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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

JACQUELINE NAYYAR, an individual,
AMANDA MEDRANO, an individual, on behalf
of themselves, other Aggrieved Employees, and
the State of California,

Plaintiffs,

vs.

PIZZA INVESTMENT ENTREPRENEURS,
L.L.C., a Nevada Limited Liability Company;
and DOES 1-50, Inclusive;

Defendant.

Case No. FCS056804

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO APPROVE
PAGA SETTLEMENT**

Judge: Hon. Stephen Gizzi
Department: 3

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jacqueline Nayyar (“Plaintiff”) seeks approval of the PAGA Settlement Agreement
4 (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 787
5 “Aggrieved Employees,” defined as all individuals who are or previously were employed by Pizza
6 Investment Entrepreneurs, LLC (“Defendant”) in California and classified as non-exempt employees
7 (“Aggrieved Employees”) at any time between May 3, 2020, through June 3, 2024 (“PAGA Period”).
8 Agreement at §§ I(B); I(U); III(A)(2). This is only a settlement of the PAGA claim for civil penalties
9 and is not a class settlement and does not release the individual wage claims, if any, of the affected
10 employees other than Plaintiff herself. Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS Transportation*,
11 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages
12 are not recoverable under PAGA).

13 If approved, the Aggrieved Employees and the California Labor Workforce and Development
14 Agency (“LWDA”) will share a PAGA Payment of Seventy-Nine Thousand Three Hundred Thirty-
15 Three Dollars and Thirty-Three Cents (\$79,333.33). Agreement at § I(C); I(N); I(S); III(J)(8)-(10).
16 After deducting any Court-approved PAGA Counsel Award, Service Award, and the Claims
17 Administration Costs, the PAGA Payment shall be distributed, 75% to the LWDA and 25% to the
18 Aggrieved Employees (“Aggrieved Employee Payment”). Agreement at § I(S).

19 An objective evaluation of the proposed settlement confirms that the relief negotiated on behalf
20 of the Aggrieved Employees and the LWDA is fair, reasonable, and valuable. The Settlement is a
21 product of informed, adversarial, and non-collusive and mediated negotiations between experienced
22 counsel. As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement
23 approval. Accordingly, Plaintiff and PAGA Counsel respectfully request this Court grant approval
24 of the Agreement. Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 9.

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¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to
28 the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized
terms used herein have the same meaning as those defined by the Agreement.

1 **II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA And Civil Action**
3 **Against Defendant**

4 On May 3, 2021, Plaintiff, on behalf of herself and on behalf of other Aggrieved Employees,
5 served Defendant and the LWDA with a Notice of Violations ("PAGA Notice") and draft complaint
6 memorializing claims against Defendant for alleged violations of the California Labor Code, including
7 causes of action for failure to provide compliant meal and rest periods; failure to accurately
8 compensate for missed meal and rest periods; failure to pay all minimum, regular, and overtime wages;
9 failure to provide accurate itemized wage statements; failure to reimburse employees for required
10 business expenses, and failure to timely pay wages due during, and upon termination of employment.
11 (LWDA Case No. LWDA-CM-831092-21). JCL Dec., ¶ 10.

12 The 65-day "waiting period" on Plaintiff's right to file a civil action under PAGA, *see* Cal.
13 Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff that they intended to
14 investigate the claims in the PAGA Notice. To date, the LWDA still has not advised Plaintiff of any
15 intent to take action with respect to the claims in the PAGA Notice. JCL Dec., at ¶ 11.

16 On July 14, 2021, Plaintiff Nayyar and a second individual, Amanda Medrano, filed a class
17 and representative action complaint against Defendant in the Superior Court for Solano, Case Number
18 FCS056004 ("Class Action"). The Action alleged ten causes of action against Defendant for: (1)
19 Unfair Competition; (2) Failure to Pay Minimum Wages; (3) Failure to Pay Overtime Wages; (4)
20 Failure to Provide Required Meal Periods; (5) Failure to Provide Required Rest Periods; (6) Failure to
21 Provide Accurate Itemized Statements; (7) Failure to Reimburse Employees for Required Expenses;
22 (8) Failure to Provide Wages When Due; (9) Unlawful Deductions; and (10) Violations of the Private
23 Attorneys General Act. JCL Dec., ¶ 12. On September 14, 2021, Plaintiff moved to dismiss the class
24 and individual claims asserted against Defendant, without prejudice, and file a First Amended
25 Complaint against Defendant that included a single cause of action pursuant to the Private Attorneys
26 General Act ("PAGA"). This First Amended Complaint (the "FAC") was filed on September 14,
27 2021, and is the operative complaint in this Action. JCL Dec., ¶ 13.

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1 On December 20, 2023, Plaintiff and Medrano filed a Doe Amendment in order to identify
2 Daniel Abfalter as Doe 1. JCL Dec., ¶ 14.

3 On April 4, 2024, the Parties participated in an all-day mediation presided over by Brian
4 McKelvey, Esq., an experienced mediator of wage and hour representative actions. In advance of the
5 with the mediation, Defendant provided Plaintiff with sufficient information to properly evaluate
6 Defendant’s potential liability exposure. Among the data and documents Defendant produced
7 information that included, but was not limited to, the total number of Aggrieved Employees, pay
8 periods, along with a sample of the Aggrieved Employees’ time and payroll data. JCL Dec., ¶ 15.

9 The mediation resulted in a settlement and was memorialized in the form of a Memorandum
10 of Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
11 negotiated a long-form settlement which is the subject of the instant motion. The Settlement was
12 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
13 – including the risk of Plaintiff not being able to maintain representative claims, the difficulty of
14 proving Plaintiff’s claims in a manageable trial, the merits of Defendant’s potential defenses, and the
15 significant delay and potential appellate issues inherent to litigation – and was reached after extensive
16 arm’s length negotiations, with the assistance of Mediator McKelvey. JCL Dec., at ¶ 16.

17 On April 18, 2024, Plaintiff filed a request for dismissal of the second named plaintiff in the
18 Action, Amanda Medrano. JCL Dec., at ¶ 17.

19 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by
20 Plaintiff on behalf of herself, the LWDA, and the State of California. This is only a Settlement of the
21 PAGA claims for civil penalties and is not a class settlement and does not release the individual claims,
22 if any, of the Aggrieved Employees. This Settlement does not release any claim that is not a PAGA
23 claim.² Nor does this Settlement waive Defendant’s right to assert *res judicata* or other available
24 defense to any asserted claim or lawsuit. JCL Dec., at ¶ 18.

25 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
26 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
27

28 ² As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: “Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties.”

1 for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiff will
2 submit to the LWDA a copy of the Court’s judgment and order approving the Settlement Agreement
3 within ten (10) days after entry of judgment or order. JCL Dec., at ¶ 19.

4 **III. TERMS OF THE PAGA SETTLEMENT**

5 **A. The Gross Settlement Amount**

6 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
7 The Settlement Agreement negotiated by the Parties provides for a Gross Settlement Amount payment
8 in the amount of One Hundred Eighty-Three Thousand Five Hundred Dollars and Zero Cents
9 (\$183,500.00) to resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction
10 of: i) a PAGA Counsel Award in the amount of Eighty-Six Thousand One Hundred Sixty-Six Dollars
11 and Sixty-Seven Cents (\$86,166.67), comprised of one-third of the Gross Settlement Amount
12 (estimated to be approximately \$61,166.67) and reimbursement of incurred litigation expenses in an
13 amount not to exceed Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00); ii) Service Award
14 to Plaintiff of up to Ten Thousand Dollars and Zero Cents (\$10,000.00); and iii) Claims Administration
15 Costs of Eight Thousand Dollars and Zero Cents (\$8,000.00). Agreement generally at § III(J)(8)-(10).
16 After these deductions, the amount remaining is the “PAGA Payment,” which is estimated to be
17 \$79,333.33. JCL Dec., ¶ 20.

18 The Gross Settlement Amount will be used to satisfy the Aggrieved Employee Payment, the
19 LWDA PAGA Payment, PAGA Counsel Award, Service Award, and the Administration Costs.
20 Agreement at § I(L).

21 Of the PAGA Payment, seventy-five percent (75%) shall be paid to the LWDA and the
22 remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees (“Aggrieved
23 Employee Payment”). Agreement at §I(S). This 75/25 allocation is required by Labor Code § 2699
24 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

25 **B. Allocation of Aggrieved Employee Payment**

26 The Aggrieved Employee Payment will be calculated by dividing the amount of the Aggrieved
27 Employees’ 25% share of PAGA Payment (\$19,833.33) by the total number of PAGA Pay Periods
28 worked by all Aggrieved Employees during the PAGA Period and then multiplying the result by each

1 Aggrieved Employee's PAGA Pay Periods. Agreement at § III(J)(1). The PAGA Period is the period
2 between May 3, 2020, through June 3, 2024. Agreement at § I(U).

3 At the time of the parties' settlement of this action, Defendant estimated that there were
4 approximately 787 Aggrieved Employees who worked approximately 10,281 pay periods during the
5 PAGA Period based on company records. Agreement at § III(A)(2).³

6 **C. Funding and Distribution**

7 Provided that an order approving this Settlement is entered by the Court, Defendant shall fund
8 the Gross Settlement Amount within fifteen (15) days after the Court's Judgment approving the PAGA
9 Settlement becomes Final. Agreement at § III(A)(3). No later than five (5) calendar days after
10 Defendant fully funds the Gross Settlement Amount, the Settlement Administrator will mail the
11 Aggrieved Employee Payment via First-Class U.S. Mail to the Aggrieved Employees' last known
12 mailing address. Agreement at § III(J)(4). Settlement checks issued to Aggrieved Employees will
13 expire one hundred eighty (180) days from the date they are issued by the Settlement Administrator.
14 Agreement at § III(J)(6). If the check remains uncashed by the expiration of the 180-day period, the
15 Settlement Administrator shall transmit the funds to the Community Law Project, a non-profit
16 organization, in accordance with California Code of Civil Procedure section 386, in the name of the
17 Aggrieved Employee who did not claim the funds. Agreement at *Id.* The Aggrieved Employee
18 Payments are 100% penalties and interest and shall be reported using IRS Form 1099s. Agreement at
19 § III(J)(2).

20 **D. Release of Claims**

21 As of the Funding Date, the State of California, the LWDA, and Plaintiff shall release the
22 Released Parties (as defined in the Agreement) from the Released PAGA Claims which include all
23 PAGA claims that occurred within the PAGA Period and that were alleged in the operative Complaint
24 and Plaintiff's PAGA notice to the LWDA, , regarding Defendant, and expressly excluding all other
25 claims, including claims for vested benefits, wrongful termination, unemployment insurance,
26

27 ³ The Agreement contains an escalator clause, providing that, should the number of Pay Periods increase by more than
28 10% of what was represented during the PAGA Period, the Gross Settlement Amount will increase proportionally for the
number of Pay Periods over 110% of 10,281. For example, if the total Pay Periods in the PAGA Period are 115% of 10,281,
the Gross Settlement Amount shall increase by 5%. Agreement at § III(A)(2).

1 disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period.
2 Agreement at §§ I(Z); III(B).

3 **IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

4 Labor Code § 2699(l) requires that the Court "shall review and approve any settlement of any
5 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
6 agency at the same time that it is submitted to the court." Further, the Court in *Moniz v. Adecco USA,*
7 *Inc.* (2021) 72 Cal.App.5th 56, 77 stated that "the trial court must review and approve a PAGA
8 settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a
9 safeguard." (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal
10 quotations omitted.) "The Supreme Court has also observed that trial court approval ensures that any
11 negotiated resolution is fair to those affected," leading the Court in *Moniz* to determine that "adoption
12 of a standard of review for settlements that prevents fraud, collusion or unfairness, and protects the
13 interests of the public and the LWDA in the enforcement of state labor laws is warranted." (*Moniz,*
14 *supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *Dunk v.*
15 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations omitted.) In other words,
16 "[i]n review and approval of a proposed settlement under section 2699, subd. (l)(2), a trial court thus
17 must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the
18 state's interests, and hence the public interest." (*Moniz, supra*, 72 Cal.App.5th at 88.) Consequently,
19 the Parties respectfully ask the Court to review and approve the settlement of the PAGA claims and
20 the PAGA Payment to be paid as part of the proposed Settlement.

21 **A. The Gross Settlement Amount is Fair and Reasonable**

22 The Gross Settlement Amount of \$183,500.00 is fair and reasonable and, therefore, should be
23 approved. Here, *without stacking* the PAGA penalties, Defendant's estimated *maximum* liability
24 exposure is estimated at approximately \$1,193,687 in PAGA penalties. JCL Dec., ¶ 21. Plaintiff's
25 consultant estimated Defendant's exposure as follows:

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Claim	Penalty Amount ⁴	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
Meal Period Violations Cal. Labor Code §§ 226.7 and 512	\$50 ⁵	2,941	29% of PAGA Pay Periods	\$147,050
Rest Period Violations Cal. Labor Code §§ 226.7 and 512	\$50	2,941	29% of PAGA Pay Periods	\$147,050
Suitable Seating Violations Cal. Labor Code §1198; Industrial Wage Orders, § 14	\$50	2,570	25% of PAGA Pay Periods	\$128,512
Wage Statement Violations Cal. Labor Code § 226	\$50	5,141	50% of PAGA Pay Periods	\$257,025
Unpaid Wages Violations Cal. Labor Code §§ 1194, 1197, 1197.1, 1198 and 510	\$100	5,141	50% of PAGA Pay Periods	\$514,050

JCL Dec., ¶ 22.

i. Estimated Liability for Unpaid Wages

Plaintiff alleged Defendant failed to pay all minimum and overtime wages when she and other Aggrieved Employees worked off the clock. Specifically, Plaintiff alleged that she and other

⁴ In *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144, the court decided that “[u]ntil the employer has been notified that it is violating a Labor Code provision ... the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.” Therefore, Plaintiff used only penalties for initial violations.

⁵ The \$50 penalty rate was used for a number of reasons in this instance. First, Defendant argued that increased civil penalties for subsequent violations do not apply unless the Plaintiff can present evidence that the Labor Commission or a court notified the employer that it was in violation of the Labor Code. *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144 citing *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 [“Until the employer has been notified that it is violating a Labor Code provision ... the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.”].) Separately, Defendant also argued that courts have considerable discretion to reduce the penalty awards under PAGA. See, e.g. *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty amount by 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiff would recover full penalty amounts even if she prevailed in establishing the underlying Labor Code violations. Pursuant to California Labor Code section 558(a)(1), an employer is subject to a penalty of \$50 for violations of a Labor Code section regulating hours and days of work, including meal period and rest period violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a \$50 penalty per violation rate. JCL Dec., ¶ 31.

1 Aggrieved Employees were required to perform pre-shift off-the-clock work, including setting up
2 condiments, organizing the ordering line, preparing salads, and setting up pizza boxes. Plaintiff further
3 alleges that she and other Aggrieved Employees were required to perform post-shift off-the-clock
4 work, including taking out the garbage, restocking boxes, washing dishes, and helping customers. JCL
5 Dec., ¶ 23. Defendant denies these allegations, contending that all employees are instructed not to
6 work off-the-clock, that Defendant's timekeeping system allows employees to account for this work,
7 and accordingly, any work performed off-the-clock was not at the direction of Defendant. Taking
8 Defendant's defenses into consideration, Plaintiff applied a 50% discount to this claim. Applying
9 said discount, Plaintiff estimates Defendant's exposure for this claim to be \$514,050. JCL Dec., ¶ 24

10 **ii. Estimated Penalties for Meal Period Violations**

11 Plaintiff alleged that Defendant rounded meal periods, supported by data evidencing that over
12 35% of all first meal periods taken during shifts greater than six hours were exactly 30 minutes in
13 length. JCL Dec., ¶ 25. Based on this data, Plaintiff alleges that Defendant implemented a practice
14 of either rounding or auto-deducting 30 minutes for fictitious meal breaks from every shift, creating a
15 paper trail of compliance and depriving employee of their breaks and wages owed for time deducted.
16 Defendant denies these allegations, contending that they maintain compliant meal period policies and
17 practices, that employees are responsible for recording their own time, and that Defendant does not
18 alter time records and no evidence of rounding or time sheet manipulation exists. Defendant also
19 argues that it pays meal period premiums, and a contention that it alters employees' time records is
20 incongruous with its documented history of paying meal period premiums when time records reflect
21 non-compliant breaks. Taking into account Defendant's defenses, Plaintiff applied a 50% discount to
22 this claim. Applying said discount, Plaintiff estimates Defendant's exposure for this claim to be
23 approximately \$147,050. JCL Dec., ¶ 26.

24 **iii. Estimated Penalties for Suitable Seating Violations**

25 Plaintiff also alleges that Defendant failed to provide suitable seating to Aggrieved Employees
26 throughout the PAGA Period. Specifically, Plaintiff alleged that she and the Aggrieved Employees
27 were not provided a seat when they worked at the cash register, and that their duties performed while
28 at the cash register could have been done while seated. Defendant argued that seating would impede

1 the efficiency of operations, and further, that this claim, even if valid, would be limited to a small
2 number of employees whose duties involved working the cash register. Taking into account
3 Defendant's defenses, particularly its defense that this claim would only apply to a small number of
4 individuals, Plaintiff applied a 75% discount to this claim. Applying said discount, Plaintiff estimates
5 Defendant's exposure for this claim to be approximately \$128,512. JCL Dec., ¶ 27.

6 **iv. Estimated Penalties for Non-Compliant Wage Statements**

7 Plaintiff alleges that Defendant failed to furnish wage statements that complied with the
8 requirements of Labor Code Section 226(a). Specifically, Plaintiff alleges that the wage statements
9 failed to include all applicable hourly rates in effect during the pay period. Defendant argued that
10 there is no evidence that any Aggrieved Employee suffered any injury or harm, and moreover, that
11 there is no evidence that the alleged deficiencies were knowing and intentional. Taking into account
12 Defendant's defenses, Plaintiff applied a 50% discount to this claim. Applying said discount, Plaintiff
13 estimates Defendant's exposure for this claim to be approximately \$257,025. JCL Dec., ¶ 28.

14 **v. Estimated Penalties for Rest Period Violations**

15 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically,
16 Plaintiff alleged that because of their rigorous work schedules, Plaintiff and Aggrieved Employees
17 were not able to take timely and duty-free rest periods. Further, Defendant did not pay a single rest
18 period premium during the PAGA Period. Because rest periods are not recorded, Plaintiff's expert
19 could not identify a violation rate. Plaintiff therefore made the reasonable assumption that rest period
20 violations were committed at a rate similar to that of meal period violations. JCL Dec., ¶ 29.
21 Defendant argued that it had a legally compliant rest period policy. Defendant also argued that
22 Plaintiff's rest break claim would have mainly relied on the testimony of Aggrieved Employees,
23 making it a riskier claim. Establishing liability likely would have entailed competing testimony
24 stating either rest breaks were taken, or rest breaks were voluntarily waived. See, e.g., *Ordonez v.*
25 *Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing
26 testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break
27 policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site*
28 *Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's

own evidence confirms that the written policy does not generate uniform practices”). To determine potential liability, Plaintiff assumed a violation rate that mirror meal period violations. Taking into account Defendant’s defenses, Plaintiff then applied a 50% discount to this claim. Applying said discount, Plaintiff estimates Defendant’s exposure for this claim to be approximately \$147,050. JCL Dec., ¶ 30.

B. The Gross Settlement Compares Favorably to the Likely Recovery

In light of the above, the Gross Settlement Amount is approximately 15.4% of Defendant’s potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery of PAGA penalties through continued litigation. Defendant’s maximum exposure to PAGA penalties is not a realistic outcome of the litigation because it fails to account for the risks of continued litigation including, but not limited to, Defendant’s defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal. January 18, 2018). For instance, Defendant argued that it can only be assessed civil penalties for actual violations of the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need to prove each Aggrieved Employee was subject to the alleged Labor Code violation, which would be difficult to do, since Defendant deny any liability or wrongdoing of any kind associated with the claims alleged in this action. Thus, Defendant contended that Plaintiff would be required to “prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009). JCL Dec., ¶ 31. Moreover, the maximum penalty figure does not consider that Courts have complete discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v. Starbucks Corp.*, 30 Cal.

1 App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period; “Although the trial court
2 may have disagreed with Starbucks regarding the issue of liability, it clearly took the circumstances
3 proffered by Starbucks into consideration when it imposed the penalty ... only \$5 per initial
4 violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778, 788 (2018), review granted on
5 other grounds (noting that the trial court “exercised its discretion to reduce the [PAGA] penalties to
6 13 percent of the full amount [requested, because] [o]n average, plaintiffs were deprived of 13 percent
7 of the 30-minute meal period”); *Fleming v. Covidien, Inc.*, 2011 WL 7563047, *4 (C.D. Cal. 2011)
8 (exercising discretion to reduce the maximum amount of PAGA civil penalties for plaintiffs’ section
9 226 claims from \$2,800,000 to \$500,000 because the employees suffered no injuries as a result of the
10 erroneous wage statements and made no complaints about the errors or omissions in the wage
11 statements, thus reducing the maximum penalty by 82%); *see also, Gola v. University of San*
12 *Francisco*, 90 Cal. App. 5th 548 (2023), as modified (May 9, 2023), reh’g denied (May 15, 2023),
13 review denied (July 12, 2023), and disapproved of by *Naranjo v. Spectrum Sec. Servs., Inc.*, 15 Cal.
14 5th 1056, 547 P.3d 980 (2024) (concluding after a full-blown bench trial that a penalty of 15% of the
15 maximum PAGA penalties was the appropriate penalty). The gross amount obtained by PAGA
16 Counsel is reasonable in light of Defendant’s arguments. JCL Dec., ¶ 32.

17 The gross amount obtained by PAGA Counsel is also reasonable in light of Defendant’s
18 financial condition. Defendant has submitted a sworn declaration attesting to its financial condition.
19 Namely, that Defendant’s monthly cash flow has been negative for over a year, with monthly deficits
20 in some months reaching \$20,000 to \$30,000. See Declaration of Michael Sheehan (“Sheehan Dec.”)
21 at ¶ 5. Moreover, Defendant has roughly \$300,000 in short-term liability, including expenses such as
22 payroll, inventory and leases. Sheehan Dec. at ¶ 4. Lastly, customer transactions have fallen by more
23 than 20% annually, which has led to an overall sales decline of approximately 16% since 2021.
24 Sheehan Dec. at ¶ 3.

25 Given Defendant’s defenses to the claimed Labor Code violations at issue, the risks and costs
26 of continued litigation, Plaintiff and PAGA Counsel believe that the Gross Settlement Amount is fair
27 and reasonable. This settlement was negotiated by experienced counsel at arm’s length. JCL Dec., ¶
28 33. The LWDA has been provided with notice of this motion and the PAGA settlement, and the

1 decision of LWDA to accept the PAGA settlement and not oppose the motion should be given
2 considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and
3 protect its own rights. JCL Dec., ¶¶ 5, 34.

4 **C. The Remaining Settlement Terms Are Fair and Reasonable**

5 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
6 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
7 there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to
8 class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only needs
9 to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
10 herein, the settlement terms for attorneys' fees and costs are reasonable. JCL Dec., ¶ 35.

11 **V. THE PAGA COUNSEL AWARD IS FAIR AND REASONABLE**

12 PAGA Counsel seeks approval of the PAGA Counsel Award, comprised of attorneys' fees in
13 the amount of \$61,166.67 (one-third of the Gross Settlement Amount) and reimbursement of litigation
14 costs not to exceed \$25,000.00.⁶ PAGA does not have any requirements for reviewing attorneys' fees,
15 and Plaintiff's position is that the payment of attorneys' fees and costs in this Settlement is a matter
16 of contract for a contingent representation. Nevertheless, should this Court review the requested
17 attorneys' fees, the requested fees and costs are reasonable for experience wage and hour counsel.
18 JCL Dec., ¶ 36.

19 **A. The Requested Attorneys' Fees Are Fair and Reasonable**

20 The requested PAGA Counsel Award of \$86,166.67, comprised of \$61,166.67 for attorneys'
21 fees and reimbursement of litigation expenses of up to \$25,000.00 is fair, reasonable, and justified by
22 the result achieved. Agreement at § III(J)(9); JCL Dec., ¶ 37. PAGA Counsel negotiated a recovery
23 of One Hundred Eighty-Three Thousand, Five Hundred Dollars and Zero Cents (\$183,500.00), and
24 this result justifies the requested fees equal to one third of this recovery. This percentage is within the
25 standard contingent recovery percentage of one-third, and this percentage is what was expressly
26 approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the
27

28 ⁶ As detailed *infra*, at the time of filing this motion, Plaintiff's Counsel incurred \$21,494.23 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 time this case was brought, the result was far from certain. Defendant's defenses to the merits of the
2 case created difficulties with proof and complex legal issues for PAGA Counsel to overcome. Here,
3 several defenses asserted by Defendant present serious threats to the claims of Plaintiff and the
4 Aggrieved Employees. Defendant asserted that its employment practices complied with all applicable
5 labor laws. If successful, Defendant's factual and legal defenses would eliminate *any recovery* to the
6 Aggrieved Employees. While Plaintiff believes that these defenses could be overcome, Defendant
7 maintains that these defenses have merit and therefore present a serious risk to recovery. The
8 Settlement was possible because, in PAGA Counsels' eyes, PAGA Counsel was able to persuade
9 Defendant that there was an appreciable risk that Plaintiff would prevail on the factual and legal issues
10 underlying liability and overcome difficulties in proof as to monetary relief. JCL Dec., ¶ 38.

11 Further, the fee award is justified by the work performed. Generally, the Ninth Circuit and
12 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for accepting
13 the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506
14 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half*
15 *Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied
16 and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001)
17 (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8
18 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of
19 lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third
20 of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
21 LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a
22 multiplier of 2.76 as falling within the "majority" range for risk multipliers).

23 As detailed in PAGA Counsels' time and billing records submitted herewith, PAGA Counsels'
24 current combined loadstar is \$69,780.00. JCL Dec., ¶¶ 6, 43-47; Declaration of Shani Zakay ("Zakay
25 Dec.") at ¶¶ 3-5. Thus, PAGA Counsels' fee request is equal to PAGA Counsel's loadstar with a
26 *negative* multiplier of 0.87 – well below the 2.13 multiplier approved in *Laffitte* – and well within the
27 recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S. Dist.
28 LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award with cross-check

lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check lodestar multiplier of 1.7). JCL Dec., ¶ 47.

B. PAGA Counsel is Entitled to Reimbursement of Actual and Reasonably Incurred Litigation Costs.

Attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include counsel's incurred expenses because those who benefit from their effort should share in the cost. *See Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation costs for consultants, online legal research, copying, postage, long distance charges, travel expenses, filing fees, mediation fees and investigation fees). Prior to incurring costs for filing of this motion, PAGA Counsel collectively expended \$21,494 prosecuting this action (JCL Law Firm, APC - \$14,067.30, Zakay Law Group, APLC - \$7,426.93). JCL Dec. ¶¶ 7, 49; Zakay Dec., ¶¶ 6-7. PAGA Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; factual and legal research charges; mediation fees; and expert costs which were all incurred during, and were necessary for the successful prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 7, 50.

VI. PLAINTIFF'S SERVICE AWARD IS FAIR AND REASONABLE

Incentive payments are intended to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, *to recognize their willingness to act as a private attorney general.*" *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (emphasis added). Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the litigation. *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to plaintiffs for their efforts in bringing class case). The factors courts use in determining

1 the amount of service awards include: (1) a comparison between the service awards and the range of
2 monetary recovery available to the class; (2) time and effort put into the litigation; (3) whether the
3 litigation will further the public policy underlying the statutory scheme; and (4) risks of retaliation.
4 *Clark v. American Residential Services, LLC*, 175 Cal. App. 4th 785, 804-805 (2009).

5 The Settlement provides for a Service Award of \$10,000 for Plaintiff. The Service Award
6 payment is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting
7 PAGA Counsel with the litigation and settlement, regularly conferring with PAGA Counsel on the
8 status of her case and the strategies for prosecuting the claims and agreeing to provide Defendant a
9 broad general release of all claims arising out of her employment. Plaintiff willingly came forward to
10 protect and advance the rights of the Aggrieved Employees on important legal disputes affecting
11 California employees. By way of example, Plaintiff assumed the serious risk of liability for
12 Defendant's costs and potentially fees if the case was unsuccessful. Nevertheless, Plaintiff knowingly
13 and voluntarily undertook the risk to vindicate the rights of the Aggrieved Employees. JCL Dec., ¶ 51.

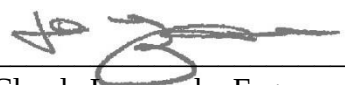
14 Plaintiff's efforts in bringing the lawsuit conferred a monetary benefit to 787 Aggrieved
15 Employees. Accordingly, Plaintiff and PAGA Counsel respectfully request the Court approve the
16 Service Award in accordance with the Settlement Agreement. JCL Dec., ¶ 62.

17 **VII. CONCLUSION**

18 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA Settlement
19 as set forth in the Settlement Agreement and enter the proposed order and judgment submitted
20 herewith.

21
22 Dated: September 6, 2024

JCL LAW FIRM, APC

23
24 By: 
25 Jean-Claude Lapuyade, Esq.
26 Attorney for Plaintiff
27
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