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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BRANDON STOCKER and JOSE OLIVERA,
individuals, on behalf of themselves, and on
behalf of all persons similarly situated,

Plaintiff,

v.

SILICON VALLEY SECURITY & PATROL,
INC., a California corporation; and DOES 1
through 50, Inclusive;

Defendants.

Case No. 22CV015476

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

Hearing Date: March 27, 2024
Hearing Time: 2:30 P.M.

Judge: Hon. Desautels
Dept.: 16

Reservation ID: 810371707876

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Brandon Stocker and Jose Olivera (“Plaintiffs”) seek approval of the Joint Stipulation
4 of Settlement of PAGA Action and Release of PAGA Claims (“Agreement”)¹, which if approved,
5 would provide valuable monetary relief for 761 “Aggrieved Employees,” defined as all individuals
6 who are or previously were employed by Defendant in California and classified as non-exempt
7 employees during the period between April 14, 2021 and January 31, 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 Plaintiffs themselves. Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS*
11 *Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019)
12 (unpaid wages are not recoverable under PAGA).

13 If approved, the Aggrieved Employees and the California Labor Workforce and Development
14 Agency (“LWDA”) will share in a Gross Settlement Amount of Four Hundred Ten Thousand Dollars
15 and Zero Cents (\$410,000.00). Agreement at § I(L). After deducting any Court-approved PAGA
16 Counsel Award, Service Awards, and the Claims Administration Expenses, the PAGA Payment shall
17 be distributed, 75% to the LWDA and 25% to the Aggrieved Employees. Agreement at § I(S).

18 An objective evaluation of the proposed Settlement confirms that the relief negotiated on
19 behalf of the Aggrieved Employees and the LWDA is fair and reasonable. The Settlement is a product
20 of informed, adversarial, and non-collusive and mediated negotiations between experienced counsel.
21 As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement approval.
22 Accordingly, Plaintiffs and PAGA Counsel respectfully request this Court grant approval of the
23 Agreement. JCL Dec., at ¶ 10.

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

25 **A. Plaintiffs’ Exhaustion of Administrative Remedies Under PAGA**

26
27
28 ¹ The Agreement is attached as Ex. “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to 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 On April 14, 2022, Plaintiff Olivera, on behalf of himself and on behalf of other “Aggrieved
2 Employees,” served Defendants and the LWDA with a Notice of Violations (“PAGA Notice”). On
3 August 2, 2022, Plaintiff Stocker, on behalf of himself and on behalf of the other “Aggrieved
4 Employees,” served Defendants and the LWDA with a PAGA Notice and draft complaint
5 memorializing claims against Defendants for alleged violations of the California Labor Code,
6 including causes of action for unfair competition in violation of Business & Professions Code sections
7 17200, *et seq.*; failure to pay minimum wages in violation of Labor Code sections 1194, 1197 and
8 1197.1; failure to pay overtime wages in violation of Labor Code sections 510; failure to provide
9 required meal periods in violation of Labor Code sections 226.7 and 512; failure to provide required
10 rest periods in violation of Labor Code sections 226.7 and 512; failure to provide accurate itemized
11 wage statements in violation of Labor Code section 226; failure to reimburse employees for required
12 expenses in violation of Labor Code section 2802; failure to provide wages when due in violation of
13 Labor Code sections 201, 202, and 203; and unlawful deductions in violation of Labor Code section
14 221 (LWDA Case Number LWDA-CM-899156-22). JCL Dec., at ¶¶ 4-5, 11.

15 The 65-day “waiting period” on Plaintiffs’ right to file a civil action under PAGA, *see* Cal.
16 Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiffs that they intended to
17 investigate the claims in the PAGA Notices. To date, the LWDA still has not advised Plaintiffs of any
18 intent to take action with respect to the claims in the respective PAGA Notices. JCL Dec., at ¶ 12.

19 **B. Plaintiffs’ Civil Action Against Defendant**

20 On August 2, 2022, Plaintiff Stocker filed a class action complaint against Defendants in the
21 Superior Court for Alameda, Case Number 22CV015476 (the “Stocker Action”). The complaint
22 alleged nine causes of action for (1) Unfair Competition in Violation of Cal. Bus. & Prof Code §§
23 17200 *et seq.*; (2) Failure to Pay Minimum Wages in Violation of Cal. Labor Code §§ 1194, 1197 and
24 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Labor Code § 510; (4) Failure to
25 Provide Required Meal Periods in Violation of Cal. Labor Code §§ 226.7 and 512; (5) Failure to
26 Provide Required Rest Periods in Violation of Cal. Labor Code §§ 226.37 and 512; (6) Failure to
27 Provide Accurate Itemized Wage Statements in Violation of Cal. Labor Code § 226; (7) Failure to
28 Reimburse Employees for Required Expenses in Violation of Cal. Labor Code § 2802; (8) Failure to

1 Provide Wages When Due in Violation of Cal. Lab. Code §§ 201-203; and (9) Unlawful Deductions
2 in Violation of Cal. Lab. Code §221. On August 3, 2022, Plaintiff Olivera filed a representative PAGA
3 action in the Superior Court for Contra Costa, for various violations of the Private Attorneys General
4 Act at Cal. Lab. Code §§2698, *et seq* (the “Olivera Action”). On October 11, 2022, Plaintiff Stocker
5 filed a First Amended Complaint alleging a tenth cause of action for Violation of the Private Attorney
6 General Act. On December 15, 2022, Plaintiff Stocker filed a Second Amended Complaint,
7 dismissing the class claims and moving forward with only the representative PAGA claims. On March
8 1, 2024, Plaintiff Stocker filed a Third Amended Complaint, adding Plaintiff Olivera to the Stocker
9 Action (the “Consolidated Action”). JCL Dec., ¶ 13.

10 On September 25, 2023, the Parties attended a full-day mediation with experienced wage and
11 hour class and PAGA action mediator, Steve Serratore, Esq. In advance of the mediation, Defendant
12 provided Plaintiffs with sufficient information to properly evaluate Defendant’s liability exposure for
13 civil penalties to the Aggrieved Employees. The data and documents Defendant produced included,
14 but was not limited to, the total number Aggrieved Employees and pay periods, written wage and hour
15 policies, employee handbooks, and a sample of all time and payroll records for the Aggrieved
16 Employees. JCL Dec., ¶ 14.

17 At the conclusion of the mediation, and with the assistance of the mediator, the Parties reached
18 a settlement. The Parties subsequently executed a binding and enforceable Memorandum of
19 Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
20 negotiated a long-form Settlement which is the subject of the instant motion. The Settlement was
21 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
22 – including the risk of Plaintiffs not being able to maintain representative claims and establishing
23 manageability, the difficulty of proving Plaintiffs’ claims in a manageable trial, the merits of
24 Defendant’s potential defenses, and the significant delay and potential appellate issues inherent to
25 litigation – and was reached after extensive arm’s length negotiations, with the assistance of mediator.
26 JCL Dec., at ¶ 15.

27 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by
28 Plaintiffs on behalf of the Aggrieved Employees and State of California. This is only a settlement of

1 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
2 claims, if any, of the Aggrieved Employees. This Settlement does not release any claim that is not a
3 PAGA claim.² Nor does this Settlement waive Defendant’s right to assert *res judicata* or other
4 available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 16.

5 Pursuant to California Labor Code Section 2699(1), Plaintiffs are providing a copy of the
6 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
7 for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiffs will
8 submit to the LWDA a copy of the Court’s judgment and order approving the Settlement Agreement
9 within ten (10) days after entry of judgment or order. JCL Dec., at ¶¶ 6, 17.

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

11 **A. The Gross Settlement Amount**

12 The PAGA Settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
13 The Settlement Agreement negotiated by the Parties provides for a “Gross Settlement Amount”
14 payment in the amount of Four Hundred Ten Thousand Dollars and Zero Cents (\$410,000.00) to
15 resolve the Released PAGA claims. From the Gross Settlement Amount, there is a deduction of
16 attorneys’ fees in the amount of \$136,666.66 (which is one-third of the Gross Settlement Amount),
17 reimbursement of incurred attorneys’ expenses in an amount not to exceed \$15,000.00 (collectively,
18 “PAGA Counsel Award”), Service Awards of not more than \$5,000.00 to each Plaintiff, and payment
19 of Claims Administration Costs to the Claims Administrator in an amount not to exceed \$8,500.00.
20 Agreement at §§ III(I)(7),(9)-(10). After these deductions, the amount remaining is the “PAGA
21 Payment,” which is estimated to be \$239,833.34. Agreement at § I(S).

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

26
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 **B. Allocation of Individual Aggrieved Employee Payments**

2 The Individual Aggrieved Employee Payments to the Aggrieved Employees shall be based on
3 the number of Pay Periods each Aggrieved Employee worked during the PAGA Period as a percentage
4 of the total Pay Periods worked by all Aggrieved Employees during the PAGA Period. Agreement at
5 § III(I)(1).

6 At the time of mediation, Defendant estimated that there were approximately 761 Aggrieved
7 Employees who worked approximately 40,000 Pay Periods during the PAGA Period based on
8 company records. Should the number of Pay Periods during the PAGA Period increase by more than
9 15% of what was represented at the mediation, Defendant shall increase the Gross Settlement Amount
10 proportionally. Agreement at § III(A)(2).

11 **C. Funding and Distribution**

12 Provided that an order approving this Settlement is entered by the Court, Defendant shall pay
13 the Gross Settlement Amount within sixty (60) days of the Court's Settlement approval order.
14 Agreement at § III(A)(3). The Effective Date is the date upon which the Court enters the order
15 approving the Settlement of the PAGA penalties as described in the Parties' Settlement Agreement.
16 Agreement at § I(I).

17 Within fifteen (15) calendar days of the date on which the Gross Settlement Amount is funded
18 in full by Defendant, in accordance with the terms of the Settlement Agreement (the "Funding Date"),
19 the Settlement Administrator will transmit the LWDA Payment to the LWDA as one lump sum
20 payment. Agreement at § III(I)(8).

21 No later than fifteen (15) calendar days after the Funding Date, the Settlement Administrator
22 will mail the Individual Aggrieved Employee Payments to the Aggrieved Employees by regular First-
23 Class U.S. Mail to the Aggrieved Employees' last known mailing address. § III(I)(4). Settlement
24 checks issued to Aggrieved Employees will expire one hundred eighty (180) days from the date they
25 are issued by the Settlement Administrator. Agreement at § III(I)(5). If the check remains uncashed
26 by the expiration of the 180-day period, the Settlement Administrator shall cause the aggregate sum
27 represented by those uncashed checks to be sent to the Community Law Project, a Cy Pres, in
28 accordance with California Code of Civil Procedure section 384 and subject to Court approval.

1 Agreement at § III(I)(6). The Individual Aggrieved Employee Payments are 100% penalties and
2 interest and shall be reported using IRS Form 1099s. Agreement § III(I)(2).

3 **D. Release of Claims**

4 Upon entry of final judgment and funding of the Gross Settlement Amount in full, Plaintiffs,
5 the LWDA and the State of California shall release the Released PAGA Claims against Defendant,
6 and its former and present parents, subsidiaries, and affiliates or related entities, and their current and
7 former owners, including but not limited to Ray Higdon, officers, directors, employees, partners,
8 shareholders, and agents, and the predecessors and successors, assigns, and legal representatives of all
9 such entities and individuals (“Released Parties”). Agreement at §§ I(AA); III(B). The Released
10 PAGA Claims are all PAGA claims alleged, or those that could have reasonably been alleged based
11 on the facts alleged, in the operative complaints in the Stocker Action, Olivera Action, Consolidated
12 Action, and/or Plaintiffs’ PAGA Notices to the LWDA, which occurred during the period between
13 April 14, 2021 and January 31, 2024, and expressly excluding all other claims, including claims for
14 vested benefits, wrongful termination, unemployment insurance, disability, social security, workers’
15 compensation, and PAGA claims outside of the PAGA Period. Agreement at §§ I(U); I(Z).

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

17 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
18 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
19 agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco USA,*
20 *Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA
21 settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a
22 safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal
23 quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that any
24 negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that “adoption
25 of a standard of review for settlements that prevents fraud, collusion or unfairness, and protects the
26 interests of the public and the LWDA in the enforcement of state labor laws is warranted.” (*Moniz,*
27 *supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *Dunk v.*
28 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations omitted.) In other words,

“[i]n review and approval of a proposed settlement under section 2699, subd. (1)(2), a trial court thus must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state’s interests, and hence the public interest.” (*Moniz, supra*, 72 Cal.App.5th at 88.) Consequently, the Parties respectfully ask the Court to review and approve the Settlement of the PAGA claims and the amount to be paid as part of the proposed Settlement.

A. The Gross Settlement Amount is Fair and Reasonable

The Gross Settlement Amount of \$410,000.00 is fair and reasonable and, therefore, should be approved. JCL Dec., ¶ 18. Here, *without stacking* the PAGA penalties, Defendant’s *maximum* liability exposure is estimated at approximately \$1,315,450 in PAGA penalties. If derivative penalties are included (or “stacked”), Defendants’ maximum liability exposure is estimated at approximately \$3,237,150. JCL Dec., ¶ 19. Plaintiffs’ expert consultant estimated Defendant’s exposure as follows:

Claim	Penalty Amount	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	4,668	24.3% of PAGA Pay Periods	\$233,400
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	9,608	50% of PAGA Pay Periods	\$480,425
<i>Unpaid Wages</i> Cal. Labor Code §§ 201, 202, 203, 204, 510, 1194, 1197, 1997.1 1198 and 558	\$100	1,212	6.3% of PAGA Pay Periods	\$121,200
<i>Business Reimbursement Violations</i> Cal. Labor Code § 2802	\$100	4,804	25% of PAGA Pay Periods	\$480,425
<i>Wage Statement Violations</i> Cal. Labor Code § 226(a)	\$100	19,217	100% of PAGA Pay Periods	\$1,921,700

i. Estimated Penalties for Rest Period Violations

Plaintiffs alleged that Defendant unlawfully required all non-exempt security guards, including Plaintiffs, to remain at their post and on-call or on-duty during their 10-minute rest breaks. JCL Dec., ¶ 21. Specifically in the context of security guards, the California Supreme Court’s decision in *Augustus v. ABM Security Services, Inc.*, held that “employers . . . must relinquish control over how

1 employees spend their time” during rest periods. 2 Cal. 5th 257, 259 (2016). Moreover, Lab. Code §
2 226.7(c) provides that “if an employer fails to provide an employee a meal or rest or recovery period
3 in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the
4 employer shall pay the employee one additional hour of pay at the employee’s regular rate of
5 compensation for each workday that the meal or rest or recovery period is not provided.”

6 Here, Defendant maintained a written on-duty meal period policy that stated that there are
7 some positions/sites that prevent an employee from being relieved for a meal break. Plaintiffs alleged
8 that off-duty rest periods could not be provided under the same circumstances that required on-duty
9 meal periods. Plaintiffs were also unable to find any evidence of an attempt by Defendant to apply to
10 the Department of Industrial Relations for an exemption from the provision of the Industrial Welfare
11 Commission requiring off-duty breaks. Defendant argued that its written policies encouraged rest
12 breaks. Defendant also argued that Plaintiffs’ rest break claim would have mainly relied on the
13 testimony of Aggrieved Employees, making it a riskier claim. JCL Dec., ¶ 22. Establishing liability
14 likely would have entailed competing testimony stating either rest breaks were taken, or rest breaks
15 were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
16 210223, at *11 (“Because of the competing testimony before the Court, plaintiff’s evidence that
17 defendant may have an illegal, written rest break policy is insufficient for this Court to find that
18 common issues predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13,
19 2012) 2012 WL 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy
20 does not generate uniform practices.”). JCL Dec., ¶ 23.

21 Plaintiffs estimate that their claim for rest period violations was potentially worth
22 approximately \$480,425. This was calculated by multiplying a 50% violation rate by a penalty of \$50,
23 accounting for Defendant’s argument that some positions did not require an on-duty meal or rest break.
24 JCL Dec., ¶ 24. The \$50 penalty rate was used for a number of reasons in this instance. First,
25 Defendant argued that increased civil penalties for subsequent violations do not apply unless the
26 plaintiff can present evidence that the Labor Commission or a court notified the employer that it was
27 in violation of the Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209
28 [“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 Plaintiffs would recover full penalty amounts even if they 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, Plaintiffs used a \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶ 25.

ii. Estimated Penalties for Meal Period Violations

Plaintiffs also alleged that Defendant unlawfully required blanket on-duty meal break waivers in advance from non-exempt security guards, regardless of the working conditions at particular sites. An on-duty meal period is not a waiver of an off-duty meal period, but rather “a type of meal period that can be lawfully provided only in those circumstances in which the three conditions set forth in [the regulation] are satisfied.” *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 959 (9th Cir. 2013) (quoting DLSE Opinion Letter 2009.06.09 at 8). The standard is laid out in *Lubin v. Wackenhut Corporation*, 5 Cal.App.5th 926, 947 (2016), which established that the type of work, the availability of other employees to provide relief to an employee during a meal period, the potential consequences to the employer if the employee is relieved of all duty, the ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal break, and whether the work product or process will be destroyed or damaged by relieving the employee of all duty are all factors considered to determine whether an on-duty meal period is required. JCL Dec., ¶ 26.

Plaintiffs’ expert estimated the damages for this claim at \$233,400. JCL Dec., ¶ 26. This number was calculated by multiplying a 24.3% violation rate of the number of total pay periods by a

1 violation rate of \$50. The \$50 penalty rate was used for the same reasons as stated above. JCL Dec.,
2 ¶ 27.

3 **iii. Estimated Penalties for Unpaid Wages**

4 Plaintiffs alleged that Defendants miscalculated the regular rate of pay for purposes of
5 overtime, meal period premiums, and sick pay. Specifically, the records provided by Defendant show
6 Defendant paid Aggrieved Employees non-discretionary incentive compensation directly related to
7 the amount of time they remained employed with the company, as well as for referrals. Plaintiffs
8 alleged that these incentives were not properly calculated into the regular rate for purposes of overtime
9 compensation, meal period premiums, and sick pay. Defendant argued that any non-discretionary
10 incentive compensation was properly calculated into the regular rate of pay, and any incentive
11 compensation that was not included in the regular rate of pay calculation was discretionary. JCL Dec.,
12 ¶ 28.

13 Plaintiffs' expert estimated that Defendant's total exposure for this claim was approximately
14 \$121,200 in penalties. This was calculated using a 6.3% violation rate for unpaid overtime as a result
15 of the alleged regular rate miscalculation multiplied by a \$100 penalty. JCL Dec., ¶ 29.

16 **iv. Estimated Liability for Defendant's Violation of Labor Code §2802**

17 Plaintiffs alleged that Defendant required Plaintiffs and the Aggrieved Employees to use their
18 personal cell phones and personal vehicles for Defendant's benefit. Plaintiffs and the Aggrieved
19 Employees were required to incur expenses for their personal cell phone and vehicle use for which
20 they were not reimbursed or compensated. Defendant denied any liability for this claim. Defendant
21 argued that on the rare occasions where employees did incur business expenses, these expenses were
22 fully reimbursed. JCL Dec., ¶ 30.

23 Plaintiffs' expert estimated that Defendant's total exposure for this claim was approximately
24 \$480,425 in penalties. This was calculated by multiplying a 25% violation rate by the total number of
25 pay periods by a violation rate of \$100 per pay period. Plaintiffs used a 25% violation rate for this
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1 claim to reflect its belief that Aggrieved Employees incurred cell phone and vehicle expenses
2 approximately once per month. JCL Dec., ¶ 31.

3 **v. Estimated Derivative Penalties for Wage Statement Violations**

4 Plaintiffs alleged that Defendant failed to provide accurate itemized wage statements that
5 include all items required by Labor Code § 226(a)(1-9). As a result of the failure to pay employees for
6 all time worked, and failure to pay for all premiums owed, the wage statements issued by Defendant
7 do not indicate the correct number of hours worked, the amount of gross wages earned, or net wages
8 earned during each pay period. Plaintiffs' expert estimated that Defendant could be liable for
9 \$1,921,700 in *derivative* PAGA penalties as a result of these violations. JCL Dec., ¶ 32.

10 **vi. The Gross Settlement Compares Favorably to The Likely Recover**

11 In light of the above, the Gross Settlement Amount is approximately 31.2% of Defendant's
12 potential unstacked PAGA exposure, and 12.7% of Defendant's potential stacked PAGA exposure.
13 The Gross Settlement Amount compares favorably to the likely recovery of PAGA penalties through
14 continued litigation. JCL Dec., ¶ 19.

15 Defendant's maximum exposure to PAGA penalties is not a realistic outcome of the litigation
16 because it fails to account for the risks of continued litigation including, but not limited to, Defendant's
17 defenses. Here, Defendant argued that it can only be assessed civil penalties for actual violations of
18 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiffs
19 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice,*
20 *Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ["Given the statutory language [of PAGA],
21 a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a
22 violation of the Labor Code by the defendant."].) To do this, Plaintiffs would need to prove each
23 Aggrieved Employee was subject to the alleged Labor Code violation. JCL Decl., ¶ 33. Thus,
24 Defendant contended that Plaintiffs would be required to "prove Labor Code violations with respect
25 to each and every individual on whose behalf plaintiff seeks to recover civil penalties under PAGA."
26 *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009). When
27 "determining whether the employer committed Labor Code violations with respect to each employee"
28

1 is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off. Superstore*, 2021 WL
2 4099059, *11 (Cal. Ct. App. Sept. 9, 2021. JCL Decl., ¶ 34.

3 Second, Defendant contended that PAGA actions with numerous employees, many locations,
4 and different types of employees are not manageable and may be dismissed on that basis. *See, Wesson*
5 *v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss PAGA
6 claims if significant variation exists among aggrieved employees, who have unique factual situations)
7 *see also, Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833 (dismissing
8 PAGA claim as unmanageable because “a multitude of individualized assessments would be
9 necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448 (striking
10 PAGA claim as unmanageable because “individualized issues predominate in this action” and a
11 “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal., LLC*
12 (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). JCL Decl., ¶ 35.
13 Here, with over 700 Aggrieved Employees working at different locations and in different types of
14 jobs, Defendant asserted that Plaintiffs’ theories were unmanageable. *Cf. Estrada v. Royalty Carpet*
15 *Mills, Inc.*, (Cal.App. 4th Dist. March 30, 2022) (disagreeing with *Wesson* and creating a split among
16 the Courts of Appeal on whether manageability is a prerequisite to bringing a PAGA claim). JCL Dec.,
17 ¶ 36.

18 Third, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
19 See [https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/)
20 [2024-ballot/](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/). If this initiative passes, it will effectively repeal PAGA by taking away the ability to
21 pursue civil penalties via a representative action. Plaintiffs view this initiative as a significant
22 additional risk due to the potential limitation on their ability to recover penalties against Defendant
23 should litigation continue. JCL Dec., ¶ 37.

24 Finally, the maximum penalty figure does not consider that Courts have complete discretion
25 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
26 the facts and circumstances of the particular case, to do otherwise would result in an award that is
27 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). JCL Dec., ¶ 38. In
28 fact, Courts routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g.*

1 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per
2 pay period; “Although the trial court may have disagreed with Starbucks regarding the issue of
3 liability, it clearly took the circumstances proffered by Starbucks into consideration when it imposed
4 the penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th
5 778, 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion
6 to reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
7 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*, 2011
8 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of PAGA
9 civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the employees
10 suffered no injuries as a result of the erroneous wage statements and made no complaints about the
11 errors or omissions in the wage statements, thus reducing the maximum penalty by 82%); *see also*,
12 *Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-5655018,
13 Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San Francisco
14 Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum PAGA
15 penalties was the appropriate penalty). The gross amount obtained by PAGA Counsel is reasonable
16 in light Defendant’s arguments. Further, the adverse decision in *Wesson* poses very significant, and
17 even fatal, risk to Plaintiffs’ case. JCL Dec., ¶ 39.

18 Given Defendant’s defenses to the claimed Labor Code violations at issue, and the risks and
19 costs of continued litigation, Plaintiffs and PAGA Counsel believe that the Gross Settlement Amount
20 is fair and reasonable. This settlement was negotiated by experienced counsel at arm's length. JCL
21 Dec., ¶ 40. The LWDA has been provided notice of this motion and the PAGA settlement, and the
22 decision of LWDA to accept the PAGA settlement and not oppose the motion should be given
23 considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and
24 protect its own rights. JCL Dec., ¶ 41.

25 **B. The Remaining Settlement Terms Are Fair and Reasonable**

26 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
27 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
28 there are no class allegations for which Plaintiffs seeks approval, the approval provisions applicable

1 to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only
2 needs to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as
3 explained herein, the settlement terms for attorneys' fees and costs are reasonable.

4 **i. The Attorneys' Fees and Expenses are Fair and Reasonable**

5 PAGA Counsel seeks approval of attorneys' fees in the amount of \$131,666.66 (one-third of
6 the Gross Settlement Amount) and attorneys' expenses not to exceed \$30,000.00³ for reimbursement
7 of actually incurred litigation expenses. PAGA does not have any requirements for reviewing
8 attorneys' fees, and Plaintiffs' position is that the payment of attorneys' fees and costs in this
9 Settlement is a matter of contract for a contingent representation. Nevertheless, should this Court
10 review the requested attorneys' fees, the requested fees and costs are reasonable for experienced wage
11 and hour counsel. JCL Dec., ¶ 42.

12 **V. THE ATTORNEYS' FEES AND EXPENSES ARE FAIR AND REASONABLE**

13 **A. The Requested Attorneys' Fee is Fair and Reasonable**

14 The requested attorneys' fees of \$131,666.66 and reimbursement of attorneys' expenses of up
15 to \$30,000.00 is fair, reasonable, and justified by the result achieved. JCL Dec., ¶42. PAGA Counsel
16 negotiated a recovery of \$410,000.00, and this result justifies the requested fees equal to one third of
17 this recovery. This percentage is the standard contingent recovery percentage of one-third, and this
18 percentage is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*,
19 1 Cal.5th 480, 504, (2016). At the time this case was brought, the result was far from certain.
20 Defendant's defenses to the merits of the case created difficulties with proof and complex legal issues
21 for PAGA Counsel to overcome. Here, as noted above in section IV(A), several defenses asserted by
22 Defendant present serious threats to the claims of Plaintiffs and the Aggrieved Employees. While
23 Plaintiffs believe that these defenses could be overcome, Defendant maintains that these defenses have
24 merit and therefore present a serious risk to recovery. The Settlement was possible because, in PAGA
25 Counsels' eyes, PAGA Counsel was able to persuade Defendant that there was an appreciable risk that
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28 ³ As detailed *infra*, at the time of filing this motion, PAGA Counsel incurred \$21,074.18 litigating this matter. Plaintiffs will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 Plaintiffs would prevail on the factual and legal issues underlying liability and overcome difficulties
2 in proof as to monetary relief. JCL Dec., ¶ 43.

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

15 As detailed in PAGA Counsels' time and billing records submitted herewith, PAGA Counsels'
16 current combined loadstar is \$177,865.00. JCL Dec., ¶¶44-49; Declaration of Shani Zakay ("Zakay
17 Dec.") at ¶¶ 4-6; Declaration of Cody Payne ("Payne Dec.") ¶¶ 20-21. Thus, PAGA Counsels' fee
18 request is equal to PAGA Counsel's loadstar with a negative multiplier of 0.77 – well below the 2.13
19 multiplier approved in *Laffitte* – and well within the recognized multiplier range between 2 and 4.
20 See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following
21 *Laffitte*, approved 30% fee award with cross-check lodestar multiplier of 2.26); *Emmons v. Quest*
22 *Diagnostics Clinical Labs., Inc.*, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*,
23 approved 33% fee award with cross-check lodestar multiplier of 1.7).

24 **B. PAGA Counsel Are Entitled to Reimbursement of Actual and Reasonably**
25 **Incurred Litigation Costs.**

26 Attorneys who create a common fund for the benefit of a class are entitled to payment from
27 the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include
28 counsel's incurred expenses because those who benefit from their effort should share in the cost. *See*

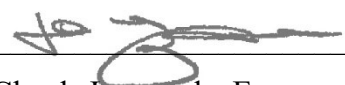
1 *Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in
2 deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to
3 paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also*
4 *Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation
5 costs for consultants, online legal research, copying, postage, long distance charges, travel expenses,
6 filing fees, mediation fees and investigation fees). Prior to incurring costs for the filing of this motion,
7 PAGA Counsel collectively expended \$21,074.18 prosecuting this action (JCL Law Firm, APC -
8 \$5,105.38, Zakay Law Group, APLC - \$6,565.98, and Payne Nguyen, LLP - \$9,402.82). JCL Decl.
9 ¶¶ 8, 51; Zakay Dec., ¶¶ 7-8, Payne Dec. ¶ 26. PAGA Counsel's out-of-pocket expenses are the types
10 of expenses normally charged to paying clients including the following: filing fees; copying; postage;
11 factual and legal research charges; mediation fees; and expert costs, which were all incurred during,
12 and were necessary for the successful prosecution of, the litigation and, therefore, should be
13 reimbursed. JCL Dec., ¶¶ 8, 52.

14 V. CONCLUSION

15 Based on the foregoing, Plaintiffs respectfully requests this Court approve the PAGA
16 Settlement as set forth in the Settlement Agreement and enter the proposed order and judgment
17 submitted herewith.

18 Dated: March 4, 2024

JCL LAW FIRM, APC

19 By: 
20 Jean-Claude Lapuyade, Esq.