

1 JOHN A. LOFTON, ESQ. (222259)
2 Aiman-Smith & Marcy, P.C.
3 7677 Oakport Street, Suite 1150
4 Oakland, CA 94621
5 Telephone: 510-817-2711
6 Facsimile: 510-562-6830
7 Email: jal@asmlawyers.com

8 Attorneys for Plaintiff Estevan Arnold

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
UNLIMITED JURISDICTION

ESTEVAN ARNOLD, an individual,

Plaintiff,

v.

EDWIN TRUCKING, INC., a California
corporation; EDWIN BENITEZ, an
individual; and DOES 1-25, inclusive,

Defendants.

Case No. 20TRCV00191

Reservation ID: 511563982298

**Memorandum of Points and Authorities in
Support of Plaintiff's Motion for Approval
of Settlement of Labor Code Section 2698,
et. seq., Private Attorneys General Act
("PAGA") Claims**

Date: December 14, 2021

Time: 8:30 a.m.

Dept.: M

Judge: Hon. Deirdre Hill

Complaint Filed: February 27, 2020

Trial Date: None Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION1

II. SUMMARY OF THE LITIGATION AND SETTLEMENT3

 A. Factual Allegations and Legal Analysis of Claims in the First Amended Complaint3

 B. Plaintiff’s Individual Claims4

 C. Mediation and Settlement4

III. THE PROPOSED SETTLEMENT5

 A. Settlement Payout5

 B. Calculation and Distribution of Settlement Payments5

 C. PAGA Notice and Release of Claims6

 D. Incentive Award to PAGA Representative7

 E. Settlement Administrator Costs8

 F. Attorneys’ Fees and Litigation Costs.....8

 1. The Contingent Nature.....11

 2. The Experience, Reputation, and Ability of Counsel, and the Skill Displayed in Litigation11

 3. The Results Achieved12

 4. Preclusion of Other Employment.....12

IV. THE STANDARD FOR APPROVAL OF PAGA SETTLEMENTS13

V. THE PAGA SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.....14

VI. CONCLUSION.....17

TABLE OF AUTHORITIES

State Cases

<u>Amalgamated Transit Union, Local 1756 v. Superior Court</u> , 46 Cal.4th 993 (2009)	13
<u>Bank of America v. Cory</u> , 164 Cal.App.3d 66 (1985).....	10
<u>Carrington v. Starbucks Corp.</u> , 30 Cal.App.5th 504 (2018)	16
<u>Cellphone Termination Fee Cases</u> , 186 Cal.App.4th 1380 (2010)	7
<u>Chavez v. Netflix, Inc.</u> , 162 Cal.App.4th 43 (2008).....	10
<u>Clark v. Am. Residential Servs. LLC</u> , 175 Cal.App.4th 785 (2009).....	7
<u>Dynamex Operations West, Inc. v. Superior Court</u> , 4. Cal. 5 th 903 (2018).....	1, 16
<u>Glendale City Employees’ Assoc. v. City of Glendale</u> , 15 Cal.3d 328 (1975)	9
<u>In re Consumer Privacy Cases</u> , 175 Cal.App.4th 545 (2009).....	9
<u>In re Microsoft I-V Cases</u> , 135 Cal.App.4th 706 (2006)	14
<u>Kaufman v. Goldman</u> , 195 Cal.App.4th 734 (2011).....	14
<u>Knoff v. City and County of San Francisco</u> , 1 Cal.App.3d 184 (1969).....	10
<u>Laffitte v. Robert Half Internat. Inc.</u> , 1 Cal.5th 480 (2016).....	9, 10
<u>Naranjo v. Spectrum Security Services, Inc.</u> , 40 Cal.App.5th 444 (2019)	4
<u>Parker v. Los Angeles</u> , 44 Cal.App.3d 556 (1974).....	10
<u>Rider v. County of San Diego</u> , 11 Cal.App.4th 1410 (1992).....	10
<u>Serrano v. Priest (“Serrano III”)</u> , 20 Cal.3d 25 (1977)	9, 12
<u>Thurman v. Bayshore Transit Mgmt., Inc.</u> , 203 Cal.App.4th 1112 (2012)	16
<u>Wershba v. Apple Computer, Inc.</u> , 91 Cal.App.4th 224 (2001)	14

Federal Cases

<u>Baumann v. Chase Investment Servs. Corp.</u> , 747 F.3d 1117 (9th Cir. 2014).....	13
<u>Bernstein v. Virgin Am., Inc.</u> , 365 F.Supp.3d 980, 985, 992 (N.D.Cal. 2019)	15
<u>Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)</u> , 213 F.3d 454 (9th Cir. 2000)....	16
<u>Fleming v. Covidien, Inc.</u> 2011 U.S. Dist. LEXIS 154590 (C.D.Cal. Aug. 12, 2011).....	16

1	<u>In Re First Capital Holdings Corp. Fin. Prods. Securities Litig.</u>	
2	1992 U.S. Dist. LEXIS 14337 (C.D. Cal. June 10, 1992)	9
3	<u>In re Sumitomo Copper Litig.</u> , 74 F.Supp.2d 393 (S.D.N.Y. 1999).....	9, 10
4	<u>Mills v. Electric Auto-Lite Co.</u> , 396 U.S. 375 (1970)	9
5	<u>Navarro v. Ordaz Cultured Marble & Onyx, Inc.</u>	
6	2015 U.S. Dist. LEXIS 21374, (N.D. Cal. Feb. 23, 2015)	13
7	<u>Officers for Justice v. Civil Service Com.</u> , 688 F.2d 615 (9th Cir. 1982).....	14
8	<u>Sakkab v. Luxottica Retail North American, Inc.</u> , 803 F.3d 425 (9th Cir. 2015).....	13
9	<u>Shames v. Hertz Corp.</u> , 2012 U.S. Dist. LEXIS 158577 (N.D.Cal. Nov. 5, 2012)	16
10	<u>Urbino v. Orkin Services of California</u> 726 F.3d 1118 (9th Cir. 2013).....	13
11	<u>Statutes</u>	
12	Labor Code §201	3, 4
13	Labor Code §202	3, 4
14	Labor Code §204	3
15	Labor Code §210	3
16	Labor Code §226	3, 4
17	Labor Code §226.3.....	3
18	Labor Code §226.7.....	3, 4
19	Labor Code §510	3, 4
20	Labor Code §512	3, 4
21	Labor Code §558	3, 4, 15
22	Labor Code §2699.....	2, 3, 5, 6, 13-16
23	Labor Code §2802.....	3
24	I.W.C. Wage Order No. 9 (8 C.C.R. §1190).....	3, 4, 15
25	<u>Secondary Authorities</u>	
26	CALIFORNIA PRACTICE GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group)	
27	at §7.172.3.....	9
28	Theodore Eisenberg & Geoffrey P. Miller, INCENTIVE AWARDS TO CLASS ACTION PLAINTIFFS: AN EMPIRICAL STUDY (2006) 53 UCLA L. Rev. 1303.....	7

1 **MEMORANDUM**

2 Plaintiff Estevan Arnold respectfully submits the following Memorandum of Points and
3 Authorities in Support of Plaintiff's Motion for Approval of Settlement of Labor Code Section
4 2698, *et seq.*, Private Attorneys General Act ("PAGA") Claims:

5 **I. INTRODUCTION**

6 This action involves a combination of PAGA claims arising from Defendants' alleged
7 Labor Code violations, including misclassification of employees as independent contractors,
8 meal and rest period violations, record keeping violations, failure to pay overtime wages, failure
9 to provide accurate wage statements, and reimbursement violations, as well as individual claims
10 arising from those same Labor Code violations. Plaintiff contends that Defendants misclassified
11 employees as independent contractors, and thereby denied them the corresponding protections
12 under the Labor Code. Specifically, Plaintiff alleges that Defendants failed to record employees'
13 hours worked, failed to provide wage statements, failed to provide meal and rest periods, and
14 failed to reimburse employees for work-related expenses. Plaintiff alleges that these purported
15 violations violate several provisions of the California Labor Code and subject Defendants to
16 penalties under PAGA, as well as costs and attorney's fees. In addition to PAGA penalties,
17 Plaintiff also sought individual damages for the violations above.

18 Defendants generally denied the allegations, contending, among other things, that the
19 ABC test for independent contractors under Dynamex Operations West, Inc. v. Superior Court,
20 4. Cal. 5th 903 (2018) and A.B. 5 does not apply because of preemption of the Federal Aviation
21 Administration Authorization Act, which governs interstate trucking.

22 By this motion, Plaintiff requests that the Court grant approval of the Settlement reached
23 between the parties. Pursuant to the Settlement Agreement, the parties will resolve all the claims
24 in this case. A copy of the Settlement and this Motion was served on the Labor Workforce and
25 Development Agency ("LWDA") on November 10, 2021. See Declaration of John A. Lofton
26 ("Lofton Decl."), ¶ 8.
27

28 Pursuant to the Settlement, Defendants will pay a non-reversionary Gross Settlement

1 Amount of \$50,000.00. From the Gross Settlement Amount, Counsel requests approval of
2 attorney's fees equal to 33.33% of the Gross Settlement, or \$16,665.00, and reimbursement of
3 costs incurred to prosecute this case, not to exceed \$3,000.00 (currently, Plaintiff's out-of-pocket
4 costs allocated to the PAGA claims are \$1,596.73). Plaintiff also requests the Court approve an
5 incentive fee for the named Plaintiff for the risk he took and his valuable participation in this
6 litigation on behalf of the LWDA in the amount of \$5,000.00. Plaintiff further requests the
7 Court to approve Atticus Administration, LLC as the settlement administrator. Atticus has
8 submitted a quote for its costs for administration at \$2,500.00. After deducting these amounts
9 from the Gross Settlement Amount, at least \$24,238.27 will be distributed pursuant to PAGA.

10 Per the PAGA, 75% of the \$24,738.27.00 Net Settlement Amount, or \$18,178.70, shall
11 be paid to the LWDA. See Labor Code §2699(i). The remaining 25%, or \$6,059.57, shall be
12 distributed among the Aggrieved Employees. Defendants identified 21 Aggrieved Employees
13 who worked during the PAGA Period, from January 10, 2019 through June 7, 2021. Per
14 Defendants' records, these Aggrieved Employees worked a total of approximately 600 pay
15 periods from January 10, 2019 through June 7, 2021, when this Settlement was finalized. The
16 Aggrieved Employees Share of \$6,059.57 will be divided by the total number of pay periods
17 (600) for a per-pay period amount of approximately \$10.10, which will be multiplied by the
18 number of pay periods each Aggrieved Employee worked in the PAGA period to determine the
19 amount he or she will receive. For example, an Aggrieved Employee who worked 20 pay
20 periods during the PAGA Period would receive \$202.00 (20 x \$10.10). See Lofton Decl.,
21 Exhibit B. If all Aggrieved Employees had worked the same number of pay periods, the average
22 recovery per Aggrieved Employee would be approximately \$288.55.

23 The Aggrieved Employees will be mailed their checks directly by the Settlement
24 Administrator. Aggrieved Employees will have 120 days to cash their checks. If any funds
25 remain after the expiration date of the check cashing period, any residual funds will be
26 distributed to the LWDA.

27 The Settlement was the product of arm's-length negotiations by experienced counsel on
28

1 both sides. On March 10, 2021, the Parties participated in a mediation conducted by Jamie E.
2 Wrage, Esq. In advance of the mediation, Defendants provided Plaintiff's Counsel with
3 documents and data regarding the claims in the case, including pay and time records for all
4 Aggrieved Employees for the PAGA Period. Defendants also provided tax returns and bank
5 records regarding their financial condition. During the mediation, each side, represented by its
6 respective counsel, recognized the substantial risk of an adverse result in the case as well as the
7 grim financial condition of Defendants and the Court's substantial discretion in modifying the
8 dollar amount of any award. It was with this understanding that the parties agreed to resolve the
9 claims presented as set forth in the Settlement Agreement. This Settlement is a fair and
10 reasonable resolution on behalf of the LWDA and for the Aggrieved Employees.

11 **II. SUMMARY OF THE LITIGATION AND SETTLEMENT**

12 Plaintiff submitted his notice of Labor Code violations to the LWDA on January 10,
13 2020. Plaintiff filed the Complaint in Los Angeles County Superior Court on February 27, 2020,
14 and filed a First Amended Complaint ("FAC") on March 20, 2020. The action was assigned to
15 Judge Deirdre Hill in Dept. B.

16 As set forth in the FAC, Plaintiff alleges that Defendants violated Labor Code §§ 201,
17 202, 204, 226, 226.7, 226.8, 510, 512, 558, 2802, and IWC Wage Order No. 9-2001 (8
18 C.C.R. §11090). With respect to Plaintiff and all Aggrieved Employees, who have been injured
19 as a result of these violations, they allege that they are entitled to civil penalties pursuant to
20 Labor Code §§210, 226, 226.3, 226.7, 558, 2699(a), and 2699(f), and to recover costs and
21 attorney's fees pursuant to California law, including Labor Code § 2699(g)(1).

22 **A. Factual Allegations and Legal Analysis of Claims in the First Amended** 23 **Complaint**

24 Defendants own and operate a small trucking business in and around Torrance,
25 California. Plaintiff was employed by Defendants as a delivery driver from approximately early-
26 2018 to October 18, 2019. Plaintiff alleged that he and other employees were misclassified as
27 independent contractors and denied the protections afforded to employees under the Labor Code.
28

1 Specifically, Plaintiff alleged that Defendants denied him and other employees timely and
2 uninterrupted meal and rest periods, failed to track hours worked, failed to provide itemized
3 wage statements, and failed to pay employees correctly for regular and overtime hours worked.
4 Plaintiff also alleged that Defendants required employees to wear a uniform and provide their
5 own tools, without reimbursement.

6 Defendants paid Plaintiff and the other employees a flat daily rate, regardless of hours
7 worked. Plaintiff alleges that he and the other employees routinely worked in excess of eight
8 hours in a day and forty hours in a week with no overtime pay.

9 Willful misclassification of employees is a violation of Labor Code §226.8, subjecting
10 Defendants to a civil penalty of \$5,000-\$25,000 for each violation.

11 Failure to provide meal and rest periods constitutes a violation of Labor Code §§226.7,
12 512, 558 and I.W.C. Wage Order No. 9 (8 C.C.R. §11090), and failure to pay the penalty
13 premiums set forth therein constitutes a separate violation of Labor Code §226.7.

14 Failure to pay wages on time is a violation of Labor Code §204, and failure to provide
15 overtime wages is a violation of Labor Code §§510, 558, and I.W.C. Wage Order No. 9 (8
16 C.C.R. §11090).

17 Failure to reimburse employees for expenditures incurred by employees at the instruction
18 of Defendants and for Defendants' benefit is a violation of Labor Code §2802.

19 **B. Plaintiff's Individual Claims**

20 In addition to his claims for civil penalties made under PAGA, Plaintiff asserted
21 individual claims for the damages for the Labor Code violations set forth above. Defendants
22 denied these allegations. Plaintiff estimates his actual damages were approximately \$94,254.00.
23 See Lofton Decl., ¶ 6. The parties settled Plaintiff's individual claims at mediation for
24 \$50,000.00, contingent on the Court's approval of this Settlement Agreement. See id.

25 **C. Mediation and Settlement**

26 On March 10, 2021, the Parties participated in a mediation conducted by Jamie E. Wrage,
27 Esq. See id., ¶ 6. In advance of the mediation, Defendants provided Plaintiff's Counsel with
28

documents and data regarding the claims in the case. See id., ¶ 4. Specifically, Defendants provided pay and time records (such as they were) for all Aggrieved Employees for the time period beginning January 10, 2019. See id. Defendants represented that they had altered their pay and classification policies as well as other relevant policies, so that there should be no further systemic violations.

Defendants also provided tax returns and bank statements for both Mr. Benitez and the corporation, which indicated that neither had significant assets with which to pay a large settlement. See id.

The Parties reached a tentative settlement at mediation and negotiated the language of a formal settlement agreement thereafter. On June 7, 2021, the Parties finalized a written settlement agreement. See id.

III. THE PROPOSED SETTLEMENT

The proposed Settlement is for a non-reversionary Gross Settlement Amount of \$50,000.00. Per the PAGA, 75% of the Net Settlement Amount shall be paid to the LWDA. Labor Code §2699(i). The remaining 25% of the Net Settlement Amount will be distributed by a direct mailing of checks by the Settlement Administrator to the Aggrieved Employees.

A. Settlement Payout

Subject to the terms and conditions of the Settlement Agreement, the Gross Settlement Amount that Defendants are obligated to pay in connection with the Settlement is \$50,000.00. This amount will cover (as approved by the Court) (i) all PAGA Settlement Shares paid to Aggrieved Employees; (ii) the PAGA Representative Payment; (iii) the Plaintiff's Counsel Fees and Expenses Payment; (iv) the LWDA Payment; and (iv) the Settlement Administrator's fees and expenses. The Gross Settlement Amount is non-reversionary.

B. Calculation and Distribution of Settlement Payments

Per the PAGA, 75% of the \$24,238.27.00 Net Settlement Amount, or \$18,178.70, will be paid to the LWDA. See Lab. Code § 2699(i). The remaining 25%, or \$6,059.57, will be distributed among the Aggrieved Employees. Defendants identified 21 Aggrieved Employees

1 who worked during the PAGA Period, from January 10, 2019 through June 7, 2021. Per
2 Defendants' records, these Aggrieved Employees worked a total of approximately 600 pay
3 periods from January 10, 2019 through June 7, 2021 when this Settlement Agreement was
4 finalized. The Aggrieved Employees Share of \$6,059.57 will be divided by the total number of
5 pay periods (600) for a per-pay period amount approximately \$10.10, which will be multiplied
6 by the number of pay periods each Aggrieved Employee worked in the PAGA period to
7 determine the amount he or she will receive. For example, an Aggrieved Employee who worked
8 20 pay periods during the PAGA Period would receive \$202.00 (20 x \$10.10). See Lofton Decl.,
9 Exhibit B. If all Aggrieved Employees had worked the same number of pay periods, the average
10 recovery per Aggrieved Employee would be approximately \$288.55.

11 Each PAGA Settlement Share shall be allocated as one hundred percent (100%)
12 penalties, from which there will be no tax withholdings and for which an IRS Form 1099 will be
13 issued, as needed.

14 The timing of payment is as follows: Within thirty days after the Effective Date, as
15 defined in the Settlement Agreement, Defendants shall transfer to the Settlement Administrator
16 the entire Gross Settlement Amount of \$50,000.

17 Upon receipt of the Gross Settlement Amount, the Settlement Administrator shall release
18 the Court-approved PAGA Representative Incentive Fee Payment to Plaintiff and the Court-
19 approved Plaintiff's Counsel Attorney's Fees and Litigation Costs Payment to Plaintiff's
20 Counsel, and the LWDA Payment to the LWDA, and pay itself its court-approved reasonable
21 fees and expenses.

22 Within 30 calendar days after receipt of the Gross Settlement Amount, the Settlement
23 Administrator will confirm names and addresses for the Aggrieved Employees and mail checks
24 for payment to the Aggrieved Employees. Aggrieved Employees will have 120 days to cash
25 their checks. After last outstanding check becomes invalid, the Settlement Administrator will
26 transfer any amount remaining to the LWDA.

27 **C. PAGA Notice and Release of Claims**

28 Within thirty (30) calendar days after receipt of the entire Settlement Payment, the

1 Settlement Administrator shall mail via U.S. First Class mail each Individual Settlement Check
2 to the last known address with directions to the Postmaster to forward the payment checks and
3 return all undeliverable payment checks to the Settlement Administrator. It will be conclusively
4 presumed that an Aggrieved Employee's Individual Settlement Check was received if the
5 payment check has not been returned within thirty (30) days of the original mailing of the
6 payment check. The date of the initial mailing of the payment check, shall be conclusively
7 determined according to the records of the Settlement Administrator.

8 A letter approved by the Parties explaining this Settlement will be included in the mailing
9 of each Aggrieved Employee's individual settlement check.

10 **D. Incentive Award to PAGA Representative**

11 Plaintiff requests, and Defendants do not oppose, that the Court award a PAGA
12 Representative Incentive Fee in the amount of \$5,000.00, in consideration of Plaintiff Estevan
13 Arnold initiating and pursuing this lawsuit, including formal discovery and participating in the
14 all-day mediation of the matter, undertaking the risk of liability for attorney's fees and expenses
15 in the event he was unsuccessful in the prosecution of this lawsuit, having his name forever part
16 of a public record of him suing his employer, and agreeing to the general release as part of the
17 Settlement. The Settlement Administrator will pay the PAGA Representative Incentive Fee
18 approved by the Court of up to \$5,000.00 total out of the Gross Settlement Amount.

19 Awarding an incentive to a PAGA representative follows the same principle that applies
20 in the class action context. "[T]he rationale for making enhancement or incentive awards to
21 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
22 conferring a benefit on other members of the class. An incentive award is appropriate if it is
23 necessary to induce an individual to participate in the suit." Cellphone Termination Fee Cases,
24 186 Cal.App.4th 1380, 1395 (2010) (quoting Clark v. Am. Residential Servs. LLC, 175
25 Cal.App.4th 785, 804-806 (2009)). An award of \$5,000 falls well below the average
26 enhancement award according to one study. See, Theodore Eisenberg & Geoffrey P. Miller,
27 INCENTIVE AWARDS TO CLASS ACTION PLAINTIFFS: AN EMPIRICAL STUDY (2006) 53 UCLA L.
28

1 Rev. 1303, 1308 (concluding the average award per class representative was \$15,992).

2 An incentive award in a PAGA case is especially important where the Plaintiff has filed
3 suit on behalf of the LWDA and, is thus, providing a vital service for the State. As a result of
4 Mr. Arnold's efforts, the LWDA will receive \$18,553.70.

5 Mr. Arnold spent a significant amount of time helping Counsel with the prosecution of
6 this action and performing the following tasks: (1) meeting with and communicating with his
7 attorneys on numerous occasions; (2) detailing his experiences and producing copies of
8 documents; (3) contacting witnesses; (4) assisting in preparing the PAGA claim notice and
9 complaint; (5) reviewing the mediation documents prepared; (6) attending the mediation; (7)
10 reviewing the terms of and signing the Settlement Agreement; and (8) assisting in the preparation
11 of this motion. See, Lofton Decl. ¶ 15. Mr. Arnold also undertook personal and financial risks
12 as a PAGA representative that should be rewarded. See Lofton Decl. ¶¶ 15-17.

13 In light of the work that Mr. Arnold performed on behalf of the LWDA and Aggrieved
14 Employees, the requested PAGA Representative Incentive Fee of \$5,000.00 is reasonable and
15 appropriate.
16

17 **E. Settlement Administrator Costs**

18 The Settlement Administrator will pay out of the Gross Settlement Amount to itself its
19 reasonable fees and expenses, not to exceed \$2,500.00, after such payment has been approved by
20 the Court. Atticus Administration has submitted a quote for its costs for administration at
21 \$2,500.00. See Lofton Decl., ¶ 28, Exhibit E. Atticus Administration is a well-known and
22 respected Settlement Administrator. Plaintiff's counsel has used Atticus Administration in other
23 matters, and knows its rates to be fair and competitive. See id. Plaintiff requests that Atticus
24 Administration be approved as Settlement Administrator by the Court.

25 **F. Attorneys' Fees and Litigation Costs**

26 In considering the overall fairness of the Settlement, the Court may look to the
27 reasonableness of the Attorneys' Fees and Costs allocated in the Settlement Agreement.
28 Plaintiff's Counsel's litigation costs were all reasonable and necessary expenses in litigating and
resolving this action. A copy of the itemized list of out-of-pocket costs, in the amount of

1 \$3,193.45 is attached to the Declaration of John A. Lofton as Exhibit D. Plaintiff allocates 50%
2 of these costs to the PAGA claims and 50% to Mr. Arnold's individual claims, so Plaintiff seeks
3 \$1,596.73 to be paid out of the Gross Settlement Amount.

4 Plaintiff also seeks 33.33% of the Gross Settlement Amount, or \$16,665.00, in attorney's
5 fees. For the purposes of a lodestar cross-check, Plaintiff's Counsel has spent approximately
6 47.8 hours working on this matter, at an hourly rate of \$650, for a total of \$31,070.00. See id., ¶
7 26. If one half of those hours are allocated to the PAGA claims, the result is very close to the
8 33.33% requested by this motion.

9 The attorneys' fees sought will compensate Plaintiff's Counsel for work performed in
10 recovering a significant benefit for the LWDA and Aggrieved Employees. In reviewing
11 attorneys' fees in the class action context, one court explained: "The fee was negotiated at arm's-
12 length with sophisticated defendants by the attorneys who were intimately familiar with the case,
13 the risks, the amount and value of their time, and the nature of the result obtained for the class."
14 In Re First Capital Holdings Corp. Fin. Prods. Securities Litig. 1992 U.S. Dist. LEXIS 14337, at
15 *4 (C.D. Cal. June 10, 1992) (awarding attorney's fees of \$8 million).

16 Courts have long recognized the "common fund" or "common benefit" doctrine, under
17 which attorneys who create a common fund or benefit for a group of persons may be awarded
18 their fees and costs to be paid out of the fund. See Laffitte v. Robert Half Internat. Inc., 1 Cal.5th
19 480, 504 (2016); See also, Serrano v. Priest ("Serrano III"), 20 Cal.3d 25, 34 (1977); Glendale
20 City Employees' Assoc. v. City of Glendale, 15 Cal.3d 328, 341, fn. 19 (1975); In re Consumer
21 Privacy Cases, 175 Cal.App.4th 545, 557 (2009); In re Sumitomo Copper Litig., 74 F.Supp.2d
22 393, 396-398 (S.D.N.Y. 1999) (describing the overwhelming weight of federal authority in favor
23 of the percentage fee method); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392 (1970)
24 (United States Supreme Court endorsing the common fund approach to class actions.)

25 The California Practice Guide: Civil Trials and Evidence (The Rutter Group) at §7.172.3
26 explains the common fund doctrine as follows:

27
28 Where the lawsuit results in the recovery of a fund or property benefiting others as well as plaintiff (*e.g.*, a class action), the court has inherent equitable power to order plaintiff's attorney fees paid out of the common fund or property [citations]. Such

1 fee spreading assures that all of those benefited by the litigation pay their fair share
2 of obtaining the recovery.

3 Numerous appellate courts have similarly endorsed the “percentage fee” method for determining
4 reasonable attorney’s fees in common benefit cases.¹

5 In the Laffitte decision, the California Supreme Court held that, “when class action
6 litigation establishes a monetary recovery fund for the benefit of the class members, and the trial
7 court in its equitable powers awards class counsel a fee out of that fund, the court may determine
8 the amount of a reasonable fee by choosing an appropriate percentage of the fund created.”
9 Laffitte, supra, 1 Cal.5th at 503. The California Supreme Court also noted that the percentage of
10 the fund method “more accurately reflects the results achieved” than the lodestar method, serves
11 as a “better approximation of market conditions in a contingency case,” and encourages “counsel
12 to seek an early settlement and avoid unnecessarily prolonging the litigation.” Id. at 503-504.

13 Courts have recognized that a one-third fee is appropriate in common fund cases. See,
14 e.g., Chavez v. Netflix, Inc., 162 Cal.App.4th 43, 66, fn.11 (2008) (“Empirical studies show that,
15 regardless of whether the percentage method or the lodestar method is used, fee awards in class
16 actions average around one-third of the total recovery.”)

17 The attorney’s fees requested here are in line with other fee awards in California wage
18 and hour cases. For example, in Smiles v. Walgreens Co., Alameda Superior Court Case
19 Number RG17862495, Judge Seligman awarded attorney’s fees of 35% of the \$15,000,000
20 settlement in a PAGA case, plus costs; in Pearce v. Linens ‘N Things, Inc., Orange County
21 Superior Court Case No. 00CC04830, Judge McDonald awarded attorney’s fees equal to 33
22 1/3% of the settlement fund, plus costs; in Albrecht v. Rite Aid Corp., San Diego Superior Court
23

24
25 ¹ See, e.g., Knoff v. City and County of San Francisco, 1 Cal.App.3d 184, 203-204 (1969) (court
26 upheld a “contingent percentage” award of attorneys’ fees in a representative action as the proper
27 exercise of the court’s equitable powers); Rider v. County of San Diego, 11 Cal.App.4th 1410,
28 1423 (1992) (attorneys’ fees and expenses properly awarded from common benefit composed of
illegally imposed sales and use tax); Bank of America v. Cory, 164 Cal.App.3d 66, 89-92 (1985)
(fees awarded from common benefit created by action compelling state to claim dormant bank
accounts); Parker v. Los Angeles, 44 Cal.App.3d 556, 567-568 (1974) (court upheld fee award
equal to one-third of the damages to owners of residential property in an inverse condemnation
action.)

Case No. 729129, Judge Haden awarded attorney's fees equal to 35% of the settlement fund, plus costs; in Crandall v. U-Haul International, L.A. Superior Court Case No. BC 178775, Judge Czuleger awarded plaintiffs' counsel attorney's fees equal to 40% of the settlement fund; in Graubard v. Goodyear Tire Rubber Company, LA Superior Court Case No. BC 230520, Judge Mohr awarded attorney's fees equal to 32.1% of the settlement fund, plus costs. These cases illustrate that California courts recognize that a one-third fee is appropriate in a wage and hour common fund case.

Given the results achieved under the circumstances of this litigation, the requested fee award is reasonable. As discussed in In re Sumitomo Copper Litigation, supra, 74 F.Supp.2d at 396:

No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

In that vein, this Court should consider the contingent nature of this case, the uncertainty of the outcome, the quality of the counsel, and the preclusion from other employment.

1. The Contingent Nature

From the outset of the case to the present, prosecution of this action has involved significant financial risk for Plaintiff's Counsel. Plaintiff's Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Plaintiff's Counsel have placed their own resources at risk to prosecute this action with no guarantee of success. See, Lofton Decl., ¶¶ 20-21. If Defendants prevailed on any one of the affirmative defenses raised, ***it could substantially reduce, if not wholly defeat, recovery.*** See id. Despite such challenges, Plaintiff's Counsel was able to persuade Defendants that it faced sufficient exposure such that Defendants were willing to settle Plaintiff's claims brought on behalf of the LWDA. See id.

2. The Experience, Reputation, and Ability of Counsel, and the Skill Displayed in Litigation

Plaintiff's Counsel has substantial experience in complex and representative action litigation, including many wage and hour cases. See Lofton Decl., ¶ 19, Ex. C (firm résumé).

1 The quality of opposing counsel is also important to evaluating the quality of the work
2 done by Plaintiff's Counsel. Here, Matthew Knez of the Knez Law Group, LLP, an experienced
3 employment law litigator, represented Defendants. Thus, the complexity and potential duration
4 of the case, and that in the face of experienced and resourceful opposition, weigh in favor of
5 awarding the requested attorney's fees. See id. ¶ 22.

6 **3. The Results Achieved**

7 The results achieved by the Settlement support Plaintiff's Counsel's request for
8 attorney's fees. As noted, the Settlement will result in payment of \$18,178.70 to the LWDA and
9 \$6,059.57 to Aggrieved Employees. This is a significant sum of money in light of Defendants'
10 bleak financial circumstances.

11 Finally, the efficiency with which this litigation was conducted and resolved should be
12 rewarded. See Lofton Decl., ¶ 24. Plaintiff and Defendants moved promptly from the initial
13 filing in February 2020 to mediation in March 2021 and final settlement in June 2021. The
14 parties were able to minimize use of the Court's resources and avoid any motion practice. The
15 LWDA and Aggrieved Employees will directly benefit from the prompt and fair resolution of
16 their claims. They will be receiving a significant award in a short period of time as opposed to
17 waiting years to recover some undetermined amount if they succeeded at trial, which is an
18 uncertainty in itself. See id.

19 **4. Preclusion of Other Employment**

20 As California law recognizes, Plaintiff's Counsel's commitment to this litigation should
21 not be assessed in a vacuum. See, Serrano, supra, 20 Cal.3d at 49. A relevant factor in
22 determining attorney's fees is whether the litigation required Plaintiff's Counsel to forego other
23 employment. See id. Additional work was available that Plaintiff's Counsel had to forgo to
24 devote the time necessary to pursue this litigation. See Lofton Decl. ¶ 25.

25 Accordingly, attorney's fees in the amount of \$16,665.00, which is 33.33% of the Gross
26 Settlement Amount is fair and reasonable under the circumstances, and under California
27 precedent, along with \$1,596.73 in litigation costs (which is less than the \$3,000 in costs
28 estimated in the Settlement Agreement). See id., ¶¶ 26-27.

1 **IV. THE STANDARD FOR APPROVAL OF PAGA SETTLEMENTS.**

2 Labor Code §2699(l)(2) provides: “[t]he superior court shall review and approve any
3 settlement of any civil action filed pursuant to this part.” However, because PAGA claims are
4 not class actions, the usual rules or various findings required by Rule 23 or CCP §382 do not
5 apply. See, e.g., Navarro v. Ordaz Cultured Marble & Onyx, Inc. 2015 U.S. Dist. LEXIS 21374,
6 at *2 (N.D. Cal. Feb. 23, 2015). There is no requirement to provide notice to the Aggrieved
7 Employees, the Aggrieved Employees do not have the right to object to or opt out of the
8 Settlement, and there is no need for separate preliminary and final hearings. See Amalgamated
9 Transit Union, Local 1756 v. Superior Court, 46 Cal.4th 993, 1003 (2009); Urbino v. Orkin
10 Services of California 726 F.3d 1118, 1122-23 (9th Cir. 2013).

11 The requirements for a settlement under the PAGA are that the settling parties are to
12 submit the proposed settlement to the LWDA at the same time it is filed with the Court, and then,
13 if the settlement is approved, to submit the judgment to the LWDA within 10 days after entry.
14 See Labor Code §2699(l)(3). PAGA does not set forth any standards for evaluating a settlement.
15 Id.

16 The only potential objector is the LWDA itself, whose comments, if any, will be
17 submitted to the Court in advance of the approval hearing. The PAGA does not give absent
18 employees any substantive right to bring their own PAGA claim. See Sakkab v. Luxottica Retail
19 North American, Inc., 803 F.3d 425, 436 (9th Cir. 2015). Rather, “[a]n employee bringing a
20 PAGA action does so ‘as the proxy or agent of the state’s labor law enforcement agencies,’ who
21 are the real parties in interest ... However, by obtaining such penalties, the employee-plaintiff
22 does not vindicate absent employees’ claims, for the PAGA does not give absent employees any
23 substantive right to bring their ‘own’ PAGA claims.” (internal citations omitted). Id. at 435-436.
24 Therefore, the “bulk of any recovery goes to the LWDA, not to the aggrieved employees ... A
25 PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the
26 state, not a claim for class relief.” Baumann v. Chase Investment Servs. Corp., 747 F.3d 1117,
27 1123-24 (9th Cir. 2014).

28 Although the PAGA does not provide instruction on how courts are to evaluate a
settlement under the Act, California law provides some general guidance concerning judicial

1 approval of any settlement. First, California courts recognize a strong public policy in favor of
2 settlements. See Kaufman v. Goldman, 195 Cal.App.4th 734, 735 (2011) (“We note there is
3 well-established policy in the law to discourage litigation and favor settlement. Pretrial
4 settlements are highly favored because they diminish the expense of litigation.”) Here, the
5 Settlement not only avoids the complexities and legal uncertainties discussed above, but also the
6 delay, expense, and drain on judicial resources that would result from a lengthy trial. Second, in
7 all circumstances, the decision to approve or reject a settlement is committed to the trial court’s
8 sound discretion. See Wershba v. Apple Computer, Inc., 91 Cal.App.4th 224, 234-235 (2001).
9 This basic principle coincides with the discretion the Legislature specifically afforded courts
10 under sections 2699(e)(1) and (2) of the PAGA, granting to the courts the same discretion as that
11 held by the LWDA in assessing civil penalties and specifically authorizing courts the ability to
12 award lesser amounts than the maximum civil penalties set forth in section 2699. Third,
13 although the court possesses discretion in approving a PAGA settlement, it seems logical that the
14 court’s role “must be limited to the extent necessary to reach a reasoned judgment that the
15 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
16 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
17 concerned.” In re Microsoft I-V Cases, 135 Cal.App.4th 706, 723 (2006) (quoting Officers for
18 Justice v. Civil Service Com., 688 F.2d 615, 625 (9th Cir. 1982)). Here, the parties agreed that
19 settlement, on the terms set forth in the Settlement Agreement, are fair, reasonable, and adequate
20 to the LWDA and Aggrieved Employees.

21 **V. THE PAGA SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.**

22 The Settlement was reached only after arm’s-length and good faith negotiations. See
23 Lofton Decl., ¶ 9. Prior to mediation, the parties engaged in a significant exchange of data with
24 Defendants providing all time and pay records for all Aggrieved Employees and detailed
25 financial documents. See id. Counsel and the parties attended a full-day mediation on March
26 10, 2021. Both parties provided detailed mediation briefs and Plaintiff’s counsel prepared an
27 extensive analysis of the potential exposure. See id. The risks of continued litigation and the
28 Defendants’ financial status during a pandemic had to be considered and a compromise of the
claims was settled upon.

1 In this case, the penalties available under PAGA far exceeded Defendants' ability to pay
2 any significant settlement or judgment. Based on Plaintiff's analysis, Defendants' likely
3 maximum exposure exceeded \$500,000.

4 Under the PAGA, for the failure to provide meal periods, a maximum penalty of \$100 per
5 pay period is assessed for initial violations and \$200 for subsequent violations. Here, because
6 Defendants has not been previously penalized for the violations set forth in Plaintiff's PAGA
7 charge, only the initial \$100 amount per pay period would likely be awarded. See Lofton Decl.,
8 ¶ 10. Here, there were approximately 600 pay periods during the PAGA Period. See id. At
9 \$100 per each of the 600 pay periods, the maximum exposure at trial for meal period violations
10 would be \$60,000.00.

11 Rest period violations carry a smaller penalty of \$50 per pay period for initial violations
12 and \$100 for subsequent violations. See Labor Code §558, I.W.C. Wage Order No. 9 (8 C.C.R.
13 §11090). If the rest period violations could be proved at the same rate as meal period violations,
14 the maximum exposure at trial for rest period violations would be likely be \$30,000.00. See
15 Lofton Decl., ¶ 11.

16 However, there was a substantial question of fact as to whether the Aggrieved Employees
17 were in fact denied meal and rest periods to the extent claimed, and whether and to what extent it
18 could be proved. Moreover, the PAGA grants trial courts discretion to reduce the amount of
19 civil penalties to be imposed. See Labor Code §2699(e)(2); See also, Bernstein v. Virgin Am.,
20 Inc., 365 F.Supp.3d 980, 985, 992 (N.D.Cal. 2019) (judgment reducing PAGA penalties from
21 \$33,300,000 to \$24,981,150).

22 The misclassification claims carry potential penalties of \$5,000-\$15,000 per violation, or
23 \$10,000-\$25,000 per violation if the employer is engaged in a pattern and practice of
24 misclassification. See Labor Code §226.8. So the range of potential penalties for
25 misclassification would be \$105,000-\$525,000. See Lofton Decl., ¶ 12.

26 The additional Labor Code violations each carried penalties of \$50-\$100 per employee
27 per pay period, with a total likely exposure in excess of \$300,000.00. However, the major
28 overriding limiting factor in this litigation has been the fact that Defendants' business is low-

1 profit and neither Defendant has significant assets. A result of \$50,000.00 is an eminently
2 reasonable result given the risks involved. See Lofton Decl., ¶¶ 12-13.

3 Here, the Gross Settlement Amount results in an award of \$10.10 per pay period. This
4 compromised amount compares favorably to other PAGA settlements and court awards. For
5 example, in Garrett v. Bank of America, Alameda Superior Court Case Number RG13699027,
6 involving almost one million pay periods, the Alameda Superior Court, on October 28, 2016,
7 approved a \$15 million PAGA settlement, which would be a penalty of \$15 per pay period.

8 In Carrington v. Starbucks Corp., 30 Cal.App.5th 504 (2018), the trial Court reduced the
9 PAGA penalty amount to only \$5 per pay period. In Carrington, the plaintiff requested penalties
10 in excess of \$70 million, which was based on a \$25 to \$75 penalty per violation. The trial court
11 instead awarded a \$5 penalty per pay period and stated this reduction was warranted because
12 imposing the maximum penalty would be unjust, arbitrary, and oppressive based on Starbucks's
13 "good faith attempts" to comply with meal period obligations and because the court found the
14 violations were minimal. Similarly, here, Defendants argued that it had a good faith belief that it
15 was complying with the law on the grounds that it believed its employees were independent
16 contractors and that the ABC test under Dynamex Operations West, Inc. v. Superior Court, 4.
17 Cal. 5th 903 (2018) did not apply because of preemption of the Federal Aviation Administration
18 Authorization Act, which governs interstate trucking. Plaintiff has strong arguments against
19 these defenses, but even if Defendants were held liable for the PAGA violations, it was highly
20 possible that this Court would give deference to their "good faith attempt to comply with the
21 law" argument and reduce the penalty amount.

22 Other courts have also reduced PAGA civil penalties, often dramatically. For example,
23 in Thurman v. Bayshore Transit Mgmt., Inc., 203 Cal.App.4th 1112, 1136 (2012), the Court of
24 Appeal affirmed the trial court's reduction of PAGA civil penalties by 30 percent, finding that
25 awarding the full penalties would have been "unjust" because the "evidence
26 showed...defendants took their obligations...seriously and attempted to comply with the law,"
27 and that the defendants' financial condition "rendered them unable to pay penalties from ongoing
28 revenues." Similarly, in Fleming v. Covidien, Inc. 2011 U.S. Dist. LEXIS 154590, at *8-9
(C.D.Cal. Aug. 12, 2011), the court reduced PAGA civil penalties for wage statement violations

1 from \$2,800,000 to \$500,000. Accordingly, while courts cannot deny PAGA civil penalties
2 outright if liability is found, they can and do reduce the awarded penalties based on such
3 considerations as the egregiousness of the violations, the employer's efforts at compliance, and
4 the employer's ability to pay.

5 Finally, the fact that the total amount potentially available, assuming a full recovery on
6 all claims is greater than the value of a settlement, this does not militate against approval of this
7 Settlement. As the court in Shames v. Hertz Corp., 2012 U.S. Dist. LEXIS 158577, at *6
8 (N.D.Cal. Nov. 5, 2012) (citing Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.), 213 F.3d
9 454 (2000) (court approved a settlement constituting one-sixth of the potential recovery) held:
10 "While settlement amounts that are close to the plaintiff's estimate of damages provide strong
11 support for approval of the settlement, settlement offers that constitute only a fraction of the
12 potential recovery do not preclude a court from finding the settlement offer is fair."

13 Here, the Settlement reflects a compromise to approximately 25% of the maximum likely
14 potential exposure, but a relatively high return per pay period. See Lofton Decl., ¶ 13. This
15 result is excellent, especially given Defendants' defenses and financial condition, as well as the
16 Court's discretion to discount any penalty awarded down to the proverbial peppercorn.

17 **VI. CONCLUSION**

18 Because the Settlement is fair, reasonable, and adequate, Plaintiff respectfully requests
19 that the Court grant approval of all terms of the Settlement, as set forth in the Settlement
20 Agreement, attached to Lofton Decl., Exhibit B.

21 DATED: November 10, 2021

AIMAN-SMITH & MARCY, P.C.

23 

24 _____
25 John A. Lofton, Esq.
26 Attorney for Plaintiff Estevan Arnold
27
28