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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**
10

11 AYANNA SIMMONS, an individual, on
behalf of the State of California, as a private
12 attorney general, and on behalf all others
similarly situated,

13 Plaintiff,

14 v.

15 PLATINUM SECURITY, INC, a California
Corporation; and DOES 1-50, inclusive,

16 Defendants.
17

CASE NO.: 20STCV13020

Assigned to the Hon. Gregory Keosian

**NOTICE OF MOTION AND MOTION
TO APPROVE PAGA SETTLEMENT
PURSUANT TO THE PRIVATE
ATTORNEY GENERAL ACT OF 2004;
MEMORANDUM OF POINTS AN
AUTHORITIES IN SUPPORT
THEREOF**

*[Declaration of Joshua S. Falakassa
and[Proposed] Order filed concurrently
herewith]*

HEARING DATE

Date: April 7, 2021

Time: 10:00 a.m.

Dept.: 61

Complaint Filed: April 02, 2020

Trial Date: None Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 7, 2021 at 10:00 a.m., or as soon thereafter as this
3 matter may be heard by the Hon. Gregory Keosian in Department 61 of the Los Angeles County
4 Superior Court for the State of California, located at the 111 North Hill Street Los Angeles,
5 California 90012 Plaintiff Ayanna Simmons (“Plaintiff”) will and hereby does move this Court for
6 an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California
7 Labor Code § 2698 *et seq.* (“PAGA”).

8 This motion is based upon this Memorandum of Points and Authorities; the Declaration of
9 Joshua S. Falakassa in support thereof; the PAGA Settlement Agreement and attachments thereto
10 (the “Settlement Agreement” and/or the “Settlement”); the [Proposed] Order granting approval of
11 the PAGA Settlement; all other records, pleadings, and papers on file in this action; and upon such
12 other evidence or argument as may be presented to the Court at the hearing of this motion.

13
14 Dated: March 19, 2021

FALAKASSA LAW, P.C.

15
16 BY: _____

17 JOSHUA FALAKASSA

Attorneys for Plaintiff Ayanna Simmons

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This PAGA representative action stems from the alleged failure of defendant Platinum
4 Security, Inc. (hereinafter “Defendant”) to timely pay its non-exempt employees in violation of
5 Labor Code § 204. As a result, Plaintiff seeks to recover civil penalties under the Labor Code Private
6 Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”).

7 Plaintiff, as a private attorney general for the State of California, sought civil penalties under
8 PAGA. PAGA actions are a type of *qui tam* action filed on behalf of the state to assist it with labor
9 law enforcement. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380–
10 382.) As such, the state is the real party in interest in a PAGA action. (*Id.* at 382.) Accordingly,
11 and pursuant to PAGA, the Labor and Workforce Development Agency (“LWDA”) The State of
12 California was timely served with a copy of the Settlement Agreement concurrently filed with this
13 instant Motion to Approve the PAGA Settlement.

14 Plaintiff and the aggrieved employees work and/or worked for Defendant as hourly
15 employees within the State of California from March 31, 2019, through April 7, 2021. (the “Covered
16 Employees”) The Covered Employees contend that Defendant failed to pay them within 7 calendar
17 days of the close of the biweekly pay periods in violation of Labor Code § 204(d), and therefore,
18 owes civil penalties under the PAGA. Defendant denies these claims, denies any fault or
19 wrongdoing, and disputes Plaintiff’s characterization of liability, and availability of penalties.

20 Following extensive discussions, as well as negotiations and the exchange of informal
21 discovery, the Parties engaged in a full session of mediation on September 29, 2020 with Steve
22 Pearl, Esq. serving as the mediator. Mr. Pearl has extensive experience in wage and hour class and
23 PAGA actions. At the conclusion of the mediation session, the parties did not reach an agreement
24 or settlement. However, the parties along with the mediator’s guidance continued negotiations after
25 mediation. After several months of continued negotiations, the Parties finally reached agreement by
26 way of a mediator’s proposal. The Parties subsequently memorialized the terms in the long-form
27 Settlement Agreement as set forth in the PAGA Settlement Agreement (“Settlement Agreement”)
28 attached at **Exhibit “A”** to Declaration of Joshua Falakassa (“Falakassa Decl.”) filed concurrently

1 herewith.

2 Now with a comprehensive Settlement Agreement that resolves the claims alleged in this
3 case, Plaintiff seeks this Court's approval of the \$650,000.00 Settlement Sum involving
4 approximately 1,490 Covered Employees. This Settlement merits approval because it fulfills the
5 purpose of PAGA (*i.e.*, to deter violations of the Labor Code and secure obedience of California's
6 labor laws; and to provide relief that is genuine, meaningful, and consistent with California's goal
7 of benefitting the public through enforcement of labor laws).

8 Because this is a PAGA-only settlement, the process for approval is straight-forward: "The
9 superior court shall review and approve any settlement of any civil action filed pursuant to this part."
10 (Labor Code § 2699(1)(2).) Based on the California Supreme Court's holdings in *Arias v. Superior*
11 *Court*, 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348
12 (2014), there is no requirement under PAGA for Plaintiff to establish the requirements of class
13 certification (*i.e.* numerosity, typicality, commonality and adequacy) nor is there the usual two-step
14 preliminary and final approval process as found in class actions. Rather, this PAGA-only settlement
15 merely requires a one-step review and approval process. For these reasons and those discussed
16 below, the Parties now seek the Court's approval of the Settlement.

17 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

18 **A. Factual Background**

19 Defendant Platinum Security, Inc. provides private security services across California.
20 Plaintiff started working for Defendant as an hourly non-exempt security guard in September 2019
21 until her termination in January 2020. Plaintiff and other aggrieved employees were responsible for
22 various roles in all aspects of Defendant's security operations in Northern and Southern California.
23 (Falakassa Decl. ¶ 11.) Plaintiff and similarly aggrieved employees worked as hourly employees for
24 Defendant from March 31, 2019, through April 7, 2021 or the date that the Court approves this
25 settlement, whichever occurs earlier. ("Release Period") (*Id.*)

26 During the Release Period, Plaintiff alleges that Defendant uniformly failed to timely pay
27 Covered Employees in violation of Labor Code § 204(d). Although Covered Employees were paid
28 on a biweekly payroll, Defendant failed to pay all wages within 7 calendar days of the close of the

1 payroll period. As such, Defendant owes civil penalties under PAGA. (Falakassa Decl. ¶ 12.)

2 For example, for the pay period 10/20/19 to 11/02/19 Defendant paid Covered Employees
3 on 11/14/19, more than 7 calendar days after the close of the payroll period in violation of Labor
4 Code § 204(d)). (Falakassa Decl. ¶ 12.)

5 During the Release Period, Defendant's late payment schedule equally applied to Plaintiff
6 and all Covered Employees. (*Id.*)

7 **B. Procedural History**

8 On March 31, 2020, Plaintiff's counsel sent notice to the California Labor & Workforce
9 Development Agency ("LWDA") of her intent to pursue a representative action pursuant to PAGA,
10 on behalf of herself and the State of California, as well as on behalf of a group of aggrieved
11 employees (the "PAGA Notice"). (Falakassa Decl. ¶ 13.) This PAGA Notice is required under Labor
12 Code § 2699.3(a)(1)(A) as a prerequisite to bringing a PAGA representative claim against an
13 employer. The LWDA did not respond to this notice, thus allowing Plaintiff to file the instant
14 lawsuit. Labor Code § 2699.3(a)(2)(A). (*Id.*)

15 On April 02, 2020, Plaintiff filed her Complaint on behalf of herself, the State of California,
16 as a private attorney general, and all other similarly aggrieved employees. Through her PAGA
17 claim, Plaintiff seeks penalties for Defendant's violation of Labor Code §§ 204 (Falakassa Decl. ¶
18 14.)

19 Although Defendant denies the allegations and vowed to vigorously defend against them,
20 the Parties agreed to attend mediation with Steven Pearl, Esq. (Falakassa Decl. ¶ 15.) In preparation
21 for mediation, the Parties exchanged documents and information that allowed both sides to evaluate
22 the potential exposure and potential risk, such as a sampling of payroll records for the Covered
23 Employees, review of Defendant's employee handbook and payment schedules, along with wage
24 statements, and the total number of employees and workweeks during the Release Period. (*Id.*)
25 During this process, Plaintiff's counsel analyzed, researched, and investigated the potential issues,
26 including matters related to the calculation of damages, trial management, and appellate issues and
27 risks. (*Id.*)

28 On September 29, 2020, the Parties attended mediation with Steve Pearl, Esq., an

1 experienced mediator in wage and hour matters. (Falakassa Decl. ¶ 16.) During that mediation, the
2 Parties exchanged further information and discussed all aspects of the case, including the risks and
3 delays of litigation, the risk associated with proceeding in a representative capacity, liability under
4 the claims asserted, and the ability to recover and measure damages and/or penalties. (*Id.*)

5 The settlement negotiations were at all times at arm's length and although conducted in a
6 professional manner, were adversarial. (Falakassa Decl. ¶ 17.) Although the case did not settle on
7 the day of mediation, with guidance from the mediator, the Parties reached agreement regarding the
8 major terms of the settlement and subsequently finalized those terms in a long-form Settlement
9 Agreement. This Settlement was the culmination of protracted discussions between the Parties
10 following a thorough analysis of the pertinent facts and law at issue. The Parties now present the
11 Settlement Agreement to this Court for approval. (*Id.*)

12 **III. PAGA AND ITS REQUIREMENTS**

13 PAGA provides an enforcement mechanism for California's labor laws by enlisting
14 individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share
15 also going to the aggrieved employees. Due to the lack of financing for California's agencies, and
16 the substantial number of Labor Code violations by California employers, the California Legislature
17 found that it was in the public interest to allow aggrieved employees to act as "private attorneys
18 general" to enforce and recover civil penalties on behalf of the State of California for Labor Code
19 violations committed by employers. *Arias, supra*, 46 Cal.4th at 980. As the Legislature that adopted
20 PAGA observed, "the only meaningful deterrent to unlawful conduct is the vigorous assessment and
21 collection of civil penalties as provided in the Labor Code." Stats. 2003 ch. 906, § 1(b).

22 Moreover, the Labor Code's primary purpose is to "ensure employees are not required or
23 permitted to work under substandard unlawful conditions ... and to protect employers who comply
24 with the law from those who attempt to gain a competitive advantage at the expense of their workers
25 by failing to comply with minimum labor standards." Labor Code § 90.5(a). Therefore, the
26 Legislature determined that "adequate financing of labor law enforcement was necessary to achieve
27 maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies
28 had declined and were unlikely to keep pace with the future growth of the labor market, and that it

1 was therefore in the public interest to allow aggrieved employees, acting as private attorneys general,
2 to recover civil penalties for Labor Code violations, with the understanding that labor law
3 enforcement agencies were to retain primacy over private enforcement efforts.” Thus, Plaintiff,
4 acting as a private attorney general and proxy for the State of California, filed this action seeking
5 civil penalties for Defendant’s alleged violations of the Labor Code.

6 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor
7 and Workforce Development Agency for enforcement of labor laws and education of employers and
8 employees about their rights and responsibilities under this code ...; and 25 percent to the aggrieved
9 employees.” Lab. Code § 2699(i).

10 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
11 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges
12 the employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the
13 opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf
14 if the LWDA fails to respond to the notice within 65 days, responds that it does not intend to
15 investigate, or investigates and does not issue a citation within 185 days. Labor Code §§
16 2699.3(a)(2), 2699(h).

17 In this case, Plaintiff provided the LWDA with the PAGA Notice advising it of the alleged
18 Labor Code violations, but the LWDA deferred the prosecution of these violations to Plaintiff and
19 her attorneys. Accordingly, the Settlement and the \$650,000 common fund created by it for the
20 benefit of the State and Covered Employees, is solely the result of the work performed by Plaintiff
21 and her attorneys on this case – all while the Covered Employees will preserve their own separate
22 individual claims should they wish to pursue them.

23 Any settlement of a PAGA action brought by an aggrieved employee must be approved by
24 the court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA
25 approval process and, more specifically, whether an aggrieved employee needs to meet class
26 certification requirements. *Arias, supra*, 46 Cal.4th at 976. After a substantial review of the
27 legislative history of PAGA, the Court held that an aggrieved employee's representative action
28 brought on behalf of the state and other aggrieved employees against an employer for PAGA

1 violations *does not* need to meet the requirements for class certification nor does there need to be
2 notice to the other employees. *Id.* at 975, 980-88. As the Court held, a plaintiff bringing suit under
3 PAGA does so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986.
4 Thus, the Court reviews any proposed settlement and approves it if it is deemed to be fair and
5 reasonable.

6 Accordingly, the Parties to this current PAGA action have reached such an agreement and
7 now seek this Court's approval of the Settlement.

8 **IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

9 The following is a summary of the principal terms of the Settlement Agreement.

10 **A. Covered Employees and Terms of the Settlement**

11 Covered Employees are defined as, all hourly employees of Defendant in California at any
12 time from March 31, 2019, through April 7, 2021 or the date that the Court approves this Settlement,
13 whichever occurs earlier. (*See* Settlement Agreement §1.01(c).) The number of Covered Employees
14 Members, including Plaintiff, is estimated to be 1,490 individuals who worked approximately
15 23,930 pay periods during the Release Period. (Falakassa Decl. ¶ 18.)

16 The Settlement provides that Defendant will pay a *Settlement Sum of Six Hundred and*
17 *Fifty Thousand Dollars (\$650,000.00)* (the "Settlement Sum"), inclusive of payments to the LWDA
18 and Covered Employees, payment of Plaintiff's Enhancement Award, attorneys' fees and litigation
19 costs,¹ and third-party Settlement Administration Costs.² (Settlement Agreement pg. 1) After
20 payment of attorneys' fees and litigation costs, Plaintiff's Enhancement Award, Settlement
21 Administration Costs, and any other court mandated and/or approved deductions, approximately
22 \$408,950.00 remains (the "Net Settlement Sum"). (*See* Settlement Agreement §3.04(b).)

23 **B. Settlement Allocation to the LWDA and Covered Employees**

24 Pursuant to the Settlement Agreement, the Net Settlement Sum in the amount of
25

26 ¹ Plaintiff's Counsel will seek a standard fee of one-third (\$215,650.00) of the Settlement Sum, and reimbursement of
27 actual litigation costs of \$7,100.00 (Settlement Agreement ¶ 28.)

28 ² The Parties have selected Phoenix Settlement Administrators as the Settlement Administrator, and its estimated costs
of \$7,500 will be deducted from the Settlement Sum. (Settlement Agreement ¶ 33.)

1 approximately \$408,950.00 shall be designated as PAGA penalties to be allocated between the
2 LWDA and the Covered Employees pursuant to Labor Code section 2699(i) with 75% paid to the
3 LWDA (the “LWDA Net Settlement Amount”) and 25% paid to the Covered Employees (the
4 “Employee Net Settlement Amount”) on a pro-rata basis. (See Settlement Agreement §3.04(b).)

5 The following chart reflects the estimated payments from the Settlement Agreement:

	Total Amount
Total Settlement Payment	\$650,000.00
Plaintiff’s Counsel’s fees (1/3)	\$215,650.00
Plaintiff’s Counsel’s litigation costs	\$7,100.00
Plaintiff’s Enhancement Award	\$10,000.00
Administration Costs (<i>not to exceed</i> \$7,500.00)	\$7,500.00
Net Settlement Sum (“PAGA Penalties”)	\$408,950.00
• 75% to the LWDA	\$306,712.50
• 25% to the PAGA Members	\$102,237.50

13 Based on these distributions, the LWDA Net Settlement Amount will be approximately
14 \$306,712.50 (75 percent of the PAGA Penalties) and the amount paid to Covered Employees for
15 civil penalties under PAGA is estimated to be \$102,237.50 (25 percent). (Falakassa Decl. ¶¶ 19-21.)

16
17 **C. Individual Payments, the Notice and Timing of Payments**

18 As noted, twenty-five percent (25%) of the Net Settlement Sum will be allocated to the
19 Covered Employees (“Employee Net Settlement Amount”). (See Settlement Agreement §3.04(b).)
20 Based on the numbers provided by Defendant, approximately 1,490 current and former Covered
21 Employees will share in their pro-rate portion of the Employee Net Settlement Amount. The
22 Settlement Agreement provides a very fair and equitable means of allocating this fund. The
23 Employee Net Settlement Amount shall be divided by the total pay periods worked by all Covered
24 Employees during the Release Period to yield the “Covered Employee Settlement Share Value.”
25 Each Covered Employee shall be paid their individual total pay periods worked for Defendant in
26 California during the Release Period multiplied by the Covered Employee Settlement Share Value.
27 (*Id.*) All Individual Payments made to Covered Employees will be reported on an IRS Form 1099.
28 (*Id.*)

1 The Settlement is non-reversionary and does not require Covered Employees to submit a
2 claim form to reap financial benefit from the Settlement.

3 Within forty-five (45) days after the Court issues an Order approving the Settlement or the
4 “Effective Date”, Defendant shall provide the Settlement Administrator with a list of the names,
5 addresses and number of pay periods/paychecks issued to each of the Covered Employees during
6 the Release Period. (Settlement Agreement § 3.03(a)(1).)

7 Further, within thirty (30) days after the Effective Date³, the Settlement Administrator shall
8 mail the Notice of PAGA Settlement (attached to the Settlement Agreement as Exhibit B) together
9 with a settlement payment to all Covered Employees by first-class United States mail, postage
10 prepaid, to the last known address of each recipient with directions to the Postmaster to forward the
11 Notice of PAGA Settlement and return all undeliverable Notices to the Settlement Administrator.
12 For each Notice of PAGA Settlement that is returned as undeliverable, the Settlement Administrator
13 shall promptly attempt to locate the Covered Employee by using an address refresher database.
14 (Settlement Agreement § 3.03(a)(2) and Exhibit B attached thereto.)

15 Finally, as stated in section 3.04(a) of the Settlement Agreement, within thirty (30) days of
16 notice of entry of an order by the Court approving this Settlement, Defendant will fund with the
17 Settlement Administrator an Initial Payment of \$444,725 sufficient to pay for the following:

- 18 1. Employee Net Settlement Amount (\$102,237.50)
- 19 2. (1/3) of the LWDA Net Settlement Amount (\$102,237.50)
- 20 3. Plaintiff’s attorney fees’ (\$215,650)
- 21 4. Plaintiff’s cost of suit (\$7,100)
- 22 5. Settlement Administrator’s fees and costs (\$7,500); and
- 23 6. Plaintiff’s Enhancement Award (\$10,000)

24
25 ³ “Effective Date” means the later of: (a) approval of the Settlement is granted by the Superior Court of California for
26 the County of Los Angeles, or other court assuming jurisdiction of this matter; (b) if any timely objections or intervenor
27 requests are filed and not subsequently withdrawn, the 61st day after the Court enters an Order or Judgment approving
28 of this PAGA Settlement; (c) if any timely appeals are filed, the date of the resolution (or withdrawal) of any such appeal
in a way that does not alter the material terms of the Settlement; or (d) if no timely objections or intervenor requests are
filed, or if all objections and/or interventions are withdrawn, the date upon which the Court enters an order approving
the PAGA Settlement (Settlement Agreement § 3.04(a).)

1 (collectively “Initial Payment”)

2 Such amounts shall then forthwith be distributed by the Settlement Administrator upon the Effective
3 Date.

4 As to the remaining 2/3 balance of the LWDA Net Settlement Amount (\$204,475),
5 Defendant will issue payment to the Settlement Administrator pursuant to the following payment
6 schedule: an additional one-third (1/3) or \$102,237.50 will be paid to the Settlement Administrator
7 within six months after the Initial Payment, and the final one-third (1/3) or \$102,237.50 will be paid
8 to the Settlement Administrator within one year after the Initial Payment. (Settlement Agreement
9 Section § 3.04(a).) These payments are to be distributed by the Settlement Administrator to the
10 LWDA within 15 days of the Defendant’s deposit of each installment payment. (*Id.*)

11 All payments to Named Plaintiff and Covered Employees shall be treated as penalties for
12 tax purposes and shall be accompanied by an IRS Form 1099. All Covered Employees who cash or
13 otherwise negotiate their settlement checks may receive an IRS Form 1099 for their portion of the
14 settlement, if deemed required by the Settlement Administrator (in compliance with IRS guidelines).

15 Individual Payment checks issued to Covered Employees pursuant to the Settlement
16 Agreement will expire one hundred and eighty (180) days from the date they are mailed by the
17 Settlement Administrator. Any unclaimed funds after the 180-day period shall be sent to the LWDA.
18 (Settlement Agreement § 3.04(b).)

19 **D. The Limited Release**

20 Importantly, the California Supreme Court has explained that other employees are bound by
21 a PAGA adjudication only with respect to civil penalties, just as they would be “bound by a
22 judgment in an action brought by the government.” *Arias, supra*, 46 Cal.4th at 986. In accordance
23 with this rule, the release of the Covered Employees herein is narrowly tailored to include release
24 from liability for claims seeking *civil penalties* under California Labor Code Section 2698 *et seq.*
25 predicated on the alleged California Labor Code and Wage Order No. 4-2001 violations asserted in
26 the operative Complaint. (Settlement Agreement § 5.01)

27 **E. Attorneys’ Fees and Litigation Costs**

28 Plaintiff’s Counsel request one-third of the Settlement Sum, or up to \$215,650.00, in

1 attorneys' fees, and \$7,100.00 in reimbursement of actual litigation costs. (Settlement Agreement §
2 3.01.) Further discussion and support for the requested awards is set forth in Sections VI and VII,
3 *infra*, and the accompanying Falakassa Decl. ¶¶ 46-52 filed concurrently herewith.

4 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND SHOULD BE APPROVED**

5 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
6 any civil action filed pursuant to this part.” Labor Code § 2699(l)(2). The amendment also requires
7 that the “proposed settlement shall be submitted to the agency at the same time that it is submitted
8 to the court.” As such, on the day of filing of this Motion, the Settlement is also being concurrently
9 submitted to the LWDA in accordance with this section. (Falakassa Decl. ¶ 41.)

10 **A. Standards for Approval of a PAGA Settlement**

11 The legislative history of PAGA makes little mention of the approval requirements in § 2699,
12 subdivision (l). PAGA was passed by the legislature as Senate Bill (“SB”) 796, and it was signed
13 by the Governor and filed with the Secretary of State on October 12, 2003. *See*, Legislative Digest
14 re Senate Bill No. 796. It took effect on January 1, 2004.

15 The original version of the act did not contain the court approval requirement now codified
16 in § 2699(l). That subdivision was added as part of the amendments to the Act that were introduced
17 as SB 1809 in February 2004 and signed by the Governor on August 11, 2004. *See*, Legislative
18 Digest re Senate Bill No. 1809. Those amendments took effect immediately, and the Court approval
19 requirement of § 2699(l) was one of the provisions that the legislature made retroactive to January
20 1, 2004. *Id.*

21 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments
22 (SB 1809). On July 29, 2004, during the consideration of the amendments in SB 1809, Senator Dunn
23 sent a letter addressed to the President Pro Tem of the Senate, which was published in the Senate
24 Daily Journal, “to clarify the extent of subdivision (l)” of what is now section 2699. He was sending
25 this letter “in response to an issue raised by the Judicial Council of California.” *Id.* In the letter,
26 Senator Dunn stated,

27 The purpose of court review of the penalties in subdivision (l) is to ensure that
28 settlements involving penalties arising out of Labor Code Section 2699 do not

1 undercut the dual statutory purposes of punishment or deterrence, or result in unjust,
2 arbitrary, and oppressive, or confiscatory settlements. *Id.*

3 The broad criteria appear to give the Court wide latitude in determining whether to approve
4 the penalties proposes as part of a PAGA settlement. Interestingly, the criteria focus on the effect
5 the penalties may have on the defendant-employer rather than the LWDA or the aggrieved
6 employees who will receive the penalties. *See, Iskanian, supra*, 59 Cal.4th at 313 (stating that while
7 the State clearly has an interest “in receiving the proceeds of civil penalties,” the penalties are “used
8 to deter violations.”) This is different than the analysis of a class action settlement, which typically
9 focuses on the amount received by the class and compares that to the reasonable range of potential
10 outcomes in this case. *C.f., e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.
11 Moreover, “there is not requirement that the Court certify a PAGA claim for representative
12 treatment” as in a class action. *Villalobos v. Calandri Sonrise Farms LP* (C.D. Cal. July 2015) 2015
13 WL 12732709, at *5.

14 Additionally, the Court can consider the value of any effective injunctive relief that a PAGA
15 plaintiff obtains through settlement even though Labor Code 2699(a) permits a PAGA plaintiff to
16 recover only penalties on behalf of the LWDA. The primary purpose of LWDA law enforcement
17 proceedings is to ensure compliance with the law and not to impose and collect penalties. In enacting
18 PAGA, "The Legislature declared that adequate financing of labor law enforcement was necessary
19 to achieve maximum compliance with state labor laws." (*Arias v. Superior Court* (2009) 46 Cal.4th
20 969, 980.)

21 **B. The Civil Penalties are Appropriate Under the Circumstances**

22 Here, the penalties are appropriate when considered in light of the principles discussed in
23 Senator Dunn’s letter. Plaintiff contends that a *non-reversionary* Settlement Sum of \$650,000.00
24 represents an excellent recovery that is large enough to punish or deter Defendant. The proposed
25 Settlement provides a fair and reasonable monetary recovery for the LWDA and Covered
26 Employees in the face of disputed claims. (Falakassa Decl. ¶ 33.)

27 **First**, although PAGA and its legislative history do not seem to require a comparison with
28 the “maximum value” of the claims to the actual settlement amount, the penalties are reasonable

1 when considered in this context as well. The number of Covered Employees in the Release Period
2 is nearly 1,490, but the number of PAGA-eligible pay periods is only approximately 24,000
3 (Falakassa Decl. ¶ 34.) Further, while Plaintiff believes the claims are meritorious and that she
4 would have recovered unreduced penalties, Defendant asserts numerous defenses to the claims. For
5 example, a significant factor in evaluating the value of a PAGA-only case is that all PAGA awards
6 are discretionary and subject to potentially significant reduction by the Court. Defendant maintains
7 that given its good faith conduct and minimal actual injury to the Covered Employees, this Court
8 would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant
9 liable. (Falakassa Decl. ¶ 35.) *See also*, Labor Code §§ 203, 2699(e)(2); *Thurman v. Bayshore*
10 *Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties);
11 *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at *4 (reducing
12 PAGA penalties from \$2.8 million to \$500,000). Additionally, Defendant could argue that Plaintiff
13 could only seek PAGA penalties at the \$100 “initial” violation rate, as opposed to the \$200
14 “subsequent” violation rate, since before Plaintiff initiated this action, Defendant had never been
15 put on notice by a court or the Labor Commissioner that its practices violated the Labor Code. *See*,
16 *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (finding “initial” violation rate
17 applies until employer has been notified that it is violating a Labor Code provision). Moreover,
18 Defendant was encountering financial difficulties, and could not afford to pay a seven-figure
19 settlement without undergoing severe financial difficulties and potential Chapter 11 Bankruptcy. As
20 a result, Plaintiff took these issues in consideration in calculating potential PAGA penalties.
21 (Falakassa Decl. ¶ 35.) In light of the foregoing, Plaintiff’s Counsel took into consideration, when
22 valuing the merits of the lawsuit, the chances of prevailing on the merits, the additional hurdles of
23 prevailing in light of the defenses raised, Defendant’s financial condition, the court’s discretion to
24 reduce penalties, and applied the appropriate discounts. (Falakassa Decl. ¶¶ 36-39.)

25 Based on the data provided by Defendant, the proposed maximum exposure for the PAGA
26 claims for Covered Employees is approximately \$4,200,000. The proposed Settlement Sum of
27 \$650,000 represents **15% of the potential maximum exposure**. (*Id.*) However, courts can exercise
28 their discretion to reduce the amount of PAGA penalties. *See, e.g., Fleming v. Covidien Inc.*, 2011

1 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties to \$500 per employee
2 prior to the 75-25 split). (*Id.*) The Settlement Sum here is already analogous to that awarded by the
3 Court in *Covidien*. Accordingly, the proposed Settlement approximates or provides the same or an
4 even better result than some actual PAGA trials that were litigated to completion, though other cases
5 also provided for a greater award than *Covidien*. (*Id.*) Thus, the Settlement Sum amount is
6 reasonable in light of significant risks and uncertainties associated with the PAGA claims in this
7 case.

8 Defendant disputed the merits of Plaintiff's claims. Specifically, Defendant argued that
9 Covered Employees did not suffer any actual injury as a result of the late payment of wages and
10 they had in the past agreed to the wage payment schedule. (Falakassa Decl. ¶ 37.) Defendant also
11 argued that any PAGA penalties would be severely reduced by the court in its sound discretion.
12 (Falakassa Decl. ¶ 38.) Finally, Defendant additionally contended that it in its current financial
13 condition it could not afford to be in business if it had to pay a seven-figure settlement. In support
14 of this contention, Defendant's bankruptcy counsel also attended mediation and provided a
15 liquidation analysis to Plaintiff's counsel and the mediator. (*Id.*)

16 **Second**, the scope of the release of the PAGA Settlement is necessarily strictly confined to
17 those PAGA civil penalties that were or could have been alleged in the operative Complaint. The
18 PAGA Released Claims do not release any Covered Employees' non-PAGA claims for alleged
19 violations of the Labor Code. Covered Employees who believe they have been denied, for example,
20 Labor Code Section 204 or other Labor Code claims, can maintain those rights to pursue those
21 claims in another proceeding. In that respect, the Settlement also requires that each Covered
22 Employee receive a notice, *i.e.*, the PAGA Notice, which describes this litigation and the Settlement
23 Sum. Plaintiff contends that this notice will educate Covered Employees as to the requirements of
24 the Labor Code, something that is in the public interest and consistent with PAGA's purposes. *See*,
25 Labor Code § 2699(j) (stating that civil penalties recovered under PAGA shall be distributed to the
26 LWDA for [among other things] "education of employers and employees about their rights and
27 responsibilities under this code.") (Falakassa Decl. ¶ 42.)

28 **Third**, the proposed Settlement, even with deductions, provides a substantial sum of

1 \$306,712.50 to the State and \$102,237.50 to Covered Employees. The Settlement secured by
2 Plaintiff here is equal to or greater than other PAGA penalty awards approved by California state
3 courts resulting in much lower PAGA penalty payments on a per capita basis. *See, e.g., Penaloza v.*
4 *PPG Industries Inc.*, Case No. BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May
5 20, 2013) (approving PAGA penalties of \$5,000.00 to class of 667 members); *Cabrera v. Advantage*
6 *Sale & Marketing, LLC*, Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March
7 12, 2013) (approving PAGA penalties of \$10,000.00 for class of approximately 3,000 members).
8 (Falakassa Decl. ¶ 43.)

9 **Fourth**, public policy strongly favors the settlement of litigation. *Consumer Advocacy*
10 *Group v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 63. Because the proposed
11 Settlement is neither unjust nor ignores the public interest, it should be approved. (Falakassa Decl.
12 ¶ 44.)

13 **Fifth**, as a result of this case, Defendant has been required to change its payment schedule
14 so that employees are paid in a timely manner in compliance with Labor Code Section 204. Since
15 the primary purpose of LWDA law enforcement proceedings is to ensure compliance with the law
16 and not to impose and collect penalties, and Settlement serves this function, it should be approved.
17 (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980. [“The Legislature declared that adequate
18 financing of labor law enforcement was necessary to achieve maximum compliance with state labor
19 laws”].) (Falakassa Decl. ¶ 45.)

20 **VI. THE ATTORNEYS’ FEES REQUEST IS FAIR AND REASONABLE**

21 For their efforts and the risk that they undertook in obtaining a common fund settlement that
22 benefits the LWDA and Covered Employees, the Parties allocated one-third of the Settlement Sum
23 up to \$215,650, to Plaintiff’s Counsel for reasonable attorneys’ fees. (Settlement Agreement §
24 3.01(a).) These fees are warranted under the law and within the range of fees commonly awarded in
25 similar cases.

26 **A. Attorneys’ Fees Are Recoverable under the Common Fund Doctrine**

27 PAGA provides that a Plaintiff is entitled to recover reasonable attorneys’ fees, expenses,
28 and costs under section 2699(g)(1) of the California Labor Code, which states that, “Any employee

1 who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs,
2 including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or
3 subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. As discussed below, in a
4 qui tam action, reasonable attorneys’ fees and costs are typically awarded under the common fund
5 doctrine where, as here, the litigation creates a common fund of money in a specific amount for the
6 benefit of others.

7 “A qui tam action is one brought under a statute that allows a private person to sue as a
8 private attorney general to recover damages or penalties, all or part of which will be paid to the
9 government.” *People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-
10 492. “A qui tam action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the qui
11 tam plaintiff stands in the shoes of the state or political subdivision [citation].’” *Id.* at p. 501. As the
12 name of the PAGA statute makes clear (e.g., “Labor Code Private Attorney General Act”), a PAGA
13 action is a qui tam action because the statute allows the employee plaintiff, acting as the proxy of
14 the state’s labor law enforcement agency, to sue his or her employer for Labor Code violations and
15 recover civil penalties that otherwise would have been assessed and collected by the Labor and
16 Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59
17 Cal.4th 348, 380. “A PAGA representative action is therefore a type of *qui tam* action.” *Id.* at p. 382.
18 Here, where a common fund is created in a qui tam action by the successful litigation of a plaintiff
19 and her attorney, the plaintiff’s attorney is entitled to recover their fees from the common fund. *Bank*
20 *of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. (Falakassa Decl. ¶ 47.)

21 Moreover, a more generic application of the common fund doctrine is found “consistently
22 in California when an action brought by one party creates a fund in which other persons are entitled
23 to share.” *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110. An award of fees
24 from the gross settlement amount under the common fund doctrine prevents unjust enrichment of
25 those who benefit from the common fund through the successful efforts of plaintiff’s counsel and
26 furthers the important goal of attracting competent counsel to handle representative actions
27 enforcing minimum labor standards. *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503.
28 (Falakassa Decl. ¶ 56.) In affirming the use of the common fund doctrine in California, the California

1 Supreme Court summarized the benefits of the percentage method of recovery stating:

2 The recognized advantages of the percentage method – including relative ease of
3 calculation, alignment of incentives between counsel and the class, a better
4 approximation of market conditions in a contingency case, and the encouragement it
5 provides counsel to see an early settlement and avoid unnecessarily prolonging the
6 litigation [citations] – convince us the percentage method is a valuable tool that should
7 not be denied our trial courts. *Id.*

8 *See also, Lealao v. Beneficial Cal. Ins.* (2000) 82 Cal.App.4th 19, 48 (observing that the key
9 advantage of the common-fund method is that it focuses on the total benefit conferred on the
10 beneficiaries resulting from the efforts of counsel). Thus, the common fund approach is the most
11 reasonable one here given the nature of the case and of the Parties' Settlement.

12 **B. A Fee of One-Third the Total Settlement Payment is Fair and Reasonable**

13 Among the factors considered in determining whether the requested fee percentage is
14 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
15 plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature
16 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.
17 *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50. All these factors support an
18 award here of one-third of the common fund.

19 First, the efforts of Plaintiff's Counsel resulted in a common fund Settlement amount of
20 \$650,000.00. This is a good PAGA settlement considering the risks at stake.

21 Second, Plaintiff faced significant risks going forward with the litigation. As discussed, in
22 addition to Defendant's financial distress including potential Chapter 11 Bankruptcy, Defendant
23 raised *de-minimus* defenses, and argued the PAGA penalties are routinely severely reduced, such
24 that Plaintiff faced risky issues going forward with this litigation, as well as the fact that it would
25 have taken significant time to realize any recovery in this action along with the possibility of post-
26 trial appeals. (Falakassa Decl. ¶ 50.)

27 Third, Plaintiff's Counsel is experienced representative and class action litigation, and have
28 previously achieved significant PAGA and class action awards. This experience and expertise,
29 combined with the high quality of work performed in this case by Plaintiff's Counsel, resulted in the
30 Settlement achieved. *See*, (Falakassa Decl. ¶¶ 5-10)

1 Fourth, Plaintiff's Counsel represented Plaintiff (and the State of California) in this matter
2 on a strictly contingency basis and, as such, had to forego other financial opportunities to litigate
3 other cases (contingency and hourly), incurred the risk of non-recovery after investment of time,
4 money, and resources, and have done so since the inception of this case without payment or
5 compensation. This is not an easy burden for Plaintiff's Counsel and, if the best that could be hoped
6 for is merely to be paid the customary hourly rate, such would not be sufficiently incentivize future
7 similar private attorney general/qui tam cases with contingency risks. (Falakassa Decl. ¶ 51)

8 Fifth, the request for attorney's fees in the amount of one-third of the common fund falls well
9 within the norms accepted by state and federal courts in California in comparable representative
10 actions. The following list shows PAGA actions and mixes PAGA/class action cases where
11 attorney's fees were awarded on a common fund basis in a range between 33.33% and 40%:

12 *Banda v. Verizon California, Inc.*, Los Angeles Superior Court Case No. BC434587 (**35%**
13 **fee awarded** on \$15,000,000 settlement of mixed PAGA/class claims);

14 *Robles v. DCH*, Los Angeles County Superior Court Coordination Proceeding Case No.
15 4833 (**33.33% fee awarded** on \$4,035,600 settlement of mixed PAGA/class claims);

16 *Padilla v. Staffmark Investment, Inc.*, San Bernardino County Superior Court Case No.
17 CIVDS1408641 (**33.33% fee awarded** on \$2,000,000 settlement of a **PAGA only case**);

18 *Bengel v. Career Strategies Temporary, Inc.*, Los Angeles County Superior Court Case No.
19 BC 565227 (**33.33% fee awarded** on \$750,000 settlement of PAGA/class claims);

20 *Birch v. Office Depot*, United States District Court for the Southern District of California,
21 Case No. 06cv1690 DMS (**40% fee awarded** on \$16,000,000 settlement of mixed
22 PAGA/class claims);

23 *Brewer v. Connell Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123-
24 CU-OC-CXC (**33.33% fee awarded** on a **PAGA only case**);

25 *Garcia v. The Pep Boys*, Orange County Superior Court Case No. 30-20014-007205740-
26 CU-OE-CJC (**33.33% fee awarded** on \$1,030,000 settlement of a **PAGA only case**);

27 *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court Case No.
28 MCC1401137 (**33.33% fee awarded** on a \$650,000 settlement of a **PAGA only case**).

Moreover, the award of a one-third fee recovery under the common fund doctrine was recently approved by the California Supreme Court in *Laffitte, supra*, 1 Cal.5th 480, 503. For all of the above reasons, a common fund fee award here in the amount of one-third of the \$650,000.00 common fund created by Plaintiff and her attorney is fair and reasonable.

Therefore, Plaintiff seeks a negative multiplier in requesting one third of the common fund created of \$215,650.00.

VII. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE

Plaintiff's Counsel requests reimbursement of actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. *See, Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19. Plaintiff's Counsel is permitted to recover their litigation costs and expenses under the common fund doctrine. *See, Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees by...[Plaintiffs'] attorneys"). Furthermore, Plaintiff's Counsel is entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." *Harris, supra*, 24 F.3d at 19.

The Settlement Agreement authorized Plaintiff's Counsel to seek recovery of litigation costs of \$7,100. As set forth in the Falakassa Decl. is an exact breakdown of the litigation costs in this matter. (Falakassa Decl. ¶ 52.)

VIII. SUBMISSION TO THE LWDA

As set forth in the Falakassa Decl. at ¶ 32, the Settlement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic submission is attached as **Exhibit B** to the Falakassa Decl.

IX. THE SETTLEMENT ADMINISTRATOR

The Parties have agreed to use Phoenix Settlement Administrators as the Settlement Administrator. The Settlement Administrator will be responsible for processing the Individual Payments and providing notice to the Covered Employees. A true and correct copy of the Phoenix

1 Settlement Administrators cost estimate bid for settlement administration is attached at **Exhibit C**
2 to the Falakassa Decl.

3 **X. CONCLUSION**

4 For the foregoing reasons, Plaintiff requests the court approve the Settlement Agreement.

5
6 Dated: March 17, 2021

FALAKASSA LAW, P.C.

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BY: _____
JOSHUA FALAKASSA
*Attorneys for Plaintiff and the Aggrieved
Employees*

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