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on behalf of herself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

CYNTHIA VIZCARRA-MCNAMEE,
individually and on behalf of herself and all
others similarly situated,

Plaintiff,

vs.

NORDSTROM, INC., a Washington
Corporation, and DOES 1-50, inclusive,

Defendants.

Case No. 30-2020-01141916-CU-OE-CXC

Reservation #: 73726023

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

Date: June 10, 2022
Time: 9:30 a.m.
Dept. C-16

Judge: Hon. James Di Cesare

Trial Date: None Set
Complaint Filed: June 4, 2020

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1 **I. INTRODUCTION**

2 Plaintiff Cynthia Vizcarra-McNamee (“Plaintiff”) and Defendant Nordstrom, Inc. (“Defendant”)
3 reached a settlement of the claims asserted under the California Private Attorneys General Act, Cal. Labor
4 Code § 2698, *et seq.* (“PAGA”) in the above-entitled action. The only claim in this action is the
5 representative PAGA claim. In accordance with California Labor Code §2699(l), Plaintiff now asks this
6 Court to review and approve the settlement of Plaintiff’s PAGA claims.¹ This is only a settlement of the
7 PAGA claims for civil penalties, and is not a class settlement and does not release the individual claims,
8 if any, of the Affected Employees. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation* (2014)
9 59 Cal. 4th 348, 381. Recently, the Court of Appeal in *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56
10 (2021) explained that, similar to class action settlements, the trial court should satisfy itself that the
11 settlement is “fair, adequate, and reasonable” in view of PAGA’s “purposes and policies.” The statute
12 does not, however, require the two-step process utilized in class actions. *See Salazar v. Sysco Central*
13 *Cal.*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (rejecting the application of
14 class action settlement rules and procedures for PAGA settlement approval). Nothing in the PAGA
15 changes the strong judicial preference in support of approving settlements.

16 The PAGA settlement is set forth in the accompanying Stipulation of Private Attorneys General
17 Act Settlement and Release (“Settlement,” “Agreement,” or “Settlement Agreement”). A true and correct
18 copy of the Settlement Agreement which sets forth the terms for the settlement of the PAGA claims is
19 attached as **Exhibit 1** to the Declaration of James R. Hawkins, filed herewith. Capitalized terms shall
20 have the same meaning as defined in the Settlement Agreement. All parties agree that the terms of the
21 Settlement are fair and reasonable. The California Labor Workforce Development Agency (“LWDA”)
22 received notice of this Settlement and this motion as set forth in the accompanying proof of service.

23 The civil penalties secured by the settlement represent a fair compromise of Plaintiff’s PAGA
24 claims in view of the risks of continued litigation and the hotly-contested issues of law and fact relating
25 to the PAGA claims. The Settlement accomplishes PAGA’s objectives by imposing sufficient civil
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27 ¹ Section 2699(l)(2) provides as follows: “The superior court shall review and approve any
28 settlement of any civil action filed pursuant to this part.”

penalties “to punish and deter” Defendant from committing any of the Labor Code violations alleged, while also ensuring that the penalties are not “unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014). For these reasons, Plaintiff respectfully requests that the Court approve the Settlement and enter the proposed Order Granting Approval of PAGA Settlement and Judgment.

II. SUMMARY OF FACTS

A. Brief Overview of Litigation

Nordstrom, Inc. is an American luxury department store chain with numerous locations in the state of California. (Complaint, on file herein, ¶ 6-7.) Nordstrom employed Plaintiff as a non-exempt store administrator in Newport Beach, California from approximately August 18, 2008 through April 30, 2019. (Complaint, ¶ 8, 18.) On March 30, 2020, Plaintiff mailed Defendant and the Labor and Workforce Development Agency notice of the alleged Labor Code and IWC Wage Order(s) violations that allegedly subjected Defendant to penalties under PAGA. (Hawkins Decl. ¶ 4.) Plaintiff initially sought to obtain penalties on behalf of the state for violations committed as to non-exempt employees in administrative support, store management, and operations, and other similar support positions, however titled, during the liability period. (Complaint, ¶ 10, 20.) Through the discovery and investigation process, Plaintiff limited the group of employees that she sought to represent. (Id. ¶ 5.) More specifically, Plaintiff limited the definition of “Affected Employees” covered by the Settlement to “Plaintiff and the 43 other individuals employed by Nordstrom as hourly, non-exempt store administrators, executive assistants, administrative assistants, and store clericals employed in Nordstrom’s California full-line stores between March 30, 2019 and April 30, 2021.” (Id.; Settlement, ¶ 2.).

Having received no response from the LWDA after 65 days, Plaintiff filed an action in Superior Court of California, County of Orange, styled *Cynthia Vizcarra-McNamee, on behalf of herself and all others similarly situated v. Nordstrom, Inc., a Washington Corporation, and Does 1 through 50 Inclusive*, Case No. 30-2020-01141916-CU-OE-CXC on June 4, 2020 (the “Action”). (Hawkins Decl. ¶ 6.) Plaintiff alleged a single cause of action for civil penalties under PAGA for Defendant’s alleged: (1) failure

1 to pay all wages owed for all hours worked, including minimum wages, under Labor Code sections
2 1182.12, 1194, 1197, 1198, and Wage Order 7-2001; (2) failure to pay all wages owed for all hours
3 worked, including overtime wages, under Labor Code sections 510, 1194, 1197, 1198, and Wage Order
4 7-2001; (3) failure to comply with the requirement of Labor Code section 216 to pay wages after demand
5 was made by Plaintiff; (4) failure to comply with the requirements of Labor Code sections 204 and 210 to
6 timely pay all wages earned; (5) failure to comply with the requirement of Labor Code section 225.5 to
7 pay wages due; (6) failure to comply with the requirements of Labor Code sections 201 and 202 to pay
8 wages due to former employees or pay waiting time penalties to former employees for violating Labor
9 Code sections 201-203; (7) failure to comply with the requirements of Labor Code sections 226.7, 1198,
10 and IWC Wage Order 7-2001 to authorize and permit ten-minute rest breaks and to pay one hour of
11 premium pay for each statutorily required rest break that was not authorized and permitted; (8) failure to
12 comply with the requirements of Labor Code sections 226.7, 512, 1198, and IWC Wage Order 7-2001 to
13 provide uninterrupted 30 minute off-duty meal periods and to pay one hour of premium pay for each
14 statutorily required meal break that was not provided; (9) failure to maintain required records in violation
15 of Labor Code sections 226, 1174, and Wage Order 7-2001; (10) failure to provide accurate compliant
16 wage statements under Labor Code section 226; and (11) failure to reimburse necessary expenses in
17 violation of Labor Code section 2802. (See, Complaint generally; Hawkins Decl. ¶7.)

18 Defendant timely filed an answer including a general denial and affirmative defenses. (Hawkins
19 Decl. ¶ 8.)

20 **B. Plaintiff's Counsel Conducted a Thorough Investigation of the Factual and Legal Issues**
21 **Allowing Them To Objectively Assess the Settlement's Reasonableness.**

22 Since the filing of the Action and through execution of the Settlement, Plaintiff's Counsel
23 conducted a thorough investigation into the factual and legal issues implicated by Plaintiff's claims, and
24 were able to objectively assess the settlement's reasonableness. (Hawkins Decl. ¶ 9.) Indeed, prior to
25 filing the Action, Plaintiff provided to Plaintiff's Counsel the factual bases for pursuing her claims against
26 Defendant for Labor Code violations. Plaintiff was intimately familiar with Defendant's labor policies
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1 and practices, and over the course of multiple interviews, knowledgeably summarized those policies and
2 practices. (Id. at ¶ 9.) Plaintiff explained how the policies and practices were instituted and provided
3 valuable insight into how they gave rise to the alleged Labor Code violations. (Id. at ¶ 9.) Based on
4 these interviews, Plaintiff's Counsel determined that there were legally sufficient grounds for pursuing
5 this Action against Defendant. Additionally, in preparation for drafting the LWDA notice and the civil
6 complaint for the Action, Plaintiff's Counsel conducted their own independent preliminary investigations
7 into the factual bases for Plaintiff's claims, which entailed, inter alia, a careful examination of Plaintiff's
8 personnel files and associated records. (Id.)

9 During litigation, Plaintiff propounded general and employment form interrogatories, requests for
10 admissions, requests for production, and special interrogatories. (Hawkins Decl. ¶ 10.) Defendant also
11 propounded general interrogatories, requests for admission, and requests for production. (Id.). Both
12 Parties responded to the written discovery, and then engaged in an extensive meet and confer process
13 regarding supplemental responses. In addition, the Parties entered into a stipulation for disclosure of the
14 Affected Employees' personal information pursuant to *Belaire-West* notice process. (Id.) Defendant also
15 took Plaintiff's deposition over the course of a day. (Hawkins Decl. ¶ 10.) Plaintiff's counsel received
16 a considerable amount of documents and data which allowed Plaintiff's counsel to assess the claims.
17 Regarding Plaintiff, Defendant produced hundreds of pages of documents including her pay statements,
18 waiver forms, time edits, expense reimbursement pay stubs, personnel file documents and relevant
19 communications, timecard reports, job descriptions, position expectations, signed acknowledgement
20 pages, SAT reports, time certifications, performance reviews, and separation documents. Regarding all
21 Affected Employees, Defendant produced hundreds of pages of documents including: corporate policies;
22 expense-reimbursement related policies and documents; timekeeping, meal period, rest period, mobile
23 phone, and communications policies and documents; training documents for store administrators; manager
24 guidelines; code of conduct documents; job descriptions; position expectations; expense reimbursement
25 receipts; and scheduling policies and documents. (Hawkins Decl. ¶11.). The Parties also engaged in the
26 exchange of detailed data regarding pay periods worked, positions held, and dates of employment for the
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1 Affected Employees. (Id.). Plaintiff also produced voluminous text messages stored on her cellphones.
2 (Id.) The document and data exchanges allowed Plaintiff's Counsel to fully assess the nature and
3 magnitude of the claims being settled, as well as the impediments to recovery, and ultimately enabled
4 Plaintiff's Counsel to make an independent assessment of the reasonableness of the settlement's terms.
5 (Id. at 12.)

6 After a month of extensive, adversarial arms-length negotiations between the Parties, the Parties
7 reached a settlement of the Action in accordance with the terms set forth in the Settlement Agreement that
8 is now presented to this Court at Exhibit 1 to the Declaration of James R. Hawkins. (Hawkins Decl. ¶
9 16.) At all times, the Parties' negotiations were adversarial and non-collusive. (Id.) The Settlement
10 therefore constitutes a fair, adequate, and reasonable compromise of the claims at issue. (Id.)

11 In summary, Plaintiff's Counsel performed a thorough investigation into the claims at issue, which
12 included: (1) determining Plaintiff's suitability as a private attorney general through interviews,
13 investigations, and analyses of her employment files and related records; (2) evaluating all of Plaintiff's
14 potential representative claims; (3) researching similar PAGA actions as to the claims brought, the nature
15 of the positions, and the type of employer; (4) analyzing time and wage records; (5) reviewing Defendant's
16 employment policies and practices; (6) reviewing all written discovery responses; (7) researching
17 settlements in similar cases; (8) evaluating Plaintiff's claims and estimating Defendant's liability for
18 purposes of settlement; (9) reviewing and refining the scope of the claims; and (10) participating in
19 extensive arm's length negotiations with defense counsel (Id. at ¶ 17.)

20 By engaging in such a thorough investigation and evaluation of Plaintiff's claims, Plaintiff's
21 Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement
22 Agreement, is fair, reasonable, and adequate, and is in the best interests of the LWDA in light of all known
23 facts and circumstances, including the risk of significant delay and uncertainty associated with litigation,
24 and various defenses asserted by Defendant. (Id. at ¶ 18.)

25 **C. The Parties Negotiated A Fair And Reasonable Settlement Of Plaintiff's Claims.**

26 The Settlement Agreement negotiated by the parties provides for Defendant to pay \$115,000 as
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1 the “Total Settlement Amount.” (Settlement, ¶ 23.) From the Total Settlement Amount, Plaintiff will
2 apply for the following allocations: (1) up to \$38,334.00 shall be paid to Plaintiff’s Counsel for payment
3 of attorneys’ fees (Id., ¶ 23(a)); (2) up to \$6,000 shall be paid to Plaintiff’s Counsel for litigation expenses
4 incurred in prosecuting the PAGA claims (Id., ¶ 23(a)); (3) up to \$2,000 shall be paid to Plaintiff as a
5 service award for her work in prosecuting the action and securing the Settlement and general release; (4)
6 up to the amount of \$2,500.00 shall be paid for Settlement Administration Costs to the Settlement
7 Administrator (Id., ¶ 23(c)); and (5) the PAGA Settlement Amount of \$66,166 (of which 75%, or
8 \$49,624.50, will be paid to the LWDA, and 25%, or \$16,541.50, will be paid to the Affected Employees).
9 (Id., ¶ 23(d)). Any difference from these maximum amounts will be added to the PAGA Settlement
10 Amount. (Id. ¶ 23.)

11 The Settlement is subject to Court approval consistent with Labor Code § 2699. Upon approval,
12 the PAGA Settlement Amount shall be allocated 75% to the LWDA and 25% among Affected Employees.
13 The 75/25 allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.
14 5th 175 (2019).

15 The 25% payable to the Affected Employees will be paid as “Individual Settlement Payments”.
16 (Settlement, ¶ 37.) The amount of each Affected Employee’s Individual Settlement Payment will be
17 calculated based on the following formula: Individual Settlement Payment = (Individual Pay Periods ÷
18 Total Pay Periods) x (25% of the PAGA Settlement Amount) (Settlement, ¶ 38.) All payments made to
19 the Affected Employees will be allocated 100% as non-wages and interest. (Id., ¶ 39.)

20 On or before the Effective Date, Nordstrom will provide the Settlement Administrator with the
21 Affected Employee List. (Settlement, ¶ 31.) Within ten (10) calendar days after the Effective Date,
22 Defendant shall transmit the Total Settlement Amount due under this Settlement Agreement to the
23 Settlement Administrator for deposit into the Settlement Fund Account. (Id., ¶ 32.) Within fifteen (15)
24 calendar days after receipt of the Affected Employees List and Deposit of the Total Settlement Amount,
25 the Settlement Administrator shall mail each Affected Employee a Notice of PAGA Settlement and
26 individual settlement check at the last known address of the Affected Employee via U.S. First Class Mail.
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(Settlement, ¶ 9, 30, 37; Exhibit A to Hawkins Decl.) Settlement checks shall remain valid and negotiable for ninety (90) calendar days from the date of their issuance “Void Date”. (Settlement, ¶ 37.) The Parties agree that within ten (10) calendar days after the Void Date, the Settlement Administrator shall issue a payment to United Way for the amount of any uncashed checks and any residual. (*Id.*)

D. The Settled Claims.

Upon approval by the Court, Plaintiff and each Affected Employee will release Defendant and each Released Party of the Released Claims set forth in the PAGA Release. (Settlement, ¶ 25.) The “Settlement Period,” including the period of the release, is the time period from March 30, 2019 to December 31, 2021 (Settlement, ¶ 18, 25.) Per the PAGA Release:

In consideration of Nordstrom’s promises and agreements as set forth herein, Plaintiff, on behalf of herself, the State of California, and all Affected Employees, hereby releases the Released Parties from any and all claims, rights, demands, liabilities, and causes of action under PAGA arising from the same set of operative facts alleged in Plaintiff’s March 30, 2020 notice letter to the LWDA, and the Action, for (1) failure to pay all wages owed for all hours worked, including minimum wages, under Labor Code sections 1182.12, 1194, 1197, 1198, and Wage Order 7-2001; (2) failure to pay all wages owed for all hours worked, including overtime wages, under Labor Code sections 510, 1194, 1197, 1198, and Wage Order 7-2001; (3) failure to comply with the requirement of Labor Code section 216 to pay wages after demand was made by Plaintiff; (4) failure to comply with the requirements of Labor Code sections 204 and 210 to timely pay all wages earned; (5) failure to comply with the requirement of Labor Code section 225.5 to pay wages due; (6) failure to comply with the requirements of Labor Code sections 201 and 202 to pay wages due to former employees or pay waiting time penalties to former employees for violating Labor Code sections 201-203; (7) failure to comply with the requirements of Labor Code sections 226.7, 1198, and IWC Wage Order 7-2001 to authorize and permit ten-minute rest breaks and to pay one hour of premium pay for each statutorily required rest break that was not authorized and permitted; (8) failure to comply with the requirements of Labor Code sections 226.7, 512, 1198, and IWC Wage Order 7-2001 to provide uninterrupted 30 minute off-duty meal periods and to pay one hour of premium pay for each statutorily required meal break that was not provided; (9) failure to maintain required records in violation of Labor Code sections 226, 1174, and Wage Order 7-2001; (10) failure to provide accurate compliant wage statements under Labor Code section 226; and (11) failure to reimburse necessary expenses in violation of Labor Code section 2802. This PAGA Release also include all claims that Plaintiff and/or the Affected Employee may have against Nordstrom or the Released Parties relating to: (12) the payment, taxation, and allocation of Attorneys’ Fees and Costs pursuant to this Settlement Agreement; and (13) the payment, taxation, and allocation of Plaintiff’s Service Award pursuant to this Settlement Agreement (“**PAGA Release**”). This PAGA Release applies to all claims arising during the Settlement Period.

(Settlement, ¶ 25.) The Released Claims are limited to claims for civil penalties under the PAGA and related attorneys’ fees and costs (*Id.*). In addition, Plaintiff shall grant Defendant and each Released Party

1 a general release. (*Id.* at ¶ 24.)²

2 The LWDA is being served with a copy of this motion with the Settlement Agreement through the
3 online process as required by Labor Code § 2699(l), and therefore the LWDA has been provided notice
4 of this PAGA settlement and this motion. This service on the LWDA is verified in the accompanying
5 proof of service. (Hawkins Decl. ¶27)

6 **III. ARGUMENT**

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

8 The settlement of a PAGA claim requires court approval. *See* Labor Code §2699(l) (stating, the
9 “court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant
10 to this part”). The Court must be mindful that “[s]ettlement is a compromise, which balances the possible
11 recovery against the risks inherent in litigating further.” *In re TD Ameritrade Account Holding Litig.*, Case
12 No. C 07-2852 SBA, C 07-4903 SBA, 2011 WL 4079226, *9 (N.D. Cal. Sept. 13, 2011). Indeed, “the
13 very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes,’”
14 as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation
15 that induce consensual settlements.” *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624-25 (9th
16 Cir. 1982). As such, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial
17 on the merits,” or “judged against a hypothetical or speculative measure of what might have been
18 achieved.” *Id.*

19 Although the operative PAGA statute does not set forth the criteria by which a PAGA settlement
20 is to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a class
21 action settlement. However, “a PAGA claim asserted on a non-class representative basis...is not
22 considered a class action but a law enforcement action, and therefore does not have to meet the
23 requirements of [a class action].” *See Casida v. Sears Holdings Corp.*, 2012 WL 253217 at *3 (E.D. Cal.
24 Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 at *4 (E.D. Cal. Jul. 1, 2010). A court’s
25 review of a PAGA settlement necessarily implicates the following unique features that render the approval

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27 ² Separate and apart from the PAGA action and Settlement, Plaintiff has also executed an Individual Settlement Agreement,
28 which includes a release of Plaintiff’s individual claims. (Hawkins Decl. ¶ 26.)

1 process distinct from approval of a class action settlement under C.C.P. § 382 and C.R.C. Rule 2.769.

2 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not concerned with
3 the amount(s) that “aggrieved employees” are to receive, but rather, must focus on the total settlement
4 amount in achieving PAGA’s objective. Indeed, “[t]he remedy sought in a PAGA suit consists of civil
5 penalties, not individual or class damages,” and while a “[PAGA] action is...designed to protect the public
6 and penalize the employer for past illegal conduct,” a reviewing Court must be mindful of the fact that
7 settlement of a PAGA claim involves a compromise. *Mendez, supra*, 2010 WL 2650571 at *4. “Unlike
8 class actions, these civil penalties are not meant to compensate unnamed employees because the action is
9 fundamentally a law enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777
10 at *4 (N.D. Cal. Apr. 2, 2010). The Court must not lose sight of the fact that “[u]nlike a class action
11 seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private
12 parties to recover civil penalties for the government that otherwise may not have been assessed and
13 collected by overburdened state enforcement agencies,” *Id.* Rather, the LWDA has advised that courts
14 should evaluate settlements of PAGA claims based on whether “the relief provided for under the PAGA
15 [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public.”
16 O’Connor, 201 F. Supp. 3d at 1133; see also, *Salazar v. Sysco Central Cal.*, No. 15-01758-DAD, 2017
17 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (quoting the above passage). As courts defer to the agency’s
18 interpretation of a statute where authority has been delegated to that agency (*see New Cingular Wireless*
19 *PCS, LLC v. Pub. Utilities Comm’n*, 246 Cal. App. 4th 784, 807 (2016)), the Court should analyze the
20 PAGA settlement by focusing on whether the amount of civil penalties obtained is “genuine and
21 meaningful” in light of PAGA’s statutory purpose. The Court’s evaluation of the settlement should
22 therefore not focus on “restitution”—the average recovery per allegedly aggrieved employee, as in a class
23 action settlement, but rather take into account PAGA’s statutory purpose in deterring Labor Code
24 violations through the imposition of civil penalties, with special attention on whether the relief is “genuine
25 and meaningful.” *Salazar*, 2017 WL 1135801 at *2.

26 Second, consistent with the fact that unnamed employees have no property interest in a PAGA
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claim,³ “[u]nnamed employees need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez*, 2010 WL 1340777 at *5. This renders the approval process of the PAGA settlement distinct from a class action settlement, as there is no need for the Court to employ the “two-step approval process” required under F.R.C.P. Rule 23 (“Rule 23”) and C.R.C. Rule 3.769 (“Rule 3.769”).⁴

Finally, unlike class action settlements under Rule 23(e) and Rule 3.769, the scope of release permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding...the non-party employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.” *See Arias v. Sup. Ct.* (2009) 46 Cal. 4th 969, 986-87. Thus, the scope of a release in a PAGA settlement is confined to the PAGA penalties alleged in the complaint and to the claims that were, or could have been, alleged pursuant to PAGA based on the factual allegations in the Complaint.⁵ In the case at hand, as the only claims at issue are PAGA claims, only those claims will be extinguished because of this Settlement.

B. This Court Should Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of Disputed Claims

In assessing whether the amount of civil penalties is genuine and meaningful, the Court may balance the amount in penalties against the risks of further litigation. Here, Plaintiff obtained a meaningful amount of civil penalties in view of the risks of continued litigation. Based on information and evidence

³ As held by the California Supreme Court, “[PAGA] does not create property rights or any other substantive rights” as [it] is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.” *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.* (2009) 46 Cal. 4th 993, 1003.

⁴ The “two-step approval process of Rule 23(e) is required to facilitate “notice” to absent class members, as Rule 23(e) expressly requires notice and an opportunity for absent class members to exclude themselves or object. *See Fed. R. Civ. Proc. R. 23 (e)*. Rule 3.769 contains similar rules for State court class actions.

⁵ This is contrasted with the much broader release permitted in a class action context, which may release all underlying Labor Code violations based on “any matter or fact” alleged in the complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) (“The weight of authority establishes that ... a court may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.”); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“we have held that federal district courts properly released claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement.”).

1 produced by Defendant during discovery, Plaintiff's Counsel determined that Affected Employees
2 (members of the PAGA group) worked during a total of approximately 1811 pay periods during the
3 Settlement Period. (Hawkins Decl. ¶ 13.). Statutory penalties would be calculated according to Labor
4 Code 2699(f)(2): If, at the time of the alleged violation, the person employs one or more employees, the
5 civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial
6 violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent
7 violation.

8 However, a number of courts have found that the "subsequent" penalty under PAGA applies only
9 after a court or the Labor Commissioner determines that the employer has violated the Labor Code. *See*
10 *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing judgment as to "heightened
11 civil penalties" because the defendant was not given notice by the Labor Commissioner when the
12 "subsequent" violations occurred); *Vieyara-Flores v. Sika Corp.*, No. EDCV19606JVSKKX, 2019 WL
13 2436998, at *5 (C.D. Cal. June 10, 2019) ("employers are not subject to heightened penalties . . . until a
14 court or commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not
15 offered evidence that the Labor Commission or a court has notified them of PAGA violations [thus]
16 PAGA's heightened penalty of \$200 for subsequent violations will not be calculated to determine the
17 amount in controversy"); *Chen v. Morgan Stanley Smith Barney, LLC*, No. 8:14-CV-01077 ODW
18 (FFMx), 2014 WL 4961182 (C.D. Cal., October 2, 2014) ("Under the Labor Code, if an employer does
19 not have notice that they are committing a violation, they are not subject to the heightened penalties.");
20 *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12-07658 DDP (RZx), 2012 WL
21 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are not subject to heightened
22 penalties for subsequent violations unless and until a court or commissioner notifies the employer that it
23 is in violation of the Labor Code"), *citing Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008).
24 While Plaintiff alleged that Defendant was liable for over \$3 million in penalties due to multiple violations
25 of the Labor Code each pay period (and that stacking is allowed), Plaintiff's Counsel is cognizant that
26 there is at least an argument under this line of cases that Defendant's exposure would be approximately
27 \$181,100 = 1,811 violative pay periods times \$100. (Hawkins Decl. ¶14.)
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1 After calculating Defendant's maximum exposure under PAGA, Plaintiff then discounted that
2 exposure for settlement purposes to account for the risks of continued litigation, including: (i) the strength
3 of Defendant's defenses on the merits; (ii) the risk of losing at trial; (iii) the risk that the Court would
4 exercise its discretion under PAGA to significantly reduce the maximum civil penalties available by
5 statute; (iv) the chances of a favorable verdict being reversed on appeal; and (v) the difficulties attendant
6 to collecting on a judgment. (Hawkins Decl. ¶15.). Taking into account the above contingencies, Plaintiff
7 determined that a \$115,000 settlement was warranted by the circumstances of the case, and is fair and
8 reasonable. (Id.).

9 It should be noted that PAGA gives the Court wide latitude to reduce the amount of civil penalties
10 "based on the facts and circumstances of a particular case" when "to do otherwise would result in an award
11 that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code 2699(h). In reducing PAGA
12 penalties, courts have considered issues including whether the employees suffered actual injury from the
13 violations, whether the defendant was aware of the violations, and the employer's willingness to fix the
14 violation. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of
15 only 0.2% of the maximum); *see also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016);
16 *Fleming v. Covidien Inc.*, No. ED CV 10-01487 RGK (OPX), 2011 WL 7563047, at *4 (C.D. Cal. Aug.
17 12, 2011). For example, during the penalty phase of trial in *Carrington*, the plaintiff requested PAGA
18 penalties in the amount of approximately \$70 million. The trial court instead awarded only \$150,000—**or**
19 **0.21% of the maximum**—and stated that this reduction was warranted because imposing the maximum
20 penalty would be "unjust, arbitrary, and oppressive" based on Starbucks's "good faith attempts" to comply
21 with meal period obligations and because the court found the violations were minimal. *Carrington*, 30
22 Cal. App. 5th at 517. The Court of Appeal affirmed the lower court's reduced award of a \$150,000 penalty
23 under PAGA. *Id.* at 529. Likewise, in *Covidien*, the Court reduced the potential penalties by over 82%,
24 awarding \$500,000 instead of maximum penalties of \$2.8 million. *Covidien*, 2011 WL 7563047 at *4; *see*
25 *also Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming 30%
26 reduction under specified PAGA claim where the employer produced evidence that it took its obligations
27 seriously); *Elder v. Schwan Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12,

2011) (reversing trial court decision denying any civil penalties where violations had been proven, remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal. June 15, 2012) (denying PAGA penalties for violation of California Labor Code section 226 as redundant with recovery on a class basis pursuant to California Labor Code section 226, directly); *Aguirre v. Genesis Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30, 2013) (reducing penalty for past PAGA violations from \$1.8 million to \$500,000, after rejecting numerous other PAGA claims).

Given these risks and Defendant's asserted defenses, Plaintiff respectfully submits that a \$115,000 for a limited release of PAGA penalties for 44 individuals is a fair, reasonable, and just result and furthers PAGA's objectives. Thus, the Court should approve the Settlement.

C. The Requested Recovery In Litigation Expenses Is Reasonable.

Plaintiff's Counsel is entitled to reimbursement of their discretionary litigation costs. Cal. Lab. Code § 2699(g)(1). Out-of-pocket discretionary expenses are compensable if they would normally be billed to a fee-paying client. See *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991), overruled in part on other grounds in *Olson v. Automobile Club of Southern Calif.*, 42 Cal. 4th 1142 (2008). Such discretionary costs may be claimed as part of an attorneys' fees motion when seeking statutory fees under the Labor Code. See *Amaral v. Cintas Corp.* No. 2, 163 Cal. App. 4th 1157, 1218 n.27 (2008) (awarding costs that are necessarily incurred). Here, Plaintiff's Counsel advanced \$4,657.15 in out-of-pocket costs to the State for, among other things, filing and service fees, court calls, and related expenditures. (Hawkins Decl. ¶ 28.) Because these reasonable costs were necessarily incurred during the case's pendency, these costs are reasonable and should be awarded. See also Cal. Civ. Pro. Code 1033.5(c)(4) ("[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."); *Hsu v. Semiconductor Sys., Inc.*, 126 Cal. App. 4th 1330, 1341 (2005) ("[W]hile it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.").

1 **D. The Court Should Award the Requested Attorneys' Fees in the Amount of**
2 **Approximately One-Third of the Total Settlement Amount.**

3 An award of attorneys' fees in the amount of approximately one-third of the Total Settlement
4 Amount is fair and reasonable, and in line with what other California courts, both state and federal, have
5 awarded in settlements of similar litigation. The PAGA provides that a plaintiff is entitled to recover
6 reasonable attorneys' fees, expenses, and costs. Section 2699(g)(1) of the California Labor Code provides
7 that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees
8 and costs." In a qui tam action, reasonable attorneys' fees and costs are typically awarded under the
9 common fund doctrine where, as here, the litigation creates a common fund of money in a specific amount
10 for the benefit of others. PAGA "is a type of qui tam action." See *Iskanian*, 59 Cal. 4th at 382. "A qui tam
11 action 'is a type of private attorney general lawsuit' [citation], in which 'the qui tam plaintiff stands in the
12 shoes of the state or political subdivision [citation].'" *People ex rei. Stratham v. Acacia Research Corp.*,
13 210 Cal. App. 4th 487, 501 (2012). A PAGA action is a qui tam action because the statute allows the
14 employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to sue his or her
15 employer for Labor Code violations and recover civil penalties that otherwise would have been assessed
16 and collected by the LWDA. See *Iskanian*, 59 Cal. 4th at 382. Indeed, majority of the civil penalties
17 recovered in a PAGA action are paid to the State, with a smaller portion paid to the aggrieved employees
18 (e.g., 75% paid to the state; 25% paid to the aggrieved employees). See Cal. Lab. Code 2699(i). Where,
19 as here, a common fund is created in a qui tam action by the successful litigation of a plaintiff and her
20 attorneys, the plaintiff's attorneys are entitled to recover their fees from the common fund:

21 Those benefiting from the recovery of the fund, in this case some depositors and eventually
22 the People of the State of California, must bear their share of the cost of litigation. Fees for
23 taxpayers' attorneys will be deducted from the judgment, and each claimant's share
24 reduced proportionately. To the extent the judgment relies upon section 1021.5 for
25 recovery of attorney fees, it must be modified to confine the award of fees to the common
26 fund theory.

27 *Bank of America v. Cory*, 164 Cal. App. 3d 66, 91 (1985) (authorizing common fund fees in a qui tam
28 taxpayer suit against certain banks).

1 Likewise, through the successful efforts of Plaintiff and her attorneys, a common fund was created
2 in the amount of \$115,000 for the benefit of the employees and the State of California. Thus, these
3 beneficiaries must bear their share of the costs and attorneys' fees, to be deducted from the gross settlement
4 fund under the common fund theory. *Id.* Such fees are deducted as a percentage of the settlement amount.
5 See, e.g., *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478-482 (1980); *Six (6) Mexican Workers v. Arizona*
6 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Williams v. MGM-Pathe Communications Co.*, 129
7 F.3d 1026, 1027 (9th Cir. 1997); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003).

8 The common fund theory of recovery for attorneys' fees was upheld by the California Supreme
9 Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 506 (2016). The Court recognized that awarding
10 counsel a percentage of the total recovery, rather than fees based on hours worked, the common fund
11 method encourages attorneys to efficiently litigate to achieve the best results possible. See *Laffitte*, 1 Cal.
12 5th at 492-494. Indeed, "the percentage method is generally favored in common fund cases because it
13 allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it
14 for failure. *Id.* at 493 (*quoting In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)
15 (internal quotations omitted).

16 As a California appellate court very recently confirmed, "fee awards in class actions average
17 around one-third of the recovery' regardless of 'whether the percentage method or the lodestar method is
18 used." *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (*quoting Chavez v. Netflix,*
19 *Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008)).

20 A fee award in the amount of one-third of the common fund is also reasonable because it best
21 reflects the market rate for contingency fees. See *Lealao v. Beneficial Cal. Inc.*, 82 Cal. App. 4th 19, 47
22 (2000) ("attorneys providing the essential enforcement services must be provided incentives roughly
23 comparable to those negotiated in the private bargaining that takes place in the legal marketplace. . . .").
24 Fees representing one-third of the recovery reflect the rate negotiated in "typical contingency fee
25 agreements [which] provide that class counsel will recover 33% if the case is resolved before trial and
26 40% if the case is tried." *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008
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1 WL 8150856, at *16 (C.D. Cal. July 21, 2008) (citing an academic study collecting contingency fee
2 agreements and finding that a fee award constituting 34% of the fund is reasonable on that basis). Because
3 the negotiated fee structure mimics the marketplace, it is reasonable and should be approved. A one-third
4 common fund attorneys' fee award is also consistent with what courts have awarded in other representative
5 action cases. (See e.g., *Cruz v. Wal-Mart Associates, Inc.*, Los Angeles Superior Court, No. 18STCV03128
6 (May 28, 2021); *Jones v. J.C. Penney Corporation*, Los Angeles Superior Court, Case No. BC451823
7 (April 20, 2017); *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007
8 (Sept. 13, 2017); *Garcia v. Pep Boys*, Orange County Superior Court, Case No. 30-2014-00720574-CU-
9 OE-CJC (July 14, 2016); *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-
10 00852123-CUOC-CXC (June 15, 2017); *Perez v. Staffmark Investment, LLC*, Riverside County Superior
11 Court, Case No. MCC1401137 (May 23, 2016)).

12 California courts have a strong policy in favor of settlement. See, e.g., *Stambaugh v. Superior*
13 *Court* (1976) 62 Cal.App.3d 231, 236. Unlike individual settlements, class and representative PAGA
14 settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to
15 absent individuals. See *Malibu Outrigger Bd. Of Governors v. Superior Court* (1980) 103 Cal.App.3d
16 573 578-79. California law generally follows the same standards applicable under Rule 23. See *Hanlon v.*
17 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (stating that Rule 23(e) requires the trial court to
18 determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). To be
19 approved, a settlement must be "fair, reasonable and adequate to all concerned." *Reed v. United Teachers*
20 *Los Angeles* (2012) 208 Cal.App.4th 322, 337. Settlement is the preferred means of dispute resolution,
21 particularly in complex representative litigation. See *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th
22 Cir. 2008). The Court's role in evaluating a proposed settlement is limited to ensuring that the agreement
23 taken as a whole is fair and is not the product of fraud or collusions between the negotiating parties. See,
24 e.g., *Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness when the settlement
25 agreement was negotiated at arm's length by experienced counsel. *Kullar v. Foot Locker Retail, Inc.*
26 (2008) 168 Cal.App.4th 116, 130. Because this Settlement is fair, adequate, and reasonable, Plaintiff
27 respectfully requests that the Court grants approval.

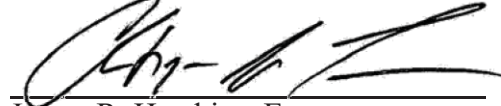
1 **IV. CONCLUSION**

2 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA settlement
3 and the PAGA Settlement Amount as set forth in the Agreement and enter the proposed order submitted
4 herewith.
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6 Dated: March 25, 2022

JAMES HAWKINS APLC

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8 By:



James R. Hawkins, Esq.
Christina M. Lucio, Esq.
Mitchell J. Murray, Esq.

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10 Attorneys for Plaintiff
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