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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE**

ANDY GARCIA, on behalf of the State of
California and Aggrieved Employees,

Plaintiffs,

vs.

GREAT LAKES SERVICES, LLC,

Defendant.

Case No. 30-2020-01141083-CU-OE-CXC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
SETTLEMENT PURSUANT TO PRIVATE
ATTORNEYS GENERAL ACT OF 2004**

Date: January 14, 2022

Time: 9:00 a.m.

Department: CX104

Reservation No. 73666429

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CASES

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OTHER AUTHORITIES

Eisenberg & Miller, *Attorney Fees in Class Action Settlements:*

An Empirical Study, J. of Empirical Legal Studies, Vol. 1, Issue 1, March 2004, 13

1 **I. INTRODUCTION**

2 Pursuant to Labor Code § 2699(1)(3), Plaintiff Garcia, on behalf of the State and Aggrieved
3 Employees (“Plaintiff”), seeks approval of a Settlement¹ for civil penalties against Defendant Great
4 Lakes Services, LLC. (“Defendant”) under the California Labor Code Private Attorneys General Act
5 (“PAGA”; Labor Code §§ 2698, *et seq.*).

6 The Action was filed as a result of wage and hour violations with respect to Defendant’s non-
7 exempt employees in California. The Parties participated in a mediation that led to a \$715,000
8 settlement of the PAGA claims. The Settlement warrants approval because it fulfills the purpose of
9 the PAGA and provides reasonable relief to approximately 1,110 Aggrieved Employees.

10 The principal terms of the Settlement are as follows: (1) the Gross Settlement Fund is
11 \$715,000.00; (2) Plaintiff Garcia will be awarded \$10,000.00 for his service in bringing the
12 representative claims and in exchange for a general release; (3) Plaintiff’s Counsel will be awarded
13 attorneys’ fees not to exceed thirty-three and one-third percent (33 1/3%) of the Gross Settlement
14 Fund, or \$238,333.33; (4) Plaintiff’s Counsel will receive no more than \$13,000 in costs, which at this
15 time amount to \$9,490.37; (5) the Settlement Administrator will be Simpluris, whose estimated costs
16 are \$5,941.00 for its service as settlement administrator; and (6) the remaining funds (the “Net
17 Settlement Fund”), currently estimated to be \$451,235.30, will be split between the State of California
18 and the Aggrieved Employees. Approximately \$338,426.47, or 75% of the Net Settlement Fund, will
19 be remitted to the State of California, while the remaining \$112,808.83, or 25% of the net PAGA
20 settlement amount, will be remitted to the Aggrieved Employees. For the reasons set forth herein,
21 Plaintiff respectfully requests that the Court approve the Settlement.

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

23 Plaintiff filed his PAGA notice with the Labor & Workforce Development Agency (“LWDA”)
24 on March 18, 2020. (Cottrell Decl., ¶ 9.) After waiting the requisite 65-days without notice from the
25 LWDA of their intent to investigate his claims, Plaintiff filed this action on May 26, 2020 seeking
26 penalties under PAGA for Defendant’s wage and hour violations. (*Id.*, ¶ 10.)

27 Plaintiff’s complaint alleges that Great Wolf Resorts Holdings Inc., Centerbridge Partners LP,

28 ¹ A true and correct copy of the Settlement Agreement of Representative Action under Labor Code Private Attorneys
General Act (the “Settlement”) is attached as Exhibit 1 to the Declaration of Carolyn Hunt Cottrell (“Cottrell Decl.”).

1 and The Blackstone Group, Inc. violated the California Labor Code by (1) failing to pay Plaintiff and
2 Aggrieved Employees overtime wages; (2) failing to pay all tip wages owed from gratuity payments;
3 (3) failing to authorize and permit meal and rest breaks; (4) failing to compensate for all hours worked;
4 (5) failing to provide accurate, itemized wage statements; (6) failing to timely pay full wages upon
5 termination or resignation; and (7) failing to remit the total proceeds from mandatory service fee
6 surcharges to non-managerial service workers. Plaintiff asserts PAGA claims predicated on these
7 alleged violations. (Cottrell Decl., ¶ 11.)

8 On July 28, 2020, Great Wolf Resorts Holdings Inc. and The Blackstone Group, Inc. filed their
9 answer to the complaint. (*Id.*, ¶ 12.) Thereafter, Plaintiff filed a request for dismissal without prejudice
10 as to Centerbridge Partners LP and The Blackstone Group, Inc., which the clerk signed on August 31,
11 2020. (*Id.*, ¶ 13.) The Notice of Entry of Dismissal and Proof of Service were filed on September 4,
12 2020. (*Id.*) On April 1, 2021, the Parties stipulated to dismiss Great Wolf Resort Holdings, Inc.,
13 without prejudice, and substitute in Great Lakes Services, LLC. (*Id.*, ¶ 14.) The Court signed the
14 proposed order on April 5, 2021. (*Id.*)

15 The Parties engaged in extensive formal discovery. (*Id.*, ¶ 15). Great Wolf Resort Holdings
16 Inc. served its first set of Request for Production of Documents on Plaintiff on September 30, 2020.
17 (*Id.*, ¶ 16). Plaintiff responded to the same on October 30, 2020. (*Id.*) Plaintiff supplemented his
18 responses and document production when the same requests were made along with his Notice of
19 Deposition. (*Id.*, ¶ 17). Plaintiff sat for his deposition on January 26, 2021. (*Id.*)

20 Plaintiff served his first set of Requests for Production of Documents and Special
21 Interrogatories on Great Wolf Resort Holdings Inc. on November 19, 2020. (*Id.*, ¶ 18). Defendant
22 responded to the same on January 12, 2021. (*Id.*) On January 27, 2021, Plaintiff sent Great Wolf Resort
23 Holdings Inc. a letter outlining the deficiencies in its discovery responses. (*Id.*, ¶ 19). During a
24 telephonic conference on February 2, 2021, the Parties discussed the possibility of mediation and
25 decided to put formal discovery on hold, in lieu of informal discovery, in anticipation of mediation.
26 (*Id.*) The Parties agreed that the mediation would consist of both this PAGA action and Plaintiff's
27 individual arbitrable claims. (*Id.*, ¶ 20).

28 On March 12, 2021, through counsel, Plaintiff sent Defendant a letter detailing documents and
information he would need to adequately prepare for mediation. (*Id.*, ¶ 21). Thereafter, the Parties

1 exchanged several correspondences to compromise on the exchange of information. (*Id.*) Prior to
2 mediation, Defendant produced documents and data, including but not limited to Plaintiff's personnel
3 file, job descriptions, written policies, timekeeping and payroll information, service fee documents,
4 and a sampling of Aggrieved Employee contact information. (*Id.*, ¶ 22).

5 The remote mediation took place on June 15, 2021 before Hon. Gail A. Andler (Ret.), an
6 experienced and respected wage and hour mediator. (*Id.*, ¶ 23). The mediation involved serious and
7 intensive arms-length negotiations. (*Id.*) At the conclusion, the Parties agreed to a global settlement of
8 both the PAGA action and Plaintiff's individual arbitrable claims, and later agreed to allocate
9 \$715,000 to the PAGA action. (*Id.*) The Parties thereafter worked together to jointly draft the
10 Settlement Agreement, exchanging several drafts in the process. (*Id.*, ¶ 24). The Settlement was fully
11 executed as of December 9, 2021. (*Id.*, ¶ 25). Plaintiff now brings this motion seeking Court approval
12 of the proposed Settlement.

13 **III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

14 **A. Terms of the PAGA Settlement and Distribution of PAGA Penalties**

15 The Settlement provides that Defendant will pay a non-reversionary settlement amount of
16 \$715,000.00 (the "Gross Settlement Fund"). (*Id.*, ¶ 26). From the Gross Settlement Fund, payments
17 will be made to the LWDA and the Aggrieved Employees, to the Plaintiff for his Service Award, to
18 Plaintiff's attorneys for fees and litigation costs, and to the Settlement Administrator for settlement
19 administration costs. (*Id.*; Settlement, Section II.A.16-17. and Section II.B.1.) The Settlement sets
20 aside \$10,000.00 for Plaintiff as a Service Award, in return for his general release of all claims of any
21 kind against Defendant, and for his efforts in bringing and prosecuting the matter. (Cottrell Decl., ¶
22 27; Settlement, Section II.A.18 and Section II.E.2.) Plaintiff's counsel will seek a standard fee award,
23 not to exceed thirty-three and one-third (33 1/3%) of the Gross Settlement Fund, along with
24 reimbursement of actual litigation costs, not to exceed \$13,000.00. (Cottrell Decl., ¶ 28; Settlement,
25 Section II.C.2.b.) The costs incurred at this time are \$9,490.37. (Cottrell Decl., ¶ 28.) The
26 administration costs for the proposed Settlement Administrator, Simpluris, are currently estimated at
27 \$5,941.00. (Cottrell Decl., ¶ 29; Settlement, Section II.A.13.)

28 After distributions for the Service Award, attorneys' fees and costs, and Settlement

1 Administrator costs, approximately \$451,235.30 will be available as estimated net proceeds (the “Net
2 Settlement Fund”). (Cottrell Decl., ¶ 30.) Seventy-Five percent (75%) of the Net Settlement Fund will
3 be paid to the LWDA and the remaining 25% will be paid to the Aggrieved Employees. (*Id.*;
4 Settlement, Section II.A.17.) Accordingly, the LWDA will receive approximately \$338,426.47 from
5 the Settlement. (Cottrell Decl., ¶ 31.) Employees will receive approximately \$112,808.83 from the Net
6 Settlement Fund. This will result in an average payment amount of \$102.55 for each employee. (*Id.*)

7 The Aggrieved Employees include all non-exempt employees of Great Lakes Services, LLC
8 in California at any time during the period between March 22, 2019 to the date the Effective Date.²
9 (*Id.*, ¶ 32; Settlement, Section II.A.3.) The amounts to be paid to Aggrieved Employees will be
10 determined as follows: the Settlement Administrator will allocate 25% of the Net Settlement Fund to
11 the Aggrieved Employees. Payments will be calculated and apportioned based on the number of
12 workweeks an Aggrieved Employee worked during the PAGA Recovery Period³. (Cottrell Decl., ¶
13 37; Settlement, Section II.D.5.) The Settlement Administrator will calculate the number of workweeks
14 worked by each Aggrieved Employee (“Individual Workweeks”) during the PAGA Recovery Period,
15 the amount to be paid per workweek, and the individual payments to eligible Aggrieved Employees.
16 (Cottrell Decl., ¶ 38; Settlement, Section II.D.5.a.)

17 The payment to each Aggrieved Employee will be determined as follows: The Settlement
18 Administrator will calculate the total number of workweeks for the entire group of Aggrieved
19 Employees (as weighted). The Settlement Administrator will divide the 25% of the Net Settlement
20 Fund by the total number of workweeks (as weighted), resulting in the Workweek Value. The
21 Settlement Administrator will multiply the Workweek Value by the number of workweeks worked by
22 each Aggrieved Employee (as weighted), to determine each payment. To account for the additional
23 penalties relating to the underlying Labor Code § 351 allegations, the Individual Workweeks for
24 Aggrieved Employees whose title was Banquet Server, Banquet Bartender, and Banquet Captain at
25 any time during the PAGA Recovery Period, shall be weighted. The Settlement Administrator shall
26 multiply the number of Individual Workweeks initially calculated for each of these individuals by 2.0.

27 ² “Effective Date” means the 61st day following entry of the Judgment if no appeal is filed, or if an appeal is filed, the
date the appeal is dismissed or denied and is no longer subject to appellate review. (Settlement, Section II.A.5.)

28 ³ “PAGA Recovery Period” is the period between March 22, 2019 and the Effective Date.

(For example, if an Aggrieved Employee held the title of Banquet Server, Banquet Bartender, or Banquet Captain during the PAGA Recovery Period and worked ten (10) workweeks, the Settlement Administrator will multiply 10 workweeks by a multiplier of 2.0 for the purposes of calculating the Workweek Value and calculating his or her individual payment.) (Cottrell Decl., ¶ 40; Settlement, Section II.D.5.c.)

The payment to the Aggrieved Employees, including Plaintiff's Service Award, will be treated as civil penalties for purposes of IRS reporting. (Settlement, Section II.D.8.) Defendant shall report such payments by use of the IRS 1099 Miscellaneous form to each Aggrieved Employee, which shall be issued at the same time as the settlement checks. (Cottrell Decl., ¶ 41; Settlement, Section II.D.8.)

If there are funds attributable to uncashed settlement checks after 180 days, the Settlement Administrator shall make any payments necessary to Aggrieved Employees arising from successful disputes, and remit remaining unclaimed funds to the *cy pres* recipient that is approved by the Court. (Cottrell Decl., ¶ 44; Settlement, Section II.D.7.) If there are insufficient funds attributable to uncashed settlement checks to pay in full the amounts triggered by successful disputes from Aggrieved Employees, such payments shall be made *pro rata*. (*Id.*) The parties propose Legal Aid at Work as the *cy pres* recipient. (*Id.*)

B. The Releases for the Aggrieved Employees and Plaintiff

Under the Settlement, Aggrieved Employees release certain PAGA claims that accrue from March 22, 2019 through through the Effective Date. (Cottrell Decl., ¶ 45; Settlement, Section II.E.1, II.A.3.) These "PAGA Released Claims" include:

any and all claims, causes of action, debts, liabilities, demands, damages, penalties, costs, and attorneys' fees under the PAGA, known or unknown, based on or arising out of the Labor Code sections alleged in Plaintiff's operative complaint or that could have been alleged based on the factual and legal allegations in the PAGA Letter and/or the complaint in the Action including but not limited to PAGA claims for Great Wolf's alleged failure to (1) pay Plaintiff and Aggrieved Employees overtime wages; (2) pay Plaintiff and Aggrieved Employees all tip wages owed from gratuity payments; (3) authorize and permit Plaintiff and Aggrieved Employees to take meal and rest breaks to which they are entitled by law; (4) compensate Plaintiff and Aggrieved Employees for all hours worked; (5) provide Plaintiff and Aggrieved Employees accurate, itemized wage statements; (6) timely pay Plaintiff and Aggrieved Employees full wages upon termination or resignation; and (7) remit the total proceeds from mandatory service fee surcharges to non-managerial service workers like the Aggrieved Employees. Without limiting the foregoing, Plaintiff, on behalf of himself and the State of California, and all Aggrieved Employees, fully and without limitation release, covenant not to sue and forever discharge Great Wolf and the Great Wolf Releasees, both individually and collectively, from any and all claims, causes of action, debts, liabilities,

1 demands, damages, penalties, costs, and attorneys' fees, for penalties pursuant to the PAGA
2 for the following California Labor Code sections referenced in the PAGA Letter and/or the
3 complaint in the Action: 201-204, 225.5, 226, 226.3, 226.7, 227.3, 256, 351, 510, 512, 558,
4 1194, 2699 *et seq.*, and 2802).

5 (Settlement, Section II.E.1.) The Judgment entered by the Orange County Superior Court shall
6 have *res judicata* effect as to each aggrieved PAGA employee with respect to the PAGA Released
7 Claims. (Cottrell Decl., ¶ 46; Settlement, Section II.E.1.)

8 California courts routinely approve PAGA settlements that include release of claims language
9 similar to the release language in the Agreement here. For example, in *Hernandez v. Best Buy Stores,*
10 *LP*, the Southern District approved a PAGA settlement under which the aggrieved employees released
11 the PAGA claims brought, but were not barred from pursuing their underlying claims under the Labor
12 Code. No. 13cv2587 JM (KSC), 2017 U.S. Dist. LEXIS 86859, 2017 WL 2445438 at *6 (S.D. Cal.
13 June 6, 2017). The court approved a settlement that “releases Best Buy from PAGA liability for any
14 and all claims by similarly situated general managers that were asserted or reasonably could have been
15 asserted based on the facts of this case.” (*Id.*) A similar settlement was approved in *Mancini v. W. &*
16 *S. Life Ins. Co.* (S.D. Cal. Sep. 18, 2018) No. 16cv2830-LAB (WVG), 2018 U.S. Dist. LEXIS 160320,
17 at *6. “The settlement does not bar the employees other than Mancini from pursuing other (non-
18 PAGA) Labor Code claims against Defendants should they violate those, which leaves open the
19 possibility of additional compensation.” (*Id.*)

20 Other courts have frequently approved releases or other similar language binding the State and
21 nonparty employees from pursuing civil penalties for the settled PAGA claims. *See, e.g., Ramirez v.*
22 *Benito Valley Farms* (N.D. Cal. Aug. 25, 2017) *LLC*, No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS
23 137272, at *3 (approving PAGA settlement, which provided \$40,700 in compensation for Plaintiff's
24 individual damages, \$27,500 in civil penalties under the PAGA, injunctive relief, and \$41,800 in
25 attorney's fees, for a total settlement amount of \$110,000); *Echavez v. Abercrombie & Fitch Co.* (C.D.
26 Cal. Mar. 23, 2017) No. CV 11-09754-GAF, 2017 WL 3669607, at *3 (approving settlement with a
27 release of PAGA claims); *Jordan v. NCI Group* (C.D. Cal. Jan. 5, 2018) No. 16-1701-JVS, 2018 U.S.
28 Dist. LEXIS 25297, at *5 (approving PAGA settlement that provides penalties to LWDA “paid in
exchange for a release only for those claims pled in the notice to the LWDA and the Complaint”).)

Additionally, upon the Effective Date, Plaintiff Garcia agrees to a broader, general release of

1 all claims of any kind against Defendant. (Cottrell Decl., ¶ 47; Section II.E.2(3).) Based on my review,
2 the Named Plaintiff's general release of these claims pursuant to the \$10,000.00 Service Award, as
3 well as the time and risk expended by him on this case, and a review of prior settlements, is a fair
4 compromise. (Cottrell Decl., ¶ 48.) Incentive awards "are intended to compensate class representatives
5 for work done on behalf of the class, to make up for financial or reputational risk undertaken in
6 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."
7 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393–1394.)

8 **IV. PAGA AND ITS REQUIREMENTS**

9 Enacted in 2004, PAGA provides an enforcement mechanism for California's Labor Code by
10 enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with
11 a share also going to the individual plaintiffs and other employees. Prior to PAGA, the recovery of
12 civil penalties for violations of certain Labor Code provisions were solely the province of the
13 California Department of Labor. (*See Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.)

14 The Labor Code's primary purpose is to "ensure employees are not required or permitted to
15 work under substandard unlawful conditions ... and to protect employers who comply with the law
16 from those who attempt to gain a competitive advantage at the expense of their workers by failing to
17 comply with minimum labor standards." (Labor Code § 90.5(a).) In enacting the PAGA, the legislature
18 expressly stated that "the only meaningful deterrent to unlawful conduct is the vigorous assessment
19 and collection of civil penalties as provided in the Labor Code." (Stats. 2003 ch. 906, § 1(b).) The
20 legislature determined it is "in the public interest to allow aggrieved employees, acting as private
21 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
22 labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias*, 46
23 Cal.4th at 980.)

24 Under this regime, Plaintiff, acting as private attorney general and proxy for the State, filed
25 this action seeking civil penalties for Defendant's alleged violations of the Labor Code.

26 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND WARRANTS APPROVAL**

27 Within this framework, the Parties have consummated and structured the Settlement. The
28 Plaintiff has extensively analyzed the facts and claims to evaluate the Settlement's fairness and

1 reasonableness. (Cottrell Decl., ¶ 50; see also ¶¶ 51-66 .) Plaintiff’s counsel has conducted extensive
2 discovery and outreach to the Aggrieved Employees. (*Id.*) Plaintiff’s counsel used this information
3 and data to perform analyses of the claims and potential recovery, the results of which are summarized
4 here. (*Id.*)

5 **A. Judicial Review of PAGA Settlements**

6 Court approval is required for PAGA settlements. (Labor Code § 2699(1)(2).) However, the
7 PAGA does not establish any standards for the review of PAGA settlements. “[N]either the California
8 legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA]
9 has provided any definitive answer’ as to what the appropriate standard is for approval of a PAGA
10 settlement.” (*Jordan, supra*, 2018 U.S. Dist. LEXIS 25297, at *5 (quoting *Flores v. Starwood Hotels*
11 & Resorts Worldwide, Inc. (C.D. Cal. 2017) 253 F. Supp. 3d 1074, 1075).)

12 Courts have recognized that PAGA settlements must be viewed in light of the PAGA’s public
13 purpose, namely augmenting the state’s enforcement capabilities, encouraging compliance with Labor
14 Code provisions, and deterring noncompliance with California’s labor laws. (*See, e.g., Vargas v.*
15 *Central Freight Lines* (Sept. 25, 2017 S.D. Cal.) No. 16-cv-00507-JLB, 2017 WL 4271893, *6;
16 *Ramirez, supra*, 2017 U.S. Dist. LEXIS 137272.) “[T]he Court will approve the PAGA settlement
17 upon a showing that the settlement terms are fundamentally fair, adequate, and reasonable in light of
18 PAGA’s policies and purposes.” (*Jordan*, 2018 U.S. Dist. LEXIS 25297, at *5.) The Settlement here
19 is fair and reasonable in light of the purposes of the PAGA, and the authority cited herein finding
20 similar PAGA settlements to warrant approval.

21 **B. Nature of Alleged Violations and Total Potential PAGA Penalties**

22 Plaintiff alleges three core sets of claims in this action: a service fee claim, meal and rest break
23 claims, and unpaid hours claims. (Cottrell Decl., ¶ 51.) Additionally, Plaintiff asserts derivative
24 violations for failure to provide accurate, itemized wage statements and waiting time penalties. (*Id.*)
25 While each of these claims expose Defendant to PAGA penalties, it is anticipated that the amount that
26 the penalties should be “stacked,” with multiple violations assessed per person for individual pay
27 periods, would be vehemently disputed by Defendant. (*Id.*, ¶ 52.)⁴

28 ⁴ PAGA penalties for multiple Labor Code violations can be “stacked,” in the sense that plaintiffs are entitled to recover
penalties for multiple violations during the same time period. (*See Hernandez v. Towne Park, Ltd.* (C.D. Cal. June 22,
2012) No. 12 Civ. 02972, 2012 WL 2373372, at *17 n.77 [noting that “federal courts applying California law have

1 The California Labor Code provides for statutory penalties of \$100 per employee, per pay
2 period for each initial violation and \$200 per employee, per pay period for each subsequent violation.
3 (Labor Code § 2699(f)(2).) Under California law, however, courts have held that employers are not
4 subject to heightened penalties for subsequent violations unless and until a court or commissioner
5 notifies the employer that it is in violation of the Labor Code.⁵ (*Amaral v. Cintas Corp. No. 2* (2008)
6 163 Cal. App. 4th 1157 ; *see also Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*
7 (S.D. Cal. Aug. 10, 2009) No. 05cv1199, 2009 U.S. Dist. LEXIS 69842, 2009 WL 2448430, at *9 ;
8 *Trang v. Turbine Engine Components Techs. Corp.* (C.D. Cal. Dec. 19, 2012) 2012 U.S. Dist. LEXIS
9 179710, at *14 .) Plaintiff performed an in-depth analysis of interviews conducted with Aggrieved
10 Employees, timekeeping and payroll data, service fee-related and written policies provided by
11 Defendant, and the underlying state law provisions to develop Defendant's potential exposure,
12 including workweek weighing to account for the additional harms only suffered by banquet employees
13 for alleged violations of Labor Code § 351. (Cottrell Decl., ¶¶ 22, 57.) As there are no known findings
14 by a court or the Labor Commissioner that Defendant has violated the Labor Code, Plaintiff applies
15 the \$100 penalty amount for all violations. (*Id.*, ¶ 58.)

16 Based on records provided by Defendant before mediation, Plaintiff based damages
17 calculations on there being approximately 1,110 Aggrieved Employees employed by Defendant in
18 California during the PAGA Recovery Period, of which approximately 31 are banquet employees, and
19 they worked approximately 21,380 and 414 pay periods respectively, during that time. (*Id.*, ¶ 59.)
20 Based on the analysis of the data Defendant provided and interviews with Aggrieved Employees,
21 Plaintiff further assumed that he could prove the following: the service fee claims at 100% violation
22 rate, the rest break, waiting time, and inaccurate wage statement violations at a rate of 50%, the meal

23 concluded that stacking is appropriate," under which "multiple PAGA penalties can be assessed for the same pay period
24 for different Labor Code violations"; *Atempa v. Pedrazzani*, (2018) 27 Cal. App. 5th 809, 814, *review filed on other*
25 *grounds* (Nov. 7, 2018) [affirming trial court's grant of civil penalties under California Labor Code § 558 (overtime
26 violations) and § 1197.1 (minimum wage violations)]; *Schiller v. David's Bridal, Inc.* (E.D. Cal. July 14, 2010) No. 1:10
27 Civ. 00616, 2010 WL 2793650, *6 ["Plaintiff cites no authority establishing that PAGA penalties could not be awarded
28 for every cause of action under which they are alleged. Therefore, it is conceivable that Plaintiff could recover PAGA
penalties for each separate type of Labor Code violation"].)

⁵ Additionally, "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based
on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and
oppressive, or confiscatory." (Labor Code § 2699(e)(2).) The Court may approve a lesser penalty amount for technical or
inadvertent violations. (*See Raines v. Coastal Pac. Food Distribs., Inc.* (2018) 23 Cal. App. 5th 667, 681.)

1 period violations at a rate of 40%, the off-the-clock claims at a violation rate of 30%, and the overtime
2 claims at a rate of 15%. (*Id.*, ¶ 60.)

3 Based on these figures, Plaintiff calculated a potential exposure of \$4,444,550.00. (*Id.*, ¶ 61.)
4 However, Plaintiff determined that further, additional discounting factors were appropriate for certain
5 claims to account for the risk that Plaintiff would not be able to proceed on a representative basis as
6 to all employees at issue based on manageability issues, the risk that Plaintiff may not be able to prove
7 the violations at the rates specified above, and the risk that the Court may reduce the penalties as
8 arbitrary. (*Id.*; *see also id.*, ¶ 62 for full explanation of discounting.) Discounting results in a net
9 exposure of approximately \$2,195,435.00 and weighing of approximately 2.0 for banquet pay periods.
10 (*Id.*, ¶ 63.)

11 The case settled for \$715,000.00, which is approximately 32.57% of the total potential
12 exposure of \$2,195,435.00 that Plaintiff's Counsel estimated it could recover. (*Id.*, ¶ 64.) This amount
13 assumes that Plaintiff prevails on liability and proves up the violations at the levels described above.
14 (*Id.*, ¶ 65.) Plaintiff faced risks in proving up his claims in this manner. (*Id.*) In light of these risks
15 discussed below and analysis of similar PAGA settlements, \$715,000.00 constitutes a material
16 percentage of the total damage exposure and is a reasonable overall settlement sum. (*Id.*, ¶ 66.)

17 **C. Litigation Risks**

18 Plaintiff was confronted with considerable uncertainty in proceeding to trial on the PAGA
19 claims. (*Id.*, ¶ 67.) Plaintiff's counsel has reviewed hundreds of pages of documents and conducted
20 substantial outreach with the employees at issue concerning their experiences working for Defendant.
21 (*Id.*, ¶ 68.) Plaintiff's investigation shows these employees performed different roles and hold different
22 positions. (*Id.*) Variability as to employees' experiences is not uncommon in employment litigation,
23 and such variability may present a risk to Plaintiff's case here if it were to proceed to trial based on
24 manageability issues. (*Id.*)

25 Defendant also has legal defenses available to it. (*Id.*, ¶ 69.) Defendant represented that it
26 obtained valid meal period waivers for many of the workers. (*Id.*) Though the issue would be hotly
27 contested, there is a likelihood that the Court would uphold Defendant's meal period agreements,
28 which would abrogate a considerable component of Plaintiff's claim. (*Id.*) Defendant also argues that

1 its policies and procedures are facially compliant with California labor law. (*Id.*, ¶ 70.) Defendant
2 produced meal break, rest break, and timekeeping policies that, on their face, appear lawful. (*Id.*)
3 Though Plaintiff contends violations can be found based on non-compliant practices, Plaintiff
4 recognizes the Court could credit Defendant for maintaining facially compliant policies. (*Id.*)

5 Further, although the evidence shows that Defendant did not remit any part of the service
6 charge to the service employees, a Court might still find that the language in the banquet event order,
7 banquet contracts or other banquet event receipts is sufficient to allow the customer to understand that
8 this charge is not meant to be a gratuity to the service workers. (*Id.*, ¶ 71.) Additionally, Plaintiff's
9 claims regarding waiting time penalties and wage statements are derivative, and rise and fall with
10 Plaintiff's other wage payment claims for unpaid tips, minimum wage and overtime wages, and so the
11 same risks apply to those derivative claims. (*Id.*, ¶ 72.)

12 Plaintiff also recognizes that some courts have interpreted Labor Code section 2699(f)(2) to
13 impose the enhanced "subsequent violation penalty" or "heightened penalty" only after an employer
14 has been notified that its conduct violates the Labor Code. (*Id.*, ¶ 73.) While Plaintiff regards this
15 interpretation as flawed, he recognizes this interpretation has gained traction with some courts. (*Id.*)

16 While Plaintiff believes that he would have prevailed on these issues and others, Plaintiff
17 recognizes the risk that a fact finder may have found for Defendant on one or more of these issues
18 and/or found penalties to be significantly less than what Plaintiff claims. (*Id.*, ¶ 74.)

19 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**
20 **AND REASONABLE**

21 For Plaintiff's counsel's efforts and the substantial risk that they undertook in obtaining a large
22 common fund settlement to benefit the LWDA and the Aggrieved Employees, the Parties allocated
23 thirty-three and one-third percent (33 1/3%) of the Gross Settlement Fund to Plaintiff's counsel for
24 reasonable attorneys' fees (*Id.*, ¶ 79.), plus actual litigation costs in an amount not to exceed
25 \$13,000.00, which at this time are \$9,490.37. These fees and costs are warranted under the law and
within the range commonly awarded in similar cases.

26 PAGA provides that a plaintiff is entitled to recover reasonable attorneys' fees, expenses, and
27 costs. Labor Code section 2699(g)(1) provides that "[a]ny employee who prevails in any action shall
28

1 be entitled to an award of reasonable attorney's fees and costs." As discussed below, in a qui tam
2 action, reasonable attorneys' fees and costs are typically awarded under the common fund doctrine
3 where, as here, litigation creates a common fund of money in a specific amount for others' benefit.

4 **A. Plaintiff's Counsel are Entitled to Recover Attorneys' Fees of One-Third Under**
5 **the Common Fund Doctrine in this Qui Tam Action**

6 A qui tam action allows a private person to sue to recover damages or penalties, all or part of
7 which will be paid to the government. "A qui tam action 'is a type of private attorney general lawsuit'
8 [citation], in which 'the qui tam plaintiff stands in the shoes of the state or political subdivision
9 [citation].'" (*People ex rei. Stratham v. Acacia Research Corp.* (2012) 210 Cal. App. 4th 487, 501) A
10 PAGA action is a qui tam action because the statute allows the plaintiff, acting as the proxy of the
11 State's labor law enforcement agency, to sue their employer for Labor Code violations and recover
12 civil penalties that otherwise would have been assessed and collected by the LWDA. (*See Iskanian v.*
13 *CLS Transp. L.A. LLC* (2014) 59 Cal. 4th 348, 382 ("A PAGA representative action is therefore a type
14 of qui tam action.")) Indeed, a majority of the civil penalties recovered in a PAGA action are paid to
15 the State, with a smaller portion paid to the employees. (*See Cal Lab. Code* § 2699(i).)

16 As here, where a common fund is created in a qui tam action by the successful litigation of a
17 plaintiff, the plaintiff's attorneys are entitled to recover their fees from the common fund:

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

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

26 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common
27 fund was created in the amount of \$715,000.00 for the benefit of the employees and the State. Thus,
28 these beneficiaries must bear their share of the costs and attorneys' fees, to be deducted from the Gross
Settlement Fund under the common fund theory. (*Id.*) Such fees are deducted as a percentage of the
settlement amount. (*See, e.g., Boeing Co. v. Van Gernert* (1980) 444 U.S. 472, 478-482; *Staton v.*
Boeing Co. (9th Cir. 2003) 327 F.3d 938, 967).

1 The California Supreme Court upheld the use of the common fund theory of recovery for
2 attorneys' fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the settlement
3 created a common fund of \$19 million. The Court approved attorneys' fees in the amount of one third
4 of the gross settlement (e.g., an award of \$6.33 million) under the common fund theory. (*Id.*) By
5 awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the
6 common fund method encourages attorneys to efficiently litigate to achieve the best results possible
7 for the class. (*See Laffitte*, 1 Cal. 5th at pp. 492-494.) Indeed, the "percentage-of-recovery method is
8 generally favored in common fund cases because it allows courts to award fees from the fund 'in a
9 manner that rewards counsel for success and penalizes it for failure.'" (*Id.* at p. 493 (quoting *In re Rite*
10 *Aid Corp. Securities Litig.*(3d Cir. 2005) 396 F.3d 294, 300 (internal quotations omitted).)

11 California state and federal courts routinely award attorneys' fees equaling approximately one-
12 third of the common fund. (*See, e.g., Laffitte*, 1 Cal.5th at 506 ("33 1/3 percent of the common fund is
13 consistent with, and in the range of, awards in other class action lawsuits"); *Chavez v. Netflix, Inc.*
14 (2008) 162 Cal. App. 4th 43, 66 n.11 (accord); Eisenberg & Miller, *Attorney Fees in Class Action*
15 *Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at
16 35 (independent studies of class action litigation nationwide conclude that fees representing one-third
17 of the total recovery is consistent with market rates).)

18 A one-third common fund attorneys' fee award is also consistent with what courts have
19 awarded in PAGA cases. (*See, e.g., Vorise v. 24 Hour Fitness USA, Inc.*, Contra Costa County Superior
20 Court, Case No. C 15-02051 (33.33% fee awarded on \$11,000,000 settlement of a PAGA-only case);
21 *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007 (33.33% fee
22 awarded on \$12,500,000 settlement of a PAGA-only case); *Garcia v. Pep Boys*, Orange County
23 Superior Court, Case No. 30-2014-00720574-CU-OE-CJC (33.33% fee awarded on a \$1,030,000
24 settlement of a PAGA-only case); *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case
25 No. 30-2016-00852123-CU-OC-CXC (33.33% fee awarded on a PAGA-only case); *Perez v.*
26 *Staffmark Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (33.33% fee
27 awarded on a \$650,000 settlement of a PAG- only case).)

28 Based on the foregoing, awarding attorneys' fees based of one-third of the Gross Settlement
Fund is favored by California Courts when a fund established for the common benefit of others is

involved, as is the case here. Accordingly, awarding fees on this basis in the amount of one third of the \$715,000.00 Gross Settlement Fund is appropriate.

B. A Fee of 33 1/3% of the Gross Settlement Fund is Fair and Reasonable

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50) For the reasons below, all these factors support an award here of 33 1/3% of the common fund.

First, Plaintiff's counsel's efforts resulted in a common fund settlement amount of \$715,000.00. (Cottrell Decl., ¶ 75.) This is a substantial settlement in light of the size of the Aggrieved Employee group, and an especially favorable result in light of the challenges Plaintiff may have faced at trial. (*Id.*) This result was achieved by the work and success of Plaintiff's counsel, who negotiated the Settlement after extensive preparation. (*Id.*)

Second, Plaintiff faced significant risks going forward with this litigation. (*Id.*, ¶ 76.) This case involved hundreds of employees who held different positions. (*Id.*) The fact that these events occurred a few years ago and several of these employees have changed jobs presents issues that could be detrimental to Plaintiff's case. (*Id.*)

Third, Plaintiff's counsel are experienced representative action litigators. (*Id.*, ¶¶ 6-8, 77.) This experience and expertise, combined with the high quality of work performed in this case by Plaintiff's counsel, resulted in the Settlement achieved. (*Id.*, ¶ 77.)

Fourth, Plaintiff's counsel have represented Plaintiff and the State here on strictly contingency basis, and had to forego opportunities to litigate other cases. (*Id.*, ¶ 78.) Plaintiff's counsel incurred risk of non-recovery after a substantial investment of time, money, and resources, and have done so since the inception of the case without compensation. (*Id.*) This is no easy burden for any firm.

Fifth, as discussed above, the requests for attorneys' fees in the amount of thirty-three and one-third percent of the Gross Settlement Fund falls well within the range found acceptable by state and federal courts in California in comparable wage and hour actions. The award of a one-third fee

1 recovery under the common fund doctrine was approved by the California Supreme Court in *Laffitte*,
2 *supra*, 1 Cal.5th at 503.

3 For the above reasons, a fee award in the amount of 33 1/3 % of \$715,000.00 is fair and
4 reasonable. A lodestar “cross-check” confirms that the award is reasonable under the circumstances.⁶
5 Here, the lodestar for Plaintiff’s counsel in this Action is over \$255,000. (Cottrell Decl., ¶ 80, Exh. 4).
6 The attorneys’ fees requested are \$238,333.33. Plaintiff’s counsel has agreed to accept this
7 compromise and reduction of the full lodestar in an effort to resolve the case and obtain a fair
8 settlement for Plaintiff and the Aggrieved Employees. A cross-check of Plaintiff’s counsel’s lodestar
9 confirms that a fee award of one third of the \$715,000.00 Settlement Fund is a reasonable and fair
10 payment.

11 **C. The Litigation Costs are Fair and Reasonable**

12 Plaintiff’s counsel also requests reimbursement of their actual out-of-pocket expenses incurred
13 to prosecute the Action, which are \$9,490.37 as of the date of preparing this Motion (Cottrell Decl., ¶
14 85, Exh. 5.) Attorneys are permitted to recover their litigation costs and expenses under PAGA and
15 the common fund doctrine. (Labor Code § 2699(g)(1); *Rider v. County of San Diego* (1992) 11
16 Cal.App.4th 1410, 1424 n.6.) Plaintiff’s counsel incurred costs including, *inter alia*, filing and service
17 fees, costs for remote appearances, and mediation fees. (Cottrell Decl., ¶ 98.) These expenses were
18 incidental and necessary to the effective representation of the Aggrieved Employees. (*Id.*) They are
19 reasonable and uncontested and should be approved.

20 **VII. CONCLUSION**

21 The proposed PAGA Settlement provides a reasonable and fair result for both the State and
22 Aggrieved Employees. For all of the reasons herein, Plaintiff respectfully requests the Court approve
23 the Settlement.

24 ⁶ The trial court may use an abbreviated lodestar cross-check for common fund awards if the court considers it useful.
25 (*Laffitte*, 1 Cal. 5th at pp. 504-05.) However, under *Laffitte*, this is not meant to displace the percentage analysis, but
26 rather to act as a backstop. Indeed, the Supreme Court expressly instructed that “the lodestar calculation, when used in
27 this manner, does not override the trial court’s primary determination of the fee as a percentage of the common fund and
28 thus does not impose an absolute maximum or minimum on the fee award.” (*Id.* at p. 505.) Critically, the Court in
Laffitte emphasized that only where the “multiplier calculated by means of a lodestar cross-check is extraordinarily high
or low” should the court “consider whether the percentage should be adjusted so as to bring the imputed multiplier
within a justifiable range.” (*Id.*) Furthermore, in conducting a lodestar cross-check, courts are not “required to closely
scrutinize each claimed attorney-hour.” (*Id.* at p. 505.) An evaluation may be done by reviewing “counsel declarations
summarizing overall time spent.” (*Id.*)

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2 Dated: December 21, 2021,

Respectfully submitted,

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