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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN BERNARDINO**

10 RAFFE CHAMOUN, individually, and on behalf
11 of other aggrieved employees pursuant to the
California Private Attorneys General Act,

12 Plaintiff,

14 v.

16 RUSNAK AUTO GROUP; RUSNAK
CORPORATION; RUSNAK/WESTLAKE;
17 RUSNAK/PASADENA; RUSNAK/ARCADIA;
RUSNAK DAIMLER CHRYSLER CENTER,
18 INC.; and ANAHEIM HILLS JAGUAR LAND
ROVER, INC. collectively doing business as
19 BENTLEY PASADENA, HYUNDAI INLAND
EMPIRE, JAGUAR ANAHEIM HILLS, LAND
20 ROVER ANAHEIM HILLS, ROLLS-ROYCE
MOTOR CARS PASADENA, RUSNAK BMW,
21 RUSNAK MASERATI, MERCEDES-BENZ OF
ARCADIA, RUSNAK/PASADENA AUDI,
22 RUSNAK/PASADENA JAGUAR,
23 RUSNAK/PASADENA PORSCHE, RUSNAK
VOLVO CARS, RUSNAK/WESTLAKE AUDI,
24 RUSNAK/WESTLAKE PORSCHE, KARMA
PASADENA, KARMA WESTLAKE, AND
25 GENESIS OF LOMA LINDA; and DOES 1
26 through 100,

27 Defendants.
28

Case No. CIVDS2023062

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
PRIVATE ATTORNEYS GENERAL
ACT (CAL. LABOR CODE § 2698, ET
SEQ.) SETTLEMENT AGREEMENT
AND AWARD OF ATTORNEYS' FEES
AND COSTS, PAYMENT TO NAMED
PLAINTIFF, AND SETTLEMENT
ADMINISTRATION COSTS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declaration of Anthony J. Orshansky;
Declaration of Raffe Chamoun; and
[Proposed] Order and Judgment filed
concurrently herewith]

Hearing

Date: December 11, 2020

Time: 9:00 a.m.

Dept.: S26

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

2 **PLEASE TAKE NOTICE** that at 9:00 a.m., on December 11, 2020, or as soon after as
3 the matter can be heard in Department S26 of the San Bernardino County Superior Court, located
4 at 247 W. 3rd Street, San Bernardino, California 92415, Plaintiff Raffe Chamoun (“Plaintiff”)
5 will and hereby does move this Court for an order approving a settlement pursuant to the Private
6 Attorneys General Act of 2004, California Labor Code section 2698, *et seq.* (the “PAGA”).

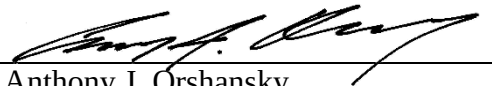
7 This motion is based upon this Notice of Motion; the Memorandum of Points and
8 Authorities; the Declaration of Anthony J. Orshansky in support thereof, along with the attached
9 Settlement Agreement; the Declaration of Raffe Chamoun; the [Proposed] Order granting
10 approval of the PAGA Settlement; all other records, pleadings, and paper filed in this action; and
11 upon such other evidence or argument as may be presented to the Court at the hearing of this
12 Motion. **This Motion is unopposed.**

13
14
15 Dated: November 17, 2020

Respectfully submitted,

COUNSELONE, PC

16
17 By



Anthony J. Orshansky
Jennifer L. Connor
Attorneys for Plaintiff, the State of
California, and Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this case, Plaintiff Raffae Chamoun (“Plaintiff” or “Chamoun”) alleged a cause of action
4 for civil penalties under the Private Attorneys General Act of 2004, California Labor Code section
5 2698, *et seq.* (“PAGA”) against defendants Rusnak Corporation; Rusnak/Westlake;
6 Rusnak/Pasadena; Rusnak/Arcadia; Rusnak Daimler Chrysler Center, Inc.; and Anaheim Hills
7 Jaguar Land Rover, Inc. collectively doing business as “Rusnak Auto Group,” Bentley Pasadena,
8 Hyundai Inland Empire, Jaguar Anaheim Hills, Land Rover Anaheim Hills, Rolls-Royce Motor
9 Cars Pasadena, Rusnak BMW, Rusnak Maserati, Mercedes-Benz of Arcadia, Rusnak/Pasadena
10 Audi, Rusnak/Pasadena Jaguar, Rusnak/Pasadena Porsche, Rusnak Volvo Cars, Rusnak/Westlake
11 Audi, Rusnak/Westlake Porsche, Karma Pasadena, Karma Westlake, and Genesis of Loma Linda
12 (collectively, “Defendants” or “Rusnak”). Plaintiff claims that Defendants owe PAGA penalties as
13 a result of their alleged violations of various California Labor Code sections and Industrial
14 Welfare Commission Wage Order Nos. 4-2001 and 7-2001. Plaintiff’s operative complaint seeks
15 these penalties on behalf of the State of California and other similarly-situated aggrieved
16 employees (“Aggrieved Employees”), as authorized by the PAGA.

17 As will be explained in further detail below, based on the California Supreme Court’s
18 decisions in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
19 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as called
20 for under the PAGA on behalf of the State of California and other similarly-situated employees
21 without seeking class certification or meeting the requirements of class certification (i.e.,
22 numerosity, typicality, commonality, and adequacy). As such, the usual two-step preliminary and
23 final approval process is not required.

24 Rather, as called for under Labor Code section 2699(l), all that is required is an approval
25 by this Court of the PAGA settlement. The Parties have reached such an agreement, and thus,
26 Plaintiff, an “aggrieved employee” under the PAGA, now respectfully moves this Court for an
27 Order granting approval of the Private Attorneys General Act (Labor Code § 2698, *et seq.*)
28 Settlement Agreement and Release (“Settlement Agreement” or “Settlement”) with Defendants. A

1 true and correct copy of the Settlement Agreement entered into by the Parties, along with the
2 accompanying Notice of PAGA Settlement and Release of Claims (“Explanatory Letter”), are
3 attached as Exhibit “1” to the Declaration of Anthony J. Orshansky (“Orshansky Decl.”) filed
4 concurrently herewith. As set forth herein, the Settlement is fair, reasonable, and adequate, and
5 this Court should enter the [Proposed] Order and Judgment submitted concurrently herewith.

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

7 **A. Procedural History**

8 Prior to initiating this lawsuit, and as early as January 2020, CounselOne, P.C. (“Plaintiff’s
9 Counsel”) thoroughly investigated the claims and considered the facts and circumstances
10 underlying the pertinent issues and applicable law.

11 On March 13, 2020, Plaintiff’s Counsel sent a letter, on behalf of Plaintiff and other
12 Aggrieved Employees, via certified mail to Defendants and via online submission to the California
13 Labor & Workforce Development Agency (“LWDA”) outlining the facts and legal theories to
14 support the claims regarding Defendants’ alleged violation of wage-and-hour laws.¹ (Orshansky
15 Decl. ¶ 10.) This notice is required under Labor Code section 2699.3(a)(1) as a prerequisite to
16 bringing a PAGA claim against an employer. Plaintiff did not receive any communication from
17 the LWDA of its intent to investigate within the allotted 65-calendar day time period. (Id. ¶ 10.)

18 It is important to mention that Plaintiff’s Counsel began their investigation into the at-issue
19 allegations prior to filing the original Complaint. (Id. ¶ 11.) As a result of these early and
20 extensive discussions with counsel for Defendants, notwithstanding the PAGA letter date, the
21 Parties agreed to tolling from January 20, 2020. (Id. ¶ 11.) Thus, the one-year PAGA statutory
22 period for Plaintiff and all Aggrieved Employees reaches back to January 20, 2019. (Id. ¶ 11.)
23 Further, in response to Plaintiff’s Counsel’s informal discovery requests, Defendants provided
24 Plaintiff’s Counsel with information and documents pertaining to Plaintiff and other Aggrieved
25

26
27 ¹ Aggrieved Employees is a defined term and means all persons who are or were employed by any of the Defendants
28 during the Release Period in the State of California and were compensated, in whole or in part, based on commissions,
but excluding those persons designated as executive, administrative, or professionally exempt (“Aggrieved
Employees”) (Settlement Agreement § 1.01(b).)

1 Employees in order for Plaintiff's Counsel to investigate Plaintiff's allegations and value the
2 PAGA claim. (Id. ¶ 12.)

3 On October 27, 2020, Plaintiff filed a Representative Action Complaint entitled *Chamoun,*
4 *et al. v. Rusnak Auto Group, et. al.* in the above-captioned court for Civil Penalties Under the
5 Private Attorneys General Act, California Labor Code section 2698, *et seq.* (Id. ¶ 13.)

6 Defendants maintained, and continue to maintain, that they had, and continue to have,
7 legally-compliant employment policies and practices throughout the time period at issue.
8 Defendants deny that they ever violated any provision of the California Labor Code, including, but
9 not limited to, those sections for which Plaintiff seeks penalties under the PAGA. (Id. ¶ 14.)

10 After meeting and conferring on the substantive issues, the Parties agreed to a full day
11 mediation with the Honorable Peter D. Lichtman (Ret.) of Signature Resolution, one of the
12 preeminent wage and hour class and representative action mediators in California, a well-
13 respected mediator experienced in mediating complex labor and employment matters. (Id. ¶ 15.)

14 In conjunction with the upcoming mediation, Defendants provided Plaintiff's Counsel with
15 time and pay records for a sampling of Aggrieved Employees along with a summary of relevant
16 data necessary for a PAGA exposure analysis. (Id. ¶ 16.) Plaintiff's Counsel also obtained
17 Defendants' wage and hour policies during the relevant period, as well as Plaintiff's personnel file,
18 time records, and wage statements. (Id. ¶ 16.) The Parties vigorously debated the likelihood of
19 Plaintiff's ability to proceed on a representative basis, the legal bases for Plaintiff's claims and
20 Rusnak's defenses, and the Parties' analyses and conclusions based on the information and
21 documents provided by Rusnak. (Id. ¶ 16.)

22 Ultimately, after a full day of mediation at arm's-length and with the help of Judge
23 Lichtman who issued a mediator's proposal, the Parties were able to successfully negotiate a
24 resolution of the lawsuit. (Id. ¶ 17.)

25 In the following weeks, the Parties formalized their agreement and executed the Settlement
26 Agreement now before the Court. (Id. ¶ 18.)

27 ///

28 ///

1 **B. Factual Background**

2 Plaintiff Raffé Chamoun is a former employee of Defendants’ automobile dealerships and
3 alleges that Defendants’ common policies and practices result in wage-and-hour violations against
4 non-exempt and similarly-aggrieved employees. (Orshansky Decl. ¶¶ 19, 20.)

5 Plaintiff alleges that Defendants failed to pay for all hours worked, along with associated
6 overtime premiums, whenever Aggrieved Employees performed pre- and post-shift off-the-clock
7 work. (Id. ¶ 21.) Off-the-clock work included duties such as meetings, doing paperwork, or
8 remaining on the lot to assist customers and close deals. (Id. ¶ 21.)

9 Plaintiff further alleges that Defendants failed to compensate for “non-productive” time
10 (i.e., non-sales activity) which is compensable. *See, e.g., Vaquero v. Stoneledge Furniture, LLC*
11 (2017) 9 Cal. App. 5th 98; *Balasanyan v. Nordstrom* (S.D. Cal. 2012) 913 F. Supp. 2d 1001.
12 (Orshansky Decl. ¶ 22.)

13 Defendants incurred minimum wage and rest period liability for using commission pay
14 plans that do not separately compensate for rest breaks. *Stoneledge, supra*, 9 Cal. App. 5th at 110
15 (“We agree with *Bluford* that Wage Order No. 7 requires employers to separately compensate
16 employees for rest periods if an employer’s compensation plan does not already include a
17 minimum hourly wage for such time.”) (Orshansky Decl. ¶ 22.)

18 Plaintiff also alleges that Aggrieved Employees were frequently subject to missed, late,
19 short, or interrupted meal periods and rest breaks and that were not duty-free. (Id. ¶ 23.) As a
20 result of non-compliant meal periods and rest breaks, Plaintiff alleges that Defendants failed to
21 provide premium pay and are in violation of Labor Code section 226.7 and Wage Order Nos. 4-
22 2001 and 7-2001. (Id. ¶ 23.)

23 Plaintiff further alleges that Aggrieved Employees were required to use their personal cell
24 phones for a variety of work activities, including communicating with customers, management,
25 and other employees, but were not reimbursed as required by Labor Code section 2802. (Id. ¶ 24.)

26 These various misdeeds created wage statement inaccuracies with regard to hours worked
27 and wages earned, and to the extent meal and rest period premiums are supposed to appear on pay
28 stubs. *See*, Labor Code § 226(a); (Orshansky Decl. ¶ 25.) Further, because Defendants did not pay

1 all final wages due to Plaintiff and Aggrieved Employees upon separation from their employment,
2 waiting-time penalties were also triggered. *See*, Labor Code § 203. (Orshansky Decl. ¶ 25.)

3 As a result of these alleged substantive violations, Plaintiff asserts that Defendants are
4 liable for civil penalties under the PAGA pursuant to Labor Code section 2698, *et seq.*

5 **III. PAGA AND ITS REQUIREMENTS**

6 Prior to the enactment of the PAGA, many of the penalties provided for violations of
7 certain Labor Code provisions were exclusively within the province of the State of California and
8 its agencies to seek, enforce, and assess. *Arias, supra*, 46 Cal. 4th at 980. However, due to the lack
9 of financing for California’s agencies, and the substantial number of Labor Code violations by
10 California employers, the California Legislature found that it was in the public interest to allow
11 aggrieved employees to act as “private attorneys general” to enforce and recover penalties on
12 behalf of similarly-situated aggrieved employees for Labor Code violations committed by their
13 employers. *Id.*

14 PAGA was enacted to allow such enforcement and recovery by private individuals who
15 have been aggrieved by their employers. The statute calls for 75 percent of any penalties recovered
16 to be paid to California’s LWDA and the remaining 25 percent to the aggrieved employees. *See*,
17 Labor Code § 2699.3(a)(1).

18 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
19 employee must first provide written notice to the LWDA and the employer of the particular Labor
20 Code violations the aggrieved employee alleges the employer has committed. *See*, Labor Code §
21 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to
22 investigate the alleged violations, or if the LWDA does not respond within a certain period of
23 time, the aggrieved employee is then allowed to proceed in a civil action against the employer on
24 behalf of the LWDA and all other similarly-situated aggrieved employees. *See*, Labor Code §
25 2699.3(a)(2)(A).

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1 In 2009, the California Supreme Court considered the issue of whether the aggrieved
2 employee who brings a PAGA representative claim needs to meet class action requirements.
3 *Arias, supra*, 46 Cal. 4th at 976. After substantial review of the legislative history of PAGA, the
4 Court held that an aggrieved employee's representative action brought on behalf of other
5 aggrieved employees against an employer for PAGA violations does not need to meet
6 requirements for class certification. *Id.* at 975, 980-988. As the Court held, a plaintiff bringing suit
7 under PAGA does so as a proxy or agent of California's labor law enforcement agencies. *Id.* at
8 986. Because the employee's PAGA action functions as a substitute for an action brought by the
9 government itself, a judgment in the PAGA action binds all those who would be bound by a
10 judgment in an action brought by the government. *Id.*

11 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court
12 shall "review and approve any settlement of any civil action filed pursuant to this part." Labor
13 Code § 2699(l)(2). The Parties to this current PAGA action have reached such a Settlement and
14 now seek this Court's approval of the Settlement. The Parties have also submitted the Settlement
15 to the LWDA as required by section 2699(l)(2).

16 **IV. DEFENDANTS' DENIAL OF WRONGDOING OR LIABILITY**

17 Under the Settlement, Defendants deny any liability or wrongdoing as to all of the claims
18 alleged, and the Settlement is not an admission by Defendants of any fault, wrongdoing, or
19 liability. (Settlement Agreement § 4.01.) There has been no determination by this court or any
20 court as to the merits of the claims asserted by Plaintiff against Defendants. (Orshansky Decl. ¶
21 27.) Defendants state that they concluded that given the risks and costs of litigation, it is desirable
22 that the action be fully and finally settled in the manner and upon the terms and conditions set
23 forth in the Settlement Agreement. (*Id.* ¶ 27.)

24 **V. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

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

26 **A. Aggrieved Employees and Terms of the Settlement**

27 Aggrieved Employees are defined as all persons who are or were employed by any of the
28 Defendants during the Release Period in the State of California and were compensated, in whole

1 or in part, based on commissions, but excluding those persons designated as executive,
2 administrative, or professionally exempt. (Settlement Agreement § 1.01(b).) The number of
3 Aggrieved Employees, including Plaintiff, is estimated to be 596 individuals. (Orshansky Decl. ¶
4 28.)

5 The settlement provides that Defendants will pay a ***non-reversionary settlement amount***
6 ***of Three Hundred Ninety Thousand Dollars (\$390,000.00)*** (the “Gross Settlement Amount”),
7 inclusive of payments to the LWDA and Aggrieved Employees, payment of attorneys’ fees and
8 litigation costs,² payment to Plaintiff in exchange for his individual general release,³ as well as
9 third-party settlement administrator costs.⁴ (Settlement Agreement § 1.01(f).) After payment of the
10 attorneys’ fees and costs, Plaintiff’s settlement payment for his individual release, and
11 administration costs, approximately \$227,940.20 will remain as the estimated net proceeds for
12 distribution to the LWDA and Aggrieved Employees (the “Net Settlement Amount”).

13 **B. Settlement Allocation to the LWDA and Aggrieved Employees**

14 Pursuant to the Settlement Agreement, the entire Net Settlement Amount shall be
15 designated as PAGA civil penalties to be allocated as follows: 75 percent (\$170,955.15) shall be
16 distributed to the LWDA and 25 percent (\$56,985.05) to Aggrieved Employees (divided on a *pro*
17 *rata* basis on each employee’s proportionate number of pay periods during the Release Period).
18 See, Labor Code § 2699(i) (“Except as provided in subdivision (j), civil penalties recovered by
19 aggrieved employees shall be distributed as follows: 75 percent to the [LWDA] enforcement of
20 labor laws and education of employers and employees about their rights and responsibilities under
21 this code...and 25 percent to the aggrieved employees.”). (Settlement Agreement § 3.04(b).)

22 ² Plaintiff’s Counsel will seek a fee of 35 percent (or \$136,500) of the Gross Settlement Amount. (Settlement
23 Agreement § 3.01(a).) Notwithstanding that the Settlement Agreement allocated up to \$12,000, Class Counsel’s total
24 costs as of today are \$9,559.80. (Settlement Agreement § 3.01(b).) Note: this amount does not include costs to be
incurred in connection with filing and serving final approval papers and appearing at the final approval hearing
estimated at \$250.

25 ³ Defendants have agreed to pay Plaintiff \$5,000 in exchange for his individual general release of claims (above and
26 beyond those of the other Aggrieved Employees), along with his services to the LWDA and Aggrieved Employees for
the risks he undertook in prosecuting this Action. (Settlement Agreement § 3.01(d).)

27 ⁴ The Parties selected CPT Group, Inc. as the Settlement Administrator, and its costs of \$11,000 will be deducted from
28 the Settlement Amount. Note, the amount allocated for administration costs is \$15,000. (Settlement Agreement §
3.04(d).)

1 Assuming *arguendo* that distribution was *pro rata* across the approximately 596 Aggrieved
2 Employees (in reality, it is *pro rata* based on proportionate pay periods worked), the average
3 payment to each Aggrieved Employee is estimated to be \$95.61. (Orshansky Decl. ¶ 31.)

4 **C. Settlement Share Payments and the Notice**

5 The Settlement is non-reversionary and does not require Aggrieved Employees to submit a
6 claim form to reap financial benefit from the Settlement. Within five (5) calendar days of Court
7 approval, Defendants will tender to the Settlement Administrator the Gross Settlement Amount
8 and a list containing each Aggrieved Employee's full name, last known mailing address, start
9 date(s) of employment, end date(s) of employment, total pay periods during the Release Period,
10 and Social Security numbers. (Settlement Agreement § 3.03(a)(1).)

11 Within fifteen (15) calendar days of Court approval, Settlement Administrator will
12 distribute payments to Aggrieved Employees along with the Explanatory Letter (i.e., notice) – *see*,
13 Exhibit “A” to the Settlement Agreement - via First-Class U.S. Mail. (Settlement Agreement §
14 3.03(a)(3).) Before mailing, Settlement Administrator will perform a search of the National
15 Change of Address registry and/or perform skip-traces to find the most current addresses for
16 Aggrieved Employees. (Settlement Agreement § 3.03(a)(2).) If any Explanatory Letters are
17 returned without a forwarding address, Settlement Administrator will attempt to locate a current
18 address by performing an additional skip-trace. (Settlement Agreement § 3.03(a)(3).)

19 Aggrieved Employees will have 180 days to cash their checks. Any settlement checks
20 remaining uncashed after 180 days shall cause that Aggrieved Employee's payment to be
21 distributed to Controller of the State of California to be held pursuant to the Unclaimed Property
22 Law, California Civil Code section 1500, *et seq.*, for the benefit of that Aggrieved Employee.
23 (Settlement Agreement § 3.04(b).) The Parties agree that this disposition results in no “unpaid
24 residue” under California Civil Procedure Code section 384, as the entire Net Settlement Amount
25 will be paid out to Aggrieved Employees. (Settlement Agreement § 3.04(b).) In the event that an
26 Aggrieved Employee's payment is distributed to the Controller of the State of California, the
27 terms of the final judgment and the Release of Claims will nevertheless be binding upon that
28 Aggrieved Employee. (Settlement Agreement § 3.04(b).)

1 **D. Settlement Administrator's Costs**

2 The Parties have allocated up to \$15,000 for payment to the Settlement Administrator for
3 administration costs. (Settlement Agreement § 3.04(d). However, based on its bid, the Settlement
4 Administrator has agreed to perform all services in connection with providing notice and
5 disbursements to Aggrieved Employees for \$11,000. (Orshansky Decl. ¶ 35.)

6 **E. The Releases and Settlement Payment to Plaintiff**

7 Importantly, the California Supreme Court has explained that other employees are bound
8 by a PAGA adjudication only with respect to civil penalties, just as they would be “bound by a
9 judgment in an action brought by the government.” *Arias, supra*, 46 Cal. 4th at 986. In accordance
10 with this rule, the release of Aggrieved Employees herein is narrowly tailored to release from
11 liability for “any and all claims during the Release Period relating to the facts and claims asserted
12 in the Action or any other claims under PAGA based on the facts alleged, including, but not
13 limited to, any and all claims for PAGA penalties for violations of the California Labor Code
14 governing: (1) meal period and rest period liability (including, but not limited to, Labor Code §§
15 512 and 226.7); (2) underpayment, nonpayment, or late payment of minimum wages, overtime and
16 double time wages (including, but not limited to, Labor Code §§ 510, 1194, 1197 and 1198); (3)
17 wage statement violations (including, but not limited to, Labor Code § 226); (4) untimely wages
18 and waiting time penalties (including, but not limited to, Labor Code §§ 201-203, 204 and 210);
19 and (5) failure to reimburse business expenses (including, but not limited to, Labor Code § 2802).”
20 (“Released Claims”). (Settlement Agreement § 1.01(k).)

21 Defendants have also agreed to make a settlement payment to Plaintiff in exchange for his
22 individual general release of claims, in addition to the Released Claims, in an amount of \$5,000.
23 (Settlement Agreement § 1.01(g).) Plaintiff’s general release includes a release of all claims,
24 whether known or unknown, under federal law or state law (including his individual wage and
25 hour claims) and a California Civil Code Section 1542 waiver. (Orshansky Decl. ¶ 37.) While not
26 explicitly an incentive award *per se*, the Settlement Payment also acknowledges the services
27 provided and risks undertaken by Plaintiff in prosecuting this litigation. (Settlement Agreement
28 § 1.01(g)); (Orshansky Decl. ¶ 37.)

1 **F. No Right to Object to, or Opt Out of, the Settlement**

2 “[A] PAGA action is a statutory action for penalties brought as a proxy for the State,” as
3 such, “there is no need to protect absent employees’ due process rights[.]” *Williams v. Superior*
4 *Court* (2017) 3 Cal. 5th 531, 546. “Unnamed employees need not be given notice of the PAGA
5 claim, nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-*
6 *Hernandez v. CJADERS Foods, Inc.* (N.D. Cal. Apr. 2, 2010), 2010 WL 1340777, at *5. A
7 representative PAGA action need not satisfy class action requirements, and no due process
8 concern arises from the fact that there are “nonparty aggrieved employees who are not given
9 notice of, and an opportunity to be heard in, a representative action that is not brought as a class
10 action.” *Arias, supra*, 46 Cal. 4th at 984. “PAGA does not make other potentially aggrieved
11 employees parties” to the action and no “due process concerns arise under PAGA because absent
12 employees do not own a personal claim for PAGA civil penalties and whatever personal claims
13 the absent employees might have for relief are not at stake.” *Williams, supra*, 3 Cal. 5th at 546-
14 547 (internal references omitted, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v.*
15 *Superior Court* (2009) 46 Cal. 4th 993, 1003 and *Iskanian v. CLS Transportation Los Angeles,*
16 *LLC* (2014) 58 Cal. 4th 348, 381.)

17 “[A]bsent fellow employees will be bound by the outcome of any PAGA action[.]”
18 *Williams, supra*, 3 Cal. 5th at 548 (internal references omitted, citing *Arias, supra*, 46 Cal. 4th at
19 980-981; *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1074 and *Richmond v. Dart*
20 *Industries, Inc.* (1981) 29 Cal. 3d 462, 474.) A “judgment in such an action is binding not only on
21 the named employee plaintiff but also on government agencies and any aggrieved employee not a
22 party to the proceeding” because “the employee plaintiff represents the same legal right and
23 interest as state labor law enforcement agencies[.]” “collateral estoppel applies [...] against those
24 for whom the party acted as an agent or proxy[.]” and “[w]hen a government agency is authorized
25 to bring an action on behalf of an individual or in the public interest, and a private person lacks an
26 independent right to bring the action, a person who is not a party but who is represented by the
27 agency is bound by the judgment as though the person were a party.” *Arias, supra*, 46 Cal. 4th at
28 985-86 (citations omitted).

1 As such, the Settlement is consistent with the law, and there is no requirement that
2 Aggrieved Employees be provided with a mechanism to opt out of or object to the Settlement.

3 **G. Attorneys' Fees and Costs**

4 Plaintiff's Counsel request 35 percent of the Gross Settlement Amount in attorneys' fees
5 and \$9,559.80 in reimbursement of actual litigation costs.⁵ (Settlement Agreement § 3.01(a));
6 (Orshansky Decl. ¶¶ 38, 57-74.) Further discussion and support for the requested awards is set
7 forth in Section VIII, *infra*, and the accompanying Orshansky Decl. ¶¶ 38, 57-74.

8 **VI. THE PENALTIES SHOULD BE APPROVED**

9 In 2016, PAGA was amended to require the Court to "review and approve any settlement
10 of any civil action filed pursuant to this part." Labor Code § 2699(l)(2). The amendment also
11 requires that the "proposed settlement shall be submitted to the agency at the same time that it is
12 submitted to the court." As such, on the day of filing of this Motion, the Settlement is also being
13 concurrently submitted to the LWDA in accordance with this section. (Orshansky Decl. ¶ 39.)

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

15 The legislative history of PAGA makes little mention of the approval requirement in
16 section 2699, subdivision (l). PAGA was passed by the legislature as Senate Bill ("SB") 796, and
17 it was signed by the Governor and filed with the Secretary of State on October 12, 2003. *See*,
18 Legislative Digest re Senate Bill No. 796. It took effect on January 1, 2004.

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

25 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the
26 amendments (SB 1809). On July 29, 2004, during the consideration of the amendments in SB

27 ⁵ Notwithstanding that the Settlement Agreement allocated up to \$12,000, Class Counsel's total costs as of today are
28 \$9,559.80. (Settlement Agreement § 3.01(b).) Note: this amount does not include costs to be incurred in connection
with filing and serving final approval papers and appearing at the final approval hearing estimated at \$250.

1 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was
2 published in the Senate Daily Journal, “to clarify the extent of subdivision (1)” of what is now
3 section 2699. He was sending this letter “in response to an issue raised by the Judicial Council of
4 California.” *Id.* In the letter, Senator Dunn stated,

5 The purpose of court review of the penalties in subdivision (l) is to ensure that
6 settlements involving penalties arising out of Labor Code Section 2699 do not
7 undercut the dual statutory purposes of punishment or deterrence, or result in
unjust, arbitrary, and oppressive, or confiscatory settlements. *Id.*

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

19 **B. The Penalties Are Appropriate under the Circumstances**

20 Here, the penalties are appropriate when considered in light of the principles discussed in
21 Senator Dunn’s letter. Plaintiff contends that a ***non-reversionary*** Gross Settlement Amount of
22 \$390,000.00 represents an excellent recovery that is large enough to punish or deter Defendants.
23 (*Orshansky Decl.* ¶ 40.) In fact, Rusnak’s dealerships have already made changes to their practices
24 to address the issues raised in the PAGA notice. (*Id.* ¶ 40.) The Settlement provides a fair and
25 reasonable monetary recovery for the LWDA and Aggrieved Employees in the face of hotly-
26 disputed claims. (*Orshansky Decl.* ¶ 40.)

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 Aggrieved Employees in the Release
2 Period is approximately 596 and the number of PAGA-eligible pay periods is approximately
3 18,132. (Id. ¶ 41); (Settlement Agreement § 1.01(b).)

4 In order for Plaintiff to prevail on the PAGA claims, Plaintiff's Counsel would have to
5 prove the underlying California Labor Code violations, demonstrate that Aggrieved Employees
6 suffered, and demonstrate that Defendants' conduct gives rise to penalties. *See, e.g., Elliot v.*
7 *Spherion Pac. Work, LLC* (C.D. Cal. 2008) 572 F. Supp. 2d 1169, 1181-82 ("Plaintiff's claim
8 under [PAGA] is wholly dependent upon her other claims. Because all of plaintiff's other claims
9 fail as a matter of law, so does her PAGA claim."). (Orshansky Decl. ¶ 42.)

10 Although wage-and-hour actions are amenable to resolution as to a group of employees
11 some courts have also found that, for various reasons, the issues raised by Plaintiff raise
12 individualized issues and/or are unmanageable and thus not suitable for adjudication as to a group
13 of employees. Defendants contended that courts have required, and that due process requires, that
14 the adjudication of PAGA claims meet a "manageability" requirement. *See, e.g., Liuy v. Merrill*
15 *Lynch & Co.* (C.D. Cal. Nov. 10, 2014) No. CV-14-0425-PA, WL 5904904 at **3-4 (Court
16 dismissed the PAGA claim because a multitude of individualized assessments would be necessary,
17 making the PAGA claim unmanageable). (Orshansky Decl. ¶ 43.)

18 Defendants maintained several defenses to Plaintiff's theory of liability, which, if
19 successfully argued and proven, had the potential to eliminate or substantially reduce recovery.
20 Defendants maintained, and continue to maintain, that they had, and continue to have, legally-
21 compliant employment policies and practices throughout the time period at issue. (Orshansky
22 Decl. ¶ 44.) Defendants deny that they ever violated any provision of the California Labor Code,
23 including, but not limited to, those sections for which Plaintiff seeks penalties under the PAGA.
24 (Id. ¶ 44.) Defendants further denied, and continue to deny, that the lawsuit is appropriate for
25 representative treatment for any purpose other than the settlement. (Id. ¶ 44.) Defendants
26 contended that the work experiences of Aggrieved Employees varied because they have different
27 job positions with widely varying responsibilities, and that these factors would pose a challenge to
28

1 proving injuries to all Aggrieved Employees and to the manageability and viability of
2 representative adjudication of the PAGA claims. (Orshansky Decl. ¶ 44.)

3 Defendants also argued that an important feature of PAGA is that the Court retains
4 discretion to lower the penalties if, based on the facts and circumstances of the particular case, to
5 do otherwise would result in an award that is “unjust, arbitrary and oppressive, or confiscatory.”
6 *See*, Labor Code § 2699(e)(2); *see also Thurman v. Bayshore Transit Management, Inc.* (2012)
7 203 Cal. App. 4th 1112, 1136 (holding that a court may reduce the amount of PAGA penalties
8 awarded to an employee based upon discretionary factors). (Orshansky Decl. ¶ 45.) Defendants
9 maintained, and continue to maintain, that they had and continues to have, legally-compliant
10 employment policies and practices throughout the time period at issue. (Id. ¶ 45.) Defendants deny
11 that they ever violated any provision of the California Labor Code. (Id. ¶ 45.) Even if, *arguendo*,
12 such violations occurred, which Defendants deny, Defendants contended that said violations
13 would only be considered “initial violations” and thus heightened “subsequent violation” penalties
14 were not warranted. *See*, Labor Code § 2699(f)(2); *see also Amaral v. Cintas Corp. No. 2* (2008)
15 163 Cal. App. 4th 1157, 1208-09 (“Until the employer has been notified that it is violating a Labor
16 Code provision [...], the employer cannot be presumed to be aware that its continuing
17 underpayment of employees is a ‘violation’ subject to penalties.”). (Orshansky Decl. ¶ 45.)

18 Lastly, Defendants contended that, with respect to PAGA claims, the Court was unlikely to
19 assess cumulative penalties for the maximum number of possible, separate California Labor Code
20 violations, because it would be unjust, arbitrary, oppressive, and/or confiscatory, especially where
21 certain conduct may be regulated by multiple provisions of the California Labor Code that are
22 interrelated and work in tandem. (Id. ¶ 46.) As such, Defendants contended that cumulative
23 penalties and heightened penalties would be unjust, arbitrary, oppressive, and confiscatory. (Id. ¶
24 46.) Finally, many of the claims were derivative of each other, which tended to undermine any
25 stacking of penalties. (Id. ¶ 46.)

26 While Plaintiff disagrees with Defendants’ contentions and maintains that his PAGA claim
27 has merit, in reaching the settlement, Plaintiff and his counsel took into account the strengths and
28 weaknesses of each side’s position and the uncertainty of how the case might have concluded as

1 litigation continued, at trial, and/or appeals. (Id. ¶ 47.) The PAGA settlement amount is reasonable
2 in light of significant risks and uncertainties associated with the PAGA claims in this case.

3 **Second**, the scope of the release is necessarily strictly confined to those PAGA civil
4 penalties that were or could have been alleged in the operative complaint. The Released Claims do
5 not release any Aggrieved Employee’s non-PAGA claims for alleged violations of the Labor
6 Code. The Settlement also requires that each Aggrieved Employee receive a notice, i.e., the
7 Explanatory Letter, which describes this litigation and the Settlement. Plaintiff contends that this
8 notice will educate Aggrieved Employees as to the requirements of the Labor Code, something
9 that is in the public interest and consistent with PAGA’s purposes. *See*, Labor Code § 2699(j)
10 (stating that civil penalties recovered under PAGA shall be distributed to the LWDA for [among
11 other things] “education of employers and employees about their rights and responsibilities under
12 this code.”)

13 **Third**, “the very essence of a settlement is compromise, ‘a yielding of absolutes and an
14 abandoning of highest hopes.’” *Officers for Justice v. Civil Service Comm’n* (9th Cir. 1981) 688 F.
15 2d 615, 624. “The proposed settlement is not to be judged against a hypothetical or speculative
16 measure of what might have been achieved by the negotiators.” *Id.* at 625. Here, the Settlement,
17 even with deductions, provides a substantial sum of \$170,955.15 to the State and \$56,985.05 to
18 Aggrieved Employees.

19 The Settlement is a compromise of highly disputed claims. Plaintiff and his counsel
20 recognize the expense and length of continued proceedings necessary to litigate the matter through
21 trial and any possible appeals. (Orshansky Decl. ¶ 49.) Plaintiff and his counsel have also taken
22 into account the uncertainty and risk of the outcome of further litigation, and the difficulties and
23 delays inherent in such litigation. (Id. ¶ 49.) Moreover, Plaintiff and his counsel are also aware of
24 the burdens of proof necessary to establish liability, both generally and in response to Defendants’
25 defenses thereto, and the difficulties in establishing Defendants’ liability for, and the right to
26 recover, penalties on behalf of Plaintiff, the State of California, and other Aggrieved Employees.
27 (Id. ¶ 49.) Plaintiff and his counsel have also taken into account Defendants’ agreement to enter
28

1 into a settlement that confers significant relief upon Aggrieved Employees and the State of
2 California. (Id. ¶ 49.)

3 Considering all of the facts in this case, Plaintiff and his counsel have determined that the
4 Settlement represents a fair, adequate, and reasonable resolution of the PAGA claims, and that it is
5 in the best interests of Aggrieved Employees and the State of California. (Id. ¶ 50.)

6 The Settlement secured by Plaintiff here is greater than other PAGA penalty awards
7 approved by California state courts, which often range between \$7,500.0 and \$15,000.00 for
8 PAGA claims impacting hundreds or thousands of individuals, resulting in much lower PAGA
9 penalty payments on a per capita basis. *See, e.g., Penaloza v. PPG Industries Inc.*, Case No.
10 BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving PAGA
11 penalties of \$5,000.00 to class of 667 members); *Cabrera v. Advantage Sale & Marketing, LLC*,
12 Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March 12, 2013) (approving
13 PAGA penalties of \$10,000.00 for class of approximately 3,000 members). (Orshansky Decl. ¶
14 51.) The result achieved in this case, and the monetary recovery provided by this Settlement, are
15 well-within the range of an acceptable settlement under the circumstances, especially when
16 compared to the settlement of PAGA claims in other cases.⁶ (Orshansky Decl. ¶ 51.)

17 **Fourth**, public policy strongly favors the settlement of litigation. *Consumer Advocacy*
18 *Group v. Kintetsu Enterprises of America* (2006) 141 Cal. App. 4th 46, 63. Because the proposed
19 Settlement is neither unjust nor ignores the public interest, it should be approved.

20 **VII. THE SETTLEMENT PAYMENT TO PLAINTIFF IS REASONABLE**

21 As part of the Settlement, Plaintiff Raffé Chamoun is providing a general release of his
22 individual claims, in addition to those Released Claims by Aggrieved Employees, and in
23

24 ⁶ *See, e.g., DCH Auto Wage and Hour Cases*, Los Angeles Superior Court, Case No. JCCP4833 (May 2017)
25 (approving the amount of \$15,000 out of \$4 million toward settlement of PAGA claims); *Garcia, supra*, 2012 WL
26 5364575, at *3 (approving the amount of \$10,000 out of \$3.7 million toward settlement of PAGA claims); *Schiller,*
27 *supra*, 2012 WL 2117001, at *14 (approving the amount of \$10,000 out of \$518,245 toward settlement of PAGA
28 claims); *Chu, supra*, 2011 WL 672645, at *1 (approving the amount of \$10,000 out of \$6.9 million toward settlement
of PAGA claims); *Franco, supra*, 2012 WL 5941801, at *14 (approving the amount of \$10,000 out of \$2.5 million
toward settlement of PAGA claims); *Nordstrom Commissions Case, supra*, at 589 (finding no abuse of discretion by
the trial court in approving a settlement that allocates \$0 toward the settlement of PAGA claims that were at issue in
the lawsuit). Here, the value obtained for settlement of the PAGA claims is significant, and it will be distributed in
accordance with and in fulfillment of the objectives of the PAGA statute.

1 consideration thereof, Defendants agreed to a settlement payment in an amount of \$5,000.00.
2 (Settlement Agreement § 1.01(g).) Moreover, although this is not an incentive payment *per se*, the
3 Parties acknowledge that Plaintiff Chamoun took significant risks in bringing this litigation and
4 actively supported its prosecution. While not determinative, numerous other state courts have
5 previously approved service awards and/or individual settlement payments to PAGA
6 representatives in amounts that demonstrate the reasonableness of Plaintiff's request. *See, e.g.*
7 *Garrett v. Bank of America*, Alameda County Superior Court Case No. RG13699027 (Oct. 28,
8 2016) (awarding three PAGA plaintiffs \$25,000.00 each as service awards); *Brewer v. Connell*
9 *Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123 (approving a PAGA
10 representative awarded as an individual settlement payment of \$15,000.00); *Jones v. J.C. Penny*
11 *Corp.*, Los Angeles Superior Court Case No. BC451823 (awarding PAGA representative a service
12 award of \$10,000.00); and *Garcia v. Macy's West Stores*, San Bernardino Superior Court Case
13 No. CIVDS1516007 (approving a PAGA settlement and service award of \$10,000.00).
14 (Orshansky Decl. ¶ 54.)

15 Here, Plaintiff Chamoun spent a significant amount of time helping Plaintiff's Counsel
16 with the prosecution of this action and performing the following tasks: (1) regularly speaking with
17 his attorneys; (2) providing information and documents on dealership practices; (3) evaluating and
18 producing relevant documents; (4) identifying potential witnesses; (5) discussing informal
19 discovery, damages, and penalties issues; (6) participating in the mediation process; and (7)
20 reviewing the terms of and signing the Settlement Agreement. (Declaration of Raffae Chamoun
21 ("Chamoun Decl.") ¶ 6 filed concurrently herewith.) Plaintiff will not 'benefit financially' from
22 this Settlement in any meaningful sense, yet he has obtained a substantial payment for the State of
23 California and for other Aggrieved Employees. Thus, Plaintiff's individual settlement payment in
24 the amount of \$5,000 is modest, reasonable, and should be approved. (Orshansky Decl. ¶ 55.)

25 **VIII. THE ATTORNEYS' FEES AND COSTS ARE REASONABLE**

26 Here, Plaintiff moves for approval of attorneys' fees of 35 percent, or \$136,500, of the
27 common fund. (Settlement Agreement § 3.01(a).) Pursuant to Labor Code section 2699(g)(1), the
28 prevailing party in a PAGA action is entitled to reasonable attorney's fees and costs. Plaintiff is

1 not claiming that he is the prevailing party, but nevertheless the settlement of a PAGA action must
2 consider the fees that have been incurred as an element of the liability analysis and ultimate
3 settlement. (Orshansky Decl. ¶ 57.) This request for attorneys’ fees is supported by California law
4 under the common fund doctrine. The main advantage of the Settlement here is that it creates a
5 significant fund to benefit the LWDA and Aggrieved Employees. As noted by the trial court in
6 *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal. App. 4th 589, plaintiff’s
7 attorneys should share in this recovery. These circumstances are analogous to cases, like wage and
8 hour class actions, where the common fund doctrine is applied. The common fund doctrine has
9 been applied “consistently in California when an action brought by one party creates a fund in
10 which other persons are entitled to share.” *City and County of San Francisco v. Sweet* (1995) 12
11 Cal. 4th 105, 110. (Orshansky Decl. ¶ 58.)

12 An award of fees from the gross settlement amount under the common fund doctrine
13 prevents unjust enrichment of those who benefit from the common fund through the successful
14 efforts of plaintiff’s counsel and furthers the important goal of attracting competent counsel to
15 handle representative actions enforcing minimum labor standards. *Laffitte v. Robert Half Int’l, Inc.*
16 (2016) 1 Cal. 5th 480, 503. In affirming the use of the common fund doctrine in California, the
17 California Supreme Court summarized the benefits of the percentage method of recovery stating:

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

22 See also, *Lealao v. Beneficial Cal. Ins.* (2000) 82 Cal. App. 4th 19, 48 (observing that the key
23 advantage of the common-fund method is that it focuses on the total benefit conferred on the
24 beneficiaries resulting from the efforts of counsel). Thus, the common fund approach is the most
25 reasonable one here, given the nature of the case and of the Parties’ Settlement. (Orshansky Decl.
26 ¶¶ 57-63.)

27 The attorney fee award requested is also consistent with what courts have awarded in other
28 representative action cases. The following list shows PAGA actions and mixes PAGA/class action

1 cases where attorney's fees were awarded on a common fund basis in a range between 33.33% and
2 40%:

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

5 *Robles v. DCH*, Los Angeles County Superior Court Coordination Proceeding Case No.
6 4833 (**33.33% fee awarded** on \$4,035,600 settlement of mixed PAGA/class claims);

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

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

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

14 *Zelada v. Majestic Terminal Services*, San Bernardino Superior Court Case No.
15 CIVDS1916968 (**38% fee awarded** on \$1,800,000 settlement of a PAGA only case);

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

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

20 Plaintiff's Counsel's application for attorneys' fees in light of the facts and circumstances
21 surrounding the case is well-within the range of reasonableness. In fact, historically, courts have
22 awarded fees as high as fifty percent (50%) of the settlement in complex actions. *See In re*
23 *Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F. Supp. 494 (**awarding attorneys' fees in the**
24 **amount of 45%** of the \$7.3 million total settlement amount); *Beech Cinema, Inc. v. Twentieth-*
25 *Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F. Supp. 1195 (awarding approximately **53% of the**
26 **settlement as attorneys' fees**). California courts routinely approve attorneys' fees awards
27 "average[ing] around one-third of the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th
28

1 43, 66 n.11 (lower court found the range of contingency fees in marketplace to be up to 40 percent
2 and determined such a percentage fee was appropriate).

3 Based on the foregoing, awarding attorneys' fees based on a percentage of the gross
4 settlement amount is favored by California Courts when a fund established for the common
5 benefit of other is involved, such as here. *See, Laffitte, supra*, 1 Cal. 5th 480, 503. Here, Plaintiff's
6 Counsel represented Plaintiff (and the State of California) in this matter on a strictly contingency
7 basis and, as such, had to forego other financial opportunities to litigate other cases (contingency
8 and hourly), incurred the risk of non-recovery after investment of time, money, and resources, and
9 have done so since the inception of this case without payment or compensation. (*Orshansky Decl.*
10 ¶ 62.) This is not an easy burden for Plaintiff's Counsel and, if the best that could be hoped for is
11 merely to be paid the customary hourly rate, such would not sufficiently incentivize future similar
12 private attorney general/qui tam cases with contingency risks. (*Id.* ¶ 63.) Given that the request
13 for attorneys' fees here falls well within the norms accepted in comparable California court cases,
14 Plaintiff's request for \$136,500 in attorneys' fees award is fair and reasonable.

15 Significantly, *Laffitte* also held that trial courts have discretion to assess reasonableness of
16 fee awards with tools such as the lodestar cross-check, though they need not do so. *Laffitte, supra*,
17 1 Cal. 5th at 506. This Court can and should award attorneys' fees and costs based on the
18 percentage fee alone in light of the excellent results achieved and for the reasons stated.
19 Nevertheless, the lodestar "cross-check" here also supports the requested contingency-fee
20 percentage. *Serrano v. Priest* (1975) 20 Cal. 3d 25, 48. A multiplier of approximately 1.49 is
21 necessary to yield the requested fees. (*Orshansky Decl.* ¶ 70.) The requested multiplier in this case
22 is within even the modest multipliers that are accepted by California courts. *See, Vizcaino v.*
23 *Microsoft Corp.* (9th Cir. 2002) 290 F. 3d 1043, 1050-1051 (looking to multipliers awarded in
24 comparable cases as evidence of reasonableness; affirming 3.65 multiplier). (*Orshansky Decl.* ¶
25 70.) Multipliers routinely range from 3 to 5, and it is not uncommon that multipliers of between 5
26 and 10, or higher, are applied. *See, e.g., Wilson v. Bank of Am. Natl. Trust & Savs. Assn.* (Cal. Sup.
27 Ct., Aug. 16, 1982) Case No. 643872 (multiplier of 10); *Glendora Comm. Redev. Agency v.*
28 *Demeter* (1984) 155 Cal. App. 3d 456, 465 (affirming multiplier of 12, and expressly rejecting

1 argument that fee was either exorbitant or unconscionable); *Wershba v. Apple Computer, Inc.*
2 (2001) 91 Cal. App. 4th 224, 255 (noting that “[m]ultipliers can range from 2 to 4 or even
3 higher”); *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 298 (3-4 are in
4 the “range [of] common” multipliers for class actions); *Laffitte, supra*, 1 Cal. 5th at 487-88
5 (multiplier of 2.03 to 2.13); *City of Oakland v. Oakland Raiders* (1988) 203 Cal. App. 3d 78
6 (affirming a 2.34 multiplier without remand); *Sutter Health Uninsured Pricing Cases* (2009) 171
7 Cal. App. 4th 495, 512 (applying a 2.52 multiplier); *Chavez, supra*, 162 Cal. App. 4th at 66
8 (applying a 2.5 multiplier); *Chau, et al v. CVS RX Services, Inc.*, Los Angeles County Superior
9 Court No. BC349224, Order Granting Final Approval of Class Action Settlement, Reasonable
10 Attorneys’ Fees and Costs and Service Payments to the Class Representatives, a 3.8 multiplier was
11 applied based primarily on contingent risk and the “excellent results [] obtained [] with relative
12 efficiency”). (*Orshansky Decl.* ¶ 70.) Recently, on October 23, 2020, the California Court of
13 Appeal issued its ruling in *Santana v. FCA US, LLC*, Case No. G057244, G058020, affirming the
14 trial court’s award of fees to plaintiff’s attorneys in a contingency case utilizing a 2.0 multiplier
15 explaining:

16 Under our precedents, the unadorned lodestar reflects the general local hourly rate
17 for a fee-bearing case; it does not include any compensation for contingent risk,
18 extraordinary skill, or any other factors a trial court may consider under *Serrano*
19 III. The adjustment to the lodestar figure, *e.g.*, to provide a fee enhancement
20 reflecting the risk that the attorney will not receive payment if the suit does not
21 succeed, constitutes earned compensation; unlike a windfall, it is neither
unexpected nor fortuitous. Rather, it is intended to approximate market-level
compensation for such services, which typically includes a premium for the risk of
nonpayment or delay in payment of attorney fees. *Id.* at 20 (citing *Ketchum v. Moss*
(2001) 24 Cal.4th 1122, 1138).

22 The *Santana* court concluded a multiplier was appropriate to account for the contingency factor.

23 Accordingly, the lodestar cross-check affirms that the fee award requested does in fact fall
24 within the range of reasonableness. (*Orshansky Decl.* ¶ 71.)

25 The Settlement Agreement authorized Plaintiff’s Counsel to recover actual litigation costs
26 of up to \$12,000. (*Settlement Agreement* § 3.01(b).) In actuality, Plaintiff’s Counsel have
27
28

1 advanced and seek reimbursement for \$9,559.80 in actual litigation costs.⁷ These expenses
2 include: (1) Court filing fees; (2) LWDA filing fees; (3) mediation fees; and (4) mailing, postage,
3 and delivery. (Orshansky Decl. ¶¶ 72-74.) The expenses incurred by Plaintiff's Counsel in this
4 matter benefited Plaintiff, the LWDA, and Aggrieved Employees, and are of the type routinely
5 billed by attorneys in such litigation. Given that the \$9,559.80 in litigation costs are reasonable
6 and uncontested, they should be approved.

7 **IX. CONCLUSION**

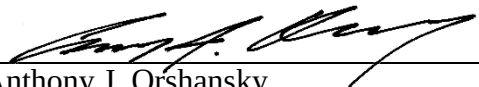
8 For the foregoing reasons, Plaintiff requests that the Court approve the PAGA Settlement
9 of this matter.

10 Respectfully submitted,

11 Dated: November 17, 2020

COUNSELONE, PC

12
13 By:



14 Anthony J. Orshansky
15 Jennifer L. Connor
16 Attorneys for Plaintiff, the State of
17 California, and Aggrieved Employees
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27 ⁷ Notwithstanding that the Settlement Agreement allocated up to \$12,000, Class Counsel's total costs as of today are
28 \$9,559.80. (Settlement Agreement § 3.01(b).) Note: this amount does not include costs to be incurred in connection
with filing and serving final approval papers and appearing at the final approval hearing estimated at \$250.