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**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF ORANGE**

MACKENZIE HEYMAN, individually and on  
behalf of those similarly situated,

Plaintiff,

vs.

THE RESORT AT PELICAN HILL, LLC;  
IRVINE MANAGEMENT COMPANY; THE  
IRVINE COMPANY, LLC; and DOES 1-50,  
inclusive,

Defendants.

Case No. 30-2020-01145518-CU-OE-CXC

*Assigned for All Purposes to:*

Hon. William D. Cluster

Dept. CX101

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

Date: July 26, 2024

Time: 9:00 a.m.

Dept.: CX101

**Res. No. 74319580**

Complaint Filed: May 26, 2020

Trial Date: None Set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mackenzie Heyman (“Plaintiff”) seeks approval of a \$1,000,000 non-reversionary  
4 Settlement for civil penalties against Defendants The Resort at Pelican Hill, LLC, Irvine  
5 Management Company, and The Irvine Company, LLC (“Defendants”) under the Private Attorneys  
6 General Act of 2004, Cal. Lab. Code §§ 2698, *et seq.* (“PAGA”). The Private Attorneys General Act  
7 Settlement Agreement and Release (“Settlement”) resolves this consolidated action for Defendants’  
8 alleged violations of the Labor Code in California.

9 Plaintiffs now seek this Court’s approval of the PAGA-only Settlement to resolve this action.  
10 Through exhaustive discovery practice and two mediations, the Parties reached the instant  
11 Settlement. The resulting non-reversionary Settlement is reasonable based on its terms: (1) the Gross  
12 Settlement Amount is \$1,000,000; (2) no portion of the Gross Settlement Amount will revert to  
13 Defendants; (3) PAGA Penalties of approximately \$603,495.28 will be available for distribution to  
14 the State of California and the Aggrieved Employees; (4) the PAGA Penalties will be allocated  
15 between the State of California (*i.e.*, 75% or \$452,621.46) and the Aggrieved Employees (*i.e.*, 25%  
16 or \$150,873.82); (5) Service Award of \$10,000 will be paid to the Named Plaintiff in this action for  
17 her efforts to obtain the Settlement; (6) the actual costs and expenses of the Settlement  
18 Administrator, ILYM Group, Inc. ( “ILYM” ), currently estimated to be \$9,450, will be paid from  
19 the Gross Settlement Amount; (7) up to 35% (*i.e.*, 350,000) of the Gross Settlement Amount for  
20 attorneys’ fees; and (8) actual costs will be reimbursed to Plaintiffs’ counsel in an amount not to  
21 exceed \$30,000, and which is estimated to be \$27,054.72.

22 Because this is a PAGA-only Settlement, the process for approval is straightforward: “The  
23 superior court shall review and approve any settlement of any civil action filed pursuant to this part.”  
24 Cal. Lab. Code § 2699(1)(2). The Settlement merits full approval because it is fair, reasonable, and  
25 adequate, and fulfills the purpose of PAGA (*i.e.*, to deter potential violations of the Labor Code and  
26 to provide relief that is genuine, meaningful, and consistent with California’s goal of benefitting the  
27 public through enforcement of labor laws). By making more than \$150,873.82 available to  
28 approximately 1,941 Aggrieved Employees and requiring Defendants to pay more than \$450,000 to

1 the LWDA, this Settlement vindicates the purpose and goals of PAGA.

2 Plaintiff thus respectfully submits that the Settlement satisfies the purpose of the PAGA and  
3 should be approved.

## 4 **II. FACTS AND PROCEDURE**

### 5 **A. Factual Background**

6 Plaintiff was employed at The Resort at Pelican Hill as an in-room food service employee  
7 who was subjected to the unlawful retention of a service charge that should have been distributed  
8 to service employees. Defendants charge their customers a mandatory “service fee “ of  
9 approximately 20%, which customers reasonably believe represents gratuity/tips for Ms. Heyman  
10 and the Aggrieved Employees. In reality, Ms. Heyman and Aggrieved Employees only receive 1%  
11 to 2% of that service fee, with Defendants retaining the remaining amount. As a result, Ms. Heyman  
12 and Aggrieved Employees are denied all gratuity payments that customers reasonably believe would  
13 be paid to these service workers.

### 14 **B. Pleadings and Arbitration**

15 On May 26, 2020, Plaintiff Heyman filed a class action against Defendants in this Court, for  
16 the failure to pay all gratuities owed, intentional interference with prospective economic advantage,  
17 conversion, unjust enrichment, failure to provide timely and accurate itemized wage statements,  
18 waiting time penalties, and unlawful business practices, pursuant to California Labor Code, the  
19 California Unfair Competition Law, and other California laws. (Declaration of Carolyn H. Cottrell  
20 [“Cottrell Decl.”], ¶ 7). On July 16, 2020, once the time for the Labor Workforce and Development  
21 Agency review had expired, Plaintiff filed a First Amended Complaint to assert claims for penalties  
22 under the California Private Attorneys General Act of 2004 (“PAGA”). (*Id.*, ¶ 8).

23 Following the Court’s May 18, 2021, Minute Order granting Defendants’ motion to compel  
24 arbitration as to all of Plaintiff’s individual claims and staying Plaintiff’s PAGA and class action  
25 claims pending arbitration, Plaintiff submitted her demand for arbitration against all Defendants to  
26 JAMS on July 9, 2021. (*Id.*, ¶ 9). On August 4, 2023, the Court issued a Minute Order compelling  
27 Plaintiff’s individual PAGA claims in the ninth and tenth causes of action to arbitration. (*Id.*, ¶ 11).

28 On October 1, 2021, the Parties submitted a Stipulation to dismiss Respondent Irvine

1 Company from the arbitration, and Respondents The Resort at Pelican Hill LLC and The Irvine  
2 Management Company submitted their answer to the First Amended Complaint. (*Id.*, ¶ 12).

3 **C. Discovery**

4 In July of 2021 Plaintiff submitted her individual claims to arbitration and the PAGA case  
5 was stayed. On April 12, 2022, Plaintiff served written discovery in her individual Arbitration and  
6 received responses after a September Informal Discovery Conference with the Arbitrator. (*Id.*, ¶ 13).

7 Plaintiff was subjected to a whole day deposition on February 2, 2023. (*Id.*, ¶ 14).

8 In July of 2022 the *Viking River* Decision by the United States Supreme Court prompted the  
9 Parties to delay Arbitration in anticipation of the California Supreme Court's Ruling in *Adolph*.<sup>1</sup> As  
10 such the individual arbitration was continued to June 19-23, 2023. In the interim the parties agreed  
11 to mediation to seek a resolution of both individual and PAGA claims and disclosed informal  
12 discovery between April and December of 2023 regarding the potential PAGA Aggrieved  
13 Employees. This included Defendant's production of over 35,000 documents including time and  
14 pay data, paystubs, audit trails, and other employment records for a random sample of 10 percent of  
15 employees. (*Id.*, ¶¶ 17, 22).

16 **D. Mediation**

17 On May 17, 2023, the Parties attended a mediation with Steve Pearl in hopes of informally  
18 resolving both matters before this Court and in arbitration but were unsuccessful. (Cottrell Decl., ¶  
19 18).

20 Following the May 17, 2023 mediation, Plaintiff identified an alternative theory of liability.  
21 The First Amended Complaint largely concerned the service charges collected by The Resort at  
22 Pelican Hill.

23 However, upon analysis of the records produced for mediation, Plaintiff discovered  
24 alternative Labor Code violations. Plaintiff's time and pay records Plaintiff showed 213 instances  
25 where she was not properly paid a meal premium. Based on Defendant's assertion that the service  
26 charge was not a gratuity but rather constituted wages, Defendant's failure to incorporate the service  
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28 <sup>1</sup> *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639; *Adolph v. Uber Techs., Inc.* (2023) 14  
Cal.5th 1104, 1120 (The *remedy* for a Labor Code violation, through settlement or other means, is  
distinct from the fact of the violation itself," and only the latter is required for PAGA standing).

1 charge wages into the regular rate calculation for purposes of meal and rest break premiums, and  
2 overtime wage calculations, led to the discovery of an alternative theory of violations.

3 The Parties agreed to include this alternative theory of liability as part of the mediation, but  
4 narrowed the scope of Aggrieved Employees, to just those employed by Defendant The Resort at  
5 Pelican Hill, not the adjacent apartment property. Both properties – the Resort at Pelican Hill and  
6 the apartments – fall under the umbrella of the Irvine Company, but they are managed and owned  
7 by separate entities. To avoid any potential conflict with the coordinated PAGA case *Joseph Delia*  
8 *v. The Irvine Company, LLC* (which focused on the employees who worked at the apartments), the  
9 Parties clarified that the group of Aggrieved Employees to be covered by any settlement were just  
10 those, who like Plaintiff, were employed at the Resort at Pelican Hill. (*Id.*, ¶ 21).

11 On January 2, 2024, the Parties attended a second mediation with Steve Rottman. The Parties  
12 settled the PAGA and Individual claims at mediation on January 2, 2024 with a MOU identifying  
13 the contours of the settlement and a long form to be drafted and signed thereafter. On March 20,  
14 2024 the Parties entered into the long-form PAGA settlement agreement, and Plaintiff’s individual  
15 settlement agreement, resolving all of the claims asserted by Plaintiff individually and in Plaintiff’s  
16 notice to the LWDA on behalf of non-exempt employees who worked at The Resort at Pelican Hill,  
17 and resolving the matter before this Court and in arbitration. (*Id.*, ¶ 22.)

18 As part of the Settlement, the Parties further stipulated to amend Plaintiff’s Second Amended  
19 Complaint to include the alternative PAGA claims for alleged violations of California labor laws,  
20 as asserted in Plaintiff’s PAGA notice to the LWDA (but which were not pleaded in Plaintiff First  
21 Amended Complaint). Plaintiff filed her Second Amended Complaint pursuant to the stipulation on  
22 June 12, 2024 (*Id.*, ¶ 23).

### 23 **III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

#### 24 **A. Terms of the Settlement and Distribution of PAGA Penalties**

25 The Settlement provides that Defendants will pay a non-reversionary Gross Settlement  
26 Amount of \$1,000,000. (Settlement, ¶ 1.12.)<sup>2</sup> From the Gross Settlement Amount, upon Court  
27

28 <sup>2</sup> The Settlement also contemplates an individual settlement amount paid to Plaintiff for her individual claims as asserted in her individual demand in the amount of \$75,000 in addition to the

1 approval, payments will be made to the LWDA, the Aggrieved Employees, the Named Plaintiff for  
2 her court-approved service award, to Plaintiff's Counsel for court-approved attorneys' fees and  
3 litigation costs, and to ILYM for settlement administration costs. (*See, e.g., id.*, ¶ 1.17). The basic  
4 terms of the Settlement follow here:

- 5 • Aggrieved Employees: All individuals who were employed by Irvine Management  
6 Company at The Resort at Pelican Hill in California and classified as non-exempt  
7 employees between April 7, 2019 to January 2, 2024 (the "PAGA Period"). (*Id.* ¶¶ 1.4,  
8 1.22). There are approximately 1,941 Aggrieved Employees. (Declaration of Paul  
9 Amante, Jr. ¶ 3.)
- 10 • Attorneys' Fees and Costs: Subject to Court approval, Plaintiffs' Counsel may seek a  
11 maximum of \$350,000<sup>3</sup> (*i.e.*, 35% of the Gross Settlement Amount) for Plaintiffs'  
12 Counsel's attorneys' fees, and a maximum of no more than \$30,000 in Plaintiffs'  
13 Counsel's litigation costs. (Settlement, ¶¶ 1.20, 3.21).
- 14 • Funding and Payment Timeline: IMC will pay the Gross Settlement Amount into the  
15 Settlement Administrator's designated account no later than 30 days after the Effective  
16 Date. (*Id.*, ¶ 4.3.) Within 14 days after that date, the Administrator mail checks for  
17 Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses  
18 Payment, the Service Award, and the PAGA Counsel Expenses Payment. (*Id.*, ¶ 4.4).
- 19 • PAGA Penalties: The PAGA Penalties, or the Gross Settlement Amount less attorneys'  
20 fees and costs, service awards, and settlement administration costs, is estimated to be  
21 \$616,660. (*See* Cottrell Decl. ¶ 19.) Seventy-five percent of the PAGA Penalties (*i.e.*,  
22 \$462,495) will be paid to the LWDA, and twenty-five percent will be paid to the  
23 Aggrieved Employees (*i.e.*, \$154,165). (*Id.*; Cottrell Decl., ¶ 19).
- 24 • Releases: The Aggrieved Employees will fully release and discharge the Released Parties  
25 from all claims for civil penalties under the PAGA for claims predicated on the California  
26 Labor Code violations asserted in Plaintiff's LWDA Notice and operative complaint.  
(Settlement, ¶¶ 1.28, 1.29, 5.1, 5.2). Aggrieved Employees have no right to opt-out or  
27 exclude themselves from the Settlement. (*Id.*).
- 28 • Service Award: Subject to Court approval, each of the Named Plaintiff will receive a  
maximum of \$10,000 for her efforts in bringing and prosecuting this matter. (*Id.*, ¶ 1.30).
- Settlement Administrator Costs: ILYM, the parties agreed-upon settlement administrator,  
will handle the administration of the settlement, including establishing a qualified  
settlement fund and issuing payments and tax forms to the Aggrieved Employees, the  
LWDA, Plaintiff, and Plaintiff's Counsel, for an estimated cost of \$9,450. (*Id.*, ¶¶ 1.2,  
3.1, 3.2, 3.3, 4.2, 4.3, 4.4, 4.5, 7.1-7.4; Declaration of Lisa Mullins, ¶¶ 6-7, Ex. C).

27 Gross Settlement Amount, in exchange for her general release, which includes a waiver of rights  
28 under Cal. Code Civ. Proc. § 1542. (Cottrell Decl., ¶ 18, Exhibit A; Settlement, ¶¶ 1.27, 5.3).

<sup>3</sup> Although the Settlement terms permit Plaintiff's Counsel to seek up to 35%, as discussed later,  
Plaintiff's Counsel only requests one third of the Gross Settlement and supports that request as being  
a fraction of the Lodestar of fees actually incurred.

1           **B.     Allocation and Payments for the Aggrieved Employees**

2           Payments to Aggrieved Employees will be made from twenty-five percent of the Net  
3 Settlement Amount. (Settlement, ¶ 3.2.4.) The individual allocations will be calculated on a *pro rata*  
4 basis using the number of pay periods worked by each aggrieved employee during the PAGA  
5 Release Period. (*Id.*, ¶¶ 1.13, 3.2.4.1). Because the payments to the Aggrieved Employees represent  
6 civil penalties, they will be treated as non-wage income with no taxes withheld, and will be reported  
7 by the Settlement Administrator on IRS Form 1099s to the respective PAGA Settlement Employee  
8 and governmental authorities. (*Id.*, ¶ 7.2).

9           **IV.   THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND WARRANTS**  
10           **COURT APPROVAL**

11           Any settlement of a PAGA action brought by an aggrieved employee must be approved by  
12 the Court. Cal. Lab. Code § 2699(1)(2). Because PAGA is not subject to class certification  
13 procedures, the Court must simply review the settlement and approve it if it is “fair, reasonable,  
14 and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future  
15 ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.* (2021) 72  
16 Cal.App.5th 56, 77. The Court also held that the trial court must assess “the fairness of the  
17 settlement’s allocation of civil penalties between the affected aggrieved employees.” (*Id.*, at 64-65).

18           In reviewing PAGA settlements, courts have recognized that PAGA settlements must be  
19 viewed in light of the PAGA’s public purpose, namely augmenting the state’s enforcement  
20 capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance  
21 with California’s labor law. *See, e.g., Vargas v. Central Freight Lines* (S.D. Cal. Sept. 25, 2017) No.  
22 16-cv-00507-JLB, 2017 WL 4271893, \*6; *Ramirez v. Benito Valley Farms, LLC* (N.D. Cal. Aug.  
23 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, \*6-7. “[T]he Court will approve  
24 the PAGA settlement upon a showing that the settlement terms are fundamentally fair, adequate, and  
25 reasonable in light of PAGA’s policies and purposes.” *Jordan v. NCI Group* (C.D. Cal. Jan. 5, 2018)  
26 No. EDCV 16-1701 JVS (SPx), 2018 U.S. Dist. LEXIS 25297, at \*5.

27           The Parties agreed upon and structured the Settlement to fit within this framework. Plaintiff  
28 analyzed the facts and claims to evaluate the Settlement’s fairness and reasonableness. Plaintiff’s

counsel conducted discovery to ascertain the extent of violation. Based on the Defendant's assertion that the service charge payment was a wage that implicated a regular rate violation in relation to premium payments. Plaintiff has amended her complaint to reflect the regular rate miscalculation practice. Plaintiff's counsel conducted outreach that resulted in substantive discussions with additional Aggrieved Employees to corroborate Plaintiff's working experience across the group of Aggrieved Employees. Plaintiff's counsel used the data provided in anticipation of mediation and the discovery obtained in arbitration to perform an analysis of the claims and Defendants' exposure, the results of which are summarized herein. The proposed Settlement advances the PAGA's purpose and is fair and reasonable in light of the challenges and risks presented by continued litigation and should be approved.

#### **A. The Proposed Settlement Advances the PAGA's Purpose**

The PAGA provides an enforcement mechanism for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to the individual plaintiffs and other employees. *See Arias v. Super. Ct.* (2009) 46 Cal.4th 969 at 980. In enacting PAGA, the Legislature expressly stated that "the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code." Stats. 2003 ch. 906, § 1(b). In enacting the PAGA, the legislature expressly stated that "the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code." *Id.*

The Gross Settlement Amount of \$1,000,000 serves as a warning to Defendants and to employers throughout California that failing to ensure strict compliance with the Labor Code will lead to expensive repercussions. If approved by the Court, the ensuing penalty will achieve PAGA's objectives by (1) holding an employer accountable for its violations of the Labor Code; (2) deterring future violations of the Labor Code by Defendants and other employers; (3) collecting penalties from an employer and recovering 75% of the penalties *i.e.*, \$462,495, on behalf of the State of California for purposes of enforcement and education; and (4) distributing 25% of the penalties, *i.e.*, \$154,165 to the Aggrieved Employees pursuant to Cal. Lab. Code § 2699(i). (Cottrell Decl. ¶ 29.)

This penalty shows Defendants and other employers that they must have compliant policies

that must be strictly enforced. This settlement encourages employers to expend additional resources to ensure that they handle service charges collected in a compliant manner, pay employees for all hours worked and authorize and permit meal and rest breaks and deter other violations of the Labor Code. In addition, the Settlement will result in a large payment to the LWDA to use for furthering its mission of protecting workers as well as reasonable payments to the Aggrieved Employees which do not require them to release their individual claims under the Labor Code, but simply deter such employees from asserting standing to represent any future PAGA claims.

**B. The Settlement Provides a Fair, Reasonable, and Adequate Resolution for the State of California and the Aggrieved Employees**

**1. The Settlement and Release Language is Fair to the Aggrieved Employees and the State of California**

The proposed Settlement ensures that the Aggrieved Employees are fairly compensated under the PAGA statute, as each will receive a *pro rata* share based on their pay periods worked, ensuring the distribution of the PAGA component is fair to those affected. *Moniz*, 72 Cal.App.5th at 77. Additionally, the scope of the Settlement Release language<sup>4</sup> is fair to Aggrieved Employees because the release is limited to the PAGA penalties not to the damages any individual might claim for the underlying Labor Code Violations. Aggrieved Employees are still able to seek recovery for damages caused by the underlying violations. *Moniz, supra*, at 86 (holding that “any and all known and unknown claims under the PAGA against the Released Parties that were or could have been pled based on the factual allegations of the Complaint “was a fair release that did not preclude individual claims for damages from Labor Code violations.”).

Here, the release is not overbroad. It is tailored to the scope of the claims actually litigated in this case through formal and informal discovery. The release is fair in scope and distribution to all

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<sup>4</sup> Release Language from the Settlement Agreement 5.1 (Cottrell Decl., ¶ 18) (“from all PAGA claims for civil penalties under California Labor Code Sections 2698, *et seq.*, predicated on the California Labor Code violations that are asserted in the LWDA Notice and operative complaint (or PAGA claims that could have been asserted based on the alleged Labor Code violations as well as the facts alleged in the operative LWDA Notice and which will be reflected in the amended complaint) which are for civil penalties pursuant to Labor Code section 2699, *et seq.* for violations of Labor Code sections 201, 202, 203, 204, 225.5, 226, 226.3, 226.7, 256, 351, 432, 510, 512, 1194, 1197, 1198.5, 2802 and applicable Industrial Welfare Commission Wage Orders during the PAGA Period.”)

1 affected employees. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549 (holding a settlement  
2 must be “fair to those affected.”) While courts have found that a release of tangential claims is not  
3 fair due to over-breadth of release language, narrowly tailored releases are frequently approved.  
4 *Garcia v. Great Wolf Resorts Holdings*, 2022 Cal. Super. LEXIS 22224, \*1-2 (the State and the  
5 Aggrieved Employees[...]will be bound instead by the PAGA-specific release in the settlement  
6 agreement.) (Judge Claster); *Torres v. Imperial Parking Indus.*, 2023 Cal. Super. LEXIS 63949, \*5  
7 (Judge Claster); *compare to Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 528).

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 *Ghazanfari* this Court  
10 approved a PAGA settlement under which the aggrieved employees released the PAGA claims  
11 brought but were not barred from pursuing their underlying claims under the Labor Code.<sup>5</sup>  
12 *Ghazanfari v. Better Mortg. Corp.*, Superior Court of California, County of Orange, Case No. 30-  
13 2022-01248489-CU-OE-CXC.

14 Here, the Released PAGA Claims are limited to PAGA penalties for the underlying violations  
15 including failure to remit tips, failure to provide compliant meal and rest breaks, failure to pay all  
16 hours worked, failure to pay overtime, and inaccurate wage statements. (Settlement Agreement p.  
17 12). There is no release of individual Aggrieved Employee’s claims for damages from the underlying  
18 violations of the Labor Code, and employees remain free to pursue those claims. (Cottrell Decl. ¶  
19 30). Here, the allocation of PAGA penalty payments is based on the pro rata portion of workweeks  
20 for each Aggrieved Employee and thus represents a fair distribution among such employees for the  
21 scope of penalties released. Therefore, the release of PAGA claims and the distribution of the  
22 settlement is fair and should be approved.

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25 <sup>5</sup> *Hernandez v. Best Buy Stores, LP* (S.D. Cal. June 6, 2017), No. 12cv2587 JM (KSC), 2017 U.S.  
26 Dist. LEXIS 86859 at \*6 (The court approved a settlement that “releases Best Buy from PAGA  
27 liability for any and all claims by similarly situated general managers that were asserted or  
28 reasonably could have been asserted based on the facts of this case.”) *Mancini v. W. & S. Life Ins.*  
*Co.* (S.D. Cal. Sep. 18, 2018) No. 16cv2830-LAB (WVG), 2018 U.S. Dist. LEXIS 160320 at \*6 (A  
similar settlement was approved in *Mancini* where “The settlement does not bar the employees other  
than Mancini from pursuing other (non-PAGA) Labor Code claims against Defendants should they  
violate those, which leaves open the possibility of additional compensation.”)

1                                   **2.       The Settlement is Well Within the Range of Reasonableness Based**  
2                                   **on the Underlying Facts.**

3           Not only does the Settlement advance the PAGA’s purpose but the result achieved is well  
4 within the range of reasonableness. Based on the underlying facts and the risks faced by Plaintiff in  
5 proving these claims the Gross Settlement amount represents an excellent 27% recovery of the  
6 substantive service charge violation. (Cottrell Decl., ¶ 31). As an enforcement action this recovery  
7 for what Defendant’s frame as a simple miscalculation is meaningful. “A PAGA action is at heart a  
8 civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class  
9 relief.” *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1124. A court’s focus is  
10 thus not the amount employees ultimately receive as a result of a PAGA settlement, but on whether  
11 the settlement achieves PAGA’s objectives, even if it represents only a portion of an employer’s  
12 total exposure.<sup>6</sup> As is the case here, a settlement that represents a fraction of the potential recovery  
13 is still meaningful and reasonable.<sup>7</sup>

14           Here, the Settlement achieved represents a reasonable result for both the State of California  
15 and the Aggrieved Employees. Plaintiff’s Counsel analyzed Defendants’ informal discovery  
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17 <sup>6</sup> *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245, (“The proposed settlement is  
18 not to be judged against a hypothetical or speculative measure of what might have been achieved  
19 had plaintiffs prevailed at trial.”) disapproved on another ground in *Hernandez v. Restoration*  
20 *Hardware, Inc.* (2018) 4 Cal.5th 260 [Court needs to “scrutinize the proposed settlement agreement  
21 to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud  
22 or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
23 whole, is fair, reasonable and adequate to all concerned.”] [internal quotation marks omitted].

24 <sup>7</sup> Courts in California are generally cautious about PAGA settlements representing less than 1% of  
25 the total value of a PAGA claim, but not regarding PAGA settlements representing 1% or more of  
26 the total value of a PAGA claim. *Haralson v. U.S. Aviation Servs. Corp.* (N.D. Cal. 2019) 383  
27 F.Supp.3d 959, 972-73 (collecting cases discussing settlements of less than 1% of the total value of  
28 a PAGA claim); *Moreno v. Capital Bldg. Maint. & Cleaning Servs.* (N.D. Cal. May 5, 2021) No.  
19-cv-07087-DMR, 2021 U.S. Dist. LEXIS 87268, at \*25 n. 3 (noting the PAGA portion of a  
proposed settlement representing 2.4% of total exposure under the PAGA exceeded the 1%  
benchmark “and therefore does not invoke the additional concerns examined in *Haralson*”). *See*  
also, e.g., *Johnson v. Dispensaries* (Super. Ct. L.A. Cnty. Nov. 1, 2022) No. 21SMCV00156, 2022  
Cal. Super. LEXIS 76537, at \*4, 20 (approving PAGA allocation of \$40,000, with \$10,000 going  
to the Aggrieved Employees); *Schiller v. David’s Bridal, Inc.* (E.D. Cal. 2012), No. 1:10-cv-00616-  
AWI-SKO, 2012 U.S. Dist. LEXIS 80776, at \*35-36 (approving PAGA settlement of \$7,500 or  
0.14% of the total settlement). Indeed, the LWDA has stated it “is not aware of any existing case  
law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation  
to the recovery on other claims in the action.” *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S.  
Dist. LEXIS 137272, at \*3 (quoting from the LWDA response in *O’Connor v. Uber Techs. Inc.*  
(N.D. Cal 2016) 201 F.Supp.3d 1110).

1 including the violation rate calculations based on a 10% sample of the identified Aggrieved  
2 Employee population as well as information provided by employees during interviews with  
3 Plaintiff's counsel and Plaintiff's specific payroll records as compared to her testimony of  
4 experienced violations.. From this the Gross Settlement Amount represents approximately 27% of  
5 penalties potentially recoverable for the failure to properly calculate an employee's regular rate for  
6 meal and rest premiums.<sup>8</sup> (*See id.*, ¶ 31.) Based on the data obtained there were approximately  
7 37,762 PAGA pay periods where the service charge wage was paid and a meal/rest premium was  
8 paid that resulted in a regular rate violation. This the lead to the calculation of a likely exposure of  
9 \$3,762,761 for the violation. The \$1,000,000.00 Gross Settlement is not only a 27% recovery based  
10 on that substantive violation, but reflects a recovery of approximately \$27 per pay period for each  
11 pay period worked with the violation and an average of \$515 per Aggrieved Employee.

12 Thus, the proposed Settlement represents a fair and reasonable compromise on the PAGA  
13 penalties that promotes the PAGA's purpose of disincentivizing Labor Code violations.

### 14 **3. Litigation Risks Further Support the Adequacy of the Settlement.**

15 Despite the vigorous defense faced, and assertive prosecution of Plaintiff's claims, there  
16 remain significant risks in continuing on with litigation. These risks are such that a settlement that  
17 represents a fraction of possible recovery is still an adequate result based on the facts and legal  
18 uncertainty. First, the Court is likely to limit stacking and exercise discretion in reducing any  
19 penalties.<sup>9</sup> Second, trials are inherently risky and bear the possibility of shifting facts or unforeseen  
20 difficulties, particularly where there is an underlying individual arbitration. Each of these are  
21 discussed below but in sum they lead to a reasonable determination that the Settlement Amount is  
22 adequate to represent a success in achieving the goals of the PAGA based on the significant risks of  
23 going forward.

24 First, even where Plaintiff is successful on the merits, this Court may still choose - at its  
25

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26 <sup>8</sup> Based on Defendant's admission that the service charge was a wage, Plaintiff's analysis focused  
27 on the substantive regular rate violation. This calculation is based on a \$100 per pay period penalty.

28 <sup>9</sup> *Smith v. Lux Retail N. Am., Inc.* (N.D. Cal. June 13, 2013) No. C 13-01579 WHA, 2013 U.S. Dist.  
LEXIS 83562, at \*9 ("For the single mistake of failing to include commissions in the overtime base,  
plaintiff has asserted five (count them, five) separate labor code violations that could lead to  
statutory penalties [...]. There is a chance that the Court would decline to assess multiple violations  
per pay period per employee.")

1 discretion - to discount the value of the PAGA penalties. Judgements issued in PAGA cases show  
2 that courts exercise broad discretion when discounting PAGA civil penalties. Four California  
3 appellate cases reveal judicial discounts applied to the civil penalties sought ranging from 95% to  
4 25%.<sup>10</sup> These are cases that have already reached judgement, whether through trial or summary  
5 adjudication. Plaintiff thus recognizes that there is a significant chance that the Court would limit  
6 penalties should the case proceed to trial.

7 In reducing PAGA penalties, courts have considered issues including whether the employees  
8 suffered actual injury from the violations, whether Defendants was aware of the violations, and the  
9 employer's willingness to fix the violation. *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030,  
10 1037; *Fleming v. Covidien* (C.D. Cal. 2011) 2011 WL 7563047, at \*4. Here, the injury faced by each  
11 employee is limited. The difference between Aggrieved Employee's base hourly rate, and the regular  
12 rate that should have been used is minimal. Defendant was aware of the wages paid but had a good  
13 faith belief that such wages did not have to be used to compute the employee's regular rate of pay.  
14 Significantly, after the California Supreme Court's 2021 decision in *Ferra*, regarding regular rate of  
15 pay, Defendant appears to have begun adjusting the employee's regular rate of pay based on  
16 additional wage payments in a workweek showing an attempt to comply with its Labor Code  
17 obligations. *Ferra v. Loews Hollywood Hotel* (2011) 1 Cal.5th 858. Given these circumstances, it is  
18 still likely that this Court would choses to exercise discretion and reduce the penalties awarded  
19 based on the service charge Regular Rate violation calculation offered above. (Cottrell Decl., ¶ 34).

20 This PAGA Settlement represents a measured rebuke of Defendant's unlawful practices.  
21 Thus, even though the maximum penalty a court could assess per violation is \$100 it is likely that  
22 even if Plaintiff were to prevail that this Court would exercise its discretion, as many courts do, and  
23

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24 <sup>10</sup> *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (\$75 million in penalties sought, yet  
25 Court awarded PAGA penalties of only \$150,000 based on 30,000 violations and reduced the  
26 penalty rate to \$5 per violation, equating to a 95% discount of the initial penalty rate of \$100 per  
27 violation, affirmed on appeal); *Atempa v. Pama* (2018) 27 Cal.App.5th 809 (San Diego County  
28 Superior Court, July 31, 2015) (PAGA penalties of \$456,133 sought, \$197,434 assessed, reflecting  
a 56% discount; Trial Judge Joel Wohlfeil); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203  
Cal.App.4th 1112, disapproved on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th  
175, 196 n8 (requested \$512,000, awarded \$358,588 reflecting a 25% discount; Trial Judge Tim  
Taylor, San Diego County Superior Court); *Amaral v. Cintas Corp. No. 2*  
(2008) 163 Cal.App.4th 1157 (requested \$500,000, awarded \$258,900, reflecting a 48% discount;  
Trial Judge Steven Brick, Alameda County Superior Court).

1 reduce the penalty upon judgement. Taking that into consideration, this represents a recovery that is  
2 well within the range of awards successful plaintiffs have achieved.<sup>11</sup> This recovery should not be  
3 compared to the average recovery in class actions as they represent inherently different types of  
4 recovery and PAGA penalties serve a separate and distinct purpose.

5 Second, trials are inherently risky for all parties, particularly where Defendant contests all  
6 liability. Although Plaintiff believes that she would be successful in proving each of these claims, a  
7 trial would carry a high degree of risk and costs. (Cottrell Decl., ¶ 36). For example, there is the  
8 possibility that a finder of fact determine that the service charge was not a tip or a wage, but rather  
9 a discretionary bonus for purposes of remitting the amount to employees, thus undercutting  
10 Plaintiff's theory of liability. Alternatively, if the finder of fact did determine that the service charge  
11 payments were a wage, triggering regular rate violations, they may choose not to assess multiple  
12 penalties for the one act. On the derivative claims, Defendants would have argued that no penalties  
13 for waiting-time violations can be awarded unless the failure to pay wages is "willful," an element  
14 that Plaintiff acknowledges would have been difficult to prove, given Defendants' policies and  
15 enforcement.<sup>12</sup> Thus, this Settlement provides a reasonable overall settlement sum given the very  
16 real and unique trial risks faced by the Plaintiff in proving her claims.<sup>13</sup>

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17  
18 <sup>11</sup> For instance, in the *Cotter* case, the Court found that a \$1 million PAGA settlement was fair and  
19 reasonable in light of the unsettled nature of the law, resulting in a \$2.52 per pay period award to  
20 the aggrieved employees (there were 397,110 pay periods in a \$1 million PAGA settlement,  
21 resulting in a 97.5% reduction from the maximum). In *Fleming*, the Court reduced the potential  
22 penalties by over 82%, awarding \$500,000 for 28,742 pay periods at issue. *Fleming*, 2011 WL  
23 7563047. See also *Kaanaana v. Barrett Bus. Servs., Inc.* (2018) 29 Cal.App.5th 778, 788 (indicating  
24 that the trial court exercised its discretion to reduce the penalties to 13 percent of the full amount  
25 and that such action was within the court's discretion (remanded based on additional violations for  
26 penalty consideration)).

27 <sup>12</sup> *Naranjo v. Spectrum Sec. Servs., Inc.* (2024) 15 Cal.5th 1056, 1074 (finding that courts refuse to  
28 impose civil penalties against a party who acted with a good faith and reasonable belief in the  
legality of his or her actions."). *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 996–997  
(addressing civil penalties for violations of the prevailing wage statute for employees working on  
public work projects (Cal. Lab. Code § 1775), citing *Whaler's Village Club v. California Coastal  
Com.* (1985) 173 Cal.App.3d 240, 263, and *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50  
Cal.App.3d 8, 30).

<sup>13</sup> See *Carrington*, 30 Cal.App.5th at 504. It is well-settled that a proposed settlement is not to be  
measured against a hypothetical ideal result that might have been achieved. See, e.g., *7-Eleven  
Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150 (quoting *Linney  
v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1242 with approval: "This court has aptly  
held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive  
litigation that induce consensual settlements. The proposed settlement is not to be judged against a

1           Given the risks and complexity of issues involved, absent this settlement, it possibly would  
2 have taken several more years to realize any recovery, and even more years to realize any recovery  
3 for the State of California following the completion of her individual arbitration. (Cottrell Decl. ¶  
4 37). In light of the risks discussed above and under an analysis of similar PAGA settlements, the  
5 Gross Settlement amount constitutes a meaningful percentage of the conservative damage exposure  
6 and is an adequate overall Settlement sum.

7       **V. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**  
8       **AND REASONABLE**

9           For the efforts and substantial risks Plaintiff's Counsel undertook in obtaining a significant  
10 common fund settlement to benefit the LWDA and the Aggrieved Employees, the Parties allocated  
11 35% of the Gross Settlement Amount to Plaintiff's Counsel for reasonable attorneys' fees, despite  
12 this agreed provision, Plaintiff now asks only for one-third (33.33%) of the Gross Settlement plus  
13 actual litigation costs in an amount of \$27,054.72. These fees and costs are warranted pursuant to  
14 statute, particularly given that they significantly undervalue the service of Plaintiff's Counsel based  
15 on a Lodestar cross-check, and are within the range awarded in similar cases.

16           **A. Plaintiffs' Counsel Are Entitled to Recover Reasonable Attorneys' Fees under the**  
17           **Common Fund Doctrine**

18           The PAGA provides that a plaintiff is entitled to recover reasonable attorneys' fees, expenses,  
19 and costs. Cal. Lab. Code § 2699(g)(1) ("[a]ny employee who prevails in any action shall be entitled  
20 to an award of reasonable attorney's fees and costs."). Typically, a one-third award of attorneys' fees  
21 is warranted under the common fund doctrine in a PAGA action.<sup>14</sup> Here, Plaintiff's Counsel has

22  
23 hypothetical or speculative measure of what might have been achieved by the negotiators."'). A  
24 settlement that represents only a fraction of the potential recovery is still reasonable. *See, e.g., In re*  
25 *Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 ("It is well-settled law that a cash  
26 settlement amounting to only a fraction of the potential recovery does not per se render the  
27 settlement inadequate or unfair.") (citation omitted).

28 <sup>14</sup> *See, e.g., Fritz v. Wells Fargo & Company*, Alameda County Superior Court Case No.  
RG20069677 (33.3% fee awarded on \$460,000 settlement of PAGA-only case); *Lefevers v. Enloe*  
*Medical Center*, Butte County Superior Court Case No. 19CV02194 (33.33% fee awarded on  
\$7,000,000 settlement of PAGA-only case); *Gonzales v. Healthcare Servs., Grp., Inc., et al.*, San  
Francisco Superior Court Case No. CGC-18-570988 (one-third of \$5,700,000 settlement awarded  
as fees of PAGA-only case); *Vorise v. 24 Hour Fitness USA, Inc.*, Contra Costa County Superior  
Court, Case No. C 15-02051 (33.33% fee awarded on \$11,000,000 settlement of a PAGA-only

1 earned an upward adjustment of that baseline, to one-third of the Gross Settlement, based on the  
2 reasonable hours necessary to prosecute the litigation appropriately.

3 A PAGA action is a qui tam action because the statute allows the plaintiff, acting as the proxy  
4 of the State’s labor law enforcement agency, to sue their employer for Labor Code violations and  
5 recover civil penalties that otherwise would have been assessed and collected by the LWDA. *See*  
6 *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 (“A PAGA representative  
7 action is therefore a type of qui tam action.”); *People ex rel. Strathmann v. Acacia Research Corp.*  
8 (2012) 210 Cal.App.4th 487, 501 (explaining that a qui tam action allows a private person to sue to  
9 recover damages or penalties, all or part of which will be paid to the government) “A *qui tam* action  
10 ‘is a type of private attorney general lawsuit’ [citation], in which ‘the *qui tam* plaintiff stands in the  
11 shoes of the state or political subdivision [citation].’” *Id.*, at 501. Indeed, majority of the civil  
12 penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to the  
13 aggrieved employees (*e.g.*, 75% paid to the state; 25% paid to the aggrieved employees). *See* Cal.  
14 Lab. Code § 2699(i).

15 As here, where a common fund is created in a *qui tam* action by the successful litigation of  
16 plaintiffs and their attorneys, the plaintiffs’ attorneys are entitled to recover their reasonable fees  
17 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  
section 1021.5 for recovery of attorney fees, it must be modified to confine the award  
of fees to the common fund theory.

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

24 Likewise, in this case, through the successful efforts of Plaintiff and her attorneys, a common  
25

26 case); *Garcia v. Macv’s*, San Bernardino County Superior Court, Case No. CIVDS1516007  
27 (33.33% fee awarded on \$12,500,000 settlement of a PAGA-only case); *Garcia v. Pep Boys Manny*  
28 *Moe & Jack*, 2016 Cal. Super. LEXIS 15556 (33.33% fee awarded on a \$1,030,000 settlement of a  
PAGA-only case); *Brewer v. Connell Chevrolet*, 2017 Cal. Super. LEXIS 15031 (33.33% fee  
awarded on a PAGA-only case); *Perez v. Staffmark Inv., LLC*, Riverside County Superior Court,  
Case No. MCC1401137 (33.33% fee awarded on a \$650,000 settlement of a PAGA only case)).

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

8 The California Supreme Court upheld the use of the common fund theory of recovery for  
9 attorneys' fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the  
10 settlement created a common fund of \$19 million. The Court approved the award of attorneys' fees  
11 in the amount of one third of the gross \$19 million settlement (*e.g.*, an award of \$6.33 million) under  
12 the common fund theory. (*Id.*). By awarding counsel a percentage of the total recovery, rather than  
13 fees based on hours worked, the common fund method encourages attorneys to efficiently litigate  
14 to achieve the best results possible for the class. *See Laffitte, supra*, at 492-94. Indeed, the  
15 "percentage-of-recovery method is generally favored in common fund cases because it allows courts  
16 to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for  
17 failure.'" *Id.* at 493 (quoting *In re Rite Aid Corp. Sec. Litig.* (3d Cir. 2005) 396 F.3d 294, 300).

18 The request for one-third of the Gross Settlement Amount is substantially within the range  
19 customarily approved by courts in California and should be approved. *See Ellsworth v. Leclair*  
20 *Fitness II LLC*, 2022 Cal. Super. LEXIS 59587, \*8 ("The percentage of the gross settlement equates  
21 to 35% which is generally in line with percentage fees in similar litigation."); *Van Vranken v. Atlantic*  
22 *Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 297-98 ( "Class Counsel have also cited 73 district  
23 court opinions in which fees in the range of 30-50 percent of the common fund were awarded.").  
24 Plaintiff's Counsel has successfully obtained approval of a similar fee awards in other actions as  
25 well. *See Thompson v. Restoration Hardware, Inc.; RH which Will Do Business in California as*  
26 *Restoration Hardware Holdings, Inc.*, Marin County Super. Ct., No. CIV2200970, Dec. 29, 2023  
27 [preliminarily approving a 35% award in a wage and hour class and PAGA action].)

28 Based on the foregoing, awarding attorneys' fees of 33.33% of the gross settlement amount

1 represents reasonable fees for Plaintiff's Counsel and is supported by California Courts when a fund  
2 established for the common benefit of others is involved, as is the case here. Accordingly, awarding  
3 fees on this basis in the amount of 33.33% of the Gross Settlement Amount is reasonable and  
4 appropriate.

5 **B. A Fee Award of One-Third of the Gross Settlement Amount is Fair and**  
6 **Reasonable and Serves the Public Policy of Attracting Competent Counsel to**  
7 **Litigate Cases**

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

14 First, Plaintiff's Counsel's efforts resulted in a common fund settlement amount of  
15 \$1,000,000. This result was achieved by the work and success of Plaintiff's counsel, who negotiated  
16 the Settlement after extensive preparation, discovery, deposition, two full mediation sessions, and  
17 substantial negotiations. (*See, e.g., Cottrell Decl., ¶ 12*). This result is significant for the  
18 approximately 1,900 employees who worked for Defendant.

19 Second, Plaintiff faced significant risks going forward with the litigation. As discussed above  
20 this litigation presented unique risks related to the underlying tip/service charge violation and thus  
21 merits added risk consideration because of the unsettled nature of the factual determination of the  
22 service fee being a gratuity or a basis for a bonus. Defendants vowed to raise all of its defenses,  
23 including affirmative defenses, at trial and would no doubt further stonewall discovery to delay a  
24 trial. Plaintiff would have had her individual arbitration to contend with and so faced with these  
25 serious risks moving forward it would be quite likely to have taken several more years to realize  
26 any recovery. (*Id.*, ¶ 37).

27 Third, Plaintiff's counsel are experienced representative action litigators. (*Id.*, ¶¶ 4-6). This  
28 experience and expertise, combined with the high quality of work performed in this case by

1 Plaintiff's counsel, resulted in the Settlement achieved. The in-depth analysis of the regular rate  
2 violations required a complex understanding of the law as well as of the data provided. The large  
3 amount of data required Plaintiff's counsel to expend well developed resources to appropriately  
4 analyze and value the claims. Plaintiff's Counsel had to call on its expertise and experience from  
5 the vast number of wage and hour cases litigated to anticipate the risks and achieve a reasonable  
6 settlement.

7 Fourth, Plaintiff's Counsel have been representing Plaintiff (and the State of California) in  
8 these matters on strictly contingency basis, and had to forego opportunities to litigate other cases,  
9 incurred the risk of non-recovery after a substantial investment of time, money, and resources, and  
10 have done so since the inception of the cases without any payment or compensation. This is no easy  
11 burden for any firm. (*Id.*, ¶ 31). If, despite these hardships and risks, Plaintiff's Counsel are paid  
12 only basic hourly rates multiplied by the number of hours worked on the case, they would have  
13 received far more than the requested fee award, making the instant request for a reduced fee award  
14 instead based on a thirty five percent of the common fund even more reasonable.

15 Fifth, as discussed above, the request for attorneys' fees in the amount of thirty three percent  
16 of the common fund falls well within the range accepted by state and federal courts in California in  
17 comparable wage and hour actions, including by the California Supreme Court in *Laffitte*.<sup>15</sup> Here,  
18 Plaintiff's Counsel could argue for full compensation under the loadstar-multiplier method, as the  
19 fees expended well exceed the customary percentage of the common fund, but as a percentage  
20 method better aligns the incentives between Counsel and the public interest. As such a fee award of  
21 one third the Gross Settlement is reasonable particularly, where as described below, Counsel has  
22 earned the full measure of such fees.

23 For all of these reasons, a common fund fee award in the amount of one-third of the  
24 \$1,000,000 common fund created by Plaintiffs and Plaintiff's counsel is fair and reasonable.  
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27 <sup>15</sup> *Laffitte*, 1 Cal.5th at 503 (“The recognized advantages of the percentage method—including  
28 relative ease of calculation, alignment of incentives between counsel and the class, a better  
approximation of market conditions in a contingency case, and the encouragement it provides  
counsel to seek an early settlement and avoid unnecessarily prolonging the litigation.”)

1           **C.     A Lodestar Cross-Check Further Confirms the Reasonableness of the Fee Award**

2           Plaintiff's Counsel requests a fee award representing a fraction of the fees that have been  
3 incurred. The fee request is significantly less than the fees that would be incurred to continue the  
4 action through trial. A trial court may use an abbreviated lodestar "cross-check" for common fund  
5 awards if the court considers it useful. *See Laffitte*, 1 Cal.5th at 504-05. Under *Laffitte*, this is not  
6 meant to displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme Court  
7 expressly instructed that "the lodestar calculation, when used in this manner, does not override the  
8 trial court's primary determination of the fee as a percentage of the common fund and thus does not  
9 impose an absolute maximum or minimum on the fee award." (*Id.* at p. 505). Furthermore, in  
10 conducting a lodestar cross-check, the court is not "required to closely scrutinize each claimed  
11 attorney-hour." (*Id.* at p. 505). An evaluation may be done by reviewing "counsel declarations  
12 summarizing overall time spent." (*Ibid.*)

13           In conducting a lodestar cross-check, the court first determines a lodestar value for the fees  
14 by multiplying the time reasonably spent by plaintiffs' counsel on the case by a reasonable hourly  
15 rate. *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-57. To determine whether the  
16 requested rate is reasonable, courts look to the prevailing rate for similar work in the pertinent  
17 geographic region. *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096-97 (using prevailing  
18 hourly rate in community for comparable legal services even though party used in-house counsel).

19           Here, Plaintiffs' Counsel's hourly rates are comparable to those charged by other class and  
20 representative action plaintiffs' counsel and the firms defending class and representative actions and  
21 have been approved by numerous federal and state courts. (Cottrell Decl., ¶¶ 46-48). PAGA  
22 Counsel's lodestar is currently estimated at approximately \$438,060.00 based on approximately  
23 556.30 hours of attorney and staff time. (*See id.*, ¶ 49). PAGA Counsel's aggregate lodestar will  
24 increase as a result of preparation for and attendance at the Approval Hearing and the settlement  
25 administration process. (*Id.*, ¶ 50). The attorneys' fees requested represent approximately 76% of  
26 the Lodestar incurred by Plaintiff's counsel. (*Id.*, ¶ 51). Plaintiff's counsel has agreed to accept this  
27 compromise and reduction in an effort to resolve the case and obtain a fair settlement for Plaintiff  
28 and the Aggrieved Employees. (*Id.*).

1 A cross-check of PAGA Counsel's lodestar, which results in the application of a negative  
2 multiplier, confirms that a fee award of 33.33% of the \$1,000,000 Gross Settlement Amount is a  
3 reasonable and fair payment where courts have regularly approved a positive multiplier. *See*  
4 *Wershba*, 91 Cal.App.4th at 255 (noting that multipliers can range from 2 to 4 or higher).

5 As such, the Attorney fee request for 33.33% of the Gross Settlement amount is fair and  
6 reasonable given the applicable factors and the practice of California Superior Courts. (Cottrell  
7 Decl., ¶52).

#### 8 **D. The Litigation Costs are Fair and Reasonable**

9 Plaintiff's Counsel requests reimbursement of their actual out-of-pocket expenses incurred  
10 to prosecute these actions, of \$27,054.72. Attorneys are permitted to recover their litigation costs  
11 and expenses under PAGA and the common fund doctrine. Cal. Lab. Code § 2699(g)(1); *Serrano v.*  
12 *Priest* (1977) 20 Cal.3d 25 at 35; *Rider v. Cty. of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6.

13 Plaintiff's counsel's costs total \$27,054.72. (Cottrell Decl., ¶ 26). Plaintiff's Counsel incurred  
14 costs including mediation fees, filing fees, online research, court reporters, travel to hearings and  
15 depositions, and service of process fees. These expenses were incidental and necessary to the  
16 effective representation of the State of California and the Aggrieved Employees. (Cottrell Decl., ¶  
17 53). Not only are the costs in line with the Settlement Agreement, they are reasonable based on the  
18 necessary extent of inquiry for this action.

#### 19 **VI. THE REQUESTED SERVICE AWARD IS REASONABLE AND SHOULD BE** 20 **APPROVED**

21 Courts award service payments to advance public policy by encouraging individuals to come  
22 forward and perform their civic duty in protecting the rights of a class, as well as to compensate  
23 representatives for their time, effort, inconvenience, and for any expense or risk incurred. *In re*  
24 *California Indirect Purchases* (1998) 1998 WL 1031494, \*11; *Munoz v. BCI Coca-Cola Bottling*  
25 *Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412. The same should apply in the PAGA context.

26 As a result of Plaintiff's efforts and her willingness to step forward, the State of California  
27 and the Aggrieved Employees will receive significant recoveries if the Settlement is approved.  
28 (Cottrell Decl., ¶¶ 38, 39). Plaintiff has committed her time to this case, including sitting for a full

1 day deposition, and assumed significant risk to obtain the result. (*Id.*, ¶¶ 38-42). Her service in a  
2 wage and hour representative lawsuit may be discerned by potential employers and members of the  
3 community, creating a very real risk of future repercussions, particularly with respect to their future  
4 job opportunities. (*See id.*, ¶¶ 42, 44).

5 Throughout this litigation, Plaintiff worked with Plaintiff’s Counsel and assisted in the  
6 development of the case. (Declaration of Mackenzie Heyman [“Heyman Decl.”], ¶¶ 3-9). Plaintiff  
7 produced multiple of pages of documents which Plaintiff’s Counsel relied upon in mediation,  
8 answered Plaintiff’s Counsel’s questions in developing its position for mediations, responded to  
9 discovery, and appeared for her own deposition. (*Id.*, ¶¶ 10-11). Plaintiff has taken part in the  
10 Settlement decision and remained apprised of the case at all times during litigation. (*Id.*, ¶¶ 12-14).

11 If Plaintiff did not serve as PAGA Representatives or assist in the prosecution of this case,  
12 the matter would likely never have been brought. The State of California and the Aggrieved  
13 Employees would not be getting any recovery in this action and Defendants’ alleged conduct would  
14 have gone unchecked. (*Id.*, ¶ 31). As a result of Plaintiff’s willingness to step forward, the State of  
15 California and the Aggrieved Employees will receive significant recoveries if the Settlement is  
16 approved. (*See id.*, ¶ 26-30).

17 A service award to Plaintiff in the amount of \$10,000 is reasonable in light of the efforts she  
18 made and the risks she took in filing and prosecuting this action to obtain this \$1,000,000 Settlement  
19 and should be approved. (*Id.*, ¶ 44; see also Heyman Decl., ¶ 14-16).

## 20 VII. CONCLUSION

21 As set forth herein, the proposed PAGA Settlement provides an excellent result for both the  
22 State of California and the Aggrieved Employees. Plaintiff respectfully requests that the Court  
23 approve the Settlement.

24 Respectfully Submitted,

25 Date: June 17, 2024

26 

27 Carolyn H. Cottrell

28 Ori Edelstein

Laurel Holmes

SCHNEIDER WALLACE

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**COTTRELL KONECKY LLP**

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