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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN BERNARDINO**

12 JARRELL ELLSWORTH, on behalf of
himself and others similarly situated,

13 Plaintiff,

14 v.

15 SCHNEIDER NATIONAL CARRIERS,
16 INC., a Nevada corporation; and DOES 1
through 10, inclusive,

17 Defendants.
18
19

Case No. CIVDS2012486

[Assigned for all purposes to Hon. David Cohn]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

Date: May 25, 2022

Time: 10:00 a.m.

Department: S-26

Complaint Filed: May 29, 2020

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

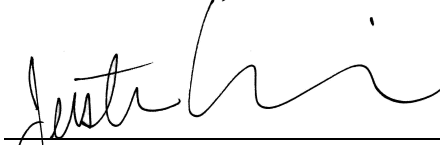
2 PLEASE TAKE NOTICE that on May 25, 2022 at 10:00 a.m., or as soon thereafter as this
3 matter may be heard by the Hon. David Cohn in Department S-26 of the San Bernardino County
4 Superior Court for the State of California, located at San Bernardino Justice Center, 247 West Third
5 Street, San Bernardino, CA 92415-0210, Plaintiff Jarrell Ellsworth ("Plaintiff") will and hereby
6 does move this Court for an order approving a settlement pursuant to the Labor Code Private
7 Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* ("PAGA").

8 This Motion is based upon this Memorandum of Points and Authorities; the Declarations of
9 Justin Kachadoorian and Jarrell Ellsworth in support thereof; the Settlement Agreement and
10 Release of Claims (the "Settlement Agreement"); the [Proposed] Order granting approval of the
11 PAGA settlement, attached as Exhibit 1 to the Kachadoorian Declaration; all other records,
12 pleadings, and papers on file in this action, and upon such other evidence or argument as may be
13 presented to the Court at the hearing on this motion.

14 Finally, given the multiplicity of issues addressed in this Motion, Plaintiff believes that there
15 is good cause to exceed the 15-page limit set forth in California Rule of Court 3.1113(d), and
16 respectfully requests that the Court consider Plaintiff's memorandum of points and authorities,
17 which is approximately 19 pages in length.

18 Date: March 15, 2022

COUNSELONE, PC

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20 

21 Anthony J. Orshansky
22 Alexandria R. Kachadoorian
23 Justin Kachadoorian

24 *Attorneys for Plaintiff Jarrell Ellsworth*

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1 **I. INTRODUCTION**

2 By and through this Motion, Plaintiff Jarrell Ellsworth (“Plaintiff” or “Ellsworth”) seeks
3 this Court’s approval pursuant to Labor Code § 2699(l) of the settlement of Plaintiff’s claims under
4 the Labor Code Private Attorneys General Act (“PAGA,” Labor Code § 2698, *et seq.*) with
5 Defendant Schneider National Carriers, Inc. (“Defendant,” “SNC,” or “Schneider”). Under the
6 Settlement Agreement and Release of Claims, Defendant will pay \$1,350,000.00 to resolve the
7 PAGA claims brought on behalf of all Aggrieved Employees¹ for Labor Code violations based on
8 the allegations in the Lawsuit. Aggrieved Employees are comprised of California-based drivers
9 from April 7, 2019, to the date of Court approval of the Settlement or 90 days from December 20,
10 2021, whichever is sooner. After deductions for administration costs, attorneys’ fees and expenses,
11 and the incentive award to the Plaintiff, the Net Settlement Amount will be distributed in
12 accordance with Section 2699(i) as follows: 75% to the Labor and Workforce Development
13 Agency (LWDA) and 25% to Aggrieved Employees.

14 The Settlement settles and releases only PAGA claims on behalf of Aggrieved Employees;
15 it is not a class settlement, and the settlement does not release the individual claims of Aggrieved
16 Employees other than Plaintiff. *See* Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*
17 (2014) 59 Cal. 4th 348, 381. The PAGA penalties to be paid are fair, reasonable, and adequate,
18 thereby justifying Court approval.

19 Plaintiff’s Counsel has prosecuted this hotly contested litigation for nearly two years,
20 displayed zealous advocacy on behalf of the Aggrieved Employees, and committed to pursue the
21 action through trial and appeals. In order to compensate them for those efforts, the Settlement
22 permits Plaintiff’s Counsel to request attorneys’ fees in the amount of \$472,500, an amount that is
23 equal to 35 percent of the Gross Settlement Fund. The requested fee would result in a negative
24 multiplier of .96, given Counsel’s lodestar of \$501,133.00 and should be approved. The Settlement
25 also allows Plaintiff’s Counsel to seek reimbursement of their actual and reasonable litigation costs
26 in addition to their fees, which with the filing of this Motion total \$19,435.87. It also provides for

27 ¹ All capitalized terms used herein have the same meaning as set forth in the Settlement Agreement
28 and Release of Claims, attached to the Declaration of Justin Kachadoorian, filed concurrently
herewith, as Exhibit 1.

1 a representative Enhancement Award of up to \$10,000 for Plaintiff and reimbursement of settlement
2 administration fees in an amount of up to \$10,000. Plaintiff's Counsel has provided herewith a
3 detailed explanation of the basis for their rates, how they allocated work, and a task-based summary
4 based on contemporaneous time-records in order to aid the Court in performing the required
5 analysis.

6 Plaintiff now respectfully requests that the Court approve the Settlement as fair adequate
7 and reasonable, and approve the proposed awards for attorneys' fees, representative Enhancement
8 Award and settlement administration costs, and enter judgment accordingly so that this complex
9 litigation can be resolved, judgment can be entered, and the settlement funds distributed to the
10 LWDA and Aggrieved Employees as expeditiously as possible.

11 **II. BACKGROUND**

12 Ellsworth worked for Schneider as a delivery driver from October 2019 through March
13 2020. On April 7, 2020, through his counsel, Plaintiff submitted to the LWDA and Defendant a
14 notice of his intent to seek civil penalties pursuant to PAGA as required by the statute for alleged
15 violations of the Labor Code, including unpaid minimum wages, meal period and rest break
16 violations, final pay and pay timing violations, and wage statement violations, under Labor Code
17 §§ 201, 202, 203, 204, 221, 510, 512, 558, 558.1, 1182.12, 1193.6, 1194, 1194.2, 1197, 1197.1 and
18 1199. Because the LWDA did not pursue the violations, Plaintiff was deputized to proceed with
19 an action for civil penalties on behalf of himself, the LWDA, and other Aggrieved Employees.
20 (Kachadoorian Decl. ¶ 10.)

21 On July 23, 2020, through his counsel, Plaintiff sent an amended notice letter to the LWDA
22 and Defendant, which in addition to the Labor Code violations alleged in the prior notice letter, also
23 provided notice of a violation of Labor Code § 221 regarding unlawful deductions from the wages
24 of Plaintiff and other Aggrieved Employees for, among other things, expenses for advance fees and
25 safety shoes that were necessary to perform job duties. Because the LWDA did not pursue the
26 violations, Plaintiff was deputized to proceed with an action for civil penalties on behalf of himself,
27 the LWDA, and other Aggrieved Employees. (Kachadoorian Decl. ¶ 11.)

28 Ellsworth filed this action in San Bernardino County Superior Court on May 29, 2020, and

1 filed a First Amended Complaint (FAC) on July 23, 2020. On August 21, 2020, Defendant removed
2 this action to the United States District Court for the Central District of California. On September
3 18, 2020, Ellsworth filed his Second Amended Complaint (SAC). Defendant filed a motion to
4 dismiss or strike the SAC on October 9, 2020, to which Plaintiff filed opposition. On December
5 11, 2020, the district court heard oral argument on Defendant's motion to dismiss/strike and issued
6 its order the same day. On January 11, 2021, Ellsworth filed his Third Amended Complaint (TAC).
7 (Kachadoorian Decl. ¶ 11.)

8 On March 26, 2021, Defendant moved to compel arbitration. On April 26, 2021, the district
9 court denied the motion to compel arbitration, finding Defendant had waived its right to compel
10 arbitration. On May 13, 2021, Schneider filed a notice of appeal. On June 14, 2021, the district
11 court issued an order denying Defendant's motion to stay filed in that court. Schneider filed an
12 emergency motion in the Ninth Circuit to stay litigation pending its appeal, which the Ninth Circuit
13 denied on July 7, 2021. (Kachadoorian Decl. ¶ 12.)

14 Throughout this litigation the parties conducted substantial discovery. Defendant produced
15 thousands of pages of documents, and the parties retained expert witnesses to review and analyze
16 the produced data. Plaintiff filed his motion for class certification on July 9, 2021, per the schedule
17 set by the district court. Schneider filed its opposition on July 30, 2021, and Plaintiff filed his reply
18 on August 13, 2021. Oral argument on the motion for class certification was heard October 22,
19 2021. At the hearing, the district court expressed concern that Plaintiff was no longer typical or
20 adequate to represent the class by virtue of the district court's ruling that Defendant had waived its
21 right to compel arbitration. On October 28, 2021, the district court issued an order denying class
22 certification on Plaintiff's Labor Code claims due to a lack of typicality and adequacy, and
23 dismissing Plaintiff's claim under the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681,
24 *et seq.* based on lack of Article III standing. (Kachadoorian Decl. ¶ 13.)

25 On November 12, 2021, Ellsworth filed a petition in the Ninth Circuit Court of Appeals
26 pursuant to Federal Rule of Civil Procedure 23(f) for permission to appeal the order denying class
27 certification. The petition focused on the interaction between the waiver of arbitration by Defendant
28 and Plaintiff's typicality, adequacy, and standing to represent the putative class. Defendant filed

1 an answer to the petition and on November 29, 2021, Ellsworth filed a motion for leave to allow
2 the filing of a reply with a proposed reply brief. If the Court of Appeals denied Plaintiff's petition,
3 Plaintiff would have promptly moved to remand this action to state court. (Kachadoorian Decl. ¶
4 14.) See Exhibit 5 to the Declaration of Justin Kachadoorian for the district court and Ninth Circuit
5 docket reports.

6 On December 20, 2021, the Parties mediated the case with private mediator Phillip Cha,
7 Esq. The case did not resolve at the mediation, but on December 21, 2020, the parties accepted a
8 mediator's proposal presented by Mr. Cha, subject to the negotiation, preparation and execution of
9 the Agreement and the Court's approval thereof. (Kachadoorian Decl. ¶ 19.) As part of this
10 Settlement, and in light of the denial of class certification and dismissal of Plaintiff's federal claim,
11 the Parties have agreed to remand this action to state superior court and to the filing of an amended
12 complaint in the Lawsuit to accurately reflect the PAGA claims alleged in the Lawsuit and/or in
13 any notice provided pursuant to PAGA by Plaintiff to the LWDA and Defendant (including, without
14 limitation, in Plaintiff's April 7, 2020 and July 23, 2020 PAGA notice letters), which are being
15 settled pursuant to the Settlement. (*Ibid.*)

16 **III. NATURE OF PAGA ACTIONS**

17 Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of
18 other current or former employees and the State of California to recover civil penalties for Labor
19 Code violations. *See Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380.
20 Seventy-five percent of any PAGA penalties go to the LWDA, leaving the remaining 25 percent
21 for the employees. *Id.* PAGA is intended to augment the limited enforcement capability of LWDA
22 by empowering employees to enforce the Labor Code as representatives of the Agency. *Id.* A
23 judgment in a PAGA action binds all those who would be bound by a judgment in an action brought
24 by the government. *Id.* at 381.

25 As a prerequisite to a PAGA action, an aggrieved employee must first provide written notice
26 to the LWDA and the employer of the alleged Labor Code violations. *See* Labor Code §
27 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to investigate
28 the alleged violations, or if the LWDA does not respond, the aggrieved employee may then file an

1 action on behalf of the LWDA and all other similarly situated aggrieved employees. *See* Labor
2 Code § 2699.3(a)(2)(A).

3 PAGA penalties are different from monetary relief in a class action. The purpose of PAGA
4 penalties is to deter violative conduct by the employer. *See Iskanian, supra*, 59 Cal. 4th at 386-387
5 (PAGA “is a dispute between an employer and the state, which alleges directly or through its
6 agents—either the Labor and Workforce Development Agency or aggrieved employees—that the
7 employer has violated the Labor Code. Through his PAGA claim, Iskanian is seeking to recover
8 civil penalties, 75 percent of which will go to the state’s coffers The fact that any judgment
9 in a PAGA action is binding on the government confirms that the state is the real party in interest.
10 [] It is true that ‘a person may not bring a PAGA action unless he or she is an aggrieved employee’
11 . . . but that does not change the character of the litigant or the dispute.”); *Arias v. Superior Court*
12 (2009) 46 Cal.4th 969, 986 (“Because an aggrieved employee’s action under the Labor Code Private
13 Attorneys General Act of 2004 functions as a substitute for an action brought by the government
14 itself, a judgment in that action binds all those, including nonparty aggrieved employees, who
15 would be bound by a judgment in an action brought by the government. The act authorizes a
16 representative action only for the purpose of seeking statutory penalties for Labor Code violations
17 . . . and an action to recover civil penalties ‘is fundamentally a law enforcement action designed to
18 protect the public and not to benefit private parties’”).

19 A PAGA lawsuit is a law enforcement action, not a class claim, and therefore need not
20 satisfy certification requirements under Civil Code § 382 or Fed. R. Civ. P. 23. *See Arias, supra*,
21 46 Cal. 4th at 975; *see also Canela v. Costco Wholesale Corp.* (9th Cir. 2020) 971 F.3d 845, 851;
22 *Baumann v. Chase Inv. Services Corp.* (9th Cir. 2014) 747 F.3d 1117, 1124; *Villalobos v. Calandri*
23 *Sonrise Farm LP* (C.D. Cal. July 22, 2015) No. CV122615PSGJEMX, 2015 WL 12732709, at *5
24 (“[T]here is no requirement that the Court certify a PAGA claim for representative treatment like
25 in Rule 23”). A court does not, for example, have a fiduciary duty to protect putative class
26 members. *See Williams v. Super. Ct.* (2017) 3 Cal. 5th 531, 546-547. Under *Arias* and *Iskanian*,
27 Plaintiff can seek civil penalties under PAGA on behalf of the State of California and other similarly
28 situated aggrieved employees without meeting the requirements of class certification.

1 Under PAGA the court shall “review and approve any settlement of any civil action filed
2 pursuant to this part.” Labor Code § 2699(l)(2). The Parties therefore seek the Court’s approval of
3 the Settlement here. Plaintiff is concurrently submitting the Settlement Agreement to the LWDA
4 per § 2699(l)(2). (Kachadoorian Decl. ¶ 25.)

5 The relief provided in a PAGA settlement must “be genuine and meaningful, consistent with
6 the underlying purpose of the statute to benefit the public.” *Villalobos v. Calandri Sunrise Farm*
7 *LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13. Courts will
8 generally approve a PAGA settlement upon a showing that the settlement terms are “fundamentally
9 fair, adequate, and reasonable” in light of PAGA’s policies and purposes. *Jordan v. NCI Grp., Inc.*,
10 (C.D. Cal. Jan. 5, 2018) No. EDCV161701JVSSPX) 2018 WL 1409590, at *3 (finding that
11 proposed settlement of plaintiff’s PAGA claims was fair, adequate, and reasonable in light of the
12 policies and purposes of PAGA); *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal.
13 2017) 253 F. Supp. 3d 1074, 1075 (same). Given that courts often exercise their discretion to award
14 PAGA penalties below the statutory maximum even when a claim succeeds a trial, a PAGA
15 settlement may substantially discount the amount of civil penalties recovered. *See Vicerel v.*
16 *Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) No. 15-CV-02198-EMC, 2016 WL 5907869, at *8-9.

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

18 The Settlement provides that Defendant will pay a Gross Settlement Fund of \$1,350,000.00
19 to release the PAGA claims alleged in the Lawsuit on behalf of all Aggrieved Employees. After
20 Court-approved deductions for attorneys’ fees and litigation costs, final costs of settlement
21 administration, and the Enhancement Award to Named Plaintiff, the remaining Net Settlement
22 Amount will be distributed in accordance with Labor Code §2699(i), i.e., 75% to the LWDA and
23 25% to the Aggrieved Employees. (Settlement Agreement ¶ 34.)

24 **A. The Aggrieved Employees**

25 Under the Settlement, Aggrieved Employees include all persons who were employed as a
26 driver by Defendant in California and who received wages for work performed at any time from
27 April 7, 2019 through the date of Court approval of the settlement or 90 days from the date of
28 December 20, 2021, whichever occurs sooner. As of November 23, 2021, when the mediation data-

pull ended, there were approximately 1,833 persons who answered to this definition. (Kachadoorian Decl. ¶ 24.)

B. Distribution to Aggrieved Employees and the LWDA.

The Settlement is non-reversionary and does not require Aggrieved Employees to submit a claim form to reap financial benefit from the Settlement. Each of the Aggrieved Employees shall be allocated a portion of 25% share of the Net Settlement Amount to be paid to Aggrieved Employees on a pro-rata basis. Each Aggrieved Employee's Individual PAGA Payment shall be calculated by multiplying the Aggrieved Employees PAGA Payment by a fraction, the numerator of which is the total number of pay periods in which an Aggrieved Employee received wages for hours worked during the Settlement Period, and the denominator of which is the total aggregate number of pay periods in which all Aggrieved Employees received wages for hours worked during the Settlement Period. (Settlement Agreement ¶ 37.)

Within 10 business days after the Effective Date, Defendant will provide to the Settlement Administrator an Excel spreadsheet including the following information for each Aggrieved Employee: (1) name; (2) last known address, (3) phone number, (4) hire date of record with Defendant, (5) termination date of record with Defendant, (6) Social Security Number, and (7) the number of pay periods in which the employee received wages for hours worked from Defendant during the Settlement Period (hereafter, the "Database"). (Settlement Agreement ¶ 39.)

Within 15 calendar days following its receipt of the Database, the Settlement Administrator shall disburse the Gross Settlement Fund by sending to the Aggrieved Employees, by first class mail, a check representing their pro-rata share of the 25% of the Net Settlement Amount, based on the formula described above, along with a copy of the Notice of Settlement Payment; and issuing payment to the LWDA for 75% of the Net Settlement Amount. (Settlement Agreement ¶ 40.)

Aggrieved Employees have 180 days to cash their checks. If any checks mailed to Aggrieved Employees remain uncashed after the expiration of 180 days, or an envelope mailed to an Aggrieved Employee is returned and no forwarding address can be located for the Aggrieved Employee after reasonable efforts have been made, then any such funds shall be transmitted by the Settlement Administrator pursuant to governing California law to the State of California Unclaimed

1 Property Fund, to be held there in the name of and for the benefit of such Aggrieved Employees.
2 (Settlement Agreement ¶ 41.)

3 **C. The Releases and Settlement Payment to Plaintiff.**

4 Importantly, the California Supreme Court has explained that other employees are bound
5 by a PAGA adjudication only with respect to civil penalties, just as they would be “bound by a
6 judgment in an action brought by the government.” *Arias*, supra, 46 Cal. 4th at 986. In accordance
7 with this rule, the release of Aggrieved Employees herein is narrowly tailored: “Plaintiff, the
8 LWDA, and all Aggrieved Employees shall, for the entire Settlement Period, be deemed to have
9 fully released and discharged the Released Parties from any and all Released Claims.” (Settlement
10 Agreement ¶ 50.) The Release Claims means “*any claim for civil penalties under the PAGA and*
11 *all other related remedies available under the PAGA* for all allegations, claims, debts, rights,
12 demands, charges, complaints, actions, causes of action, guarantees, interest, costs, expenses,
13 attorneys’ fees, damages, obligations or liabilities of any and every kind, contingent or accrued,
14 that are, were or reasonably could have been alleged or asserted based upon the facts and/or theories
15 alleged in the PAGA claims filed in the Lawsuit and/or in any notice provided pursuant to PAGA
16 by Ellsworth to the LWDA and Defendant (including, without limitation, in Ellsworth’s April 7,
17 2020 and July 23, 2020 PAGA notice letters), arising out of, based on or related to any violation of
18 Labor Code §§ 201, 202, 203, 204, 221, 226, 510, 512, 558, 558.1, 1182.12, 1193.6, 1194, 1194.2,
19 1197, 1197.1, 1199 that occurred, arose or accrued at any time during the Settlement Period.” (*Id.*
20 at ¶ 13; emphasis added.)

21 No individual claims of any Aggrieved Employee (other than Plaintiff) are released, and the
22 only claims released are PAGA claims for civil penalties based on the facts alleged in the litigation,
23 as set forth above.

24 **D. Attorneys’ Fees and Costs and Enhancement Award**

25 The Settlement also provides that Plaintiff’s Counsel may request an award of attorneys’
26 fees of \$472,500.00, which reflects 35 percent of the Gross Settlement Amount. (Settlement
27 Agreement ¶ 34.) As discussed below, the request for attorneys’ fees is justified by the substantial
28 work of Plaintiff’s Counsel in this action.

1 The Settlement also provides for an Enhancement Award of \$10,000 in light of services
2 provided and risks undertaken by Plaintiff in bringing and prosecuting the Lawsuit and for agreeing
3 to a general release of claims against Defendant to effectuate the Settlement. (Settlement
4 Agreement ¶¶ 34, 51.)

5 **E. Filing of Amended Complaint**

6 The Parties have agreed, as a condition of settlement and subject to the Court's approval,
7 to the filing of an amended complaint to accurately reflect the PAGA claims alleged in the Lawsuit
8 and/or in any notice provided pursuant to PAGA by Plaintiff to the LWDA and Defendant
9 (including, without limitation, in Plaintiff's April 7, 2020 and July 23, 2020 PAGA notice letters),
10 which are being settled pursuant to the Agreement. (Settlement Agreement ¶ 21.) Plaintiff's
11 proposed Fourth Amended Complaint is attached to the Kachadoorian Declaration at Exhibit 4.
12 Pursuant to ¶¶ 21 and 30.b of the Agreement, respectively, upon Plaintiff's filing of the Fourth
13 Amended Complaint following receipt of approval from the Court to do so, the Fourth Amended
14 Complaint shall be deemed to have been generally denied by Defendant.

15 **V. THE PAGA SETTLEMENT SHOULD BE APPROVED.**

16 In 2016, PAGA was amended to require the Court to "review and approve any settlement
17 of any civil action filed pursuant to this part." Labor Code § 2699(l)(2). The amendment also
18 requires that the "proposed settlement shall be submitted to the agency at the same time that it is
19 submitted to the court." Plaintiff is concurrently submitting the Settlement to the LWDA.
20 (Kachadoorian Decl. at ¶ 25.)

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

22 PAGA was passed by the legislature as Senate Bill 796, and it was signed by the Governor
23 and filed with the Secretary of State on October 12, 2003. See Legislative Digest re Senate Bill
24 No. 796. It took effect on January 1, 2004. The original version of the act did not contain the court
25 approval requirement now codified in section 2699(l). That subdivision was added as part of the
26 amendments to the Act that were introduced as SB 1809 in February 2004 and signed by the
27 Governor on August 11, 2004. See Legislative Digest re Senate Bill No. 1809. Those amendments
28

1 took effect immediately, and the Court approval requirement of section 2699(l) was one of the
2 provisions that the Legislature made retroactive to January 1, 2004. *Ibid.*

3 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments
4 (SB 1809). On July 29, 2004, during the consideration of the amendments in SB 1809, Senator
5 Dunn sent a letter addressed to the President Pro Tempore of the Senate, which was published in
6 the Senate Daily Journal, “to clarify the extent of subdivision (1)” of what is now section 2699. He
7 was sending this letter “in response to an issue raised by the Judicial Council of California.” *Ibid.*
8 In the letter Senator Dunn stated, “The purpose of court review of the penalties in subdivision (l) is
9 to ensure that settlements involving penalties arising out of Labor Code Section 2699 do not
10 undercut the dual statutory purposes of punishment or deterrence, or result in unjust, arbitrary, and
11 oppressive, or confiscatory settlements.” *Ibid.*

12 This legislative history provides courts wide discretion to approve PAGA penalties
13 proposed as part of a settlement. The criteria courts apply consider the effect the penalties have on
14 the defendant rather than on the LWDA or the aggrieved employees. *See Iskanian*, 59 Cal. 4th at
15 313 (stating that while the State has an interest “in receiving the proceeds of civil penalties,” the
16 penalties are “used to deter violations”). This analysis differs from approving settlements in the
17 class action context, where the concern is the amount received by the class and comparison is made
18 to the maximum potential recovery that could be available to the class after trial. *See Kullar v. Foot*
19 *Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130. Importantly, “there is no[] requirement that
20 the Court certify a PAGA claim for representative treatment” as in a class action. *Villalobos v.*
21 *Calandri Sunrise Farms LP* (C.D. Cal. July 2015) 2015 WL 12732709, at *5.

22 **B. The PAGA Penalties to Be Paid under the Settlement Are Fair, Reasonable,**
23 **and Adequate.**

24 Here, the penalties are appropriate when considered in light of the principles discussed in
25 Senator Dunn’s letter. The Gross Settlement Amount of \$1,350,000 represents an excellent
26 recovery that is large enough to punish or deter Defendant, especially in light of the significant risks
27 entailed by further litigation. (Kachadoorian Decl. ¶¶ 26-35.)

1 To prevail and recover PAGA penalties at trial, Plaintiff would be required to establish
2 Defendant's liability for the underlying Labor Code claims and the appropriate amount of recovery.
3 See *Elliot v. Spherion Pac. Work, LLC* (C.D. Cal. 2008) 572 F. Supp. 2d 1169, 1181-82 ("Plaintiff's
4 claim under [PAGA] is wholly dependent upon her other claims. Because all of plaintiff's other
5 claims fail as a matter of law, so does her PAGA claim."). Even if liability is established, the
6 amount of the penalty ultimately awarded is subject to the Court's discretion. See *Thurman v.*
7 *Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1136, overruled on other
8 grounds in *ZB, N.A. v. Super. Ct.*, 8 Cal. 5th 175 (2019). A court may decide not to award maximum
9 civil penalties or permit stacking of PAGA penalties for multiple violations within a pay period in
10 light of various considerations, including the employer's good-faith efforts to comply with
11 California law. See Labor Code § 2699e(2) [the Court may "award a lesser amount than the
12 maximum civil penalty amount [authorized by PAGA] if, based on the facts and circumstances of
13 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
14 or confiscatory." Moreover, some authority suggests that civil penalties for "subsequent" violations
15 under the statute cannot be awarded unless the employer has been notified that is it violating the
16 particular Labor Code provision. See *Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, 1209;
17 accord, *Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127, 1144. (Kachadoorian Decl. ¶
18 27.)

19 Defendant maintained and continues to maintain that it had legally compliant employment
20 policies and practices throughout the statutory period. Defendant denied and continues to deny that
21 it ever violated any provision of the California Labor Code and argued that, even assuming such
22 violations occurred, Defendant will not be treated as having engaged in subsequent violations
23 giving rise to heightened penalties. *Ibid.* In other words, Defendant argued that heightened civil
24 penalties for subsequent violations would not be assessed unless it could be shown that Defendant
25 had notice that it was violating the law, e.g., it had been cited by a labor agency or adjudged by a
26 court to have done so. Thus, Defendant contended that, at best, even if a violation giving rise to a
27 penalty was shown for each pay period, only the lower civil penalty associated with initial violations
28 would apply. (Kachadoorian Decl. ¶ 28.)

1 Plaintiff faced significant challenges in obtaining greater civil penalties, including
2 Defendant's assertion that all Aggrieved Employees were subject to arbitration agreements that
3 require individual arbitration and prohibit collective relief, including prohibiting PAGA actions.
4 Although the California Supreme Court held in *Iskanian* held that the Federal Arbitration Act
5 (FAA) does preempt representative PAGA actions, the United States Supreme Court recently
6 granted *certiorari* in *Viking River Cruises, Inc. v. Mariana*, U.S. Supreme Court Case No. 20-1573,
7 which will answer the question of whether the Federal Arbitration Act "requires enforcement of a
8 bilateral arbitration agreement providing that an employee cannot raise representative claims,
9 including under PAGA." (Kachadoorian Decl. ¶ 29.)

10 Defendant also asserted that Plaintiff's meal and rest break claims were preempted by recent
11 Department of Transportation (DOT) regulations, namely, 49 C.F.R. § 395.3, citing to recent Ninth
12 Circuit authority in *Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.* (9th
13 Cir. 2021) 986 F.3d 841, 848. (Kachadoorian Decl. ¶ 30.) Moreover, Defendant asserted defenses
14 to liability, insisting on its compliance with California law. Defendant also argued that drivers used
15 a proprietary computer application which alerted them to take meal and rest breaks; this application
16 also prompted drivers to certify whether any noncompliance with California meal and rest break
17 laws was voluntary. (*Ibid.*) Further, Defendant contended that Aggrieved Employees consisted of
18 a diverse range of driver classifications with different routes and job duties, and thus there was
19 variation as to the circumstances that could allegedly cause drivers to work off the clock or to be
20 deprived of the opportunity to take legally compliant, duty-free meal and/or rest periods. (*Ibid.*)
21 Given Defendant's policies and practices, Defendant contended the PAGA claim would be
22 unmanageable due to individualized analyses required as to each Aggrieved Employee, and thus
23 the representative claims should be stricken as authorized by a recent California appellate opinion,
24 *Wesson v. Staples the Off. Superstore, LLC* (2021) 68 Cal. App. 5th 746, 763; *see also Liu v. Merrill*
25 *Lynch & Co.* (C.D. Cal. Nov. 10, 2014) No. CV-14-0425-PA, 2014 WL 5904904, at *3-4
26 (dismissing the PAGA claim because a multitude of individualized assessments would be
27 necessary, making the PAGA claim unmanageable). (*Ibid.*)

1 Another important consideration was the length, difficulty, and uncertainty of further
2 litigation. (Kachadoorian Decl. ¶¶ 31, 34.) The litigation that has already occurred over the last
3 two years has been fierce and substantial. There have been five contested motions in the district
4 court, one contested appellate motion, and two appeals filed, as well as significant written
5 discovery. Plaintiff and his counsel are conscious of the cost and duration of continuing to litigate
6 this matter through trial and appeal, a process that will include hundreds if not thousands of hours
7 of law and motion, written discovery, document production, depositions, discovery motions,
8 dispositive motions, expert testimony, and appeals. (*Ibid.*) Plaintiff and his counsel also are
9 conscious of the uncertainty and risk of the outcome of further litigation, and the difficulties and
10 delays inherent in such litigation. (*Ibid.*)

11 Given Defendant's potential defenses to the claimed Labor Code violations at issue, and the
12 risks and costs of continued litigation, Plaintiff's Counsel applied appropriate discounts in reaching
13 the instant Settlement. Plaintiff used the initial \$100 per-pay-period violation (as opposed to the
14 \$200 subsequent per violation rate) to calculate a realistic estimate of \$8,418,700 (based on 84,187
15 pay periods during the Settlement Period) in potential PAGA penalty exposure. (Kachadoorian
16 Decl. ¶ 32.) Here, the Gross Settlement Fund is \$1,350,000.00, which after deductions provides a
17 substantial sum of at least \$825,500, with \$619,125 to the State and \$206,375 to Aggrieved
18 Employees. (Settlement Agreement ¶ 34.) This amount achieves PAGA's enforcement objectives
19 by encouraging compliance with the Labor Code; incidentally, it also confers a substantial benefit
20 to and is in the best interests of Aggrieved Employees and the State of California. As a result, the
21 Settlement is fair, adequate, and should be approved. (Kachadoorian Decl. ¶¶ 32-36.)

22 The Settlement Amount being paid out here to the LWDA and the Aggrieved Employees
23 exceeds amounts that have been approved by courts in other cases. For example, in *Franco v. Ruiz*
24 *Food Products, Inc.*, 2012 WL 5941801 (E.D. Cal. 2012), the court approved a total PAGA penalty
25 amount of \$10,000, with the \$2,500 employee portion divided between as many as 2,055 current
26 and former employees. In *Schiller v. David's Bridal, Inc.*, 2012 WL 217001 (E.D. Cal. 2012), the
27 court also approved a PAGA penalty amount of \$10,000, with the \$2,500 employee portion divided
28 between as many as 3,326 individuals. *See also Penaloza v. PPG Industries Inc.*, Case No.

1 BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving PAGA
2 penalties of \$5,000.00 for class of 667 members); *Cabrera v. Advantage Sale & Marketing, LLC*,
3 Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March 12, 2013) (approving
4 PAGA penalties of \$10,000.00 for class of approximately 3,000 members). The result here is well
5 within the range of an acceptable settlements under the circumstances, especially when compared
6 to the settlement of other PAGA actions. (Kachadoorian Decl. ¶ 35.)

7 Moreover, the LWDA has been provided with the settlement pursuant to Labor Code §
8 2699(l)(2), and the decision of the Agency to accept the Settlement and not oppose this Motion
9 should be given considerable weight. This is not a situation where the Court needs to be concerned
10 about the rights of absent employees as in a class action settlement, as this PAGA only settlement
11 does not release any individual claims of any of the allegedly aggrieved employees other than
12 Plaintiff, and the LWDA has received its statutorily required notice of the
13 Settlement and is fully able to object to the Settlement if it so chooses. (Kachadoorian Decl. ¶ 25.)

14 **VI. THE ATTORNEYS' FEES AND COSTS ARE REASONABLE**

15 Pursuant to the Settlement Agreement, Plaintiff's Counsel may request attorneys' fees of up
16 to \$472,500 or 35% of the Gross Settlement Fund, and Plaintiff's Counsel respectfully request the
17 Court to award that amount. (Settlement Agreement ¶ 34). This request is fair, reasonable, and
18 adequate to compensate Class Counsel for the substantial work they have done on this case and the
19 work they will continue to do in bringing this action to a conclusion and ensuring that Aggrieved
20 Employees receive their payments. (Kachadoorian Decl. ¶ 36.)

21 Pursuant to Labor Code section 2699(g)(1), the prevailing party in a PAGA action is entitled
22 to reasonable attorney's fees and costs. Consequently, the Court may award fees under either the
23 common-fund doctrine or the lodestar method. *See Lealao v. Beneficial California, Inc.* (2000) 82
24 Cal. App. 4th 19, 26 (observing that application of the lodestar method to calculate reasonable
25 attorneys' fees is appropriate in fee-shifting cases); *see also Ketchum v. Moses* (2001) 24 Cal.4th
26 1122, 1131-1132 (citing *Serrano v. Priest* (1977) 20 Cal.3d 2); *Wershba v. Apple Computer, Inc.*
27 (2001) 91 Cal.App.4th 224, 254; *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480,
28 489.

1 The common -fund doctrine support Plaintiff's Counsel's request for attorneys' fees. The
2 common-fund doctrine has been applied "consistently in California when an action brought by one
3 party creates a fund in which other persons are entitled to share." *City and County of San Francisco*
4 *v. Sweet* (1995) 12 Cal. 4th 105, 110. The Settlement confers a significant benefit on the LWDA
5 and the Aggrieved Employees, and thus Plaintiff's Counsel may share in such recovery. See
6 *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal. App. 4th 589.

7 Awarding attorneys' fees from the Gross Settlement Fund under the common-fund doctrine
8 prevents unjust enrichment of those who benefit from the common fund through the successful
9 efforts of counsel and furthers the important goal of attracting competent counsel to handle
10 representative actions enforcing minimum labor standards. See *Laffitte, supra*, 1 Cal. 5th at 503;
11 *Lealao, supra*, 82 Cal. App. 4th at 48 (observing that the key advantage of the common-fund
12 method is that it focuses on the total benefit conferred on the beneficiaries resulting from the efforts
13 of counsel).

14 The attorneys' fees requested here are consistent with what courts have awarded in other
15 representative action cases. The following reflects PAGA and composite PAGA/class action
16 matters in which attorney's fees were awarded on a common fund basis between 33.33% and 40%:

- 17 • *Banda v. Verizon California, Inc.*, Los Angeles Superior Court Case No. BC434587
18 (35% fee awarded on \$15,000,000 settlement of mixed PAGA/class claims);
- 19 • *Padilla v. Staffmark Investment, Inc.*, San Bernardino County Superior Court Case
20 No. CIVDS1408641 (33.33% fee awarded on \$2,000,000 settlement of a PAGA only case);
- 21 • *Birch v. Office Depot*, United States District Court for the Southern District of
22 California, Case No. 06cv1690 DMS (40% fee awarded on \$16,000,000 settlement of mixed
23 PAGA/class claims);
- 24 • *Zelada v. Majestic Terminal Services*, San Bernardino Superior Court Case No.
25 CIVDS1916968 (38% fee awarded on \$1,800,000 settlement of a PAGA only case); and
- 26 • *Garcia v. The Pep Boys*, Orange County Superior Court Case No. 30-20014-
27 007205740-CU-OE-CJC (33.33% fee awarded on \$1,030,000 settlement of a PAGA only case).
28 (Kachadoorian Decl. ¶ 37.)

1 Plaintiff's Counsel's application for attorneys' fees in light of the facts and circumstances
2 surrounding the case is well-within the range of reasonableness. Court have historically awarded
3 fees as high as fifty percent of the settlement in complex actions. *See In re Ampicillin Antitrust*
4 *Litig.* (D.D.C. 1981) 526 F. Supp. 494 (awarding attorneys' fees in the amount of 45% of the \$7.3
5 million total settlement amount); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.*
6 (S.D.N.Y. 1979) 480 F. Supp. 1195 (awarding approximately 53% of the settlement as attorneys'
7 fees). California courts routinely approve attorneys' fees awards "average[ing] around one-third of
8 the recovery." *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66 n.11 (lower court found the
9 range of contingency fees in marketplace to be up to 40 percent and determined such a percentage
10 fee was appropriate).

11 Awarding attorneys' fees based on a percentage of the gross settlement amount is favored
12 by California courts when a fund established for the common benefit of others is involved, such as
13 here. *See Laffitte, supra*, 1 Cal. 5th at 503. Plaintiff's Counsel represented Plaintiff (and the State
14 of California) on a contingent-fee basis and thus had to forgo other matters (contingent and hourly)
15 to litigate this case, did not receive compensation during this litigation's pendency, and took the
16 risk that they would not recover their investment of time, money, and resources. (Kachadoorian
17 Decl. ¶ 40.) Such a burden is difficult for Plaintiff's Counsel, and simply recovering an hourly rate
18 does not reflect the true value of the risks taken. (*Ibid.*) The attorneys' fees sought here are well
19 within the range accepted in comparable cases, and Plaintiff submits that his counsel's request for
20 \$472,500.00 is fair and reasonable.

21 The lodestar method also justifies Plaintiff's Counsel's fee request. *Laffitte, supra*, 1 Cal.
22 5th at 506. Plaintiff's Counsel have heavily litigated this case over the last two years and have
23 spent 757.8 hours working on this case thus far. (Kachadoorian Decl. ¶¶ 46, 47, Exhibit 2)
24 Factoring in the additional time likely to be incurred on activities subsequent to the filing of this
25 Motion (e.g., attending the approval hearing, communicating with the administrator and Aggrieved
26 Employees, filing status reports regarding the distribution of settlement funds), Plaintiff's Counsel
27 estimate their total lodestar to be \$501,133.00, which is an amount greater than Plaintiff's Counsel
28 request the Court to award in fees and would result in a negative multiplier of .96. (Kachadoorian

Decl. ¶¶ 41, 42, 44, 45.) Accordingly, the fees requested should be approved under either the common-fund or lodestar methods.

Pursuant to the Settlement Agreement, Plaintiff's counsel may recover actual litigation costs of up to \$32,000. (Settlement Agreement ¶ 34.) Plaintiff's litigation expenses include: (1) court filing fees; (2) LWDA filing fees; (3) mediation fees; and (4) mailing, postage, and delivery. These together total \$19,435.87. (Kachadoorian Decl. ¶¶ 48, 50, 51, Exhibit 3.) The expenses incurred by Plaintiff's counsel in this matter benefited Plaintiff, the LWDA, and the Aggrieved Employees, and are of the type routinely billed by attorneys in such litigation. (*Ibid.*) Litigation costs of \$19,435.87 are reasonable, and should be approved.

VII. THE ENHANCEMENT AWARD TO PLAINTIFF IS REASONABLE.

As part of the Settlement, Plaintiff Jarrell Ellsworth is providing a general release of his individual claims, in addition to those Released Claims by all Aggrieved Employees, and in consideration thereof, as well as Plaintiff's effort and initiative in bringing and helping to prosecuting the Lawsuit, Defendant has agreed to an enhancement of \$10,000 or such other amount as the Court approves. (Settlement Agreement ¶ 34; Kachadoorian Decl. ¶¶ 52, 56.)

Moreover, although this is not an incentive payment per se, the Parties acknowledge that Plaintiff took significant risks in bringing this litigation and actively supported its prosecution. (*Id.* at ¶ 53, 54.) Mr. Ellsworth risked his reputation, his future employability, and potentially much larger recovery he could have obtained in an individual action. (*Ibid.*) Plaintiff is a trucker by trade but sued one of the largest trucking companies in the country at the start of his career—he was only 25 years old when he started working for Schneider in 2019 and had only worked for one other motor carrier before starting at Schneider, for about a month. (*Ibid.*; Ellsworth Decl. ¶¶ 6, 10.) The Lawsuit has received substantial attention on the Internet, as a Google search of the Plaintiff's name demonstrates. (Kachadoorian Decl. ¶ 54.) The Notice of Settlement Payment will be as sent to nearly two thousand Aggrieved Employees, garnering widespread attention. (*Ibid.*; *see also* Settlement Agreement, Exhibit A, Notice of Settlement Payment.) Mr. Ellsworth has significant concerns regarding this action's effect on his current search for employment. (*Id.* at ¶ 54.)

The time Mr. Ellsworth devoted to this case came at a steep cost. He was out of a job,

1 because, he believed, Defendant had terminated him for blowing the whistle on its Labor Code
2 violations, and his participation in this Lawsuit impeded his efforts to find a job. (Ellsworth Decl.
3 ¶ 10.) In fact, Mr. Ellsworth was unemployed for about a year after his employment with Defendant
4 ended. (*Ibid.*) During that time, Mr. Ellsworth experienced homelessness, and when he was able
5 to find temporary work, his participation in this lawsuit at times caused him to miss work and
6 employment opportunities. (*Ibid.*) Moreover, throughout this case Mr. Ellsworth had, and
7 continues to have, substantial personal obligations to take care of his minor child and his father,
8 who was on disability. (*Ibid.*) Thus, Mr. Ellsworth had to surmount myriad personal difficulties to
9 fulfill his obligations as the representative plaintiff. (*Ibid.*) Moreover, Mr. Ellsworth assumed the
10 risk of being liable to Defendant for its costs of suit, which could be substantial. (*Id.* at ¶ 11.)

11 Nevertheless, Mr. Ellsworth's involvement was exceptional. Plaintiff has zealously
12 advocated on behalf of his fellow employees over the last two years. He has spent a significant
13 amount of time, approximately 60 hours, helping Plaintiff's Counsel prosecute this action,
14 including but not limited to frequently communicating with his attorneys for more than two years
15 regarding this case, providing information about Defendant and the trucking industry, producing
16 relevant documents, identifying potential witnesses, assisting counsel in drafting and amending the
17 pleadings, assisting Plaintiff's Counsel to understand the documents and discovery produced by
18 Defendant, working with Plaintiff's Counsel to prepare declarations relating to Defendant's motion
19 to compel arbitration and Plaintiff's motion for class certification, preparing for his noticed
20 deposition, participating in mediation and settlement discussions, reviewing, discussing, and
21 evaluating the terms of and signing the Settlement Agreement, and regularly requesting updates on
22 the status of the case. (Kachadoorian Decl. ¶ 52; Ellsworth Decl. ¶¶ 9, 17, 18.)

23 Significantly, Plaintiff chose to forgo his potential individual wrongful
24 termination/whistleblowing claim, which might have resolved sooner, in order to prosecute this
25 representative action for the benefit of California employees. (Ellsworth Decl. ¶ 10; Kachadoorian
26 Decl. ¶ 55.)

27 Plaintiff will not benefit financially from this Settlement in any meaningful sense, yet he
28 has obtained a substantial payment for the State of California and for other Aggrieved Employees.

1 (Ellsworth Decl. ¶ 19; Kachadoorian Decl. ¶ 57.) Plaintiff's Enhancement Award in the amount of
2 \$10,000 is modest, reasonable, and should thus be approved. (Ellsworth Decl., *passim*;
3 Kachadoorian Decl. ¶¶ 52-58.)

4 Numerous other state courts have approved service awards and/or individual settlement
5 payments to PAGA representatives in amounts that demonstrate the reasonableness of Plaintiff's
6 request. *See, e.g. Garrett v. Bank of America*, Alameda County Superior Court Case No.
7 RG13699027 (Oct. 28, 2016) (awarding three PAGA plaintiffs \$25,000.00 each as service awards);
8 *Brewer v. Connell Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123
9 (approving a PAGA representative awarded as an individual settlement payment of \$15,000.00);
10 *Jones v. J.C. Penny Corp.*, Los Angeles Superior Court Case No. BC451823 (awarding PAGA
11 representative a service award of \$10,000.00); and *Garcia v. Macy's West Stores*, San Bernardino
12 Superior Court Case No. CIVDS1516007 (approving a PAGA settlement and service award of
13 \$10,000.00). (Kachadoorian Decl. ¶ 58.)

14 **VIII. CONCLUSION**

15 For the foregoing reasons, Plaintiff respectfully requests that the Court grant approval of the
16 PAGA settlement entered into by the Parties.

17
18 Date: March 15, 2022

COUNSELONE, PC

19
20 

21 _____
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22
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