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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MICHAEL THOMPSON, on behalf of himself and all "aggrieved employees" pursuant to Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

MESA MANAGEMENT, INC., a California corporation, and DOES 1 through 10, inclusive,

Defendants.

CASE NO: 30-2020-01150629-CU-OE-CXC

Assigned to Judge James Di Cesare, Dept. C16

NOTICE OF UNOPPOSED MOTION AND MOTION FOR AN ORDER AND JUDGMENT APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004, AWARDING ATTORNEYS' FEES, COSTS, SERVICE AWARD PAYMENT, AND REIMBURSEMENT OF SETTLEMENT ADMINISTRATION EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 4, 2022
Time: 9:30 a.m.
Dept.: C16

Reservation Number: 73655002

Complaint Filed: July 7, 2020

PLEASE TAKE NOTICE THAT on March 4, 2022 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department C16 of the above-entitled Court, located at 700 W. Civic Center Drive, Santa Ana, California 92702, Plaintiff Michael Thompson will and hereby does move unopposed for an Order and Judgment: (1) granting approval of the proposed settlement of claims brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) set forth in the parties' Joint Stipulation of PAGA Settlement ("Settlement Agreement"); (2) appointing ILYM Group, Inc. and approving payment of its fees not to exceed $5,000 from the Gross Settlement Amount; (3) directing disbursement of the Gross Settlement Amount pursuant to the terms of the Settlement Agreement; (4) directing payment of attorneys' fees and litigation costs from the Gross Settlement Amount in the amount of $94,805.62 to Plaintiff's counsel; (5) directing payment of a service award payment from the Gross Settlement Amount in the amount of $7,500 to Plaintiff Thompson; and (6) entering Judgment consistent with the Settlement Agreement.

This motion will be based on this Notice, the supporting memorandum of points and authorities, the parties' Settlement Agreement, the Declarations of Daniel F. Gaines, Esq. and Plaintiff Michael Thompson, the documents and records on file in this matter, and such additional arguments, authorities, and evidence and other matters as may be presented by the parties hereafter.

Date: December 16, 2021

Respectfully submitted,

GAINES & GAINES, APLC

By: _____

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Attorneys for Plaintiff
MICHAEL THOMPSON

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Michael Thompson ("Plaintiff" or "Thompson") and all Aggrieved Employees under the Labor Code's Private Attorneys General Act of 2004 ("PAGA") respectfully move this Court for an Order granting approval of the proposed Settlement Agreement of the above-captioned lawsuit against Defendant Mesa Management, Inc. ("Defendant"). The proposed Settlement will dispose of the Released Claims asserted on behalf of Plaintiff and approximately 100 PAGA Employees (defined as all individuals who worked for Defendant in California as an hourly or non-exempt employee at any time during the Covered Period (May 2, 2019 through August 30, 2021). Defendant represents that the total number of Aggrieved Employees is no more than 100 individuals who worked a total of 3,430 pay periods during the Covered Period.

This case addresses claimed violations of employee protections embodied in the California Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that Defendant failed to properly compute non-base hourly wages, including rental credits, earned by Plaintiff and other PAGA Employees who lived in apartments on Defendants' premises, into the regular rate of pay for purposes of calculating and paying overtime at the correct rates, in violation of Labor Code §§ 510, 558 and 1194; failed to pay Plaintiff and other PAGA Employees all wages due, in violation of Labor Code §§ 510, 558 and 1194 and IWC Wage Order 5-2001; failed to pay premium wages to Plaintiff and PAGA Employees who were denied rest periods, in violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 5-2001; failed to provide Plaintiff and PAGA Employees with wage statements that fully and accurately itemized the requirements set forth in Labor Code § 226(a); and failed to timely pay Plaintiff and certain PAGA Employees all wages due at the separation of their employment based on the time frames required by Labor Code §§ 201 and 202. As a result of Defendant's alleged violations of the Labor Code, approximately 100 employees are claimed to have suffered Labor Code violations for up to 3,430 aggregate pay periods at the rate of $100 each based on PAGA's penalty provisions. Defendant denies that any of

the PAGA Employees suffered any Labor Code violations and denies that Plaintiff or the PAGA Employees are entitled to recover any civil penalties under PAGA.

In deciding whether to grant approval of the proposed Settlement, the primary issue to be decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it: (1) is the product of arms-length negotiations, (2) was negotiated by attorneys experienced in wage and hour issues, (3) occurred subsequent to undertaking sufficient investigation necessary to evaluate the relative strength and value of the PAGA claim, and (4) reflects a reasoned compromise based directly on the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and likely duration of further litigation.

The value achieved by the Settlement may be gleaned from the fact that the Labor and Workforce Development Agency ("LWDA") and the approximately 100 PAGA Employees encompassed by the Settlement will receive no less than $142,694.48 under the terms of the Settlement, which, pursuant to the operative statute, shall be allocated "75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees." *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only because further litigation may have resulted in a net-zero recovery based on the defenses available to Defendant, but because the amount secured by Plaintiff is sizable and in line with similar settlements of these types of claims under PAGA. It is also important to underscore that all penalty amounts paid to PAGA Employees will be an unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA penalties.

For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this Court enter the Order submitted herewith.

II. STATEMENT OF THE CASE AND THE SETTLEMENT

A. The Parties

Defendant is a full-service management company with over 40 years of experience in property management services. Defendant specializes in multi-family communities, senior communities and commercial retail/office sites across California, including eight properties in

California. Gaines Decl. at ¶ 6.

Plaintiff worked as a non-exempt Maintenance Supervisor (in training) from September, 2017 through November 2019 at Defendant's Park Mesa Villas apartment complex in Costa Mesa, California, Brooklake apartment complex in La Habra, California, and Emerald Isle apartment complex in Placentia, California. Plaintiff is acting as a representative plaintiff under the PAGA on behalf of himself and PAGA Employees. Gaines Decl. at ¶ 7.

B. The Claims Asserted

Plaintiff asserts claims that Defendant failed to properly compute non-base hourly wages, including rental credits, earned by Plaintiff and other PAGA Employees who lived in apartments on Defendants' premises, into the regular rate of pay for purposes of calculating and paying overtime at the correct rates, in violation of Labor Code §§ 510, 558 and 1194; failed to pay Plaintiff and other PAGA Employees all wages due, in violation of Labor Code §§ 510, 558 and 1194 and IWC Wage Order 5-2001; failed to pay premium wages to Plaintiff and PAGA Employees who were denied rest periods, in violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 5-2001; failed to provide Plaintiff and PAGA Employees with wage statements that fully and accurately itemized the requirements set forth in Labor Code § 226(a); and failed to timely pay Plaintiff and certain PAGA Employees all wages due at the separation of their employment based on the time frames required by Labor Code §§ 201 and 202. Plaintiff asserts these claims under PAGA, seeking civil penalties for the alleged Labor Code violations. Gaines Decl. at ¶ 8.

C. Procedural Posture

Plaintiff exhausted the PAGA on or about March 23, 2020, when he submitted a letter by online submission to the Labor & Workforce Development Agency ("LWDA") and by certified mail to Defendant outlining the facts and theories underlying his claims. *See* **Exhibit B** to Gaines Decl. at ¶ 9. Plaintiff then filed his PAGA representative complaint on July 7, 2020 in the Orange County Superior Court on behalf of himself and other PAGA Employees seeking penalties pursuant to PAGA for Defendant's violations of Labor Code §§ 201, 202, 226(a), 226.3, 226.7, 510, 558, and 1194. On or about September 10, 2020, Defendant filed its Answer to Plaintiff's complaint. Gaines Decl. at ¶ 10.

Concurrently with the filing of this Motion, Plaintiff submitted the Settlement Agreement, together with this Motion and all supporting documents, to the LWDA via online upload on December 16, 2021. Service of the LWDA is reflected on the Declaration of Service submitted herewith. Gaines Decl. at ¶ 11.

D. Plaintiff's Counsel's Investigation

Counsel for Plaintiff engaged in informal discovery of Defendant's alleged Labor Code violations, which specifically targeted evaluating the strength and value of the PAGA claims in preparation for a resolution of this Action. Gaines Decl. at ¶ 12.

Plaintiff's Counsel obtained and reviewed multiple documents, including (i) Plaintiff's employee file and wage statements, (ii) policy documents relating to the employment of Plaintiff and other PAGA Employees, and (iii) data relating to the number of alleged violations and the value of the recoverable penalties. Gaines Decl. at ¶ 13.

Based on the information received, as well as through discussions with Defendant's Counsel, Plaintiff's Counsel were able to (i) determine the total number of distinct individuals falling within the definition of "Aggrieved/PAGA Employee" for the relevant statutory period, and (ii) construct a damage model that calculated the maximum realistic amount of PAGA penalties that could be levied against Defendant within the Covered Period. Defendant, however, disputed Plaintiff's claims and disputed both the existence of and extent of liability as alleged by Plaintiff. Gaines Decl. at ¶ 14.

Based on Plaintiff's Counsel's experience in litigating similar "representative" wage and hour claims, the degree of investigation that was conducted, and the amount of data that was obtained, was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5, 12-15.

E. Settlement Negotiations

On August 30, 2021, the Parties participated in a mediation session with respected mediator Todd A. Smith, Esq. During the mediation, the parties engaged in arm's-length negotiations. At the conclusion of the mediation, Mr. Smith successfully brought the parties to agree on a resolution of the PAGA claims asserted in the action. Gaines Decl. at ¶ 16.

F. The Proposed Settlement

The Parties jointly prepared and executed the Settlement Agreement. Gaines Decl. at ¶ 17, **Exhibit C**. The Settlement Agreement sets forth the terms of the Settlement reached by the Parties, including the following key points:

1. Defendant agrees to settle this matter for the payment of Two Hundred Fifty Thousand Dollars ($250,000) (hereinafter the "Gross Settlement Amount"), which shall be all inclusive, encompassing (i) all payments to the Labor and Workforce Development Agency and PAGA Employees, (ii) any and all costs of third-party administration of the settlement, (iii) Plaintiff's Counsel's attorneys' fees and costs of suit, and (iv) a service award payment to Plaintiff. *See* Settlement Agreement, at § 34.

2. The total sum available for payment of PAGA penalties shall be calculated by deducting $94,805.62 for the payment of Plaintiff's Counsel's fees and costs ($83,333.33 in fees and $11,472.29 in costs)[1], $7,500 to Plaintiff Thompson for his service award payment, and the costs of administration (up to $5,000) from the $250,000 Gross Settlement Amount, yielding approximately $142,694.48. Seventy-five percent (75%) of this amount, or $107,020.86, shall be distributed to the LWDA, and the remaining twenty-five percent (25%) or $35,673.62, shall be distributed to the PAGA Employees. *See* Settlement Agreement, at § 36.

3. All PAGA Employees will receive a pro rata share of the $35,673.62, which shall be distributed based on the number of Compensable Pay Periods each PAGA Employee worked for Defendant in California during the Covered Period. *See* Gaines Decl. at ¶ 20; Settlement Agreement, at § 12. Although these calculations will not be made until after approval, a rough estimation of the value to the 100 individuals falling within the definition of "PAGA Employee" may be gleaned from the fact that an equal division would provide about $356.74 to each PAGA Employee, net of payments to the LWDA, to the Settlement Administrator, attorney's fees and costs. The LWDA will be paid $107,020.86. Gaines Decl. at ¶ 19.

[1] Plaintiff's counsel's formal fee request is one-third of the Gross Settlement Amount and combined total final costs of $11,472.29, as discussed herein and set forth in **Exhibit E** to the Gaines Declaration. This cost request is less than the $15,000 allocated in the Settlement.

4. In exchange for the above settlement consideration, Defendant and the Released Parties shall be entitled to the following release from each and every PAGA Employee, including Plaintiff[2]:

> Upon the Court's approval of this Settlement Agreement, subject to Defendant's full payment of the Gross Settlement Amount, and except as to such rights or claims as may be created by this Settlement Agreement, Plaintiff, all PAGA Employees, and the LWDA fully release and discharge the Released Parties (Defendant, and each of its former and present direct and/or indirect owners, dba's, affiliates, parents, subsidiaries, brother and sister corporations, divisions, related companies, successors and predecessors, and current and former employees, attorneys, officers, directors, shareholders, owners, trustees, fiduciaries, beneficiaries, subrogees, executors, partners, privies, agents, servants, insurers, representatives, administrators, employee benefit plans, and assigns of said entities.) of and from all Released Claims (all claims, demands, rights, liabilities, penalties, fees, and causes of action under PAGA, including under Labor Code sections 558 and/or 2698 *et seq.*, predicated on any Labor Code violations alleged in the operative Complaint (which include Labor Code section 201, 202, 226, 226.3, 226.7, 510, 1194, 1194.2, and all claims under the governing Wage Order) or that could have been alleged in the operative Complaint based on the facts, policies, practices, occurrences, or acts alleged in the operative Complaint, or that are based on any alleged failure to pay minimum, regular, or hourly wages, and/or alleged off-the-clock work; failure to pay overtime wages or accurate overtime wages; failure to provide rest periods or pay rest period premiums, failure to pay timely wages during employment or upon separation; failure to provide accurate and/or complete wage statements; failure to maintain records. No underlying Labor Code or other claims other than those asserted under PAGA shall be released by the PAGA Employees, including those of Plaintiff Thompson, whose release shall be the same as all other PAGA Employees.) which accrued during employment by Defendant in California in a non-exempt position during the Covered Period.

See Settlement Agreement, at § 47.

5. Settlement administration, which is to be paid from the Gross Settlement Amount,

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[2] This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act . . . .").

will not exceed $5,000. See Settlement Agreement, at § 25. ILYM Group, Inc., a reputable settlement administration company, has agreed to administer the settlement for this amount, submitting a competitive bid.

6. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and litigation costs of a combined $94,805.62, and Plaintiff seeks a service award payment of $7,500. *See* Settlement Agreement, at § 36.

7. Finally, under the terms of Settlement, funds represented by settlement checks returned as undeliverable and those settlement checks remaining un-cashed for more than 180 days after issuance will be void and the unclaimed funds reissued to the California State Controller's Unclaimed Property Fund under the PAGA Employee's individual name. *See* Settlement Agreement, at § 39.

III. LEGAL ARGUMENT

A. Standards for Approval of A PAGA Settlement

The settlement of a PAGA claim requires court approval pursuant to the operative PAGA statute, which states that the "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part." *See Labor Code* § 2699(l)(2).

As with any settlement, the Court must be mindful in conducting its inquiry that "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further." *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 24 (N.D. Cal. Sept. 12, 2011). Indeed, "the very essence of a settlement is … 'a yielding of absolutes and an abandoning of highest hopes'" [*Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624 (9th Cir., 1982)], as "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *See id.*, at 625. As such, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" or "judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *See id.*

Although the operative PAGA statute does not set forth the criteria on which a PAGA settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for

review of a class action settlement under Fed. R. Civ. P. 23 ("Rule 23"), C.C.P. § 382 and Rule 3.769, Cal. Rules of Court, as courts within California have approved settlements of PAGA claims encompassed within class action settlements using Rule 23 criteria.[3] However, it is important to underscore that not all Rule 23 factors can be applied, as "a PAGA claim asserted on a non-class representative basis . . . is not considered a class action but a law enforcement action, and therefore does not have to meet the requirements of Rule 23." *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan. 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2, 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010). Based thereon, a court's review of a PAGA settlement necessarily implicates the following unique features that render the approval process completely distinct from approval of a class action settlement under Rule 23 or C.C.P. § 382 and Rule 3.769, Cal. Rules of Court.

First, in evaluating the adequacy of the settlement amount, the Court's focus is not concerned with the amount which "aggrieved employees" are to receive, but rather, must focus on the total settlement amount in achieving PAGA's objective.

While "'[a PAGA] action is … designed to protect the public and penalize the employer for past illegal conduct" [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take into account the fact that settlement of a PAGA claim – like any settlement – involves a "compromise" that stops short of rendering findings of liability and damages. Moreover, the Court must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties

[3] As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 "[involves] a balancing of several factors which may include, among others, some or all of the following: [1] the strength of Plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement." *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir., 1998). "Not all of these factors will apply to every class action settlement" and "[u]nder certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *See Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525-526 (C.D. Cal. 2004).

for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies." *See Ochoa-Hernandez*, 2010 U.S. Dist. LEXIS 32774, at 12.

B. The Settlement Meets All the Criteria For Approval

Applying the Rule 23 fairness factors – limited to those compatible with the unique PAGA considerations detailed above – the proposed Settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for approval.

1. The Factors Giving Rise to a Presumption of Fairness Exist

In conducting a review of a settlement, it is generally recognized that an "agreement . . . reached through arms-length negotiation between experienced parties . . . is entitled to a presumption of fairness." *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377, 44 (C.D. Cal. Apr. 12, 2010).

A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-length negotiations brokered through a respected third party neutral [Gaines Decl. at ¶ 16], (2) that was negotiated by Counsel with significant experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient investigation to evaluate the strength and potential value of the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *See id.*, at ¶ 12-16. Based thereon, the court should give considerable weight to the competency and integrity of counsel in assuring itself that the Settlement Agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.

2. The Relative Strength Of The PAGA Claim, And the Realistic Range of Outcomes In The Litigation, Strongly Favor Approval of the Settlement

The relative strength of the PAGA claims brought by Plaintiff weighs in favor of the Court finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the potential to completely eliminate any recovery.

This case addresses alleged violations of important employee protections embodied in the

California Labor Code – namely, that Defendant failed to properly compute non-base hourly wages, including rental credits, earned by Plaintiff and other PAGA Employees who lived in apartments on Defendants' premises, into the regular rate of pay for purposes of calculating and paying overtime at the correct rates, in violation of Labor Code §§ 510, 558 and 1194; failed to pay Plaintiff and other Employees all wages due, in violation of Labor Code §§ 510, 558 and 1194 and IWC Wage Order 5-2001; failed to pay premium wages to Plaintiff and PAGA Employees who were denied rest periods, in violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 5-2001; failed to provide Plaintiff and PAGA Employees with wage statements that fully and accurately itemized the requirements set forth in Labor Code § 226(a); and failed to timely pay Plaintiff and certain PAGA Employees all wages due at the separation of their employment based on the time frames required by Labor Code §§ 201 and 202. Defendant's maximum theoretical exposure in this action, without stacking potentially duplicative and oppressive penalties, totals approximately $343,000 computed by multiplying 3,430 pay periods by $100 each. *See* Gaines Decl. at ¶ 22.

Defendant contends it acted within the requirements of California law at all times as to all PAGA Employees. It further contends that not every pay period at issue involved an alleged Labor Code violation subject to civil penalties. Moreover, it maintained that even if the Court did award penalties, the Court could and would *substantially* reduce the penalties awarded based on the discretionary factors contained in Labor Code § 2699(e)(2) ("In action by an aggrieved employee . . . , a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."). *See* Gaines Decl. at ¶ 23.

Based on these disputes, which had the potential to completely eliminate Plaintiff's recovery, the range of realistic "litigation outcomes" on the Plaintiff's PAGA claim was defined by a "maximum possible liability" amount of approximately $343,000 based on 3,430 pay periods in the Covered Period, without stacking claims, at $100 per violation, and a net-zero recovery based on the defenses asserted by Defendant. *Id.* Notwithstanding the existence of such issues, the Settlement achieves a significant benefit. As such, this factor weighs very heavily in favor of resolution by way of the compromise set forth in the Settlement. Gaines Decl. at ¶ 24.

3. The Risk, Expense, and Complexity of Further Litigation Balances Strongly in Favor of Approval of the Settlement

Approval of the proposed Settlement Agreement is also appropriate in light of the risk, expense, and complexity of further litigation. As discussed above, the proposed Settlement Agreement takes into consideration the specific factual and legal hurdles faced by Plaintiff in establishing Defendant's penalty-liability in this case, which again, may have resulted in a net-zero recovery. These risks – when balanced with the fact that the settlement achieved a very significant recovery (as demonstrated below), and that further litigation posed a risk of diminishing such recovery by increasing litigation expenses – weigh strongly in favor of settlement approval.

4. The Benefits Conferred by the Settlement Balance in Favor of Approval

The Settlement Agreement provides a significant monetary benefit that falls well within "the range of an acceptable settlement" under the circumstances, which is the standard on which the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where it only provides a fraction of what could have been obtained at trial:

> The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at 625 (emphasis in original). Thus, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id.* at 624 (citations omitted). As the Second Circuit has pointed out: "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2nd Cir. 1974).

See Linney, 151 F.3d at 1242.

Here, after all deductions are made for administration, a service award payment, attorneys' fees and costs, $142,694.48 will be paid out, of which $107,020.86 (i.e. 75%) will go to the LWDA, and $35,673.62 (i.e. 25%) will go to the PAGA Employees, as required by Labor Code § 2699(i) ("civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees."). Gaines Decl. at ¶¶ 19-20.

This result is remarkable, as settlements of PAGA claims impacting thousands of individuals have been approved as reasonable for amounts far less than the payment in this case. *See Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27, 2012) ("Defendant has agreed to pay $10,000 as civil penalties pursuant to the PAGA . . . . Of the $10,000, 75 percent ($7,500) will be paid to the State of California, and the remainder ($2,500) will benefit the class . . . . The Court finds that the PAGA payment is set at a reasonable amount, and it shall be approved."); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D. Cal. Oct. 29, 2012) ("GTI agrees to allocate $10,000 to Plaintiff's PAGA claims, and will pay $7,500 to the LWDA, and $2,500 to participating Class Members on a pro-rata basis. This comports with settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the allocation of the Settlement to Plaintiff's PAGA claim."); *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) ("Pursuant to the Settlement Agreement, the parties have agreed to pay $7,500 to the California Labor and Workforce Development Agency . . . . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it be approved."); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11, 2012) ("Pursuant to the Settlement Agreement, Defendant has agreed to pay $15,000 to the California Labor and Workforce Development Agency . . . . The Court finds that the PAGA payment is set at a reasonable amount, and it shall be approved.").[4]

Thus, notwithstanding the existence of issues having the potential to completely eliminate recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds typical PAGA awards routinely approved by the courts, it recovers significant monies for PAGA Employees which they otherwise would not receive. As such, this factor balances strongly in favor of approval of the Settlement. Gaines Decl., ¶ 18.

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[4] Significantly, each of the above-cited actions involved substantially more "aggrieved employees" than the approximately 111 aggrieved employees in the instant Lawsuit. *See Franco*, 2012 U.S. Dist. LEXIS 169057, 14 ("2,055 Class Members were ultimately identified"); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of "approximately 1,869 individuals"); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16 ("3,327 California Class members were ultimately identified"); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 ("2,051 California Class Members were ultimately identified").

5. The Scope of the Release is Narrowly Tailored

As discussed above, the California Supreme Court has concluded that in the context of PAGA "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the release provided in exchange for the foregoing consideration is limited to the civil penalties asserted in the Action under Labor Code §§ 2698 *et seq.* See Settlement Agreement, at § 47.

As such, this factor balances strongly in favor of approval of the Settlement.

6. The Experience and Views of Plaintiff's Counsel Favor Approval of the Settlement

Plaintiff's Counsel has a significant degree of experience in complex wage and hour litigation. *See* Gaines Decl., ¶¶ 2-5, Gaines Decl. at **Exhibit A**. In Plaintiff's Counsel's view, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under the circumstances, as it reflects a reasoned compromise which takes into consideration the risks inherent in this case which had the potential to completely eliminate recovery. Gaines Decl., ¶¶ 14-18. As such, this factor balances in favor of approval of the Settlement.

7. The Extent of Discovery Completed And The Stage Of The Proceedings Favor Approval of the Settlement

In evaluating this element, the Court should be mindful that "'formal discovery is not a necessary ticket to the bargaining table'" [*Linney*, 151 F.3d at 1239], as the relevant consideration is "whether 'the parties have sufficient information to make an informed decision about settlement.'" *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at 26 (C.D. Cal. Nov. 9, 2011).

Here, the extent of informal discovery conducted was sufficient to enable Plaintiff's Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl. at ¶¶ 12-16. As discussed above, Plaintiff's Counsel's investigation was sufficient to, among other things, tabulate with precision the total number of alleged Labor Code violations at issue during the Covered Period and identify the total number of individuals falling within the definition of

"PAGA Employee" for the Covered Period.

Based on Plaintiff's Counsel's experience litigating wage and hour claims, such investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this claim for purposes of settlement. *See* Gaines Decl. at ¶¶ 23-24.

8. Additional Factors Weigh In Favor Of Finding The Terms Of The Proposed Settlement To Be Fair, Adequate, And Reasonable

In addition to the factors presented above, the proposed Settlement does not possess any obvious deficiencies. The Settlement contemplates entry of an order (submitted concurrently herewith) which approves the Settlement and dismisses the Action with prejudice. Section 60 of the Settlement Agreement and paragraph 8 of the proposed order authorize the Court to retain jurisdiction over the Action pursuant to Code of Civil Procedure section 664.6. This procedure effectively disposes of the Action in its entirety, documents the Court's approval of the Settlement as required by PAGA, allows for Court intervention if necessary to enforce the terms of the Settlement Agreement, and avoids any stigmas associated with the entry of a judgment against Defendant. In sum, under the applicable standards for approval of PAGA settlements in California, the settlement in this case meets the standards for approval.

IV. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR REASONABLE FEES AND COSTS

Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of $83,333.33 and reimbursement of total litigation costs of $11,472.29, falling within the bounds authorized by the Settlement Agreement. *See* Settlement Agreement, at § 3. Plaintiff's Counsel's entitlement to an award of attorneys' fees and costs is warranted on multiple independent grounds. Further, the amount of fees requested falls well within the range of reasonableness under applicable standards, as the amount requested constitutes a "percentage of the fund" deemed reasonable in similar wage and hour settlements of this size and approved by California courts, which is not only warranted based on the contingency risk Plaintiff's Counsel has agreed to incur for the benefit of the State of California and PAGA Employees, but also based on the significant results achieved, as the Settlement obtains a recovery substantially above the range approved as reasonable by

California state and federal courts. Based thereon, Plaintiff's Counsel respectfully request that the Court enter an order approving the fee and cost amounts requested.

A. Plaintiff's Counsel Are Entitled To Recover Their Reasonable Fees And Costs As A Matter Of Right

Plaintiff's Counsel are entitled to recover attorneys' fees and costs under the "common fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

Courts have long recognized the "common fund" or "common benefit'" doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. *Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995) 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

The California Supreme Court has held that, "when a number of persons are entitled in common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III*, *supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d 1; *see also Boeing*, *supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Mills*, *supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter Group) at § 17:172.3 explains the common fund doctrine as follows:

> Where the lawsuit results in the recovery of a fund or property benefiting others as well as Plaintiffs (e.g., a class action), the court has inherent equitable power to order Plaintiffs' attorney fees paid out of the common fund or property [citations]. Such fee spreading assures that all of those benefited by the litigation pay their fair share of obtaining the recovery.

The percentage-of-the-fund approach appears to be the preferred method of awarding fees in traditional common fund cases, such as this case. Where the settlement amount is a "certain or easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. *Serrano III*, 20 Cal. 3d at 35.

In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19, the California Supreme Court upheld an attorneys' fee award based on a percentage of the common benefit obtained in a lawsuit by a city employees' association for retroactive wages:

> It is not necessary to find this suit a proper class action in order to uphold the portion of the judgment awarding counsel for Plaintiffs 25 percent of all retroactive salaries and wages received. That award may be sustained under the rule that a litigant who creates a fund in which others enjoy beneficial rights may require those beneficiaries to pay their fair share of the expense of litigation. (*See Sprague v. Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer* (1959) 53 Cal.2d 124, 132).

In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111, the California Supreme Court recognized that the common benefit doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share."

Numerous appellate courts have similarly found. *See e.g.*, *Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of attorneys' fees in a representative action as the proper exercise of the court's broad equitable powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and expenses properly awarded from common benefit composed of illegally imposed sales and use tax); *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners of residential property in an inverse condemnation action).

Moreover, at least eight federal courts of appeal-the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and the D.C. Circuit-have endorsed the "percentage fee" method for determining reasonable attorneys' fees in common benefit cases. *See e.g.*, *In re Sumitomo Copper Litig.* (S.D.N.Y. 1999) 74 F. Supp. 2d 393, 396-398 (describing the overwhelming weight of federal authority in favor of the percentage fee method); *see also*, *Lealao*, *supra*, 82 Cal.App.4th at 30-31 (describing same).

Thus, as Plaintiff's Counsel have expended a significant amount of time and money to secure a $142,694.48 settlement fund for the LWDA and PAGA Employees [*Schiller*, 2012 U.S. Dist. LEXIS 80776, at 43 ("A common fund results when 'the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which sum or 'fund' the fees are to be paid.'")], and in doing so, have exclusively borne the risk of loss for such expenditures of time and expenses (as the LWDA elected not to take the case after receiving the PAGA Notice), Plaintiff's Counsel are entitled to claim reasonable fees from that fund under applicable precedent.[5]

B. <u>The Fee Amount Requested Is Reasonable</u>

In addition to the forgoing, Plaintiff's Counsel's request for attorneys' fees in the amount of $83,333.33, or one-third of the $250,000 Gross Settlement Amount, falls well within the "zone of reasonableness."

It is important to highlight at the outset that the fee amount presently sought is not extraordinary, but actually falls at the "average" fee deemed reasonable under California State court authority, as it is recognized that "courts may award attorney's fees in the 30-40% range in wage

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[5] Plaintiff's Counsel is also entitled to recover attorney's fees and costs as a matter of right under the PAGA statute [*Labor Code* § 2699(g)(1) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.")], and under *C.C.P.* § 1021.5, as the instant PAGA action was by definition "for the public benefit" and secured monetary awards for approximately 188 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the fact that he pursued this public interest class action not only for himself but on behalf of a class comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers. [] No more is required to satisfy the 'significant benefit,' 'public interest,' and 'large class of persons' requirements of Code of Civil Procedure section 1021.5.").

and hour class actions that result in recovery of a common fund under $10 million." *See e.g. Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). In fact, this fee request is at the lower end of that range.

Moreover, taking into account the contingency risk Plaintiff's Counsel agreed to incur for the benefit of the State of California (which elected not to take the case after receiving the PAGA Notice), and the significant results achieved – facts which justify the requested fee – Plaintiff's Counsel's requested fee is reasonable under all applicable standards.

C. The Fee Amount Allocated by The Settlement Agreement Is Within the Zone of Reasonableness Under the "Percentage of the Fund" Method

The amount of fees requested by Plaintiff's Counsel is also reasonable based on standards applicable to the "percentage of the fund" method. "When assessing whether the percentage requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases." *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

First, the results achieved by Plaintiff's Counsel are significant, as Defendant has agreed to pay $250,000 pursuant to the Settlement. This is a significant recovery given the risk of success in obtaining any recoverable penalties. [Gaines Decl. at ¶ 18], and further, as the settlement of PAGA claims impacting much higher numbers of individuals have been approved as reasonable for between $7,500 and $15,000. *See* Section III.B.4., *supra.*

Second, such results were achieved in the face of significant risks. As explained above, Defendant maintained defenses to Plaintiff's PAGA claims that very well could have resulted in a net-zero recovery at trial. Gaines Decl. at ¶ 19.

Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the instant PAGA claim for the benefit of the State of California on a contingency basis. Gaines Decl. at ¶ 27. This not only required Plaintiff's Counsel to personally assume the risk of nonpayment in securing the very substantial financial benefit the State of California stands to receive, but constitutes a "loan" on Plaintiff's Counsel services – both of which are factors warranting fee

enhancement under applicable California Supreme Court authority:

> One of the most common fee enhancers . . . is for contingency risk. We reaffirmed the propriety of a contingency risk enhancement in Ketchum: "The economic rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' (Posner, Economic Analysis of Law (4th ed. 1992) pp. 534, 567.) 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."

Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 579-580.

Finally, the percentage requested by Plaintiff's Counsel falls within a typical range, particularly in light of the modest settlement size. *Martin, supra,* 2011 U.S. Dist. LEXIS 61796, 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million." *See also Crandall v. U-Haul International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common fund).

Attorneys' fee awards in the amount sought here are well-established by California law and practice. Accordingly, Plaintiff's Counsel's fee request is fair and reasonable and is consistent with the awards in California and the Ninth Circuit. It is also reasonable given the history of this action and the results obtained.

D. While the Requested Award of Attorneys' Fees is reasonable as a Percentage of the Common Fund, It is Further Confirmed by a Lodestar Cross-Check

The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 506, that "[t]he percentage of fund method survives in California class action cases." Specifically, the *Laffitte* Court held:

> The recognized advantages of the percentage method—including 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—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Id. at 503 (internal citation omitted); *see also e.g.*, *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ("when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.* 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorneys' fees more accurately reflects the results achieved for the putative class than the lodestar method and "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid Corp. Securities Litigation* 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.").

Laffitte also held that trial courts have discretion to assess reasonableness of fee awards with tools such as the "lodestar cross-check," whereby the trial court calculates class counsel's lodestar (hours worked multiplied by hourly rate) and determines whether the "lodestar multiplier" needed to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte,* 1 Cal.5th at 503-06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 ("[w]e hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.")

Here, Plaintiff's Counsel's fee request of $83,333.33 (one-third of the Gross Settlement Amount) is fair and reasonable based on a percentage of the recovery, and as well as when confirmed with a lodestar cross-check. First, "regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v.*

Netflix, Inc., 162 Cal.App.4th 43, 66, fn. 11 (2008). This is also consistent with Class Counsel's experience in similar wage and hour class action matters. Gaines Decl. at ¶ 21. Thus, the percentage sought by Plaintiff's Counsel here is reasonable.

Next, as stated, under the lodestar method the court computes the "lodestar" amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their reasonable hourly rates. *See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 48 The court then enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49; *Ketchum v. Moses*, (2001) 24 Cal.4th 1122, 1132-36; *Thayer v. Wells Fargo Bank*, (2001) 92 Cal.App.4th 819, 834 ("There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation").

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland v. Oakland Raiders*, (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition for L. County Planning etc. Interest v. Bd. of Supervisors*, (1977) 76 Cal.App.3d 241, 251 (approving multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to the class "can be monetized with a reasonable degree of certainty," a court may "adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Consumer Privacy Cases*, (2009) 175 Cal.App.4th 545, 557. In doing so, "the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market for such services." *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

In this case, Plaintiff's Counsel is submitting an attorney fee request equaling $83,333.33. Based on a projected final lodestar of $59,985, this yields a multiplier of 1.38 over the $83,333.33 fee request. Gaines Decl. at ¶ 28. The billing rates used to compute the lodestar are reasonable in view of the evidence submitted herewith. Gaines Decl. at ¶¶ 30-32; **Exhibit D** to Gaines Decl.

Based thereon, and for the reasons discussed above (the significant risk in continuing to

litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and burden involved in representation on a contingency basis; the knowledge and experience of Plaintiff's Counsel; and the value obtained by Plaintiff's Counsel for the PAGA Employees), it is fair and reasonable to account for these risks and compensate Plaintiff's Counsel with a fee award of one-third of the Gross Settlement Amount.

E. Plaintiff's Counsel's Request for Costs is Reasonable

In the course of this litigation, Plaintiff's Counsel collectively incurred out-of-pocket costs of $11,472.29 through the conclusion of this matter. *See* Gaines Decl. at ¶ 36, **Exhibit E**.

As demonstrated in the Gaines Declaration submitted herewith, the incurred costs included filing fees, mediation fees, expert analysis fees, photocopy charges, service of process fees, mailing charges, and other charges typical of litigation of this nature. *Id.* Such costs are appropriate for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

The costs incurred by Plaintiff's Counsel in this litigation benefited Plaintiff, PAGA Employees, and the State. In light of the litigation costs that Plaintiff's Counsel was required to incur to prosecute this action, Plaintiff's cost request is reasonable and should be granted.

V. THE SERVICE AWARD PAYMENT SOUGHT BY PLAINTIFF IS REASONABLE AND SHOULD BE APPROVED

The Parties have agreed that Plaintiff will be paid a service award payment in the amount of $7,500. This payment is intended to recognize both the time and effort that Plaintiff spent on behalf of other PAGA Employees and the State. See Settlement Agreement at § 11. *See* Gaines Decl., ¶ 34; Declaration of Michael Thompson ("Thompson Dec.") submitted herewith.

As to an incentive award, case law supports the award of incentive payments in private attorney general actions. The Ninth Circuit has recognized that a named Plaintiff's "willingness to act as a private attorney general" may justify the award of an incentive payment. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub LLC*, no. 2:12-CV-02716-TLN-CKD (E.D. Cal., Sep. 6, 2013), the United States District Court for

the Eastern District of California approved a similar PAGA-only settlement and awarded a service payment to the representative Plaintiff in recognition of her efforts.

The traditional bases for awarding incentive awards in class settlements support the award of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs is that he or she should be compensated for the expense or risk he has incurred in conferring a benefit" on others. *Id.* at 806. This rationale applies in this Action exactly the same it would in a traditional class action.

Without Plaintiff's efforts, there would be no recovery at all. The requested award is appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on other of Defendant's employees and the State of California. *See* Settlement Agreement, ¶¶ 11 and 48

As a result of the named Plaintiff's efforts, PAGA Employees will receive monetary settlement payments totaling approximately $35,673.62 in the aggregate, and the State of California will receive approximately $107,020.86 to be put toward education about and enforcement of California's labor laws.

In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in investigating and substantiating the claims alleged in this action, including multiple interviews with counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the settlement of this litigation. *See generally*, Thompson Declaration. Moreover, as with any plaintiff who files a civil action, the named Plaintiff undertook the financial risk that, in the event of a judgment in favor of Defendant in this action, he could have been personally responsible for any attorneys' fees and costs awarded in Defendant's favor.

The award of such payment to Plaintiff is especially warranted in a case like this one. It is necessary to ensure that employees, like Plaintiff, continue to bring claims like those brought here to enforce the rights of employees. Individuals like Plaintiff (and most PAGA Employees) would

have little, if any, recourse without the representative action device. Most PAGA Employees – like the Plaintiff—would be fearful of retaliation in response to filing any lawsuit, much less a representative action suit. Plaintiff must be commended for pursuing his claims; a modest payment like that sought here is an appropriate means of doing so.

VI. CONCLUSION

As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order and Judgment Approving Settlement, do the following:

1. Grant approval of the Settlement Agreement, pursuant to California Labor Code § 2699, subpart l;

2. Appoint ILYM Group, Inc. as the Settlement Administrator and approve its administration fees up to $5,000 for payment out of the Gross Settlement Amount;

3. Approve the award of attorneys' fees and costs to Plaintiff's Counsel in the amount of $94,805.62 payment of which shall come from the Gross Settlement Amount;

5. Approve the award of a service award payment to Plaintiff Thompson in the amount of $7,500 from the Gross Settlement Amount;

6. Direct disbursement of the remaining Gross Settlement Amount to the LWDA and all PAGA Employees as provided for in the Settlement Agreement; and

7. Enter judgment consistent with the Settlement Agreement.

Date: December 16, 2021

Respectfully submitted,

GAINES & GAINES, APLC

By: _____

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