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on behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

JOSEPH MONTGOMERY, individually
and on behalf of himself and all others
similarly situated,

Plaintiff,

v.

COPART, INC., a Delaware Corporation,
and DOES 1-50, inclusive,

Defendants.

Case No. 34-2020-00280733-CU-OE-GDS

Reservation #: 2644065

Assigned for All Purposes To:

Hon. Jill H. Talley

Dept.: 25

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO APPROVE PAGA SETTLEMENT**

Date: July 2, 2022

Time: 9:00 a.m.

Dept: 25

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1 **I. INTRODUCTION**

2 Plaintiff Joseph Montgomery (“Plaintiff”) reached a settlement of the California Private
3 Attorneys General Act, Cal. Labor Code §2699, et seq. (“PAGA”) claim asserted in this action
4 against Defendant Copart, Inc. (“Defendant”). The only claim in this action is the representative
5 PAGA claim. In accordance with California Labor Code §2699(l), Plaintiff now asks this Court
6 to review and approve the settlement of Plaintiff’s PAGA claims.¹ This is only a settlement of
7 the PAGA claims for civil penalties, and is not a class settlement and does not release the
8 individual claims, if any, of the aggrieved employees, other than Plaintiff himself. Cal. Labor
9 Code §2699(g)(1); *Iskanian v. CLS Transportation* (2014) 59 Cal. 4th 348, 381. Recently, the
10 Court of Appeal in *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021) explained that, similar
11 to class action settlements, the trial court should satisfy itself that the settlement is “fair, adequate,
12 and reasonable” in view of PAGA’s “purposes and policies.” The statute does not, however,
13 require the two-step process utilized in class actions. *See Salazar v. Sysco Central Cal.*, No. 15-
14 01758-DAD, 2017 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (rejecting the application of class
15 action settlement rules and procedures for PAGA settlement approval). Nothing in the PAGA
16 changes the strong judicial preference in support of approving settlements.

17 The PAGA settlement is set forth in the accompanying Private Attorneys General Act
18 (Labor Code § 2698 Et. Seq.) Settlement and Release Agreement (“Settlement”, “Agreement” or
19 “Settlement Agreement”). A true and correct copy of the Settlement Agreement which sets forth
20 the terms for the settlement of the PAGA claims is attached as **Exhibit 1** to the Declaration of
21 James Hawkins (“Hawkins Decl.”), filed herewith. Capitalized terms shall have the same
22 meaning as defined in the Settlement Agreement. All parties agree that the terms of the
23 Settlement are fair and reasonable. The California Labor Workforce Development Agency
24 (“LWDA”) received notice of this Settlement and this Motion as set forth in the accompanying
25 proof of service.

26
27 ¹ Section 2699(l) provides as follows: “The superior court shall review and approve any settlement of any civil action
28 filed pursuant to this part.”

1 The civil penalties secured by the settlement represent a fair compromise of Plaintiff's
2 PAGA claims in view of the risks of continued litigation and the hotly-contested issues of law
3 and fact relating to the PAGA claims. The Settlement accomplishes PAGA's objectives by
4 imposing sufficient civil penalties "to punish and deter" Defendant from committing any of the
5 Labor Code violations alleged, while also ensuring that the penalties are not "unjust, arbitrary and
6 oppressive, or confiscatory." Cal. Lab. Code § 2699(e)(2); *Iskanian*, 59 Cal. 4th at 384. For these
7 reasons, Plaintiff respectfully requests that the Court approve the Settlement and enter the
8 proposed Order Granting Approval of PAGA Settlement and Judgment. A proposed order
9 confirming review and approval of the PAGA settlement is submitted herewith.

10 II. SUMMARY OF FACTS

11 A. Brief Overview of the Litigation.

12 Defendant Copart, Inc. provides online vehicle auction and remarketing services in
13 California, and throughout the United States. (First Amended Complaint ("FAC"), ¶ 12.) On
14 April 9, 2020, Plaintiff sent a letter to the LWDA alleging a number of violations of the Labor
15 Code and Wage Order under the Private Attorneys General Act of 2004, Cal. Lab. Code section
16 2698 *et seq.* (Hawkins Decl. ¶ 7, **Exhibit 2**, PAGA Letter). Having received no response from
17 the LWDA after 65 days, on June 15, 2020, Plaintiff filed an action in the Superior Court of
18 California, County of Sacramento, entitled *Joseph Montgomery, on behalf of himself and all*
19 *others similarly situated v. Copart, Inc., a Delaware Corporation, and DOES 1-50, inclusive*,
20 Case No. 34-2020-00280733-CU-OE-GDS, and alleging a single cause of action for civil
21 penalties under PAGA. (Id. ¶ 6.) As set forth in the original complaint, the operative First
22 Amended Complaint, and the PAGA letters, Plaintiff sought to recover penalties for Defendant's
23 violations of 201, 202, 203, 204, 210, 216, 225.5, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1194,
24 1194.2, 1197, 1198, 2802, Wage Order 7 and 9, including for Defendant's (1) failure to pay all
25 wages owed for all hours worked, including minimum wages and overtime; (2) failure to provide
26 lawful, timely meal periods; (3) failure to pay one hour of premium pay when timely, lawful meal
27 periods were not provided or timely, lawful rest periods were not authorized and permitted; (4)
28 failure to authorize and permit rest periods; (5) failure to timely pay all owed wages at the time

1 of termination; (6) failure to provide accurate, itemized wage statements; and (7) failure to keep
2 accurate records. (Id., ¶ 7.) Plaintiff alleged that the violations were committed as to a group of
3 non-exempt employees, however titled, during the period from April 9, 2019 to November 10,
4 2021. (Id. ¶ 5; see **Exhibit 3**, Amended/ Supplemental PAGA Letter.)

5 Defendant timely filed an answer including a general denial and affirmative defenses.
6 (Hawkins Decl. ¶ 8.)

7 In connection with effectuating the Settlement, Plaintiff sent a second PAGA letter to the
8 LWDA and filed the amended complaint. (Hawkins Decl. ¶ 9; Ex. 3.)

9 **B. Plaintiff's Counsel Conducted a Thorough Investigation of the Factual and**
10 **Legal Issues Allowing The Objective Assessment of the Settlement's**
11 **Reasonableness.**

12 Since the filing of the Action and through execution of the Settlement, Plaintiff's Counsel
13 conducted a thorough investigation into the factual and legal issues implicated by Plaintiff's
14 claims, and were able to objectively assess the settlement's reasonableness. (Hawkins Decl. ¶
15 10.) Indeed, prior to filing the Action, Plaintiff provided to Plaintiff's Counsel the factual bases
16 for pursuing his claims against Defendant for Labor Code violations. Plaintiff was intimately
17 familiar with Defendant's labor policies and practices, and over the course of multiple interviews,
18 knowledgeably summarized those policies and practices. (Id.) Plaintiff explained how the
19 policies and practices were instituted and provided valuable insight into how they gave rise to the
20 alleged Labor Code violations. (Id.) Based on these interviews, Plaintiff's Counsel determined
21 that there were legally sufficient grounds for pursuing this Action against Defendant.
22 Additionally, in preparation for drafting the LWDA notice and the civil complaint for the Action,
23 Plaintiff's Counsel conducted their own independent preliminary investigations into the factual
24 bases for Plaintiff's claims, which entailed, inter alia, a careful examination of Plaintiff's
25 personnel files and associated records. (Id.)

26 During litigation, Plaintiff propounded form interrogatories, employment interrogatories,
27 special interrogatories, requests for production, and requests for admission. (Hawkins Decl. ¶
28

11.) In response to Plaintiff's formal discovery requests, Copart provided Plaintiff with verified discovery responses that included information and documents pertaining to Plaintiff and other Aggrieved Employees. (Id.) The Parties also met and conferred regarding the need for additional responses. Rather, than engaging in motion practice, the Parties agreed to hold additional formal discovery in abeyance and preserve any disputes while they pursued private mediation. (Id.) Copart produced sufficient information and documents relating to Plaintiff and other Aggrieved Employees to allow Plaintiff's Counsel to investigate Plaintiff's allegations and value the claims of the Aggrieved Group. (Id. ¶12.) In preparation for the mediation, Defendant's counsel provided sample time and payroll data for the purported aggrieved employees, the employee handbook, exemplars of wage statements and time sheets, premium request forms, all relevant policies and procedures, job descriptions, certain relevant communications, termination checklists, Plaintiff's personnel file, time records, and wage statements, the number of purported aggrieved employees, and the estimated number of pay periods during the PAGA period of April 9, 2019 to September 10, 2021. (Id.) The document and data exchanges allowed Plaintiff's Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, and ultimately enabled Plaintiff and his Counsel to make an independent assessment of the reasonableness of the settlement's terms. (Id.)

The Parties provided detailed briefing and analysis in connection with the mediation. (Hawkins Decl. ¶ 14.) On September 10, 2021, the Parties participated in a full day mediation with Mediator Lisa Klerman, an experienced mediator. (Hawkins Decl. ¶ 13.) The action did not resolve that day but the Parties engaged in continued negotiations with the assistance of Ms. Klerman, and the case was resolved as a result of a mediator's proposal. (Id.) With Ms. Klerman's assistance, and after extensive, arms' length negotiations, the Parties agreed to fully and finally resolve the Action and the PAGA Released Claims as to Plaintiff, the State of California, and the Aggrieved Employees in accordance with the terms set forth in the Settlement Agreement that is now presented to this Court. (Hawkins Decl. ¶ 13.) At all times, the Parties'

1 negotiations were adversarial and non-collusive. (Id.) The Settlement therefore constitutes a fair,
2 adequate, and reasonable compromise of the claims at issue. (Id.)

3 In summary, Plaintiff's Counsel performed a thorough investigation into the claims at
4 issue, which included: (1) determining Plaintiff's suitability as a private attorney general through
5 interviews, investigations, and analyses of his employment files and related records; (2)
6 evaluating all of Plaintiff's potential representative claims; (3) researching similar PAGA actions
7 as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing time
8 and wage records; (5) reviewing Defendant's employment policies and practices; (6) reviewing
9 all written discovery responses; (7) researching settlements in similar cases; (8) evaluating
10 Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (9) reviewing
11 and refining the scope of the claims; and (10) participating in extensive arm's length negotiations
12 with defense counsel (Id. at ¶ 18.)

13 By engaging in such a thorough investigation and evaluation of Plaintiff's claims,
14 Plaintiff's Counsel can opine that the Settlement, for the consideration and on the terms set forth
15 in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests of the
16 LWDA in light of all known facts and circumstances, including the risk of significant delay and
17 uncertainty associated with litigation, and various defenses asserted by Defendant. (Id. at ¶ 19.)

18 **C. The Parties Negotiated a Fair and Reasonable Settlement of the Claims.**

19 The Settlement Agreement negotiated by the Parties provides for Defendant to pay
20 \$1,290,000.00 as the "Gross Settlement Amount" ("GSA"). The "Net Settlement Amount"
21 ("NSA") is the amount remaining of the GSA after deduction of Plaintiff's enhancement
22 payment, Plaintiff's Counsel's attorneys' fees and costs, and administration costs. (Ex. 1,
23 Agreement ¶ 27). The NSA is estimated to be \$830,000.00 (Hawkins Decl. ¶ 21.)

24 The NSA is subject to Court approval consistent with Labor Code §2699. Upon approval,
25 the NSA shall be allocated 75% to the LWDA (approximately \$622,500.00) and 25% among
26 Aggrieved Employees (\$207,500.00). (Agreement, p. 28; Hawkins Decl. ¶ 21.) The 25% of the
27 NSA payable to the Aggrieved Employees will be divided among the Aggrieved Employees on a
28

1 pro rata basis, based on their respective number of pay periods worked for Copart during the
2 PAGA Period. (Id.) Payments to Aggrieved Employees of their share of the employee PAGA
3 Portion shall be referred to as “PAGA Penalty Payment(s).” (Id.) All payments made to the
4 Aggrieved Employees will be allocated 100% as non-wages and interest. (Id.) The 75/25
5 allocation is required by Labor Code §2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal. 5th
6 175 (2019).

7 The “Aggrieved Employees” are defined as “all current and former non-exempt
8 employees of Copart, Inc. in California at any time during the PAGA Period.” (Agreement, ¶ 2.)
9 The “PAGA Period” is the time period from April 9, 2019, to November 10, 2021. (Id., ¶ 16.)

10 At the mediation, Defendant estimated that the Aggrieved Employees consisted of
11 approximately 993 Aggrieved Employees who worked approximately 30,533 pay periods during
12 the PAGA Period. (Agreement, ¶ 26; Hawkins ¶ 15.) In the event that the pay periods from April
13 9, 2019 to September 10, 2021 are more than 10% greater than 30,533 (i.e., if there are more than
14 33,586 pay periods from April 9, 2019 to September 10, 2021), Copart shall increase the GSA in
15 proportion to the increase in pay periods over 10% (e.g., if the number of pay periods is 12%
16 greater than 30,533, Copart will increase the GSA by 12%). (“Escalator Clause”). In the event
17 that the escalator clause is triggered, the Parties shall cooperate to obtain an amended judgment
18 which reflects the increased Gross Settlement Amount. (Id.)

19 Within ten (10) business days of the Effective Date, Defendant shall transmit the list of
20 Aggrieved Employees to the Settlement Administrator. (Agreement ¶ 38.) The Parties have
21 agreed that ILYM Group, Inc. will serve as the Settlement Administrator. (Id. ¶ 37.) Copart shall
22 deposit the Gross Settlement Amount into an account established by the Settlement Administrator
23 and agrees to fund the settlement on the sixty-first (61st) day following the Effective Date. (Id.
24 ¶26.) Within twenty-one (21) calendar days after the Settlement has been fully funded and after
25 receiving approval from Plaintiff’s Counsel and Defendant’s counsel of the payment calculations,
26 the Settlement Administrator shall mail copies of the explanatory letter, which has been mutually
27 approved by the Parties (see **Exhibit A** to Agreement), along with Individual PAGA Payments to
28 all Aggrieved Employees via regular First-Class U.S. Mail. (Id. ¶ 39.)

1 Any checks returned as non-deliverable before the check cashing deadline will be sent via
2 regular First-Class U.S. Mail to the forwarding address affixed thereto. If no forwarding address
3 is provided, the Settlement Administrator will perform a “skip trace” or other reputable search
4 method using the name, address and/or Social Security number of the Aggrieved Employee
5 involved, and will perform up to a single re-mailing if a new address is located. (Id. ¶ 40.)

6 Settlement checks shall remain valid and negotiable for one hundred eight (180) calendar
7 days from the date of their issuance. (Id. ¶ 39.) If there are uncashed checks following this
8 period, the uncashed funds shall be distributed to the Controller for the State of California to be
9 held for the benefit of the Aggrieved Employee. (Id. ¶ 40.)

10 **D. The Settled Claims**

11 Upon the Effective Date and payment of all funds due under the Settlement, Plaintiff, the
12 Aggrieved Employees, and the State of California will be forever barred from pursuing any and
13 all PAGA Released Claims. (Agreement, ¶ 30.) The term “PAGA Released Claims” refers to
14 any and all claims for civil penalties under PAGA based on the factual allegations alleged
15 in the notice letters Plaintiff sent to the LWDA on April 9, 2020 and October 13, 2021 and
16 the Complaint, including failure to pay for all hours worked, including overtime and
17 minimum wage; failure to provide meal periods; failure to pay one hour of premium pay
18 when lawful meal periods were not provided; failure to provide rest periods; failure to pay
19 one hour of premium pay when lawful rest periods were not provided; failure to maintain
20 accurate records of hours worked; failure to timely pay all wages at termination; failure to
furnish accurate itemized wage statements; failure to pay all earned wages twice per
month; Labor Code sections 201, 202, 203, 204, 210, 216, 218.5, 218.6, 221-224, 225.5,
226, 226.3, 226.7, 510, 512, 516, 558, 1174, 1174.5, 1194, 1194.2, 1195, 1197, 1198,
2698, et seq., 2699(a), 2802; Business and Professions Code sections 17200-17208; and
applicable IWC Wage Orders.

21 (Agreement, ¶ 17.). Upon entry of the Order approving the settlement and judgment entered
22 thereon, Plaintiff, the State of California, and all Aggrieved Employees will be forever barred
23 from pursuing any and all of the PAGA Released Claims that arose during the PAGA Period
24 against the Released Parties. (Id. ¶ 30.). The “Released Parties” are defined as means Copart, Inc.
25 and its affiliated companies and its respective parent companies, subsidiaries, affiliates,
26 shareholders, members, agents (including, without limitation, any investment bankers,
27 accountants, insurers, reinsurers, attorneys and any past, present or future officers, directors and
28 employees) predecessors, successors, and assigns. (Agreement, ¶ 18.) This release of claims only

1 covers those civil penalties which are recoverable under PAGA, and does not otherwise cover
2 individual, underlying claims or causes of action that Aggrieved Employees other than Plaintiff
3 may have under the law against Released Parties for violations of the California Labor Code. (Id.
4 ¶ 30.)

5 In addition, Plaintiff shall grant Defendant and each Released Party a general release. (Id.
6 ¶ 29.)

7 The California Labor Workforce Development Agency (“LWDA”) is being served with a
8 copy of this motion with the Settlement Agreement through the online process as required by
9 Labor Code §§2699(l), and therefore has notice of this PAGA settlement and this motion. This
10 service on the LWDA is verified in the accompanying proof of service. (Hawkins Decl. ¶ 32.)

11 The allocations to be paid from the Gross Settlement Amount other than the Net
12 Settlement Amount are as follows: (1) one-third of the Gross Settlement Amount (or
13 approximately \$430,000.00 shall be paid to Plaintiff’s Counsel for payment of attorneys’ fees; (2)
14 up to \$13,000 shall be paid to Plaintiff’s Counsel for litigation costs incurred in prosecuting the
15 PAGA claims; (3) \$10,000 to Plaintiff as an Enhancement Award and in exchange for a general
16 release of all claims against Defendant; and (4) up to \$7,000 for Settlement Administration Costs
17 to be paid to the Settlement Administrator. (Agreement ¶ 9, 27). Any difference from these
18 maximum amounts will be added to the Net Settlement Amount. This is a non-reversionary
19 settlement.

20 **III. ARGUMENT**

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

22 The settlement of a PAGA claim requires court approval. See Labor Code §2699(l)
23 (stating, the “court shall review and approve any penalties sought as part of a proposed settlement
24 agreement pursuant to this part”). The Court must be mindful that “[s]ettlement is a
25 compromise, which balances the possible recovery against the risks inherent in litigating further.”
26 *In re TD Ameritrade Account Holding Litig.*, Case No. C 07-2852 SBA, C 07-4903 SBA, 2011
27 WL 4079226, *9 (N.D. Cal. Sept. 13, 2011). Indeed, “the very essence of a settlement is
28 compromise, ‘a yielding of absolutes and an abandoning of highest hopes,’” as “it is the very

1 uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that
2 induce consensual settlements.” *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624-25
3 (9th Cir. 1982). As such, “the settlement or fairness hearing is not to be turned into a trial or
4 rehearsal for trial on the merits,” or “judged against a hypothetical or speculative measure of what
5 might have been achieved.” *Id.*

6 Although the operative PAGA statute does not set forth the criteria by which a PAGA
7 settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors
8 for review of a class action settlement. However, “a PAGA claim asserted on a non-class
9 representative basis...is not considered a class action but a law enforcement action, and therefore
10 does not have to meet the requirements of [a class action].” See *Casida v. Sears Holdings Corp.*,
11 2012 WL 253217 at *3 (E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL
12 2650571 at *4 (E.D. Cal. Jul. 1, 2010). A court’s review of a PAGA settlement necessarily
13 implicates the following unique features that render the approval process distinct from approval
14 of a class action settlement under C.C.P. § 382 and C.R.C. Rule 3.769.

15 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not
16 concerned with the amount(s) that “aggrieved employees” are to receive, but rather, must focus
17 on the total settlement amount in achieving PAGA’s objective. Indeed, “[t]he remedy sought in a
18 PAGA suit consists of civil penalties, not individual or class damages,” and while a “[PAGA]
19 action is...designed to protect the public and penalize the employer for past illegal conduct,” a
20 reviewing Court must be mindful of the fact that settlement of a PAGA claim involves a
21 compromise. *Mendez, supra*, 2010 WL 2650571 at *4. “Unlike class actions, these civil penalties
22 are not meant to compensate unnamed employees because the action is fundamentally a law
23 enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777 at *4 (N.D.
24 Cal. Apr. 2, 2010). The Court must not lose sight of the fact that “[u]nlike a class action seeking
25 damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private
26 parties to recover civil penalties for the government that otherwise may not have been assessed
27 and collected by overburdened state enforcement agencies,” *Id.* Rather, the LWDA has advised
28 that courts should evaluate settlements of PAGA claims based on whether “the relief provided for

1 under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the
2 statute to benefit the public.” O’Connor, 201 F. Supp. 3d at 1133; see also, *Salazar v. Sysco*
3 *Central Cal.*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (quoting the
4 above passage). As courts defer to the agency’s interpretation of a statute where authority has
5 been delegated to that agency (see *New Cingular Wireless PCS, LLC v. Pub. Utilities Comm’n*,
6 246 Cal. App. 4th 784, 807 (2016)), the Court should analyze the PAGA settlement by focusing
7 on whether the amount of civil penalties obtained is “genuine and meaningful” in light of
8 PAGA’s statutory purpose. The Court’s evaluation of the settlement should therefore not focus
9 on “restitution”—the average recovery per allegedly aggrieved employee, as in a class action
10 settlement, but rather take into account PAGA’s statutory purpose in deterring Labor Code
11 violations through the imposition of civil penalties, with special attention on whether the relief is
12 “genuine and meaningful.” *Salazar*, 2017 WL 1135801 at *2.

13 Second, consistent with the fact that unnamed employees have no property interest in a
14 PAGA claim, ² “[u]nnamed employees need not be given notice of the PAGA claim, nor do they
15 have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez*, 2010 WL
16 1340777 at *5. This renders the approval process of the PAGA settlement distinct from a class
17 action settlement, as there is no need for the Court to employ the “two-step approval process”
18 required under F.R.C.P. Rule 23 (“Rule 23”) and Rule 3.769.³

19 Finally, unlike class action settlements under Rule 23(e) and Rule 3.769, the scope of
20 release permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is
21 binding not only on the named employee plaintiff but also on government agencies and any
22 aggrieved employee not a party to the proceeding...the non-party employees, because they were
23 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
24 judgment as to remedies other than civil penalties.” See *Arias v. Sup. Ct.* (2009) 46 Cal. 4th 969,

25 ² As held by the California Supreme Court, “[PAGA] does not create property rights or any other substantive rights”
26 as [it] is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code
27 violations—that otherwise would be sought by state labor law enforcement agencies.” *Amalgamated Transit Union,*
Local 1756, AFL-CIO v. Sup. Ct. (2009) 46 Cal. 4th 993, 1003.

28 ³ The “two-step approval process of Rule 23(e) is required to facilitate “notice” to absent class members, as Rule
23(e) expressly requires notice and an opportunity for absent class members to exclude themselves or object. See
Fed. R. Civ. Proc. R. 23 (e). Rule 3.769 contains similar rules for State court class actions.

1 986-87. Thus, the scope of a release in a PAGA settlement is confined to the PAGA penalties
2 alleged in the complaint and to the claims that were, or could have been, alleged pursuant to
3 PAGA based on the factual allegations in the Complaint.⁴ In the case at hand, as the only claims
4 at issue are PAGA claims, only those claims will be extinguished because of this Settlement.

5 **B. This Court Should Approve the Settlement Because It Is a Fair, Adequate and**
6 **Reasonable Compromise of Disputed Claims.**

7 In assessing whether the amount of civil penalties is genuine and meaningful, the Court
8 may balance the amount in penalties against the risks of further litigation. Here, Plaintiff obtained
9 a meaningful amount of civil penalties in view of the risks of continued litigation. Based on
10 information and evidence produced by Defendant during discovery, the Parties determined that
11 Aggrieved Employees (members of the PAGA group) worked during a total of approximately
12 30,533 pay periods during the PAGA Period. (Hawkins Decl. ¶ 15.). Statutory penalties would be
13 calculated according to Labor Code 2699(f)(2): If, at the time of the alleged violation, the person
14 employs one or more employees, the civil penalty is one hundred dollars (\$100) for each
15 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
16 each aggrieved employee per pay period for each subsequent violation.

17 However, a number of courts have found that the “subsequent” penalty under PAGA
18 applies only after a court or the Labor Commissioner determines that the employer has violated
19 the Labor Code. *See Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing
20 judgment as to “heightened civil penalties” because the defendant was not given notice by the
21 Labor Commissioner when the “subsequent” violations occurred); *Vieyara-Flores v. Sika Corp.*,
22 No. EDCV19606JVSKKX, 2019 WL 2436998, at *5 (C.D. Cal. June 10, 2019) (“employers are
23 not subject to heightened penalties . . . until a court or commissioner notifies the employer that it

24
25 ⁴ This is contrasted with the much broader release permitted in a class action context, which may release all
26 underlying Labor Code violations based on “any matter or fact” alleged in the complaint. *See In re Corrugated*
27 *Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) (“The weight of authority establishes that . . . a court
28 may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have
been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.”); *Hesse*
v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010) (“we have held that federal district courts properly released claims
not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave
rise to the settlement.”).

1 is in violation of the Labor Code . . . [Plaintiff] has not offered evidence that the Labor
2 Commission or a court has notified them of PAGA violations [thus] PAGA’s heightened penalty
3 of \$200 for subsequent violations will not be calculated to determine the amount in controversy”);
4 *Chen v. Morgan Stanley Smith Barney, LLC*, No. 8:14-CV-01077 ODW (FFMx), 2014 WL
5 4961182 (C.D. Cal., October 2, 2014) (“Under the Labor Code, if an employer does not have
6 notice that they are committing a violation, they are not subject to the heightened penalties.”);
7 *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012
8 WL 6618854 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to
9 heightened penalties for subsequent violations unless and until a court or commissioner notifies
10 the employer that it is in violation of the Labor Code”), *citing Amaral v. Cintas Corp. No. 2*, 163
11 Cal. App. 4th 1157 (2008). While Plaintiff alleged that Defendant was liable for over \$56 million
12 in penalties due to multiple violations of the Labor Code each pay period (and that stacking is
13 allowed) and enhanced penalties under Labor Code 226.3 (\$250 initial violation/ \$1,000
14 subsequent violation), Plaintiff’s Counsel is cognizant that there is at least an argument under this
15 line of cases that Defendant’s exposure would be approximately \$3,053,300 =30,533 violative
16 pay periods times \$100. (Hawkins Decl. ¶ 16.) Thus, the negotiated settlement is approximately
17 42.2% of this estimated amount. (Id.)

18 After calculating Defendant’s maximum exposure under PAGA, Plaintiff then discounted
19 that exposure for settlement purposes to account for the risks of continued litigation, including: (i)
20 the strength of Defendant’s defenses on the merits; (ii) the risk of losing at trial; (iii) the risk that
21 the Court would exercise its discretion under PAGA to significantly reduce the maximum civil
22 penalties available by statute; (iv) the chances of a favorable verdict being reversed on appeal;
23 and (v) the difficulties attendant to collecting on a judgment. (Hawkins Decl. ¶ 17.). Taking into
24 account the above contingencies, Plaintiff determined that a \$1,290,000 settlement was warranted
25 by the circumstances of the case, and is fair and reasonable. (Id.).

26 It should be noted that PAGA gives the Court wide latitude to reduce the amount of civil
27 penalties “based on the facts and circumstances of a particular case” when “to do otherwise would
28 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code

1 2699(h). In reducing PAGA penalties, courts have considered issues including whether the
2 employees suffered actual injury from the violations, whether the defendant was aware of the
3 violations, and the employer's willingness to fix the violation. *Carrington v. Starbucks Corp.*, 30
4 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of only 0.2% of the maximum); *see*
5 *also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016); *Fleming v. Covidien Inc.*,
6 No. ED CV 10-01487 RGK (OPX), 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011). For
7 example, during the penalty phase of trial in *Carrington*, the plaintiff requested PAGA penalties
8 in the amount of approximately \$70 million. The trial court instead awarded only \$150,000—or
9 0.21% of the maximum—and stated that this reduction was warranted because imposing the
10 maximum penalty would be “unjust, arbitrary, and oppressive” based on Starbucks’s “good faith
11 attempts” to comply with meal period obligations and because the court found the violations were
12 minimal. *Carrington*, 30 Cal. App. 5th at 517. The Court of Appeal affirmed the lower court’s
13 reduced award of a \$150,000 penalty under PAGA. *Id.* at 529. Likewise, in *Covidien*, the Court
14 reduced the potential penalties by over 82%, awarding \$500,000 instead of maximum penalties of
15 \$2.8 million. *Covidien*, 2011 WL 7563047 at *4; *see also Thurman v. Bayshore Transit Mgmt.*,
16 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming 30% reduction under specified PAGA claim
17 where the employer produced evidence that it took its obligations seriously); *Elder v. Schwan*
18 *Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12, 2011) (reversing
19 trial court decision denying any civil penalties where violations had been proven, remanding for
20 the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A*
21 *Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal.
22 June 15, 2012) (denying PAGA penalties for violation of California Labor Code section 226 as
23 redundant with recovery on a class basis pursuant to California Labor Code section 226, directly);
24 *Aguirre v. Genesis Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3
25 (C.D. Cal. Dec. 30, 2013) (reducing penalty for past PAGA violations from \$1.8 million to
26 \$500,000, after rejecting numerous other PAGA claims).

1 Given these risks and Defendant's asserted defenses, Plaintiff respectfully submits that a
2 \$1,290,000 gross settlement amount for a limited release of PAGA penalties is a fair, reasonable,
3 and just result and furthers PAGA's objectives. Thus, the Court should approve the Settlement.
4

5 **C. The Requested Recovery In Litigation Expenses Is Reasonable.**

6 Plaintiff's Counsel is entitled to reimbursement of their discretionary litigation costs. Cal.
7 Lab. Code § 2699(g)(1). Out-of-pocket discretionary expenses are compensable if they would
8 normally be billed to a fee-paying client. *See Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d
9 1407, 1419 (1991), overruled in part on other grounds in *Olson v. Automobile Club of Southern*
10 *Calif.*, 42 Cal. 4th 1142 (2008). Such discretionary costs may be claimed as part of an attorneys'
11 fees motion when seeking statutory fees under the Labor Code. *See Amaral v. Cintas Corp. No. 2*,
12 163 Cal. App. 4th 1157, 1218 n.27 (2008) (awarding costs that are necessarily incurred). Here,
13 Plaintiff's Counsel advanced \$10,470.77 in out-of-pocket costs to the State for, among other
14 things, filing and service fees, mediation, court calls, and related expenditures. (Hawkins Decl. ¶
15 39; Exhibit 4.) Because these reasonable costs were necessarily incurred during the case's
16 pendency, these costs are reasonable and should be awarded. See also Cal. Civ. Pro. Code
17 1033.5(c)(4) ("[i]tems not mentioned in this section and items assessed upon application may be
18 allowed or denied in the court's discretion."); *Hsu v. Semiconductor Sys., Inc.*, 126 Cal. App. 4th
19 1330, 1341 (2005) ("[W]hile it is reasonable to interpret a general contractual cost provision by
20 reference to an established statutory definition of costs, we do not discern any legislative intent to
21 prevent sophisticated parties from freely choosing a broader standard authorizing recovery of
22 reasonable litigation charges and expenses.").

23 **D. The Court Should Award the Requested Attorneys' Fees in the Amount of**
24 **Approximately One-Third of the Total Settlement Amount.**

25 An award of attorneys' fees in the amount of approximately one-third of the Gross
26 Settlement Amount is fair and reasonable, and in line with what other California courts, both state
27 and federal, have awarded in settlements of similar litigation. The PAGA provides that a plaintiff
28 is entitled to recover reasonable attorneys' fees, expenses, and costs. Section 2699(g)(1) of the

1 California Labor Code provides that “[a]ny employee who prevails in any action shall be entitled
2 to an award of reasonable attorney’s fees and costs.” In a qui tam action, reasonable attorneys’
3 fees and costs are typically awarded under the common fund doctrine where, as here, the
4 litigation creates a common fund of money in a specific amount for the benefit of others. PAGA
5 “is a type of qui tam action.” See *Iskanian*, 59 Cal. 4th at 382. “A qui tam action ‘is a type of
6 private attorney general lawsuit’ [citation], in which ‘the qui tam plaintiff stands in the shoes of
7 the state or political subdivision [citation].’” *People ex rei. Stratham v. Acacia Research Corp.*,
8 210 Cal. App. 4th 487, 501 (2012). A PAGA action is a qui tam action because the statute allows
9 the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to sue his
10 or her employer for Labor Code violations and recover civil penalties that otherwise would have
11 been assessed and collected by the LWDA. See *Iskanian*, 59 Cal. 4th at 382. Indeed, majority of
12 the civil penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to
13 the aggrieved employees (e.g., 75% paid to the state; 25% paid to the aggrieved employees). See
14 Cal. Lab. Code 2699(i). Where, as here, a common fund is created in a qui tam action by the
15 successful litigation of a plaintiff and her attorneys, the plaintiff’s attorneys are entitled to recover
16 their fees from the common fund:
17

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

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

24 Likewise, through the successful efforts of Plaintiff and his attorneys, a common fund was
25 created in the amount of \$1,290,000 for the benefit of the employees and the State of California.
26 (Hawkins Decl. ¶¶ 39-40.) Thus, these beneficiaries must bear their share of the costs and
27 attorneys’ fees, to be deducted from the gross settlement fund under the common fund theory. *Id.*
28 Such fees are deducted as a percentage of the settlement amount. See, e.g., *Boeing Co. v. Van*

1 *Gernert*, 444 U.S. 472, 478-482 (1980); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904
2 F.2d 1301, 1311 (9th Cir. 1990); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026,
3 1027 (9th Cir. 1997); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003).

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

12 As a California appellate court very recently confirmed, "fee awards in class actions
13 average around one-third of the recovery' regardless of 'whether the percentage method or the
14 lodestar method is used." *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545
15 (2021) (*quoting Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008)).

16 A fee award in the amount of one-third of the common fund is also reasonable because it
17 best reflects the market rate for contingency fees. See *Lealao v. Beneficial Cal. Inc.*, 82 Cal. App.
18 4th 19, 47 (2000) ("attorneys providing the essential enforcement services must be provided
19 incentives roughly comparable to those negotiated in the private bargaining that takes place in the
20 legal marketplace. . . ."). Fees representing one-third of the recovery reflect the rate negotiated in
21 "typical contingency fee agreements [which] provide that class counsel will recover 33% if the
22 case is resolved before trial and 40% if the case is tried." *Fernandez v. Victoria Secret Stores*,
23 LLC, No. CV 06-04149 MMM SHX, 2008 WL 8150856, at *16 (C.D. Cal. July 21, 2008) (citing
24 an academic study collecting contingency fee agreements and finding a fee award constituting
25 34% of the fund is reasonable on that basis). Because the negotiated fee structure mimics the
26 marketplace, it is reasonable and should be approved. A one-third common fund attorneys' fee
27 award is also consistent with what courts have awarded in other representative action cases. (See
28

1 e.g., *Cruz v. Wal-Mart Associates, Inc.*, Los Angeles Superior Court, No. 18STCV03128 (May
2 28, 2021); *Jones v. J.C. Penney Corporation*, Los Angeles Superior Court, Case No. BC451823
3 (April 20, 2017); *Garcia v. Macy's*, San Bernardino County Superior Court, Case No.
4 CIVDS1516007 (Sept. 13, 2017); *Garcia v. Pep Boys*, Orange County Superior Court, Case No.
5 30-2014-00720574-CU-OE-CJC (July 14, 2016); *Brewer v. Connell Chevrolet*, Orange County
6 Superior Court, Case No. 30-2016-00852123-CUOC-CXC (June 15, 2017); *Perez v. Staffmark*
7 *Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (May 23, 2016)).

8 California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v.*
9 *Superior Court* (1976) 62 Cal.App.3d 231, 236. Unlike individual settlements, class and
10 representative PAGA settlements involve a court approval process that exists to prevent fraud,
11 collusion, and unfairness to absent individuals. *See Malibu Outrigger Bd. Of Governors v.*
12 *Superior Court* (1980) 103 Cal.App.3d 573 578-79. California law generally follows the same
13 standards applicable under Rule 23. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
14 1998) (stating that Rule 23(e) requires the trial court to determine “whether a proposed settlement
15 is fundamentally fair, adequate, and reasonable”). To be approved, a settlement must be “fair,
16 reasonable and adequate to all concerned.” *Reed v. United Teachers Los Angeles* (2012) 208
17 Cal.App.4th 322, 337. Settlement is the preferred means of dispute resolution, particularly in
18 complex representative litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
19 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the
20 agreement taken as a whole is fair and is not the product of fraud or collusions between the
21 negotiating parties. *See, e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of
22 fairness when, as here, the settlement agreement was negotiated at arm’s length by experienced
23 counsel. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130; Hawkins Decl. ¶ 13.
24 Because this Settlement is fair, adequate, and reasonable, Plaintiff respectfully requests that the
25 Court grants approval.

26 **E. The General Release Fee Is Reasonable And Should Be Awarded.**

27 The Settlement provides for an Enhancement Payment and General Release Fee to be paid
28 to Plaintiff in the amount of \$10,000 in exchange for a general release of all known and unknown

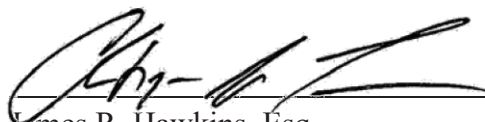
1 claims. (Agreement, ¶ 27(b), 29.) The purpose of such an award is to incentivize aggrieved
2 employees to step into the shoes of the state labor agency and undertake the responsibilities
3 associated with initiating a lawsuit and serving in a representative capacity. *See Bell v. Farers*
4 *Ins. Exch.* (2004) 115 Cal.App.4th 715, 726 (“service payments” compensate named plaintiff “for
5 [her] efforts in bringing the action”); *Clark v. Am. Residential Servs., LLC* (2009) 175 Cal.App.4th
6 785, 804 (“an incentive award is appropriate ‘if it is necessary to induce an individual to
7 participate in the suit’”); see also, e.g., *Resendez v. Bridgestone Retail Operations, LLC*, Los
8 Angeles County Superior Court, Case No. BC59689 (approving \$10,000 enhancement award in a
9 PAGA action). As detailed more extensively in the accompanying declarations, Plaintiff
10 contributed considerable time and effort to the litigation of this case in order to enforce the
11 California Labor Code on behalf of the State of California and for the benefit of other Aggrieved
12 Employees. (See, Montgomery Decl., generally; Hawkins Decl. ¶ 41-43.) Moreover, unlike the
13 Aggrieved Employees who are only releasing claims for civil penalties under PAGA, Plaintiff is
14 releasing his individual claims and entering into a general release. (Settlement, ¶ 29; Hawkins
15 Decl. ¶ 43.)

16 **IV. CONCLUSION**

17 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA
18 settlement and the PAGA Settlement Amount as set forth in the Agreement and enter the
19 proposed order submitted herewith.

20
21
22 Dated: May 6, 2022

JAMES HAWKINS APLC

23
24 

James R. Hawkins, Esq.
Christina M. Lucio, Esq.

26
27 Attorneys for Plaintiff Joseph Montgomery
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