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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

RITA NAVARRO, on behalf of herself and all
“aggrieved employees” pursuant to Labor code
§ 2698 *et seq.*,

Plaintiff,

v.

TIRE STAFFING dba IT’S CALIBER, a
Nevada corporation, CALIBER GROUP
STAFFING, INC., a California corporation,
and DOES 1 through 10, inclusive,

Defendants.

JAMES D. HENRIQUEZ, individually, and on
behalf of all other aggrieved employees,

Plaintiff,

v.

TIRE STAFFING, doing business as IT’S
CALIBER, a Nevada corporation; and DOES
1 through 50, inclusive,

Defendants.

CASE NO.: CIVDS 2016343 Consolidated
with CIVDS 2021000

[Assigned for all purposes to the Honorable
David Cohn, Department S26]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF PAGA
SETTLEMENT, ATTORNEY’S FEES
AND COSTS AND SERVICE AWARDS**

Action Filed: July 10, 2020
Trial Date: None Set

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*Attorneys for Plaintiff, James D. Henriquez, on
behalf of himself and all other aggrieved
employees*

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1 **I. INTRODUCTION**

2 Plaintiff, Rita Navarro filed an action to seek damages through the Private Attorney
3 General Act, *Labor Code* § 2698, et seq. (“PAGA”), against Defendant, Tire Staffing, doing
4 business as It’s Caliber and Caliber Group Staffing, Inc. (“Defendants”) for causing violations of
5 the *Labor Code* and the Industrial Welfare Commission (IWC) Wage Order. The damages
6 sought included penalties and statutory attorney’s fees and costs.

7 Plaintiff, James D. Henriquez, filed an action to seek damages through the Private
8 Attorney General Act, *Labor Code* § 2698, et seq. (“PAGA”), against Defendant, Tire Staffing,
9 doing business as It’s Caliber, for causing violations of the *Labor Code* and the Industrial
10 Welfare Commission (IWC) Wage Order. The damages sought included penalties and statutory
11 attorney’s fees and costs.

12 The Plaintiffs agreed to prosecute this action jointly and thereafter the Parties participated
13 in a mediation where a proposed settlement was reached subject to approval by this Court.
14 Pursuant to the terms of the settlement agreement, the Parties stipulated to the filing of a
15 Consolidated PAGA Complaint which is attached to the settlement agreement.

16 Plaintiffs have achieved an excellent result in this litigation, embodied in the PAGA
17 Settlement Agreement. The proposed settlement provides for distribution of funds to the Labor
18 and Workforce Development Agency (“LWDA”) and aggrieved employees for civil penalties.
19 The prosecution and settlement of this action furthers the dual purpose of California Labor Code
20 enforcement in that it has punished Defendant for the alleged violations while deterring them
21 from continuing their questioned practice.

22 The settlement is also fair, reasonable, and adequate to all concerned. All together, this
23 settlement meets the various standards for approval required by subdivision (l) of California
24 Labor Code § 2699. This motion for approval of the PAGA settlement should be granted.

25 **II. NO OTHER ACTIONS PENDING AGAINST DEFENDANT**

26 Plaintiffs are not aware of any other pending actions related to alleged class,
27 representative, collective or PAGA actions against Defendants other than a case entitled *Ulisses*
28 *Lopez v. Good-West Rubber Corp., et al.*, San Bernardino Superior court, Case Number: CIVDS

2011219 (“*Lopez Action*”). Final approval in the *Lopez Action* was granted by this Court on January 25, 2022 which specifically excluded staffing companies from the class and PAGA release. Plaintiff Henriquez was hired by Defendants and placed at Good-West Rubber Corp. which is the Defendant in the *Lopez Action*. Inquiries have been made on the Internet for other potential actions by way of the LWDA’s website relating to any other PAGA notices, the Los Angeles Superior Court, Orange Superior Court, Riverside Superior Court and San Bernardino Superior Court websites which confirmed no other actions are pending against Defendants. See, Declaration of Scott Ernest Wheeler (“Wheeler Decl.”), ¶21.

III. PROPOSED PAGA SETTLEMENT

The settlement with Defendants for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, adequate and is in the best interest of the LWDA and PAGA Employees. There are approximately **3,284** aggrieved employees who worked approximately **54,000** pay periods during the PAGA period. The PAGA period is from May 28, 2019 through February 7, 2022. See, Wheeler Decl., ¶8.

The Parties agreed and have stipulated to the filing of a Consolidated PAGA Complaint. See, Wheeler Decl., ¶¶16-17 and Exh. 3 (Attached to Exhibit A).

The proposed Settlement provides for a non-reversionary Gross Settlement Amount of \$300,000.00. See, Wheeler Decl., ¶24, and Exh. A, ¶11. After deducting Settlement Administration Costs, the requested Attorneys’ Fees and Costs, Service Awards to the named Plaintiffs, and assuming the Court approves these payments in full, there will be a Net Settlement Amount of \$164,682.20 distributable to the LWDA, Plaintiffs and the aggrieved employees. See, Wheeler Decl., ¶25.

The Net Settlement Amount of \$164,682.20 will then be allocated pursuant to California Labor Code § 2699(i) as follows: 75 percent shall be paid to the Workforce Development Agency (“LWDA”), which is estimated to total \$123,511.65 and the remaining 25 percent, which is estimated to total \$41,170.55 shall be paid to the PAGA Employees by dividing the Net Settlement Amount from the total number of aggrieved employees during the PAGA period as determined by the Settlement Administrator. See, Wheeler Decl., ¶25.

1 Plaintiffs' counsel request attorney's fees in the amount of \$100,000.00 and costs in the
2 amount of \$13,219.80 pursuant to *Labor Code* § 2699(g)(1). See, Wheeler Decl., Exh. A, page 1,
3 ¶4. As set forth below, the fees sought under the common fund and cross-checked by the
4 lodestar are reasonable based upon the results achieved.

5 **IV. INVESTIGATION/DISCOVERY BEFORE THE SETTLEMENT AND**
6 **LIMITATION OF RELEASE**

7 Plaintiffs' counsel expended significant time and resources reviewing and analyzing this
8 documentary evidence. Manual review of the records was also necessary, as Plaintiffs' counsel had
9 to personally review documents such as wage statements of the named Plaintiff's and a sample of
10 the aggrieved employees. See, Wheeler Decl., ¶¶11-12. Plaintiffs' counsel carefully reviewed all
11 relevant policy documents relating to background checks and analyzed this evidence in the context
12 of the merits of Plaintiffs' claims. See, Wheeler Decl., ¶13. Although these documents were
13 produced informally pursuant to the mediation privilege, obtaining these documents was the result
14 of numerous back and forth negotiations with Defendants' counsel prior to the time the Parties
15 engaged in mediation and ultimately reached a settlement. See, Wheeler Decl., ¶13.

16 Plaintiffs also carefully analyzed the facts and the law and drafted a detailed mediation brief
17 in advance of the mediation. Based on this information, Plaintiffs and their counsel were well
18 apprised of the salient factual and legal issues and had sufficient information to evaluate, inter alia,
19 the strengths and weakness of the case, the risks of continued litigation, and Defendants potential
20 exposure if Plaintiffs were to prevail at trial. See, Wheeler Decl., ¶14.

21 Based upon the settlement in the *Lopez* Action, the Parties agreed to limit any potential
22 settlement in the *Henriquez* and *Navarro* actions to the potential PAGA violations against
23 Defendants relating to only the following alleged Labor Code violations: 1) failure to furnish
24 itemized wage statements, 2) unlawful use of consumer credit reports, in violation of California
25 Labor Code §1024.5; and 3) failure to provide employer-related information, in violation of
26 California Labor Code §2810.5. See, Wheeler Decl., ¶10.

27 **V. RISK OF CONTINUED LITIGATION AND UNCERTAINTY**

28 The proposed PAGA settlement and payments provide meaningful relief to the State of

1 California and PAGA Employees, in light of all known facts and circumstances, including the
2 risk of significant delay, uncertainty associated with litigation, various defenses asserted by
3 Defendants, and potential appellate issues. See, Wheeler Decl., ¶26.

4 First, continued litigation would be expensive, involving a trial and possible appeals, and
5 would substantially delay and reduce any recovery. In contrast, the State of California and
6 PAGA Employees will greatly benefit from the Settlement by receiving timely relief and
7 avoiding the risk of an unfavorable judgment. See, Wheeler Decl., ¶27.

8 Second, a legitimate controversy exists as to each of the alleged violations of the
9 California Labor Code upon which Plaintiffs PAGA claim is predicated. See, Wheeler Decl., ¶28.
10 These considerations include:

11 **Labor Code §226**

12 Plaintiffs' wage statement claim faced uncertainty. Plaintiffs assert that Defendants failed to
13 issue Plaintiffs and Aggrieved Employees accurately itemized wage statements. The wage statements
14 issued to Plaintiffs and Aggrieved Employees did not set forth the inclusive dates of the period for
15 which employees are paid, specifically, the pay period start date, in violation of Labor Code §§
16 226(a)(6) and 226.3. See *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116 (“[T]he
17 statements at issue do not contain the requisite ‘the inclusive dates of the period for which the employee
18 is paid’ under Section 226(a)(6), because only the pay period end date, and not the start date of the pay
19 period, is included on the statement.”) See, Wheeler Decl., ¶28, pages 8-9.

20 Defendants conceded that approximately 19,281 of its wage statements were issued to Plaintiffs
21 and Aggrieved Employees that failed to set forth the required inclusive pay period dates before the
22 wage statements were corrected. In addition, a number of the wage statements issued by Defendants
23 violate Labor Code §§ 226(a) and 226.3 in two other ways: (1) they fail to list the last four digits of the
24 employees' social security number or an employee identification number other than a social security
25 number, in violation of Labor Code §§ 226(a)(7) and 226.3, and (2) they fail to list the name and address
26 of the legal entity that is the employer, in violation of Labor Code §§ 226(a)(8) and 226.3. See, Wheeler
27 Decl., ¶28, page 9.

28 Even though Defendants' address is listed on the perforated, detachable portion of the wage

1 statements, case law supports Plaintiffs' contention that Defendants wage statements violates Labor
2 Code §§ 226(a) and 226.3. *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116 is
3 particularly instructive again here. In *Willner*, the court found the wage statements violated Labor Code
4 § 226(a)(8) because the defendant's "address appears on the checks attached to the statements and on
5 the front of the envelopes containing the statements" and "because Section 226(a)(8) expressly requires
6 the name and address of the employer to be written on the wage statement itself[,] . . . [a]nything less
7 fails to comply with Section 226(a)(8)." *Id.* See, Wheeler Decl., ¶28, page 9.

8 **Cal. Lab. Code § 1024.5**

9 Plaintiff would face challenges in proving Cal. Lab. Code § 1024.5 violations.
10 Defendants have a policy and practice of running background checks and consumer credit reports
11 on all employees. Defendants do this despite the fact that Cal. Lab. Code § 1024.5 prohibits an
12 employer or prospective employer from using a consumer credit report for employment purposes
13 unless the position of the person for whom the report is sought involves things such as a
14 managerial position, access to credit card applications, or large sums of money. See, Wheeler
15 Decl., ¶28, pages 9-10. See Cal. Lab. Code § 1024.5. In short, none of the exceptions enumerated
16 in the statute apply to Plaintiffs and the other employees involved, and thus, Defendants have
17 violated Cal. Lab. Code §1024.5. See, Wheeler Decl., ¶28, pages 9-10.

18 If this matter were to continue, Plaintiffs would have significant difficulties with this
19 alleged violation. See, Wheeler Decl., ¶28, pages 9-10. First, a violation of Labor Code § 1024.5
20 is not susceptible to common proof. See, Wheeler Decl., ¶28, page 10. There is a question
21 regarding the manageability of this alleged violation as a violation of Labor Code § 1024.5
22 requires individualized assessments of each aggrieved employee who was not hired based upon
23 their credit report which would result in numerous mini-trials. See, Wheeler Decl., ¶28, page 10.
24 Finally, the Court would be called upon to review each and every situation Defendants relied on
25 the consumer credit reports for employment purposes.

26 **Cal. Lab. Code § 2810.5**

27 Plaintiffs would face significant hurdles with their Cal. Lab. Code § 2810.5. See,
28 Wheeler Decl., ¶28, page 10. In that regard, Cal. Lab. Code § 2810.5 requires employers, at the

time of hiring, to provide employees with basic information such as the name of the employer, including any ‘doing business as’ names used by the employer, rates of pay, etc. Defendants violated Cal. Lab. Code § 2810.5 by failing to provide this information to Plaintiffs and employees. See, Wheeler Decl., ¶28, page 10.

The PAGA statute reads, in relevant part: “No action shall be brought under this part for any violation of a posting, *notice*, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.” Cal. Lab. Code § 2699(g)(2) (emphasis added). See, Wheeler Decl., ¶29, pages 10-11. However, Section 2810.5 sets forth a notice requirement, so a PAGA claim based upon it is precluded. See *Segal v. Aquent LLC*, No. 18CV346-LAB (JLB), 2018 U.S. Dist. LEXIS 164610, 2018 WL 4599754, at *7 (S.D. Cal. Sept. 24, 2018) (“[T]he Court strikes...[Plaintiff’s] references to . . . [Section] 2810.5, because notice and posting requirements are not bases for a PAGA action[.]”) (citing *Titus v. McLane Foodservice, Inc.*, No. 216CV00635KJMEFB, 2016 U.S. Dist. LEXIS 125116, 2016 WL 4797497, at *6 (E.D. Cal. Sept. 14, 2016)).

Plaintiff’s PAGA penalties have been calculated as follows:

Violation	Penalties
Violation of Labor Code § 226 (19,281 violations x 100)	\$1,928,100
Violation of Labor Code § 1024.5 (3,248 x \$100)	\$328,400
Violation of Labor Code § 2810.5	\$0.00
Total PAGA Penalties	\$2,252,900

Id. at ¶28, page 11.

Fourth, for the PAGA claim to have any value, Plaintiffs would have to be able to prove a violation on the merits, exposing Plaintiffs’ PAGA claim to the same risks identified above. Put differently, for instance, if Plaintiffs failed on their wage statement claims, so too would Plaintiffs fail on the underlying PAGA claim. See, e.g., *Elliot v. Spherion Pacific Work, LLC*, 572 F.Supp.2d 1169, 1181-82 (C.D. Cal. 2008) (“Plaintiff’s claim under the Private Attorneys

1 General Act is wholly dependent upon his other claims since if all of Plaintiff's other claims fail
2 as a matter of law, so does his PAGA claim."). *Id.* at ¶29.

3 Fifth, it is highly unlikely that Plaintiff would be able to recover the maximum PAGA
4 penalties. PAGA penalties "are mandatory, not discretionary." *See Amaral v. Cintas Corp. No. 2*
5 *(2008) 163 Cal.App.4th 1157*. Even if Plaintiff was to prevail at trial and recover PAGA
6 penalties, they would likely be reduced substantially. The Court has the discretion to
7 substantially reduce PAGA penalties pursuant to Cal. Lab. Code section 2699(e)(2). An award of
8 full PAGA penalties could be confiscatory given the facts of this case. For example, it would be
9 very challenging to prove Defendant willfully committed violations of the California Labor Code,
10 likely rendering an imposition of substantial PAGA penalties unjust, arbitrary and oppressive or
11 confiscatory. *See, Amaral*, pp. 1213-14. Indeed, courts routinely reduce PAGA penalties by a
12 substantial percentage. *See, e.g., Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030 (N.D. Cal. 2016) (the
13 court found that a "significant" reduction in the amount of civil penalties was "appropriate" in
14 part because the employer did not "deliberately evad[e] a clear obligation to provide legally
15 required pay and benefits to employees..."). This is not theoretical. In practice, courts routinely
16 reduce PAGA penalties per pay period by substantial sums. *See also, Carrington v. Starbucks*
17 *Corp.* (2018) 30 Cal. App. 5th 504 (where the court significantly reduced PAGA penalties per
18 pay period). *Id.* at ¶30.

19 Sixth, although class certification requirements do not apply to PAGA claims, a PAGA
20 trial still needs to be manageable. *See, e.g., Wesson v. Staples the Office Superstore, LLC* (2021)
21 68 Cal. App. 5th 746, and *Litty v. Merrill Lynch & Co., No. CV-14-0425-PA*, 2014 WL 5904904
22 at *3 (C.D. Cal. Nov. 10, 2014) (PAGA claims can be stricken if they are found to be
23 "unmanageable."). At a PAGA trial, Plaintiffs could encounter difficulties with manageability
24 and proving violations occurred in the first place. For example, Plaintiffs' illegal background
25 check claims could prove unmanageable because they could require the presentation of numerous
26 aggrieved employees to testify some of whom may have been hired by Defendants and others
27 who were not hired by Defendants for reasons unrelated to information within their credit reports.
28

Moreover, it is also likely that notwithstanding the background checks, aggrieved employees were hired or not hired for unrelated and variable reasons. Moreover, it is unlikely Plaintiffs would be able to prove any of the violations were intentional and more likely the result of unintentional payroll errors, i.e. not including all of the requested information pursuant to Labor Code §226. *Id.* at ¶31.

Next, after establishing liability, Plaintiffs recognize that proving actual penalties owed and due to potentially all of the aggrieved employees would be an expensive, time-consuming, and uncertain proposition. In order to prove liability and damages, Plaintiff would need to, inter alia, obtain the contact information of PAGA Employees and obtain declarations from them, at significant expense. Obtaining the cooperation of current employees would also be difficult, given their likely reluctance to aid in the prosecution of a lawsuit against their employer. *Id.* at ¶32.

Finally, the release applicable to the aggrieved employees other than the named Plaintiffs is limited to PAGA penalties only based upon violations of Labor Code §§226, 1024.5 and 2810.5 against the Released Parties. Other aggrieved employees have the option to advance their claims against their worksite employers as those potential claims are not impacted by this settlement. *Id.* at ¶32.

For these reasons, a reduction to Plaintiffs' PAGA claim in the amount of 55% is appropriate. Plaintiffs reasonably believe that the maximum PAGA penalties recoverable at trial is in the range of \$1,015,425. The \$300,000 Gross Settlement fund represents over a **27 percent** of this maximum damages potential if Plaintiffs were able to prevail at trial on their PAGA claim based on their theories of liability which is in the ballpark of reasonableness. *Id.* at ¶34.

VI. THE PROPOSED PAGA SETTLEMENT IS “GENUINE AND MEANINGFUL” THAT IS “CONSISTENT WITH THE UNDERLYING PURPOSE” OF PAGA

The State's labor law enforcement agencies - LWDA and its constituent departments and divisions - are authorized to assess and collect civil penalties for specified violations of the Labor

Code committed by an employer. With a stated goal of improving enforcement of existing Labor Code obligations, the Legislature adopted PAGA (Labor Code § 2698 et seq.), permitting, as an alternative, an aggrieved employee to initiate a private civil action.

A PAGA settlement must be fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. See, *Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56. When a PAGA claim is settled, the relief provided for under the PAGA must be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public. See, *O'Connor v. Uber Techs., Inc.*, 201 F. Supp.3d 1110, 1133 (2016) (citing response from the LWDA).

A. The Settlement Provides Genuine And Meaningful Relief Consistent With PAGA's Purposes.

The settlement is fair and reasonable in light of analogous class action settlements that have been approved by other courts where a far lower percentage of the potential maximum exposure is recovered. See, e.g., *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, *8 (N.D. Cal. Apr. 3, 2009) ("The settlement ... represents less than two percent of that amount," but "may be justifiable ... given ... significant defenses that increase the risks of litigation."); *In re Toys R Us-Del., Inc.- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal.2014) (granting final approval of a settlement providing for payment reflecting 3% of possible recovery); *Reed v. 1-800 Contacts, Inc.*, 2014 WL 29011, *6 (S.D. Cal. Jan. 2, 2014) (granting final approval where settlement represented 1.7% of possible recovery); *In re LDK Solar Sec. Litig.*, 2010 WL 3001384, *2 (N.D. Cal. July 29, 2010) (granting final approval where settlement was 5% of estimated damages); *Custom LED, LLC v. eBay, Inc.*, 2014 WL 2916871, at *4 (N.D. Cal. 2014) ("[C]ourts have held that a recovery of only 3% of the maximum potential recovery is fair and reasonable when the plaintiffs face a real possibility of recovering nothing absent the settlement."). *Id.* at ¶35.

In light of Plaintiffs' evaluation of maximum penalties recoverable at trial, when balanced against the risk of continued litigation, and the fact that this Settlement was negotiated at arm's-length through the assistance of a well-respected mediator by experienced counsel, as set forth

1 above, Plaintiffs' counsel believes that the Settlement provides meaningful relief to the State of
2 California and PAGA Employees and is in all respects fair, reasonable, and adequate. As a result,
3 Plaintiffs' counsel likewise believes the PAGA settlement provides genuine and meaningful relief
4 consistent with the purposes of PAGA they would not have otherwise obtained. *Id.*, at ¶36.

5 **B. The Settlement Is Presumptively Fair**

6 A class action settlement, analogous to a PAGA settlement, is presumed to be fair if:
7 ““(1) it is reached through arm’s length bargaining; (2) investigation and discovery are
8 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
9 similar litigation; and (4) the percentage of objectors is small.”” *Chavez v. Netflix, Inc.* (2008)
10 162 Cal.App.4th 43, 52. As explained below, each of these factors demonstrate that this
11 Settlement is presumptively fair.

12 First, the Parties participated in a mediation session with Steven Serratore, a highly
13 experienced wage and hour class action and PAGA mediator. Mr. Serratore oversaw the entire
14 settlement negotiation process, during which many difficult legal and factual issues were
15 discussed and resolved between the parties. The Settlement was the product of extensive, hard-
16 fought and arms-length adversarial negotiations. See, *Wheeler Decl.*, ¶15. See also, *Clark v.*
17 *American Residential Services LLC* (2009) 175 Cal.App.4th 785, 800 (“The court undoubtedly
18 should give considerable weight to the competency and integrity of counsel and the
19 involvement of a neutral mediator in assuring itself that a settlement agreement represents an
20 arm’s-length transaction entered without self-dealing or other potential misconduct.”).

21 Second, counsel engaged in (i) significant legal and factual investigation; (ii) extensive
22 informal discovery; and (iii) reviewed and analyzed wage statements and documents, before
23 agreeing to settle this matter. *Id.*, ¶¶11-14. Among other things, this involved professional but
24 hard-fought negotiations with Defendants’ counsel to obtain a sample of the wage statements
25 provided to Plaintiffs and the other aggrieved employees. *Id.* at ¶11. Plaintiffs also conducted
26 extensive legal research and analysis, summarized in a detailed mediation brief which set forth
27 Plaintiffs’ theories of liability and exposure analysis. *Id.* at ¶14. Thus, Plaintiffs were able to act
28 intelligently and effectively in negotiating the proposed Settlement.

1 Third, the settlement negotiations were conducted by capable and experienced counsel.
2 Co-Counsel for Plaintiffs are highly experienced in PAGA and complex wage and hour class
3 action litigation. See, Wheeler Decl., ¶¶38-47, Declaration of Aubry Wand (“Wand Decl.”), ¶¶5-
4 19 and Declaration of Daniel F. Gaines (“Gaines Decl.”), ¶¶2-19.

5 Fourth, sufficient notice as been provided to the LWDA, and there has been no opposition
6 to the settlement by the LWDA. The LWDA was provided with the original PAGA Notice, the
7 settlement agreement and notice of the proposed PAGA settlement hearing and has not
8 intervened. See, Wheeler Decl., ¶¶18-19.

9 **VII. THE COURT SHOULD APPROVE COUNSEL’S REQUEST FOR AN AWARD**
10 **OF REASONABLE ATTORNEYS’ FEES AND COSTS**

11 *Labor Code* § 2699(g)(1) allows for an award of reasonable attorney’s fees and costs to a
12 prevailing plaintiff in an action under the PAGA. The parties’ settlement agreement provides for
13 this Court to determine the reasonableness of the fees, in an amount up to \$100,000.00 and costs,
14 in an amount up to \$13,219.80.¹ See, Wheeler Decl., ¶16, Exh. A, ¶58 and Gaines Decl., ¶20,
15 Exh. B.

16 This action resulted in the enforcement of an important right affecting the public interest,
17 as Plaintiffs sought to enforce the rights of aggrieved employees to recover PAGA penalties
18 arising from Defendants’ failure to provide inaccurate wage statements and conducting illegal
19 background checks. This action also conferred a significant benefit for 3,284 aggrieved
20 employees. The Settlement provides a monetary benefit, in that it permits all current and former
21 employees who worked during the PAGA Period to obtain penalties for non-compliant meal and
22 rest periods and noncompliant wage statements.

23 The Settlement provides for attorneys’ fees to counsel in an amount of up to thirty-three
24 and one third percent of the settlement fund, for a maximum fee award of \$100,000.00 plus
25 reimbursement of costs in the amount not to exceed \$13,219.80. See, Wheeler Decl., 16, Exh. A,
26 ¶4 and ¶58. The requested fees are well-within the range of fees generally sought and approved

27 ¹ Pursuant to Cal. Rules of Prof. Conduct Rule 1.5.1 any fee award will be distributed as follows: 50% to
28 Gaines & Gaines, 25% to the Law Office of Scott E. Wheeler and 25% to the Wand Law Firm.

1 in analogous common fund class action cases. The amount of requested fees is also reasonable
2 based on counsel's lodestar. In fact, the fee award requested is far less than counsel's lodestar,
3 and thus counsel is actually requesting a *negative* multiplier, to the extent the Court analyzes
4 counsel's lodestar.

5 **A. Counsel's Requested Attorneys' Fees Are Reasonable under the Common**
6 **Fund Theory**

7 The request for attorney's fees as a percentage of the Gross Settlement Amount is
8 supported by the "common fund theory." *See Laffitte v. Robert Half Internat, Inc.* (2016) 1
9 Cal.5th 480, 503 ("We join the overwhelming majority of federal and state courts in holding that
10 when class action litigation establishes a monetary fund for the benefit of the class members, and
11 the trial court in its equitable powers awards class counsel a fee out of that fund, the court may
12 determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
13 created."). The purpose of the common fund/percentage approach is to "spread litigation
14 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
15 entire burden alone." *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. In
16 *Quinn v. State of California* (1975) 15 Cal.3d 162, the California Supreme Court stated: "[O]ne
17 who expends attorneys' fees in winning a suit which creates a fund from which others derive
18 benefits may require those passive beneficiaries to bear a fair share of the litigation costs." *Id.* at
19 167. Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the
20 California Supreme Court recognized that the common fund doctrine has been applied
21 "consistently in California when an action brought by one party creates a fund in which other
22 persons are entitled to share."

23 Moreover, several courts have expressed frustration with the alternative "lodestar"
24 approach for deciding fees, which usually involves wading through voluminous and often
25 indecipherable time records. *See, e.g., In re Activision Securities Litigation* (N.D. Cal. 1989) 723
26 F. Supp. 1373, 1375. The percentage approach is preferable to the lodestar because: (1) it
27 provides predictability to class counsel and class members; (2) encourages efficient resolution of
28 the litigation by providing an incentive for early, yet reasonable, settlement; and (3) reduces the

1 demands on judicial records. *Id.* at 1378-79. Attorney's fee applications in California class
2 actions based upon a percentage of a common fund now have substantial support by the Ninth
3 Circuit Court of Appeals. See, e.g., *Paul, Johnson, Alston & Hunt v. Gaulty* (9th Cir. 1989) 886
4 F.2d 268; *In Re Washington Pub. Power Supply Sys. Sec. Lit.* (9th Cir. 1994) 19 F.3d 1291.

5 Most recently, in a detailed analysis regarding the award of attorney's fees in the class
6 action context, the California Supreme Court approved the trial court's award of attorneys' fees
7 under the common fund theory where there is an actual common fund established (i.e., there is no
8 claims process and no money shall revert back to the defendant). See *Laffitte*, 1 Cal.5th at 503.
9 Here, the Gross Settlement Amount is \$300,000 which represents a true common fund, as there is
10 no claims process and no money under the Settlement will revert to Defendant. See *Williams v.*
11 *MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (The percentage is
12 properly based upon the gross settlement, rather than on the amount of claims made).

13 The requested attorneys' fees represent 33 1/3% of the Gross Settlement Amount. See,
14 Wheeler Decl., ¶16, Exh. A, ¶4. Historically, courts have awarded percentage fees in the range of
15 20% to 50%, depending on the circumstances of the case. See Newberg on Class Actions, 4th Ed.
16 2002, § 14: 6. Newberg notes that achievement of a substantial recovery with modest hours
17 expended should not be penalized, but should be rewarded for considerations of time saved by
18 superior services performed. *Id.* Furthermore, state and federal courts in California have long
19 recognized that a percentage of recovery for attorney's fees is properly awarded on the basis of
20 the total value. See, e.g., *Boeing v. Van Gemert* (1980) 444 U.S. 472, 480-481; *In re Consumer*
21 *Privacy Cases* (2009) 175 Cal.App.4th 545, 558 n.13 ("Empirical studies show that, regardless
22 whether the percentage method or the lodestar method is used, fee awards in class actions average
23 around *one-third* of the recovery.") (emphasis added).

24 The requested fee percentage is within reason of the percentages charged by counsel for
25 other employment cases and is in line with the recovery that was recognized as standard for
26 analogous class actions. The court should also consider that the efforts of counsel have resulted in
27 benefits to the aggrieved employees, in the form of a settlement fund established to compensate
28 aggrieved employees for the alleged wage and hour violations. Without the efforts of counsel, the

1 claims alleged in the complaint would likely have gone without remedy. The requested fee award
2 is also appropriate based on the contingent risk incurred by counsel, the benefit conferred on
3 Plaintiffs and aggrieved employees and State as a result of the settlement, and the skill displayed
4 by counsel. In sum, the Court should approve counsel's request for attorneys' fees based on the
5 percentage fund method.

6 **B. Counsel's Requested Attorneys' Fees Are Reasonable under the Lodestar**
7 **Method**

8 Although the Court should analyze this fee request under the common fund theory,
9 Plaintiffs' request for fees are also clearly reasonable based on counsel's lodestar. See, Wheeler
10 Decl., ¶¶48-56, Exh. D, Wand Decl., ¶¶20-31, Exh. A and Gaines Decl., ¶¶6-19 and Exh. A.
11 Counsel were endeavored to divide tasks and avoid duplication of work to the extent that was
12 possible. Under the lodestar method, the Court considers a compilation of the time spent and a
13 reasonable hourly compensation of each attorney to evaluate the reasonableness of the fee
14 requested. See *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 622. The
15 hours spent and the reasonable hourly compensation are computed to arrive at a "lodestar" figure
16 which may then be augmented or diminished by the court taking into account various "multiplier"
17 factors. See *Id.* at 622 (citing *Serrano* (1977) 20 Cal.3d 25, at 48-49). Trial courts have
18 "discretion to conduct a lodestar cross-check on a percentage fee." See *Laffitte*, 1 Cal.5th at 506.

19 Here, Counsel's total lodestar is approximately \$125,510 (Gaines & Gaines \$36,215,
20 Wand \$27,850 and Wheeler \$61,535) which is based on approximately combined 174.10 hours of
21 attorney time at their customary hourly rates. See, Wheeler Decl., ¶¶48-56, Exh. D, Wand Decl.,
22 ¶¶20-31, Exh. A and Gaines Decl., ¶¶6-19 and Exh. A. With the requested fee award of
23 \$100,000 Plaintiffs are requesting the Court apply essentially a negative multiplier. Counsel has
24 been actively working on this case, expending significant time and resources which could have
25 been directed towards other cases. Counsel agreed to litigate this case on a contingency fee basis,
26
27
28

1 and in the process assumed considerable risk given the uncertain proposition these types of cases
2 entail.

3 Plaintiffs respectfully requests that the Court award counsel the requested fees of
4 \$100,000 under the common fund theory with a lodestar cross-check or, alternatively, based on
5 the lodestar method with a negative multiplier.

6 1. Counsels' Hours Are Reasonable

7 In determining whether the number of hours expended on the litigation was reasonable,
8 the court must determine that "the time spent was reasonably necessary and that counsel made 'a
9 good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise
10 unnecessary.'" *Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263 n.8. The court
11 "should defer to the winning lawyer's professional judgment as to how much time he was
12 required to spend on the case." *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106,
13 1112 (noting that "[l]awyers are not likely to spend unnecessary time on contingency fee cases in
14 the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount
15 of the fee.>").

16 Counsel expended a significant amount of time litigating the case to achieve the positive
17 result on behalf of the aggrieved employees. The efforts expended by counsel thus far include,
18 but are not limited to, the following: numerous interviews with Plaintiffs; preparation and filing
19 of various pleadings; numerous conferences and correspondence with Defendants' counsel;
20 document review, including time, payroll records and other employment records of Plaintiffs and
21 aggrieved employees; legal research regarding Defendants' wage and hour practices; research
22 and preparation of a mediation brief; attendance at a mediation conference; drafting, negotiation,
23 and revision of the Settlement Agreement, drafting the PAGA Notice, and motion for approval of
24 the PAGA settlement; communicating with the Settlement Administrator regarding the settlement
25 administration process; and drafting the motion for approval of the PAGA settlement and
26 accompanying declarations.

1 2. Counsels Hourly Rate is Reasonable

2 The reasonable hourly rate is that prevailing in the community for similar work. *PLCM*
3 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. “[I]n assessing a reasonable hourly rate, the
4 trial court is allowed to consider the attorneys’ skill as reflected in the quality of work, as well as
5 the attorneys’ reputation and status.” *MBNA American Bank, N.A. v. Gorman* (2006) 147
6 Cal.App.4th 1, 3. The trial court may also “find hourly rates reasonable based on evidence of
7 other courts approving similar rates.” *Parkinson v. Hyundai Motor America* (C.D. Cal. 2010)
8 796 F.Supp.2d 1160, 1172.

9 Hourly rates as set forth in the *Laffey* Matrix, provide further support for counsel’s
10 requested hourly rate. The *Laffey* Matrix is an attorney’s fee matrix developed in *Laffey v. Nw.*
11 *Airlines, Inc.* (D.D.C. 1983) 572 F. Supp. 354, 371, which provides market rates for attorneys
12 working the Washington D.C. and Baltimore areas. The LSI *Laffey* Matrix, which relies on the
13 Legal Services Index of the Bureau of Labor Statistics, provides national legal rates adjusted for
14 inflation, rather than local and generalized cost data. See, LSI *Laffey* Matrix at
15 <http://www.laffeymatrix.com/see.html>. Federal courts in the Ninth Circuit have found that hourly
16 rates determined using the *Laffey* Matrix, “are reasonable and commensurate with those charged
17 by attorneys with similar experience in the market.” See, e.g., *Kumar v. Salov N. Am. Corp.*, No.
18 14-CV-2411-YGR, 2017 WL 2902898, at *7 (N.D. Cal. July 7, 2017). Utilizing the *Laffey*
19 Matrix, counsel’s requested hourly rates are reasonable.
20

21
22 Counsel is an experienced litigator who specializes in employment law, with a substantial
23 wage and hour PAGA and class action practice. Given the skill and experience of Counsel and
24 the positive result achieved for the aggrieved employees in this case, the requested hourly rates
25 are reasonable.

26 **C. Counsel’s Costs Are Reasonable**

27 The Settlement provides for reimbursement of costs of not to exceed \$20,000. Wheeler
28 Decl., ¶16 and Exh. A, ¶C.2.b. These costs are reasonable and therefore counsel respectfully

request that the Court approve costs in the amount of \$13,291.80 (Wheeler \$6,929.92 and Gaines & Gaines \$6,289.88). See, Wheeler Decl., ¶¶58-59 and Gaines Decl., ¶20, Exh. B.

D. There is No Opposition to Counsels' Request for Fees and Costs Or Governmental Participation

Significantly, notice has been provided to the LWDA regarding the proposed Settlement prior to the time of hearing. No objection has been received from the LWDA to counsel's request for fees and costs. See, Wheeler Decl., ¶¶18-19.

VIII. THE COURT SHOULD APPROVE THE REQUESTED REPRESENTATIVE SERVICE AWARD

The Settlement provides for the allocation of \$10,000 for Class Representative Service Awards to be divided equally \$5,000 to Plaintiff Navarro and \$5,000 to Plaintiff Henriquez. *Id.* at ¶16, Exh. A., C.2.c, and ¶¶60-63 and Gaines Decl., ¶¶21-23. The requested service awards are eminently reasonable according to controlling case law. See, e.g., *Cellphone Termination Cases* (2010) 186 Cal.App.4th 1380, 1394-1395 (approving enhancement awards of \$10,000 to each of the four named plaintiffs).

Enhancements are especially appropriate where the plaintiffs are employees whose positions or employment credentials or recommendations may be at risk by reason of having prosecuted the suit. See, e.g., *Covillo v. Specialty's Cafe*, 2014 WL 954516, at *8 (N.D. Cal. Mar. 6, 2014) (awarding \$8,000 each to two named plaintiffs, noting that "the incentive awards are particularly appropriate in this wage and hour class action, where Plaintiffs undertook a significant 'reputational risk' in bringing this action against their former employer.").

The California Superior Courts has awarded service awards of more than \$5,000 to named plaintiffs' in PAGA only cases:

- *Garrett v. Bank of America*, Alameda County Superior Court, Case No. RG 1399027 (October 28, 2016): awarding three PAGA plaintiffs \$25,000 each.
- *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-00852123 (June 15, 2017): awarding the PAGA plaintiff an individual settlement payment of \$15,000.
- *Garcia v. Macy's West Stores, Inc.*, San Bernardino County Superior Court, Case No. CIVDS1515007 (Sept. 13, 2017): awarding the PAGA plaintiff a service award of \$10,000.

1 In sum, this PAGA action settlement would not have been possible without the aid of
2 Plaintiff, who put substantial time and effort into this litigation, sacrificed the value of their own
3 individual wage and hour claims as well as all other potential unknown claims, and placed
4 themselves at risk for the sake of the aggrieved employees, to achieve this Settlement. See, Decl.
5 of Plaintiff James D. Henriquez, ¶¶6-10 and Decl. of Plaintiff Rita Navarro, ¶11. In light of the
6 foregoing, the requested service awards \$5,000 to Plaintiff Henriquez and to Plaintiff Navarro are
7 reasonable and should be approved.

8 **IX. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully requests that the Court grant approval
10 of the PAGA settlement, approve Plaintiffs' request for an award for attorneys' fees and costs,
11 representative service awards, payment to the LWDA, payment of settlement administration
12 costs, and disbursement of individual settlement payments to the aggrieved employees.

13
14 DATED: April __, 2022

LAW OFFICE OF SCOTT E. WHEELER

15
16 By: _____
17 Scott E. Wheeler

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