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on behalf of himself and others similarly situated
7

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

10 EDWARD MORALES TELLEZ, an
individual, on behalf of himself and others
11 similarly situated,

12 Plaintiff,

13 v.

14 PICK-YOUR-PART AUTO WRECKAGE, a
California corporation; and DOES 1 through
15 50, inclusive,

16
17 Defendants.
18

Case No. CIVDS2017040

Hon. David Cohn

**NOTICE OF MOTION AND MOTION TO
APPROVE THE PRIVATE ATTORNEYS
GENERAL ACT SETTLEMENT AND
RELEASE UNDER CALIFORNIA LABOR
CODE §§ 2698 *et seq.***

*[filed concurrently with Declaration of David
Yeremian; and [Proposed] Order]*

Date: November 8, 2021
Time: 10:00 a.m.
Dept.: S-26

1 **TO THE COURT AND DEFENDANT AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 8, 2021 at 10:00 a.m. in Department S-26 of
3 the above-entitled Court, located at San Bernardino Justice Center, 247 W 3rd St, San Bernardino,
4 CA 92415. Plaintiff Edward Morales Tellez (collectively “Plaintiff” or “PAGA Representative”), on
5 behalf of himself and all persons similarly situated, will and hereby does move this Court pursuant to
6 California Labor Code § 2698 *et seq.* for an order approving the settlement agreement between
7 Plaintiff and Defendant Pick-Your-Part Auto Wrecking (“Defendant”) which will accomplish the
8 following: approve the representative action settlement embodied in the Private Attorney General
9 Act Settlement Agreement and General and Limited Release; approve PAGA Counsel’s application
10 for attorney’s fees and litigation costs; and enter judgment approving the representative action
11 settlement and release.

12 The grounds for this Motion, as set forth in the attached memorandum of points and
13 authorities and supporting declaration, are that this is a fair and reasonable settlement that benefits
14 the PAGA aggrieved employees and was the product of informed, non-collusive negotiations by
15 parties who were represented by experienced and able counsel. *See Wershba v. Apple Computer,*
16 *Inc.*, 91 Cal. App 4th 224, 244-45 (1996); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802
17 (1996); Manual for Complex Litigation, (Second), § 30.44 (1985).

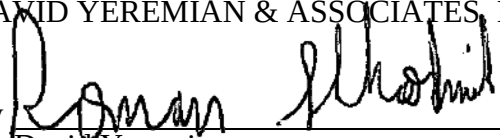
18 Defendant does not oppose the requested relief in this Motion.

19 Plaintiff bases this Motion on this Notice and the accompanying Memorandum of Points and
20 Authorities, the Declarations of David Yeremian and Roman Shkodnik, the complete pleadings,
21 records and files in the case, and such other further oral and documentary evidence which may be
22 submitted at or before the hearing on this Motion.

23
24 DATED: October 14, 2021

DAVID YEREMIAN & ASSOCIATES, INC.

25
26 By


David Yeremian

Roman Shkodnik

Attorneys for Edward Morales Tellez on behalf of
himself and others similarly situated

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 This Motion to Approve Settlement and Release of PAGA Claims (the “Motion for
4 Approval”) is made to enforce the terms of the settlement entered into by and between Plaintiff
5 Edward Morales Tellez (“Plaintiff” or “PAGA Representative”), and Defendant Pick-Your-Part
6 Auto Wrecking (“Defendant”). Plaintiff and Defendant shall be collectively referred to as the
7 “Parties.” A copy of the Stipulation Regarding the Settlement of the Representative Private
8 Attorneys General Act Action (hereinafter “Settlement” or “Stipulation”) entered into by the Parties
9 is attached to the concurrently filed Declaration of David Yeremian as **Exhibit 2**. Plaintiff seeks,
10 without opposition from Defendant, an order from the Court approving the Settlement under Labor
11 Code §§ 2698 *et seq.*

12 The proposed Settlement will dispose of the Private Attorneys General Act (“PAGA”) claim
13 alleged in the Action, which is predicated upon various alleged violations of the California Labor
14 Code including the following Labor Code sections: 201, 202, 203, 204, 212, 213, 218.6, 221, 223,
15 224, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1182.12, 1185, 1194, 1194.2, 1197, 1197.1,
16 1198, 2698, 2699, 2802, stemming from Defendant’s alleged employment practices with regard to
17 the employees of Defendant (hereinafter “Aggrieved Employees”).

18 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
19 statute, which states that the “court shall review and approve any penalties sought as part of a
20 proposed settlement agreement pursuant to this part.” See Labor Code § 2699(l). In deciding
21 whether to grant approval of the proposed Settlement, the primary issue to be decided is whether the
22 Settlement is fair, adequate, and reasonable. Specifically, the issues are whether the PAGA penalties
23 to which the Parties have agreed provide “genuine and meaningful” relief, “consistent with the
24 underlying purpose of the statute to benefit the public” (*Villalobos v. Calandri Sunrise Farm LP*
25 (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 12732709, at 5.), and whether the
26 penalties are reasonable in light of the potential verdict value in this case (*O’Connor v. Uber*
27 *Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135).

28 Additionally, in evaluating the adequacy of the settlement amount, a court is not concerned

1 with the amount the aggrieved employees are to receive, but rather, a court must focus on the total
2 settlement amount in achieving PAGA's objective. Indeed, "[t]he remedy sought in a PAGA suit
3 consists of civil penalties, not individual or class damages." *Mendez v. Tween Brands, Inc.* (E.D.
4 Cal. July 1, 2010) 2010 WL 2650571 *4. "Unlike class actions, these civil penalties are not meant to
5 compensate unnamed employees because the action is fundamentally a law enforcement action."
6 *Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D. Cal. April 2, 2010) 2010 WL 1340777 *4.
7 Moreover, a court must not lose sight of the fact that "[u]nlike a class action seeking damages or
8 injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to
9 recover civil penalties for the government that otherwise may not have been assessed and collected
10 by overburdened state enforcement agencies." *Id.*

11 As set forth herein, the proposed Settlement embodies all of the features of a settlement that
12 is fair, adequate and reasonable, as it is the product of (1) arms-length negotiations, (2) negotiated by
13 attorneys experienced in wage and hour issues, (3) subsequent to undertaking sufficient investigation
14 necessary to evaluate the relative strength and value of the PAGA claim, and (4) it reflects a
15 reasoned compromise based directly on the relative strength and value of the PAGA claims, as well
16 as the risks, expense, complexity and likely duration of further litigation.

17 Aggrieved Employees are defined as: all individuals who are or were employed by
18 Defendant as non-exempt employees within the State of California during the period from March 3,
19 2019, through Settlement approval by the Court.¹ In this case, as of July 2021 there were
20 approximately 746 Aggrieved Employees. A few days prior to the November 8, 2021 hearing,
21 Plaintiff will submit a Declaration updating the Aggrieved Employee size in the event the size is
22 larger due to new hires since July of 2021.

23 The value achieved by the Settlement may be gleaned from the fact that the Gross Settlement

24 ¹ The parties are able to negotiate a longer statute of limitations for Plaintiff's PAGA claims. In *Amaro v. Anaheim Arena*
25 *Management, LLC*, 2021 WL 4434970 at * 11 (Cal. Ct. App. September 28, 2021), the Court of Appeal allowed a named
26 plaintiff to release PAGA claims beyond the one-year limitations period. Additionally, other courts have held that the
27 parties could settle a PAGA claim outside the limitation period. *See Diamond Resorts Wage and Hour Cases*, No.
28 E071769, 2020 WL 4188098, at *13 (Cal. Ct. App. July 21, 2020) (rejecting the objectors' argument that the parties
could not settle PAGA claims beyond the one-year limitations period); *Rivera v. W. Express Inc.*, No.
EDCV181633JGBSHKX, 2020 WL 5167715, at *5 (C.D. Cal. May 1, 2020) (Gaytan's counsel seeking approval of a
four-year release of PAGA claims).

1 Amount is \$684,000.00 and that the LWDA and the Aggrieved Employees encompassed by the
2 Settlement will receive no less than \$430,360.16 under the terms of the Settlement, which, pursuant
3 to the operative statute, shall be allocated “75 percent to the Labor and Workforce Development
4 Agency... and 25 percent to the aggrieved employees.” See Cal. Lab. Code § 2699(i). This is a
5 significant recovery, not only because further litigation may have resulted in a net-zero recovery
6 based on the defenses asserted by Defendant, but because the amount secured by Plaintiff is
7 exponentially above other PAGA penalty awards approved as reasonable in these types of cases.

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

10 **II. Statement of the Case**

11 **A. Procedural History**

12 On May 13, 2020, Plaintiff Edward Morales Tellez filed a claim notice online with the
13 California Labor & Workforce Development Agency (the “LWDA”) pursuant to Labor Code §
14 2699.3(a)(1) and gave notice to Defendant. (See Declaration of David Yeremian (Yeremian Decl.”),
15 filed concurrently herewith, ¶ 4; **Exhibit 1**). Additionally, on October 23, 2020, Plaintiffs filed
16 another amended claim notice online with the LWDA removing the claim for unlawful deductions
17 and Plaintiffs gave notice to Defendant. Lastly, on August 20, 2021, Plaintiff filed an amended claim
18 notice online with the LWDA adding claims for unlawful discount of wages, unlawful deductions,
19 and secret payment of lower wages, and Plaintiff gave notice to Defendant. The LWDA declined to
20 investigate the violations alleged. *Id.* Pursuant to Labor Code § 2699.3(a)(2), after 65 days from the
21 mailing of the notice to the LWDA, Plaintiff had a private right of action to bring the instant case.
22 Plaintiff has also given notice of this stipulation for settlement to the LWDA. (See Yeremian Decl. ¶
23 42; **Exhibit 6**).

24 On August 6, 2020, after 65 days from the mailing of the first notice to the LWDA, Plaintiff
25 filed a putative PAGA Complaint against Defendant in the Superior Court for the State of California,
26 in San Bernardino County, Case Number CIVDS2017040, alleging claims for (1) failure to pay
27 minimum wages; (2) failure to pay wages and overtime; (3) failure to provide meal breaks; (4)
28 failure to provide rest breaks; (5) failure to furnish accurate itemized wage statements; (6) unlawful

1 deductions; (7) failure to timely pay final wages upon termination or separation; and (8) failure to
2 reimburse business expenses. On November 5, 2020, Plaintiff filed a First Amended Complaint that
3 dismissed the claim for unlawful deductions.

4 On September 20, 2021, the Court granted Plaintiff leave to file a Second Amended
5 Complaint (“SAC”) to add claims for unlawful discount of wages, unlawful deductions, and secret
6 payment of lower wages. (See Yeremian Decl. ¶ 5). The SAC was filed on September 30, 2021 and
7 asserts violations by Defendant of the following Labor Code sections: 201, 202, 203, 204, 212, 213,
8 218.6, 221, 223, 224, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1182.12, 1185, 1194, 1194.2,
9 1197, 1197.1, 1198, 2698, 2699, 2699.3 and 2802. (See Yeremian Decl. ¶5).

10 **B. PAGA Counsel’s Investigation**

11 The Parties engaged in informal discovery, and PAGA Counsel conducted a thorough
12 investigation of the facts and claims giving rise to the action, including the exchange of documents,
13 meeting and conferring, reviewing and analyzing pay time and records, employment handbooks,
14 Plaintiff’s personnel files, and Defendant’s relevant policies and other documentation. (See
15 Yeremian Decl. at ¶ 6). Informal discovery revealed Plaintiff, as well as many other Aggrieved
16 Employees, signed an arbitration agreement during their employment with Defendant, precluding
17 them from pursuing class action claims. (See Yeremian Decl. at ¶ 8). Given the arbitration
18 agreements signed by the class members, Plaintiff continued proceeding with the claims under Labor
19 Code § 2699. (*Id.* at ¶ 9). With the discovery in hand, the parties were able to engage in meaningful
20 settlement discussions in an attempt to resolve the claims remaining in the Action. *Id.*

21 **C. Settlement Negotiations**

22 On July 28, 2021, the parties mediated the matter and entered into a settlement agreement,
23 contingent on court approval. (See Yeremian Decl. at ¶ 10). The parties discussed all aspects of the
24 case, including the risks of further litigation, the claims, including the claims not raised in the First
25 Amended Complaint which were subsequently added in the SAC, Defendant’s defenses and
26 exchanged further information. *Id.* The parties reached a tentative settlement agreement as embodied
27
28

1 in the Settlement, which is attached as **Exhibit 2** to the Yeremian Declaration.²

2 The parties recognized that the issues presented in the Action are likely only to be resolved
3 with extensive and costly pretrial and trial proceedings, and that further litigation will lead to
4 inconvenience, distraction, disruption, delay and expense disproportionate to the potential benefits of
5 litigation. *Id.* The parties took into account the risk and uncertainty of the outcome inherent in any
6 litigation in reaching this agreement. *Id.*

7 **D. Settlement Agreement and Accompanying Documents**

8 The Settlement requires Defendant to pay a total settlement amount of Six Hundred Eighty-
9 Four Thousand Dollars and Zero Cents (\$684,000.00) in exchange for a release of the Plaintiff's
10 Representative PAGA claims asserted in the operative Complaint and the LWDA letters. (See
11 Yeremian Decl. at ¶ 13; **Exhibit 2** at ¶ 4). From the total settlement amount the following deductions
12 shall be made, if approved by the Court:

- 13 a. Attorneys' fees in the amount of Two Hundred Thirty-Nine Thousand Four
14 Hundred Dollars and Zero Cents (\$239,400.00) ("PAGA Counsel's Fees") and
15 Four Thousand Seven Hundred Thirty-Nine and Eight-Four Cents (\$4,739.84) for
16 PAGA Counsel's actual litigation expenses incurred to date ("PAGA Counsel's
17 Costs) (*see id.* Yeremian Decl. ¶ 13; at **Exhibit 2**, at ¶ 4(a));
- 18 b. Administration costs of no more than Nine Thousand and Five Hundred Dollars
19 and Zero Cents (\$9,500.00) to be paid to the Settlement Administrator
20 ("Administration Costs") for sending notices and for calculating settlement shares
21 and preparing all checks and mailings (See Yeremian Decl. ¶ 13; **Exhibit 2**, ¶
22 4(b)); and
- 23 c. Distribution of the remainder Thirty Thousand Three Hundred Three Hundred
24 Sixty Dollars and Sixteen Cents (\$430,360.16) to the LWDA and the Aggrieved
25 Employees per statute: 75% (\$322,770.12) must be paid to the Labor and

26
27 ² As part of the settlement and in addition to the Gross Settlement Amount, Defendant has agreed to separately settle
28 Plaintiff's individual wage and hour claims which were raised in a claim Plaintiff filed with the Labor Commissioner's
Office. The terms of that separate individual settlement are in a Confidential Settlement Agreement.

1 Workforce Development Agency per Labor Code § 2699 *et seq.* and 25%
2 (\$107,590.04) shared by the Aggrieved Employees on a pro-rata basis (*See id.*;
3 **Exhibit 2** at ¶ 4(c)).

4 From PAGA Counsel's review of the facts, strengths, and weaknesses of the case, the risks
5 and delays posed by further litigation, and PAGA Counsel's own prior litigation experience, PAGA
6 Counsel believes that the recovery for each aggrieved employee is fair and reasonable, taking into
7 consideration the amounts received in other PAGA actions, the risks inherent in litigation of this
8 genre, and the reasonable tailoring of each aggrieved employee's claim to the settlement award he or
9 she will receive. (*See* Yeremian Decl. at ¶ 14). Defendant, for its part, vigorously contests liability
10 and damages. (*Id.* at ¶ 8). Further, and based on the settlement negotiations, which were hard-fought
11 and conducted in good faith and at arm's length between attorneys with substantial experience
12 litigating PAGA actions, the Settlement Agreement was the product of a non-collusive settlement
13 process in which the parties were forced to make significant compromises in the interest of reaching
14 a full and complete settlement of the lawsuit. (*Id.* at ¶ 14).

15 **III. Discussion**

16 **A. The Relief Obtained Through the PAGA Settlement is Genuine, Meaningful,**
17 **and Consistent with the Underlying Purpose of the Statute to Benefit the Public**

18 Plaintiff alleges that Defendant violated California law and various provisions of the Labor
19 Code during the course of Plaintiff and Aggrieved Employees' employment. (*See* Yeremian Decl. at
20 ¶ 5). Plaintiff claims civil penalties under PAGA pursuant to Labor Code § 2699 *et seq.* (*Id.*).

21 Under Labor Code § 2699, specifically, Plaintiff alleged that the Aggrieved Employees were
22 not paid all wages they were owed, including for all work performed and for all overtime hours
23 worked. (*See* Yeremian Decl. at ¶ 16). Specifically, when Aggrieved Employees arrived at work,
24 they had to walk over to the timekeeping station and allegedly had to wait in line to undergo security
25 checks before they could clock in. On top of these violations, Plaintiff alleged that Aggrieved
26 Employees often were not allowed to take legally compliant meal and rest breaks due to the demands
27 of the job. Plaintiff alleged that to the extent they were able to take a break, it was often interrupted.
28 Moreover, Defendant paid incentive and other bonuses to employees but failed to factor these

1 nondiscretionary bonuses into the regular rate when calculating overtime pay. (*Id.*) Additionally,
2 Plaintiff alleged that Defendant had an agreement with a payroll service provider for the issuance of
3 payroll cards to Aggrieved Employees that required Aggrieved Employees to incur a fee in order to
4 access their full wages in violation of California Labor Code § 212 and 213. Aggrieved Employees
5 would not be able to withdraw their entire wages in one transaction via an ATM because ATM's
6 only disburse cash in limited denominations and do not dispense exact change. Moreover, Aggrieved
7 Employees had to abide by business hours of a specific bank chain and had limited locations with
8 limited business hours that created additional obstacles and hurdles to access their entire wages
9 without discount and without delay. Additionally, Defendant provided Aggrieved Employees with
10 payroll debit cards as payment of their wages. Under this payroll debit card program, Aggrieved
11 Employees were assessed various fees in connection with their use of the payroll debit cards.
12 Aggrieved Employees were required to pay per-transaction fees. ATM fees, in-person teller fees,
13 and/or other fees to obtain and/or spend their earned and due wages. The fees charged to Aggrieved
14 Employees resulted in a discount of their wages. Defendants' payroll debit card program, which
15 resulted in a discount of wages to employees, is tantamount to taking deductions from Aggrieved
16 Employees' paychecks without their written authorization and therefore constitutes an unlawful
17 deduction of wages, in violation of Labor Code §221 and 224. Furthermore, Defendant willfully and
18 systemically issued payroll debit cards to Aggrieved Employees that discounted their wages by
19 charging various fees in connection with the use of the payroll debit cards. Defendant's payroll debit
20 card program resulted in the payment of less than statutorily-required wages to Aggrieved
21 Employees. In doing so, Defendant acted with the intent to deprive Aggrieved Employees of
22 statutory wages, including but not limited to, overtime wages and minimum wages to which they
23 were entitled to under California law. Defendant paid other aggrieved employees lower wages than
24 those they were entitled to while purporting that other aggrieved employees were properly paid.
25 Additionally, Defendant failed to reimburse Plaintiff and Aggrieved Employees for reasonably
26 incurred business expenses, including but not limited to, cellphone expenses and mechanical overalls
27 that were used in the course of performing their job duties for Defendant.

28 Plaintiff also contends that Defendant failed to provide their employees with accurate,

1 itemized wage statements, in writing, as required by California Labor Code § 226(a). Section 226(a)
2 requires an employer to furnish each of his or her employees with an accurate, itemized statement in
3 writing showing the gross and net earnings, total hours worked, and the corresponding number of
4 hours worked at each hourly rate. Labor Code § 226(a). (*Id.* at 17) These statements must be
5 appended to the detachable part of the check, draft, voucher, or whatever else serves to pay the
6 employee's wages, or, if wages are paid by cash or personal check, these statements may be given to
7 the employee separately from the payment of wages. (*Id.*) In either case the employer must give the
8 employee these statements twice a month or each time wages are paid. (*Id.*) As a direct and
9 proximate cause of Defendant's alleged violation of Labor Code § 226(a), employees allegedly
10 suffered injuries, including not being paid their wages and overtime, confusion over whether they
11 received all wages owed them, the difficulty and expense involved in reconstructing pay records, and
12 forcing them to make mathematical computations to analyze whether the wages paid in fact
13 compensated them for all hours worked. (*Id.*) Specifically, the wage statements allegedly failed to
14 accurately account for unpaid wages and overtime due to the off the clock work. (*Id.*) As a result,
15 Defendant allegedly failed to provide employees with accurate, itemized wage statements in writing,
16 as required by the Labor Code. (*Id.*)

17 By allegedly failing to pay the Plaintiff and Aggrieved Employees their minimum wages,
18 overtime wages, all discussed above, Plaintiff and formerly employed Aggrieved Employees would
19 be due all wages at the time of termination or within seventy-two (72) hours of resignation, as
20 required under Labor Code § 203. (*Id.* at 18)

21 Defendant denied and continues to deny all of the claims made by Plaintiff in this Action and
22 contends it acted at all relevant times in conformance with the law. Defendant contends Plaintiff and
23 all putative Aggrieved Employees were provided lawfully compliant meal and rest periods and that
24 any deviations were at the voluntary election of the Plaintiff and/or the putative Aggrieved
25 Employees and not at the request of Defendant or due to work; that the deposit of wages onto pay
26 cards for those that elected to receive their wages through that method, complied with the law; that
27 Defendant paid all wages due, at the correct hourly rate and on a timely basis; that Defendant's wage
28 statements complied with the law; and that neither Plaintiff nor any putative Aggrieved Employee

1 incurred reasonable business related expenses for which they were not reimbursed. Finally,
2 Defendant disputes and denies having engaged in any alleged unlawful discount of wages, unlawful
3 deductions, and/or alleged secret lowering of paid wages due to pay cards. As a result of Defendant's
4 arguments Plaintiff's Counsel had to apply appropriate discounts in light of the facts and law as
5 discussed above. (*Id.*)

6 The projected value of PAGA claims is a variable value of two predictive indexes: 1) the
7 likelihood that Plaintiff will succeed in proving the underlying claims were violated, and 2) the
8 extent to which the Court will impose civil penalties permitted under PAGA. This is to be
9 distinguished from the projected values of class claims of Labor Code and Wage Order violations.
10 For instance, and relevant to the underlying claims in this action, class claims alleging California's
11 meal and rest break, minimum wage, and wage statement laws were violated, the predictive value for
12 purposes of determining whether settlement values are fair and reasonable rests only on the
13 likelihood of prevailing on the merits and the exposure related thereto, as there is no judicial
14 discretion to award lesser amounts owed for adjudged violations. It is for these reasons that, in
15 assessing and judging the reasonableness of PAGA settlements, the touchstone feature is the
16 "remedial purpose" achieved in the settlement amount, which takes into account the defendant
17 employer's "good faith" belief that it complied with the laws claimed to be violated. *See Bernstein v.*
18 *Virgin Am., Inc.* (N.D. Cal. 2019) 365 F.Supp. 3d 980, 991.

19 Based on the Court's discretion, in addition to whether or not the Court would side with
20 Plaintiffs on the underlying Labor Code violations, Plaintiff necessarily and substantially had to
21 discount the settlement value off of the full PAGA penalty amounts. As discussed earlier, Defendant
22 argues its meal and rest policies and practices were lawful. Likewise, Defendants argues it pays its
23 employees for all time worked. Further, Defendant argues it maintains a uniform policy and practice
24 of reimbursing employees for business expenses, maintains a complaint sick leave policy, and
25 maintains a lawful commission agreement. Thus, even if Defendant was proven wrong on these
26 fronts and ultimately found to have violated the underlying Labor Code claims, the court could find
27 a good faith reliance on *Brinker*, *Augustus*, and other governing authorities justifiably instructed
28 Defendant's actions and thereby impose a massive reduction of PAGA penalties akin to the Courts

1 in *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778 and *Carrington v.*
2 *Starbucks* (2018) 30 Cal.App.5th 504.

3 The Private Attorneys General Act, Labor Code § 2699 *et seq.*, allows Plaintiff to obtain civil
4 penalties on behalf of himself and other aggrieved employees for Defendant's violation of any
5 provision of the Labor Code enumerated under Labor Code § 2699.5. (*See id.* at ¶ 19). Where civil
6 penalties are provided in the statute, those civil penalties are recoverable; where no civil penalties
7 are recoverable, Labor Code § 2699(f) establishes civil penalties of one (\$100) for each aggrieved
8 employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved
9 employee per pay period for each subsequent violation. Pursuant to Labor Code § 2699(i), seventy-
10 five (75) percent of the penalties recovered must be allocated to the Labor and Workforce
11 Development Agency (LWDA), with the remaining twenty-five (25) percent allocated to the
12 affected employees. *See also Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13-2122 CAS (CWx),
13 2013 WL 3233211, at *7 (C.D. Cal. Jun. 25, 2013) (“[A] PAGA plaintiff pursues civil penalties on
14 behalf of the government and receives a twenty-five percent portion of the recovered penalty as a
15 bounty.”). However, under *Amaral v. Cintas*, 163 Cal. App. 4th 1157, 1207-09 (2008) the Court held
16 that a lower penalty amount of \$100 per violation applies in the absence of a determination that a
17 violation actually occurred.

18 Based on the foregoing facts and law, PAGA Counsel estimated Defendant's maximum total
19 exposure on the PAGA claim at approximately \$2,159,000. (*See* Yeremian Decl. at ¶ 21). The
20 provisions of the Labor Code potentially triggering PAGA penalties in this case include but are not
21 limited to Labor Code §§ 201, 202, 203, 204, 212, 213, 218.6, 221, 223, 224, 225.5, 226, 226.3,
22 226.7, 510, 512, 558, 1174, 1182.12, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 2698, 2699, 2802.
23 (*Id.*) Specifically, the total exposure on the PAGA claim was calculated by multiplying the total
24 number of pay periods (24,688) by 100 per violation. (*Id.*) Plaintiff's calculation of the total
25 exposure on the PAGA claim is for one PAGA penalty per pay period (*i.e.*, Plaintiff did not stack the
26 penalties in their calculation). (*Id.*) Plaintiff's claims giving rise to the penalties include all of the
27 claims asserted in the Second Amended Complaint, including, but not limited to the following: (1)
28 Defendant's alleged failure to pay, timely or otherwise, all wages due and owing ; (2) Defendant's

1 alleged failure to provide all the legally required unpaid, off-duty meal periods to the Aggrieved
2 Employees; (3) Defendant's alleged failure to provide all the legally required paid, off-duty rest
3 periods; (4) Defendant's alleged failure to provide accurate wage statements; (5) Defendant's alleged
4 failure to reimburse for all reasonably incurred business expenses; (6) the alleged debit card charges
5 and (7) Defendant's alleged failure to timely pay formerly employed Aggrieved Employees all
6 wages due and certain at the time of termination or within seventy-two hours of resignation as
7 required by Labor Code §§ 201-203. (*Id.*)

8 Case law supports the notion that it is inappropriate to "stack" penalties for multiple
9 violations, particularly when those violations all stem from the same alleged "injury" *Aguirre v.*
10 *Genesis Logistics*, 2015 U.S. Dist. LEXIS 78748 (citing *Villacres v. ABM Indus., Inc.*, 189
11 Cal.App.4th 562, 577 (2010)). ("One injury gives rise to only one claim for relief... The violation of
12 one primary right constitutes a single cause of action."; *Crowley v. Katleman*, 8 Cal. 4th 666, 681-82)
13 (1994); *Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, *17 (N.D. Cal.2012) ("There is no
14 authority that "would permit double recovery of essentially the same penalties.")

15 PAGA penalties are not mandatory but permissive. (See Yeremian Decl. at ¶ 23). Labor Code
16 § 2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount
17 specified by this part if, based on the facts and circumstances of the particular case, to do otherwise
18 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (See *Thurman v.*
19 *Bayshore* (2012) 203 Cal. App. 4th 1112 (*substantially* reducing PAGA penalties by 30% under this
20 provision) (emphasis added); *Sanchez v. McDonald's Corp.* (2017), LASC Case No. No. BC 499888
21 (98% reduction from \$41 million to \$775,000); *Ghrdilyan v. RJ Financial* (2012), LASC Case No.
22 BC430633 (94% reduction from \$5.4 million to \$325,000); *Fleming v. Covidien, Inc.* (2011), USDC
23 Case No. ED CV 10-01487-RGK (OPx) (87% reduction from \$2.8 million to \$375,000).).

24 Moreover, in *Kaanaana* , 29 Cal.App.5th 778, 788 & 809, the Court of Appeals took no issue
25 with the trial court exercising its discretion in slashing PAGA civil penalties for violations of Labor
26 Code section 512 to 13% of the total recoverable penalties. In *Carrington*, 30 Cal.App.5th 504, the
27 plaintiff requested penalties in excess of \$70 million, based on a \$25 to \$75 penalty per violation.
28 The court reduced the award, stating that awarding the maximum penalty would be unjust, arbitrary,

1 and oppressive based on Starbuck's good faith attempts to comply with the law. The lower court's
2 reduced award of \$150,000 was affirmed on appeal, which reflects .2% of the total recoverable
3 penalties sought.³ Defendant maintained that it would be unjust to award maximum PAGA penalties
4 and that stacking of penalties was not appropriate.

5 **B. The Requested Attorney Fees And Cost Award Should Be Approved**

6 The PAGA provides that any employee who prevails is entitled to an award of reasonable
7 attorneys' fees and costs. Cal. Lab. Code § 2699(g)(1). The PAGA statute provides for approval of
8 the settlement but does not specifically provide that the amount or reasonableness of attorneys' fees
9 and costs is subject to court approval. Cal. Lab. Code §§ 2699(g)(1) and (l)(2). A reasonable
10 interpretation of the PAGA is that the amount of attorneys' fees need only be addressed by a court
11 when the LWDA objects because there is no need to provide absent employees' due process rights in
12 a PAGA settlement since the aggrieved employees do not have their own substantive rights. *See*
13 *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 436. And, the LWDA,
14 as the real party in interest and the primary beneficiary of the settlement, has an opportunity to
15 review the settlement before it is approved. Cal. Lab. Code § 2699(l)(2). Unlike a class action, where
16 the purpose of court approval is to protect absent class members, in a PAGA settlement the real party
17 in interest, the LWDA, has the opportunity to review and consider the reasonableness of the fees and
18 object before the court hears the approval motion. If a court considers the reasonableness of the
19 attorneys' fees requested, it should be guided by the common fund doctrine typically applied in class
20 action cases.

21 **1. The Payment of Attorneys' Fees Is Reasonable and Therefore Falls**
22 **within the Range of Approval by the Court**

23 The California Supreme Court has recently held that "when class action litigation establishes
24 a monetary fund for the benefit of the class members, and the trial court in its equitable powers
25 awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee

26 ³ These instances of judicial discretion imposing massive reductions in recoverable penalties is to be contrasted with
27 *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) 365 F.Supp. 3d 980, 992, where the trial court reduced the recoverable
28 PAGA penalties by only 25%. *Bernstein*, however, only amplifies the predictive blind spot of how a court can exercise
its wide-discretion to reduce full PAGA exposure.

1 by choosing an appropriate percentage of the fund created.” *Laffitte v. Robert Half Intern. Inc.*
2 (2016) 205 Cal.Rptr.3d 555, 573. Indeed, courts may use the “percentage method for its primary
3 calculation of the fee award. The choice of a fee calculation method is generally one within the
4 discretion of the trial court, the goal under either the percentage or lodestar approach being the
5 award of a reasonable fee to compensate counsel for their efforts.” *Id.*

6 Pursuant to the Settlement Agreement, the PAGA Counsel is entitled to 35% of the Gross
7 Settlement Amount, or Two Hundred Thirty-Nine Thousand Four Hundred Dollars and Zero Cents
8 (\$239,400.00), as attorneys’ fees for its representation of Plaintiff and the Aggrieved Employees in
9 this Matter. (See Yeremian Decl., **Exhibit 2** at ¶ 4(a).) PAGA Counsel respectfully requests an order
10 approving its attorneys’ fees in the amount of \$239,400.00 pursuant to the Settlement Agreement.
11 (See Yeremian Decl. at ¶ 24-25).

12 In settlements where a definite monetized fund is created, it is appropriate for courts to
13 evaluate the lodestar amount as a percentage of the recovery and adjust it accordingly if the lodestar
14 differs from the range of percentage fees freely negotiated in comparable litigation. See *Lealao v.*
15 *Beneficial Calif., Inc.* (2000) 82 Cal.App.4th 19, 49-50.

16 PAGA Counsel took this case on a contingent-fee basis against a corporation represented by
17 a reputable defense firm. (See Yeremian Decl. at ¶ 27). When taking on contingent cases, careful
18 attention must be paid to the economics involved or one bad case can destroy years of work. *Id.*
19 Accordingly, in such cases, we anticipate that we shall, if successful, receive a fee that exceeds our
20 normal hourly rate; otherwise the risk is often too great to bear. *Id.* Even with long hours of work,
21 the number of hours in a day is limited. *Id.* Because of this, when one particular matter is handled,
22 other matters are turned away. *Id.* When firms become involved in cases like this, they must realize
23 the time commitment entailed and are forced to turn down other matters that otherwise could have
24 been handled. *Id.*

25 Contingent-fee cases present the very real risk of working hundreds if not thousands of hours
26 that may never be entirely compensated. (See *id.* at ¶ 28). Moreover, while the case is being litigated,
27 counsel must pay overhead (salaries, rent, etc.), provide for their own expenses, and in most cases
28 pay the out-of-pocket expenses incurred on the plaintiff’s behalf. *Id.* And the prospect of a court-

1 awarded fee does not greatly reduce the risk posed by these cases. *Id.* In many cases, the prospect is
2 nothing more than a potential that never materializes. *Id.* First, you must win the case to get a court-
3 awarded fee; even those cases that seem strongest at the onset can be lost and sometimes are lost. *Id.*
4 Second, there are always the pitfalls and unforeseen obstacles that arise along the way, such as
5 settlement offers that the client may accept without ensuring that we receive a reasonable fee or
6 changes in the law that substantially affect the merits of the case, or other uncertainties involving the
7 client. *Id.* Finally, there is the great risk inherent in advancing tens if not hundreds of thousands of
8 dollars in out-of-pocket expenses. *Id.* If that money were to be invested in some sort of financial
9 investment, one would expect a reasonable rate of return on that investment. *Id.* Here, however, the
10 best we can hope to recover is our money, and then only if we are substantially successful; if we are
11 not, all or part of this “investment” can be lost.

12 PAGA Counsel is well acquainted with the contingent-fee market throughout California,
13 particularly as it pertains to PAGA and class-action litigation. (*See id.* at ¶ 29). PAGA Counsel has
14 negotiated numerous contingency-fee agreements with plaintiffs, both as individuals and as
15 representatives in class-action and PAGA suits. Many of those agreements required that counsel
16 receive a fee under certain scenarios that exceeds 40% of the recovery. PAGA Counsel’s recent
17 attorneys’ fees awards in similar wage-and-hour class and PAGA actions have been 40% of the
18 recovery.

19 Attorney’s fees payable from this settlement amount to PAGA Counsel in no way
20 undermined their fiduciary duties to the putative class. (*See id.* at ¶ 30).

21 PAGA counsel in contingency-fee cases typically receive attorneys’ fees equal to or greater
22 than forty percent of the gross settlement amount. *See Crandall v. U-Haul* (Los Angeles County
23 Super. Ct., Case No. BC178775), the Honorable Steven Czuleger awarded a 40% attorney fee
24 request in an overtime-exemption class action; in *Bushnell v. Cremer, Inc.* (Orange County Super.
25 Ct., Case No. 657778), the Honorable Donald E. Smallwood awarded attorneys’ fees in the amount
26 of 38%; in *Abzug v. Kerkorian* CA000981 (Los Angeles County Super.Ct., November 1990), the
27 Honorable R. William Schoettler awarded a 45% fee; in *Haitz v. Meyer, et al.*, Alameda County
28 Super. Court, 8-20-1990 No. 572968-3, the court awarded a 40% fee; in *Elliott v. Clothestime*

1 (Orange County Super. Ct., Case No. 01-CC00333) the Honorable Jonathan Cannon awarded a 40%
2 fee in a wage-and-hour class action which had not yet proceeded to the class certification stage; in
3 both *Rippee v. Boston Market Corporation*, Case No.: 05 CV 1359 BTM (JMA) and *Barile v. Boston*
4 *Market Corporation*, Case No.: 05 CV 1360 BTM (JMA), the Honorable Judge Barry T. Moskowitz
5 awarded a 40% fee to plaintiffs' counsel in wage-and-hour class actions that had not proceeded to
6 the class-certification stage.(See Yeremian Decl. ¶ 31.)

7 Moreover, PAGA Counsel, in both prior wage-and-hour class action and PAGA lawsuits that
8 received final approval similar to this one, received awards of forty percent (40%) of the settlement
9 amount for attorneys' fees. The requested amount is also in line with the foregoing case authority as
10 well as the practice in most wage-and-hour class actions. (*Id.* at ¶¶ 31-33.)

11 The amount requested here will fairly compensate PAGA Counsel for their successful
12 vindication of aggrieved employee rights, taking into account the quality, nature, and extent of
13 counsel's efforts, and the fact that the amount of fees for which approval is sought is consonant with
14 legal precedent. PAGA Counsel's diligent, efficient, and creative pursuit of this matter positioned
15 Plaintiff to settle this action successfully, affording redress to the PAGA Aggrieve Employees and
16 avoiding the inevitable expense and risk attendant to protracted litigation. In sum, it was through the
17 efforts of Plaintiff and PAGA Counsel that the considerable benefits of the settlement were obtained.

18 PAGA Counsel spent adequate time on this matter. Aside from drafting the initial complaint,
19 PAGA Counsel conducted informal discovery, reviewed and analyzed time and pay records,
20 employment handbooks, the Plaintiff's personnel files, relevant policies and other documentation,
21 researched the applicable law and potential defenses, constructed damage models based on
22 interpretations of California law, reviewed information provided by Defendant at the mediation,
23 engaged in meet and confer efforts with Defendant, and ultimately drafted and revised the settlement
24 agreement. (*See id.* at ¶32). PAGA Counsel conservatively estimates that it invested over 209 hours
25 of attorney time in this matter. David Yeremian's billing rate is \$750.00 per hour (18 years out of
26 law school and is less than the Laffey Matrix rate of \$759.00), and he spent 81 hours on this matter.
27 Roman Shkodnik's billing rate is \$575.00 (9 years out of law school matches Laffey Matrix rate of
28 \$672.00), and he spent 75 hours on this matter. Jason Rothman's billing rate is \$450.00 (6 years out

1 of law school, Laffey Matrix rate of \$450.00), and he spent 53 hours on this matter. (See Yeremian
2 Decl. (See *id.* at ¶32).) The lodestar for Plaintiff’s counsel is \$127,721 (\$60,750 for David
3 Yeremian’s time on the case, \$43,125 for Roman Shkodnik’s time on the case, and \$23,850 for
4 Jason Rothman’s time on the case). (See Yeremian Decl. at ¶ 32, **Exhibits 4 and 5** and the
5 Declaration of Roman Shkodnik concurrently filed herewith, **Exhibit 1**). The fee request of
6 \$239,400 results in a multiplier of approximately 1.87 further evidencing the reasonableness of the
7 request.

8 In light of the foregoing, the fee request in an amount equal to thirty-five percent of the
9 settlement in this case is well within the bounds that have been established by the above-cited
10 authority. (See Yeremian Decl. at ¶ 33). **Defendant has no objection** to an award of fees in the
11 amount requested.

12 **2. The Request for PAGA Counsel’s Costs Are Reasonable**

13 PAGA Counsel requests reimbursement for costs, totaling \$4,739.84. Attached to the
14 concurrently filed Declaration of David Yeremian as **Exhibit 3**, is PAGA his cost log, showing
15 total costs of \$4,739.84 All of these costs are and were reasonable and necessary in the prosecution
16 of the Action, for the benefit of the State and the Aggrieved Employees. (See Yeremian Decl.,
17 **Exhibit 3**). Moreover, the expenses for which reimbursement is sought are recoverable in common
18 fund cases. See *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Secs. Litig.*, 1989
19 U.S. Dist. LEXIS 19146, 16 (C.D. Cal. Mar. 9, 1989) (“[R]eimbursement of ... filing fees, postage,
20 telephone bills, photocopying, legal research assistance, deposition costs, witness fees, and similar
21 items... [are] appropriate for cost reimbursement in common fund cases.”); *Bond v. Ferguson*
22 *Enters. Inc.*, 2011 U.S. Dist. LEXIS 70390, at 36-37 (E.D. Cal. June 29, 2011) (finding that the
23 incurred costs, including payment to court reporters for depositions, mediation costs, legal research,
24 and in-house copies of documents, are routinely reimbursed in these types of cases); *Vasquez v.*
25 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, at 493 (E.D. Cal. 2010) (“The costs billed, which
26 include ground transportation, copy and scanning costs, computer research, and expert witness fees,
27 are reasonable.”).

28 Based thereon, PAGA Counsel respectfully requests that the Court approve its cost

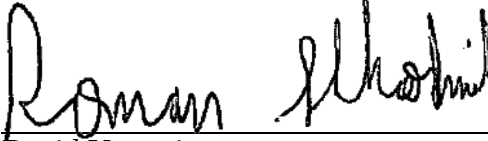
1 reimbursement request.

2 **IV. CONCLUSION**

3 For the reasons set forth herein, Plaintiff respectfully request that this Court grant this
4 Motion, and issue an order approving the PAGA Settlement Agreement and Release between the
5 Parties.

6
7 DATED: October 14, 2021

DAVID YEREMIAN & ASSOCIATES, INC.

8
9 By 

10 David Yeremian

Roman Shkodnik

11 Attorneys for Edward Morales Tellez on behalf of
12 himself and others similarly situated
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