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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

JILL TIZEKKER, on Behalf of the State of
California and Aggrieved Employees,

Plaintiffs,

v.

BEL-AIR BAY CLUB LTD., and DOES 1-
100 inclusive,
Defendant.

Case No. 20SMCV01006

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
SETTLEMENT PURSUANT TO
PRIVATE ATTORNEYS GENERAL ACT
OF 2004**

Date: April 4, 2022
Time: 8:30 AM
Department: P

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1 **I. INTRODUCTION**

2 Plaintiff Jill Tizekker, on behalf of the State and Aggrieved Employees (“Plaintiff”), seeks
3 approval of a settlement for civil penalties against Defendant Bel-Air Bay Club Ltd. (“Defendant”)
4 (collectively, “the Parties”) under the California Labor Code Private Attorneys General Act
5 (“PAGA”); Labor Code §§ 2698, *et seq*; Labor Code § 2699(l)(3)) (hereinafter, “Settlement”). (See
6 Declaration of Carolyn Hunt Cottrell (“Cottrell Decl.”), Exhibit 1 [long-form settlement agreement])).

7 The Action was filed as a result of alleged wage and hour violations with respect to Defendant’s
8 non-exempt hourly employees in California. The Parties participated in a mediation that led to a
9 \$200,000 settlement of the PAGA claims. The Settlement warrants approval because it fulfills the
10 purpose of the PAGA and provides reasonable relief to approximately 257 Aggrieved Employees (as
11 of May 2021).

12 The essential terms of the Settlement are as follows: (1) the Gross Settlement Fund is
13 \$200,000.00; (2) Plaintiff Tizekker will be awarded \$10,000.00 for her service in bringing the
14 representative claims and in exchange for a general release; (3) Plaintiff’s Counsel will be awarded
15 attorneys’ fees not to exceed thirty-three and one-third percent (33 1/3%) of the Gross Settlement
16 Fund, or \$66,666.66; (4) Plaintiff’s Counsel will receive no more than \$16,000 in costs, which at this
17 time amount to \$14,345.02; (5) the Settlement Administrator will be Simpluris, whose estimated total
18 case costs are \$4,610 for its service as settlement administrator; and (6) the remaining funds (the “Net
19 Settlement Fund”), estimated to be approximately \$104,378.32, will be split between the State of
20 California and the Aggrieved Employees. Approximately \$78,283.74, or 75% of the Net Settlement
21 Fund, will be remitted to the State of California, while the remaining \$26,094.58, or 25% of the Net
22 Settlement Fund, will be remitted to the Aggrieved Employees. For the reasons set forth herein,
23 Plaintiff respectfully requests that the Court approve the Settlement.

24 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

25 Plaintiff Jill Tizekker filed her PAGA notice with the Labor & Workforce Development
26 Agency (“LWDA”) on May 12, 2020. (Cottrell Decl., ¶ 9, Exh. 2.) After waiting the requisite 65-day
27 period without notice from the LWDA of their intent to investigate her claims, on July 30, 2020,
28 Plaintiff filed this action seeking penalties under the PAGA for Defendant’s alleged wage and hour
violations. (*Id.*, ¶ 10.)

 Pursuant to the operative complaint, Plaintiff sought civil penalties for Defendant’s alleged
failure to (1) compensate Plaintiff and Aggrieved Employees for all hours worked; (2) pay Plaintiff

1 and Aggrieved Employees all minimum wages owed; (3) pay Plaintiff and Aggrieved Employees all
2 tip wages owed from service charge gratuity payments; (4) reimburse Plaintiff and Aggrieved
3 Employees for necessary business expenses; (5) provide Plaintiff and Aggrieved Employees accurate,
4 itemized wage statements; and (6) pay Plaintiff and Aggrieved Employees all wages at separation of
employment . (*Id.*, ¶ 11.)

5 On September 4, 2020, Defendant filed a motion to stay the action. (*Id.*, ¶ 12.) Plaintiff filed
6 her opposition on September 21, 2020 and Defendant filed its reply on September 25, 2020. (*Id.*) The
7 Court denied Defendant's motion on October 2, 2020. (*Id.*)

8 Thereafter, the Parties engaged in extensive formal discovery. (*Id.*, ¶ 13.) On or about
9 November 24, 2020, Plaintiff served on Defendant her first set of Requests for Production of
10 Documents and Special Interrogatories. (*Id.*) Defendant responded to the same on or about February
11 2, 2021. (*Id.*) On or about December 9, 2021, Defendant served on Plaintiff its first set of Requests for
12 Production of Documents, Special Interrogatories, and Form Interrogatories - General. Plaintiff served
her responses to the same on February 16, 2021. (*Id.*)

13 On February 24, 2021, Plaintiff sent Defendant a meet and confer letter outlining the
14 deficiencies in its discovery response. (*Id.*, ¶ 14.) During a telephonic conference on March 5, 2021,
15 the Parties discussed the possibility of proceeding with mediation and informal discovery. (*Id.*)

16 On March 10, 2021, Plaintiff sent Defendant a letter detailing documents and information she
17 would need to adequately prepare for mediation. (*Id.*, ¶ 15.) Thereafter, the Parties exchanged more
18 than five correspondences and met and conferred by telephone to attempt to reach a compromise on
19 the pre-mediation informal documents and data that would be exchanged. (*Id.*) Prior to mediation,
20 Defendant produced documents and data, including but not limited to written policies and procedures,
21 job descriptions, organization charts, Plaintiff's personnel file and time and pay records, and a 50%
sampling of the Aggrieved Employees' contact information after a *Belaire-West* notice was sent to the
Aggrieved Employees. (*Id.*)

22 Plaintiff also informally supplemented some of the discovery requests served by Defendant,
23 after meeting and conferring with Defendant on the same. (*Id.*, ¶ 16.) Plaintiff also sat for her
24 deposition on May 24, 2021. (*Id.*) On October 27, 2021, Plaintiff took a limited purpose deposition of
25 Defendant's person most knowledgeable and qualified to testify on several relevant subjects pertinent
26 to be prepared for mediation. (*Id.*)

27 The remote mediation took place on November 2, 2021 before Steven Rottman, an
28

1 experienced and respected wage and hour mediator. (*Id.*, ¶ 17.) The mediation involved serious and
2 intensive arms-length negotiations. (*Id.*) The mediation was successful, and the Parties reached an
3 agreement in principle during the mediation session to settle both the PAGA action and Plaintiff’s
4 individual arbitrable claims. (*Id.*) The Parties fully executed a Memorandum of Understanding on
5 January 4, 2022, after several drafts and revisions. (*Id.*, ¶ 18.) The Parties thereafter worked together
6 to jointly draft the Settlement Agreement, exchanging several drafts in the process. (*Id.*) The
7 Settlement was fully executed as of March 3, 2022. (*Id.*, ¶ 19.) Plaintiff now brings this motion seeking
8 Court approval of the proposed Settlement.

9 **III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

10 **A. Terms of the PAGA Settlement and Distribution of PAGA Penalties**

11 The Settlement provides that Defendant will pay a settlement amount of \$200,000.00 (the
12 “Gross Settlement Fund” or “Gross Settlement Amount”). (*Id.*, ¶ 20; Settlement, Exhibit 1, Sections
13 II.A.16, B.1.) From the Gross Settlement Fund, payments will be made to the LWDA and the
14 Aggrieved Employees, to the Named Plaintiff for her Service Award, to Plaintiff’s attorneys for fees
15 and litigation costs, and to the Settlement Administrator for settlement administration costs. (*Id.*) The
16 Settlement sets aside \$10,000.00 for the Named Plaintiff as a Service Award, in exchange for her
17 general release of all claims against Defendant, and for her efforts in bringing and prosecuting the
18 matter. (Cottrell Decl., ¶ 21; Settlement, Section II.A.18 and Section II.E.2.) Plaintiff’s counsel will
19 seek a standard fee award, not to exceed thirty-three and one-third (33 1/3%) of the Gross Settlement
20 Fund, along with reimbursement of actual litigation costs, not to exceed \$16,000.00. (Cottrell Decl., ¶
21 22; Settlement, Section II.C.2.b.) The costs incurred at this time are \$14,345.02. (Cottrell Decl., ¶ 22.)
22 The Settlement Administrator is Simpluris. (Cottrell Decl., ¶ 23; Settlement, Section II.A.13.)
23 Settlement Administrator estimated total costs are currently \$4,610. (Cottrell Decl., ¶ 23.)

24 After distributions for the Service Award, attorneys’ fees and costs, and Settlement
25 Administrator costs, it is estimated that approximately \$104,378.32 will be available as estimated net
26 proceeds (the “Net Settlement Fund”). (Cottrell Decl., ¶ 24.) Seventy-Five percent (75%) of the Net
27 Settlement Fund will be paid to the LWDA and the remaining 25% will be paid to the Aggrieved
28 Employees (*Id.*; Settlement, Section II.A.17.) Accordingly, the LWDA will receive approximately
\$78,283.74 from the Settlement. (Cottrell Decl., ¶ 25.) The employees will receive approximately
\$26,094.58 from the Net Settlement Fund. (*Id.*) These allocations will result in an average payment
amount of \$101.53 for each employee, based on the figures provided during the mediation

1 (\$104,378.32 [Net Settlement Fund]/257 employees).¹ (*Id.*)

2 The Aggrieved Employees include all front-of-house and back-of-house hourly employees of
3 Defendant in California at any time between May 26, 2019 through the earlier of the date of approval
4 of the Settlement by the Court or 60 days after the January 4, 2021 date on which the MOU was signed
5 by the last party to sign it, and excluding the period of March 15, 2020 to June 18, 2020 when
6 employees were furloughed due to COVID-19 (“PAGA Recovery Period”). (*Id.*, ¶ 26; Settlement,
7 Section II.A.3, II.A.8.) Defendant represented that there were approximately 257 Aggrieved
8 Employees employed during the time period of May 26, 2019 through October 2021 –approximately
9 one month prior to the mediation.² (Cottrell Decl., ¶ 26.)

10 No later than ten (10) calendar days after the Effective Date³, Defendant will deliver to the
11 Settlement Administrator via wire transfer the total sum of \$200,000.00. (*Id.*, ¶ 27; Settlement, Section
12 II.D.1.) No later than twenty (20) days after the Effective Date, Defendant will email the Settlement
13 Administrator an electronic spreadsheet containing, for each Aggrieved Employee, his or her name,
14 last-known address and/or telephone number, social security number, dates of employment, whether
15 he or she worked for the Upper Club Banquets Department, and number of pay periods worked during
16 the PAGA Recovery Period. (Cottrell Decl., ¶ 28; Settlement, Section II.D.2.) Promptly after receiving
17 it, the Settlement Administrator will run the Aggrieved Employees’ addresses through the U.S. Postal
18 Service’s National Change of Address database. (*Id.*) No later than thirty (30) calendar days after the
19 Effective Date, the Settlement Administrator will pay by check or wire transfer the attorneys’ fees and
20 costs, service award, settlement administration costs, and Net Settlement Fund to the LWDA and
21 Aggrieved Employees. (Cottrell Decl., ¶ 29; Settlement, Section II.D.3) Plaintiff’s counsel will prepare
22 a draft of the communication to Aggrieved Employees for Defendant’s counsel’s review, and the
23 communication shall be jointly agreed upon by the Parties. (*Id.*)

24 The Settlement Administrator will allocate 25% of the Net Settlement Fund to the Aggrieved
25 Employees; payment will be calculated and apportioned based on the number of Pay Periods⁴ an

26 ¹ This calculation figure assumes that Aggrieved Employees worked the same number of pay periods, but as detailed
27 herein, under the terms of the settlement, the settlement proceeds will be distributed on a pro rata basis according to each
28 Aggrieved Employee’s number of pay periods worked during the recoverable period.

² As explained herein, Plaintiff’s damages exposure calculations are based on the assumption that approximately 257
employees are eligible to recover for the alleged violations.

³ “Effective Date” means the date that the Court enters an order granting the motion for approval if no appeal is filed, or
if an appeal is filed, the date the appeal is dismissed or denied and is no longer subject to appellate review.

⁴ “Pay Periods” means, for each Aggrieved Employee, the number of full or partial pay periods in which he or she was
employed by Defendant during the PAGA Recovery Period, according to Defendant’s time punch and payroll records.
(*Id.*, Settlement, Section, II.A.9.)

1 Aggrieved Employee worked during the PAGA Recovery Period. (*Id.*, ¶ 30; Settlement, Section
2 II.D.5.) The Settlement Administrator will calculate the number of Pay Periods worked by each
3 Aggrieved Employee (“Individual Pay Periods”) during the PAGA Recovery Period, the amount to be
4 paid per pay period, and the individual payments to eligible Aggrieved Employees. (*Id.*)

5 The payment to each Aggrieved Employee will be determined as follows: The Settlement
6 Administrator will calculate the total number of Pay Periods for the entire group of Aggrieved
7 Employees (as weighted, as described below). (*Id.*, ¶ 31; Settlement, Section II.D.5.c.) The Settlement
8 Administrator will divide the 25% of the Net Settlement Amount by the total number of pay periods
9 (as weighted), resulting in the Pay Period Value. (*Id.*) The Settlement Administrator will multiply the
10 Pay Period Value by the number of pay periods worked by each Aggrieved Employee (as weighted),
11 to determine the payment to each Aggrieved Employee. (*Id.*) To account for the additional penalties
12 relating to the underlying Labor Code § 351 allegations, the Individual Pay Periods for Aggrieved
13 Employees who worked for the Upper Club Banquets Department shall be multiplied by 2.0. (*Id.*) For
14 example, if an Aggrieved Employee worked in the Upper Club during the PAGA Recovery Period
15 and worked ten (10) pay periods, the Settlement Administrator will multiply 10 pay periods by a
16 multiplier of 2.0 for the purposes of calculating the Pay Period Value and calculating his or her
17 individual payment as to those Pay Periods worked for the Upper Club Banquets Department. (*Id.*)

18 Defendant’s pay period data will be presumed correct unless a particular Aggrieved Employee
19 proves otherwise to the Settlement Administrator by credible evidence. (Cottrell Decl., ¶ 32;
20 Settlement, Section II.D.5.b) All pay period disputes will be resolved and decided by the Settlement
21 Administrator, and the Settlement Administrator’s decision on all workweek disputes will be subject
22 to Counsel’s and the Court’s review. (*Id.*)

23 The payment to the Aggrieved Employees, including the Service Award, will be treated as
24 civil penalties for purposes of IRS reporting. (Cottrell Decl., ¶ 33; Settlement, Section II.D.8.) No
25 withholding shall be made in relation to the payments to the Aggrieved Employees. (*Id.*) Such
26 payments shall be reported on the IRS Form 1099 Miscellaneous to each Aggrieved Employee, which
27 shall be issued to each Aggrieved Employee by the Settlement Administrator at the same time the
28 settlement checks are issued by the Settlement Administrator. (*Id.*)

Settlement checks will remain valid for 180 days from the date of mailing. (Cottrell Decl., ¶
35; Settlement, Section D.II.7). If there are funds attributable to uncashed settlement checks after the
180-day period, the Settlement Administrator shall redistribute them to all Aggrieved Employees who

1 cashed their checks. (*Id.*) If funds still remain following the second distribution, the funds will be
2 remitted to the *cy pres* recipient that is approved by the Court. (*Id.*) The parties propose Legal Aid at
3 Work as the *cy pres* recipient. (*Id.*)

4 **B. The Releases for the Aggrieved Employees and Plaintiff, and Plaintiff's Service**
5 **Award**

6 Under the Settlement, Aggrieved Employees release certain PAGA claims. (Cottrell Decl., ¶
7 36; Settlement, Section II.E.1.) These "PAGA Released Claims" include:

8 all claims, rights, demands, liabilities, and causes of action for civil penalties asserted under
9 PAGA, or that could have been asserted, in the Complaint, which includes the claims made
10 for Defendant's alleged (1) failure to compensate Plaintiff and Aggrieved Employees for all
11 hours worked; (2) failure to pay Plaintiff and Aggrieved Employees all minimum wages
12 owed; (3) failure to pay Plaintiff and Aggrieved Employees all tip wages owed from service
13 charge gratuity payments; (4) failure to reimburse Plaintiff and Aggrieved Employees for
14 necessary business expenses; (5) failure to provide Plaintiff and Aggrieved Employees
15 accurate, itemized wage statements; and (6) failure to pay Plaintiff and Aggrieved Employees
16 all wages at separation of employment.
17 (*Id.*)

18 The Judgment entered by the Los Angeles Superior Court shall have *res judicata* effect as to
19 each Aggrieved Employee with respect to the PAGA Released Claims. (Cottrell Decl., ¶ 37;
20 Settlement, Section II.E.1.)

21 California courts routinely approve PAGA settlements that include release of claims language
22 similar to the release language in the Agreement here. For example, in *Hernandez v. Best Buy Stores,*
23 *LP*, the Southern District approved a PAGA settlement under which the aggrieved employees released
24 the PAGA claims brought, but were not barred from pursuing their underlying claims under the Labor
25 Code. (*Hernandez v. Best Buy Stores, LP* (S.D. Cal. June 6, 2017, No. 13cv2587 JM (KSC) 2017 U.S.
26 Dist. LEXIS 86859, * 6.) The court approved a settlement that "releases Best Buy from PAGA liability
27 for any and all claims by similarly situated general managers that were asserted or reasonably could
28 have been asserted based on the facts of this case." (*Id.*) A similar settlement was approved in *Mancini*
v. W. & S. Life Ins. Co. "The settlement does not bar the employees other than Mancini from pursuing
other (non-PAGA) Labor Code claims against Defendants should they violate those, which leaves
open the possibility of additional compensation." (*Mancini v. W. & S. Life Ins. Co.* (S.D. Cal. Sep. 18,
2018) No. 16cv2830-LAB (WVG), 2018 U.S. Dist. LEXIS 160320, *6.)

Other courts have frequently approved releases or other similar language binding the State and
nonparty employees from pursuing civil penalties for the settled PAGA claims. (*See, e.g., Ramirez v.*

1 *Benito Valley Farms, LLC* (N.D. Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS
2 137272, *3) (approving PAGA settlement, which provided \$40,700 in compensation for Plaintiff's
3 individual damages, \$27,500 in civil penalties under the PAGA, injunctive relief, and \$41,800 in
4 attorney's fees, for a total settlement amount of \$110,000); (*Echavez v. Abercrombie & Fitch Co.* (C.D.
5 Cal. Mar. 23, 2017) No. CV 11-09754-GAF, 2017 U.S. Dist. LEXIS 141134, at *7) (approving
6 settlement with a release of PAGA claims); (*Jordan v. NCI Grp., Inc.* (C.D. Cal. Jan. 5, 2018) No.
7 EDCV 16-1701 JVS (SPx), 2018 U.S. Dist. LEXIS 25297, * 5) (approving PAGA settlement that
8 provides penalties to LWDA "paid in exchange for a release only for those claims pled in the notice
9 to the LWDA and the Complaint".)

10 Additionally, upon the Effective Date, Plaintiff Tizekker agrees to a broader, general release.
11 (Cottrell Decl., ¶ 38; Settlement, Section II.E.2.) The general release of these claims is in exchange
12 for the \$10,000.00 Service Award, along with recognizing the named Plaintiff for her the time and
13 risk expended in this case. (Cottrell Decl., ¶ 39.) Plaintiff worked with her attorneys to prepare the
14 complaint, provided documents and information to respond to discovery, sat for her deposition,
15 participated in the mediation process and settlement decisions, incurred risks associated with future
16 employment prospects, and otherwise remained in constant contact with her attorneys, spending
17 approximately 30-40 hours in the litigation of the claims.. (See Declaration of Jill Tizekker, ¶ 5-15.)
18 Incentive awards "are intended to compensate class representatives for work done on behalf of the
19 class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes,
20 to recognize their willingness to act as a private attorney general." (*Cellphone Termination Fee Cases*
21 (2010) 186 Cal.App.4th 1380, 1393–1394.)

22 **IV. PAGA AND ITS REQUIREMENTS**

23 Enacted in 2004, PAGA provides an enforcement mechanism for California's Labor Code by
24 enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share
25 also going to the individual plaintiffs and other employees. Prior to PAGA, the recovery of civil penalties for
26 violations of certain Labor Code provisions were solely the province of the California Department of Labor.
27 (See *Arias v. Superior Court* (2009) 46 Cal.4th 969.)

28 The Labor Code's primary purpose is to "ensure employees are not required or permitted to
work under substandard unlawful conditions ... and to protect employers who comply with the law
from those who attempt to gain a competitive advantage at the expense of their workers by failing to
comply with minimum labor standards." (Labor Code § 90.5 subd. (a).) In enacting the PAGA, the

1 legislature expressly stated that “the only meaningful deterrent to unlawful conduct is the vigorous
2 assessment and collection of civil penalties as provided in the Labor Code.” (Stats. 2003 ch. 906, §
3 l(b).) The legislature determined it is “in the public interest to allow aggrieved employees, acting as
4 private attorneys general, to recover civil penalties for Labor Code violations, with the understanding
5 that labor law enforcement agencies were to retain primacy over private enforcement efforts.” (*Arias*
v. Superior Court, *supra*, 46 Cal.4th at p. 980.)

6 Under this regime, Plaintiff, acting as private attorney general and proxy for the State, filed
7 this action seeking civil penalties for Defendant’s alleged violations of the Labor Code.

8 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND WARRANTS APPROVAL**

9 Within this framework, the Parties have consummated and structured the Settlement. Plaintiff
10 has extensively analyzed the facts and claims to evaluate the Settlement’s fairness and reasonableness.
11 (Cottrell Decl., ¶¶ 41, 42-57.) Plaintiff’s counsel has conducted extensive formal and informal
12 discovery, a limited purpose Person Most Knowledgeable deposition and interviewed several
13 Aggrieved Employees about their work experiences as they related to the claims brought. (*Id.*)
14 Plaintiff’s Counsel used this information, discovery, deposition testimony and data to perform in-depth
analyses of the claims, Defendant’s exposure, and the potential recovery. (*Id.*)

15 **A. Judicial Review of PAGA Settlements**

16 Court approval is required for PAGA settlements. (Labor Code § 2699 (1)(2).) However, the
17 PAGA does not establish any standards for the review of PAGA settlements. “[N]either the California
18 legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA]
19 has provided any definitive answer’ as to what the appropriate standard is for approval of a PAGA
20 settlement.” (*Jordan*, *supra*, 2018 U.S. Dist. LEXIS 25297, at p. *5 (quoting (*Flores v. Starwood*
Hotels & Resorts Worldwide (C.D. Cal. 2017) 253 F. Supp. 3d 1074, 1075).)

21 Courts have recognized that PAGA settlements must be viewed in light of the PAGA’s public
22 purpose, namely augmenting the state’s enforcement capabilities, encouraging compliance with Labor
23 Code provisions, and deterring noncompliance with California’s labor laws. (See, e.g., *Vargas v. Cent.*
Freight Lines, Inc. (S.D. Cal. Sep. 25, 2017) No. 16-cv-00507-JLB, 2017 U.S. Dist. LEXIS 157976;
24 *Ramirez*, *supra*, 2017 U.S. Dist. LEXIS 137272.) “[T]he Court will approve the PAGA settlement
25 upon a showing that the settlement terms are fundamentally fair, adequate, and reasonable in light of
26 PAGA’s policies and purposes.” (*Jordan*, *supra*, 2018 U.S. Dist. LEXIS 25297 at p. *5.) For the
27 reasons herein, the Settlement here is fair and reasonable in light of the purposes of the PAGA and
28

1 authority cited herein finding similar PAGA settlements to warrant approval.

2 **B. Nature of Alleged Violations and Total Potential PAGA Penalties**

3 Plaintiff alleges three core sets of claims in this action: an unpaid hours claim, a service fee
4 claim, and a business expenses claim. (Cottrell Decl., ¶ 42.) Additionally, Plaintiff asserts derivative
5 violations for failure to provide accurate, itemized wage statements and waiting time penalties which
6 flow from the unpaid hours and service fee claims. (*Id.*) While each of these claims exposes Defendant
7 to PAGA penalties, it is anticipated that the amount that the penalties should be “stacked,” with
8 multiple violations assessed per person for individual pay periods, would be vehemently disputed by
9 Defendant. (*Id.*, ¶ 43.)

10 The California Labor Code provides for statutory penalties of \$100 per employee, per pay
11 period for each initial violation and \$200 per employee, per pay period for each subsequent violation.
12 (Labor Code § 2699 (f)(2).) Under California law, however, courts have held that employers are not
13 subject to heightened penalties for subsequent violations unless and until a court or commissioner
14 notifies the employer that it is in violation of the Labor Code.⁵ (*Amaral v. Cintas Corp. No. 2* (2008)
15 163 Cal.App.4th 1157; *see also Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*
16 (*S.D. Cal. Aug. 10, 2009*) No. 05cv1199 - IEG – CAB, 2009 U.S. Dist.LEXIS 69842; *Trang v. Turbine*
17 *Engine Components Techs. Corp.* (C.D. Cal. Dec. 19, 2012) No. CV 12-07658 DDP (RZx), 2012 U.S.
18 Dist. LEXIS 179710, *14.) Plaintiff performed an in-depth analysis of interviews conducted with
19 Aggrieved Employees, data provided by Defendant, and the underlying state law provisions to develop
20 Defendant’s potential exposure. (Cottrell Decl., ¶ 47.) As there are no known findings by a court or
21 the Labor Commissioner that Defendant has violated the Labor Code, Plaintiff applies the \$100
22 penalty amount for all violations. (*Id.*, ¶ 48.)

23 Based on records provided by Defendant before mediation, Plaintiff assumed there are
24 approximately 257 Aggrieved Employees employed by Defendant in California during the relevant
25 time period of May 26, 2019 through the date this figure was provided, one month prior to mediation,
26 on October 1, 2021. (*Id.*, ¶ 49.) In anticipation of mediation, Defendant represented that there were
27 6,453 pay periods at issue from May 26, 2019 through the date of mediation. (*Id.*, ¶ 50.)

28 Based on the analysis of the data Defendant provided and the interviews with Aggrieved

26 ⁵ Additionally, “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based
27 on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and
28 oppressive, or confiscatory.” (Labor Code § 2699(e)(2).) The Court may approve a lesser penalty amount for technical or
inadvertent violations. (*See Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667.)

1 Employees, Plaintiff applied discounting factors to account for litigation risk and further assumed that
2 she could prove the following: the alleged hours worked and minimum wage violations each at a rate
3 of 30%, alleged wage statement and service charge violations at a rate of 60% each, alleged expense
4 reimbursement violations at a rate of 30%, and the waiting time penalties at a rate of 50%. (*Id.*, ¶ 51.)

5 Based on these figures, Plaintiff calculated that Defendant's total exposure is approximately
6 \$1,362,730. (*Id.*, ¶ 52.) However, Plaintiff determined that further, additional discounting factors were
7 appropriate to account for the risk that Plaintiff would not be able to proceed on a representative basis
8 as to all employees at issue based on manageability issues, the risk that Plaintiff may not be able to
9 prove the violate rate at the rates specified above, and the risk that the Court may reduce the penalties
10 as arbitrary. (*Id.*; see also *id.*, ¶ 53 for full explanation of discounting.) Discounting results in a net
11 exposure of approximately \$621,008 and weighing of approximately 2.0 for Aggrieved Employees
12 who worked for the Upper Club Department. (*Id.*)

13 The case ultimately settled for \$200,000.00, which is approximately 32.2% of \$621,008, the
14 anticipated exposure on all claims, accounting for risk, that Plaintiff's Counsel estimated it could
15 recover. (*Id.*, ¶ 55.) This amount assumes that Plaintiff prevails on liability and proves up the alleged
16 violations at the levels described above for every single Aggrieved Employee and every pay period.
17 (*Id.*, ¶ 56.) In light of these risks discussed below, and analysis of similar PAGA settlements,
18 \$200,000.00 constitutes a material percentage of the total damage exposure and is a reasonable overall
19 settlement sum. (*Id.*, ¶ 57.)

20 **C. Litigation Risks**

21 Plaintiff was confronted with uncertainty in proceeding to trial on the PAGA claims. (*Id.*, ¶
22 58.) Plaintiff's counsel has reviewed hundreds of pages of documents, took a deposition of
23 Defendant's person most knowledgeable and conducted substantial outreach with the employees at
24 issue concerning their experiences working for Defendant. (*Id.*, ¶ 58.) Plaintiff's investigation shows
25 that these employees performed different roles and hold different positions, in different areas of the
26 club. (*Id.*) Variability as to individual employees' experience is not uncommon in employment
27 litigation, and such variability may present a risk to Plaintiff's case here if it were to proceed to trial
28 in the event the Defendant raises manageability concerns. (*Id.*)

Defendant also has legal defenses available to it. (*Id.*, ¶ 59.) Defendant argues that its policies
and procedures are facially compliant with California labor law. (*Id.*) Though Plaintiff contests
Defendant's practices as non-compliant, Plaintiff recognizes that the Court could credit Defendant for

1 maintaining facially compliant policies for its employees. (*Id.*) Further, Defendant argues that all
2 service charges did not need to be remitted to the Aggrieved Employee. (*Id.*, ¶ 60.) This issue, and the
3 degree to which the language conveyed to the customers is sufficient to allow a customer to understand
4 how the service fees are being remitted, or not, would be hotly contested at trial. (*Id.*) However, the
5 Court might still find that the language is sufficient to allow the customer to understand that the charge
6 is not meant to be a gratuity to the service workers. (*Id.*) Further, Defendant may also argue that the
7 time Aggrieved Employees allege to have spent walking from the parking area to the club is not
8 compensable as off-the-clock work. (*Id.*) Additionally, Plaintiff’s claims regarding waiting time
9 penalties and wage statements are derivative, and rise and fall with Plaintiff’s other wage payment
10 claims. (*Id.*, ¶ 61.)

11 Plaintiff also recognizes that some courts have interpreted Labor Code section 2699(f)(2) to
12 impose the enhanced “subsequent violation penalty” or “heightened penalty” only after an employer
13 has been notified that its conduct violates the Labor Code. (*Id.*, ¶ 62.) While Plaintiff regards this
14 interpretation as flawed, she recognizes this interpretation has gained traction with some courts. (*Id.*
15 See, e.g., *Amaral*, *supra*, 163 Cal. App. 4th 1157; see also *Amalgamated Transit Union Local 1309*,
16 *supra*, 2009 U.S. Dist. LEXIS 69842, 2009 WL 2448430, at p. *9; *Trang*, *supra*, 2012 U.S. Dist.
17 LEXIS 179710, at p. *14).)

18 While Plaintiff believes that she would have prevailed on these issues and others, Plaintiff
19 recognizes the risk that a fact finder may have found for Defendant on one or more of these issues
20 and/or found penalties to be significantly less than what Plaintiff claims. (*Id.*, ¶ 63.)

21 **VI. THE REQUESTED ATTORNEYS’ FEES AND LITIGATION COSTS ARE FAIR** 22 **AND REASONABLE**

23 For Plaintiff counsel’s efforts and the substantial risk that they undertook in obtaining a large
24 common fund settlement to benefit the LWDA and the Aggrieved Employees, the Parties allocated
25 thirty-three and one-third percent (33 1/3%) of the Gross Settlement Fund to Plaintiff’s counsel for
26 reasonable attorneys’ fees, plus actual litigation costs in an amount not to exceed \$16,000.00, which
27 at this time are \$14,345.02. (*Id.*, ¶ 64.) These fees and costs are warranted under the law and within
28 the range commonly awarded in similar cases.

PAGA provides that a plaintiff is entitled to recover reasonable attorneys’ fees, expenses, and
costs. Labor Code section 2699 (g)(1) provides that “[a]ny employee who prevails in any action shall
be entitled to an award of reasonable attorney’s fees and costs.” As discussed below, in a *qui tam*

1 action, reasonable attorneys' fees and costs are typically awarded under the common fund doctrine
2 where, as here, litigation creates a common fund of money in a specific amount for others' benefit.

3 **A. Plaintiff's Counsel are Entitled to Recover Attorneys' Fees of One-Third Under**
4 **the Common Fund Doctrine in this Qui Tam Action**

5 A qui tam action allows a private person to sue to recover damages or penalties, all or part of
6 which will be paid to the government. "A qui tam action 'is a type of private attorney general lawsuit'
7 [citation], in which 'the qui tam plaintiff stands in the shoes of the state or political subdivision
8 [citation].'" (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 501.)
9 A PAGA action is a qui tam action because the statute allows the plaintiff, acting as the proxy of the
10 State's labor law enforcement agency, to sue their employer for Labor Code violations and recover
11 civil penalties that otherwise would have been assessed and collected by the LWDA. (*See Iskanian v.*
12 *CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 ("A PAGA representative action is
13 therefore a type of qui tam action.")) Indeed, a majority of the civil penalties recovered in a PAGA
14 action are paid to the State, with a smaller portion paid to the employees. (*See Cal Lab. Code §*
15 *2699(i).*)

16 As here, where a common fund is created in a qui tam action by the successful litigation of a
17 plaintiff, the plaintiff's attorneys are entitled to recover their fees from the common fund:

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 each
21 claimant's share reduced proportionately. To the extent the judgment relies upon
22 section 1021.5 for recovery of attorney fees, it must be modified to confine the award
23 of fees to the common fund theory.
24 (*Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 91 (authorizing common fund fees in a qui tam
25 taxpayer suit against certain banks).)

26 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common
27 fund was created in the amount of \$200,000.00 for the benefit of the employees and the State. Thus,
28 these beneficiaries must bear their share of the costs and attorneys' fees, to be deducted from the Gross
Settlement Fund under the common fund theory. (*See id.*) Such fees are deducted as a percentage of
the settlement amount. (*See, e.g., Boeing Co. v. Van Gemert* (1980) 444 U.S. 772, 478-482; *Staton v.*
Boeing Co. (9th Cir. 2003) 327 F.3d 938, 967.)

The California Supreme Court upheld the use of the common fund theory of recovery for
attorneys' fees in *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the

1 settlement created a common fund of \$19 million. The Court approved attorneys' fees in the amount
2 of one third of the gross settlement (e.g., an award of \$6.33 million) under the common fund theory.
3 (*Id.*) By awarding counsel a percentage of the total recovery, rather than fees based on hours worked,
4 the common fund method encourages attorneys to efficiently litigate to achieve the best results
5 possible for the class. (*See Laffitte*, 1 Cal. 5th at pp. 492-494.) Indeed, the "percentage-of-recovery
6 method is generally favored in common fund cases because it allows courts to award fees from the
7 fund 'in a manner that rewards counsel for success and penalizes it for failure.'" (*Id.* at p. 493 (quoting
8 *In re Rite Aid Corp. Sec. Litig.* (3d Cir. 2005) 396 F.3d 294, 300) (internal quotations omitted).)

9 California state and federal courts routinely award attorneys' fees equaling approximately 33
10 1/3% of the common fund. (*See, e.g., Laffitte*, 1 Cal.5th at 506 ("33 1/3 percent of the common fund
11 is consistent with, and in the range of, awards in other class action lawsuits"); *Chavez v. Netflix, Inc.*
12 (2008) 162 Cal.App.4th 43 at 66 n.11.) (accord); Eisenberg & Miller, *Attorney Fees in Class Action*
13 *Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at
14 35 (independent studies of class action litigation nationwide conclude that fees representing one-third
15 of the total recovery is consistent with market rates).)

16 A one-third common fund attorneys' fee award is also consistent with what courts have
17 awarded in PAGA cases. (*See, e.g., Vorise v. 24 Hour Fitness USA, Inc.*, Contra Costa County
18 Superior Court, Case No. C 15-02051 (33.33% fee awarded on \$11,000,000 settlement of a PAGA-
19 only case); *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007
20 (33.33% fee awarded on \$12,500,000 settlement of a PAGA-only case); *Garcia v. Pep Boys Manny*
21 *Moe & Jack*, 2016 Cal. Super. LEXIS 15556 (33.33% fee awarded on a \$1,030,000 settlement of a
22 PAGA-only case); *Brewer v. Connell Chevrolet*, 2017 Cal. Super. LEXIS 15031 (33.33% fee awarded
23 on a PAGA-only case); *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case
24 No. MCC1401137 (33.33% fee awarded on a \$650,000 settlement of a PAGA- only case).)

25 Based on the foregoing, awarding attorneys' fees based on one-third of the Gross Settlement
26 Fund is favored by California Courts when a fund established for the common benefit of others is
27 involved, as is the case here. Accordingly, awarding fees on this basis in the amount of one third of
28 the \$200,000.00 Gross Settlement Fund is appropriate.

25 **B. A Fee of 33 1/3% of the Gross Settlement Fund is Fair and Reasonable**

26 Among the factors considered in determining whether the requested fee percentage is
27 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
28

1 plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature
2 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.
3 (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.) For the reasons below, all these
4 factors support an award here of 33 1/3% of the common fund.

5 Plaintiff's counsel's efforts resulted in a common fund settlement amount of \$200,000.00.
6 (Cottrell Decl., ¶ 65.) This is a fair and reasonable settlement and an especially favorable result in light
7 of the size of the aggrieved employee group and the challenges Plaintiff may have faced at trial. (*Id.*)
8 This result was achieved by the work and success of Plaintiff's counsel, who negotiated the Settlement
9 after extensive preparation. (*Id.*)

10 Second, Plaintiff faced risks going forward with this litigation, as described above. (*Id.*, ¶¶ 58-
11 63, 66.) Further, this case involves employees who held different positions, in different areas of the
12 club. (*Id.*, ¶ 66.) The fact that these events spanned over the last few years, and several of these
13 employees have changed jobs, presents issues that could be detrimental to Plaintiff's case. (*Id.*)

14 Third, Plaintiff's counsel are experienced representative action litigators. (*Id.*, ¶¶ 6-8, 67.) This
15 experience and expertise, combined with the high quality of work performed in this case by Plaintiff's
16 counsel, resulted in the Settlement achieved. (*Id.*)

17 Fourth, Plaintiff's counsel have been representing Plaintiff and the State in this matter on
18 strictly contingency basis, and had to forego opportunities to litigate other cases. (*Id.*, ¶ 68.) Plaintiff's
19 counsel incurred the risk of non-recovery after a substantial investment of time, money, and resources,
20 and have done so since the inception of the case without any payment or compensation. (*Id.*)

21 Fifth, as discussed and cited above, the requests for attorneys' fees in the amount of thirty-
22 three and one-third percent of the Gross Settlement Fund falls well within the range found acceptable
23 by state and federal courts in California in comparable wage and hour actions. The award of a one-
24 third fee recovery under the common fund doctrine was approved by the California Supreme Court in
25 *Laffitte*, 1 Cal.5th at p. 503.

26 For the above reasons, a fee award in the amount of 33 1/3% of \$200,000.00 is fair and
27 reasonable. The attorneys' fee award requested in reference to the lodestar confirms that the award is
28 reasonable under the circumstances.⁶ Here, the lodestar for Plaintiff's counsel in this Action is over

⁶ The trial court may use an abbreviated lodestar cross-check for common fund awards if the court considers it useful. (*Laffitte*, 1 Cal. 5th at 504-05.) However, under *Laffitte*, this is not meant to displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme Court expressly instructed that "the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the fee award." (*Id.* at 505.) Critically, the Court in *Laffitte*

1 \$272,300. (Cottrell Decl., ¶ 69, Exh. 4.) The attorneys' fees requested (\$66,666.66) represent
2 approximately 24.5% of the lodestar incurred by Plaintiff's counsel. (Cottrell Decl., ¶ 70.) Plaintiff's
3 counsel has agreed to accept this compromise and reduction in an effort to resolve the case and obtain
4 a fair settlement for Plaintiff and the Aggrieved Employees. (*Id.*) A cross-check of Plaintiff's
5 counsel's lodestar confirms that a fee award of 33 1/3 % of the \$200,000.00 Settlement Fund is a
reasonable and fair payment.

6 **C. The Litigation Costs are Fair and Reasonable**

7 Plaintiff's counsel also requests reimbursement of their actual out-of-pocket expenses incurred
8 to prosecute the Action, which are approximately \$14,345.02 as of the filing of this Motion. (Cottrell
9 Decl., ¶ 75, Exh. 5.) Attorneys are permitted to recover their litigation costs and expenses under PAGA
10 and the common fund doctrine. (Labor Code § 2699 subd. (g)(1); *Rider v. County of San Diego* (1992)
11 11 Cal.App.4th 1410, 1424 n.6.) Plaintiff's counsel incurred costs including, *inter alia*, filing and
12 service fees, costs for remote appearances, document retrieval, deposition costs, and mediation fees.
13 These expenses were incidental and necessary to the effective representation of the Aggrieved
Employees. (Cottrell Decl., ¶ 76.) They are reasonable and uncontested and should be approved.

14 **VII. CONCLUSION**

15 The proposed PAGA Settlement provides a reasonable and efficient result for both the State
16 and Aggrieved Employees. For all the reasons herein, Plaintiff respectfully requests the Court approve
17 the Settlement.

18 Dated: March 10, 2022

Respectfully submitted,

19 

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21 Caroline N. Cohen
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25 _____
26 emphasized that only where the “multiplier calculated by means of a lodestar cross-check is extraordinarily high or low”
27 should the court “consider whether the percentage should be adjusted so as to bring the imputed multiplier within a
justifiable range.” (*Id.*) Furthermore, in conducting a lodestar cross-check, courts are not “required to closely scrutinize
28 each claimed attorney-hour.” (*Id.* at 505.) An evaluation may be done by reviewing “counsel declarations summarizing
overall time spent.” (*Id.*)