

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
SEPIDEH ARDESTANI, ESQ. SBN 274259
sepideh@gaineslawfirm.com
GAINES & GAINES, APLC
27200 Agoura Rd., Suite 101
Calabasas, CA 91301
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Hector Vieyra on behalf of himself and all "Aggrieved Employees" pursuant to Labor Code § 2698 *et seq.*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE, CIVIL COMPLEX CENTER**

HECTOR VIEYRA, on behalf of himself and
all "Aggrieved Employees" pursuant to Labor
Code § 2698 *et seq.*,

Plaintiffs,

v.

SPEARMAN CLUBS, INC., a Delaware
corporation, and DOES 1 through 10,
inclusive,

Defendants.

RAFAEL RAMIREZ,

Plaintiffs,

v.

SPEARMAN CLUBS, INC. DBA LAGUNA
NIGUEL RQCQUET CLUB, a California
corporation, and DOES 1 through 50, ALL
INCLUSIVE,

Defendants.

CASE NO: 30-2020-01156371-CU-OE-CXC
and CASE NO: 30-2020-01141764-CU-WT-CJC

*Assigned for all purposes to:
Hon. William Claster, Dept. CX104*

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

**Date: June 18, 2021
Time: 9:00 a.m.
Dept.: CX104
Reservation ID #: 73530301**

Dates Actions Filed: May 26, 2020 (Ramirez)
August 21, 2020 (Vieyra)

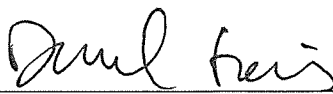
1 **PLEASE TAKE NOTICE THAT** on June 18, 2021 at 9:00 a.m., or as soon thereafter as
2 the matter may be heard, in Department CX-104 of the above-entitled Court, located at 751 West
3 Santa Ana Boulevard, Santa Ana, CA 92701, Plaintiffs HECTOR VIEYRA and RAFAEL
4 RAMIREZ will and hereby do move unopposed for an Order and Judgment: (1) granting approval
5 of the proposed settlement of claims brought pursuant to the Private Attorneys General Act of 2004
6 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”) set forth in the Stipulation and Agreement for PAGA
7 Representative Action Settlement (“Settlement Agreement”); (2) appointing ILYM Group, Inc. as
8 the Settlement Administrator and approving payment of its fees not to exceed \$5,000 from the
9 Gross Settlement Amount; (3) directing disbursement of the Gross Settlement Amount pursuant to
10 the terms of the Settlement Agreement; (4) directing payment of attorneys’ fees not to exceed
11 \$66,000 and litigation costs in the amount of \$12,247.74 from the Gross Settlement Amount to
12 Plaintiffs’ counsel; and (5) directing payment of an Enhancement Award and General Release
13 Payment to Plaintiff Vieyra from the Gross Settlement Amount in the amount of \$5,000 and an
14 Enhancement Award to Plaintiff Ramirez from the Gross Settlement Amount in the amount of
15 \$2,500.

16 This motion will be based on this Notice, the supporting memorandum of points and authorities,
17 the parties’ Settlement Agreement, the Declarations of counsel Daniel F. Gaines and Farrah Mirabel
18 and Plaintiffs Vieyra and Ramirez, the documents and records on file in this matter, and such
19 additional arguments, authorities, and evidence and other matters as may be presented by the parties
20 hereafter.

21 Date: May 18, 2021

Respectfully submitted,

22 GAINES & GAINES, APLC

23
24 By: 
25 DANIEL F. GAINES
26 Attorneys for Plaintiff
27 HECTOR VIEYRA
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Hector Vieyra and Rafael Ramirez (hereinafter, “Plaintiffs”) and Aggrieved
4 Employees under the Labor Code’s Private Attorneys General Act of 2004 (“PAGA”) respectfully
5 move this Court for an Order and Judgment granting approval of the proposed Settlement of the
6 above-captioned lawsuits against Defendant Spearman Clubs, Inc. (“Defendant”). The proposed
7 Settlement will dispose of the Released Claims, defined herein, asserted on behalf of Plaintiffs and
8 approximately 89 non-exempt employees who worked for Defendant in California at any time
9 between March 23, 2019 through the earlier of the date the Court grants approval of the Settlement
10 or July 12, 2021 (the “PAGA Period”) (the “Aggrieved Employees”).

11 This case addresses claimed violations of employee protections embodied in the California
12 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiffs allege that
13 Defendant failed to pay all minimum and overtime wages earned; failed to provide meal periods or
14 one hour of additional pay for missed meal periods; failed to provide rest periods or one hour of
15 additional pay for missed rest periods; failed to provide complete and accurate itemized wage
16 statements; failed to pay for all hours worked; failed to pay sick time, and failed to timely pay
17 wages owed during employment and upon termination of employment, pursuant to the
18 corresponding alleged violations of the California Labor Code, including but not limited to, sections
19 201-204, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 1198.5, 2698,
20 2699, 2699.3, and the applicable IWC Wage Order.

21 As a result of Defendant’s alleged violations of the Labor Code, approximately 89
22 employees are claimed to have suffered Labor Code violations for no more than 2,500 aggregate
23 pay periods at the rate of \$100 each based on PAGA’s penalty provisions.

24 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
25 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
26 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is
27 the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage and
28 hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative

strength and value of the PAGA claim, and (4) it reflects a reasoned compromise based directly on the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and likely duration of further litigation.

The value achieved by the Settlement may be gleaned from the fact that the LWDA and the approximately 89 Aggrieved Employees encompassed by the Settlement will receive no less than \$109,252.26 under the terms of the Settlement, which, pursuant to the operative statute, shall be allocated “75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the Aggrieved Employees.” *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only because further litigation may have resulted in a net-zero recovery based on the defenses asserted by Defendant, but because the amount secured by Plaintiffs is sizable and in line with similar settlements of these types of claims under PAGA. It is also important to underscore that all penalty amounts paid to Aggrieved Employees will be an unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA penalties. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶ 28.

For these reasons, as set forth more fully herein, Plaintiffs respectfully request that this Court enter the Order and Judgment submitted herewith.

II. STATEMENT OF THE CASE AND THE SETTLEMENT

A. The Parties

Defendant operates Spearman Sports Clubs, offering tennis, swimming and other outdoor fitness activities. Defendant maintains three locations in California: Irvine, Laguna Niguel and Dana Point. Gaines Decl. at ¶ 8.

Defendant employed Plaintiff Vieyra from 2014 through May 2020. Defendant employed Plaintiff Ramirez from July 2012 through May 2019. Both were employed as non-exempt employees in Orange County, California and primarily performed maintenance work. The Aggrieved Employees are all employees who were employed by Defendant in California in a non-exempt position during the PAGA Period. Gaines Decl. at ¶ 9.

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1 **B. The Claims Asserted**

2 Plaintiffs assert claims under PAGA only that Defendant failed to pay all minimum and
3 overtime wages earned; failed to provide meal periods or one hour of additional pay for missed
4 meal periods; failed to provide rest periods or one hour of additional pay for missed rest periods;
5 failed to provide complete and accurate itemized wage statements; failed to pay for all hours
6 worked; failed to pay sick time, and failed to timely pay wages owed during employment and upon
7 termination of employment, pursuant the corresponding alleged violations of the California Labor
8 Code, including but not limited to, sections 201-204, 226, 226.3, 226.7, 246, 510, 512, 558, 1174,
9 1194, 1197, 1197.1, 1198, 1198.5, 2698, 2699, 2699.3 and the applicable IWC Wage Order.
10 Plaintiffs assert these claims under PAGA, seeking civil penalties for the alleged Labor Code
11 violations. Gaines Decl. at ¶ 10.

12 **C. Procedural Posture**

13 On March 30, 2020, pursuant to Labor Code § 2699.3, Plaintiff Ramirez gave written notice
14 by online filing with the Labor and Workforce Development Agency (“LWDA”) and by certified
15 mail, return receipt requested, to Defendant of the specific provisions of the Labor Code alleged to
16 have been violated, including the facts and theories to support the alleged violation. On May 26,
17 2020, Plaintiff Ramirez filed his initial complaint with this court. Declaration of Farrah Mirabel
18 (“Mirabel Decl.”) at ¶ 4. On July 7, 2020, after the LWDA declined to take action within the
19 statutorily permissible time with respect to Plaintiff Ramirez’s March 30, 2020 letter, Plaintiff
20 Ramirez amended his complaint to include PAGA violations set forth in his letter, Mirabel Decl.,
21 ¶ 4.

22 On June 11, 2020, pursuant to Labor Code § 2699.3, Plaintiff Vieyra gave written notice by
23 online filing with the LWDA and by certified mail, return receipt requested, to Defendant of the
24 specific provisions of the Labor Code alleged to have been violated, including the facts and theories
25 to support the alleged violation. *See Exhibit B* to Gaines Decl. On August 21, 2020, and after the
26 LWDA declined to take action within the statutorily permissible time with respect to Plaintiff
27 Vieyra’s June 11, 2020 letter, Plaintiff Vieyra filed his representative action complaint in this Court.
28 Gaines Decl., ¶ 11.

1 Plaintiffs submitted the Settlement Agreement, this Motion, and all supporting documents
2 to the LWDA via online upload on May 19, 2021 concurrently with the filing of this Motion.
3 Service of the LWDA is reflected on the Declaration of Service submitted herewith. Gaines Decl.
4 at ¶ 23.

5 **D. Plaintiffs' Counsel's Investigation**

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

9 Plaintiffs' Counsel obtained and reviewed multiple documents, including (i) Plaintiffs'
10 employee files, time cards, and wage statements, (ii) policy documents relating to the employment
11 of Plaintiffs and other Aggrieved Employees, (iii) time cards and pay records of a sample of
12 Aggrieved Employees; (iv) data relating to the number of alleged violations and the value of the
13 recoverable penalties; and (v) financial documents reflecting Defendant's financial condition.
14 Gaines Decl. at ¶ 13.

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

22 Based on Plaintiffs' Counsel's experience in litigating similar "representative" wage and
23 hour claims, the degree of investigation that was conducted, and the amount of data that was
24 obtained, was sufficient to determine the potential value of the PAGA claim, and to evaluate the
25 strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-7, 15.

26 **E. Settlement Negotiations**

27 On March 12, 2021, the Parties participated in a Zoom mediation session with respected
28 mediator Lisa Klerman, Esq. During the mediation, the parties engaged in arm's-length

negotiations that successfully resulted in a resolution of the PAGA claims asserted in the action. Gaines Decl. at ¶ 16.

F. The Proposed Settlement

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

1. Defendant agrees to settle this matter for the payment of Two Hundred Thousand Dollars (\$200,000.00) (hereinafter the “Gross Settlement Amount”), which shall be all inclusive, encompassing (i) all payments to the LWDA and Aggrieved Employees, (ii) any and all costs of third party administration of the settlement, (iii) Plaintiffs’ Counsel’s attorneys’ fees and costs of suit, and (iv) an enhancement award and general release payment to Plaintiff Vieyra and an enhancement award to Plaintiff Ramirez¹. See Settlement Agreement, at ¶ 28.

2. The total sum available for payment of PAGA penalties shall be calculated by deducting up to \$78,247.74 for the payment of Plaintiffs’ Counsel’s fees and costs (\$66,000 in fees and \$12,247.74 in costs), \$5,000 for the payment of Plaintiff Vieyra’s enhancement award and general Release Payment, \$2,500 for the payment of Plaintiff Ramirez’s enhancement award, and the costs of administration (up to \$5,000) from the \$200,000 Gross Settlement Amount, yielding approximately \$109,252.26. Seventy-five percent (75%) of this amount, or \$81,939.19, shall be distributed to the LWDA, and the remaining twenty-five percent (25%) or \$27,313.07, shall be distributed to the Aggrieved Employees. Gaines Decl. at ¶ 18; See Settlement Agreement, at ¶ 28.

3. All employees who were employed by Defendant in California in a non-exempt position during the PAGA Period will receive a pro rata share of the \$27,313.07 allocated to Aggrieved Employees which shall be distributed based on the number of pay periods each PAGA Employee worked for Defendant in California during the PAGA Period. Gaines Decl. at ¶ 20; See Settlement Agreement, at ¶ 29(e). Although these calculations will not be made until after approval, a rough estimation of the value to the 89 individuals falling within the definition of “Aggrieved

¹ The Settlement compromises all of Mr. Vieyra’s claims but does not include a release of Mr. Ramirez’s individual non-PAGA claims, which he will continue to pursue against Defendant.

1 Employee” may be gleaned from the fact that an equal division would provide about \$306.88 to
2 each PAGA Employee, net of payments to the LWDA, the Settlement Administrator, attorney’s
3 fees and costs. The LWDA will be paid \$81,939.19. Gaines Decl. at ¶ 19.

4 4. In exchange for the above settlement consideration, Defendant and the Released
5 Parties shall be entitled to the following release from each and every PAGA Employee, including
6 Plaintiffs²:

7 In exchange for the consideration recited in this Settlement
8 Agreement, Vieyra and Ramirez, as representatives for the State of
9 California and all Aggrieved Employees, and on behalf of their
10 current, former, and future heirs, executors, administrators,
11 attorneys, agents, and assigns, will forever completely release and
12 discharge the Released Parties of any and all Released Claims. The
13 Aggrieved Employees and the State of California are deemed by
14 operation of the Final Order and Judgment to have agreed not to sue
15 or otherwise make a claim against any of the Released Parties for any
16 Released Claims. Additionally, Vieyra forever and completely
17 releases all claims he had, or may have had, against Defendant.

18 With the Released Claims being defined as:

19 All claims, demands, rights, liabilities, and causes of action that
20 were, or could have been, asserted against the Released Parties in the
21 Vieyra Action and/or Ramirez Action on behalf of the Aggrieved
22 Employees during the PAGA Period, pursuant to the California
23 Labor Code Private Attorneys General Act of 2004, Labor Code §§
24 2698, *et seq.*, based on or arising from the facts or claims alleged in
25 the Vieyra Action and the Ramirez Action. Without limiting the
26 foregoing, and in addition to the foregoing, the Released Claims
27 include all civil penalties under California Labor Code Section 2699
28 *et seq.* for alleged: failure to pay all minimum and overtime wages
earned; failure to provide meal periods or one hour of additional pay
for missed meal periods; failure to provide rest breaks or one hour of
additional pay for missed rest breaks; failure to provide complete and
accurate itemized wage statements; failure to pay for all hours
worked; failure to pay sick time; and failure to timely pay wages
owed during employment and upon termination of employment,
pursuant to the corresponding alleged violations of the California
Labor Code, including but not limited to, sections 201-204, 226,
226.3, 226.7, 246, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198,
1198.5, 2698, 2699, 2699.3, the California Business and Professions
Code section 17200, and the applicable IWC Wage Order. The

26 ² This comports with settled California Supreme Court authority. *See Arias v. Superior Court*
27 (2009) 46 Cal. 4th 969, 986 (concluding that “with respect to the recovery of civil penalties,
28 nonparty employees as well as the government are bound by the judgment in an action brought
under the act . . .”).

Released Claims only include claims for civil penalties under the PAGA. The Settlement does not release any individual claims belonging to the Aggrieved Employees, such as claims for unpaid wages or statutory penalties. The Settlement does not release any of individual claims in causes of action numbers 7-11 in the Ramirez Action

5. Settlement administration, which is to be paid from the Gross Settlement Amount will not exceed \$5,000. Gaines Decl. at ¶ 20; *See* Settlement Agreement, at ¶ 28. ILYM Group, Inc., a reputable settlement administration company, has agreed to administer the settlement within this amount.

6. As detailed herein, Plaintiffs' Counsel seek an award of attorneys' fees and litigation costs of a combined \$78,247.74, and Plaintiff Vieyra seeks an enhancement award and general release payment of \$5,000 and Plaintiff Ramirez seeks an enhancement award of \$2,500. Gaines Decl. at ¶ 21. *See* Settlement Agreement, at ¶ 28.

7. Finally, under the terms of Settlement, the value of checks uncashed more than 180 days after issuance shall voided and then shall be transmitted to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Code of Civil Procedure § 1500, *et seq.* in the names of each PAGA Employee who did not cash his or her settlement check until such time as he or she claims his or her property. Gaines Decl. at ¶ 22. *See* Settlement Agreement, at ¶ 35(d).

III. LEGAL ARGUMENT

A. Standards for Approval of A PAGA Settlement

The settlement of a PAGA claim requires court approval pursuant to the operative PAGA statute, which states that the “[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part.” See Labor Code § 2699(1)(2).

As with any settlement, the Court must be mindful in conducting its inquiry that “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of absolutes and an abandoning of highest hopes’” [*Officers for Justice v. Civil Service Com.*, 688

1 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
2 of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such,
3 “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits”
4 or “judged against a hypothetical or speculative measure of what might have been achieved by the
5 negotiators.” *See id.*

6 Although the operative PAGA statute does not set forth the criteria on which a PAGA
7 settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for
8 review of a class action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. § 382 and Rule
9 3.769, Cal. Rules of Court, as courts within California have approved settlements of PAGA claims
10 encompassed within class action settlements using Rule 23 criteria.³ However, it is important to
11 underscore that not all Rule 23 factors can be applied, as “a PAGA claim asserted on a non-class
12 representative basis . . . is not considered a class action but a law enforcement action, and therefore
13 does not have to meet the requirements of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012
14 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan. 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011
15 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2, 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
16 LEXIS 66454 (E.D. Cal. June 30, 2010). Based thereon, a court’s review of a PAGA settlement
17 necessarily implicates the following unique features that render the approval process completely
18 distinct from approval of a class action settlement under Rule 23 or C.C.P. § 382 and Rule 3.769,
19 Cal. Rules of Court.

20 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not
21 concerned with the amount which “Aggrieved Employees” are to receive, but rather, must focus on

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

1 the total settlement amount in achieving PAGA's objective.

2 While "[a PAGA] action is ... designed to protect the public and penalize the employer for
3 past illegal conduct" [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
4 into account the fact that settlement of a PAGA claim – like any settlement – involves a
5 "compromise" that stops short of rendering findings of liability and damages. Moreover, the Court
6 must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for
7 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
8 for the government that otherwise may not have been assessed and collected by overburdened state
9 enforcement agencies." *See Ochoa-Hernandez*, 2010 U.S. Dist. LEXIS 32774, at 12.

10 **B. The Settlement Meets All the Criteria For Approval**

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

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

16 In conducting a review of a settlement, it is generally recognized that an "agreement . . .
17 reached through arms-length negotiation between experienced parties . . . is entitled to a
18 presumption of fairness." *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
19 44 (C.D. Cal. Apr. 12, 2010).

20 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
21 length negotiations [Gaines Decl. at ¶ 24], (2) that was negotiated by Counsel with significant
22 experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-7 and **Exhibit A** to Gaines Decl.],
23 (3) which occurred after Counsel had conducted sufficient investigation to evaluate the strength
24 and potential value of the PAGA claims, as well as evaluating the risks of litigating this claim
25 through trial. *See id.*, at ¶ 12-15. Based thereon, the court should give considerable weight to the
26 competency and integrity of counsel in assuring itself that the Settlement Agreement represents an
27 arm's-length transaction entered without self-dealing or other potential misconduct.

1
2 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of**
3 **Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

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

8 This case addresses violations of important employee protections embodied in the
9 California Labor Code – namely, that Defendant failed to pay all minimum and overtime wages
10 earned; failed to provide meal periods or one hour of additional pay for missed meal periods; failed
11 to provide rest periods or one hour of additional pay for missed rest periods; failed to provide
12 complete and accurate itemized wage statements; failed to pay for all hours worked; failed to pay
13 sick time, and failed to timely pay wages owed during employment and upon termination of
14 employment, pursuant the corresponding alleged violation of the California Labor Code, including
15 but not limited to, sections 201-204, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1194, 1197,
16 1197.1, 1198, 1198.5, 2698, 2699, 2699.3 and the applicable IWC Wage Order. Defendant's
17 maximum theoretical exposure in this action and with stacking of penalties, cumulative of all
18 PAGA violations, is approximately \$934,850⁴. Gaines Decl., ¶ 30.

19 Defendant allegedly failed to pay Plaintiffs and Aggrieved Employees all minimum wages
20 and overtime wages due during the course of employment due to the alleged rounding of Plaintiffs'
21 and Aggrieved Employees' time, in violation of Labor Code §§ 510 and 1194. Plaintiffs' expert
22 deduced that the aggregate value of the alleged underpaid wages for this claim was less than \$2,800,
23 with very small underpayments (if any) per pay period. 1,682 pay periods during the PAGA Period
24 were affected by the rounding claim, such that its maximum penalty value is \$168,200 (\$100 per

25 ⁴ This amount is based on the following violations for the relevant time period of June 11, 2019
26 through March 8, 2021: \$100 x 54 terminated employees (\$5,400) for violation of Labor Code §
27 203; \$250 x 1,903 pay periods (\$475,750) for violation of Labor Code § 226.3; \$100 x 952 per pay
28 periods (\$95,200) for violation of Labor Code §§ 512/226.7 (meal breaks); \$100 x 1,903 pay
periods (\$190,300) for violation of Labor Code §§ 512/226.7 (rest breaks); and \$100 x 1,682 pay
periods for violation of §§ 510/1194 (unpaid wages/rounding) (\$168,200).

1 pay period times 1,682 pay periods). The claim was also subject to a strong defense that
2 Defendant's policy was nearly neutral, which could defeat the claim altogether. The compromise
3 is fair based on the claim's strength and weaknesses. Gaines Decl. at ¶ 31.

4 Plaintiffs contend that Defendant failed to offer or authorize uninterrupted ten-minute rest
5 periods to Plaintiffs and Aggrieved Employees for every four hours worked or major fraction
6 thereof, but did not pay them premium wages in the amount of one hour's pay for these denied rest
7 periods, in violation of Labor Code § 226.7. Plaintiffs contend that Defendant failed to maintain a
8 legally compliant written rest period policy that accounted for the "major fraction thereof" language
9 required for rest breaks, such that for shift lengths between 3:30 and 3:59 hours, 7:00 and 7:59
10 hours, and 10:00 and 11:59 hours, rest periods were not provided as required by law. Defendant
11 adamantly contested and argued that it provided proper rest periods at all times, notwithstanding
12 its written policy. Plaintiffs contend that due to the problematic policy, a large portion of rest
13 breaks were not properly provided, such that nearly every pay period – 1,903 in the aggregate
14 during the PAGA Period – would yield a \$100 PAGA civil penalty for this violation. As a result,
15 the maximum value of this claim is \$190,300 (1,903 pay periods times \$100 per pay period). Due
16 to the difficulties expected in prevailing on the merits on this claim, Plaintiffs were required to
17 discount the value of this claim for purposes of settlement at this juncture. Gaines Decl. at ¶ 32.

18 Plaintiffs also contend that Defendant maintained an illegal meal period policy that failed
19 to account for the timing of second meal periods, and, as a result, Plaintiffs and Aggrieved
20 Employees were not always properly provided meal periods to which they were entitled. Plaintiffs
21 also contend that when meal periods were provided, they were oftentimes late or cut short. Based
22 on Plaintiffs' expert's analysis of Defendant's time data, Defendant's first meal period violation
23 rate is 28.6% and its second meal period violation rate is 100%. The value of this claim is estimated
24 to be \$95,200 on a PAGA civil penalty basis based upon 952 pay periods during the PAGA Period
25 which exhibit one or more alleged meal break violations. Due to the difficulties expected in
26 prevailing on the merits on this claim, including Defendant's anticipated waiver defense, Plaintiffs
27 discounted it for purposes of settlement at this juncture. Gaines Decl. at ¶ 33.

28 Plaintiffs also seek PAGA penalties for defective wage statements and waiting time.

1 Plaintiffs, however, faced the risk that because these are partially derivative claims (e.g., Plaintiffs
2 must prevail on their underlying unpaid wage and meal and rest period claims to prevail on these
3 penalty claims), they would not recover on these claims at all. Some case law has suggested that
4 wage statement penalties and waiting time penalties will not stem from meal and rest period claims.
5 *See Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, review denied (July 13,
6 2016). The value of these claims were substantially discounted for settlement purposes in light of
7 the fact that their recovery is highly questionable. Gaines Decl. at ¶ 34. Plaintiffs allege that
8 Defendants also separately violated Labor Code § 226(a)(6), (a)(7), (a)(8), and (a)(9). This portion
9 of the claim was a direct violation of Labor Code §226(a) and was *not* derivative of any underlying
10 claim. The maximum value of the late pay claim is \$5,400 (54 separated employees times \$100
11 each, one violation per final pay period) and the maximum value of the wage statement claim is
12 \$475,750 (1,903 pay periods times \$250 each). Of course, these penalties are substantial for
13 technical and derivative violations and were subject to multiple defenses, including good faith and
14 lack of willfulness. Due to the difficulties expected in prevailing on the merits on this claim,
15 Plaintiffs discounted it for purposes of settlement at this juncture. Gaines Decl. at ¶ 35.

16 Defendant contends it acted within the requirements of California law at all times as to all
17 Aggrieved Employees. Moreover, it maintained that even if the Court did award penalties, the
18 Court could and would *substantially* reduce the penalties awarded based on the discretionary factors
19 contained in Labor Code § 2699(e)(2) (“In action by an aggrieved employee . . . , a court may award
20 a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts
21 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
22 arbitrary and oppressive, or confiscatory.”). Gaines Decl., ¶ 36.

23 Based on these disputes, which had the potential to completely eliminate Plaintiffs’
24 recovery, the range of realistic “litigation outcomes” on the Plaintiffs’ PAGA claim was defined
25 by a “maximum possible liability” amount of approximately \$934,850, and a net-zero recovery
26 based on the defenses asserted by Defendant. [Gaines Decl., ¶ 37]. Notwithstanding the existence
27 of such issues, the Settlement achieves a significant benefit. As such, this factor weighs very heavily
28 in favor of resolution by way of the compromise set forth in the Settlement. Gaines Decl., ¶ 38.

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

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

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

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

15 The proposed settlement is not to be judged against a hypothetical or
16 speculative measure of what might have been achieved by the
17 negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at
18 625 (emphasis in original). Thus, “the very essence of a settlement is
19 compromise, ‘a yielding of absolutes and an abandoning of highest
20 hopes.’” *Id.* at 624 (citations omitted). As the Second Circuit has
21 pointed out: “The fact that a proposed settlement may only amount
22 to a fraction of the potential recovery does not, in and of itself, mean
23 that the proposed settlement is grossly inadequate and should be
24 disapproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
25 n.2 (2nd Cir. 1974).

26 *See Linney*, 151 F.3d at 1242.

27 Here, after all deductions are made for administration, a general release payment, attorneys'
28 fees and costs, \$109,252.26 will be paid out of which, \$81,939.19 (i.e. 75%) will go to the LWDA,
and \$27,313.07 (i.e. 25%) will go to the Aggrieved Employees, as required by Labor Code § 2699(i)
29 (“civil penalties recovered by Aggrieved Employees shall be distributed as follows: 75 percent to
the Labor and Workforce Development Agency . . . and 25 percent to the Aggrieved Employees.”).
30 Gaines Decl., ¶ 18.

1 This result is exceptional, as settlements of PAGA claims impacting thousands of
2 individuals have been approved as reasonable for amounts far less than the payment to fewer than
3 100 employees in this case. *See Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-
4 42 (E.D. Cal. Nov. 27, 2012) (“Defendant has agreed to pay \$10,000 as civil penalties pursuant to
5 the PAGA Of the \$10,000, 75 percent (\$7,500) will be paid to the State of California, and the
6 remainder (\$2,500) will benefit the class The Court finds that the PAGA payment is set at a
7 reasonable amount, and it shall be approved.”); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist.
8 LEXIS 160052, 21-22 (E.D. Cal. Oct. 29, 2012) (“GTI agrees to allocate \$10,000 to Plaintiff’s
9 PAGA claims, and will pay \$7,500 to the LWDA, and \$2,500 to participating Class Members on a
10 pro-rata basis. This comports with settlement approval of PAGA awards in other cases. . . .
11 Therefore, the Court will approve the allocation of the Settlement to Plaintiff’s PAGA claim.”);
12 *Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012)
13 (“Pursuant to the Settlement Agreement, the parties have agreed to pay \$7,500 to the California
14 Labor and Workforce Development Agency The Court finds that the PAGA Payment is set at
15 a reasonable amount, and recommends that it be approved.”); *Gong-Chun v. Aetna Inc.*, 2012 U.S.
16 Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11, 2012) (“Pursuant to the Settlement Agreement,
17 Defendant has agreed to pay \$15,000 to the California Labor and Workforce Development Agency
18 The Court finds that the PAGA payment is set at a reasonable amount, and it shall be
19 approved.”).⁵

20 In addition to the above analysis of each claim, Plaintiffs also received and analyzed
21 documents evidencing Defendant’s financial condition over the past two years. Specifically,
22 Plaintiffs reviewed Defendant’s 2019 state and federal tax returns, inclusive of all schedules;
23 Defendant’s Profit and Loss Income Statement for the year ending December 31, 2020; and
24

25 ⁵ Significantly, each of the above-cited actions involved substantially more “Aggrieved
26 Employees” than the approximately 89 Aggrieved Employees in the instant Lawsuit. *See Franco*,
27 2012 U.S. Dist. LEXIS 169057, 14 (“2,055 Class Members were ultimately identified”); *Garcia*,
28 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of “approximately 1,869 individuals”);
Schiller, 2012 U.S. Dist. LEXIS 80776, 16 (“3,327 California Class members were ultimately
identified”); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051 California Class Members
were ultimately identified”).

1 Defendant's PPP loan records. These documents evidenced Defendant's difficult financial
2 situation, thereby further supporting the reasonableness of the settlement achieved in this matter.

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

8 **5. The Scope of the Release is Narrowly Tailored**

9 As discussed above, the California Supreme Court has concluded that in the context of
10 PAGA "the nonparty employees, because they were not given notice of the action or afforded any
11 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
12 penalties." *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the release provided in exchange for
13 the foregoing consideration is limited to the civil penalties asserted in the Action under Labor Code
14 §§ 2698 *et seq.* See Settlement Agreement, at ¶ 30.

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

16 **6. The Experience and Views of Plaintiffs' Counsel Favor Approval of the** 17 **Settlement**

18 Plaintiffs' Counsel has a significant degree of experience in complex wage and hour
19 litigation. Gaines Decl., ¶¶ 2-7, **Exhibit A** to Gaines Decl. Mirabel Decl., ¶¶ 6-8. In the view of
20 Plaintiffs' Counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and
21 adequate under the circumstances, as it reflects a reasoned compromise which takes into
22 consideration the risks inherent in this case which had the potential to completely eliminate
23 recovery. Gaines Decl., ¶¶ 24-40. As such, this factor balances in favor of approval of the
24 Settlement.

25 **7. The Extent of Discovery Completed And The Stage Of The Proceedings** 26 **Favor Approval of the Settlement**

27 In evaluating this element, the Court should be mindful that "formal discovery is not a
28 necessary ticket to the bargaining table" [*Linney*, 151 F.3d at 1239], as the relevant consideration

1 is “whether ‘the parties have sufficient information to make an informed decision about
2 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
3 26 (C.D. Cal. Nov. 9, 2011).

4 Here, the extent of informal discovery conducted was sufficient to enable Plaintiffs’
5 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
6 ¶¶ 12-15. As discussed above, Plaintiffs’ Counsel’s investigation was sufficient to, among other
7 things, tabulate with precision the total number of alleged Labor Code violations at issue during
8 the PAGA Period and identify the total number of individuals falling within the definition of
9 “Aggrieved Employee” for the PAGA Period.

10 Based on Plaintiffs’ Counsel’s experience litigating wage and hour claims, such
11 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
12 the strength of this claim for purposes of settlement. Gaines Decl., ¶¶ 12-15.

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

15 In addition to the factors presented above, the proposed Settlement does not possess any
16 obvious deficiencies.

17 With regard to settlement administration, ILYM Group, Inc. was selected because they
18 returned a competitive bid, not to exceed \$5,000. This falls within the allocated amount in the
19 Settlement Agreement, at ¶ 29(a).

20 Moreover, Plaintiffs have complied with PAGA’s notice requirements [*see Labor Code* §
21 2699(1)(2)]; Plaintiffs transmitted the Settlement Agreement to the LWDA by online submission
22 concurrently with its submission to the Court on May 19, 2021. Gaines Decl., ¶ 44.

23 In sum, under the applicable standards for approval of PAGA settlements in California, the
24 settlement in this case meets the standards for approval.

25 **IV. PLAINTIFFS’ COUNSEL ARE ENTITLED TO RECOVER THEIR**
26 **REASONABLE FEES AND COSTS**

27 Pursuant to the terms of the Settlement, Plaintiffs’ Counsel seeks attorneys’ fees of \$66,000
28 and reimbursement of litigation costs in the amount of \$12,247.74, which is less than the allowable

1 amount of \$15,000. *See* Settlement Agreement, at ¶ 28. Plaintiffs' Counsel's entitlement to an
2 award of attorneys' fees and costs is warranted on multiple independent grounds. Further, the
3 amount of fees requested falls well within the range of reasonableness under applicable standards,
4 as the amount requested constitutes a "percentage of the fund" deemed reasonable in similar wage
5 and hour settlements of this size and approved by California courts, which is not only warranted
6 based on the contingency risk Plaintiffs' Counsel has agreed to incur for the benefit of the State of
7 California and Aggrieved Employees, but also based on the significant results achieved, as the
8 Settlement obtains a recovery substantially above the range approved as reasonable by California
9 state and federal courts. Based thereon, Plaintiffs' Counsel respectfully requests that the Court enter
10 an order and judgment approving the fee and cost amounts requested.

11 **A. Plaintiffs' Counsel Are Entitled To Recover Their Reasonable Fees And**
12 **Costs As A Matter Of Right**

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

17 Courts have long recognized the "common fund" or "common benefit" doctrine, under
18 which attorneys who create a common fund or benefit for a group of persons may be awarded their
19 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
20 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
21 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
22 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
23 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

24 The California Supreme Court has held that, "when a number of persons are entitled in
25 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
26 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
27 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d
28 1; *see also Boeing, supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit

1 of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as
2 a whole."); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
3 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
4 Group) at § 17:172.3 explains the common fund doctrine as follows:

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

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

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

16 It is not necessary to find this suit a proper class action in order to
17 uphold the portion of the judgment awarding counsel for Plaintiffs
18 25 percent of all retroactive salaries and wages received. That award
19 may be sustained under the rule that a litigant who creates a fund in
20 which others enjoy beneficial rights may require those beneficiaries
 to pay their fair share of the expense of litigation. (*See Sprague v.*
 Ticonic National Bank (1939) 307 U.S. 161, 159; *Estate of Stauffer*
 (1959) 53 Cal.2d 124, 132).

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

28 Numerous appellate courts have similarly found. *See e.g., Knoff v. City and County of San*

1 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a “contingent percentage” award of
2 attorneys’ fees in a representative action as the proper exercise of the court’s broad equitable
3 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys’ fees and
4 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
5 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
6 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
7 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
8 of residential property in an inverse condemnation action).

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

15 Thus, as Plaintiffs’ Counsel has expended a significant amount of time and money to secure
16 a \$200,000 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
17 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
18 resulted in the preservation or recovery of a certain or easily calculable sum of money—out of which
19 sum or ‘fund’ the fees are to be paid.’”)], and in doing so, have exclusively borne the risk of loss
20 for such expenditures of time and expenses (as the LWDA elected not to take the case after
21 receiving the PAGA Notice), Plaintiffs’ Counsel is entitled to claim reasonable fees from that fund
22 under applicable precedent.⁶

23
24 ⁶ Plaintiffs’ Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
25 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
26 entitled to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the
27 instant PAGA action was by definition “for the public benefit” and secured monetary awards for
28 approximately 188 Aggrieved Employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
(2007) 154 Cal. App. 4th 1, 16-17 (2007) (“Estrada’s personal motivation does not diminish the
fact that he pursued this public interest class action not only for himself but on behalf of a class
comprised of FedEx’s past and present drivers and ultimately obtained awards for 209 drivers. []
No more is required to satisfy the ‘significant benefit,’ ‘public interest,’ and ‘large class of persons’

1 **B. The Fee Amount Requested Is Reasonable**

2 In addition to the forgoing, Plaintiffs' Counsel's request for attorneys' fees in the amount
3 of \$66,000, or thirty-three percent of the \$200,000 Gross Settlement Amount, falls well within the
4 "zone of reasonableness."

5 It is important to highlight at the outset that the fee amount presently sought is not
6 extraordinary, but actually falls at the "average" fee deemed reasonable under California State court
7 authority, as it is recognized that "courts may award attorney's fees in the 30-40% range in wage
8 and hour class actions that result in recovery of a common fund under \$10 million." *See e.g. Martin*
9 *v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). In fact, this fee
10 request is at the lower end of that range.

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

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

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

23 First, the results achieved by Plaintiffs' Counsel are significant, as Defendant has agreed to
24 pay \$200,000 under the Settlement. This is a significant recovery given the risk of success in
25 obtaining any recoverable penalties. [Gaines Decl., ¶¶ 18-20], and further, as the settlement of
26 PAGA claims impacting much higher numbers of individuals have been approved as reasonable
27 for between \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

28 requirements of Code of Civil Procedure section 1021.5.").

1 Second, such results were achieved in the face of significant risks. As explained above,
2 Defendant maintained defenses to Plaintiffs' PAGA claims that very well could have resulted in a
3 net-zero recovery at trial.

4 Third, notwithstanding this risk of loss, Plaintiffs' Counsel undertook representation of the
5 instant PAGA claim for the benefit of the State of California on a contingency basis. Gaines Decl.
6 at ¶ 48. This not only required Plaintiffs' Counsel to personally assume the risk of nonpayment in
7 securing the very substantial financial benefit the State of California stands to receive, but
8 constitutes a "loan" on Plaintiffs' Counsel's services – both of which are factors warranting fee
9 enhancement under applicable California Supreme Court authority:

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

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

20 Finally, the percentage requested by Plaintiffs' Counsel falls within a typical range,
21 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
22 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that
23 result in recovery of a common fund under \$10 million." *See also Crandall v. U-Haul*
24 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common
25 fund).

26 Attorneys' fee awards in the amount sought here are well-established by California law and
27 practice. Accordingly, Plaintiffs' Counsel's fee request is fair and reasonable and is consistent with
28

1 the awards in California and the Ninth Circuit. It is also reasonable given the history of this action
2 and the results obtained.

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

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

9 The recognized advantages of the percentage method—including relative
10 ease of calculation, alignment of incentives between counsel and the class, a
11 better approximation of market conditions in a contingency case, and the
12 encouragement it provides counsel to seek an early settlement and avoid
13 unnecessarily prolonging the litigation—convince us the percentage method
14 is a valuable tool that should not be denied our trial courts.

15 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
16 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
17 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
18 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d
19 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial
20 court acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v.*
21 *Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of the fund
22 method for calculating attorneys’ fees more accurately reflects the results achieved for the putative
23 class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’
24 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
25 litigation.”); *In re Rite Aid Corp. Securities Litigation* (3d Cir. 2005) 396 F.3d 294, 300 (“The
26 percentage-of-recovery method is generally favored in common fund cases because it allows courts
27 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
28 failure.”).

Laffitte also held that trial courts have discretion to assess reasonableness of fee awards with
tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
(hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed

1 to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-
2 06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold
3 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the
4 court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
5 evaluate the reasonableness of a requested percentage fee.”)

6 Here, Plaintiffs’ Counsel’s fee request of \$66,000 (thirty-three percent of the Gross
7 Settlement Amount) is fair and reasonable based on a percentage of the recovery, and as well as
8 when confirmed with a lodestar cross-check. First, “regardless whether the percentage method or
9 the lodestar method is used, fee awards in class actions average around one-third of the recovery.”
10 *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008). This is also consistent with Class
11 Counsel’s experience in similar wage and hour class action matters. *Gaines Decl.*, ¶ 2-7; 50. Thus,
12 the percentage sought by Plaintiffs’ Counsel here is reasonable.

13 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
14 multiplying the number of hours reasonably expended by each attorney or legal staff member by
15 their reasonable hourly rates. *See, e.g., Serrano v. Priest* 20 Cal.3d 25, 48 (1977). The court then
16 enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty
17 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49;
18 *Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th
19 819, 834 (2001) (“There is no hard-and-fast rule limiting the factors that may justify an exercise of
20 judicial discretion to increase or decrease a lodestar calculation”).

21 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
22 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
23 *Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition*
24 *for L. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving
25 multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to
26 the class “can be monetized with a reasonable degree of certainty,” a court may “adjust the lodestar
27 in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and
28 within the range of fees freely negotiated in the legal marketplace in comparable litigation.”

1 *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557 (2009). In doing so, “the court determines,
2 retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill
3 justifying augmentation of the unadorned lodestar in order to approximate the fair market for such
4 services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

5 In this case, Plaintiffs’ Counsel is submitting an attorney fee request equaling \$66,000.
6 Based on a projected final lodestar of \$110,035, this yields a “negative multiplier” of 0.60 under the
7 \$66,000 fee request. Gaines Decl., ¶ 50. The billing rates used to compute the lodestar are
8 reasonable in view of the evidence submitted herewith. Gaines Decl., ¶¶ 50-56; **Exhibit E**; Mirabel
9 Decl., ¶¶ 5-10.

10 Based thereon, and for the reasons discussed above (the significant risk in continuing to
11 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
12 burden involved in representation on a contingency basis; the knowledge and experience of
13 Plaintiffs’ Counsel; and the value obtained by Plaintiffs’ Counsel for the Aggrieved Employees), it
14 is fair and reasonable to account for these risks and compensate Plaintiffs’ Counsel with a fee award
15 of thirty three percent of the Gross Settlement Amount.

16 **E. Plaintiffs’ Counsel’s Request for Costs is Reasonable**

17 In the course of this litigation, Plaintiffs’ Counsel will incur out-of-pocket costs that total
18 \$12,247.74 – which is less than the \$15,000 permitted pursuant to the Settlement Agreement.
19 Gaines Decl. at ¶ 57, **Exhibit F** to Gaines Decl.; Mirabel Decl., ¶ 11, **Exhibit A** to Mirabel Decl.

20 As demonstrated in the Gaines and Mirabel Declarations submitted herewith, the incurred
21 costs included filing fees, mediation fees, photocopy charges, service of process fees, expert
22 analysis fees, and mailing charges. *Id.* Such costs are appropriate for cost reimbursement in these
23 types of cases. *See e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1,
24 *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); *see also, In re GNC Shareholder*
25 *Litigation* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

26 The costs incurred by Plaintiffs’ Counsel in this litigation benefited Plaintiffs, Aggrieved
27 Employees, and the State of California. In light of the litigation costs that Plaintiffs’ Counsel was
28 required to incur to prosecute this action, Plaintiffs’ Counsel’s cost request is reasonable and should

1 be granted.

2 **V. THE PAYMENTS SOUGHT BY EACH PLAINTIFF ARE REASONABLE**

3 The Parties have agreed that Plaintiff Vieyra will be paid an enhancement award and general
4 release payment in the amount of \$5,000. This payment is intended to both recognize the time and
5 effort that Mr. Vieyra spent on behalf of other Aggrieved Employees and the State and to
6 compensate him for a full general release of all claims. *See* Declaration of Hector Vieyra (“Vieyra
7 Dec.”) submitted herewith.

8 Plaintiff Ramirez will be paid an enhancement award in the amount of \$2,500. This
9 payment is intended to recognize the time and effort that Mr. Ramirez spent on behalf of other
10 Aggrieved Employees and the State, but does not compensate him for a general release of all claims,
11 which he will continue to pursue. *See* Declaration of Rafael Ramirez (“Ramirez Dec.”) submitted
12 herewith.

13 Case law supports the award of incentive payments in private attorney general actions. The
14 Ninth Circuit has recognized that a named plaintiff’s “willingness to act as a private attorney
15 general” may justify the award of an incentive payment. *Rodriguez v. West Publishing Corp.*, 563
16 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub LLC*, no. 2:12-CV-02716-
17 TLN-CKD (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern District of
18 California approved a similar PAGA-only settlement and awarded a service payment to the
19 representative plaintiff in recognition of his efforts.

20 The traditional bases for awarding incentive awards in class settlements support the award
21 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
22 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
23 awards and held that “the rationale for making enhancement or incentive awards to named Plaintiffs
24 is that he or she should be compensated for the expense or risk he has incurred in conferring a
25 benefit” on others. *Id.* at 806. This rationale applies in this Action exactly the same it would in a
26 traditional class action.

27 Without Plaintiffs’ efforts, there would be no recovery at all. The requested awards (and
28

1 general release payment to Plaintiff Vieyra) are appropriate to compensate Plaintiffs for the risk
2 and expense they incurred in conferring a benefit on other of Defendant's employees and the State
3 of California. *See* Settlement Agreement, at ¶ 28.

4 As a result of both Plaintiffs' efforts, Aggrieved Employees will receive monetary
5 settlement payments, and the State of California will receive \$81,939.19 to be put toward education
6 about and enforcement of California's labor laws.

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

15 The award of such a payment to each Plaintiff is especially warranted in a case like this one.
16 It is necessary to ensure that employees, like Plaintiffs, continue to bring claims like those brought
17 here to enforce the rights of employees. Individuals like Plaintiffs (and most Aggrieved Employees)
18 would have little, if any, recourse without the representative action device. Most Aggrieved
19 Employees— like Plaintiffs — would be fearful of retaliation in response to filing any lawsuit, much
20 less a representative action suit. Plaintiffs must be commended for pursuing their claims; modest
21 payments like those sought here are an appropriate means of doing so.

22 VI. CONCLUSION

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

1. Grant approval of the Settlement Agreement, pursuant to California Labor Code § 2699, subpart 1;
2. Appoint ILYM Group, Inc. as the Settlement Administrator and approve its administration fees up to \$5,000 for payment out of the Gross Settlement Amount;
3. Approve the award of attorneys' fees and costs to Plaintiffs' Counsel not to exceed \$78,247.74, payment of which shall come from the Gross Settlement Amount;
4. Approve an enhancement award and general release payment to Plaintiff Hector Vieyra in the amount of \$5,000 from the Gross Settlement Amount, and approve an enhancement award to Plaintiff Rafael Ramirez in the amount of \$2,500;
5. Direct disbursement of the remaining Gross Settlement Amount to the LWDA and all Aggrieved Employees as provided for in the Settlement Agreement; and
6. Enter a Final Order and Judgment in accordance with the Settlement Agreement in the form submitted concurrently herewith.

Date: May 18, 2021

Respectfully submitted,

GAINES & GAINES, APLC

By: 
DANIEL F. GAINES
Attorneys for Plaintiff
HECTOR VIEYRA