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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PEDRO AYALA and EMI BRUEMMER, on
behalf of themselves and in their representative
capacity as private attorneys general,

Plaintiffs,

v.

MACY'S WEST STORES, INC., an Ohio
Corporation, DOING BUSINESS AS MACY'S,
and DOES 1-50, inclusive,

Defendants.

Case No. 20STCV34182

Assigned For All Purposes to:
Hon. Elihu M. Berle

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
PAGA SETTLEMENT**

*(Filed concurrently with the Declarations of
James R. Hawkins, Emi Bruemmer, and
Proposed Order)*

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1 **I. INTRODUCTION**

2 Plaintiff Emi Bruemmer (“Plaintiff”) brings this Motion for Approval of PAGA Settlement
3 pursuant to Cal. Lab. Code § 2699(1)(2). Plaintiffs Pedro Ayala and Emi Bruemmer filed this case
4 pursuant to the Private Attorneys General Act of 2004 (“PAGA”). Plaintiff Bruemmer and Defendant
5 Macy’s West Stores, Inc. n/k/a Macy’s Retail Holdings, LLC (“Defendant”) have reached a proposed
6 settlement that effectuates the purposes of PAGA and, by this motion, Plaintiff, pursuant to California
7 Labor Code § 2699(l), seeks Court approval of such settlement. The terms of the settlement are set
8 forth in the PAGA Settlement Agreement (“Settlement”) attached as **Exhibit 1** to the Declaration of
9 James R. Hawkins (“Hawkins Decl.”) filed in support of this Motion. Under the Settlement, Defendant
10 will pay a Gross PAGA Settlement Amount of \$900,000 to settle the PAGA claims as to Plaintiff
11 Bruemmer. The non-reversionary Gross PAGA Settlement Amount will be allocated as follows:

- 12 1. PAGA Counsel’s Fees: up to one-third (1/3) of the Gross PAGA Settlement Amount
13 (\$300,000.00) and actual costs (up to \$30,000.00);
14 2. A Service Award to Plaintiff Emi Bruemmer for \$5,000.00;
15 3. Settlement Administration Costs: estimated not to exceed \$7,750.00; and
16 4. Net PAGA Settlement Amount: (approximately \$557,250.00), of which 75% (approximately
17 \$417,937.50) will be paid to the LWDA, and 25% (approximately \$139,312.50) will be paid to the
18 Covered Employees.

19 As detailed below, the Settlement is fair, reasonable, and adequate. Plaintiff requests that the
20 Court: (1) enter an Order approving the settlement pursuant to California Labor Code § 2698, *et seq.*
21 and ordering the Parties to carry out the terms of the PAGA Settlement Agreement; and (2) enter a
22 final Judgment thereon.

23 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

24 **A. Procedural History**

25 This PAGA representative action was commenced by Plaintiff Ayala on September 3, 2020,
26 in Los Angeles County Superior Court, Case No. 20STCV34182, seeking penalties under PAGA
27 based on Defendant’s alleged: (1) failure to pay all wages owed including minimum wages; (2) failure
28 to accurately calculate and pay overtime wages; (3) failure to provide meal periods; (4) failure to pay

1 compensation for meal periods that were not lawfully provided; (5) failure to authorize and permit rest
2 periods; (6) failure to pay compensation for rest periods that were not lawfully authorized and
3 permitted; (7) failure to timely pay all owed wages during employment; (8) failure to timely pay wages
4 owed upon separation from employment; (9) failure to furnish accurate, itemized wage statements;
5 and (10) failure to reimburse employees for necessary expenses. (Hawkins Decl., ¶¶ 4-5.)

6 On April 5, 2021, Plaintiff Bruemmer filed a PAGA representative complaint in Marin County
7 Superior Court, Case No. CIV2101311, seeking penalties under PAGA based on Defendant's alleged:
8 (1) failure to pay all wage owed including minimum wages; (2) failure to accurately calculate and pay
9 overtime wages; (3) failure to provide meal periods; (4) failure to pay compensation for meal periods
10 that were not lawfully provided; (5) failure to authorize and permit rest periods; (6) failure to pay
11 compensation for rest periods that were not lawfully authorized and permitted; (7) failure to timely
12 pay all owed wages during employment; (8) failure to timely pay wages owed upon separation from
13 employment; (9) failure to furnish accurate, itemized wage statements; (10) failure to properly pay
14 sick leave; and (11) failure to reimburse employees for necessary expenses. (Id. ¶¶ 6-7.)

15 Pursuant to California Labor Code § 2699.3(a), Plaintiff Ayala and Plaintiff Bruemmer gave
16 timely written notice to Defendant and to the LWDA on July 2, 2020, and February 8, 2021,
17 respectively. (Id. ¶¶ 4, 6).

18 On June 14, 2021, Plaintiffs Ayala and Bruemmer filed a Second Amended PAGA Complaint
19 consolidating the claims in both PAGA actions under Case No. 20STCV34182 before the Superior
20 Court of California, County of Los Angeles. (Id. ¶ 8.)

21 **B. Discovery, Investigation, and Mediation**

22 In preparation for mediation, the Parties exchanged documents and information that allowed
23 both sides to calculate the potential damages and evaluate potential risks. Plaintiffs' counsel analyzed,
24 researched, and investigated the potential issues, including matters related to calculating damages,
25 trial, and potential appeal. Pursuant to Plaintiffs' Counsel's informal requests, Defendant produced
26 records that enabled Plaintiffs to analyze the alleged violations. To that end, PAGA Counsel obtained,
27 through informal discovery, a random sampling of time and payroll records for the Covered
28 Employees, time and payroll records for Plaintiffs, data, policies, and other documents and

information. (Id. at ¶ 9.) This shared data facilitated a precise evaluation of Defendant’s potential liability and damages based on the presented claims. (Id.).

Following exchange of extensive informal discovery, the Parties engaged in a full-day session of mediation on December 22, 2023, with experienced wage-and-hour mediator Michael J. Loeb (Id. ¶¶ 10, 18.). Following the mediation, the Parties accepted a mediator’s proposal, and thereafter memorialized the settlement terms in a long-form PAGA Settlement Agreement (Hawkins Decl., Ex. 1, “Settlement”), which is now presented for approval. (Id. ¶ 18).¹

III. SUMMARY OF THE SETTLEMENT

A. Covered Employees and PAGA Period Definitions

The Covered Employees are “all persons employed by Defendant in California and classified as a non-exempt employee who worked during the PAGA Period and are not subject to arbitration under Defendant’s Solutions InSTORE Program.” (Ex. 1 at § 1.4.) The “PAGA Period” is January 26, 2020 to November 23, 2023. (Id. § 8). It is estimated that the number of Covered Employees is 1,329 and PAGA Pay Periods is 74,169. (Hawkins Decl. ¶ 28, Ex. 1 at § 8.)

B. Amount of the Settlement and Allocation of Settlement Amounts

In consideration for this Settlement and a release by Plaintiff, Covered Employees, and the LWDA, as provided herein, Defendant has agreed to pay \$900,000.00, to be allocated as follows:

Settlement Administration Costs	\$7,750.00
PAGA Counsel’s Costs	\$30,000.00
Service Award	\$5,000
PAGA Counsel’s Attorneys’ Fees	\$300,000.00
LWDA Share (75% of Net PAGA Settlement Amount)	\$417,937.50
Covered Employee Share (25% of Net PAGA Settlement Amount)	\$139,312.50

(Ex. 1 at § 3.). The Covered Employee Share is the portion (25%) of the Net PAGA Settlement Amount distributed to the Covered Employees. The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Covered Employees’ 25% share of PAGA Penalties by the total number of PAGA Pay Periods worked by all Covered Employees during the PAGA Period

¹ The resulting Settlement only resolves the PAGA claims as to Plaintiff Bruemmer’s PAGA action. Plaintiff Ayala’s individual PAGA claims are subject to arbitration and the Parties have reached an individual settlement that will result in dismissal of Ayala’s claims in arbitration and court.

1 and (b) multiplying the result by each Covered Employee's PAGA Pay Periods. Each Covered
2 Employee assumes full responsibility and liability for any taxes owed on his or her Individual PAGA
3 Payment. (Ex. 1 at § 3.b.iv.1.). The Administrator will report the Individual PAGA Payments on IRS
4 1099 Forms. (Ex. 1 at § 3.b.iv.2.)

5 **C. Release by Covered Employees**

6 Upon the entry of Judgment and funding of the Gross PAGA Settlement Amount, Plaintiff, the
7 State of California, and all the Covered Employees will be forever barred from pursuing against the
8 Released Parties any claims for civil penalties under PAGA arising during the PAGA Period that were
9 alleged in the Action or any associated LWDA submissions by Plaintiff, or that could have been
10 alleged based on the facts alleged in Plaintiff's complaint or any associated LWDA submissions.

11 The claims released by the Settlement include all claims for PAGA civil penalties under
12 California Labor Code §§ 2698 et seq. that were alleged, or reasonably could have been alleged, based
13 on the facts stated in the Operative Complaint and or the PAGA Notices sent by Plaintiff to the LWDA
14 dated June 29, 2020, January 26, 2021, January 27, 2021, March 17, 2021, and June 11, 2021, for the
15 entirety of the PAGA Period. Such released claims include but are not limited to alleged violations of
16 California Labor Code §§ 201-204, 210, 216, 218.5, 218.6, 221-224, 226, 226.3, 226.7, 245-249, 510,
17 512, 516, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1195, 1197, 1197.1, 1198, 2800, 2802, California
18 Industrial Welfare Commission Wage Order 7-2001, and California Code of Regulations, Title 8, §
19 11000 et seq. The claims to be released also include all claims against the Released Parties for interest,
20 costs, expenses, and attorney fees arising from the Released PAGA Claims. (Ex. 1, ¶ 5).

21 The Covered Employees will not release any individual, non-PAGA claims by virtue of this
22 PAGA Settlement and the associated entry of Judgment, as the release is narrowly related to the claims
23 alleged. (Id.)

24 **D. Settlement Administration**

25 The Parties mutually selected ILYM Group, Inc. to serve as the Settlement Administrator,
26 which will be responsible for processing the settlement payments and providing notice to the Covered
27 Employees. ILYM Group, Inc. estimates the costs of administration will not exceed \$7,750.00.

28 ///

1 **IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

2 **A. PAGA Settlements Require Court Approval**

3 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
4 Court. (Cal. Lab. Code § 2699(1)(2).) The Labor Code does not require the two-step settlement
5 approval process utilized in class actions—instead, PAGA settlements are approved on a single
6 motion. (See *Salazar v. Sysco Central Cal*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal.
7 Feb. 2, 2017) (rejecting the application of class action settlement rules and procedures for PAGA
8 settlement approval).) When trial courts review PAGA settlements, they should consider whether
9 “the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying
10 purpose of the statute to benefit the public.” (*O’Connor v. Uber Techs., Inc.*, No. 13-03826-EMC
11 (N.D. Cal. Jul. 29, 2016), ECF No. 736 at 2-3; see also *Salazar*, 2017 WL 1135801, *2 (quoting the
12 above passage).) Nothing in PAGA changes the strong judicial preference in support of approving
13 settlements. (See, e.g., *Osumi v. Sutton* (2007) 151 Cal. App. 4th 1355, 1357 (confirming the “[s]trong
14 public policy in favor of the settlement of civil cases”).)

15 **B. The PAGA Settlement is Fair and Reasonable and Accomplishes the Objectives of**
16 **PAGA**

17 Although PAGA and its legislative history do not seem to require a Court to analyze a PAGA
18 settlement in comparison to the “value” of the claims, the penalties herein are reasonable when
19 considered in this context as well.

20 Based upon the current estimates provided by Defendant, Plaintiffs’ Counsel estimates that
21 maximum realistic liability that Defendant faced for the Covered Employees during the PAGA period
22 is approximately \$7,416,900.00 based on approximately 74,169 PAGA Pay Periods at \$100 per pay
23 period. The risks associated with continuing the litigation underscore that the Settlement represents a
24 fair resolution of the contested claims, achieved through thorough arm’s length negotiations. (Hawkins
25 Decl. at ¶ 37). Further, Defendant disputes that any liability exists, and if any were found to exist for
26 any reason, asserts the Court would likely use its discretion to reduce any penalties since it claims that
27 any issues were unintentional and inconsequential. (Id. ¶¶ 40-43.)
28

1 While Plaintiff argued that Defendant could face over \$40 million in penalties based upon the
2 assessment of initial and subsequent penalties and stacking of penalties, Plaintiff is aware of adverse
3 authority and the attendant risk. In *Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, the plaintiff
4 argued that the trial court should assess a \$200 civil penalty for each violation that occurred after the
5 plaintiff submitted their PAGA letter(s) to the LWDA, thereby informing defendant of their claims.
6 However, the defendant objected to this argument, relying on a later district court case construing
7 *Amaral*, holding that the trial court can only assess a \$200 civil penalty for “subsequent” violations
8 after the date that “a court or commission” notifies the employer of a violation. (*Amalgamated Transit*
9 *Union Local 1309 v. Laidlaw Transit Servs.* (C.D. Cal 2009) U.S. Dist. LEXIS 69842, *26; see also
10 *Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 990 F.3d 1157, 1173 (reversing judgment as to
11 “heightened civil penalties” because the defendant was not given notice by the Labor Commissioner
12 when the “subsequent” violations occurred); *Vieyara-Flores v. Sika Corp.* (C.D. Cal. June 10, 2019)
13 No. EDCV19606JVSKKX, 2019 WL 2436998, at *5 (“employers are not subject to heightened
14 penalties . . . until a court or commissioner notifies the employer that it is in violation of the Labor
15 Code . . . [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them
16 of PAGA violations [thus] PAGA’s heightened penalty of \$200 for subsequent violations will not be
17 calculated to determine the amount in controversy”); *Chen v. Morgan Stanley Smith Barney, LLC*
18 (C.D. Cal., October 2, 2014) No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (“Under the
19 Labor Code, if an employer does not have notice that they are committing a violation, they are not
20 subject to the heightened penalties.”); *Trang v. Turbine Engine Components Technologies Corp.* (C.D.
21 Cal. Dec. 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (“courts have held that
22 employers are not subject to heightened penalties for subsequent violations unless and until a court or
23 commissioner notifies the employer that it is in violation of the Labor Code”).)

24 While Plaintiff argued that stacking was allowed, and that it was appropriate to award \$100
25 for each initial violation and \$200 for each subsequent violation, and that each violation of the Labor
26 Code gave rise to a separate penalty such that Defendant could ultimately face liability in excess of
27 \$40 million for initial and subsequent violations, Defendant argued that under no circumstances should
28 Plaintiffs be awarded more than \$100 per pay period for alleged PAGA violations and cited various

1 cases (as set forth above) supporting such a result. (Hawkins Decl. ¶¶ 38-43.). Defendant contended
2 that PAGA penalties cannot and should not be stacked and that, even if they could, very few Courts
3 have ever exercised discretion to stack them. (*Id.* ¶ 39.). In this case, Plaintiffs’ Counsel is cognizant
4 that there is at least an argument that Defendant’s maximum exposure for Plaintiff’s primary claims
5 (unpaid minimum and overtime wages, regular rate violations, meal period/rest break violations, and
6 derivative claims for wage statement violations and waiting time penalties) would be approximately
7 \$7,416,900.00 (74,169 violative pay periods multiplied by \$100 per pay period). (*Id.*)

8 However, this maximum amount does not consider the risks and defenses to the claims
9 asserted. For example, Defendant asserts that it adheres to a comprehensive time reporting policy,
10 ensuring employees are paid for all time worked, including overtime. (Hawkins Decl. at ¶¶ 40-43). It
11 asserted that its policies are facially compliant and that the timekeeping system automatically
12 compensates for breaks and that employees are encouraged to report any policy violations; and
13 managers are prohibited from asking employees to work off the clock. (*Id.* at ¶ 42)

14 Defendant also argues that it provides more than the required rest breaks and meal periods in
15 accordance with the law. It argued that employees are provided with two 15-minute paid rest breaks
16 and an unpaid 30-minute meal break for shifts exceeding five hours. (*Id.*). For shifts longer than ten
17 hours, a second meal break is provided. Defendant contends that its rest period policies exceed the
18 state law requirements, which mandate a 10-minute paid rest break. As such, Defendant contends there
19 are no rest break violations. (*Id.*) Defendant also argues that they provide all necessary equipment and
20 supplies, and has a policy and practice of reimbursing employee expenses. (*Id.*)

21 Additionally, Defendant asserts that, even if the claims were proven, Plaintiff’s alleged
22 maximum exposure figure fails to acknowledge that courts have wide latitude to reduce the amount
23 of civil penalties “based on the facts and circumstances of a particular case” and to avoid “an award
24 that is unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(h).) Moreover,
25 Defendant argues against the merits of the underlying claims particularly to the extent that
26 “wilfulness” and/or “good faith” defenses mitigate the civil penalty claims. In light of these arguments
27 and defenses, Plaintiff reasonably estimated Defendant’s realistic exposure to be reduced by at least
28 50%, or \$3,708,450.00.

1 Despite these defenses, Plaintiff still obtained a settlement which commits Defendant to pay
2 \$900,000 for resolution of the action (approximately 24.3% of the realistic liability) – a reasonable
3 result in light of the risks and uncertainties associated with the PAGA claims in this case. This is
4 sufficient to accomplish the objectives of PAGA while not being unjust, arbitrary and oppressive, or
5 confiscatory. For these reasons, the Parties submit that the agreed-upon PAGA Settlement is fair and
6 reasonable. (*Id.* ¶¶ 43-44).

7 **C. Plaintiff’s Service Award Payment Is Proper**

8 Plaintiff Bruemmer is a former employee of Defendant who took the extraordinary step to
9 challenge their former employer’s actions by bringing this action. (See, generally, Declaration of
10 Emi Bruemmer (“Bruemmer Decl.”). Plaintiff’s actions have resulted in a substantial recovery under
11 PAGA. Plaintiff fully participated in the case’s preparation, initiation, litigation, and mediation. (*Id.*)
12 She provided valuable information and documents pertaining to the claims and kept well informed of
13 the nature and extent of settlement discussions, and approved the same. (*Id.*).

14 The proposed Service Award to Plaintiff Bruemmer is reasonable and represents only a small
15 percentage of the Gross PAGA Settlement Amount. Absent the actions taken by Plaintiff Bruemmer,
16 neither the LWDA nor the Covered Employees would have reaped the rewards of this action. Plaintiff
17 respectfully requests that this Court approve the Settlement Agreement and the Service Award in
18 amount of \$5,000.

19 **V. THE REQUESTED ATTORNEYS’ FEES AND LITIGATION COSTS ARE FAIR AND**
20 **REASONABLE**

21 For their efforts and the risk undertaken in obtaining a common fund settlement that benefits
22 the LWDA and Covered Employees, the Parties allocated \$300,000.00 to PAGA Counsel for
23 reasonable attorneys’ fees, or one-third of the Settlement Amount. Additionally, the Parties agreed to
24 reimburse PAGA Counsel for their actual litigation costs of up to \$30,000.00 (\$25,856.53 estimated).
25 These fees and costs are warranted under the law and within the range of fees commonly awarded in
26 similar cases.

27 **A. PAGA Counsel are Entitled to Recover Attorney’s Fees Under the Common Fund**
28 **Doctrine In This Qui Tam Action**

1 PAGA provides that a plaintiff is entitled to recover reasonable attorneys’ fees, expenses, and
2 costs under section 2699(g)(1) of the California Labor Code, which provides that, “Any employee
3 who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs,
4 including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or
5 subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. As discussed below, in a *qui*
6 *tam* action, reasonable attorney’s fees and costs are typically awarded under the common fund doctrine
7 where, as here, the litigation creates a common fund of money in a specific amount for the benefit of
8 others.

9 “A *qui tam* action is one brought under a statute that allows a private person to sue as a private
10 attorney general to recover damages or penalties, all or part of which will be paid to the government.”
11 (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal. App. 4th 487, 491-492.) “A *qui*
12 *tam* action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the *qui tam* plaintiff
13 stands in the shoes of the state or political subdivision [citation].” (*Id.* at p. 501.) As the name of the
14 PAGA statute makes clear (*e.g.* “Labor Code Private Attorney General Act”), a PAGA action is a *qui*
15 *tam* action because the statute allows the employee plaintiff, acting as the proxy of the state’s labor
16 law enforcement agency, to sue his or her employer for Labor Code violations and recover civil
17 penalties that otherwise would have been assessed and collected by the LWDA. (*Iskanian v. CLS*
18 *Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380.) “A PAGA representative action is therefore
19 a type of *qui tam* action.” (*Id.* at p. 382.) Indeed, the majority of the civil penalties recovered in a
20 PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (*e.g.*, 75%
21 paid to the state; 25% paid to the aggrieved employees). (See Cal. Lab. Code § 2699(i).)

22 As here, where a common fund is created in a *qui tam* action by the successful litigation of a
23 plaintiff and her attorneys, the plaintiff’s attorneys are entitled to recover their fees from the common
24 fund. (*Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 89-91.) In *Bank of America*, California
25 taxpayers compelled the State Controller to enforce the Unclaimed Property Law against banks who
26 were retaining accounts that should have been turned over to the State. Because of the success of the
27 taxpayers’ lawsuit, a common fund was created in favor of some depositors and the State of California.
28 (*Id.*) When the taxpayers’ attorneys sought recovery of their attorney’s fees from the judgment under

1 the common fund doctrine, the Controller opposed the request. The Court of Appeal affirmed the trial
2 court's fee award to the taxpayers' counsel under the common fund doctrine stating:

3 "Those benefiting from the recovery of the fund, in this case some depositors and
4 eventually the People of the State of California, must bear their share of the cost
5 of litigation. Fees for taxpayers' attorneys will be deducted from the judgment,
6 and each claimant's share reduced proportionately. To the extent the judgment
relies upon section 1021.5 for recovery of attorney fees, it must be modified to
confine the award of fees to the common fund theory." *Id.* at p. 91.

7 In this case, the Settlement creates a common fund for the benefit of the employees and the
8 State of California. Thus, these beneficiaries must bear their share of the costs and attorney's fees,
9 which must be deducted from the settlement amount under the common fund theory. (*Id.*) Moreover,
10 such fees are deducted as a percentage of the settlement amount. (*Boeing Co. v. Van Gemert* (1980)
11 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d
12 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027;
13 *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.)

14 The California Supreme Court also upheld the use of the common fund theory of recovery for
15 attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, 506. "[W]hen a number of
16 persons are entitled in common to a specific fund, and an action brought by ... plaintiffs for the benefit
17 of all results in the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys'
18 fees out of the fund." *Serrano III v. Priest* (1977) 20 Cal. 3d 25, 34; *Boeing Co. v. Van Gemert* (1980)
19 444 U.S. 472, 478 ("[A] lawyer who recovers a common fund . . . is entitled to reasonable attorneys'
20 fees from the fund as a whole;" *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 393-394
21 (Discussing award of attorneys' fees and expenses in a settlement where "litigation has conferred a
22 substantial benefit on the members of an ascertainable class"); see also *Lealao v. Beneficial California,*
23 *Inc.* (2000) 82 Cal. App. 4th 19, 26 ("[f]ee spreading occurs when a settlement or adjudication results
24 in the establishment of a separate or so-called common fund for the benefit of the class.").

25 Accordingly, the common fund doctrine allows a court to award attorneys' fees based upon a
26 percentage of the total when the fund consists of a "certain or easily calculable sum of money." (*Dunk*
27 *v. Ford Motor, Co.* (1996) 48 Cal. App. 4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.
28 App. 3d 102, 1,282.91 [application of the percentage of the fund recovery depended on "[t]he critical

point” that “a fund was created from which attorneys’ fees could be paid”]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed. 2002).)

California law supports the percentage of the recovery method for awarding attorneys’ fees where a fund is established. (See e.g., *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 726; *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 563 (“fees based on a percentage of the benefits are in fact appropriate in large class actions...”); *Sanders v. City of Los Angeles* (1970) 3 Cal. 3d 252, 261, 263 (affirming award of attorneys’ fee based on percentage of recovery); *Chavez v. Netflix, Inc.*, *supra*, 162 Cal. App. 4th at pp. 65-66; *see also Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.* (2005) 127 Cal. App. 4th 387, 397 (the common fund doctrine is “frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class”); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 (“courts recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method and the percentage of recovery”).)

Based on the foregoing, awarding attorneys’ fees of one-third of the Settlement Amount is fair and warranted in light of the PAGA settlement that was reached on behalf of the State of California and Covered Employees. Accordingly, the requested fees are reasonable and appropriate.

B. The Percentage Fee of the Gross Settlement Amount Is Fair And Reasonable

An award of fees from the Gross PAGA Settlement Amount under the common fund doctrine prevents unjust enrichment of those who benefit from the common fund created through PAGA Counsel’s successful efforts and furthers the important goal of attracting competent counsel to handle representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Int’l. Inc.* (2016) 1 Cal. 5th 480, 503.) In affirming the use of the common fund doctrine in California, the California Supreme Court summarized the benefits of the percentage method of recovery stating: “The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should

not be denied our trial courts.” (*Id.*)

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of PAGA Counsel and the quality of work performed by PAGA Counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.) All these factors support an award here of one-third of the common fund.

First, PAGA Counsel achieved a respectable PAGA-only settlement in a case that involved highly contested issues. (Hawkins Decl. at ¶ 36-44).

Second, Plaintiffs faced significant risks going forward with the litigation. As discussed above, Defendant raised various defenses which threatened recovery and, as such, Plaintiffs faced significant risk going forward with this litigation, and it would have taken significant time to realize any recovery in this action. (Hawkins Decl. at ¶¶ 23, 64.).

Third, PAGA Counsel are experienced class and representative PAGA action litigators and have achieved some of the largest representative awards in the State of California. (Hawkins Decl. at ¶¶ 50-55.). This experience and expertise, combined with the high quality of work performed in this case by PAGA Counsel, resulted in the settlement achieved in this case. (*Id.*)

Fourth, as discussed above and as set forth in the Declaration of James Hawkins, the request for attorney’s fees falls well within the norms accepted by state and federal courts in California in comparable wage and hour actions actually handled by PAGA Counsel. (Hawkins Decl. ¶¶ 50-55.)

For all of the above reasons, a fee award here in the amount of one-third of the Gross PAGA Settlement Amount is fair and reasonable.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar “cross-check.” (*Lealao, supra*, 82 Cal. App. 4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then

enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal. App. 4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”).)

As set forth in the Declaration of James Hawkins submitted herewith, the actual aggregated lodestar between the attorneys and the paralegals that worked on this case is approximately \$340,002.50, which will continue to increase as our firm carries out the terms of the Settlement. PAGA Counsel’s lodestar is greater than the requested fee award, as reflected in the following table:

Timekeeper	Years	Hours	Rate	Total
James Hawkins, Esq.	26	136.4	\$1050	\$143,220.00
Christina Lucio	16	151.9	\$775	\$117,722.50
Mitchell Murray	12	20.9	\$750	\$15,675.00
Associate Attorneys	1-2	109.7	\$450	\$49,365.00
Paraprofessional Staff		80.1	\$200	\$16,020.00
TOTAL				\$340,002.50

(Hawkins Decl. at ¶¶ 57-62.) The requested fee is justified, reasonable and appropriate.

The hourly rates above are comparable to those of other attorneys with equal or similar experience. The starting point in determining the appropriate hourly fee is to discern the prevailing rate for similar work in the pertinent geographic region. (See, *Manual for Complex Litigation*, § 14.122 (1984) (“reasonable fees ... are to be calculated according to the prevailing market rates in the relevant community.”).) Thus, not only are PAGA Counsel’s rates reasonable and typical, but the attorneys’ fees requested are in line with the lodestar, which further confirms that the fee request is fair and reasonable. (Hawkins Decl. ¶ 57-62.)

D. The Requested Litigation Costs are Fair and Reasonable

PAGA Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. (See *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) PAGA Counsel are permitted to recover their litigation costs and expenses under the common fund doctrine. (See *Serrano v. Priest*

(1977) 20 Cal. 3d 25, 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal. App .4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by . . . [Plaintiffs’] attorneys”).) Furthermore, PAGA Counsel are entitled to recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” (*Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.)

The Settlement Agreement authorizes PAGA Counsel to recover litigation costs up to \$30,000. (Ex. 1, Settlement, ¶ 3.b.i.) However, the actual costs through the approval hearing are projected to be only \$25,856.53, which is less than the amount requested. (Hawkins Decl. at ¶ 64.) The remainder will go to the Net PAGA Settlement Amount. These costs are reasonable, uncontested, and should be approved.

VI. SUBMISSION TO THE LWDA

The Settlement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code section 2699(l)(2). The proof of electronic submission is attached as **Exhibit 4** to the Hawkins Declaration. (Hawkins Decl. at ¶ 34).

VII. CONCLUSION

The Settlement reached by the Parties is fair, adequate, and reasonable and should be approved. Based on the above, Plaintiff respectfully requests that this Court: 1) approve the Parties’ settlement and order the Parties to carry out the terms of the Settlement Agreement, and 2) enter a final Judgment thereon.

DATED: July 22, 2024

JAMES HAWKINS APLC

By: _____

James R. Hawkins

Christina M. Lucio

Attorneys for Plaintiffs Pedro Ayala and Emi Bruemmer,
on behalf of themselves and in their representative capacity as
private attorneys general