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7 Attorneys for Plaintiff Joann Torres, on behalf of herself and all "aggrieved employees" pursuant to
Labor Code § 2698 *et seq.*

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF ORANGE**

11 JOANN TORRES, on behalf of herself and all
12 "aggrieved employees" pursuant to Labor
Code § 2698 *et seq.*,

13 Plaintiffs,

14 v.

15 FRICK PAPER COMPANY LLC, a
16 California limited liability company, and
DOES 1 through 10, inclusive,

17 Defendants.
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CASE NO: 30-2020-01161120-CU-OE-CXC

*Assigned to the Honorable Randall J.
Sherman, Dept. CX105*

**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, GENERAL RELEASE
PAYMENT, AND REIMBURSEMENT OF
SETTLEMENT ADMINISTRATION
EXPENSES, AND DISMISSING ACTION
WITH PREJUDICE; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: June 11, 2021

Time: 10:00 a.m.

Dept.: CX105

RESERVATION NO.: 73529716

Complaint Filed: September 18, 2020

26 **PLEASE TAKE NOTICE THAT** on June 11, 2021 at 10:00 a.m., or as soon thereafter as
27 the matter may be heard, in Department CX-105 of the above-entitled Court, located at 751 West
28 Santa Ana Boulevard, Santa Ana, CA 92701, Plaintiff JOANN TORRES will and hereby does move

1 unopposed for an Order and Judgment: (1) granting approval of the proposed settlement of claims
2 brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*)
3 (“PAGA”) Settlement Agreement (“Settlement Agreement”); (2) appointing ILYM Group, Inc. as the
4 Settlement Administrator and approving payment of its fees not to exceed \$5,000 from the Settlement
5 Sum; (3) directing disbursement of the Settlement Sum pursuant to the terms of the Settlement
6 Agreement; (4) directing payment of attorneys’ fees and litigation costs from the Settlement Sum not
7 to exceed \$127,605.88 to Plaintiff’s counsel; (5) directing payment of a general release payment from
8 the Settlement Sum in the amount of \$5,000 to Plaintiff Joann Torres; and (6) dismissing this action
9 with prejudice.

10 This motion will be based on this Notice, the supporting memorandum of points and
11 authorities, the parties’ Settlement Agreement, the Declarations of Daniel F. Gaines and Plaintiff
12 Joann Torres, the documents and records on file in this matter, and such additional arguments,
13 authorities, and evidence and other matters as may be presented by the parties hereafter.

14 Date: May 18, 2021

Respectfully submitted,

GAINES & GAINES, APLC

17 By: 
18 DANIEL F. GAINES
19 Attorneys for Plaintiff
20 JOANN TORRES
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Joann Torres (“Plaintiff”) and aggrieved employees under the Labor Code’s Private
4 Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order and Judgment
5 granting approval of the proposed Settlement of the above-captioned lawsuit against Defendant Frick
6 Paper Company LLC (“Defendant”). The proposed Settlement will dispose of the Released Claims
7 asserted on behalf of Plaintiff and no more than 300 non-exempt employees who worked for
8 Defendant in California at any time between July 7, 2019 and March 5, 2021 (the “Release Period”)
9 (the “Aggrieved Employees”).

10 This case addresses claimed violations of employee protections embodied in the California
11 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
12 Defendant failed to compensate Plaintiff and all Aggrieved Employees with all minimum wages and
13 overtime pay, in violation of Labor Code §§ 510, 558 and 1194; failed to provide legally compliant
14 rest breaks to Plaintiff and all Aggrieved Employees, in violation of Labor Code §§ 226.7, 558 and
15 1194; failed to provide legally compliant meal breaks to Plaintiff and all Aggrieved Employees, in
16 violation of Labor Code §§ 226.7, 512, and 558; failed to pay Plaintiff and Aggrieved Employees for
17 all accrued, but unused vacation wages upon separation of their employment, instead requiring their
18 forfeiture, in violation of Labor Code § 201-202, 227.3, 510, 558, and 1194; and as a result, failed to
19 pay all wages due or issue accurately itemized wage statements to Plaintiff and all Aggrieved
20 Employees, in violation of Labor Code §§ 201-203 and 226(a). As a result of Defendant’s alleged
21 violations of the Labor Code, approximately 300 employees are claimed to have suffered Labor Code
22 violations for up to 8,100 aggregate pay periods at the rate of \$100 each based on PAGA’s penalty
23 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 hour
28 issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative

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

4 The value achieved by the Settlement may be gleaned from the fact that the LWDA and the
5 approximately 300 Aggrieved Employees encompassed by the Settlement will receive no less than
6 \$212,394.12 under the terms of the Settlement, which, pursuant to the operative statute, shall be
7 allocated “75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
8 aggrieved employees.” *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only because
9 further litigation may have resulted in a net-zero recovery based on the defenses asserted by
10 Defendant, but because the amount secured by Plaintiff is sizable and in line with similar settlements
11 of these types of claims under PAGA. It is also important to underscore that all penalty amounts paid
12 to Aggrieved Employees will be an unexpected windfall, as employees typically do not bring
13 individual lawsuits asserting only PAGA penalties. Declaration of Daniel F. Gaines (“Gaines Decl.”)
14 at ¶ 8.

15 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this Court
16 enter the Order and Judgment submitted herewith.

17 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

18 **A. The Parties**

19 Defendant Frick Paper Company LLC (“Defendant”), doing business as Paper Mart, is a
20 wholesale supplier of paper-based products, including boxes, containers, shipping supplies, and
21 bags. Defendant is located in Orange, California. Gaines Decl. at ¶ 9.

22 Defendant employed Plaintiff Joann Torres as a non-exempt employee between September
23 2010 and March 2020. The Aggrieved Employees are all non-exempt employees of Frick Paper LLC
24 employed in California at any time between July 7, 2019 and March 5, 2021. Gaines Decl. at ¶ 10.

25 **B. The Claims Asserted**

26 Plaintiff asserts claims that Defendant failed to: compensate Plaintiff and Aggrieved
27 Employees with all minimum and overtime pay due to its allegedly unlawful time rounding practice,
28 in violation of Labor Code §§ 510 and 1194; provide legally compliant rest breaks to Plaintiff and

1 all Aggrieved Employees, in violation of Labor Code § 226.7; provide legally compliant meal breaks
2 to Plaintiff and all Aggrieved Employees, in violation of Labor Code §§ 226.7 and 512; pay Plaintiff
3 and Aggrieved Employees for all accrued, but unused, vacation wages upon separation of their
4 employment, instead requiring their forfeiture, in violation of Labor Code §§ 201-202, 227.3, 510,
5 558, and 1194; timely pay wages during employment to Plaintiff and all Aggrieved Employees, in
6 violation of Labor Code §§ 201-203; and issue accurately itemized wage statements to Plaintiff and
7 all Aggrieved Employees in violation of Labor Code §§ 226(a) and 226.3. Plaintiff asserts these
8 claims under PAGA, seeking civil penalties for the alleged Labor Code violations. Gaines Decl. at
9 ¶ 11.

10 **C. Procedural Posture**

11 On July 8, 2020, pursuant to Labor Code § 2699.3, Plaintiff gave written notice by online
12 filing with the Labor and Workforce Development Agency (“LWDA”) and by certified mail, return
13 receipt requested, to Defendant of the specific provisions of the Labor Code alleged to have been
14 violated, including the facts and theories to support the alleged violation. Gaines Decl., ¶ 6. On
15 September 18, 2020, and after the LWDA declined to take action within the statutorily permissible
16 time with respect to Plaintiff’s July 8, 2020 letter, Plaintiff filed her representative action complaint
17 in this Court. Gaines Decl., ¶ 7.

18 Plaintiff submitted the Settlement Agreement, this Motion, and all supporting documents to
19 the LWDA via online upload on May 18, 2021, concurrently with the filing of this Motion. Service
20 of the LWDA is reflected on the Declaration of Service submitted herewith. Gaines Decl. at ¶ 12.

21 **D. Plaintiff’s Counsel’s Investigation**

22 Counsel for Plaintiff engaged in targeted, informal discovery of Defendant’s alleged Labor
23 Code violations, which specifically targeted evaluating the strength and value of the PAGA claims
24 in preparation for a resolution of this Action. Gaines Decl. at ¶ 13.

25 Plaintiff’s Counsel obtained and reviewed multiple documents, including (i) Plaintiff’s
26 employee file and wage statements, (ii) policy documents relating to the employment of Plaintiff and
27 other aggrieved employees, (iii) time and wage records for a sample of Aggrieved Employees, and
28 (iv) data relating to the number of Aggrieved Employee and their total pay periods worked, alleged

1 violations and the value of the recoverable penalties. Gaines Decl. at ¶ 14.

2 Based on the information received, as well as through discussions with Defendant's Counsel,
3 Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling within
4 the definition of "Aggrieved Employee" for the relevant statutory period, and (ii) construct a damage
5 model that calculated the maximum realistic amount of PAGA penalties that could be levied against
6 Defendant within the Release Period. Defendant, however, disputed Plaintiff's claims and disputed
7 both the existence of and extent of liability as alleged by Plaintiff. Gaines Decl. at ¶ 15.

8 Based on Plaintiff's Counsel's experience in litigating similar representative wage and hour
9 claims, the degree of investigation that was conducted and the amount of data that was obtained was
10 sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this
11 claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5, 16, 18-24.

12 **E. Settlement Negotiations**

13 On March 5, 2020, the Parties participated in a mediation session with respected mediator
14 Steve Mehta, Esq. During the mediation, the parties engaged in arm's-length negotiations but
15 reached an impasse. Mr. Mehta successfully brought the parties to agree on a resolution of the PAGA
16 claims asserted in the action. Gaines Decl. at ¶ 17.

17 **F. The Proposed Settlement**

18 The Parties jointly prepared and executed the Private Attorneys General Act of 2004 (Cal.
19 Labor Code § 2698 *et seq.*) ("PAGA") Settlement Agreement. Gaines Decl., ¶ 17, **Exhibit C** (the
20 "Settlement Agreement"). The Settlement Agreement sets forth the terms of the Settlement reached
21 by the Parties, including the following key points:

22 1. Defendant agrees to settle this matter for the payment of Three Hundred Fifty
23 Thousand Dollars (\$350,000.00) (hereinafter the "Settlement Sum"), which shall be all inclusive,
24 without reversion or discount, encompassing (i) all payments to the Labor and Workforce
25 Development Agency and Aggrieved Employees, (ii) any and all costs of third party administration
26 of the settlement, (iii) Plaintiff's Counsel's attorneys' fees and costs of suit, and (iv) a modest general
27 release payment to Plaintiff. Gaines Decl. at ¶ 25; *See* Settlement Agreement, **Exhibit C** to Gaines
28 Decl., at ¶ 3.05 (a).

1 2. The total sum available for payment of PAGA penalties shall be calculated by
2 deducting up to \$127,605.88 for the payment of Plaintiff's Counsel's fees and costs (\$116,666.66 in
3 fees and \$10,939.22 in costs), \$5,000 for the payment of Plaintiff's general release payment, and the
4 costs of administration (up to \$5,000) from the Settlement Sum, yielding approximately
5 \$212,394.12. Seventy-five percent (75%) of this amount, or \$159,295.59, shall be distributed to the
6 LWDA, and the remaining twenty-five percent (25%) or \$53,098.53, shall be distributed to the
7 Aggrieved Employees. Gaines Decl. at ¶ 26; *See* Settlement Agreement, at ¶ 3.05 (b).

8 3. All non-exempt employees that were employed by Defendant in California during the
9 Release Period will receive a pro rata share of the \$53,098.53 allocated to Aggrieved Employees,
10 which shall be distributed based on the number of pay periods each Aggrieved Employee worked
11 for Defendant in California during the Release Period. Gaines Decl. at ¶ 27; *See* Settlement
12 Agreement, at ¶ 3.05(b). Although these calculations will not be made until after approval, a rough
13 estimation of the value to the 300 individuals falling within the definition of "Aggrieved Employee"
14 may be gleaned from the fact that an equal division would provide about \$176.99 to each Aggrieved
15 Employee, net of payments to the LWDA, the Settlement Administrator, attorney's fees and costs.
16 Gaines Decl. at ¶ 27.

17 4. In exchange for the above settlement consideration, Defendant and the Released
18 Parties shall be entitled to the following release from each and every Aggrieved Employee, including
19 Plaintiff¹:

20 Upon entry of the order and judgment approving payment of the PAGA
21 penalties as described in this Agreement, and subject to FRICK's full
22 payment of the Settlement Sum, Plaintiff, all Aggrieved Employees,
23 and the State of California shall be deemed to have fully, finally, and
24 forever released, relinquished, and discharged each and all of the
25 Released Parties from the Released Claims (all known and unknown
claims for PAGA civil penalties that were alleged or could have been
alleged in the Complaint based on the facts alleged therein (including
but not limited to unpaid minimum and overtime wages, failure to

26 ¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009)
27 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties, nonparty
28 employees as well as the government are bound by the judgment in an action brought under the act .
...").

1 provide meal periods, failure to provide rest periods, failure to issue
2 accurate and complete wage statements, unpaid vacation wages, and
3 failure to timely pay wages at separation) which arose during the
4 Release Period) that arose during the Release Period.

5 5. Settlement administration, which is to be paid from the Settlement Sum, will not
6 exceed \$5,000. *See* Settlement Agreement, at ¶ 3.04(a)(3), **Exhibit C** to Gaines Decl. ILYM Group,
7 Inc., a reputable settlement administration company, has agreed to administer the settlement within
8 this amount. Gaines Decl. at ¶ 28.

9 6. As detailed herein, Plaintiff's Counsel seeks an award of attorneys' fees and litigation
10 costs of a combined \$127,605.88, and Plaintiff Joann Torres seeks a general release payment of
11 \$5,000. *See* Settlement Agreement, at ¶ 3.05(b), **Exhibit C** to Gaines Decl.

12 7. Finally, under the terms of Settlement, the value of checks uncashed more than 180
13 days after issuance shall be voided and then shall be transmitted to the Controller of the State of
14 California to be held pursuant to the Unclaimed Property Law, California Code of Civil Procedure
15 § 1500, *et seq.* in the names of each Aggrieved Employee who did not cash his or her settlement
16 check until such time as he or she claims his or her property. *See* Settlement Agreement, at ¶
17 3.05(b), **Exhibit C** to Gaines Decl.

18 **III. LEGAL ARGUMENT**

19 **A. Standards for Approval of A PAGA Settlement**

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

23 As with any settlement, the Court must be mindful in conducting its inquiry that "[s]ettlement
24 is a compromise, which balances the possible recovery against the risks inherent in litigating further."
25 *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 24 (N.D. Cal. Sept.
26 12, 2011). Indeed, "the very essence of a settlement is ... 'a yielding of absolutes and an abandoning
27 of highest hopes'" [*Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624 (9th Cir., 1982)],
28 as "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive

1 litigation that induce consensual settlements.” *See id.*, at 625. As such, “the settlement or fairness
2 hearing is not to be turned into a trial or rehearsal for trial on the merits” or “judged against a
3 hypothetical or speculative measure of what might have been achieved by the negotiators.” *See id.*

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

18 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not concerned
19 with the amount which “aggrieved employees” are to receive, but rather, must focus on the total
20 settlement amount in achieving PAGA’s objective.

21 While “[a PAGA] action is . . . designed to protect the public and penalize the employer for
22

23 ² As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
24 balancing of several factors which may include, among others, some or all of the following: [1] the
25 strength of Plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further litigation;
26 [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement;
27 [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views
28 of counsel; [7] the presence of a governmental participant; and [8] the 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 past illegal conduct” [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
2 into account the fact that settlement of a PAGA claim – like any settlement – involves a
3 “compromise” that stops short of rendering findings of liability and damages. Moreover, the Court
4 must not lose sight of the fact that “[u]nlike a class action seeking damages or injunctive relief for
5 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
6 for the government that otherwise may not have been assessed and collected by overburdened state
7 enforcement agencies.” *See Ochoa-Hernandez*, 2010 U.S. Dist. LEXIS 32774, at 12.

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

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

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

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

17 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
18 length negotiations [Gaines Decl. at ¶ 17], (2) that was negotiated by Counsel with significant
19 experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5 and **Exhibit A**], (3) which occurred
20 after Counsel had conducted sufficient investigation to evaluate the strength and potential value of
21 the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *See id.*, at ¶
22 13-16. Based thereon, the court should give considerable weight to the competency and integrity of
23 counsel in assuring itself that the Settlement Agreement represents an arm’s-length transaction
24 entered without self-dealing or other potential misconduct.

25 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of** 26 **Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

27 The relative strength of the PAGA claim brought by Plaintiff weighs in favor of the Court
28 finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous

1 defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the
2 potential to completely eliminate any recovery.

3 This case addresses violations of important employee protections embodied in the California
4 Labor Code – namely, that Defendant failed to compensate employees for all minimum wages and
5 overtime pay due to its time clock rounding practice, in violation of Labor Code §§ 510 and 1194;
6 failed to provide legally compliant rest breaks to employees, in violation of Labor Code § 226.7;
7 failed to provide legally compliant meal breaks to employees, in violation of Labor Code §§ 226.7
8 and 512; failed to pay Plaintiff and Aggrieved Employees for all accrued, but unused, vacation wages
9 upon separation of their employment, instead requiring their forfeiture, in violation of Labor Code
10 §§ 201-202, 227.3, 510, 558, and 1194; failed to timely pay wages during employment to employees,
11 in violation of Labor Code §§ 201-203; and failed to issue accurately itemized wage statements to
12 employees, in violation of Labor Code § 226(a). Defendant's maximum theoretical exposure for
13 PAGA penalties for all claims in this action totals approximately \$2,935,550. This was computed
14 as follows: (5,897 pay periods where time clock rounding led to an underpayment by \$100 each =
15 \$589,700) + (5,969 pay periods for the rest break claim x \$100 each = \$596,900) + (2,383 pay periods
16 for the meal break claim x \$100 each = \$238,300) + (92 former employees for the waiting time claim
17 x \$100 per employee = \$9,200) + (92 former employees for the unpaid unused vacation wages claim
18 x \$100 per employee = \$9,200) + (5,969 pay periods for the wage statement claim x \$250 per pay
19 period = \$1,492,250). Gaines Decl., ¶¶ 18, 19.

20 Defendant allegedly failed to pay Plaintiff and Aggrieved Employees all minimum wages
21 and overtime wages due in 5,897 pay periods, in violation of Labor Code §§ 510 and 1194. Plaintiff's
22 expert concluded that approximately 42,000 shifts were subject to an underpayment due to time clock
23 rounding, but that the average underpayment was only 2.8 minutes per shift, such that the net
24 underpayment to Aggrieved Employees was less than \$40,000. Defendant argued that its rounding
25 policy was neutral, such that it fully complied with California law. Plaintiff concluded that this claim
26 was strong, but that due to the limited underpayment of wages (if Plaintiff were to prevail on the
27 claim at all), any award of PAGA penalties would be greatly reduced based on the Court's discretion.
28 As such, a compromise was required to resolve this claim at this juncture of the litigation. Gaines

Decl. at ¶ 20.

Plaintiff contends that Defendant failed to offer or authorize uninterrupted ten-minute on-the-clock rest periods to Plaintiff and Aggrieved Employees for every four hours worked or major fraction thereof, but did not pay them premium wages in the amount of one hour's pay for these denied rest periods, in violation of Labor Code § 226.7. Although Defendant appears to maintain a legally compliant written rest period policy, Plaintiff argues that the policy was not put into practice as written, such that employees were frequently denied proper rest periods. Plaintiff further argued that Defendant's practice was to require employees to remain on the premises during rest periods, which violates the holding of *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal. 5th 257. However, due to the difficulties expected in prevailing on the merits on this claim, including Defendant's compliant written rest period policy, the unsettled nature of the law, and Defendant's challenges to the *Augustus* claim, Plaintiff was required to discount the value of this claim for purposes of settlement at this juncture. Gaines Decl. at ¶ 21.

Plaintiff also contends that, as a result of Defendant's illegal meal period practices, she and Aggrieved Employees were not always provided the meal periods to which they were entitled. She also contends that when meal periods were provided, they were oftentimes late or cut short. Although Defendant appears to maintain a legally compliant written meal period policy, Plaintiff argues that the policy was not put into practice as written, such that employees were frequently denied proper meal periods. Based on Plaintiff's expert's analysis of Defendant's time and wage data, Defendant's meal period violation rate was approximately 26% (almost wholly compromised of late first meal periods). These alleged violations occurred in approximately 2,383 pay periods among all employees during the Release Period. While Plaintiff argues that this claim was valued at up to \$238,300, there were risks involved which required a discount for settlement purposes, the most significant of which was Defendant's waiver argument – that employees affirmatively chose to take their meal breaks after the end of the fifth hour, while Defendant authorized them before this time, as required by law. Due to the difficulties expected in prevailing on the merits on this claim, Plaintiff discounted it for purposes of settlement at this juncture. Gaines Decl. at ¶ 22.

Defendant is also alleged to have failed to pay Plaintiff and Aggrieved Employees for all

1 accrued, but unused, vacation wages upon separation of their employment, instead requiring their
2 forfeiture. Defendant contends that it fully complied with California law as to the payment of
3 vacation wages at the separation of employment, and that it never required forfeiture of such vacation
4 wages where California law forbids it. Only 92 Aggrieved Employees separated employment with
5 Defendant during the Release Period; the maximum value of this PAGA claim is therefore \$9,200
6 based on 92 applicable pay periods. Gaines Decl. at ¶ 23.

7 Plaintiff also seeks derivative penalties for defective wage statements and waiting time. She,
8 however, faced the risk that because these are wholly derivative claims (e.g., Plaintiff must prevail
9 on her underlying unpaid wage and meal and rest period claims to prevail on these penalty claims),
10 she would not recover on these claims at all. Some case law has suggested that wage statement
11 penalties and waiting time penalties will not stem from meal and rest period claims, and the
12 California Supreme Court is considering the issue. *See Ling v. P.F. Chang's China Bistro, Inc.*
13 (2016) 245 Cal.App.4th 1242, review denied (July 13, 2016). The value of these claims were
14 substantially discounted for settlement purposes in light of the fact that their recovery is highly
15 questionable. Gaines Decl. at ¶ 24.

16 Finally, Defendant contends it acted within the requirements of California law at all times as
17 to all 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., at ¶30.

23 Based on these disputes, which had the potential to completely eliminate Plaintiff’s recovery,
24 the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined by a
25 “maximum possible liability” amount of approximately \$2,935,550, and a net-zero recovery based
26 on the defenses asserted by Defendant. [Gaines Decl., ¶ 19]. Notwithstanding the existence of such
27 issues, the Settlement achieves a significant benefit. As such, this factor weighs very heavily in
28 favor of resolution by way of the compromise set forth in the Settlement.

1 **3. The Risk, Expense, and Complexity of Further Litigation Balances Strongly**
2 **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 Plaintiff 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 very 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 “the
12 range of an acceptable settlement” under the circumstances, which is the standard on which the
13 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 625
18 (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 to
22 a fraction of the potential recovery does not, in and of itself, mean that
23 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, \$212,394.12 will be paid out [Gaines Decl., ¶ 27], of which, \$159,295.59 (i.e. 75%)
will go to the LWDA, and \$53,089.53 (i.e. 25%) will go to the Aggrieved Employees, as required
by Labor Code § 2699(i) (“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.”). Gaines Decl., ¶ 27.

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

19 Thus, notwithstanding the existence of issues having the potential to completely eliminate
20 recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds
21 typical PAGA awards routinely approved by the courts, it recovers significant monies for Aggrieved
22 Employees which they otherwise would not receive. As such, this factor balances strongly in favor
23 of approval of the Settlement.
24
25

26 ³ Significantly, each of the above-cited actions involved substantially more “aggrieved employees”
27 than the approximately 300 aggrieved employees in the instant Lawsuit. *See Franco*, 2012 U.S. Dist.
28 LEXIS 169057, 14 (“2,055 Class Members were ultimately identified”); *Garcia*, 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 **5. The Scope of the Release is Narrowly Tailored**

2 As discussed above, the California Supreme Court has concluded that in the context of PAGA
3 “the nonparty employees, because they were not given notice of the action or afforded any
4 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
5 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the release provided in exchange for
6 the foregoing consideration is limited to the civil penalties asserted in the Action under Labor Code
7 §§ 2698 *et seq*, but no direct claims for unpaid wages. See Settlement Agreement, at ¶ 5.01.

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

9 **6. The Experience and Views of Plaintiff’s Counsel Favor Approval of the**
10 **Settlement**

11 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
12 litigation. Gaines Decl., ¶¶ 2-5, **Exhibit A**. In the view of Plaintiff’s Counsel, the benefit conferred
13 by the proposed Settlement is fair, reasonable, and adequate under the circumstances, as it reflects a
14 reasoned compromise which takes into consideration the risks inherent in this case which had the
15 potential to completely eliminate recovery. Gaines Decl., ¶¶ 18-25, 29. As such, this factor balances
16 in favor of approval of the Settlement.

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

19 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
20 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration is
21 “whether ‘the parties have sufficient information to make an informed decision about settlement.’”
22 *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at 26 (C.D. Cal.
23 Nov. 9, 2011).

24 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s Counsel
25 to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl., ¶¶ 13-16.
26 As discussed above, Plaintiff’s Counsel’s investigation was sufficient to, among other things,
27 tabulate with precision the total number of alleged Labor Code violations at issue during the
28 applicable limitations period and identify the total number of individuals falling within the definition

1 of "Aggrieved Employee."

2 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such investigation
3 was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of
4 this claim for purposes of settlement. Gaines Decl., ¶¶ 13-16.

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

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

9 With regard to settlement administration, ILYM Group, Inc. was selected because they
10 returned a competitive bid, not to exceed \$5,000. This falls within the allocated amount in the
11 Settlement Agreement, at ¶ 3.04(a)(3).

12 Moreover, Plaintiff has complied with PAGA's notice requirements [*see Labor Code* §
13 2699(1)(2)]; Plaintiff transmitted the Settlement Agreement to the LWDA by online submission
14 concurrently with its submission to the Court on May 18, 2021. Gaines Decl., ¶ 12.

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

17 **IV. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR**
18 **REASONABLE FEES AND COSTS**

19 Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of
20 \$116,666.66 and reimbursement of litigation costs of \$10,939.22. *See* Settlement Agreement, at ¶
21 3.01. Plaintiff's Counsel's entitlement to an award of attorneys' fees and costs is warranted on
22 multiple independent grounds. Further, the amount of fees requested falls well within the range of
23 reasonableness under applicable standards, as the amount requested constitutes a "percentage of the
24 fund" deemed reasonable in similar wage and hour settlements of this size and approved by
25 California courts, which is not only warranted based on the contingency risk Plaintiff's Counsel has
26 agreed to incur for the benefit of the State of California and the Aggrieved Employees, but also based
27 on the significant results achieved, as the Settlement obtains a recovery substantially above the range
28 approved as reasonable by California state and federal courts. Based thereon, Plaintiff's Counsel

1 respectfully requests that the Court enter an order and judgment approving the fee and cost amounts
2 requested.

3 **A. Plaintiff's Counsel Are Entitled To Recover Their Reasonable Fees And**
4 **Costs As A Matter Of Right**

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

9 Courts have long recognized the "common fund" or "common benefit" doctrine, under which
10 attorneys who create a common fund or benefit for a group of persons may be awarded their fees
11 and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25, 34,
12 quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
13 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
14 15 Cal.3d 162, 167; see also *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
15 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

16 The California Supreme Court has held that, "when a number of persons are entitled in
17 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
18 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
19 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d 1;
20 see also *Boeing, supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit
21 of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as
22 a whole."); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
23 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
24 Group) at § 17:172.3 explains the common fund doctrine as follows:

25 Where the lawsuit results in the recovery of a fund or property
26 benefiting others as well as Plaintiffs (e.g., a class action), the court has
27 inherent equitable power to order Plaintiffs' attorney fees paid out of
28 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.

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

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

8 It is not necessary to find this suit a proper class action in order to
9 uphold the portion of the judgment awarding counsel for Plaintiffs 25
10 percent of all retroactive salaries and wages received. That award may
11 be sustained under the rule that a litigant who creates a fund in which
12 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).

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

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

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

7 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
8 a \$350,000 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
9 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
10 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
11 sum or ‘fund’ the fees are to be paid.’”)], and in doing so, have exclusively borne the risk of loss for
12 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
13 the PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
14 applicable precedent.⁴

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

16 In addition to the foregoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount
17 of \$116,666.66, or one-third of the \$350,000 Settlement Sum, falls well within the “zone of
18 reasonableness.”

19 It is important to highlight at the outset that the fee amount presently sought is not
20 extraordinary, but actually falls at the “average” fee deemed reasonable under California State court
21 authority, as it is recognized that “courts may award attorney’s fees in the 30-40% range in wage
22 and hour class actions that result in recovery of a common fund under \$10 million.” *See e.g. Martin*

23
24 ⁴ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under the
25 PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be entitled
26 to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the instant
27 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’ requirements
of Code of Civil Procedure section 1021.5.”).

1 v. *AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). In fact, this fee
2 request is at the lower end of that range.

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

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

9 The amount of fees requested by Plaintiff's Counsel – one-third of the Settlement Sum – is
10 reasonable based on standards applicable to the "percentage of the fund" method. "When assessing
11 whether the percentage requested is reasonable, courts look to factors such as: (a) the results
12 achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent
13 nature of the fee and the financial burden; and (f) the awards made in similar cases." *See Vasquez v.*
14 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

15 First, the results achieved by Plaintiff's Counsel are significant, as Defendant has agreed to
16 pay \$350,000 under the Settlement. This is a significant recovery given the risk of success in
17 obtaining any recoverable penalties. [Gaines Decl., ¶¶ 13-24], and further, as the settlement of PAGA
18 claims impacting much higher numbers of individuals have been approved as reasonable for between
19 \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

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

23 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
24 instant PAGA claim for the benefit of the State of California on a contingency basis. Gaines Decl.
25 at ¶ 31. This not only required Plaintiff's Counsel to personally assume the risk of nonpayment in
26 securing the very substantial financial benefit the State of California stands to receive, but constitutes
27 a "loan" on Plaintiff's Counsel services – both of which are factors warranting fee enhancement
28 under applicable California Supreme Court authority:

1 One of the most common fee enhancers . . . is for contingency risk. We
2 reaffirmed the propriety of a contingency risk enhancement in
3 Ketchum: “The economic rationale for fee enhancement in contingency
4 cases has been explained as follows: ‘A contingent fee must be higher
5 than a fee for the same legal services paid as they are performed. The
6 contingent fee compensates the lawyer not only for the legal services
7 he renders but for the loan of those services. The implicit interest rate
8 on such a loan is higher because the risk of default (the loss of the case,
9 which cancels the debt of the client to the lawyer) is much higher than
that of conventional loans.’ (Posner, *Economic Analysis of Law* (4th
ed. 1992) pp. 534, 567.) ‘A lawyer who both bears the risk of not being
paid and provides legal services is not receiving the fair market value
of his work if he is paid only for the second of these functions. If he is
paid no more, competent counsel will be reluctant to accept fee award
cases.’ ”

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

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

16 Attorneys’ fee awards in the amount sought here are well-established by California law and
17 practice. Accordingly, Plaintiff’s Counsel’s fee request is fair and reasonable and is consistent with
18 the awards in California and the Ninth Circuit. It is also reasonable given the history of this action
19 and the results obtained.

20 **D. While the Requested Award of Attorneys’ Fees is Reasonable as a**
21 **Percentage of the Common Fund, It is Further Confirmed by a Lodestar**
22 **Cross-Check**

23 The California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th
24 480, 506, that “[t]he percentage of fund method survives in California class action cases.”
Specifically, the *Laffitte* Court held:

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

1 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
2 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or
3 plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
4 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d 621,
5 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts
6 within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-*
7 *Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of the fund method for
8 calculating attorneys’ fees more accurately reflects the results achieved for the putative class than the
9 lodestar method and “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their
10 expected recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite*
11 *Aid Corp. Securities Litigation* (3d Cir. 2005) 396 F.3d 294, 300 (“The percentage-of-recovery method
12 is generally favored in common fund cases because it allows courts to award fees from the fund ‘in a
13 manner that rewards counsel for success and penalizes it for failure.’”).

14 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
15 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
16 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed to
17 bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-06.
18 While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold further
19 that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did
20 here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate
21 the reasonableness of a requested percentage fee.”)

22 Here, Plaintiff’s Counsel’s fee request of \$116,666.66 (one-third of the Settlement Sum) is fair
23 and reasonable based on a percentage of the recovery, and as well as confirmed with a lodestar cross-
24 check. First, “regardless whether the percentage method or the lodestar method is used, fee awards in
25 class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43,
26 66, fn. 11 (2008). This is also consistent with Class Counsel’s experience in similar wage and hour
27 class action matters. *Gaines Decl.*, ¶ 31. Thus, the percentage sought by Plaintiff’s Counsel here is
28 reasonable.

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

9 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
10 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland*
11 *v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition for L.*
12 *County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving
13 multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to the
14 class “can be monetized with a reasonable degree of certainty,” a court may “adjust the lodestar in
15 comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and
16 within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer*
17 *Privacy Cases*, 175 Cal.App.4th 545, 557 (2009). In doing so, “the court determines, retrospectively,
18 whether the litigation involved a contingent risk or required extraordinary legal skill justifying
19 augmentation of the unadorned lodestar in order to approximate the fair market for such services.” *Id.*
20 at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

21 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$116,666.66.
22 Based on a projected final lodestar of \$108,150, this yields a very small multiplier of 1.07 over the
23 \$116,666.66 fee request. *Gaines Decl.*, ¶ 45. The billing rates used to compute the lodestar are
24 reasonable in view of the evidence submitted herewith. *Gaines Decl.*, ¶¶ 32-45, **Exhibit D**.

25 Based thereon, and for the reasons discussed above (the significant risk in continuing to litigate
26 this matter and in seeking to obtain penalties based on the claims asserted; the risks and burden
27 involved in representation on a contingency basis; the knowledge and experience of Plaintiff’s
28 Counsel; and the value obtained by Plaintiff’s Counsel for the Aggrieved Employees, it is fair and

1 reasonable to account for these risks and compensate Plaintiff's Counsel with a fee award of one-third
2 of the Settlement Sum.

3 **E. Plaintiff's Counsel's Request for Costs is Reasonable**

4 In the course of this litigation, Plaintiff's Counsel will incur out-of-pocket costs of \$10,939.22.
5 Gaines Decl. at ¶ 40, **Exhibit E**.

6 As demonstrated in the Gaines Declaration submitted herewith, the incurred costs included
7 filing fees, mediation fees, photocopy charges, service of process fees, expert analysis fees, and
8 mailing charges. *Id.* Such costs are appropriate for cost reimbursement in these types of cases. *See*
9 *e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*,
10 Attorney Fee Awards, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* (W.D. Pa. 1987)
11 668 F. Supp. 450, 452.

12 The costs incurred by Plaintiff's Counsel in this litigation benefited Plaintiff, Aggrieved
13 Employees, and the State. In light of the litigation costs that Plaintiff's Counsel was required to incur
14 to prosecute this action, Plaintiff's cost request is reasonable and should be granted.

15 **V. THE GENERAL RELEASE PAYMENT SOUGHT BY PLAINTIFF IS**
16 **REASONABLE**

17 The Parties have agreed that Plaintiff Joann Torres will be paid a general release payment in
18 the amount of \$5,000. This payment is intended to both recognize the time and effort that Ms. Torres
19 spent on behalf of other Aggrieved Employees and the State and to compensate her for a full general
20 release of all claims. *See* Declaration of Joann Torres ("Torres Dec.") submitted herewith.

21 Case law supports the award of incentive payments in private attorney general actions. The
22 Ninth Circuit has recognized that a named Plaintiff's "willingness to act as a private attorney general"
23 may justify the award of an incentive payment. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948,
24 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub LLC*, no. 2:12-CV-02716-TLN-CKD
25 (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern District of California
26 approved a similar PAGA-only settlement and awarded a service payment to the representative
27 Plaintiff in recognition of her efforts.
28

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

8 Without Plaintiff’s efforts, there would be no recovery at all. The requested award is
9 appropriate to compensate Plaintiff for the risk and expense she incurred in conferring a benefit on
10 other of Defendant’s employees and the State of California in exchange for her broad release of
11 claims. See Settlement Agreement, at ¶ 5.02.

12 As a result of the named Plaintiff’s efforts, Aggrieved Employees will receive monetary
13 settlement payments, and the State of California will receive nearly \$160,000 to be put toward
14 education about and enforcement of California’s labor laws.

15 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
16 investigating and substantiating the claims alleged in this action, including multiple interviews with
17 counsel to review facts, documents, and Defendant’s policies; (2) assisted in the preparation of the
18 complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
19 settlement of this litigation. See generally, Torres Declaration. Moreover, as with any Plaintiff who
20 files a civil action, the named Plaintiff undertook the financial risk that, in the event of a judgment in
21 favor of Defendant in this action, she could have been personally responsible for any attorneys’ fees
22 and costs awarded in its favor.

23 The award of such a payment to the named Plaintiff is especially warranted in a case like this
24 one. It is necessary to ensure that employees, like Plaintiff, continue to bring claims like those brought
25 here to enforce the rights of employees. Individuals like the named Plaintiff (and most Aggrieved
26 Employees) would have little, if any, recourse without the representative action device. Most
27 Aggrieved Employees – like the named Plaintiff – would be fearful of retaliation in response to filing
28

1 any lawsuit, much less a representative action suit. Plaintiff must be commended for pursuing her
2 claims; a modest payment like that sought here is an appropriate means of doing so.

3 **VI. CONCLUSION**

4 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents
5 a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth
6 above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order and Judgment
7 Approving Settlement, do the following:

8 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
9 2699, subpart I;

10 2. Appoint ILYM Group, Inc. as the Settlement Administrator and approve its
11 administration fees up to \$5,000 for payment out of the Settlement Sum;

12 3. Approve the award of attorneys' fees and costs to Plaintiff's Counsel not to exceed
13 \$127,605.88, payment of which shall come from the Settlement Sum;

14 4. Approve the award of a general release payment to Plaintiff Joann Torres in the
15 amount of \$5,000 from the Settlement Sum;

16 5. Direct disbursement of the Settlement Sum to the LWDA and all Aggrieved
17 Employees as provided for in the Settlement Agreement;

18 6. Enter judgment in accordance with the Settlement Agreement; and

19 7. Dismiss the Action with prejudice.

20 Date: May 18, 2021

21 Respectfully submitted,

22 GAINES & GAINES, APLC

23
24 By: 

25 DANIEL F. GAINES
26 Attorneys for Plaintiff
27 JOANN TORRES
28

1 **PROOF OF SERVICE AND CERTIFICATION**

2 I am employed in the County of LOS ANGELES, State of California. I am over the age of 18 and not a party to
3 the within action; my business address is 27200 Agoura Road, Suite 101, Calabasas, CA 91301

4 _____ (For messenger) my business address is:

5 On May 18, 2021, I served the foregoing document described as NOTICE OF UNOPPOSED MOTION AND
6 MOTION FOR AN ORDER AND JUDGMENT APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT
7 TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004, AWARDING ATTORNEYS' FEES, COSTS,
8 GENERAL RELEASE PAYMENT, AND REIMBURSEMENT OF SETTLEMENT ADMINISTRATION EXPENSES,
9 AND DISMISSING ACTION WITH PREJUDICE; [PROPOSED] ORDER AND JUDGMENT on the interested parties
10 in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

James N. Knight, Esq. Law Offices of James N. Knight 100 Pacifica, Suite 370 Irvine, CA 92618 james@jnk-law.com	Joseph Tojarieh, Esq. TOJARIEH LAW FIRM, PC 10250 Constellation Blvd., Suite 100 Los Angeles, CA 90067 jft@tojariehlaw.com via e-mail only
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11
12 _____ (BY ☐ U.S. MAIL/ BY ☐ CERTIFIED MAIL, RETURN RECEIPT REQUESTED) The sealed envelope was
13 mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection
14 and processing correspondence for mailing. It is deposited with United States postal service on that same
15 day in the ordinary course of business. I am aware that on motion of party served, service is presumed
16 invalid if postal cancellation date or postage meter date is more that one day after date of deposit for
17 mailing in affidavit.

18 _____ (BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or
19 other facility regularly maintained by the express service carrier or delivered the sealed envelope to an
20 authorized carrier or driver authorized by the express carrier to receive documents.

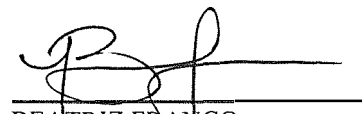
21 _____ (BY PERSONAL DELIVERY) By causing a true copy of the within document(s) to be personally hand-
22 delivered to the office(s) of the addressee(s) set forth above, on the date set forth above.

23 _____ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

24 ☒ (BY ELECTRONIC SERVICE) The above-stated document was submitted for service by electronic
25 transmission via email on the counsel of record listed above.

26 I declare under penalty of perjury that the foregoing is true and correct.

27 Executed on May 18, 2021, at Calabasas, California.

28 
BEATRIZ FRANCO