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pursuant to Labor Code § 2698 et seq.

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

11 JONATHAN MARTINEZ, on behalf of
12 himself and all "aggrieved employees"
pursuant to Labor Code § 2698 et seq.,

13 Plaintiffs,

14 v.

15 DEL RIO CARE, LLC, a California limited
16 liability company, dba CLOISTERS OF THE
VALLEY ASSISTED LIVING, and DOES 1
17 through 10, inclusive,

18 Defendants.

CASE NO: 37-2020-00043638-CU-OE-CTL

Assigned to Judge Ronald F. Frazier, Dept. C-65

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

Date: May 27, 2022

Time: 8:30 a.m.

Dept.: C-65

Complaint Filed: November 30, 2020

PLEASE TAKE NOTICE THAT on May 27, 2022, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department C-65 of the above-entitled Court, located at 330 W. Broadway, San Diego, CA, 92101, Plaintiff Jonathan Martinez will and hereby does move unopposed for an Order: (1) granting approval of the proposed settlement of claims brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) set forth in the parties' Joint Stipulation of PAGA Settlement ("Settlement Agreement"); (2) appointing ILYM Group, Inc. and approving payment of its fees not to exceed \$5,000 to be paid from the Total Monetary Settlement Amount; (3) directing disbursement of the Total Monetary Settlement Amount pursuant to the terms of the Settlement Agreement; and (4) directing payment of attorneys' fees and litigation costs from the Total Monetary Settlement Amount in the amount of \$9,746.37 to Plaintiff's counsel.

This motion will be based on this Notice, the supporting memorandum of points and authorities, the parties' Settlement Agreement, the Declaration of Daniel F. Gaines, Esq., the documents and records on file in this matter, and such additional arguments, authorities, and evidence and other matters as may be presented by the parties hereafter.

Date: February 2, 2022

Respectfully submitted,

GAINES & GAINES, APLC

By: *Daniel F. Gaines*

DANIEL F. GAINES
ALEX P. KATOFSKY
Attorneys for Plaintiff
JONATHAN MARTINEZ

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jonathan Martinez (“Plaintiff” or “Martinez”) and all Aggrieved Employees under
4 the Labor Code’s Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court
5 for an Order granting approval of the proposed Settlement Agreement of the above-captioned
6 lawsuit against Defendant Del Rio Care, LLC (“Defendant”). The proposed Settlement will dispose
7 of the Released Claims asserted on behalf of Plaintiff and approximately 199 Aggrieved Employees
8 (defined as all individuals who worked for Defendant in California in a non-exempt position
9 between September 15, 2019 and the date the Court approves the Settlement (the “Settlement
10 Period”)). Defendant represents that the total number of Aggrieved Employees is no more than 199
11 individuals who worked a total of approximately 2,023 pay periods between September 15, 2019
12 and January 22, 2022.

13 This case addresses claimed violations of employee protections embodied in the California
14 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
15 Defendant failed to properly compute non-base hourly wages earned by him and other Aggrieved
16 Employees into their regular rate of pay for purposes of paying them overtime at the correct rates,
17 in violation of Labor Code §§ 510, 558 and 1194; failed to pay premium wages to Plaintiff and
18 Aggrieved Employees who were denied rest periods, in violation of Labor Code §§ 226.7 and 558
19 and IWC Wage Order 5-2001; failed to pay premium wages to Plaintiff and Aggrieved Employees
20 who were denied meal periods, in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194 and
21 IWC Wage Order 5-2001; failed to provide Plaintiff and Aggrieved Employees with wage
22 statements that fully and accurately itemized the requirements set forth in Labor Code §§ 226(a)
23 and 226.3; and failed to timely pay Plaintiff and certain Aggrieved Employees all wages due at the
24 separation of their employment based on the time frames required by Labor Code §§ 201 and 202.
25 As a result of Defendant’s alleged violations of the Labor Code, approximately 199 employees are
26 claimed to have suffered Labor Code violations for up to 2,023 aggregate pay periods at the rate of
27 \$100 each based on PAGA’s penalty provisions. Defendant denies that any of the Aggrieved
28

1 Employees suffered any Labor Code violations and denies that Plaintiff or the Aggrieved
2 Employees are entitled to recover any civil penalties under PAGA.

3 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
4 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
5 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it:
6 (1) is the product of arms-length negotiations, (2) was negotiated by attorneys experienced in wage
7 and hour issues, (3) occurred subsequent to undertaking sufficient investigation necessary to
8 evaluate the relative strength and value of the PAGA claim, and (4) reflects a reasoned compromise
9 based directly on the relative strength and value of the PAGA claim, as well as the risks, expense,
10 complexity and likely duration of further litigation.

11 The value achieved by the Settlement may be gleaned from the fact that the Labor and
12 Workforce Development Agency (“LWDA”) and the approximately 199 Aggrieved Employees
13 encompassed by the Settlement will receive no less than \$10,250.63 under the terms of the
14 Settlement, which, pursuant to the operative statute, shall be allocated “75 percent to the Labor and
15 Workforce Development Agency . . . and 25 percent to the aggrieved employees.” *See Cal. Lab.*
16 *Code* § 2699(i). This is a reasonable recovery, not only because further litigation may have resulted
17 in a net-zero recovery based on the defenses available to Defendant, but because the amount secured
18 by Plaintiff is sizable and in line with similar settlements of these types of claims under PAGA. It
19 is also important to underscore that all penalty amounts paid to Aggrieved Employees will be an
20 unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA
21 penalties.

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

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

25 **A. The Parties**

26 Defendant operates an assisted living facility called Cloisters of the Valley in San Diego,
27 California. Gaines Decl. at ¶ 6.

28 Plaintiff worked as a non-exempt Medication Technician from April 2020 through July

2020. Plaintiff is acting as a representative plaintiff under the PAGA on behalf of himself and Aggrieved Employees. Gaines Decl. at ¶ 7.

B. The Claims Asserted

Plaintiff asserts claims that Defendant failed to properly compute non-base hourly wages earned by Plaintiff and other Aggrieved Employees into their regular rate of pay for purposes of paying them overtime at the correct rates, in violation of Labor Code §§ 510, 558 and 1194; failed to pay premium wages to Plaintiff and Aggrieved Employees who were denied rest periods, in violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 5-2001; failed to pay premium wages to Plaintiff and Aggrieved Employees who were denied meal periods, in violation of Labor Code §§ 226.7, 510, 512 and 1194 and IWC Wage Order 5-2001; failed to provide Plaintiff and Aggrieved Employees with wage statements that fully and accurately itemized the requirements set forth in Labor Code § 226(a) and 226.3; and failed to timely pay Plaintiff and certain Aggrieved Employees all wages due at the separation of their employment based on the time frames required by Labor Code §§ 201 and 202. Plaintiff asserts these claims under PAGA, seeking civil penalties for the alleged Labor Code violations. Gaines Decl. at ¶ 8.

C. Procedural Posture

Plaintiff exhausted the PAGA on or about September 15, 2020, when he submitted a letter by online submission to the LWDA and by certified mail to Defendant outlining the facts and theories underlying his claims. Gaines Decl. at ¶ 9; Exhibit B to the Gaines Decl. Plaintiff then filed his PAGA representative complaint on November 30, 2020 in the San Diego County Superior Court on behalf of himself and other Aggrieved Employees seeking penalties pursuant to PAGA for Defendant's violations of Labor Code §§ 201, 202, 226(a), 226.3, 226.7, 510, 512, 558 and 1194. On or about February 25, 2021, Defendant filed its Answer to Plaintiff's complaint. Gaines Decl., ¶ 10.

Concurrently with the filing of this Motion, Plaintiff submitted the Settlement Agreement, together with this Motion and all supporting documents, to the LWDA via online upload on February 2, 2022. Service of the LWDA is reflected on the Declaration of Service submitted herewith. Gaines Decl. at ¶ 11.

1 **D. Plaintiff's Counsel's Investigation**

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

5 Plaintiff's Counsel obtained and reviewed multiple documents, including (i) Plaintiff's
6 employee file and wage statements, (ii) policy documents relating to the employment of Plaintiff
7 and other Aggrieved Employees, and (iii) data relating to the number of alleged violations and the
8 value of the recoverable penalties. Gaines Decl. at ¶ 13.

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

16 Based on Plaintiff's Counsel's experience in litigating similar "representative" wage and
17 hour claims, the degree of investigation that was conducted, and the amount of data that was
18 obtained, was sufficient to determine the potential value of the PAGA claim, and to evaluate the
19 strength of this claim for purposes of settlement. Gaines Decl. at ¶ 15.

20 **E. Settlement Negotiations**

21 The Parties directly negotiated the settlement without the assistance of a mediator in the
22 interest of avoiding unnecessary costs that would have inevitably been borne from the Total
23 Monetary Settlement Amount and the Aggrieved Employees. Gaines Decl. at ¶ 16.

24 **F. The Proposed Settlement**

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

- 28 1. Defendant agrees to settle this matter for the payment of Twenty-Five Thousand

1 Dollars (\$25,000) (hereinafter the “Total Monetary Settlement Amount”), which shall be all
2 inclusive, encompassing (i) all payments to the Labor and Workforce Development Agency and
3 Aggrieved Employees, and (ii) any and all costs of third-party administration of the settlement, and
4 (iii) Plaintiff’s Counsel’s attorneys’ fees and costs of suit. *See* Settlement Agreement, at § A. 20.
5 Plaintiff and Defendant separately entered into a Confidential Individual Settlement Agreement
6 and Release whereby Defendant agreed to pay Plaintiff a modest sum in exchange for his general
7 release of all claims.

8 2. The total sum available for payment of PAGA penalties shall be calculated by
9 deducting \$9,746.37 for the payment of Plaintiff’s Counsel’s fees and costs (\$8,750 in fees and
10 \$996.37 in costs)¹ and the costs of administration (up to \$5,000) from the \$25,000 Total Monetary
11 Settlement Amount, yielding approximately \$10,253.63. Seventy-five percent (75%) of this
12 amount, or \$7,690.22, shall be distributed to the LWDA, and the remaining twenty-five percent
13 (25%) or \$2,563.41, shall be distributed to the Aggrieved Employees. *See* Settlement Agreement,
14 at § B. 2(a) – (b).

15 3. All Aggrieved Employees will receive a pro rata share of the \$2,563.41, which shall
16 be distributed based on the number of pay periods each Aggrieved Employee worked for Defendant
17 in a non-exempt position in California during the Settlement Period. *See* Gaines Decl., at ¶ 18;
18 Settlement Agreement, at § B. 6. Although these calculations will not be made until after approval,
19 a rough estimation of the value to the 199 individuals falling within the definition of “Aggrieved
20 Employee” may be gleaned from the fact that an equal division would provide about \$12.88 to each
21 Aggrieved Employee, net of payments to the LWDA, to the Settlement Administrator, attorney’s
22 fees and costs. The LWDA will be paid \$7,690.22. *See* Gaines Decl. at ¶ 19.

23 4. In exchange for the above settlement consideration, Defendant and the Released
24 Parties shall be entitled to the following release from each and every Aggrieved Employee,
25 including Plaintiff²:

26 ¹ Plaintiff’s counsel’s formal fee request is 35% of the Gross Settlement Amount plus costs of
27 \$996.37 combined, as discussed herein and set forth in **Exhibit E** to the Gaines Declaration.

28 ² This comports with settled California Supreme Court authority. *See Arias v. Superior Court*

1 Subject to the occurrence of the Effective Date and conditioned upon
2 Defendant's full payment of the Total Monetary Settlement Amount,
3 Plaintiff and the Aggrieved Employees hereby release the Released
4 Parties (Defendant Del Rio Care, LLC dba Cloisters of the Valley
5 Assisted Living, and all of its past, present or future parent entities,
6 and all of Defendant's partners, subsidiaries, affiliates, divisions, its
7 employee benefit and/or pension plans or funds, executors,
8 predecessors, successors and assigns and all of its past, present or
9 future directors, officers, managers, members, shareholders,
10 principals, attorneys, agents, trustees, administrators,
11 representatives, insurers, fiduciaries, employees, or assigns.) of the
12 Released Claims (all claims for penalties under the PAGA, including
costs and attorneys' fees related thereto, predicated on claims alleged
or which could have been alleged based on the facts as alleged in the
operative Complaint in the Action and/or the LWDA Letter,
including but not limited to the alleged failure to provide all overtime
wages, failure to provide meal breaks and rest breaks, failure to
provide complete and accurate wage statements, and failure to timely
pay wages upon separation of employment, that accrued during the
Settlement Period during employment in a non-exempt position in
California.).

13 See Settlement Agreement, at § B. 20.

14 5. Settlement administration, which is to be paid from the Total Monetary Settlement
15 Amount, will not exceed \$5,000. See Settlement Agreement, at § B. 11. ILYM Group, Inc., a
16 reputable settlement administration company, has agreed to administer the settlement for this
17 amount.

18 6. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
19 litigation costs of a combined \$9,746.37. *See* Settlement Agreement, at § B. 2(c) – (d).

20 7. Finally, under the terms of Settlement, funds represented by settlement checks
21 returned as undeliverable and those settlement checks remaining un-cashed for more than 180
22 days after issuance will be void and all residue from unclaimed funds shall be directed to Legal
23 Aid Society of San Diego. *See* Settlement Agreement, at § B. 7.

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25
26 (2009) 46 Cal. 4th 969, 986 (concluding that “with respect to the recovery of civil penalties,
27 nonparty employees as well as the government are bound by the judgment in an action brought
28 under the act . . .”).

III. LEGAL ARGUMENT

A. Standards for Approval of A PAGA Settlement

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

As with any settlement, the Court must be mindful in conducting its inquiry that “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of absolutes and an abandoning of highest hopes’” [*Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *See id.*

Although the operative PAGA statute does not set forth the criteria on which a PAGA settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a class action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. § 382 and Rule 3.769, Cal. Rules of Court, as courts within California have approved settlements of PAGA claims encompassed within class action settlements using Rule 23 criteria.³ However, it is important to underscore that not all Rule 23 factors can be applied, as “a PAGA claim asserted on a non-class

³ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a balancing of several factors which may include, among others, some or all of the following: [1] the strength of Plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views 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 representative basis . . . is not considered a class action but a law enforcement action, and therefore
2 does not have to meet the requirements of Rule 23.” See *Casida v. Sears Holdings Corp.*, 2012
3 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan. 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011
4 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2, 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
5 LEXIS 66454 (E.D. Cal. June 30, 2010). Based thereon, a court’s review of a PAGA settlement
6 necessarily implicates the following unique features that render the approval process completely
7 distinct from approval of a class action settlement under Rule 23 or C.C.P. § 382 and Rule 3.769,
8 Cal. Rules of Court.

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

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

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

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

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

26 In conducting a review of a settlement, it is generally recognized that an “agreement . . .
27 reached through arms-length negotiation between experienced parties . . . is entitled to a
28 presumption of fairness.” See *Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,

1 44 (C.D. Cal. Apr. 12, 2010).

2 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
3 length negotiations brokered through Counsel with significant experience in similar wage and hour
4 litigation [Gaines Decl. at ¶¶ 2-5 and **Exhibit A**], (2) which occurred after Counsel had conducted
5 sufficient investigation to evaluate the strength and potential value of the PAGA claims, as well as
6 evaluating the risks of litigating this claim through trial. *See id.*, at ¶ 12-15. Based thereon, the
7 court should give considerable weight to the competency and integrity of counsel in assuring itself
8 that the Settlement Agreement represents an arm's-length transaction entered without self-dealing
9 or other potential misconduct.

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

12 The relative strength of the PAGA claims brought by Plaintiff weighs in favor of the Court
13 finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous
14 defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the
15 potential to completely eliminate any recovery.

16 This case addresses alleged violations of important employee protections embodied in the
17 California Labor Code – namely, that Defendant failed to properly compute non-base hourly wages
18 earned by Plaintiff and other Aggrieved Employees into their regular rate of pay for purposes of
19 paying them overtime at the correct rates, in violation of Labor Code §§ 510, 558 and 1194; failed
20 to pay premium wages to Plaintiff and Aggrieved Employees who were denied rest periods, in
21 violation of Labor Code §§ 226.7 and 558 and IWC Wage Order 5-2001; failed to pay premium
22 wages to Plaintiff and Aggrieved Employees who were denied meal periods, in violation of Labor
23 Code §§ 226.7, 510, 512 and 1194 and IWC Wage Order 5-2001; failed to provide Plaintiff and
24 Aggrieved Employees with wage statements that fully and accurately itemized the requirements set
25 forth in Labor Code § 226(a) and 226.3; and failed to timely pay Plaintiff and certain Aggrieved
26 Employees all wages due at the separation of their employment based on the time frames required
27 by Labor Code §§ 201 and 202. Defendant's maximum theoretical exposure in this action, without
28 stacking potentially duplicative and oppressive penalties, totals approximately \$202,300 computed

1 by multiplying 2,023 pay periods by \$100 each. *See* Gaines Decl., ¶ 20.

2 Plaintiff's strongest claim was his allegation that Defendant failed to properly compute shift
3 differential wages and other non-base hourly wages into the regular rate of pay for purposes of
4 calculating the proper overtime rate. Plaintiff and Aggrieved Employees earned an additional
5 COVID-19 wage during the pandemic, but Defendant did not factor these shift differential wages
6 into Plaintiff's and Aggrieved Employees' regular rate of pay when calculating their overtime rate.
7 This claim, however, only affected approximately 9% of the applicable pay periods (195 out of a
8 total 2,023 pay periods at issue exhibited this violation). A compromise was required to resolve this
9 claim at this juncture of the litigation. *See* Gaines Decl., ¶ 21.

10 As to Plaintiff's remaining non-derivative claims for failing to provide legally compliant
11 meal and rest periods, after an exchange of formal and informal discovery, Plaintiff discovered that
12 these claims lacked the strength of Plaintiff's unpaid wage claim due to Defendant's compliant
13 policies. *See* Gaines Decl., ¶ 22.

14 Defendant contends it acted within the requirements of California law at all times as to all
15 Aggrieved Employees. It further contends that not every pay period at issue involved an alleged
16 Labor Code violation subject to civil penalties. Moreover, it maintained that even if the Court did
17 award penalties, the Court could and would *substantially* reduce the penalties awarded based on
18 the discretionary factors contained in Labor Code § 2699(e)(2) ("In action by an aggrieved
19 employee . . . , a court may award a lesser amount than the maximum civil penalty amount specified
20 by this part if, based on the facts and circumstances of the particular case, to do otherwise would
21 result in an award that is unjust, arbitrary and oppressive, or confiscatory."). *See* Gaines Decl., ¶
22 23.

23 Based on these disputes, which had the potential to completely eliminate Plaintiff's
24 recovery, the range of realistic "litigation outcomes" on the Plaintiff's PAGA claim was defined
25 by a "maximum possible liability" amount of approximately \$202,300 based on 2,023 pay periods
26 in the Settlement Period, without stacking claims, at \$100 per violation [Gaines Decl., ¶ 24], and a
27 net-zero recovery based on the defenses asserted by Defendant. *Id.* Notwithstanding the existence
28 of such issues, the Settlement achieves a significant benefit. Because Plaintiff's strongest claim,

1 unpaid wages, only affected 195 of the 2,023 pay periods in the Settlement Period and Plaintiff's
2 other remaining non-derivative claims were not as strong as Plaintiff's unpaid wages claim,
3 Plaintiff's Counsel determined after formal and informal discovery that the "maximum possible
4 liability" did not reflect the amount of actual liability. As such, these factors weighed very heavily
5 in favor of resolution by way of the compromise set forth in the Settlement. *Id.*

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

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

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

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

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

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

27 \\\

1 Here, after all deductions are made for administration, attorneys' fees and costs, \$10,250.63
2 will be paid out, of which \$7,690.22 (i.e. 75%) will be paid to the LWDA, and \$2,563.41 (i.e. 25%)
3 will be paid to the Aggrieved Employees, as required by Labor Code § 2699(i) ("civil penalties
4 recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and
5 Workforce Development Agency . . . and 25 percent to the aggrieved employees."). Gaines Decl.,
6 ¶¶ 18-19.

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

25 _____
26 ⁴ Significantly, each of the above-cited actions involved substantially more "aggrieved employees"
27 than the approximately 199 aggrieved employees in the instant Lawsuit. *See Franco*, 2012 U.S.
28 Dist. 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

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

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

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

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

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

15 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
16 litigation. *See* Gaines Decl., ¶¶ 2-5; **Exhibit A**. In Plaintiff’s Counsel’s view, the benefit conferred
17 by the proposed Settlement is fair, reasonable, and adequate under the circumstances, as it reflects
18 a reasoned compromise which takes into consideration the risks inherent in this case which had the
19 potential to completely eliminate recovery. *Gaines Decl.*, ¶¶ 20-24. As such, this factor balances
20 in favor of approval of the Settlement.

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

22 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
23 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration
24 is “whether ‘the parties have sufficient information to make an informed decision about
25

26
27 U.S. Dist. LEXIS 80776, 16 (“3,327 California Class members were ultimately identified”); *Gong-
28 Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051 California Class Members were ultimately
identified”).

1 settlement.” See *Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
2 26 (C.D. Cal. Nov. 9, 2011).

3 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
4 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
5 ¶¶ 12-16. As discussed above, Plaintiff’s Counsel’s investigation was sufficient to, among other
6 things, tabulate with precision the total number of alleged Labor Code violations at issue during
7 the Settlement Period and identify the total number of individuals falling within the definition of
8 “Aggrieved Employee” for the Settlement Period.

9 Based on Plaintiff’s Counsel’s experience litigating wage and hour claims, such
10 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
11 the strength of this claim for purposes of settlement. See Gaines Decl., ¶¶ 23-24.

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

14 In addition to the factors presented above, the proposed Settlement does not possess any
15 obvious deficiencies. The Settlement contemplates entry of an order (submitted concurrently
16 herewith) which approves the Settlement and provides for the dismissal of the Action with prejudice
17 following Defendant’s payment of the Total Monetary Settlement Amount. In sum, under the
18 applicable standards for approval of PAGA settlements in California, the settlement in this case
19 meets the standards for approval.

20 **IV. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER THEIR**
21 **REASONABLE FEES AND COSTS**

22 Pursuant to the terms of the Settlement, Plaintiff’s Counsel seeks attorneys’ fees of \$8,750
23 and reimbursement of total litigation costs of \$996.37, falling within the bounds authorized by the
24 Settlement Agreement. See Settlement Agreement, at § B. 2(c) – (d). Plaintiff’s Counsel’s
25 entitlement to an award of attorneys’ fees and costs is warranted on multiple independent grounds.
26 Further, the amount of fees requested falls well within the range of reasonableness under applicable
27 standards, as the amount requested constitutes a “percentage of the fund” deemed reasonable in
28 similar wage and hour settlements of this size and approved by California courts, which is not only

1 warranted based on the contingency risk Plaintiff's Counsel has agreed to incur for the benefit of
2 the State of California and Aggrieved Employees, but also based on the significant results achieved,
3 as the Settlement obtains a recovery substantially above the range approved as reasonable by
4 California state and federal courts. Based thereon, Plaintiff's Counsel respectfully request that the
5 Court enter an order approving the fee and cost amounts requested.

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

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

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

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

27 Where the lawsuit results in the recovery of a fund or property
28 benefiting others as well as Plaintiffs (e.g., a class action), the court

1 has inherent equitable power to order Plaintiffs' attorney fees paid
2 out of the common fund or property [citations]. Such fee spreading
3 assures that all of those benefited by the litigation pay their fair share
4 of obtaining the recovery.

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

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

12 It is not necessary to find this suit a proper class action in order to
13 uphold the portion of the judgment awarding counsel for Plaintiffs
14 25 percent of all retroactive salaries and wages received. That award
15 may be sustained under the rule that a litigant who creates a fund in
16 which others enjoy beneficial rights may require those beneficiaries
17 to pay their fair share of the expense of litigation. (See *Sprague v.*
18 *Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer*
19 (1959) 53 Cal.2d 124, 132).

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

27 Numerous appellate courts have similarly found. See e.g., *Knoff v. City and County of San*
28 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of
attorneys' fees in a representative action as the proper exercise of the court's broad equitable
powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
Bank of America v. Cory (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit

1 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
2 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
3 of residential property in an inverse condemnation action).

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

10 Thus, as Plaintiff’s Counsel have expended a significant amount of time and money to
11 secure a \$10,250.63 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S.
12 Dist. LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees
13 have resulted in the preservation or recovery of a certain or easily calculable sum of money-out of
14 which sum or ‘fund’ the fees are to be paid.”)], and in doing so, have exclusively borne the risk of
15 loss for such expenditures of time and expenses (as the LWDA elected not to take the case after
16 receiving the PAGA Notice), Plaintiff’s Counsel are entitled to claim reasonable fees from that
17 fund under applicable precedent.⁵

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

19 In addition to the forgoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount
20 of \$8,750, or 35% of the \$25,000 Total Monetary Settlement Amount, falls well within the “zone
21 of reasonableness.”

22 _____
23 ⁵ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
24 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
25 entitled to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the
26 instant PAGA action was by definition “for the public benefit” and secured monetary awards for
27 approximately 188 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
28 (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 It is important to highlight at the outset that the fee amount presently sought is not
2 extraordinary, but actually falls at the “average” fee deemed reasonable under California State court
3 authority, as it is recognized that “courts may award attorney’s fees in the 30-40% range in wage
4 and hour class actions that result in recovery of a common fund under \$10 million.” *See e.g. Martin*
5 *v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). In fact, this fee
6 request is at the lower end of that range.

7 Moreover, taking into account the contingency risk Plaintiff’s Counsel agreed to incur for
8 the benefit of the State of California (which elected not to take the case after receiving the PAGA
9 Notice), and the significant results achieved – facts which justify the requested fee – Plaintiff’s
10 Counsel’s requested fee is reasonable under all applicable standards.

11 **C. The Fee Amount Allocated by The Settlement Agreement Is Within the**
12 **Zone of Reasonableness Under the “Percentage of the Fund” Method**

13 The amount of fees requested by Plaintiff’s Counsel is also reasonable based on standards
14 applicable to the “percentage of the fund” method. “When assessing whether the percentage
15 requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of
16 litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the
17 financial burden; and (f) the awards made in similar cases.” *See Vasquez v. Coast Valley Roofing,*
18 *Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

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

24 Second, such results were achieved in the face of significant risks. As explained above,
25 Defendant maintained defenses to Plaintiff’s PAGA claims that very well could have resulted in a
26 net-zero recovery at trial. Gaines Decl. at ¶ 24.

27 Third, notwithstanding this risk of loss, Plaintiff’s Counsel undertook representation of the
28 instant PAGA claim for the benefit of the State of California on a contingency basis. Gaines Decl.

1 at ¶ 27. This not only required Plaintiff's Counsel to personally assume the risk of nonpayment in
2 securing the very substantial financial benefit the State of California stands to receive, but
3 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors warranting fee
4 enhancement under applicable California Supreme Court authority:

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

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

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

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

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

The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.* (2016) 1
Cal.5th 480, 506, that "[t]he percentage of fund method survives in California class action cases."

Specifically, the *Laffitte* Court held:

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—convince us the percentage method is a valuable tool that should not be denied our trial courts.

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

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

Here, Plaintiff’s Counsel’s fee request of \$8,750 (35% of the Total Monetary Settlement Amount) is fair and reasonable based on a percentage of the recovery, and as well as when confirmed

1 with a lodestar cross-check. First, “regardless whether the percentage method or the lodestar
2 method is used, fee awards in class actions average around one-third of the recovery.” *Chavez v.*
3 *Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008). This is also consistent with Class Counsel’s
4 experience in similar wage and hour class action matters. Gaines Decl. at ¶¶2-5. Thus, the
5 percentage sought by Plaintiff’s Counsel here is reasonable.

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

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

26 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$8,750. Based
27 on a projected final lodestar of \$35,302.50, this yields a negative multiplier of 0.25 under the \$8,750
28 fee request. Gaines Decl. at ¶ 28. The billing rates used to compute the lodestar are reasonable in

1 view of the evidence submitted herewith. Gaines Decl. at ¶¶ 29-32; **Exhibit D** to Gaines Decl.

2 Based thereon, and for the reasons discussed above (the significant risk in continuing to
3 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
4 burden involved in representation on a contingency basis; the knowledge and experience of
5 Plaintiff's Counsel; and the value obtained by Plaintiff's Counsel for the Aggrieved Employees), it
6 is fair and reasonable to account for these risks and compensate Plaintiff's Counsel with a fee award
7 from the Total Monetary Settlement Amount.

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

9 In the course of this litigation, Plaintiff's Counsel collectively incurred out-of-pocket costs
10 of \$996.37 through the conclusion of this matter. See Gaines Decl. at ¶ 36, **Exhibit E**.

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

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

20 **V. CONCLUSION**

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

25 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
26 2699, subpart 1;

27 2. Appoint ILYM Group, Inc. as the Settlement Administrator and approve its
28 administration fees up to \$5,000 for payment out of the Total Monetary Settlement Amount;

1 3. Approve the award of attorneys' fees and costs to Plaintiff's Counsel in the amount
2 of \$9,746.7 payment of which shall come from the Total Monetary Settlement Amount; and

3 4. Direct disbursement of the remaining Total Monetary Settlement Amount to the
4 LWDA and all Aggrieved Employees as provided for in the Settlement Agreement.

5 When the Total Monetary Settlement Amount has been funded by Defendant, Plaintiff shall
6 file a request for dismissal of this Action with prejudice. This is expected to occur within 30 days
7 of the entry the order approving the Settlement.

8 Date: February 2, 2022

Respectfully submitted,

9 GAINES & GAINES, APLC

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11 By: *Daniel F. Gaines*

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