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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ORANGE, CIVIL COMPLEX CENTER**
12

13 HEATHER GREEN, in her representative
14 capacity, on behalf of all aggrieved
15 employees,

16 Plaintiff,

17 vs.

18 NEUINTEL, LLC, A California Limited
19 Liability Company, dba PRICESPIDER;
20 and DOES 1 through 50, inclusive,

21 Defendants.

Case No. 30-2020-01172202-CU-OE-CXC

22 **AMENDED MEMORANDUM OF POINTS**
23 **AND AUTHORITIES IN SUPPORT OF**
24 **MOTION FOR COURT APPROVAL OF**
25 **THE SETTLEMENT OF THE**
26 **CALIFORNIA LABOR CODE SECTION**
27 **2699 *ET SEQ.*, PRIVATE ATTORNEYS**
28 **GENERAL ACT (PAGA), CLAIM**

DATE: July 1, 2022
TIME: 10:00AM
DEPT: CX-105
JUDGE: Randall J. Sherman

RES ID: 73713103

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1 **I. INTRODUCTION**

2 Heather Green (“Plaintiff”) is a former staff accountant of Defendant Neuintel, LLC, dba
3 PriceSpider. (“Defendant”) and hereby submits this Motion for Approval of the Private
4 Attorneys General Act (“PAGA”) Settlement reached in this action. The action (in addition to
5 other claims) alleges a cause of action for civil penalties on behalf of the state of California
6 and “aggrieved employees” under the PAGA for failure to: (1) timely pay wages during
7 employment; (2) failure to pay all wages due at the time of termination of employment; (3)
8 failure to provide compliant meal breaks; (4) failure to provide compliant rest breaks; (5) failure
9 to provide accurate itemized wage statements; (6) failure to reimburse business expenses
10 necessarily incurred by employees; (7) failure to pay overtime wages for all over hours worked
11 (based on misclassification as exempt); and (8) failure to maintain accurate payroll records.
12 Plaintiffs are “aggrieved employees” as they allege they suffered the claimed violations within
13 the PAGA period. The Gross Settlement Fund is \$25,000.00. (Lind Declaration in Support of
14 Motion (“Lind Decl.”), ¶26.) After deduction of attorney’s fees (\$8,592.00) and costs
15 (\$3,520.00), the remaining amount is the PAGA Payment, to be allocated as detailed below. (*Id.*,
16 ¶26.)

17 **II. PROCEDURAL HISTORY AND PROPOSED SETTLEMENT**

18 On September 9, 2020, Plaintiffs gave notice to the Labor and Workforce Development
19 Agency (“LWDA”) and Defendant, as required by Cal. Labor Code § 2699.3(a)(1), of their
20 intent to pursue PAGA penalties and the basis of the violations alleged. (*Id.*, ¶¶ 5-7 and Exh. A).
21 On November 25, 2020, Plaintiff filed a lawsuit that asserted several violations of the PAGA.
22 (*Id.*, ¶¶ 8-9.)

23 Plaintiff immediately propounded Special Interrogatories and Requests for Production
24 on January 7, 2020. (*Id.*, ¶ 11). Three months later, Defendant propounded its own set of
25 Requests for Production and a deposition notice seeking to conduct Plaintiff’s deposition. (*Id.*,
26 ¶ 12). Plaintiff was required to produce her own information in response to Defendant’s Request
27 for Production of Documents, Set No. One (Request Nos. 1 through 23) and deposition notice
28

1 for the Plaintiff's testimony. (*Id.*, ¶ 16) Plaintiff received responses to her first set of
2 Interrogatories/Requests, then propounded another set of Special Interrogatories on August 11,
3 2021, at which point parties agreed to informally exchange the remaining key
4 documents/information and mediate the matter. (*Id.*, ¶ 13).

5 Over the course of the litigation, Defendant produced extensive information related to
6 the PAGA claims including 1) the estimated number of aggrieved employees in the PAGA
7 period, including pay periods worked; 2) Plaintiff's time and wage records; 3) Plaintiff's
8 personnel file; 4) Defendant's employee handbook which contained relevant wage and hour,
9 meal and rest break and timekeeping policies; and (5) Job descriptions of each position within
10 the company pertaining to California-based employees (*Id.*, ¶ 14). Plaintiff's counsel analyzed
11 the records to determine the potential exposure and interviewed witnesses, including two former
12 employees of Defendant who are potential members of the group of aggrieved employees. (*Id.*,
13 ¶ 15).

14 Plaintiff learned there were a total of 14 employees who were employed during the
15 PAGA period who met the definition of "aggrieved employee" in the settlement agreement, with
16 between 4 to 10 on average receiving itemized wage statements in a pay period. (*Id.*, ¶ 17).
17 Plaintiffs calculated the **maximum** PAGA penalties they could obtain if (i) Plaintiffs prevailed
18 on **each** PAGA claim and (ii) **each** aggrieved employee had experienced **all** violations within
19 **each** pay period over the PAGA period is \$257,700. (*Id.*, ¶ 18).

20 On November 10, 2021, the Parties mediated with JJ Johnston, an experienced mediator
21 who specializes in mediating complex employment matters. (*Id.*, ¶ 23). The parties then
22 executed a short-form Memorandum of Understanding at the end of the mediation. (*Id.*, ¶ 23)
23 Following mediation, the Parties negotiated the attached long-form Settlement Agreement and
24 General Release (the "Settlement Agreement"), signed by Defendant on December 23, 2021 and
25 its counsel on December 29, 2021. (*Id.*, ¶ 24 and Exh. B.)

26 Plaintiffs now respectfully move the Court for an Order granting final approval of the
27 gross settlement amount of the PAGA Claim (\$25,000.00), which includes the following
28

components: (a) \$8,592.00 (40%) in attorney’s fees; (b) \$3,520.00 in costs; (c) \$3,222.00, or 25% of the remainder to be paid to aggrieved employees as civil penalties; and (d) \$9,666.00, or 75% of the remainder to be paid to the LWDA as PAGA penalties. (*Id.*, ¶ 26).

III. LEGAL ARGUMENT

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

The settlement of a PAGA claim requires court approval, though the statute is silent on what courts must consider when approving a PAGA settlement. Cal. Lab. 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.” *In re TD Ameritrade Account Holder Litig.* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 103222, 24. Indeed, “the very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes’”. *Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d 615, 624 (internal citations omitted). It is “the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *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.” *Id.* (emphasis in original).

As a PAGA representative action is a type of *qui tam* action, the best practice is to look to the standards used in evaluating a *qui tam* settlement, which is that the settlement is fair, adequate, and reasonable. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, 382; Cal. Gov’t Code § 12652(e). A reviewing court may utilize some of the factors for review of a class action settlement under Fed. R. Civ. P. 23 (“Rule 23”), Cal. Civ. Proc. § 382 and Cal. Rules of Court 3.769. However, not all Rule 23 factors can be applied, as “a PAGA claim asserted on a non-class representative basis... is not considered a class action but a law enforcement action, and therefore it does not have to meet the requirements of Rule 23.” *Casida v. Sears Holdings Corp.* (E.D. Cal. 2012) 2012 U.S. Dist. LEXIS 9302, 8; *see also Mendez v. Tween Brands, Inc.* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 66454. A court’s review of a PAGA

1 settlement necessarily implicates unique features that render the approval process distinct from
2 approval of a class action settlement. In evaluating the adequacy of the settlement amount, the
3 Court's focus is not concerned with the amount which aggrieved employees are to receive, but
4 rather, must focus on the total settlement amount in achieving PAGA's objective.

5 While "a PAGA action is... designed to protect the public and penalize the employer for
6 past illegal conduct" and not to provide restitution to employees for damages [see *Mendez*, 2010
7 U.S. Dist. LEXIS 66454, at 11] a reviewing Court must consider the fact that settlement of a
8 PAGA claim, like any settlement, involves compromise that stops short of rendering findings of
9 liability and damages. The Court must not lose sight of the fact that "[u]nlike a class action
10 seeking damages or injunctive relief for injured employees, the purpose of PAGA is to
11 incentivize private parties to recover civil relief for injured employees, the purpose of PAGA is
12 to incentivize private parties to recover civil penalties for the government that may not have
13 been assessed and collected by overburdened state enforcement agencies." *Ochoa-Hernandez v.*
14 *CJADERS Foods, Inc.* (N.D. Cal. 2010) 2010 U.S. Dist. LEXIS 32774, at 12.

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

16 Applying the Rule 23 factors – compatible with the unique PAGA considerations
17 detailed above – the Settlement is fair, reasonable, and adequate.

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

19 An agreement reached through arms-length negotiation between experienced parties is
20 entitled to a presumption of fairness. *Anderson v. Nextel Retail Stores, LLC* (C.D. Cal. 2010)
21 2010 U.S. Dist. LEXIS 43377, 44. A presumption of fairness exists here as the Settlement is
22 the product of arms-length negotiations brokered through an experienced and respected third
23 party neutral [see Lind Decl., ¶24], was negotiated by counsel with significant experience in
24 wage and hour and employment litigation [*Id.*, ¶¶ 32-34], and occurred after counsel had
25 conducted sufficient investigation to evaluate the strength and potential value of the PAGA
26 claims and risks of litigating through trial. [*Id.*, ¶¶ 11-23.] Some of those risks included:

- 27 • **Cumulative Nature of Penalties and Court's Discretion to Reduce Penalties:**

Defendant contends an important feature of PAGA is that the court can exercise the same discretion that the LWDA has and may reduce the penalties to be assessed against the employer pursuant to Cal. Labor Code § 2699(e)(1)-(2). As such, Defendant contends the court is unlikely to assess cumulative penalties for the maximum number of possible, separate Labor Code violations, because it would be unjust, arbitrary, oppressive, and/or confiscatory, especially where certain conduct may be regulated by multiple provisions of the California Labor Code that are interrelated and work in tandem.

- **Legally Compliant Policies:** Defendant maintains that it had legally compliant employment policies and practices throughout the statutory PAGA Period.

- **Lack of Willfulness:** Defendant contends that it would be able to show a lack of intent in the violations, such that the alleged Labor Code violations are not “willful”.

- **Manageability of PAGA Claim:** Defendant contends that individualized issues vitiated the manageability of representative adjudication of PAGA penalties, as each of the employees within the select departments of aggrieved employees were engaged in exempt duties over 50% of the time, going against the thrust of the Plaintiff’s claims. (Lind Decl. at ¶¶ 20-23.)

Based thereon, the court should give considerable weight to the competency and integrity of counsel in assuring itself that the Settlement Agreement represents an arms-length transaction entered without self-dealing or other potential misconduct.

2. The Realistic Range of Outcomes Favors Approval of the Settlement

The relative strength of the PAGA claims brought by Plaintiff and the small size of the aggrieved employee population weighs in favor of the Court finding that the Settlement is fair, adequate and reasonable, as Defendant maintained numerous defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the potential to eliminate any recovery. This case addresses violations of important employee protections embodied in the California Labor Code, detailed as follows:

- **Meal Periods:** Plaintiff alleged that she and other aggrieved employees had meal periods that were short or late or non-existent and that they were required to work through some of the

1 meal periods in violation of California law. Plaintiff acknowledges that Defendant's policies
2 (articulated in an employee handbook) did inform employees as to when their meal period could
3 or should be taken. (See Lind Decl. at ¶14.) Because Plaintiff alleged that she as well as the other
4 aggrieved employees were misclassified as exempt, there were no records to reflect that the
5 aggrieved employees were not provided legally compliant meal periods on a regular basis. This
6 made prosecution of this claim difficult for lack of documentation and need to take a multiplicity
7 of depositions.

8 Defendants claimed they met the requirements of the law based on the compliant handbook
9 meal period policy that provides employees with meal periods and that it did not prevent the
10 aggrieved employees from taking them. They also contend other employees will dispute that they
11 were forced to work through meal period, take late or short meal periods or that they could not take
12 a meal period until after the 5th hour of their shift. Plaintiffs discounted the PAGA penalty that
13 Plaintiffs could pursue from \$17,850 to about \$8,211, approximately 54%.

14 **Rest Breaks:** For rest breaks, Plaintiff alleged in her Complaint that she and the other
15 Aggrieved Employees were required to work through them. Defendant contends that it authorized
16 and permitted employees to take these breaks (per the employee handbook) and did not force
17 employees to work through their rest breaks. As rest breaks are not recorded and thus there are no
18 records to indicate when and whether a compliant rest break was taken, Plaintiff discounted the
19 maximum PAGA penalty they could pursue from \$17,850 to about \$8,211, approximately 54%.

20 **Non-Payment of Overtime Compensation:** Plaintiff also alleged that she and other
21 employees were regularly required to work over eight hours in a day or 40 in a week. Defendant
22 denied that employees were misclassified as exempt and consequently complied with all overtime
23 requirements. Defendant also took the position that Aggrieved Employees didn't work overtime.
24 Plaintiffs estimate that the maximum PAGA penalty for this claim would be \$17,850. Because
25 there are no time records of employees working overtime, and given Defendant's defenses to this
26 claim, Plaintiffs discounted the PAGA penalty that Plaintiffs could pursue from \$17,850 to about
27 \$8,211, approximately 54%.

28 **Non-Payment of All Wages Due at Termination:** Plaintiff claims that she and other
aggrieved employees were not receiving overtime for all hours worked and, therefore, at the time

1 of termination for those aggrieved employees whose employment was terminated during the PAGA
2 period, they were not paid all wages at termination. The maximum PAGA penalty recoverable
3 based on the actual number of such employees (which is 8) is \$800 (100 x 8). No discount was
4 applied to this number.

5 **Itemized Wage Statement Violations:** Plaintiff claims that because she did not receive
6 all wages due during regular pay periods – to the extent that she and other aggrieved employees
7 did not receive proper overtime compensation because they were misclassified as exempt – their
8 itemized wage statements were inaccurate. Defendant contended that employees were in fact
9 properly classified as exempt and not entitled to overtime compensation and that, in any case, any
10 overtime hours worked not listed on the itemized wage statements was not intentional and,
11 therefore, not a violation of Cal. Labor Code § 226. Based on the claim and defenses presented,
12 Plaintiff significantly discounted the maximum PAGA penalty that Plaintiffs could pursue as to
13 this claim from \$89,250 to about \$40,162.50, approximately 55%.

14 **Payroll Records:** Plaintiff claimed that because employees were working overtime not
15 reflected on the aggrieved employees' paystubs, Defendant failed to keep accurate payroll records,
16 for which the maximum penalty is \$500 per employee or \$7,000. Plaintiff applied a 78% discount
17 from this maximum penalty and re-calculated the PAGA penalty associated with this claim to be
18 \$1,540.

19 **Expense Reimbursement:** Plaintiff complained that she and the aggrieved employees did
20 not receive reimbursement for all necessary expenditures they incurred in the performance of their
21 job duties. Defendant claims that its employees were provided all tools and equipment needed to
22 perform their job duties and were reimbursed for business expenses, including mileage. Plaintiff
23 discounted the maximum PAGA penalty that Plaintiffs could pursue as to this claim from \$35,700
24 to \$16,422, approximately 46%.

25 **Timely Pay Wages During Employment:** This is a derivative claim which is based on
26 the allegation that by not paying for overtime work during the pay period in which it was worked,
27 Defendant violated Cal. Labor Code § 204. Plaintiff applied to same discount of 46%, reducing
28 the maximum PAGA penalty that Plaintiffs could pursue from \$35,700 to \$16,422.

The above numbers do not consider all risks, including the risk of a reduction in penalties awarded based on the court's discretion to do so (which Defendant would contend should be done), claims that penalties cannot be stacked, and that manageability prevents the claims to proceed on a representative basis. Accordingly, at mediation, Plaintiff applied a further discount of the above amounts, assuming for settlement purposes that Plaintiffs had at least a 25% chance of prevailing on all PAGA claims. The following table demonstrates the calculation:

PAGA Claim	PAGA Formula	Maximum PAGA Penalty	Initial Discount	Discounted Amount	New Amount
Failure to Provide Meal Periods	\$50 per employee/pay period	\$ 17,850.00	54%	\$ 9,639.00	\$ 8,211.00
Failure to Provide Rest Periods	\$50 per employee/pay period	\$ 17,850.00	54%	\$ 9,639.00	\$ 8,211.00
Failure to Pay Overtime	\$50 per employee/pay period	\$ 17,850.00	54%	\$ 9,639.00	\$ 8,211.00
Failure to Pay All Wages at Termination	\$100 per terminated employee	\$ 800.00	0%	\$ 0	\$ 800.00
Failure to Provide Compliant Itemized Wage Statements	\$250 per employee/pay period	\$ 89,250.00	55%	\$ 49,087.50	\$ 40,162.50
Failure to Maintain Accurate Payroll Records	\$500 per employee	\$ 7,000.00	78%	\$ 5,460.00	\$ 1,540.00
Failure to Reimburse Business Expenses	\$100 per employee/pay period	\$ 35,700.00	54%	\$ 19,278.00	\$ 16,422.00
Failure to Timely Pay Wages During Employment	\$100 per employee/pay period	\$ 35,700.00	54%	\$ 19,278.00	\$ 16,422.00
		TOTAL \$ 222,000.00		\$ 122,020.50	\$ 99,979.50
		PAGA Amount for Settlement (after reflecting on issues of (i) manageability, (ii) court's discretion, and (iii) stacking of penalties.		\$ 24,994.88	

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

Approval of the proposed Settlement is also appropriate considering the risk, expense, and complexity of further litigation. As discussed above, the proposed Settlement takes into consideration the specific factual and legal hurdles faced by Plaintiff in establishing Defendant's penalty-liability in this case, which again, may have resulted in a net-zero recovery. These risks-when balanced with the fact that the Settlement achieved a significant recovery, and that further litigation posed a risk of diminishing such recovery by increasing litigation expenses -weigh strongly in favor of settlement approval.

a) The Benefits Conferred by the Settlement Favor Approval

The settlement provides a significant monetary benefit that falls well within "the range of an acceptable settlement" under the circumstances. As held by the Ninth Circuit, a settlement may be fair and reasonable even where, unlike here, it only provides a fraction of what could have been obtained at trial:

The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at 625. (Emphasis in original). Thus, "the

1 very essence of a settlement is compromise, 'a yielding of absolutes and an
2 abandoning of highest hopes.'" *Id.* at 624 (citations omitted). As the Second
3 Circuit has pointed out: "The fact that a proposed settlement may only amount to
4 a fraction of the potential recovery does not, in and of itself, mean that the
5 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).

6 *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F .3d 1234, 1242.

7 Here, after deductions are made for attorneys' fees and costs, approximately \$12,888.00
8 will be paid out as PAGA civil penalties, of which \$9,666.00 (i.e., 75%) will go to the LWDA,
9 and \$3,222.00 (i.e., 25%) will go to the Aggrieved Employees as required by Cal. Labor Code §
10 2699(i). (Lind Decl. at ¶26.)

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

1 Development Agency The Court finds that the PAGA payment is set at a reasonable amount,
2 and it shall be approved.").¹

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

8 b) The Scope of the Release is Narrowly Tailored

9 The California Supreme Court has concluded that in the context of PAGA litigation, "the
10 nonparty employees, because they were not given notice of the action or afforded any opportunity
11 to be heard, would not be bound by the judgment as to remedies other than civil penalties." *See*
12 *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 987. Thus, the scope of the release provided in
13 exchange for the foregoing consideration is limited to the civil penalties asserted in the Complaint
14 in the Action under Cal. Labor Code § 2698 *et seq.* (See Lind Decl. ¶40 and Exhibit A.) As such,
15 this factor weighs in favor of approval of the Settlement.

16 c) The Experience and Views of Plaintiffs' Counsel Favor Approval
of the Settlement

17 Plaintiff's Counsel has notable experience in complex wage and hour litigation. *See* Lind
18 Decl. at ¶31-34. In the view of Plaintiff's Counsel, the benefit conferred by the proposed
19 Settlement is fair, reasonable, and adequate under the circumstances, as it reflects a reasoned
20 compromise which takes into consideration the risks inherent in this case which had the potential
21 to eliminate recovery. *See* Lind Decl. at ¶35 As such, this factor weighs in favor of approval.

22 d) The Extent of Discovery Completed and The Stage Of The
23 Proceedings Favor Approval of the Settlement

24 In evaluating this element, the Court should be mindful that "'formal discovery is not a
25 necessary ticket to the bargaining table'" (*Linney*, 151 F.3d at 1239), as the relevant

26 ¹ Significantly, each of the above-cited actions involved substantially more "aggrieved employees" than the 34
27 aggrieved employees in the instant Action. In *Franco*, 2,055 employees were ultimately identified. In *Garcia*, there
28 were 1,869 individuals. In *Schiller*, 3,327 California class members were ultimately identified). And in *Gong-Chun*,
2,051 California employees were identified.

consideration is "whether the parties have sufficient information to make an informed decision about settlement." *Sandoval v. Roadlink United States Pac., Inc.* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 130378, at 26. Here, Plaintiffs propounded formal discovery and obtained responses both formal and informal that were sufficient to enable Plaintiff's counsel to evaluate the strength and value of the claim for purposes of settlement. (Lind Decl. at ¶¶11-18.) As discussed above, Plaintiff's investigation was sufficient to, among other things, tabulate the number of alleged Labor Code violations at issue during the PAGA Period and identify the total number of individuals falling within the definition of "aggrieved employee" for the PAGA Period. The number of individuals was later found to be less, ensuring to the benefit of the aggrieved employees in terms of obtaining their penalty payouts.

Based on Plaintiff's counsel's experience litigating wage and hour claims, such investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this claim for purposes of settlement.

4. Additional Factors Weigh In Favor Of Finding The Proposed Settlement To Be Fair, Adequate, And Reasonable

The Settlement does not possess any obvious deficiencies. The Settlement contemplates entry of an order (submitted concurrently herewith) which approves the Settlement and dismisses the Action with prejudice. The Settlement Agreement and proposed order authorize the Court to retain jurisdiction over the Action pursuant to Code of Civil Procedure section 664.6. This procedure effectively disposes of the Action in its entirety, documents the Court's approval of the Settlement as required by PAGA, allows for Court intervention if necessary to enforce the terms of the Settlement Agreement, and avoids any stigmas associated with the entry of a judgment against Defendant. In sum, the Settlement meets the standard for approval.

IV. COUNSEL IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS

Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of \$8,592.00 and reimbursement of litigation costs of \$3,520.00. (Lind Decl. at ¶25-34.) Plaintiffs' counsel's entitlement to an award of attorneys' fees and costs is warranted on multiple

1 independent grounds. Further, the amount of fees requested falls well within the range of
2 reasonableness under applicable standards, as the amount requested constitutes a "percentage of
3 the fund" deemed reasonable in similar wage and hour settlements of this size and approved by
4 California courts, which is not only warranted based on the contingency risk Plaintiff's counsel
5 has agreed to incur for the benefit of the State of California and Aggrieved Employees, but also
6 based on the results achieved. Based thereon, Plaintiffs' counsel respectfully requests that the
7 Court enter an order approving the fee and cost amounts requested.

8 **A. Plaintiffs' Counsel Is Entitled To Recover Reasonable Fees And Costs**

9 Plaintiff's counsel is entitled to recover attorneys' fees and costs under the "common
10 fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers
11 a common fund for the benefit of persons other than himself or his client is entitled to a
12 reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gernert* (1980) 444 U.S.
13 472, 478. Courts have long recognized the "common fund" or "common benefit" doctrine,
14 under which attorneys who create a common fund or benefit for a group of persons may be
15 awarded their fees and costs to be paid out of the fund. *Serrano v. Priest* (1977) 20 Cal.3d 25,
16 34. quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City*
17 *Employees' Ass'n v City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of*
18 *California* (1995) 115 Cal.3d 162, 167.

19 The California Supreme Court has held that, "when a number of persons are entitled in
20 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of
21 all results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
22 attorneys' fees out of the fund." *Serrano*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d 1; *Mills*
23 *v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-392 (endorsing the common fund approach in class
24 actions). The percentage-of-the-fund approach appears to be the preferred method of awarding
25 fees in traditional common fund cases, such as this case. Where the settlement amount is a
26 "certain or easily calculable sum of money," use of the percentage-of-the-fund method is
27 appropriate. *Serrano*, 20 Cal.3d at 35. In *Glendale City Employees' Association v. City of*
28

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

4 It is not necessary to find this suit a proper class action in order to uphold the
5 portion of the judgment awarding counsel for Plaintiffs 25 percent of all
6 retroactive salaries and wages received. That award may be sustained under the
7 rule that a litigant who creates a fund, in which others enjoy beneficial rights may
8 require those beneficiaries to pay their fair share of the expense of litigation
9 [citations omitted].

10 Numerous appellate courts have similarly found. See e.g. Knoff v. City & Cty. of San
11 Francisco (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of
12 attorneys' fees in a representative action as the proper exercise of the court's broad equitable
13 powers); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
14 expenses properly awarded from common benefit composed of illegally imposed sales and use
15 tax); Parker v. Los Angeles (1974) 44 Cal.App.3d 556, 567-568 (court upheld fee award equal
16 to one-third of the damages to owners of residential property in an inverse condemnation action).

17 Thus, as Plaintiff's counsel has expended a significant amount of time and money to
18 secure a settlement fund for the LWDA and aggrieved employees, and in doing so, has
19 exclusively borne the risk of loss for such expenditures of time and expenses (as the LWDA
20 elected not to take the case after receiving the PAGA Notice), Plaintiff's counsel is entitled to
21 reasonable fees from that fund under applicable precedent.²

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

23 Plaintiffs Counsel's request for attorneys' fees in the amount of \$8,592.00 is
24 approximately 40% of the total PAGA settlement amount, is within the "zone of
25 reasonableness," as it is recognized that "courts may award attorney's fees in the 30-40% range
26 in wage and hour class actions that result in recovery of a common fund under \$10 million." See
27 e.g. Martin v. AmeriPride Servs. (S.D. Cal. 2011) 2011 U.S. Dist. LEXIS 61796, at 23.

28 ² Plaintiff's Counsel is also entitled to recover attorney's fees and costs as a matter of right under PAGA. See Cal. Labor Code
§ 2699(g)(1) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs").

Moreover, taking into account the contingency risk Plaintiff's counsel agreed to incur for the benefit of the State of California (which elected not to take the case after receiving the PAGA Notice) and the results achieved, Plaintiff's counsel's requested fee is reasonable under all applicable standards.

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

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

First, the results achieved are beneficial, as Defendant has made adjustments and agreed to pay \$25,000.00 to settle the PAGA claim. This is a significant recovery given the risk of success in obtaining any recoverable penalties. Second, such results were achieved in the face of significant risks. As explained above, Defendant maintained defenses to Plaintiff's PAGA claim that very well could have resulted in a net-zero recovery at trial. Third, notwithstanding this risk of loss, Plaintiff's counsel undertook representation of the instant PAGA claim for the benefit of the State of California on a contingency basis. This not only required Plaintiff's counsel to personally assume the risk of nonpayment in securing the financial benefit the State of California stands to receive, but constitutes a "loan" on Plaintiff's counsel's services, which are factors warranting fee enhancement as noted by the California Supreme Court authority:

'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, 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

1 reluctant to accept fee award cases."

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

3 The percentage requested by Plaintiff's counsel falls within a typical range of
4 employment cases, particularly in light of the modest settlement size in this case. Martin, 2011
5 U.S. Dist. LEXIS 61796, at 23 ("[C]ourts may award attorney's fees in the 30-40% range in
6 wage and hour class actions that result in recovery of a common fund under \$10 million.").
7 Thus, counsel's fee request is fair and reasonable and consistent with such awards in California.

8 **D. Plaintiffs' Counsel's Request for Costs Is Reasonable**

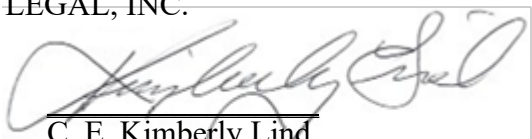
9 Plaintiff's counsel incurred costs of \$3,520.00 to date. (See Lind Decl. at ¶¶46-47). The
10 incurred costs included filing fees, court appearance fees, mediation charges, and other charges
11 typical of litigation of this nature, which are appropriate for cost reimbursement in these types
12 of cases. The costs incurred by Plaintiff's counsel in this litigation benefited Plaintiff, the
13 aggrieved employees, and the State of California. In light of the litigation costs that Plaintiff's
14 counsel was required to incur to prosecute this action, Plaintiff's cost request is reasonable and
15 should be granted.

16 **V. CONCLUSION**

17 As shown herein, the Settlement is fair, adequate and reasonable, as it represents a
18 reasoned and valuable compromise obtained through arms-length negotiations. For all the
19 reasons set forth above, Plaintiff respectfully requests this Court grant the Motion.

20
21
22 Dated: June 17, 2022

KO LEGAL, INC.

23 By: 

24 C. E. Kimberly Lind
25 Attorney for Plaintiff
26 HEATHER GREEN
27
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