

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Misty M. Lauby, Esq. [CSB No. 243009]
misty@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
4590 Allstate Drive
Riverside, CA 92501
Tel: (951) 320-1444 | Fax: (951) 320-1445

Attorneys for Plaintiff Daniel Lara Diaz, on behalf of the State of CA and Aggrieved Employees

Stan S. Mallison (Bar No. 18491)
StanM@TheMMLawFirm.com
Hector R. Martinez (Bar No. 206336)
HectorM@TheMMLawFirm.com
MALLISON & MARTINEZ
1939 Harrison Street, Suite 730
Oakland, California 94612-3547
Tel: (510) 832-9999 | Fax: (510) 832-1101

Attorneys for Plaintiff Glenn Fite, on behalf of the State of CA and Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

DANIEL LARA DIAZ and GLENN FITE,
individually, on a representative basis, and on
behalf of all others similarly situated;

Plaintiffs,

vs.

SHAMROCK FOODS CO., an Arizona
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: RIC 2004126
*[Assigned to Hon. Judge Craig Riemer, Dept
1, for all purposes]*

**NOTICE OF MOTION AND MOTION
TO APPROVE THE SETTLEMENT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATIONS IN
SUPPORT THEREOF; [PROPOSED]
ORDER**

Hearing
Date: July 6, 2022
Time: 8:30 a.m.
Dept.: 1
Reservation #: 266157493719

Complaint filed: October 20, 2020

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

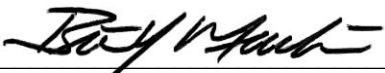
2 PLEASE TAKE NOTICE that on July 6, 2022, at 8:30 a.m., or as soon thereafter as the matter
3 may be heard in Department 1 of the Riverside County Superior Court, located at 4050 Main Street,
4 Riverside, CA 92501, Plaintiffs Daniel Lara Diaz and Glenn Fite will and hereby do move this Court
5 for an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California
6 Labor Code § 2698 *et seq.* (the “PAGA”).

7 This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities;
8 the Declarations of Plaintiffs and Plaintiffs’ counsel (Brian Mankin and Misty Lauby of Lauby
9 Mankin Lauby LLP, and Stan Mallison of Mallison & Martinez), the Settlement Administrator (Mike
10 Moore of Phoenix Class Administrators in support thereof; the Amended Settlement Agreement and
11 Release of PAGA Claim (the “Settlement Agreement”); the proposed Order granting Approval of the
12 PAGA Settlement and entry of Judgment thereon; and all other records, pleadings, and papers filed in
13 this action; and upon such other evidence or argument as may be presented to the Court at the hearing
14 of this Motion.

15
16 Dated: June 13, 2022

LAUBY, MANKIN & LAUBY LLP

17
18 BY:



Brian J. Mankin, Esq.
Attorneys for Plaintiffs, the State of California
and Aggrieved Employees

TABLE OF CONTENTS

I.	SUMMARY OF THE ACTION AND SETTLEMENT	1
II.	BACKGROUND	2
A.	Procedural History	2
B.	Summary of Plaintiffs' Claims and Defendant's Defenses	4
III.	THE PAGA AND ITS REQUIREMENTS	5
IV.	THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES	7
A.	Terms of the Settlement and Distribution of PAGA Penalties	7
B.	Payment and the Notice Letter.....	8
C.	Settlement Allocation to the Aggrieved Employees.....	8
D.	The Release.....	8
V.	THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT APPROVAL.....	10
VI.	THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR AND REASONABLE	11
A.	Plaintiffs' Counsel are Entitled to Recover Attorney's Fees Under The Common Fund Doctrine In This Qui Tam Action.....	11
B.	A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award.....	13
C.	The Requested Litigation Costs are Fair and Reasonable	15
VII.	SUBMISSION TO THE LWDA	16
VIII.	THE COURT SHOULD APPOINT PHOENIX AS THE ADMINISTRATOR.....	16
IX.	CONCLUSION.....	16

TABLE OF AUTHORITIES

CASES

<i>Amaro v. Anaheim Arena Management, LLC</i> , 29 Cal.App.5 th 521 (2021).....	9
<i>Arias v. Sup. Court</i> , 46 Cal.4th 969, 976, 980, 985, 986 (2009)	2, 5, 6, 8, 9, 10
<i>Bank of America v. Cory</i> (1985) 164 Cal.App.3d 66, 89-91	11
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715, 726.....	13
<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472, 478-482	12
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43, 65-66, 563.....	13
<i>Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.</i> (2005) 127 Cal.App.4th 387	13
<i>Dunk v. Ford Motor, Co.</i> (1996) 48 Cal.App.4th 1794, 1809	12
<i>Harris v. Marhoefer</i> (9th Cir. 1994) 24 F.3d 16, 19	15
<i>In re Activision</i> (N.D. Cal 1989) 723 F.Supp 1373	13
<i>Iskanian v. CLS Transp. Los Angeles, LLC</i> (2014) 59 Cal.4 th 348, 380-382.....	1, 2, 11
<i>Jutkowitz v. Bourns, Inc.</i> (1981) 118 Cal.App.3d 102, 110	12
<i>Laffitte v. Robert Half Int'l Inc.</i> (2016) 1 Cal.5th 480, 506	12
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4th 19, 26, 43, 46-47	12, 13, 14
<i>Mills v. Electric Auto-Lite Co.</i> (1970) 396 U.S. 375, 393-394	12
<i>Newberg on Class Actions</i> , § 14:6 (4th ed. 2002)	13
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4th 1084, 1095-96	14
<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311, 322	14
<i>Rider v. County of San Diego</i> (1992) 11 Cal.App.4th 1410, 1424 n.6	15
<i>Sanders v. City of Los Angeles</i> (1970) 3 Cal.3d 252, 261, 263	13
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25, 34, 35	12, 13, 15

1	<i>Six (6) Mexican Workers v. Arizona Citrus Growers</i> (9 th Cir. 1990) 904 F.2d 1301,	
2	1311.....	12
3	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224, 254.....	13
4	<i>Williams v. MGM-Pathe Communications Co.</i> (9 th Cir. 1997) 129 F.3d 1026, 1027;	
5	<i>Staton v. Boeing Co.</i> (9 th Cir. 2003) 327 F.3d 938, 967	12

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF THE ACTION AND SETTLEMENT**

3 In this PAGA-only action, Plaintiffs Daniel Lara Diaz and Glenn Fite – serving as
4 representatives for the State of California – and their counsel sought civil penalties against Defendant
5 Shamrock Foods Co., (“Defendant” or “Shamrock”) under the Labor Code Private Attorneys General
6 Act of 2004, California Labor Code § 2698 *et seq.* (commonly referred to as “PAGA”) on behalf of all
7 similarly situated non-exempt employees who worked for Defendant in California (the “Aggrieved
8 Employees”) at any time during the period of October 2, 2019, through the March 5, 2022 (the
9 “Statutory Period” or “PAGA Release Period”). The PAGA action is a type of qui tam action filed on
10 behalf of the State to assist it with labor law enforcement. *Iskanian v. CLS Transp. Los Angeles, LLC*
11 (2014) 59 Cal.4th 348, 380-382. As such, the State is the real party in interest in a PAGA action. *Id.* at
12 382. Here, the State of California was timely served with a copy of the Settlement Agreement and this
13 Motion to Approve the Settlement.

14 Defendant Shamrock a food distribution company which operates two distribution centers in
15 California. Plaintiffs initially brought this case as a class and representative action, but due to
16 arbitration agreements, the case was converted to a PAGA-only matter. After extensive work,
17 including a detailed expert analysis of timekeeping, payroll, and other records produced by Defendant,
18 and in connection with a mediation session with Steve Serratore, Esq., the Parties reached a settlement
19 of the alleged PAGA claims, all of which were heavily disputed by Shamrock.

20 Now with a comprehensive Settlement Agreement that resolves the claims alleged in this case,
21 Plaintiffs seek this Court’s approval of a \$470,000 PAGA-only settlement on behalf of approximately
22 1,569 non-exempt workers in California who worked for Defendant during the Statutory Period. The
23 settlement merits full approval because it fulfills the purpose of PAGA (i.e., to deter violations of the
24 Labor Code and secure obedience to California’s labor laws; to end ongoing violations of the Labor
25 Code either through injunctive relief or a defendant’s voluntary policy change in light of a PAGA
26 action; and to provide relief that is genuine, meaningful, and consistent with California’s goal of
27 benefitting the public through enforcement of labor laws).

28 ///

1 Because this is a PAGA-only settlement, the process for approval is very straight-forward
2 under PAGA: “The superior court shall review and approve any settlement of any civil action filed
3 pursuant to this part.” (Labor Code § 2699(1)(2).) Based on the California Supreme Court’s holdings
4 in *Arias v. Superior Court*, 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles,*
5 *LLC*, 59 Cal.4th 348 (2014), there is no requirement under PAGA for a Plaintiff to establish the
6 requirements of class certification (i.e. numerosity, typicality, commonality and adequacy) nor is there
7 the usual two-step preliminary and final approval process as found in class actions. Rather, this
8 PAGA-only settlement merely requires a one-step review and approval process.

9 For these reasons and those discussed below, the Parties now seek the Court’s approval of the
10 Settlement.

11 **II. BACKGROUND**

12 **A. PROCEDURAL HISTORY**

13 On October 2, 2020, Plaintiff Diaz submitted a certified letter to the California Labor
14 Workforce Development Agency (the “LWDA”) notifying it of Plaintiffs’ claims under the PAGA.
15 (Mankin Decl., ¶ 7, Exhibit “A”). Plaintiff Diaz then filed a class and representative action complaint
16 in the Court. On December 18, 2020, Defendant removed the Diaz action to the United States District
17 Court for the Central District of California, pursuant to the Class Action Fairness Act. Upon removal
18 to District Court, Plaintiff Diaz became aware of an alleged arbitration agreement between himself and
19 Defendant and, on that basis, moved for leave to amend his complaint to omit any non-PAGA class
20 and individual claims or, alternatively, to dismiss those claims and remand the PAGA claims.
21 Defendant also filed a motion to dismiss class claims and compel arbitration of the individual claims,
22 pursuant to the Parties’ alleged arbitration agreement. On April 5, 2021, the District Court issued an
23 Order dismissing Plaintiff Diaz’s individual and class claims without prejudice, remanding the
24 remaining PAGA claims to this Court, and denying Defendant’s motion as moot. (Mankin Decl., ¶ 8).

25 Plaintiff Fite also notified the LWDA of his PAGA claims on December 13, 2019. (Mallison
26 Decl., ¶ 28, Exhibit “B”). On January 5, 2021, Plaintiff Fite filed a Rule 23 class, FLSA collective,
27 and PAGA representative action in the Eastern District of California, Case No. 2:21-CV-00023-JAM-
28 KJN, against Defendant based on the same Labor Code violations alleged in Diaz. After becoming

1 aware of an alleged arbitration agreement between Plaintiff Fite and Defendant, Plaintiff Fite filed a
2 First Amended Complaint alleging a sole PAGA claim on April 21, 2021.

3 After Defendant made Plaintiffs Diaz and Fite aware of each other's cases via Notices of
4 Related Case, Plaintiffs and their counsel entered into a joint prosecution agreement and agreed to
5 jointly mediate their cases with Defendant. In preparation for the mediation, the Parties exchanged
6 documents and information that allowed both sides to calculate the potential damages and evaluate
7 potential risk, including timekeeping and payroll records relating to the current and former Aggrieved
8 Employees, as well as records of packages scanned by Aggrieved Employees which, when compared
9 to timekeeping records, reflected whether Aggrieved Employees were performing work off-the-clock.
10 Plaintiffs forwarded these records and data to their database expert, Aaron Woolfson, and performed a
11 detailed analysis thereon, resulting in a comprehensive penalties model. This robust analysis enabled
12 both parties to take a deep dive into the claims, in particular allegations relating to the failure to pay
13 proper regular and overtime wages, failure to provide compliant meal and rest periods, among other
14 things. In total, Plaintiffs' expert evaluated the data of a sampling of employees including
15 approximately 12,000 pay periods, thereby giving Plaintiffs essentially a trial-ready roadmap of the
16 claims and damages for mediation. Additionally, during this process, Plaintiffs, their counsel and
17 experts analyzed, researched, and investigated the potential issues, including matters related to the
18 calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 10; Mallison Decl. ¶ 35).

19 On January 4, 2022, the Parties mediated with Steve Serratore, Esq., one of the most respected
20 class and PAGA mediators in California. After a full day of mediation, Mr. Serratore issued a
21 mediator's proposal that both Parties accepted, resulting in a settlement of all PAGA claims alleged in
22 the action, as well as Plaintiffs' individual claims. The Parties entered into a Memorandum of
23 Understanding, and then memorialized the terms of the settlement. The long-form Settlement
24 Agreement is now presented to this Court for approval. (Mankin Decl. ¶ 11, Exhibit "B"). Pursuant
25 to the Court's CMO, Plaintiffs' separate individual settlement is discussed in the Mankin Declaration
26 at ¶¶ 55-61.

27 ///

28 ///

1 **B. SUMMARY OF PLAINTIFFS' CLAIMS AND DEFENDANT'S DEFENSES**

2 Plaintiffs' Consolidated First Amended Complaint alleges the following PAGA claims: (1) Failure
3 to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4)
4 Failure to Provide Rest Breaks; (5) Failure to Timely Pay Wages Each Period; (6) Failure to Timely
5 Pay Final Wages; and (7) Failure to Provide Accurate Itemized Wage Statements.

6 Plaintiffs' unpaid minimum wage claims were based on an alleged practice of requiring
7 Plaintiffs and the Aggrieved Employees to perform "off-the-clock" work (such as working through
8 lunch) to carry out their duties for Defendant. Defendant argued that – at all relevant times – it had a
9 policy that specifically prohibited off-the-clock work, including during lunch periods (and these
10 alleged practices also formed the basis for Plaintiffs' meal and rest break claims). Defendant therefore
11 argued that, to prove this "off-the-clock" claim, Plaintiff's evidence would necessarily consist of
12 testimony from each Aggrieved Employee that claimed to work off-the-clock. And Defendant further
13 argued that this sort of this individualized is completely unmanageable on a PAGA basis. Plaintiffs'
14 minimum wage claims were also based on the allegation that Defendant required Aggrieved
15 Employees to submit to off-the-clock security checks upon entering/leaving Defendant's facilities, and
16 to submit to temperature checks upon entry out of concern for bringing covid-19 into the workplace.
17 Defendant argued this time was de minimis in nature, and as it was unrecorded, would have similarly
18 required extensive, individualized testimony. Plaintiffs' overtime claims were also premised on these
19 practices, to the extent such resulted in Aggrieved Employees working overtime hours.

20 Plaintiffs also brought claims for failure to timely pay wages each period under Labor Code §
21 204 and also upon separation of employment under Labor Code §§ 201-203. Each of these claims
22 were derivative; Defendant's liability (if any) was dependent on the above unpaid wage claims. And
23 because these claims were derivative, Defendant argued that each would fail for the same reasons
24 discussed above. Finally, Plaintiffs brought wage statement claims based on the allegation that
25 Defendant failed to provide Plaintiffs and the Aggrieved Employees with wage statements that
26 complied with the requirements of Labor Code § 226(a) by failing to accurately state gross wages
27 earned, failing to accurately state total hours worked, failing to accurately state all deductions, failing
28 to accurately state net wages earned, and failing to state all applicable hourly rates in effect during the

1 pay period and the corresponding number of hours at each hourly rate by the employee.

2 In addition to the defenses cited above, Defendant also intended to raise additional defenses in
3 Court that pertain to damages, including the proper measure of civil penalties and the appropriate
4 discount to place on any assessment of such penalties. Defendant contends that many of Plaintiff's
5 PAGA claims are merely derivative of other claims. Thus, if Defendant were liable, Defendant argues
6 that a substantial discount should be applied to the civil penalties for these derivative (i.e., "stacked")
7 violations. In sum, each aspect of the case was vigorously contested by the parties.

8 **III. THE PAGA AND ITS REQUIREMENTS**

9 PAGA provides an enforcement method for California's Labor Code by enlisting individual
10 plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to
11 the individual plaintiffs and other employees. Prior to the enactment of PAGA in 2003, the recovery
12 of civil penalties for violations of certain Labor Code provisions were solely within the province of the
13 California Department of Labor. *Arias*, 46 Cal.4th at 980.

14 However, due to the lack of financing for California's agencies, and the substantial number of
15 Labor Code violations by California employers, the California Legislature found that it was in the
16 public interest to allow aggrieved employees to act as "private attorneys general" to enforce and
17 recover civil penalties on behalf of the State of California for Labor Code violations committed by
18 employers. *Id.* As the Legislature that adopted PAGA observed, "the only meaningful deterrent to
19 unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor
20 Code." Stats. 2003 ch. 906, § 1(b). Moreover, the Labor Code's primary purpose is to "ensure
21 employees are not required or permitted to work under substandard unlawful conditions ... and to
22 protect employers who comply with the law from those who attempt to gain a competitive advantage
23 at the expense of their workers by failing to comply with minimum labor standards." Labor Code §
24 90.5(a). Therefore, the Legislature determined that "adequate financing of labor law enforcement was
25 necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law
26 enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor
27 market, and that it was therefore in the public interest to allow aggrieved employees, acting as private
28 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that

1 labor law enforcement agencies were to retain primacy over private enforcement efforts.”

2 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor and
3 Workforce Development Agency for enforcement of labor laws and education of employers and
4 employees about their rights and responsibilities under this code ...; and 25 percent to the aggrieved
5 employees.” Lab. Code § 2699(i).

6 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
7 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the
8 employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the
9 opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf if
10 the LWDA fails to respond to the notice within 65 days, responds that it does not intend to investigate,
11 or investigates and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In
12 this case, Plaintiffs provided the LWDA with notice letters advising it of the alleged Labor Code
13 violations, but the LWDA deferred the prosecution of these violations to Plaintiffs and their attorneys.
14 Accordingly, the Settlement and the common fund created by it for the benefit of the State and
15 Aggrieved Employees, is solely the result of the work performed by Plaintiffs and their attorneys.

16 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
17 court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA approval
18 process and, more specifically, whether an aggrieved employee needs to meet class certification
19 requirements. *Arias*, 46 Cal.4th at 976. After a substantial review of the legislative history of PAGA,
20 the Court held that an aggrieved employee’s representative action brought on behalf of the state and
21 other aggrieved employees against an employer for PAGA violations *does not* need to meet the
22 requirements for class certification nor does there need to be notice to the other employees. *Id.* at 975,
23 980-88. As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of
24 California’s labor law enforcement agencies. *Id.* at 986. Thus, the Court simply reviews the
25 settlement and approves it if it is deemed to be fair and reasonable.

26 Accordingly, the Parties to this PAGA action have reached such an agreement and now seek
27 this Court’s approval of the settlement.

28 ///

1 **IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

2 The following is a summary of the principal terms of the Settlement Agreement.

3 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

4 The settlement provides that Defendant will pay a non-reversionary settlement amount of Four
5 Hundred Seventy Thousand Dollars (\$470,000) (the “Settlement Amount”), inclusive of payments for
6 Attorneys’ Fees and Attorneys’ Costs¹, and Settlement Administration Costs.² (Settlement Agreement
7 ¶ 26.) After these payments, approximately \$285,568.95 will remain as the estimated PAGA Award
8 for payment to the LWDA and Aggrieved Employees. (Settlement Agreement ¶ 40(a)-(b).)

9 Pursuant to Labor Code § 2699(i), 75 percent of the PAGA Award shall be paid to the LWDA
10 (which shall be used to assist in the enforcement of labor laws and education of employers and
11 employees about their rights and responsibilities under the Labor Code), and the remaining 25 percent
12 being paid to the Aggrieved Employees on a pro rata basis based the number of work weeks each
13 Aggrieved Employee worked during the Statutory Period. (*Id.*) A following chart reflects the
14 estimated payments from the Settlement Amount:

15

	Total Amount
<i>Settlement Amount</i>	\$470,000
Attorneys’ Fees (1/3)	\$156,666.66
Actual Litigation Costs	\$17,764.39
Administrator Costs	\$10,000
<i>PAGA Award</i>	\$285,568.95
• 75% to the LWDA	\$214,176.71
• 25% to the Aggrieved Employees	\$71,392.24
<i>Balance</i>	\$0

22
23
24

25 ¹ Plaintiff’s Counsel will seek a standard fee of one-third (\$156,666.67) of the Settlement Amount, and reimbursement of
26 actual attorney costs of \$17,764.39. Since the Settlement Agreement authorized up to \$20,000 for costs, the savings will be
placed in the PAGA Award and paid to the LWDA and Aggrieved Employees.

27 ² The Parties selected Phoenix as the Settlement Administrator, and its costs shall not exceed \$10,000, which will be
28 deducted from the Settlement Amount.

1 As such, the LWDA will receive approximately \$214,176.71 and the Aggrieved Employees
2 will receive \$71,392.24 in total and, assuming 1,569 employees, the average payment will be \$45.50.
3 The portion of each Aggrieved Employee's share will be treated as non-wage income and reported by
4 the Settlement Administrator on IRS Form 1099 to the respective Aggrieved Employee and applicable
5 governmental authorities. (*Id.*, at ¶ 40(a).)

6 **B. PAYMENT AND THE NOTICE LETTER**

7 Defendant has agreed to issue payment by wire transfer to the Settlement Administrator within
8 15 days of the Effective Date. (Settlement Agreement ¶ 45.) The Settlement Administrator will then
9 issue payments to the LWDA, Aggrieved Employees, Plaintiffs and their counsel within 10 of
10 receiving the wire payment from Defendant. (*Id.* at ¶ 46.) The Aggrieved Employees will have 180
11 days to cash their checks, and if for any reason a check is un-cashed, that share will be forwarded,
12 pursuant to the Court's CMO, to the LWDA. (*Id.* at ¶ 47).

13 A Notice will be sent to the Aggrieved Employees advising of the settlement and payment.
14 (Settlement Agreement at ¶ 16, and attached to the Mankin Decl. at Exhibit "F").

15 **C. SETTLEMENT ALLOCATION TO THE AGGRIEVED EMPLOYEES.**

16 As noted, twenty-five (25) percent of the PAGA Award (totaling \$71,392.24) will be paid to
17 the Aggrieved Employees on a pro rata basis. (*Id.* at ¶ 40(c).) Approximately 1,562 Aggrieved
18 Employees will share in this fund on a pro rata basis. The Settlement Agreement provides a very fair
19 and equitable means of allocating this fund based on the number of pay periods each Aggrieved
20 Employee worked during the Statutory Period. (*Id.* at ¶ 40(c)(i).) The twenty-five (25) percent of the
21 PAGA Award will be paid to all Aggrieved Employees on a pro-rata basis (based on the number of
22 pay periods worked during the Statutory Period) to each such Aggrieved Employee. The portion of
23 the PAGA Award allocated to each Aggrieved Employee shall be referred to as the Aggrieved
24 Employee's "Individual Share."

25 **D. THE RELEASE**

26 The California Supreme Court has explained that a judgment in "a representative action
27 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is
28 binding not only on the named employee plaintiff but also on government agencies and any aggrieved

1 employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 985-986. However, in accordance with
2 the Court’s Case Management Order, the release in the Settlement Agreement narrowly binds the
3 named Plaintiffs and LWDA only for the civil penalty claims brought under Labor Code § 2699 in the
4 action, including but not limited to, any PAGA claims that were alleged against the Released Parties
5 based on the facts stated in Plaintiffs’ Complaint and/or First Amended Complaint or in Plaintiffs’
6 original and/or amended LWDA notice letters, including all PAGA claims for alleged violations of
7 Labor Code sections 200, 201, 202, 203, 204, 204.1, 208, 221, 222, 223, 226, 226.3, 226.7, 256, 510,
8 512, 558, 1194, 1194.2, 1197, 1197.1, and 1198, attorneys’ fees and expenses related to these claims
9 based on the facts and causes of action alleged in the Action; and the applicable Industrial Welfare
10 Commission Wage Orders including, but not limited to, Sections 3(A), 4, 7, 9, 11 and 12; and PAGA
11 claims, and causes of action alleged in the First Amended Complaint or in Plaintiffs’ LWDA notice
12 letters for an assessment of PAGA penalties based on or related to allegations that Defendant: (a)
13 failed to pay minimum or contractual wages; (b) failed to pay overtime wages, (c) failed to provide
14 compliant meal periods; (d) failed to provide compliant rest periods; (e) failed to timely pay wages
15 each payroll period; (f) failed to timely pay final wages; and (g) failed to provide accurate itemized
16 wage statements. (“Released Claims” or “PAGA Claims”). (Settlement Agreement ¶ 21). As held in
17 *Amaro v. Anaheim Arena Management, LLC*, 29 Cal.App.5th 521 (2021), “a court may release not only
18 those claims alleged in the complaint and before the court, but also claims which ‘could have been
19 alleged by reason of in connection with any matter or fact set forth or referred to in’ the complaint.”
20 *Id.* at 537. Here, the released claims all lay within the scope of the allegations in the operative
21 complaint, and thus meet the criteria stated in *Amaro*.

22 Thus, upon court approval, Plaintiffs, standing in the shoes of the Labor
23 Commissioner/LWDA, and on behalf of the State of California, will forever completely release and
24 discharge the Released Parties from any and all of the Released Claims. However, under *Arias v. Sup.*
25 *Court*, 46 Cal.4th 969, 986 (2009), it is the intent of the Parties that the Settlement Approval Order
26 entered by the Court shall have full equitable and collateral estoppel and *res judicata* effect and be
27 final and binding upon Aggrieved Employees regarding the Released Claims. “Because an aggrieved
28 employee’s action under the Labor Code Private Attorneys General Act of 2004 functions as a

1 substitute for an action brought by the government itself, a judgment in that action binds all those,
2 including nonparty aggrieved employees, who would be bound by a judgment in an action brought by
3 the government.” *Id.* The time period governing the Released Claims shall be the Statutory Period.

4 Separate and apart from Plaintiffs’ PAGA claims, Plaintiffs also each allege and claim
5 individual, underlying wage claims. Therefore, subject to the Court’s approval, Defendant agrees to
6 pay Plaintiffs separately, in full and complete resolution of any and all such claims, and subject to
7 confidential settlement agreements and a complete and general release and waiver of claims under
8 California Civil Code section 1542, a total sum of Thirty Thousand Dollars (\$30,000), less applicable
9 withholdings. After one-third attorneys’ fees, Plaintiffs Diaz and Fite will each receive \$10,000 for
10 their individual claims, with \$5,000 paid to each on IRS Form W-2s, and \$5,000 paid to each on IRS
11 Form 1099s. The Parties have agreed that the individual settlement agreements with Plaintiffs are
12 confidential, and thus will not be filed. (Settlement Agreement ¶ 51).

13 For these reasons, the Parties contend that the release in the Settlement Agreement narrowly
14 applies only to the claims alleged, and the release is consistent with the California Supreme Court’s
15 ruling in *Arias v. Sup. Court*, 46 Cal.4th 969, 986 (2009).

16 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT**
17 **APPROVAL**

18 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
19 any civil action filed pursuant to this part.” (Labor Code § 2699(1)(2).) The amendment also required
20 that the “proposed settlement shall be submitted to the agency at the same time that it is submitted to
21 the court.” As such, the Settlement Agreement and this Motion have been concurrently submitted to
22 the LWDA in accordance with this section. (Mankin Decl. ¶ 65; Exhibit “E”).

23 This Court issued its Case Management Order (“CMO”) requesting certain information to
24 evaluate the facts and claims underlying any proposed PAGA settlement be provided in Plaintiffs’
25 Counsel’s declaration. Accordingly, the Mankin Declaration contains the requested information at
26 ¶¶ 14-48.

27 ///

28 ///

1 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR AND**
2 **REASONABLE**

3 For their efforts and the substantial risk they undertook in obtaining a common fund settlement
4 that benefits the LWDA and Aggrieved Employees, the Parties allocated one-third of the Settlement
5 Amount to Plaintiffs' Counsel for reasonable attorneys' fees, plus actual litigation costs. These fees
6 are warranted under the law and within the range of fees commonly awarded in similar cases.

7 **A. PLAINTIFFS' COUNSEL ARE ENTITLED TO RECOVER ATTORNEY'S FEES UNDER THE**
8 **COMMON FUND DOCTRINE IN THIS QUI TAM ACTION**

9 PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and
10 costs under section 2699(g)(1) of the California Labor Code, which provides that, "Any employee
11 who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs,
12 including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or
13 subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. As discussed below, in a qui
14 tam action, reasonable attorney's fees and costs are typically awarded under the common fund
15 doctrine where, as here, the litigation creates a common fund of money in a specific amount for the
16 benefit of others.

17 A PAGA action is a qui tam action because the statute allows the employee plaintiff, acting
18 as the proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code
19 violations and recover civil penalties that otherwise would have been assessed and collected by the
20 Labor and Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC*
21 (2014) 59 Cal.4th 348, 380. "A PAGA representative action is therefore a type of *qui tam* action." *Id.*
22 at p. 382. Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state,
23 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
24 aggrieved employees). See Lab. C. 2699(i).

25 As here, where a common fund is created in a qui tam action by the successful litigation of a
26 plaintiff and her attorneys, the plaintiff's attorneys are entitled to recover their fees from the common
27 fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. In *Bank of America*, attorneys were
28 awarded their fees from the common fund in a taxpayer action to enforce unclaimed property law.

1 Affirming the award, the Court stated:

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

9 Likewise, in this case, through the successful efforts of Plaintiffs and their attorneys, a
10 common fund was created in the amount of \$470,000 for the benefit of the employees and the State
11 of California. Thus, these beneficiaries must bear their share of the costs and attorney’s fees, which
12 fees and costs must be deducted from the \$470,000 settlement amount under the common fund
13 theory. *Id.* Moreover, such fees are deducted as a percentage of the settlement amount. *Boeing Co. v.*
14 *Van Gemert* (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th
15 Cir. 1990) 904 F.2d 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129
16 F.3d 1026, 1027; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.

17 The California Supreme Court recently upheld the use of the common fund theory of recovery
18 for attorney’s fees in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480, 506, approving attorney’s
19 fees of \$6.33M on a \$19M settlement. This ruling is consistent with the Court’s prior rulings
20 recognizing that “when a number of persons are entitled in common to a specific fund, and an action
21 brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such
22 ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest* (1977) 20 Cal.3d
23 25, 34; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] lawyer who recovers a common
24 fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole;” *Mills v. Electric Auto-Lite*
25 *Co.* (1970) 396 U.S. 375, 393-394 [discussing the acceptance of awarding attorneys’ fees and
26 expenses from a settlement where “litigation has conferred a substantial benefit on the members of an
27 ascertainable class”]; see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26
28 “[f]ee spreading occurs when a settlement or adjudication results in the establishment of a separate or
so-called common fund for the benefit of the class.”].).

Accordingly, the common fund doctrine allows a court to award attorneys’ fees based upon a
percentage of the total fund that is created for the satisfaction of beneficiaries’ claims when the fund

1 consists of a “certain or easily calculable sum of money.” *Dunk v. Ford Motor, Co.* (1996) 48
2 Cal.App.4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 110 [application of the
3 percentage of the fund recovery depended on “[t]he critical point” that “a fund was created from which
4 attorneys’ fees could be paid”]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed.
5 2002).

6 California law has long upheld, and continues to uphold, the percentage of the recovery
7 method for awarding attorneys’ fees where a fund is established. See e.g., *Serrano v. Priest* (1977) 20
8 Cal.3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v.*
9 *Netflix, Inc.* (2008) 162 Cal.App.4th 43, 563 [“fees based on a percentage of the benefits are in fact
10 appropriate in large class actions...”]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 263
11 [affirming award of attorneys’ fee based on percentage of recovery]; *Chavez v. Netflix, Inc., supra*,
12 162 Cal.App.4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets,*
13 *Inc.* (2005) 127 Cal.App.4th 387, 397 [the common fund doctrine is “frequently applied in class
14 actions when the efforts of the attorney for the named class representatives produce monetary benefits
15 for the entire class”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [“courts
16 recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method
17 and the percentage of recovery”].

18 A one-third common fund attorney fee award is also consistent with what courts have
19 awarded in other representative action cases. Thus, based on the foregoing, awarding attorneys’ fees
20 based on a one-third percentage of the gross settlement amount is favored by California Courts when
21 a fund established for the common benefit of others is involved, such as here. Accordingly,
22 awarding fees on this basis in the amount of one-third of the \$470,000 gross settlement amount is
23 reasonable and appropriate.

24 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE FEE AWARD**

25 Despite recognized limitations of the so-called lodestar method, some California and federal
26 courts acknowledge the utility of a lodestar “cross-check.”³ (*Lealao, supra*, 82 Cal.App. 4th at 46-
27

28 ³ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of

47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

The actual aggregated lodestar between the Plaintiffs’ attorneys that worked on this case is approximately \$239,377.10. This results in a substantial ***negative multiplier***, as summarized in the following table, and in the submitted declaration of Plaintiffs’ counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner - LML)	Trial Counsel	21	\$775	88.3⁴	\$68,432.50
Misty M. Lauby (Partner - LML)	Handling Attorney	15	\$650	110.3	\$71,695
Mallison & Martinez	Partners to Paralegals	(See Decl)	\$208-919	197.6	\$99,249.60
Grand Total for All Attorneys					\$239,377.10

manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); *See also In re Activision* (N.D. Cal 1989) 723 F.Supp 1373.

⁴ Includes an estimated 35 hours that will be expended after May 18, 2022, in finalizing the motion papers, attending the hearing, working with the parties and administrator regarding the notice and payment process, and filing any post judgment paperwork.

(See Mankin Decl., ¶ 53; Lauby Decl. ¶ 10, Mallison Decl. ¶ 66.) The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (i.e., the Laffrey Matrix at www.laffreymatrix.com indicates that the benchmark rate for a 4-7 year attorney to be \$468/hour and a 11-19 year attorney at \$764/hour, and a 20+ year attorney at \$919/hour). Moreover, the Wolters Kluwer 2017 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 52.)

Thus, not only are Plaintiffs’ Counsel’s rates reasonable and typical, but the attorneys’ fees requested are in line with Plaintiffs’ Counsel’s lodestar, all of which confirms that the fee request is fair and reasonable.

C. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE

Plaintiffs’ Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. See *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19. Plaintiffs’ Counsel are permitted to recover their litigation costs and expenses under the common fund doctrine. See *Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery

1 of attorneys' fees by . . . [Plaintiffs'] attorneys"). Furthermore, Plaintiffs' Counsel are entitled to
2 recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." *Harris*
3 *v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.)

4 The Settlement Agreement authorized Plaintiffs' Counsel to recover litigation costs not to
5 exceed \$20,000. (Settlement Agreement ¶¶ 6, 40(a)). Plaintiff's Counsels' actual costs are
6 \$17,764.39 through the conclusion of this matter, which includes costs of filing, serving and attending
7 the approval hearing. (Mankin Decl. ¶ 54, Exhibit "D" reporting costs of \$11,905.51 for his firm;
8 Mallison Decl. ¶ 68 reporting costs of \$5,858.88 for his firm.) The savings will be placed in the
9 PAGA Award and paid to the LWDA and Aggrieved Employees based on the percentages set forth
10 above. These costs include mediation fees, filing fees, and other costs that include Attorney Service
11 charges, expert discovery fees, CourtCall charges, and process service fees. (*Id.*) These costs are
12 reasonable and uncontested, and should be approved.

13 **VII. SUBMISSION TO THE LWDA**

14 As set forth in the Mankin Declaration at ¶ 65, the settlement and this motion are concurrently
15 being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic
16 submission is attached as Exhibit "E" to the Mankin Declaration.

17 **VIII. THE COURT SHOULD APPOINT PHOENIX AS THE ADMINISTRATOR**

18 Subject to the Court's approval, the parties stipulated to Phoenix Class Action Administration
19 serving as the Settlement Administrator who will process the settlement payments and provide notice
20 to the Aggrieved Employees. (Settlement Agreement ¶ 25). Phoenix is highly experienced in
21 administering class/PAGA settlements, and provided an all-in proposal to administer the settlement for
22 \$10,000. (Moore Decl., ¶ 9, Exhibit "2").

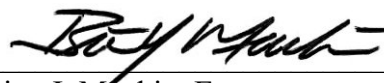
23 **IX. CONCLUSION**

24 For the foregoing reasons, Plaintiffs request the Court approve the Settlement under the PAGA.

25 Dated: June 13, 2022

LAUBY, MANKIN & LAUBY LLP

26
27 BY:



28 Brian J. Mankin, Esq.
Attorneys for Plaintiff Daniel Lara Diaz, the State
of California, and Aggrieved Employees

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

[illegible]

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 4590 Allstate Drive, Riverside, California 92501.

On June 13, 2022, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION TO APPROVE THE SETTLEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT OF 2004; MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATIONS IN SUPPORT THEREOF; [PROPOSED] ORDER**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

By Mail I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

[] By Facsimile I sent this document via fax to all parties as listed on attached service list, on

[] **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

[X] By Email or Electronic Transmission: Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

By Certified Mail-Return Receipt Requested I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California.

By Personal Service I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

[X] State I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 13, 2022, Riverside, California.

[] Federal I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Tracie Chiarito
Tracie Chiarito, Declarant

SERVICE LIST

Andrew J. Sommer, Esq.
Megan Shaked, Esq.
COHN MACIEL CAREY
One Sansome Street, #3500
San Francisco, CA 94104
415-268-8894-Andrew direct
415-268-8882-Megan direct
asommer@connmaciel.com
mshaked@connmaciel.com
Attorneys for SHAMROCK FOODS COMPANY