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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – NORTHWEST DIVISION**

SANTIAGO NUNEZ, on behalf of himself
and all “aggrieved employees” pursuant to
Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

CANOGA TOPANGA DH, LP, a California
limited partnership, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 21VECV00160

*Assigned to the Honorable Shirley K. Watkins,
Department T*

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

Date: April 21, 2022

Time: 8:30 AM

Dept.: T

RESERVATION ID: 954963730982

Complaint Filed: February 9, 2021

Trial Date: None

1 **PLEASE TAKE NOTICE THAT** on April 21, 2022 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Department T of the above-entitled Court, located at 6230 Sylmar
3 Avenue, Van Nuys, CA 91401, Plaintiff Santiago Nunez will and hereby does move unopposed for
4 an Order: (1) granting approval of the proposed settlement of claims brought pursuant to the Private
5 Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”) set forth in the parties’
6 Amended PAGA Settlement Agreement (the “Amended Settlement Agreement”); (2) appointing
7 ILYM Group, Inc. as the Settlement Administrator and approving payment of its fees not to exceed
8 \$3,549 from the PAGA Settlement Sum; (3) directing disbursement of the PAGA Settlement Sum
9 pursuant to the terms of the Amended Settlement Agreement; (4) directing payment of attorneys’
10 fees and litigation costs from the PAGA Settlement Sum not to exceed \$45,412.72 to Plaintiff’s
11 counsel; (5) directing an enhancement payment from the PAGA Settlement Sum in the amount of
12 \$5,000 to Plaintiff Santiago Nunez; and (6) dismissing this action with prejudice.

13 This motion will be based on this Notice, the supporting memorandum of points and
14 authorities, the parties’ Amended PAGA Settlement Agreement, the Declarations of Daniel F.
15 Gaines, Plaintiff Santiago Nunez, and ILYM Administrator Sean Hartranft, the documents and
16 records on file in this matter, and such additional arguments, authorities, and evidence and other
17 matters as may be presented by the parties hereafter.

18 Date: March 18, 2022

Respectfully submitted,

GAINES & GAINES, APLC

21 By: Daniel F. Gaines
22 DANIEL F. GAINES
23 ALEX P. KATOFISKY
24 Attorneys for Plaintiff
25 SANTIAGO NUNEZ

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Santiago Nunez (“Plaintiff”) and aggrieved employees under the Labor Code’s
4 Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order
5 granting approval of the proposed Settlement of the above-captioned lawsuit against Defendant
6 Canoga Topanga DH, LP (“Defendant”), a single-unit restaurant franchisee located in Canoga Park,
7 California. The proposed Settlement will dispose of the Released Claims asserted on behalf of
8 Plaintiff and approximately 110 non-exempt employees who worked for Defendant in California
9 at any time between November 10, 2019 and December 31, 2021 (the “Aggrieved Employees”¹).

10 This case addresses claimed violations of employee protections embodied in the California
11 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
12 Defendant failed to pay Plaintiff and Aggrieved Employees all wages due including all minimum
13 wages and overtime wages, in violation of Labor Code §§ 510, 558, and 1194, failed to provide
14 legally compliant rest breaks to Plaintiff and Aggrieved Employees, in violation of Labor Code §§
15 226.7 and 558, failed to provide legally compliant meal breaks to Plaintiff and Aggrieved
16 Employees, in violation of Labor Code §§ 226.7, 512, and 558, and failed to timely pay all wages
17 due and issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in
18 violation of Labor Code §§ 201-202, 226(a), and 226.3. As a result of Defendant’s alleged
19 violations of the Labor Code, approximately 110 employees are claimed to have suffered Labor
20 Code violations for up to 1,485 aggregate pay periods at the rate of \$100 each based on PAGA’s
21 penalty provisions.

22 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
23 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
24 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is
25 the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage and

26 _____
27 ¹ The individuals identified as “Aggrieved Employees” are “Aggrieved” solely for the purposes of
28 this settlement only.

1 hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative
2 strength and value of the PAGA claim, and (4) it reflects a reasoned compromise based directly on
3 the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and
4 likely duration of further litigation.

5 The value achieved by the Settlement may be gleaned from the fact that the LWDA and the
6 approximately 110 Aggrieved Employees encompassed by the Settlement will receive no less than
7 \$36,038.28 under the terms of the Settlement, which, pursuant to the operative statute, shall be
8 allocated “75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
9 aggrieved employees.” *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only
10 because further litigation may have resulted in a net-zero recovery based on the defenses available
11 to Defendant, but because the amount secured by Plaintiff is sizable and in line with similar
12 settlements of these types of claims under PAGA. It is also important to underscore that all penalty
13 amounts paid to Aggrieved Employees will be an unexpected windfall, as employees typically do
14 not bring individual lawsuits asserting only PAGA penalties.

15 At the case review held on January 14, 2022, the Court addressed concern over the
16 following issues, each of which is detailed legally and factually herein:

- 17 • Reasonableness of settlement – addressed on pages 11-17.
- 18 • Anticipated average award per Aggrieved Employee (total pay periods) – addressed
19 on page 8, section II(F).
- 20 • Plaintiff’s enhancement payment – addressed on page 22, section V.
- 21 • Notice to Aggrieved Employees, including identification and qualification of
22 Administrator – addressed on page 26, section VI.
- 23 • Attorneys’ fees – addressed on page 22, section IV(A)-(C).
- 24 • Costs – addressed on page 22, section IV(D).

25 *See* Court’s Tentative Order, **Exhibit C** to Declaration of Daniel F. Gaines (“Gaines Decl.”)

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

II. STATEMENT OF THE CASE AND THE SETTLEMENT

A. The Parties

Defendant Canoga Topanga DH, LP operates a single Dog Haus restaurant in Canoga Park, California. Gaines Decl. at ¶ 8.

Defendant employed Plaintiff Santiago Nunez as a non-exempt employee from July 2020 through October 2020. The Aggrieved Employees are all persons who worked for Defendant in California as a non-exempt employee at any time from November 10, 2019 to December 31, 2021. Gaines Decl. at ¶ 9.

B. The Claims Asserted

Plaintiff asserts claims that Defendant failed to pay Plaintiff and Aggrieved Employees all wages due including all minimum wages and overtime wages, in violation of Labor Code §§ 510, 558, and 1194, failed to provide legally compliant rest breaks to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7 and 558, failed to provide legally compliant meal breaks to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7, 512, and 558, and failed to pay all wages due or issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 201-202, 226(A), and 226.3. Plaintiff asserts these claims under PAGA, seeking civil penalties for the alleged Labor Code violations. Gaines Decl. at ¶ 10.

C. Procedural Posture

On November 10, 2020, pursuant to Labor Code § 2699.3, Plaintiff gave written notice by online filing with the Labor and Workforce Development Agency (“LWDA”) and by certified mail, return receipt requested, to Defendant of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation. Gaines Decl., **Exhibit B** (LWDA Notice Letter). On February 9, 2021, and after the LWDA declined to take action within the statutorily permissible time with respect to Plaintiff’s November 10, 2020 letter, Plaintiff filed his representative action complaint in this Court. Gaines Decl., ¶ 6-7.

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

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

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, including time and payroll data. The major issue in this case
9 was whether Defendant failed to pay all minimum wages consistent with the Los Angeles County
10 minimum wage ordinance. Defendant proffered data and documents evidencing that it paid the
11 minimum wage to most, if not all, employees, such that this claim had minimal value. Gaines Decl.
12 at ¶ 14.

13 Based on the information received, as well as through discussions with Defendant's
14 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
15 within the definition of "Aggrieved Employee" for the relevant statutory period, and (ii) construct
16 a damage model that calculated the maximum realistic amount of PAGA penalties that could be
17 levied against Defendant within the PAGA Period. Defendant, however, disputed Plaintiff's claims
18 and disputed both the existence of and extent of liability as alleged by Plaintiff. Based on the
19 information received, as well as through discussions with Defendant's counsel, Plaintiff's Counsel
20 was able to ascertain (i) the size of the aggrieved employee group, (ii) the number of affected pay
21 periods at issue among them, and (iii) the strength of Plaintiff's claims. Gaines Decl. at ¶ 15.

22 Plaintiff's Counsel's experience in litigating similar "representative" wage and hour claims,
23 the degree of investigation that was conducted here, the amount of data that was obtained, and the
24 discussions guided by mediation, was sufficient to determine the potential value of the PAGA
25 claim, and to evaluate the strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5,
26 13-16.

1 **E. Settlement Negotiations**

2 On November 29, 2021, the Parties participated in a mediation session with a respected
3 mediator, attorney Steve Pearl. During the mediation, the parties engaged in arm's-length
4 negotiations and reached a resolution of the PAGA claims asserted in this action. Gaines Decl. at
5 ¶ 16.

6 **F. The Proposed Settlement**

7 The Parties jointly prepared and executed the original PAGA Settlement Agreement on
8 December 20, 2021 and thereafter submitted the initial Settlement Agreement, a Stipulation and
9 Order to approve the settlement, and the Declaration of Daniel F. Gaines on January 7, 2022, to the
10 Court (the "Stipulation"). Gaines Decl. ¶ 16; On January 21, 2022, the Court issued its [Tentative]
11 Order Re: Declaration of Daniel Gaines in Support of Stipulation and [Proposed] Order Approving
12 Settlement of PAGA Claims and Dismissing Action with Prejudice (the "Tentative Order"). Gaines
13 Decl., **Exhibit C**. The Tentative Order directed Plaintiff to address a number of issues regarding
14 the settlement, and directed Plaintiff to submit a motion for approval of the settlement. Those issues
15 are addressed herein.

16 The Parties thereafter jointly prepared and executed an Amended PAGA Settlement
17 Agreement. Gaines Decl., ¶ 16, **Exhibit D** (the "Amended Settlement Agreement"). The Amended
18 Agreement sets forth the terms of the Settlement reached by the Parties, including the following
19 key points:

20 1. Defendant agrees to settle this matter for the payment of Ninety Thousand U.S.
21 Dollars (\$90,00.00) (hereinafter the "PAGA Settlement Sum"), which shall be all inclusive,
22 encompassing (i) all payments to the Labor and Workforce Development Agency and Aggrieved
23 Employees, (ii) any and all costs of third party administration of the settlement, (iii) Plaintiff's
24 Counsel's attorneys' fees and costs of suit, and (iv) a modest enhancement payment to Plaintiff.
25 *See Amended Settlement Agreement, at § 3.02.*

26 2. The total sum available for payment of PAGA penalties shall be calculated by
27 deducting \$45,412.72 for the payment of Plaintiff's Counsel's fees and costs (\$36,000 in fees and

1 \$9,412.72 in costs), \$5,000 for the payment of Plaintiff's enhancement payment, and the costs of
2 administration (up to \$3,549) from the \$90,000 PAGA Settlement Sum, yielding \$36,038.28.
3 Seventy-five percent (75%) of this amount, or \$27,028.71, shall be distributed to the LWDA, and
4 the remaining twenty-five percent (25%) or \$9,009.57, shall be distributed to the Aggrieved
5 Employees. *See* Amended Settlement Agreement, at § 3.02(a)(2).

6 3. All non-exempt employees that performed work for Defendant during the PAGA
7 Period will receive a pro rata share of the \$9,009.57 allocated to Aggrieved Employees, which shall
8 be distributed based on the number of pay periods each Aggrieved Employee worked for Defendant
9 in California during the PAGA Period. *See* Amended Settlement Agreement, at § 3.02(a)(3).
10 Although these calculations will not be made until after approval, a rough estimation of the value
11 to the 110 individuals falling within the definition of "Aggrieved Employee" may be gleaned from
12 the fact that an equal division would provide about \$81.90 to each Aggrieved Employee, net of
13 payments to the LWDA, the Settlement Administrator, attorney's fees, and costs. The LWDA will
14 be paid \$27,028.71. *See* Amended Settlement Agreement, at § 3.02(a)(2).

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

18 Upon the Effective Date and subject to Defendant's full payment of
19 all sums required by this Settlement, Plaintiff, on behalf of himself,
20 his heirs, executors, and assigns, the Aggrieved Employees, and the
21 State of California, fully releases and discharges Defendant, and each
22 of its present and former affiliates, parent companies, subsidiaries,
23 divisions, successors, predecessors, and assigns, and each of its
24 respective past and present shareholders, officers, partners, directors,
current and former employees, agents, attorneys, insurers,
successors, assigns, representatives, accountants, and all persons
acting under, by, through, or in concert with any of them
(collectively, "Released Parties") from any and all claims, rights,
demands, liabilities, and causes of action of every nature and

25 ² This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009)
26 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties, nonparty
27 employees as well as the government are bound by the judgment in an action brought under the act
....").

1 description, under PAGA, which were alleged or which could have
2 been alleged based on the facts asserted in the operative complaint in
3 the Action and/or the operative administrative exhaustion letter filed
4 with the Labor Workforce Development Agency (“Released
Claims”) that accrued during the Release Period (from November 10,
2019 through December 31, 2021).

See Notice of Settlement.

5 5. Settlement administration, which is to be paid from the PAGA Settlement Sum, will
6 not exceed \$3,549. See Declaration of Sean Hartranft (“Hartranft Decl.”), ¶ 6. ILYM Group, Inc.,
7 a reputable settlement administration company, has agreed to administer the settlement for this
8 amount, submitting a competitive bid. ILYM Group, Inc. is a qualified settlement administrator,
9 having been in business as such since 2010, during which time ILYM has efficiently and
10 economically provided administration services on many settlements for counsel for Plaintiff. *See,*
11 *generally*, Hartranft Decl.

12 6. As detailed herein, Plaintiff’s counsel seeks an award of attorneys’ fees and
13 litigation costs totaling \$45,412.72, and Plaintiff Santiago Nunez seeks an enhancement payment
14 of \$5,000. *See* Amended Settlement Agreement, at § 3.02(a)(2).

15 7. Finally, under the terms of Settlement, the value of checks uncashed more than
16 180 days after issuance shall be remitted to the Unclaimed Property Fund of the California State
17 Controller’s Office to be held in the name of the Aggrieved Employees. *See* Amended Settlement
18 Agreement, at § 3.02(a)(8).

19 **III. LEGAL ARGUMENT**

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

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

24 As with any settlement, the Court must be mindful in conducting its inquiry that
25 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
26 litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
27

1 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
2 absolutes and an abandoning of highest hopes” [*Officers for Justice v. Civil Service Com.*, 688
3 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
4 of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such,
5 “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits”
6 or “judged against a hypothetical or speculative measure of what might have been achieved by the
7 negotiators.” *See id.*

8 Although the operative PAGA statute does not set forth the criteria on which a PAGA
9 settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for
10 review of a class action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. § 382 and Rule
11 3.769, Cal. Rules of Court, as courts within California have approved settlements of PAGA claims
12 encompassed within class action settlements using Rule 23 criteria.³ However, it is important to
13 underscore that not all Rule 23 factors can be applied, as “a PAGA claim asserted on a non-class
14 representative basis . . . is not considered a class action but a law enforcement action, and therefore
15 does not have to meet the requirements of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012
16 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan. 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011
17 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2, 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
18 LEXIS 66454 (E.D. Cal. June 30, 2010). Based thereon, a court’s review of a PAGA settlement
19 necessarily implicates the following unique features that render the approval process completely
20 distinct from approval of a class action settlement under Rule 23 or C.C.P. § 382 and Rule 3.769,

21 ³ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
22 balancing of several factors which may include, among others, some or all of the following: [1] the
23 strength of Plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further
24 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
25 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
26 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
27 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 Cal. Rules of Court.

2 First, in evaluating the adequacy of the settlement amount, the Court's focus is not
3 concerned with the amount which "aggrieved employees" are to receive, but rather, must focus on
4 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" [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
7 into account the fact that settlement of a PAGA claim – like any settlement – involves a
8 "compromise" that stops short of rendering findings of liability and damages. Moreover, the Court
9 must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for
10 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
11 for the government that otherwise may not have been assessed and collected by overburdened state
12 enforcement agencies." *See Ochoa-Hernandez*, 2010 U.S. Dist. LEXIS 32774, at 12.

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

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

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

19 In conducting a review of a settlement, it is generally recognized that an "agreement . . .
20 reached through arms-length negotiation between experienced parties . . . is entitled to a
21 presumption of fairness." *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
22 44 (C.D. Cal. Apr. 12, 2010).

23 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
24 length negotiations brokered through a respected third party neutral [Gaines Decl. at ¶ 16], (2) that
25 was negotiated by Counsel with significant experience in similar wage and hour litigation [*see id.*,
26 at ¶¶ 2-5, 24-28 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient
27 investigation to evaluate the strength and potential value of the PAGA claims, as well as evaluating

1 the risks of litigating this claim through trial. *See id.*, at ¶¶ 13-15, 20-23. Based thereon, the Court
2 should give considerable weight to the competency and integrity of counsel in assuring itself that
3 the Amended Settlement Agreement represents an arm's-length transaction entered without self-
4 dealing or other potential misconduct.

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

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

11 This case addresses violations of important employee protections embodied in the
12 California Labor Code – namely, that Defendant failed to pay Plaintiff and Aggrieved Employees
13 all wages due including all minimum wages and overtime wages, in violation of Labor Code §§
14 510, 558, and 1194, failed to provide legally compliant rest breaks to Plaintiff and Aggrieved
15 Employees, in violation of Labor Code §§ 226.7 and 558, failed to provide legally compliant meal
16 breaks to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7, 512, and 558,
17 and failed to timely pay all wages due and issue accurately itemized wage statements to Plaintiff
18 and Aggrieved Employees, in violation of Labor Code §§ 201-202, 226(a), and 226.3. Defendant's
19 maximum theoretical exposure in this action for the 110 total Aggrieved Employees is
20 approximately \$148,500, which is ascertained by multiplying the 1,485 total aggregate pay periods
21 by \$100 each, assuming one violation occurred in every pay period at the initial penalty rate and
22 without stacking penalties, as there is currently no California authority that provides for PAGA
23 penalties to be stacked. *See* Gaines Decl., ¶ 19.

24 Plaintiff argued that Defendant failed to pay the applicable minimum wage for all periods
25 of time during the relevant limitations period. Defendant demonstrated that it paid most – if not all
26 – employees at the proper rates. As a result, this claim had minimal value. Defendant also
27 demonstrated through the production of time and wage records and policy documents that it

1 enforced meal and rest period policies and practices which complied with California law. As a
2 result, Plaintiff's claims were not strong; the settlement amount is a fair compromise considering
3 the risks of continued litigation in light of the strengths and weaknesses of Plaintiff's claims on
4 behalf of himself and other aggrieved employees. Because Plaintiff's wage statement and waiting
5 time penalty claims were wholly derivative of his unpaid wage claims, and subject to independent
6 defenses of their own, he was required to compromise them as set forth in the Amended Settlement
7 Agreement. *See* Gaines Decl., ¶ 20.

8 Defendant, however, contends it acted within the requirements of California law at all times
9 as to all Aggrieved Employees. It further contends that not every pay period at issue – and no pay
10 periods at issue – involved an alleged Labor Code violation subject to civil penalties. Moreover,
11 it maintained that even if the Court did award penalties, the Court could and would *substantially*
12 reduce the penalties awarded based on the discretionary factors contained in Labor Code §
13 2699(e)(2) (“In action by an aggrieved employee . . . , a court may award a lesser amount than the
14 maximum civil penalty amount specified by this part if, based on the facts and circumstances of the
15 particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
16 confiscatory.”). *See* Gaines Decl., ¶ 21.

17 Based on these disputes, which had the potential to completely eliminate Plaintiff's
18 recovery, the range of realistic “litigation outcomes” on the Plaintiff's PAGA claim was defined
19 by a “maximum possible liability” amount of approximately \$148,500 [Gaines Decl., ¶ 22], and a
20 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
21 such issues, the Settlement achieves a significant benefit – approximately 60% recovery of the
22 maximum possible liability. As such, this factor weighs very heavily in favor of resolution by way
23 of the compromise set forth in the Settlement. Gaines Decl., ¶ 22.

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

26 Approval of the Amended Settlement Agreement is also appropriate in light of the risk,
27 expense, and complexity of further litigation. As discussed above, the Amended Settlement

1 Agreement takes into consideration the specific factual and legal hurdles faced by the Plaintiff in
2 establishing Defendant's penalty-liability in this case, which again, may have resulted in a net-zero
3 recovery. Any recovery on these claims is not certain. And even when liability is found, PAGA
4 claims are discretionary, such that the Court could decline to award their full value. Some of
5 Plaintiff's claims are also derivative, and as such, Plaintiff must prevail on his underlying Labor
6 Code claims in order to prevail on the derivative claims. These risks – when balanced with the fact
7 that the settlement achieved a very significant recovery (as demonstrated below), and that further
8 litigation posed a risk of diminishing such recovery by increasing litigation expenses – weigh
9 strongly in favor of settlement approval.

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

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

15 The proposed settlement is not to be judged against a hypothetical or
16 speculative measure of what might have been achieved by the
17 negotiators.” *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at
18 625 (emphasis in original). Thus, “the very essence of a settlement is
19 compromise, ‘a yielding of absolutes and an abandoning of highest
20 hopes.’” *Id.* at 624 (citations omitted). As the Second Circuit has
21 pointed out: “The fact that a proposed settlement may only amount
22 to a fraction of the potential recovery does not, in and of itself, mean
23 that the proposed settlement is grossly inadequate and should be
24 disapproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
25 n.2 (2nd Cir. 1974).

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

27 Here, after all deductions are made for administration, an enhancement payment, attorneys’
28 fees and costs, \$36,08.28 will be paid out, of which \$27,028.71 (i.e. 75%) will go to the LWDA,
and \$9,009.57 (i.e. 25%) will go to the Aggrieved Employees, as required by Labor Code § 2699(i)
 (“civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to
the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees.”).

1 See Amended Settlement Agreement, at § 3.02(a)(2).

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

20 Thus, notwithstanding the existence of issues having the potential to completely eliminate
21 recovery on the PAGA claim, the Amended Settlement Agreement not only achieves a recovery
22 that exceeds typical PAGA awards routinely approved by the courts, it recovers significant monies

23 _____
24 ⁴ Significantly, each of the above-cited actions involved substantially more “aggrieved employees”
25 than the approximately 110 aggrieved employees in the instant Lawsuit. See *Franco*, 2012 U.S.
26 Dist. LEXIS 169057, 14 (“2,055 Class Members were ultimately identified”); *Garcia*, 2012 U.S.
27 Dist. LEXIS 160052, at 12 (class comprised of “approximately 1,869 individuals”); *Schiller*, 2012
U.S. Dist. LEXIS 80776, 16 (“3,327 California Class members were ultimately identified”); *Gong-
Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051 California Class Members were ultimately
identified”).

1 for Aggrieved Employees which they otherwise would not receive. As such, this factor balances
2 strongly in favor of approval of the Settlement..

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

4 As discussed above, the California Supreme Court has concluded that in the context of
5 PAGA “the nonparty employees, because they were not given notice of the action or afforded any
6 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
7 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the release provided in exchange for
8 the foregoing consideration is limited to the civil penalties asserted in the Action under Labor Code
9 §§ 2698 *et seq.* *See* Amended Settlement Agreement, at § 5.01.

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

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

13 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
14 litigation. *See* Gaines Decl., ¶¶ 2-5, Gaines Decl. at **Exhibit A**. In the view of Plaintiff’s Counsel,
15 the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under the
16 circumstances, as it reflects a reasoned compromise which takes into consideration the risks
17 inherent in this case which had the potential to completely eliminate recovery. Gaines Decl., ¶¶
18 19-22. As such, this factor balances in favor of approval of the Settlement.

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

21 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
22 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration
23 is “whether ‘the parties have sufficient information to make an informed decision about
24 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
25 26 (C.D. Cal. Nov. 9, 2011).

26 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
27 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,

¶¶ 13-15. As discussed above, Plaintiff's Counsel's investigation was sufficient to, among other things, tabulate with precision the total 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.

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. *See* Gaines Decl., ¶¶ 2-5; 13-15.

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

In addition to the factors presented above, the proposed 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. Section 2.01(c) of the Amended Settlement Agreement and paragraph 7 of the 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 Amended Settlement Agreement, and avoids any stigmas associated with the entry of a judgment against Defendant. In sum, under the applicable standards for approval of PAGA settlements in California, the settlement in this case meets the standards for approval.

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

Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of \$36,000 and reimbursement of litigation costs of \$9,412.72, falling within the bounds authorized by the Amended Settlement Agreement. *See* Amended Settlement Agreement, at § 3.02(a)(2). Plaintiff's Counsel's entitlement to an award of attorneys' fees and costs is warranted on multiple independent grounds. Further, the amount of fees requested falls well within the range of reasonableness under applicable standards, as the amount requested constitutes a "percentage of the fund" deemed

1 reasonable in similar wage and hour settlements of this size and approved by California courts,
2 which is not only warranted based on the contingency risk Plaintiff's Counsel has agreed to incur
3 for the benefit of the State of California and Aggrieved Employees, but also based on the significant
4 results achieved, as the Settlement obtains a recovery substantially above the range approved as
5 reasonable by California state and federal courts. Based thereon, Plaintiff's Counsel respectfully
6 requests that the Court enter an order approving the fee and cost amounts requested.

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

9 Plaintiff's Counsel are 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 a
11 common fund for the benefit of persons other than himself or his client is entitled to a reasonable
12 attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

13 Courts have long recognized the "common fund" or "common benefit" doctrine, under
14 which attorneys who create a common fund or benefit for a group of persons may be awarded their
15 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
16 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
17 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
18 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
19 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

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

1 Group) at § 17:172.3 explains the common fund doctrine as follows:

2 Where the lawsuit results in the recovery of a fund or property
3 benefiting others as well as Plaintiffs (e.g., a class action), the court
4 has inherent equitable power to order Plaintiffs' attorney fees paid
5 out of the common fund or property [citations]. Such fee spreading
6 assures that all of those benefited by the litigation pay their fair share
7 of obtaining the recovery.

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

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

15 It is not necessary to find this suit a proper class action in order to
16 uphold the portion of the judgment awarding counsel for Plaintiffs
17 25 percent of all retroactive salaries and wages received. That award
18 may be sustained under the rule that a litigant who creates a fund in
19 which others enjoy beneficial rights may require those beneficiaries
20 to pay their fair share of the expense of litigation. (*See Sprague v.*
21 *Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer*
22 (1959) 53 Cal.2d 124, 132).

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

Numerous appellate courts have similarly found. *See e.g., Knoff v. City and County of San*
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

1 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
2 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
3 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
4 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
5 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
6 of residential property in an inverse condemnation action).

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

13 Thus, as Plaintiff's Counsel has expended a significant amount of time and money to secure
14 a \$90,000 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
15 LEXIS 80776, at 43 ("A common fund results when 'the activities of the party awarded fees have
16 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
17 sum or 'fund' the fees are to be paid.'")], and in doing so, has exclusively bore the risk of loss for
18 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
19 the PAGA Notice), Plaintiff's Counsel is entitled to claim reasonable fees from that fund under
20 applicable precedent.⁵

22 ⁵ Plaintiff's Counsel is also entitled to recover attorney's fees and costs as a matter of right under
23 the PAGA statute [*Labor Code* § 2699(g)(1) ("Any employee who prevails in any action shall be
24 entitled to an award of reasonable attorney's fees and costs.")], and under *C.C.P.* § 1021.5, as the
25 instant PAGA action was by definition "for the public benefit" and secured monetary awards for
26 approximately 110 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
27 (2007) 154 Cal. App. 4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the
28 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 **B. The Fee Amount Requested Is Reasonable**

2 In addition to the forgoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount
3 of \$36,000, or forty percent (40%) of the \$90,000 PAGA Settlement Sum, falls well within the
4 “zone of reasonableness.”

5 It is important to highlight at the outset that the fee amount presently sought is not
6 extraordinary, but actually falls at the “average” fee deemed reasonable under California State court
7 authority, as it is recognized that “courts may award attorney’s fees in the 30-40% range in wage
8 and hour class actions that result in recovery of a common fund under \$10 million.” *See e.g. Martin*
9 *v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). This fee falls
10 directly within that range.

11 Moreover, Plaintiff’s Counsel agreed to incur the contingency risk for the benefit of the
12 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
13 Decl., ¶ 29. The significant results achieved and the underlying facts therefrom justify Plaintiff’s
14 Counsel’s requested fee as reasonable under all applicable standards.

15 **C. The Fee Amount Allocated by The Amended Settlement Agreement Is**
16 **Within the Zone of Reasonableness Under the “Percentage of the Fund”**
17 **Method**

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

23 First, the results achieved by Plaintiff’s Counsel are significant, as Defendant has agreed to
24 pay \$90,000 under the Settlement. This is a significant recovery given the risk of success in
25 obtaining any recoverable penalties [Gaines Decl., ¶ 20], and further, as the settlement of PAGA
26 claims impacting much higher numbers of individuals have been approved as reasonable for
27

1 between \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

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

5 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
6 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
7 Decl. at ¶ 29. This required Plaintiff's Counsel to personally assume the risk of nonpayment in
8 securing the very substantial financial benefit the State of California stands to receive, and also
9 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors that warrant fee
10 enhancement under applicable California Supreme Court authority:

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

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

27 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,
28 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
29 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that
30 result in recovery of a common fund under \$10 million." *See also Crandall v. U-Haul*
31 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common
32 fund).

Attorneys' fee awards in the amount sought here are well-established by California law and 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

1 failure.”).

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

10 Here, Plaintiff’s Counsel’s fee request of \$36,000 (40% of the PAGA Settlement Sum) is
11 fair and reasonable based on a percentage of the recovery, and as well as when confirmed with a
12 lodestar cross-check. First, “regardless whether the percentage method or the lodestar method is
13 used, fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*
14 (2008) 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff’s Counsel’s experience
15 in similar wage and hour class action matters. *Gaines Decl.*, ¶ 2-5; 24-28. Thus, the percentage
16 sought by Plaintiff’s Counsel here is reasonable.

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

25 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
26 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
27 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition*

1 *for L. County Planning etc. Interest v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251 (approving
2 multiplier of ~2.04). In representative actions such as this one, where the value of the benefit
3 conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust
4 the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is
5 reasonable and within the range of fees freely negotiated in the legal marketplace in comparable
6 litigation.” *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. In doing so, “the court
7 determines, retrospectively, whether the litigation involved a contingent risk or required
8 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate
9 the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

10 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$36,000.
11 Based on a projected final lodestar of \$70,592.50 this yields a “negative multiplier” of 0.51 under
12 the \$36,000 fee request. Gaines Decl., ¶ 23. The billing rates used to compute the lodestar are
13 reasonable in view of the evidence submitted herewith. Gaines Decl., ¶ 24-28; **Exhibit F**.

14 Based thereon, and for the reasons discussed above (the significant risk in continuing to
15 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
16 burden involved in representation on a contingency basis; the knowledge and experience of
17 Plaintiff’s Counsel; and the value obtained by Plaintiff’s Counsel for the Aggrieved Employees), it
18 is fair and reasonable to account for these risks and compensate Plaintiff’s Counsel with a fee award
19 of 40% of the PAGA Settlement Sum.

20 **E. Plaintiff’s Counsel’s Request for Costs is Reasonable**

21 In the course of this litigation, Plaintiff’s Counsel incurred out-of-pocket costs of \$9,412.72.
22 *See* Gaines Decl. at ¶ 35, **Exhibit G**. As demonstrated in the Gaines Declaration submitted herewith,
23 the incurred costs included filing fees, mediation fees, photocopy charges, service of process fees,
24 mailing charges, and other charges typical of litigation of this nature. *Id.* Such costs are appropriate
25 for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp. Sec. Litig.* (C.D.
26 Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); *see also,*
27 *In re GNC Shareholder Litigation* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

1 The costs incurred by Plaintiff's Counsel in this litigation benefited Plaintiff, Aggrieved
2 Employees, and the State. Plaintiff's cost request is reasonable and represents the costs that
3 Plaintiff's Counsel was required to incur to prosecute this action and should therefore be granted.

4 V. **THE ENHANCEMENT PAYMENT SOUGHT BY PLAINTIFF IS**
5 **REASONABLE AND SHOULD BE APPROVED**

6 The Parties have agreed that Plaintiff Santiago Nunez will be paid an enhancement in the
7 amount of \$5,000. This payment is intended to recognize the time and effort that Mr. Nunez spent
8 on behalf of other Aggrieved Employees and the State.⁶ See Amended Settlement Agreement at
9 §5.01. See Declaration of Santiago Nunez, submitted herewith.

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

17 The traditional bases for awarding incentive awards in class settlements support the award
18 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
19 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
20 awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs
21 is that he or she should be compensated for the expense or risk he has incurred in conferring a
22 benefit" on others. *Id.* at 806. That rationale applies synonymously in this Action.

23 Without Plaintiff's efforts, there would be no recovery at all. The requested award is
24 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
25 other of Defendant's employees and the State of California. As a result of the named Plaintiff's

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27 ⁶ Mr. Nunez, represented by separate counsel, has concurrently resolved his individual termination-
28 related claims against Defendant for a confidential sum.

1 efforts, Aggrieved Employees will receive monetary settlement payments, and the State of
2 California will receive \$27,028.71 to be put toward education about and enforcement of
3 California's labor laws.

4 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
5 investigating and substantiating the claims alleged in this action, including multiple interviews with
6 counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the
7 complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
8 settlement of this litigation. *See generally*, Nunez Declaration. Moreover, as with any Plaintiff
9 who files a civil action, the named Plaintiff undertook the financial risk that, in the event of a
10 judgment for Defendant in this action, he could have been personally responsible for any attorneys'
11 fees and costs awarded in Defendant's favor.

12 The award of such payment to Plaintiff is especially warranted in a case like this one. It is
13 necessary to ensure that employees continue to bring forth claims that enforce their rights.
14 Individuals like the named Plaintiff (and most Aggrieved Employees) would have little, if any,
15 recourse without the representative action device. Most Aggrieved Employees – like the named
16 Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much less a
17 representative action suit. Plaintiff must be commended for pursuing his claims; the modest
18 payment sought here is an appropriate means of doing so.

19 **VI. NOTICE OF SETTLEMENT TO AGGRIEVED EMPLOYEES**

20 The Amended Settlement Agreement and the Notice of Settlement of Private Attorneys
21 General Act Claim ("Notice of Settlement"), attached as Exhibit A to the Amended Settlement
22 Agreement to be sent to each Aggrieved Employee (submitted herewith) were both amended to
23 address the Court's concerns in its Tentative Order. Both documents identify the administrator for
24 the settlement as ILYM Group, Inc ("Settlement Administrator"). The qualifications of the
25 Settlement Administrator, its procedures for receiving and updating the list of Aggrieved
26 Employees, processing of payments, and handling of notices are all addressed in the Declaration of
27 Sean Hartranft of ILYM Group, Inc. *See generally*, Hartranft Declaration. The Amended Settlement

1 Agreement further indicates that Defendant will provide the Settlement Administrator with a
2 confidential list containing the names, addresses, and total number of pay periods worked during
3 the PAGA Period for each of the Aggrieved Employees within ten (10) calendar days after the
4 Effective Date. *See* Amended Settlement Agreement at §3.02(a)(6).

5 The Tentative Order also raised certain issues that are not applicable to this matter. This
6 case is a PAGA action – not a class action. As such, there is no “class list” to be provided to the
7 Settlement Administrator as part of the settlement process, nor any class notice to be sent to advise
8 class members of their rights and deadline to opt-out or object to the Settlement. Rather, the notice
9 that is sent in conjunction with a PAGA settlement is one that accompanies each Aggrieved
10 Employee’s individual payment. It informs the Aggrieved Employees about the nature of the case,
11 the settlement, the amount of their individual payment and how it was calculated, and what claims
12 they are releasing. The proposed Notice of Settlement in this matter provides that information.

13 Additionally, and per the Court’s Tentative Order, the Amended Settlement Agreement
14 provides that any notices returned to the administrator as undeliverable will be reviewed by the
15 Settlement Administrator to update the recipient’s address and, if applicable, re-mailed by the
16 Settlement Administrator. *See Generally* Hartranft Declaration. Because this PAGA settlement
17 does not require either a preliminary or final approval hearing, there is no hearing location or other
18 information to provide in the Notice of Settlement, nor a settlement website or publication notice.
19 The hearing on this motion to approve the PAGA settlement is the only hearing on the matter,
20 pursuant to the settlement procedures set forth in Labor Code §§ 2698, 2699 *et seq.*

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1 **VII. CONCLUSION**

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

6 1. Grant approval of the Amended Settlement Agreement, pursuant to California Labor
7 Code § 2699, subpart I;

8 2. Appoint ILYM Group, Inc. as the Settlement Administrator and approve its
9 administration fees up to \$3,549 for payment out of the PAGA Settlement Sum;

10 3. Approve the award of attorneys' fees and costs to Plaintiff's Counsel not to exceed
11 \$45,412.72, payment of which shall come from the PAGA Settlement Sum;

12 4. Approve the award of enhancement payment to Plaintiff Santiago Nunez in the
13 amount of \$5,000 from the PAGA Settlement Sum;

14 5. Direct disbursement of the remaining Net Settlement Fund to the LWDA and all
15 Aggrieved Employees as provided for in the Amended Settlement Agreement; and

16 6. Dismiss the Action with prejudice.

17
18 Date: March 18, 2022

Respectfully submitted,

19 GAINES & GAINES, APLC

20
21 By: Daniel F. Gaines

22 DANIEL F. GAINES
23 ALEX P. KATOFISKY
24 Attorneys for Plaintiff
25 SANTIAGO NUNEZ