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on behalf of herself and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

KATHLEEN RISHI, an individual, on
behalf of herself, and all others similarly
situated,

Plaintiff,

v.

COGENT COMMUNICATIONS, Inc., Gregory
Dominguez, an individual and DOES 1 through
25, inclusive,

Defendants.

Case No. CGC-21-592577

PAGA REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT “PAGA”
SETTLEMENT, AWARD FOR
ATTORNEYS’ FEES AND COSTS,
SERVICE PAYMENT AND ENTERING
JUDGMENT**

[Filed concurrently with Notice of Motion;
Declarations of Catherine J. Coble, Beth Gunn,
Kathleen Rishi, and Julie Green of CPT Group,
Inc.; [Proposed] Judgment and [Proposed]
Order]

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1 **I. INTRODUCTION**

2 Plaintiff Kathleen Rishi (“Plaintiff”) submits this Memorandum of Points and Authorities in
3 support of the Motion for Approval of the Private Attorneys General Act (“PAGA”) settlement
4 entered into in this Action. Plaintiff and Defendant Cogent Communications, Inc. (“Defendant”)
5 (collectively, “the Parties”) have documented the proposed settlement terms in the Joint Stipulation
6 Re Private Attorneys General Act Settlement (“Settlement Agreement” or “SA”) attached as Exhibit
7 A to the Declaration of Catherine J. Coble (“Coble Decl.”), ¶ 3.

8 In the only claims remaining in this action,¹ Plaintiff seeks civil penalties pursuant to PAGA
9 for the alleged violation of California Labor Code (“Labor Code”) section 2802 on behalf of herself
10 and other aggrieved employees of Defendant in California at any time during the time period of
11 December 18, 2019 to present who were not reimbursed for necessary business expenses incurred
12 while performing work from home. Plaintiff sought reimbursement of costs incurred by California
13 employees for the use of internet service, office supplies, office equipment and/or computer
14 equipment required to perform their work for Defendant from their homes during the COVID-19
15 pandemic. This settlement of PAGA claims is for civil penalties only; it is not a class settlement and
16 does not release individual claims, of any of the affected Aggrieved employees. *See* Labor Code §
17 2699(g)(1); *Iskanian v. CLS Transp.* (2014) 59 Cal.4th 348, 381.

18 The proposed \$575,000 Gross Settlement Amount is intended to settle all claims, demands,
19 rights, liabilities and/or causes of action for PAGA civil penalties referenced above for non-exempt
20 employees of Defendant in California at any time during the time period of December 18, 2019 to
21 February 28, 2022 pursuant to Labor Code § 2699.² (Coble Decl. ¶¶ 3-4, Ex. A, SA ¶¶ 12, 13). As
22 demonstrated below and in the accompanying declarations of Catherine Coble, Beth Gunn, Kathleen
23 Rishi, and Julie Green of CPT Group, Inc. the proposed settlement warrants the Court’s approval.

24 ¹ Plaintiff’s individual causes of action were previously resolved and will be dismissed with
25 prejudice, along with the entire case, once PAGA settlement approval has been granted.

26 ² During settlement negotiations, the Parties agreed to limit the scope of the release to non-exempt
California employees and the time period of December 18, 2019 to February 28, 2022.

II. THE PARTIES

Defendant Cogent Communications, Inc. is a publicly traded multinational Tier 1 internet service provider that offers internet access and data transport. As part of its multinational business, Cogent has operations and employees throughout California.

Plaintiff Kathleen Rishi began her most recent period of employment with Defendant, which was her second, in March 2014 as a sales representative in San Francisco, and she worked for Defendant until September 2, 2020. On March 18, 2020, Defendant was ordered to direct its California employees to work from home due to the COVID-19 pandemic. Beginning on March 18, 2020, Ms. Rishi's alleged necessary business expenses included internet service charges required to work from home, office supplies, chairs, and/or computer monitors required to perform work for Defendant. *See* Declaration of Kathleen Rishi ("Rishi Dec."), ¶ 4.

The Aggrieved Employees are the individuals who are or were non-exempt employees of Defendant in California at any time between December 18, 2019 and February 28, 2022 and who were not reimbursed for necessary business expenses incurred while performing work from home.

III. PLAINTIFF'S CONTENTIONS

Plaintiff maintains that from March 20, 2020 until March 1, 2022, Defendant required its California employees to work from home due to the COVID-19 pandemic without reimbursing them for any business expenses, thereby unlawfully shifting its operating costs on its employees, requiring Plaintiff and other employees to absorb necessary business expenses, including costs associated with mandatory remote work, such as internet service costs, office supplies, office equipment and/or computer equipment required to perform their work for Defendant from their homes by paying those costs from their wages. On behalf of the State of California and Aggrieved Employees, Plaintiff sought PAGA penalties predicated on Defendant's violations of California's reimbursement requirements in Labor Code Section 2802. *See Williams v. Amazon.com Serv. LLC*, 2022 US Dist. LEXIS 97920; 2022 WL 1769124 (N.D. Cal. June 1, 2022) (holding that the employer could be liable for Lab. Code §2802 and related PAGA claims because a tech company who knew or had

reason to know that employees working from home during the pandemic were incurring basic costs for that work). Plaintiff requested reimbursement from Defendant, which Defendant refused to provide as required by the Labor Code.

IV. PROCEDURAL HISTORY

On December 18, 2020, Plaintiff served on the LWDA and Defendant notice of her PAGA claim for failure to reimburse aggrieved employees for necessary business expenses (“PAGA Letter”). (Coble Decl. ¶ 5, Ex. B.) On June 4, 2021, without a response from the LWDA indicating it intended to investigate Plaintiff’s claims, Plaintiff filed her Complaint in the San Francisco County Superior Court against Defendant, case number CGC-21-592577, which included her thirteenth cause of action for violation of PAGA for failure to reimburse employees for necessary business expenses, and sought penalties, costs, attorneys’ fees, and any other relief deemed appropriate by the Court on the basis of the allegations. (Coble Decl., ¶ 6.)

On July 12, 2021, Defendant answered the Complaint with a general denial and assertion of affirmative defenses. The Parties resolved Plaintiff’s individual first through twelfth causes of action in a separate agreement prior to reaching agreement on Plaintiff’s PAGA claim. (Coble Decl., ¶ 87) On May 2, 2022, the Parties engaged in mediation before Ann Kotlarski, Esq., an experienced mediator in this area of law. (Coble Decl., ¶ 8.) The mediation was not successful and the Parties continued to litigate this case with Plaintiff bringing motions to compel Defendant’s responses to written discovery and deposing Defendant’s Person Most Qualified regarding the topics relevant to her PAGA claim. (Coble Decl., 9.) On November 15, 2022, following multiple subsequent settlement negotiations with the mediator, and additional information exchanged by the Parties, the Parties both accepted a mediator’s proposal containing the principal terms of settlement of Plaintiff’s PAGA claim. (Coble Decl., 10)

V. INVESTIGATION AND DISCOVERY CONDUCTED

On January 27, 2022, Plaintiff served Requests for Production of Documents, Set One on Defendant. (Coble Decl., ¶11.) On March 22, 2022, Plaintiff served Special Interrogatories on

Defendant. (Coble Decl., ¶ 12.) After numerous meet and confer attempts, on July 12, 2022, Plaintiff exercised due diligence and brought a motion to compel Defendant's further substantive and verified responses to her Requests for Production of Documents and on July 15, 2022 Plaintiff brought a motion to compel Defendant's responses to her Special Interrogatories. (Coble Decl., ¶ 13.) Plaintiff's motions to compel were granted and on August 12, 2022. The Court ordered Defendant to provide Code of Civil Procedure-compliant further verified responses to Plaintiff's Request for Production of Documents, Set One and Plaintiff's Special Interrogatories by August 22, 2022. (Coble Decl., ¶ 14.) On August 22, 2022, Defendant did so. Also on August 22, 2022, Defendant produced 1459 pages of requested documents, including documents regarding its travel and expense reimbursement policies and procedures, its employee handbooks, communications regarding COVID-19 work from home policies and procedures, Defendant's pay period schedule, comprehensive employee data showing the aggrieved employees who worked for Defendant from December 18, 2019 to the date of the response, including their dates of employment, work from home dates, and amounts of business expense reimbursements paid, if any, to aggrieved employees. (Coble Decl., ¶ 15.)

On November 8, 2022, Plaintiff deposed Defendant's Person Most Qualified ("PMQ"), Defendant's Senior Director, Financial Analysis Keesha Major, covering 11 topics regarding its expense reimbursement policies, practices and procedures, preservation of electronically stored information and responses to Plaintiff's Requests for Production of Documents and Special Interrogatories. (Coble Decl., ¶ 16.)

VI. PAGA'S PURPOSE AND PROCEDURE

A. PAGA Actions are Brought on Behalf of the State of California.

"The California legislature enacted PAGA after a 2004 budget shortfall that led to understaffing in the Labor and Workforce Development Agency ("LWDA") and insufficient resources to enforce the Labor Code. PAGA was intended to address these problems and ensure more vigorous enforcement of the labor and employment laws." *Tseng v. Nordstrom, Inc.*, 2016 U.S. Dist.

LEXIS 176790 (C.D. Cal. December 19, 2016), *13-14 (citations omitted). “[T]he purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.... Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” *Id.*

“The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions. The primary purpose of PAGA is to ensure compliance with the law; restitution is not the object of a PAGA action.”

Franco v. Athens Disposal Co., Inc. (2009) 171 Cal.App.4th 1277, 1300. PAGA “deputizes” citizens as private attorneys general to enforce the Labor Code on behalf of the State of California. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501. “By deputizing aggrieved employees, the California Legislature intended to create incentives for non-governmental actors to enforce the law in a growing labor market that could not be effectively controlled by public agents.” *Tseng, supra*, at *13.

B. Plaintiff Exhausted PAGA’s Administrative Requirements

A PAGA action begins by “[t]he aggrieved employee or representative [giving] written notice by online filing with the [LWDA] and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.” Lab. Code § 2699.3(c)(1). The LWDA has 60 days to notify an aggrieved employee it intends to investigate the alleged PAGA violation. If no notice of cure by the employer or of investigation by the LWDA is provided, the aggrieved employee may file a civil action 65 days after providing notice of the violations. Lab. Code § 2699.3(a)(2). On December 18, 2020, Plaintiff served on the LWDA and Defendant notice of her PAGA claim for failure to reimburse aggrieved employees for necessary business expenses (“PAGA Letter.”) (Coble Decl. ¶ 5, Ex.B.) The LWDA did not provide notice of its intent to investigate the charges contained in Plaintiff’s notice. *Id.* ¶ 6.

VII. THE PROPOSED PAGA SETTLEMENT

A. Mediation

On May 2, 2022, the Parties engaged in mediation before Ann Kotlarski, Esq., an experienced and well-regarded mediator in this area of law. The mediation was not successful and the Parties continued to litigate this case, including significant investigation by Plaintiff via written and oral discovery described above. (Coble Decl. ¶¶ 8-16.) On November 15, 2022, following subsequent settlement negotiations and discussions with the mediator, including analysis of the additional information learned through written discovery and deposition testimony, the Parties both accepted a mediator's proposal containing the principal terms of this settlement. (Coble Decl. ¶10.)

B. Monetary Relief

Subject to Court approval, as required by Labor Code section 2633(i), the SA proposes that Defendant will pay the Gross Settlement Amount of \$575,000, from which the PAGA Fund, estimated at \$386,250, will be distributed pursuant to PAGA, *i.e.*, seventy-five percent (\$289,688) will be paid to the LWDA and twenty-five percent (\$96,563) will be distributed to the Aggrieved Employees as follows:

GROSS SETTLEMENT AMOUNT:	\$ 575,000
Attorneys' Fees [30%] (not to exceed)	\$ 172,500
PAGA Representative Enhancement Fee (not to exceed)	\$ 5,000
Costs (not to exceed)	\$ 5,000
Settlement Administration (not to exceed)	\$ 6,250
Anticipated Net Settlement Amount:	\$ 386,250
Amount to LWDA (75% of Net Settlement Amount)	\$ 289,688
Amount To Be Distributed Equally Amongst All Aggrieved Employees (25% of Net Settlement Amount)	\$ 96,563
Average Amount Per Aggrieved Employee	\$ 404

Pursuant to the SA, 246 Aggrieved Employees will receive a proportionate share of the 25% of the Net Settlement Amount (\$96,563) based on the number of Pay Periods each worked during the PAGA period. The number of PAGA Pay Periods for each Aggrieved Employee will be calculated based on Defendant's records of each Aggrieved Employee's inclusive dates of employment during the PAGA Period. These amounts shall be characterized, for tax purposes, as penalties. Accordingly, the payments to Aggrieved Employees will not be reduced by payroll tax withholding and

deductions; instead, the Settlement Administrator will issue to the Aggrieved Employees IRS Form 1099s and their state and local equivalents with respect to the payments. (Coble Decl. ¶10, Ex. A, ¶12.)

C. Scope of Release

If this Settlement is approved, then as of the Effective Date, each Aggrieved Employee (including Plaintiff on behalf of herself, the State of California and all Aggrieved Employees), individually and on behalf of their respective successors, assigns, agents, attorneys, executors, heirs and personal representatives, shall fully and finally release and discharge the Released Parties from the PAGA claim alleged in Plaintiff's Complaint as the thirteenth cause of action in the Civil Action ("Released PAGA Claim"). The Released PAGA Claim expressly covers any Aggrieved Employee's potential PAGA claim based on failure to reimburse for necessary work-from-home business expenses during the PAGA period which might result in PAGA penalties, interest, and/or attorneys' fees and costs. Plaintiff expressly releases all claims for damages, costs, and expenses, attorneys' fees, enhancement fees, statutory penalties, and interest against Released Parties arising from the thirteenth cause of action pursuant to PAGA during the PAGA Period. (Coble Dec., ¶ 3 [SA ¶ 12(c)]). Because a PAGA action is brought on behalf of the government, a "judgment is binding not only on the named employee but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009). Non-party aggrieved employees are not given notice or an opportunity to opt-out or object and therefore are not bound by the judgment except as to civil penalties. *Id.* at 987; Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.").

D. Settlement Administration

Within 10 business days following Court approval, Defendant will provide to the Settlement Administrator, CPT Group, Inc., in an agreed-upon secure manner, all information required to (1) identify Aggrieved Employees; (2) mail PAGA Settlement Shares to Aggrieved Employees; (4)

1 calculate the PAGA Pay Periods worked by each Aggrieved Employee; and (5) enable the Settlement
2 Administrator to complete any tax or other governmental reporting required as a result of the
3 Settlement. At a minimum, Defendant shall provide the following data regarding Aggrieved
4 Employees: Each Aggrieved Employee's full name, most recent mailing address and telephone
5 number, social security number, most recent e-mail address, and dates of hire and termination to the
6 extent possible. The provided information shall only be used by the Settlement Administrator for the
7 purpose of administering this Settlement. (Coble Dec., ¶ 3, Ex. A [SA ¶ 15]).

8 Within thirty (30) days of the date of approval of this Settlement, CPT Group, Inc. will
9 search the National Change of Address Database to update stale addresses and to mail the Court-
10 approved letter to each PAGA Employee explaining the Settlement, the basis for the payment, and
11 include a check for their proportionate share. (*Id.* [SA ¶ 23]). If the envelope containing the letter and
12 check is returned as undeliverable, CPT will perform a skip-trace using the Aggrieved Employee's
13 social security number to locate a current mailing address, and re-mail the envelope to the updated
14 address. (*Id.*) If any check remains uncashed after 180 days from mailing, it will be voided and the
15 value of the uncashed check will be forwarded to the State of California's Controller, Unclaimed
16 Property Division for further handling on behalf of the Aggrieved Employee. (*Id.*, Declaration of Julie
17 Green on Behalf of CPT Group, Inc., ("Green Decl.") ¶ 7).

18 **VIII. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE IN VIEW OF**
19 **THE PURPOSES AND POLICIES OF PAGA AND SHOULD BE APPROVED.**

20 **A. The Court's Role in Reviewing PAGA Settlements.**

21 "[B]ecause a settlement of PAGA claims compromises a claim that could otherwise be
22 brought by the state, the PAGA provides that 'court[s] shall review and approve any settlement of
23 any civil action filed pursuant to [PAGA].'" *Ramirez v. Benito Valley Farms, LLC*, 2017
24 U.S.Dist.LEXIS 137272, at *7 (N.D. Cal. Aug. 25, 2017) (citing Lab. Code § 2699(1)(2)). "Despite
25 the fact that 'a representative action under PAGA is not a class action' and is instead a type of qui
26 tam action, a standard requiring the trial court to determine independently whether a PAGA

1 settlement is fair and reasonable is appropriate.” *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th
2 56, 76 (citations omitted). California Courts review PAGA settlements to ensure that they are “fair,
3 adequate and reasonable under all the circumstances.” *Id.* They also review PAGA settlements to
4 ensure that they are fair in promoting PAGA’s purposes and policies. *See id.* As articulated by the
5 LWDA: “It is thus important that when a PAGA claim is settled, the relief provided for under PAGA
6 be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the
7 public” and “unique public policy of PAGA.” *See* LWDA Comments on Proposed PAGA Settlement
8 in *O’Connor v. Uber Technologies, Inc.*, Case No. 13-cv-03836-EMC (N.D. Cal., July 27, 2016).

9 **B. The Settlement Satisfies PAGA’s Purpose and the State’s Interest.**

10 PAGA actions primarily seek to vindicate the public interest in enforcement of California’s
11 labor law. *See Franco v. Athens Disposal Co.*, 171 Cal.App.4th at 1300. Thus, the majority of any
12 recovery goes to the LDWA, not to aggrieved employees. *See Caliber Bodyworks, Inc. v. Super. Ct.*
13 (2005) 134 Cal.App.4th 365. “The employee’s recovery is thus an incentive to perform a service to
14 the state, not restitution for wrongs done to members of the class.” *Baumann v. Chase Inv. Servs.*
15 *Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014). Here, the proposed settlement fulfills PAGA’s purpose
16 by: (1) enforcing the law and deterring future violations; (2) collecting penalties in the amount of
17 \$289,688 on behalf of the State of California to assist its enforcement and education activities; and
18 (3) distributing penalties in the amount of \$96,563 (an average of \$404 per employee) to Aggrieved
19 Employees pursuant to Labor Code § 2699(i). The proposed settlement provides an excellent
20 recovery for the State of California and significant relief for the Aggrieved Employees. (Coble Decl.,
21 ¶ 23.) *See* Lab. Code § 2699(1)(2); *Haralson v. U.S. Aviation Svcs. Corp.*, 383 F.Supp.3d 959, 972
22 (N.D. Cal. Jun. 7, 2019) (“by providing fair compensation to the class members as employees and
23 substantial monetary relief, a settlement not only vindicates the rights of the class members as
24 employees, but may have a deterrent effect upon the defendant employer and other employers, an
25 objective of PAGA”); *O’Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d at 1132-35 (“it is thus
26 important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine

1 and meaningful, consistent with the underlying purpose of the statute to benefit the public and, ...
2 the court evaluate whether the settlement meets the standards of being 'fundamentally fair,
3 reasonable, and adequate' with reference to the public policies underlying the PAGA.”)

4 **C. The Settlement is a Reasonable Compromise of Plaintiff’s PAGA Claim.**

5 The PAGA provides for aggrieved employees to recover any civil penalties provided by the
6 Labor Code that are recoverable by the LWDA. Lab. Code § 2699(a). Under PAGA, a plaintiff may
7 bring a representative action as an aggrieved employee on behalf of herself and other current or
8 former employees seeking civil penalties for Labor Code violations. *See Huff v. Securitas Security*
9 *Services USA, Inc.* (2018) 23 Cal.App.5th 745, 751. Labor Code section 2699(f)(2) provides for a
10 calculation of potential PAGA damages as \$100 for each aggrieved employee per pay period for the
11 initial violation and \$200 for each employee pay period for each subsequent violation. *Id.*

12 Liability attaches if during a pay period (1) aggrieved employees made expenditures or
13 incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's
14 discharge of his or her duties, or obedience to the directions of the employer; (3) the expenditures or
15 losses were necessary; and (4) the employer fails to provide some reimbursement to an aggrieved
16 employee. *See Nicholas Laboratories, LLC v. Chen* (2011) 199 Cal.App.4th 1240, 1249 (citing
17 *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 230). Through this
18 settlement, Plaintiff seeks PAGA penalties, attorneys’ fees and costs for Defendant’s violation of
19 Labor Code § 2802 pursuant to Labor Code §§ 2699(i) and 2699(g)(1).

20 **D. Maximum Recoverable PAGA Penalties and Proposed Settlement Amount.**

21 Defendant’s authenticated employee data provided the inclusive dates in which its employees
22 worked from home, confirmed that the included employees worked from home during the relevant
23 period, and confirmed Defendant’s pay period schedule during the relevant time period. (Coble
24 Decl., ¶ 17.) Based on that data, Plaintiff calculated the aggregate number of pay periods worked by
25 all aggrieved employees from the time period of December 18, 2019 to February 28, 2022 as 5,878
26 and the total number of aggrieved employees as 239. (*Id.*) Using this data, the maximum potential

1 amount of recoverable PAGA penalties in this case is \$1,151,700, calculated by assessing \$100 for
2 each aggrieved employee's first pay period with a violation and \$200 for each aggrieved employee's
3 subsequent pay periods with violations. (*Id.*, ¶ 18.)

4 Through extensive arms-length settlement discussions facilitated by mediator Ann Kotlarski
5 from May through November 2022, Defendant asserted its defenses. (Coble Dec., ¶ 19). Defendants
6 argued that (1) the Court had broad discretion in awarding civil penalties, and could use its discretion
7 to lower the amounts of any penalties assessed; (2) because no law required reimbursements to be
8 paid in each pay period, Labor Code § 2802 violations could only occur during the one pay period
9 per month when reimbursements were regularly scheduled to be paid, not every single pay period
10 during the time period in question (which would reduce the pay periods at issue to roughly 2,939 pay
11 periods); and (3) only the initial violation rate of \$100 per pay period applied to each pay period in
12 question instead of the subsequent \$200 violation rate because no "notice" had been issued by the
13 LWDA to advise that Defendant had violated the law, based on the holding in *Amaral v. Cintas Corp*
14 *No. 2* (2008) 163 Cal.App.4th 1157, 1209 (in the context of Labor Code § 210, the "initial violation
15 rate" is assessed per pay period and the "subsequent violation rate" cannot be assessed until the
16 Defendant has been put on notice of the violation). (*Id.*) If Defendant's arguments had succeeded,
17 the amount of PAGA penalties to be assessed – even if Plaintiff proved liability – could have been
18 reduced to total penalties of \$293,900, with the 75% to the LWDA as \$220,425, and the 25% to
19 distribute to aggrieved employees as \$73,475, an average of \$307.45 per employee. These amounts
20 are lower than what the LWDA and Aggrieved Employees are slated to receive pursuant to this
21 Settlement, even before the Court might apply any discretion. (*Id.*, ¶ 20.)

22 Though Plaintiff disagreed with Defendant's positions, the mediator's proposal accounted
23 for the risk of these potential defenses and Plaintiff accounted for the risks that Defendant could
24 prevail on these defenses and that any recovery of civil penalties pursuant to PAGA is subject to
25 judicial discretion. (*Id.*, ¶21.) Because the settlement amount was proposed by a respected and
26 experienced mediator after Plaintiff had conducted formal discovery and presented that information

1 to her, Plaintiff deemed it was in the best interests of the LWDA and Aggrieved Employees to accept
2 the settlement proposal reflecting the amount to be paid to them as 33.5% of the maximum potential
3 PAGA penalties available and significantly more than the amount of Defendant's argued-for \$100
4 monthly violation rate (131.42%) in order to secure a substantial guaranteed recovery for the State
5 of California and Aggrieved Employees. (*Id.*, ¶ 22.)

6 As a result of the settlement, the LWDA will receive \$289,688 total and Aggrieved
7 Employees' recoveries will be approximately \$16.43 per pay period worked, with a maximum
8 potential recovery of \$870.79 for the 53 pay periods in the PAGA period with a total amount of
9 \$96,563 being paid to the Aggrieved Employees per the 25% PAGA allocation. (*Id.*, ¶ 23.)

10 **E. Distribution of Settlement Proceeds.**

11 The Aggrieved Employees will receive a proportionate share of the \$96,563 based on the
12 number of pay periods worked during the PAGA period. (*Id.*, ¶ 3, Ex. A, SA ¶ 12.b]). These amounts
13 shall be characterized, for tax purposes, as penalties. Accordingly, the payments to Aggrieved
14 Employees will not be reduced by payroll tax withholding and deductions; instead, the Settlement
15 Administrator will issue to the Aggrieved Employees IRS Form 1099s and their state and local
16 equivalents with respect to the payments. (*Id.*, ¶ 23.)

17 **F. Notice to Aggrieved Employees.**

18 Following Court approval, the Claims Administrator CPT Group, Inc. will mail the Court-
19 approved letter to each Aggrieved Employee explaining the Settlement, the basis for the payment,
20 and include a check for their proportionate share. (*Id.*, ¶ 3, Ex., A, SA ¶¶ 23]). The proposed letter to
21 the Aggrieved Employees has been agreed to by the Parties and is attached as Exhibit C to the Coble
22 Declaration. (*Id.*, ¶ 24, Ex. C.)

23 **G. Notice to LWDA.**

24 Plaintiff's/PAGA Counsel provided this PAGA Approval Motion to the Labor Workforce
25 and Development Agency as required, via its website on the date the motion was served and
26 submitted for filing with the Court. (*Id.*, ¶ 25, Ex. D.)

1 **IX. THE ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED.**

2 **H. The Fee Award is Reasonable.**

3 PAGA Counsel respectfully requests that this Court approve an attorneys' fees award to
4 PAGA Counsel up to \$172,500, which is 30% of the Gross Settlement Amount under the "common
5 fund" doctrine. This application requires court approval of the attorneys' fees paid through
6 settlement. Lab. Code § 2699(g)(1). The court has discretion to award attorneys' fees based on the
7 percentage-of-recovery method. *See Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, 503.
8 California law provides that "[e]xcept as attorney's fees are specifically provided for by statute, the
9 measure and mode of compensation of attorneys and counselors at law is left to the agreement,
10 express or implied, of the parties..." Cal. Civ. Proc. Code § 1021. Courts have long recognized the
11 "common fund" or common benefit doctrine, under which attorneys who create a common fund or
12 benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. *See*
13 *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34 (quoting *D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.
14 3d 1, 25). The California Supreme Court has held that "when a number of persons are entitled in
15 common to a specific fund, and an action brought by a plaintiff ... for the benefit of all results in the
16 creation or preservation of that fund, such plaintiff ... may be awarded attorneys' fees out of the
17 fund." *Serrano*, 20 Cal. 3d at 34 (quoting *D'Amico*, 11 Cal. 3d at 25); *see also Boeing Co. v. Van*
18 *Gemert*, 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund for the benefit of
19 persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a
20 whole.").

21 Using the "percentage-of-the-fund" approach for cases like this, awards between 27.9% and
22 30% are consistent with what courts routinely award – up to around one-third (33%) of the recovery.
23 *See Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66 n.11; *see, e.g., Laffitte*, 1 Cal. 5th at 503
24 (affirming fee award of one-third of the common fund and recognizing several advantages in using
25 method for awarding); *In re Consumer Privacy Cases* (2009) 175 Cal. App. 4th 545, 557 n.13. The
26 percentage-of-the-fund approach appears to be the preferred method of awarding fees in a traditional

1 common fund. *See Serrano*, 20 Cal. 3d at 35. Where the settlement amount is “a certain or easily
2 calculable sum of money,” use of the percentage-of-the-fund method is appropriate. *Id.*; *Quinn v.*
3 *State* (1975) 15 Cal. 3d 162, 167 (requiring “passive beneficiaries to bear a fair share of the litigation
4 costs”).

5 The proposed fee award is reasonable and well-justified in consideration of the risks
6 Plaintiff’s counsel has undertaken in pursuing this case on a contingency basis, as well as the
7 outstanding result achieved on behalf of the State of California and Aggrieved Employees. *See*
8 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 406. Plaintiff’s
9 counsel expended significant time and resources on this matter, and will continue to do so over the
10 coming months to oversee administration of the Settlement. PAGA counsel’s detailed time entries
11 for this matter reflect that the attorneys’ fee award is reflective of and actually less than the value of
12 the time spent investigating and litigating this case, without even accounting for any multiplier which
13 would be warranted by outstanding results in this action. (Coble Decl., ¶¶ 30-34, Ex. E.) Accordingly,
14 PAGA Counsel’s fee request of 30% of the Gross Settlement Amount is fair and reasonable and is
15 consistent with awards in California.

16 **I. The Circumstances of this Action, Including the Results Achieved, Support the**
17 **Fee Request.**

18 Given the contingent nature of this case, the experience, reputation, and ability of PAGA
19 Counsel, and the significant results achieved, a 30% fee award is reasonable. In all aspects,
20 prosecution of this action has involved significant financial risk for Plaintiff’s Counsel. (*Id.*, ¶¶ 26-
21 34.) PAGA Counsel undertook this matter solely on a contingent basis with no guarantee of recovery,
22 and its own resources were at risk to prosecute this action with no guarantee of success. (*Id.*) Despite
23 such challenges, PAGA Counsel was able to settle the claims for \$575,000. (*Id.*)

24 PAGA Counsel is experienced in litigating class and representative action cases involving
25 California Labor Code violations. (Coble Decl., ¶¶ 26-29, Gunn Decl., ¶¶ 1-6.) PAGA Counsel’s
26 skills in developing a factual record and convincing Defendants of the exposure under California law

were essential to achieving the Settlement. Through their skill, experience, and reputation, PAGA Counsel was able to obtain a Settlement that provides an outstanding result for the LWDA and Aggrieved Employees. Another relevant factor in determining attorneys' fees is whether the litigation required PAGA Counsel to forego other employment. *See Serrano*, 20 Cal. 3d at 49. Additional work was available that PAGA Counsel had to forego to devote the time necessary to pursue this litigation. (Coble Decl., ¶ 32.)

X. THE COSTS ARE REASONABLE AND SHOULD BE AWARDED.

A. Litigation Costs.

In the course of this litigation, PAGA Counsel had to incur out-of-pocket costs totaling \$5,129.88. (*Id.*, ¶ , Ex. F.) The incurred costs include agency (LWDA) and court fees, mediation fees, attorney service fees, postage fees, and court reporter and transcript fees incurred in litigating the PAGA claims in this case, including motion practice, discovery, and preparing for mediation. (*Id.*) Such costs are appropriate for cost reimbursement. *See, e.g., In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 1989 WL 73211, at *6 (C.D. Cal. Mar. 9, 1989). In light of the actual litigation costs that were necessary to prosecute this Action, and the positive results achieved, the request of \$5,000.00 for costs is eminently reasonable and should be granted. (*Id.*)

B. Settlement Administration Costs.

Under the terms of the Settlement Agreement, PAGA counsel seeks to have CPT Group, Inc. appointed as the Settlement Administrator. (*Id.*, ¶ 3, Ex. A [SA, ¶ 12]). CPT Group, Inc. will be responsible for processing employee data from Defendant, verifying addresses, using skip-tracing to obtain current addresses Aggrieved Employees whose letters are returned as undeliverable, calculating payments to Aggrieved Employees, and distributing notice letters settlement payments to Aggrieved Employees. (*Id.*) CPT Group, Inc. is a competent and experienced settlement administration company, and for its efforts, PAGA counsel requests the Court approve \$6,250 to cover CPT Group, Inc.'s fees, which is reasonable based on the amount of work to be performed by the Settlement Administrator. (Green Decl., ¶ 8 Ex. B). *See Munoz, supra*, at 406 (approving claim

administration costs of \$35,353 for settlement amount of \$611,440.68).

XI. THE SERVICE PAYMENT IS REASONABLE AND SHOULD BE AWARDED

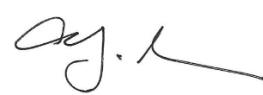
The \$5,000 Service Award payment requested will compensate Plaintiff Kathleen Rishi for her assistance in documenting the alleged violations, initiating this Action, and participating in its prosecution. (Rishi Decl. ., ¶¶ 1-12.) Service payments are routinely approved. “Such awards are...intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Plaintiff actively participated in this litigation by gathering and reviewing documentation and information, including identifying missing and incomplete information, helping to prepare the Complaint, participating in a full day mediation in May 2022, meetings, and telephone consultations with PAGA Counsel who required considerable information pertaining to Defendant’s policies and procedures. (Coble Decl., ¶ 38, Rishi Decl. ¶¶ 1-12.) Plaintiff’s request of \$5,000 is less than one percent of the gross benefits achieved and not unreasonable given the outstanding results achieved for the State of California and Aggrieved Employees. (Coble Decl., ¶ 39.) For the foregoing reasons, the PAGA service payment is reasonable and should be approved.

XII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court approve the PAGA settlement.

DATED: March 16, 2023

GUNN COBLE LLP

By: 

Beth Gunn
Catherine J. Coble

Attorneys for Plaintiff
KATHLEEN RISHI, and all others similarly
situated