

1 Jahan Sagafi (SBN 224887)
2 Molly J. Frandsen (SBN 320094)
3 OUTTEN & GOLDEN LLP
4 One California Street, 12th Floor
5 San Francisco, CA 94111
6 Telephone: (415) 638-8800
7 Facsimile: (415) 638-8810
8 E-Mail: jsagafi@outtengolden.com
9 E-Mail: mfrandsen@outtengolden.com

7 Chauniqua Young*
8 OUTTEN & GOLDEN LLP
9 685 Third Avenue, 25th Floor
10 New York, NY 10017
11 Telephone: (212) 245-1000
12 Facsimile: (646) 509-2002
13 E-Mail: cyoung@outtengolden.com

11 Galvin Kennedy*
12 KENNEDY LAW FIRM LLP
13 2925 Richmond Ave., Suite 1200
14 Houston, TX 77098
15 Telephone: (713) 425-6445
16 Facsimile: (888) 535-9271
17 E-Mail: galvin@kennedyattorney.com

16 *Attorneys for Plaintiffs, the Proposed Class, and Aggrieved Employees*

17 ** Admitted pro hac vice*

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **FOR THE COUNTY OF ORANGE**

20 RYLAND GIMENEZ and STEPHEN
21 GIMENEZ, on behalf of themselves and all
22 others similarly situated,

23 Plaintiffs,

24 v.

25 ALACRITY SOLUTIONS GROUP, LLC f/k/a
26 WORLEY CLAIMS SERVICES, LLC,

27 Defendant.
28

Case No. 30-2020-01175645-CU-OE-CXC

**NOTICE OF MOTION AND
UNOPPOSED MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Assigned for All Purposes To: Judge Peter J. Wilson

Date: April 21, 2022
Time: 2:00 p.m.
Dept: CX102

Date Action Filed: December 22, 2020
Trial Date: Not Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	FACTUAL AND PROCEDURAL BACKGROUND.....	2
III.	TERMS OF THE PROPOSED SETTLEMENT	4
IV.	ARGUMENT	6
A.	Legal Standard for PAGA Settlements	6
B.	The Terms of the Settlement Are Fair, Reasonable, and Adequate	7
1.	The Settlement Is the Result of Extensive, Non-Collusive, Arm’s Length Negotiations Between the Parties	8
2.	The Parties Had Sufficient Information to Enter Into an Informed and Reasonable Settlement	8
3.	Plaintiffs’ Counsel Are Experienced in Complex Litigation	9
4.	The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation.....	9
C.	The Requested Attorneys’ Fees and Costs Are Reasonable	11
1.	An Award of One-Third of the Fund Is Reasonable	11
2.	Counsel’s Costs Are Reasonable	13
D.	The Proposed Service Payment Is Fair and Reasonable	13
V.	CONCLUSION	14

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Abelar v. Am. Residential Servs., L.L.C.</i> , No. 19 Civ. 726, 2019 WL 6054607 (C.D. Cal. Nov. 14, 2019)	11, 12, 13
<i>Alvarez v. Farmers Ins. Exch.</i> , No. 14 Civ. 574, 2017 WL 2214585 (N.D. Cal. Jan. 18, 2017).....	12
<i>Basiliali v. Allegiant Air, LLC</i> , No. 18 Civ. 3888, 2019 WL 8107885 (C.D. Cal. July 1, 2019)	7, 12
<i>Bell v. Farmers Ins. Exch.</i> , 115 Cal. App. 4th 715 (2004).....	13, 14
<i>Cellphone Termination Fee Cases</i> , 186 Cal. App. 4th 1380 (2010).....	14
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008).....	11, 12
<i>Dudum v. Carter’s Retail, Inc.</i> , No. 14 Civ. 988, 2016 WL 7033750 (N.D. Cal. Dec. 2, 2016)	12
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996).....	7, 8
<i>Dynamex Operations W. v. Super. Ct.</i> , 4 Cal. 5th 903 (2018)	3, 9
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008).....	7, 8, 9
<i>Laffitte v. Robert Half Int’l Inc.</i> , 1 Cal. 5th 480, (2016)	11, 12
<i>McLeod v. Bank of Am., N.A.</i> , No. 16 Civ. 03294, 2018 WL 5982863 (N.D. Cal. Nov. 14, 2018).....	11
<i>Moniz v. Adecco USA, Inc.</i> , 72 Cal. App. 5th 56 (2021).....	7
<i>O’Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110 (N.D. Cal. 2016)	7
<i>Ramirez v. Benito Valley Farms, LLC</i> , No. 16 Civ. 4708, 2017 WL 3670794 (N.D. Cal. Aug. 25, 2017).....	11
<i>Rodriguez v. RCO Reforesting, Inc.</i> , No. 16 Civ. 2523, 2019 WL 331159 (E.D. Cal. Jan. 25, 2019).....	6, 11

1	<i>S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.</i> ,	
2	48 Cal. 3d 341 (1989)	3, 8, 9, 10
3	<i>Taylor v. Shippers Transp. Express, Inc.</i> ,	
4	No. 13 Civ. 2092, 2015 WL 12658458 (C.D. Cal. May 14, 2015).....	12
5	<i>Viking River Cruises, Inc. v. Moriana</i> ,	
6	B297327, 2020 WL 5584508 (Sept. 18, 2020)	10
7	<i>Williams v. Superior Court</i> ,	
8	3 Cal. 5th 531 (2017)	6
9	STATUTES	
10	Cal. Lab. Code § 226.8.....	10
11	Cal. Lab. Code § 2699(g)(1)	11
12	Cal. Lab. Code § 2699(l)(2)	2, 3
13	Cal. Lab. Code § 2783(a)	3, 9
14	Cal. Lab. Code § 2785(b).....	3, 9, 10
15	OTHER AUTHORITIES	
16	California Rule of Court 3.770.....	3
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 21, 2022 at 2:00 p.m. or as soon thereafter as the matter
3 may be heard, in Department CX102 of this Court, located at 751 West Santa Ana Blvd., Santa
4 Ana, CA 92701, California, Plaintiff Ryland Gimenez, will and hereby does, move this Court for
5 entry of an order approving the parties' Private Attorneys General Act ("PAGA") settlement
6 pursuant to California Labor Code section 2699(1)(2).

7 This unopposed motion is based on the Notice of Motion and Motion; the accompanying
8 Memorandum of Points and Authorities; the Declarations of Chauniqua D. Young and Galvin
9 Kennedy, filed herewith; all exhibits attached thereto, including the executed settlement
10 agreement; the pleadings, papers, and other records on file in this action; and oral argument on
11 the motion.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Plaintiff Ryland Gimenez (“Plaintiff”) seeks approval of a Private Attorneys General Act
3 (“PAGA”) settlement with Defendant Alacrity Solutions LLC f/ka/Worley Claims Services, LLC
4 (“Alacrity” or “Defendant”).¹ Under the Settlement Agreement, Alacrity will pay a total gross
5 amount of \$200,000. The proposed settlement is fair, reasonable, and adequate based on
6 Plaintiff’s investigation of the facts, discovery, and detailed knowledge of the issues in this case. In
7 agreeing to this settlement, Plaintiff and Plaintiffs’ Counsel carefully considered the time and
8 expense of litigation, the Court’s discretion to reduce PAGA penalties, and other potential risks. It
9 is well within the Court’s discretion to approve the proposed settlement.

10 Accordingly, Plaintiff requests that the Court: (1) approve the Settlement Agreement,
11 attached as **Exhibit A** to the Declaration of Chauniqua D. Young in Support of Unopposed
12 Motion to Approve PAGA Settlement (“Young Decl.”); (2) approve the requests for attorneys’
13 fees and costs and a service payment to Plaintiff; and (3) enter judgment in accordance with the
14 settlement terms.

15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 On December 22, 2020, Plaintiffs Ryland Gimenez and Stephen Gimenez filed a class
17 action complaint. Plaintiffs alleged that they and other independent insurance claims adjusters,
18 who contracted with Alacrity, were misclassified as independent contractors, and that, as a result
19 of this alleged misclassification, Alacrity violated various California Labor Code provisions
20 regarding overtime, minimum wage, reimbursement of business expenses, and rest and meal
21 breaks. That same day, Plaintiff gave written notice of his intention to file a PAGA lawsuit, on
22 behalf of himself and similarly-situated Insurance Adjusters, to the Labor and Workforce
23 Development Agency (“LWDA”). On December 23, 2020, Plaintiffs served the LWDA notice on
24 Defendant. *See* Young Decl. ¶ 13.

25 On March 1, 2021, Plaintiffs filed an Amended Complaint alleging PAGA claims on
26 behalf of Plaintiff and the PAGA Settlement Members. Thereafter, Alacrity produced an
27

28 ¹ Plaintiffs’ Counsel submitted a copy of the Settlement Agreement to the LWDA
concurrently with this motion. *See* Young Decl. ¶ 24; Cal. Lab. Code § 2699(1)(2).

1 arbitration agreement for Plaintiff. After reviewing the arbitration agreement, Plaintiff stipulated
2 to withdraw his individual claims and bring them in arbitration. The Court so-ordered the parties'
3 stipulation to this effect on April 23, 2021. On April 28, 2022, Plaintiffs filed a Second Amended
4 Complaint ("SAC") withdrawing Plaintiff as a proposed class representative, along with his
5 individual claims, but maintaining his PAGA claims. *See* Young Decl. ¶ 14.

6 Thereafter, the parties exchanged discovery requests, and each party served responses and
7 objections. During the course of meeting and conferring regarding the discovery disputes, the
8 parties agreed to mediation. *Id.* ¶ 15. In the intervening time, the California Legislature enacted
9 legislation exempting insurance adjusters from coverage under the ABC test set forth in *Dynamex*
10 *Operations W. v. Super. Ct.*, 4 Cal. 5th 903 (2018), and requiring instead that the question of their
11 worker status be assessed under the multi-factor test set forth in *S. G. Borello & Sons, Inc. v.*
12 *Dept. of Indus. Rel.*, 48 Cal. 3d 341 (1989). *See* Cal. Lab. Code § 2783(a). The Legislature also
13 made the exemption retroactive. *See* Cal. Lab. Code § 2785(b).

14 On January 27, 2022, the parties participated in a full-day mediation session with the
15 assistance of Judge Jay C. Gandhi, a former U.S. Magistrate Judge and experienced wage and
16 hour mediator. At mediation, the parties agreed to settle the PAGA claims brought by Plaintiff
17 and executed a term sheet that day.² The parties executed a final settlement agreement on March
18 29, 2022. Young Decl. ¶ 16.

19 In connection with settlement negotiations, the parties engaged in significant informal
20 discovery to allow them to value the claims and evaluate litigation risks. Alacrity provided
21 Plaintiffs' Counsel with compensation information for each PAGA Settlement Member, including
22 the number of pay periods in the PAGA Period (defined below), Plaintiffs' personnel files, and
23 identified the number of PAGA Settlement Members potentially subject to arbitration
24 agreements. In preparation for the mediation, the parties exchanged mediation statements that
25 outlined the key arguments they would make during the course of the litigation. Plaintiffs'

26
27
28 ² At the mediation, the parties also reached a settlement of Stephen Gimenez's individual
claims. His Request for Dismissal of the Class Claims Pursuant to California Rule of Court 3.770
will be filed concurrently with this Motion. Young Decl. ¶ 17.

Counsel also provided Alacrity with Plaintiffs' and PAGA Settlement Members' damages estimates. Young Decl. ¶ 18.

III. TERMS OF THE PROPOSED SETTLEMENT

A. PAGA Period. The period covered by the settlement, or PAGA Period, is from July 2, 2019 through the date the Court enters the Approval Order. Ex. A (Settlement Agreement) § 1.20.

B. PAGA Settlement Members. The Settlement covers 127 PAGA Settlement Members who performed adjusting services under contract with Alacrity as an Independent Adjuster in California at any time from July 2, 2019 through September 30, 2021. *Id.* § 1.21.

C. Gross Settlement Amount. Alacrity will pay a Gross Settlement Amount of \$200,000.00. *Id.* § 1.10. The Gross Settlement Amount covers all Individual Settlement Payments made to PAGA Settlement Members, Administration Costs, the Service Award, the LWDA Payment, and Attorneys' Fees and Costs. No portion of the Gross Settlement Amount shall revert to Defendant. *Id.*

D. Net Settlement Amount. "Net Settlement Amount" refers to the Gross Settlement Amount minus Administration Costs, Attorneys' Fees and Costs, and the proposed Service Award. *Id.* § 1.16. The Net Settlement Amount shall include all Individual Settlement Payments due to PAGA Settlement Members and the LWDA Payment. The Net Settlement Amount is the maximum amount that shall be available for distribution to the LWDA and PAGA Settlement Members. *Id.*

E. Release of Claims. By operation of the entry of the Approval Order and Judgment, each PAGA Settlement Member will release all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations and/or other provisions of law pled or that could have been pled based on the facts alleged in the Action, including but not limited to claims for PAGA civil penalties based on alleged violations of California Labor Code sections 201-204, 218.5, 226, 226.7, 226.8, 510, 512, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2802, 2698, *et seq.*, and California Industrial Welfare Commission Wage Order No. 4-2001, with respect to PAGA Settlement Members during the PAGA Period (the "Released Claims"). *Id.* §§ 1.27, 5.1.

1 **F. Settlement Administrator.** Plaintiffs’ Counsel sought bids from three third-party
2 administrators and, with Alacrity’s consent, selected Phoenix Settlement Administrators
3 (“Phoenix”), a neutral, third-party administrator, to perform the administration of the settlement
4 (“Settlement Administrator”). Phoenix has agreed to administer the settlement for an amount not
5 to exceed \$3,500. *See id.* §§ 3.1, 4.4; Young Decl. ¶ 25.

6 **G. Attorneys’ Fees and Costs.** Plaintiffs’ counsel seek approval of attorneys’ fees of
7 one-third of the Gross Settlement Amount (\$66,666.67) and reimbursement of their actual
8 litigation costs of no more than \$20,868.73. *See* Ex. A (Settlement Agreement) § 4.2. Any
9 amounts not approved by the Court will become part of the Net Settlement Amount. *Id.* § 4.2.1.

10 **H. Service Payment.** Plaintiff seeks approval of \$10,000 from the Gross Settlement
11 Amount as a Service Payment and in exchange for signing a general release of claims. *Id.* §§ 4.3,
12 5.2.

13 **I. PAGA Check Enclosure Letter.** PAGA Settlement Members will receive a notice
14 with their checks that provides them with information concerning the material terms of the
15 settlement, a copy of which is attached as Exhibit A to the Settlement Agreement. *Id.* § 1.18, Ex.
16 A (PAGA Check Enclosure Letter).

17 **J. Allocation of the PAGA Distribution Fund.** The PAGA Distribution Fund refers to
18 the twenty-five percent (25%) of the Net Settlement Amount that will be distributed to PAGA
19 Settlement Members. Ex. A (Settlement Agreement) § 1.19. Each PAGA Settlement Member will
20 be eligible to receive a portion of the Net Settlement Amount based on the following formula:

21 The individual PAGA Settlement Share payment to each PAGA Settlement Member
22 will be calculated by dividing the number of Eligible Pay Periods attributed to him
23 or her by the number of all Eligible Pay Periods attributed to all PAGA Settlement
24 Members multiplied by the PAGA Distribution Fund.

24 *Id.* § 4.7

25 Alacrity’s records will be used to calculate the number of Eligible Pay Periods for PAGA
26 Settlement Members. *Id.*

27 **K. Eligible Pay Period.** An Eligible Pay Period refers to a pay period during the PAGA
28 Period in which a PAGA Settlement Member performed adjusting services under contract with

1 Defendant or received compensation for performing adjusting services under contract with
2 Defendant. *Id.* § 1.9.

3 **L. Timing of Payments.** Alacrity will deposit the Gross Settlement Amount into a
4 Qualified Settlement Fund administered by the Settlement Administrator within 7 calendar days
5 after the Effective Date. *Id.* § 4.1. The Effective Date is 60 days after the Court enters its final
6 Judgment after granting approval of the settlement if there are no appeals. *Id.* § 1.8. Within 14
7 days of the Effective Date, and as approved by the Court, the Settlement Administrator will issue
8 the LWDA Payment to the LWDA, the Service Award to Plaintiff, and Attorneys' Fees and Costs
9 to Plaintiffs' Counsel. *Id.* §§ 4.2.2, 4.3.2, 4.6. Within 30 calendar days of the Effective Date, the
10 Settlement Administrator will issue payments to the PAGA Settlement Members. *Id.* § 4.8.
11 Within 35 days of the Effective Date, the Settlement Administrator will pay itself any approved
12 Administration Costs. *Id.* § 4.4.1.

13 **M. Unclaimed Checks.** Any checks that are returned undeliverable will be re-sent to
14 any forwarding address within five calendar days. *Id.* § 4.9. If no forwarding address is provided,
15 the Settlement Administrator will attempt to determine the correct address through a skip-trace
16 search. Checks must be cashed within 180 days. *Id.* Any checks that remain undeliverable or are
17 uncashed after 180 days will be cancelled and the funds associated with the checks will be sent to
18 the California State Controller's Office Unclaimed Property Fund in the names of the respective
19 PAGA Settlement Members. *Id.*

20 **IV. ARGUMENT**

21 **A. Legal Standard for PAGA Settlements.**

22 PAGA settlements are subject to court review to "ensur[e] that any negotiated resolution
23 is fair to those affected." *Williams v. Superior Court*, 3 Cal. 5th 531, 549 (2017) (quoting Cal.
24 Lab. Code § 2699(1)(2)). "Because state law enforcement agencies are the real parties in interest,
25 the court's task is to ensure that the state's interest in enforcing the law is upheld." *Rodriguez v.*
26 *RCO Reforesting, Inc.*, No. 16 Civ. 2523, 2019 WL 331159, at *3 (E.D. Cal. Jan. 25, 2019).

27 Although the PAGA statute does not set forth the particular standards against which a
28 PAGA settlement should be evaluated, the LWDA has provided guidance for approval that

mirrors the standards for evaluating class action settlements. See *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134-35 (N.D. Cal. 2016). In *O'Connor*, the LWDA commented:

It is thus important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court [must] evaluate whether the settlement meets the standards of being “fundamentally fair, reasonable, and adequate” with reference to the public policies underlying the PAGA.

Id.

A California Court of Appeal recently affirmed, as a matter of first impression, that “a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (2021). The court noted that because “many of the factors used to evaluate class action settlements bear on a settlement’s fairness—including the strength of the plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement.” *Id.* Courts must evaluate these factors “‘in light of PAGA’s public policy goals’ of ‘benefitting the public by augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance.’” *Basiliari v. Allegiant Air, LLC*, No. 18 Civ. 3888, 2019 WL 8107885, at *3 (C.D. Cal. July 1, 2019) (quoting *Patel v. Nike Retail Servs., Inc.*, No. 14 Civ. 4781, 2018 WL 2029061, at *2 (N.D. Cal. May 8, 2019)).

B. The Terms of the Settlement Are Fair, Reasonable, and Adequate.

To determine whether the settlement is fair, reasonable, and adequate, the Court may consider several factors, including: “‘the strength of [the] plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, . . . the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996)). “[A] presumption of fairness exists where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and

1 discovery are sufficient to allow counsel and the court to act intelligently; [and] (3) counsel is
2 experienced in similar litigation” *Dunk*, 48 Cal. App. 4th at 1802.

3 **1. The Settlement Is the Result of Extensive, Non-Collusive, Arm’s**
4 **Length Negotiations Between the Parties.**

5 “The court . . . should give considerable weight to the competency and integrity of counsel
6 and the involvement of a neutral mediator in assuring itself that a settlement agreement represents
7 an arm’s length transaction entered without self-dealing or other potential misconduct.” *Kullar*,
8 168 Cal. App. 4th at 129. Here, the proposed settlement was reached through vigorous, arm’s-
9 length negotiations between lawyers with significant experience, assisted by a third-party
10 mediator. *See* Young Decl. ¶¶ 4-10, 16; Declaration of Galvin Kennedy (“Kennedy Decl.”) ¶¶ 3-
11 10.

12 **2. The Parties Had Sufficient Information to Enter Into an Informed and**
13 **Reasonable Settlement.**

14 The parties engaged in sufficient discovery to recommend settlement. In preparation for
15 the mediation, Plaintiffs’ Counsel reviewed and analyzed compensation information for each
16 PAGA Settlement Member, including the number of pay periods in the PAGA Period and
17 compensation for each PAGA Settlement Member, Plaintiffs’ personnel files, and the number of
18 PAGA Settlement Members potentially subject to arbitration agreements. The parties also
19 exchanged robust mediation statements, which outlined the key arguments they would make
20 during the course of the litigation, including the degree to which Plaintiffs and PAGA Settlement
21 Members were subject to Alacrity’s control under *Borello*. Young Decl. ¶ 18.

22 Before filing the Complaint, Plaintiffs’ Counsel obtained and reviewed documents from
23 Plaintiffs, including job descriptions, compensation records, and email correspondence. Counsel
24 conducted extensive interviews of Plaintiffs and other witnesses. Plaintiffs’ Counsel also
25 researched state and federal court cases addressing potential exemptions to which Plaintiffs and
26 PAGA Settlement Members may have been subject. Finally, Plaintiffs’ Counsel performed an
27 initial calculation of Plaintiffs’ and PAGA Settlement Members’ potential damages. *Id.* ¶ 19.
28

1 This exchange of information was sufficient to create “an understanding of the amount
2 that is in controversy and the realistic range of outcomes of the litigation.” *Kullar*, 168 Cal. App.
3 4th at 120.

4 **3. Plaintiffs’ Counsel Are Experienced in Complex Litigation.**

5 Plaintiffs’ counsel have considerable experience in complex wage and hour litigation and
6 are qualified to evaluate the PAGA claims, the value of the settlement versus moving forward
7 with litigation, and the viability of Defendant’s defenses. *See* Young Decl. ¶¶ 4-10; Kennedy
8 Decl. ¶¶ 3-10. Plaintiffs’ counsel believe that the settlement is fair, reasonable, and adequate in
9 light of the risks associated with the merits of Plaintiff’s claims, the uncertainty of the outcome of
10 the litigation, the Court’s discretion to lower the amount of penalties ultimately awarded, and the
11 secured benefit to the LWDA and PAGA Settlement Members. Young Decl. ¶ 20.

12 **4. The Settlement Is Fair and Reasonable Based on the Strength of**
13 **Plaintiff’s Case and the Risks and Costs of Further Litigation.**

14 The settlement is reasonable in light of the litigation risks. Alacrity asserted numerous
15 defenses to Plaintiff’s claims and contends that it properly classified Plaintiff and the PAGA
16 Settlement Members as independent contractors under applicable law.³

17 When the case was first filed in December 2020, the determination of whether
18 Independent Adjusters should be considered employees was governed by the ABC test, “a
19 simpler, clearer test for determining whether the worker is an employee or an independent
20 contractor.” *Dynamex Operations*, 4 Cal. 5th at 950 n. 20. After the case was filed, the California
21 Legislature amended the Labor Code to retroactively exclude insurance adjusters from coverage
22 under the ABC test, which required such claims to be assessed instead under the multi-factor test
23 set forth in *S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.*, 48 Cal. 3d 341, 346 (1989). *See* Cal.
24 Lab. Code §§ 2783(a), 2785(b). Because the *Borello* test for worker classification is a fact
25 intensive analysis, establishing liability would have required substantial further discovery,
26 including depositions of Defendant’s corporate-level and supervisory employees. *See id.*

27 _____
28 ³ Alacrity strongly believes that it would prevail on the threshold issue of misclassification
under the *Borello* test, and that Plaintiff cannot establish the alleged Labor Code violations on a
representative basis.

1 In addition, the United States Supreme Court will decide by June 2022 whether the
2 Federal Arbitration Act requires the enforcement of PAGA representative action waivers in
3 arbitration agreements. *See Viking River Cruises, Inc. v. Moriana*, B297327, 2020 WL 5584508
4 (Sept. 18, 2020), *cert. granted*, 142 S. Ct. 734, 2021 WL 5911481 (Dec. 15, 2021). A decision in
5 favor of the employer in that case would foreclose Plaintiff and PAGA Settlement Members from
6 pursuing their claims in this forum. Finally, Alacrity also contends that any trial on Plaintiff's
7 PAGA claim would be unmanageable because Plaintiff's claims would require him to prove, for
8 each PAGA Settlement Member, that he or she was misclassified and that he or she suffered one
9 or more of the alleged Labor Code violations, and the number of pay periods in which a violation
10 occurred.

11 In light of these challenges, Plaintiff recognizes that he faced significant risks in
12 establishing his and PAGA Settlement Members' entitlement to penalties. If Alacrity prevailed on
13 the threshold issue of misclassification under *Borello*, or some of its other defenses, it is likely
14 that they would recover nothing. Thus, in the face of such uncertainty, the settlement was fair,
15 reasonable, and advantageous to Plaintiff, the LWDA, and the PAGA Settlement Members.

16 Plaintiff estimates that Defendant's total potential exposure is \$2,974,450, assuming he
17 prevailed on his argument that PAGA penalties can be stacked (which Alacrity disputes).⁴ *See*
18 *Young Decl.* ¶ 22. However, a substantial portion of these penalties (\$1,270,000) is attributable to
19 penalties related to willful misclassification, under California Labor Code § 226.8, which would
20 have been difficult to prove, particularly in light of the change in the law subjecting independent
21 adjusters like PAGA Settlement Members to a more fact-bound test. Plaintiff would also have to
22 establish his and the PAGA Settlement Members' entitlement to expense reimbursement and
23 unpaid wages in the absence of time and expense records from Alacrity, which did not keep such
24 records, in order to prevail on his claims for penalties related to these alleged injuries. *Id.*

25
26
27 ⁴ To calculate the maximum potential exposure, Plaintiffs' Counsel calculated the total pay
28 periods from July 2, 2019 through an estimated release date of June 1, 2022 and assumed that
there was a violation for every pay period in which a PAGA Settlement Member worked. *Young Decl.* ¶ 21.

1 Given the Court’s discretion to award lower penalties, the Gross Settlement Amount of
2 \$200,000 – or approximately 6.72 percent of the maximum total potential penalties that could be
3 awarded if Plaintiff had prevailed – is reasonable. *See id.* ¶ 23; *see also, e.g., Abelar v. Am.*
4 *Residential Servs., L.L.C.* No. 19 Civ. 726, 2019 WL 6054607, at *4 (C.D. Cal. Nov. 14, 2019)
5 (PAGA settlement amount approximately 5% of maximum penalties); *Rodriguez*, 2019 WL
6 331159, at *5 (approving PAGA penalties representing about 6% of maximum penalties);
7 *Ramirez v. Benito Valley Farms, LLC*, No. 16 Civ. 4708, 2017 WL 3670794 at *5 (N.D. Cal.
8 Aug. 25, 2017) (approving PAGA penalties of less than 4.5% of maximum penalties); *McLeod v.*
9 *Bank of Am., N.A.*, No. 16 Civ. 03294, 2018 WL 5982863, at *2, *4 (N.D. Cal. Nov. 14, 2018)
10 (PAGA penalties approximately 1% of maximum penalties).

11 **C. The Requested Attorneys’ Fees and Costs Are Reasonable.**

12 PAGA allows a prevailing plaintiff to collect attorneys’ fees and costs. Cal. Labor Code §
13 2699(g)(1). Plaintiff requests approval of attorneys’ fees in the amount of one-third of the Total
14 Settlement Amount (\$66,666.67). Courts typically award fees in this range. *See Chavez v. Netflix,*
15 *Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (“Empirical studies show that, regardless whether the
16 percentage method or the lodestar method is used, fee awards in class actions average around
17 one-third of the recovery.”) (internal quotation marks omitted). Moreover, the fees requested are
18 significantly less than Plaintiffs’ Counsel’s combined lodestar to date. Young Decl. ¶¶ 26-29;
19 Kennedy Decl. ¶ 14. Given Plaintiffs’ Counsel’s efforts, the amounts requested are reasonable
20 and warrant approval.

21 **1. An Award of One-Third of the Fund Is Reasonable.**

22 “California has long recognized, as an exception to the general American rule that parties
23 bear the costs of their own attorneys, the propriety of awarding an attorney fee to a party who has
24 recovered or preserved a monetary fund for the benefit of himself or herself and others.” *Laffitte*
25 *v. Robert Half Int’l Inc.*, 1 Cal. 5th 480, 488-89 (2016). In awarding fees in a class action, courts
26 generally use either the percentage of the recovery or the lodestar approach. *See generally id.* at
27 490-97. Courts approving PAGA settlements similarly use this approach. *See Basilioli*, 2019 WL
28 8107885, at *4 (quoting *Laffitte*, Cal. 5th at 503). “The choice of a fee calculation method is

1 generally one within the discretion of the trial court,” the goal under either approach being to
2 “award a reasonable fee to compensate counsel for their efforts.” *Laffitte*, 1 Cal. 5th at 504. There
3 are numerous “recognized advantages of the percentage method—including relative ease of
4 calculation, alignment of incentives between counsel and the class, a better approximation of
5 market conditions in a contingency case, and the encouragement it provides counsel to seek an
6 early settlement and avoid unnecessarily prolonging the litigation.” *Id.* at 503.

7 In determining the proper percentage of the fund, courts examine the risks and potential
8 value of the litigation, the contingent nature of the representation, the novelty and discussion of
9 the issues presented, the skill shown by counsel, and the hours worked and asserted hourly rates.
10 *Id.* California state courts have not established a “benchmark” percentage of the fund but have
11 noted that fee awards in class actions average approximately one-third of the settlement fund
12 regardless of whether the percentage method or the lodestar method is used. *Chavez*, 162 Cal.
13 App. 4th at 66 n.11. Courts approving PAGA-only settlements have similarly approved fee
14 awards of one third of the settlement fund. *See, e.g., Basilioli*, 2019 WL 8107885, at *4; *Abelar*,
15 2019 WL 6054607, at *6.

16 The Court may also use a lodestar analysis as a final “cross-check” on the percentage of
17 the fund method. Here, the amount of attorneys’ fees requested is far less than the amount of time
18 spent litigating this action multiplied by the attorneys’ reasonable hourly rates, Young Decl. ¶¶
19 26-31, which further demonstrates that the fees requested are reasonable. *See Basilioli*, 2019 WL
20 8107885, at *4 (finding 33.3% of the common fund in PAGA settlement reasonable where
21 requested fee fell well below the approximate lodestar amount); *Abelar*, 2019 WL 6054607, at *6
22 (same); *see also Taylor v. Shippers Transp. Express, Inc.*, No. 13 Civ. 2092, 2015 WL 12658458,
23 at *16-17 (C.D. Cal. May 14, 2015) (finding 33 1/3% fee reasonable where amount represented a
24 26% discount from the unadjusted lodestar); *see also Alvarez v. Farmers Ins. Exch.*, No. 14 Civ.
25 574, 2017 WL 2214585, at *5 (N.D. Cal. Jan. 18, 2017) (fee award that was 53% of lodestar was
26 “objectively reasonable under the lodestar method of calculation”); *Dudum v. Carter’s Retail,*
27 *Inc.*, No. 14 Civ. 988, 2016 WL 7033750, at *7 (N.D. Cal. Dec. 2, 2016) (negative multiplier,
28 0.87).

1 **2. Counsel's Costs Are Reasonable.**

2 As of the date of this filing, Plaintiffs' Counsel have incurred \$20,868.73 in litigation
3 costs and expenses, related to: legal research, Plaintiff's share of the mediation fees, the LWDA
4 and court filings, printing/copying fees, court appearances, and records requests from California
5 Government agencies. Young Decl. ¶ 32-33; Kennedy Decl. ¶ 16.⁵ These costs are reasonable,
6 and the Court should approve them. *See e.g., Abelar*, 2019 WL 6054607, at *6 (approving
7 reimbursement of reasonable costs from the total PAGA settlement amount, including mediation
8 fees, travel, filing fees, postage, copying, and legal research).

9 **D. The Proposed Service Payment Is Fair and Reasonable.**

10 Service payments compensate named plaintiffs for the time they put into a case and
11 recognize the risks and burdens they bear by stepping forward and pursuing claims on behalf of
12 other "aggrieved employees" and the State. *See e.g., Abelar*, 2019 WL 6054607, at *6 (approving
13 service award for named plaintiff in PAGA action as "reasonable compensation for the time and
14 acceptance of adverse employment risk by Plaintiff"). Such payments are appropriate in a
15 representative action because they provide an incentive to bring important cases that have a broad
16 impact on others, not just the plaintiff. *See Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726
17 (2004) (affirming service payments to the named plaintiffs "compensating them for their efforts
18 in bringing suit").

19 Plaintiff requests approval of a \$10,000 service payment as compensation for the efforts
20 he made on behalf of the PAGA Settlement Members and the State. "[C]riteria courts may
21 consider in determining whether to make an incentive award include: 1) the risk to the class
22 representative in commencing suit, both financial and otherwise; 2) the notoriety and personal
23 difficulties encountered by the class representative; 3) the amount of time and effort spent by the
24 class representative; 4) the duration of the litigation and; 5) the personal benefit . . . enjoyed by
25 the class representative as a result of the litigation." *Cellphone Termination Fee Cases*, 186 Cal.
26 App. 4th 1380, 1394-95 (2010) (citations and internal quotation marks omitted).

27 _____
28 ⁵ The requested costs do not account for additional costs that may be incurred during the
course of seeking settlement approval and any other costs arising during the settlement check
distribution process. Young Decl. ¶ 32.

1 Plaintiff's efforts in support of the litigation include: providing factual information to
2 Counsel and maintaining communication with them throughout the case; reviewing the
3 Complaints before they were filed; responding to discovery requests, including searching for any
4 potentially relevant documents or records in his possession; communicating with Counsel in
5 advance of the mediation and assisting in the preparation for mediation; remaining on-call and
6 available to discuss settlement negotiations on the date of the mediation session; and approving
7 the settlement terms. *See* Young Decl. ¶ 34.

8 Plaintiff also undertook significant and well-recognized risks by attaching his name to a
9 lawsuit against his alleged employer, undertaking the potential obligation for costs in the event of
10 a judgment for Defendant, and risking loss of income or accrued leave if necessary to prosecute
11 the action. *Id.* at ¶ 35.

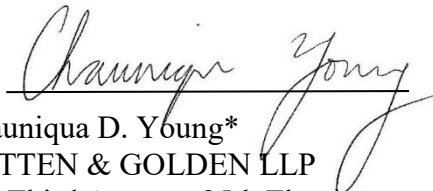
12 **V. CONCLUSION**

13 For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) approve the
14 Settlement Agreement; (2) approve the requests for attorneys' fees, reimbursements, and a service
15 payment; and (3) dismiss the PAGA claims with prejudice.

16
17 Dated: March 29, 2022

Respectfully submitted,

18 By:

19 
20 Chauniqua D. Young*
21 OUTTEN & GOLDEN LLP
22 685 Third Avenue, 25th Floor
23 New York, NY 100170
24 Telephone: (212) 245-1000
25 Facsimile: (212) 638-8810
26 E-Mail: cyoung@outtengolden.com

27 Jahan Sagafi (SBN 224887)
28 Molly J. Frandsen (SBN 320094)
OUTTEN & GOLDEN LLP
One California Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
E-Mail: jsagafi@outtengolden.com
E-Mail: mfrandsen@outtengolden.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Galvin Kennedy*
KENNEDY LAW FIRM LLP
2925 Richmond Ave., Ste. 1200
Houston, TX 77098
Telephone: (713) 425-6445
Facsimile: (888)535-9271
E-Mail: galvin@kennedyattorney.com

*Attorneys for Plaintiffs, the Proposed Class,
and Aggrieved Employees*

**Admitted pro hac vice*