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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

SANTOS CARRILLO, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

BLUSKY RESTORATION
CONTRACTORS LLC, a Delaware
Limited Liability Company; HAR-BRO,
LLC, a California Limited Liability
Company; HAR-BRO, INC., a California
Corporation; and DOES 3 through 20,
inclusive;

Defendants;

Case No.: CIVSB2105793
*[Assigned to Hon. Judge David Cohn, Dept S26,
for all purposes]*

**PLAINTIFF'S UNOPPOSED MOTION TO
APPROVE THE SETTLEMENT PURSUANT
TO THE PRIVATE ATTORNEY GENERAL
ACT OF 2004; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF
BRIAN MANKIN IN SUPPORT THEREOF;
[PROPOSED] ORDER**

Hearing

Date: June 29, 2022

Time: 10:00 a.m.

Dept.: S26

Complaint filed: February 11, 2021

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

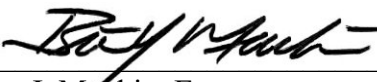
2 PLEASE TAKE NOTICE that on June 29, 2022, at 10:00 a.m. or as soon thereafter as the
3 matter may be heard by the Honorable David Cohn in Department S26 of the San Bernardino County
4 Superior Court, located at 247 West Third Street, San Bernardino, CA 92415, Plaintiff Santos Carrillo
5 will and hereby does move this Court for an order approving a settlement pursuant to the Private
6 Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (the “PAGA”).

7 This unopposed motion is based upon this the Memorandum of Points and Authorities; the
8 Declaration of Plaintiff’s counsel (Brian Mankin) in support thereof; the PAGA Settlement Agreement
9 and Release of PAGA Claims (the “Settlement Agreement”); the proposed Order granting Approval of
10 the PAGA Settlement; all other records, pleadings, and papers filed in this action; and upon such other
11 evidence or argument as may be presented to the Court at the hearing of this motion.
12

13 Dated: June 2, 2022

LAUBY, MANKIN & LAUBY LLP

14
15 BY:



16 Brian J. Mankin, Esq.
17 Attorneys for Plaintiff, the State of California and
18 Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

3 In this PAGA-only action, Plaintiff Santos Carrillo – serving as the representative for the State
4 of California – and his counsel sought civil penalties against Defendants BluSky Restoration Contractors
5 LLC, Har-Bro, LLC, and Har-Bro, Inc., (“Defendants” or “BluSky”) under the California Labor Code
6 Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (commonly referred to as
7 “PAGA”) on behalf of all similarly situated non-exempt employees who worked for Defendants in
8 California (the “Aggrieved Employees”) at any time during the period of February 11, 2020, through
9 February 5, 2022 (the “Statutory Period”). The PAGA action is a type of *qui tam* action filed on behalf
10 of the State to assist it with labor law enforcement. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014)
11 59 Cal.4th 348, 380-382. As such, the State is the real party in interest in a PAGA action. *Id.* at 382.
12 Here, the State of California was timely served with a copy of the PAGA Representative Action
13 Settlement Agreement and Release of PAGA Claims (the “Settlement Agreement” or “S.A.”) and this
14 Motion to Approve the Settlement.

15 Defendants’ primary business involves restoration, renovation, and other services for properties
16 damaged by water, fire, storms, and other disasters. Defendants have approximately 13 locations in
17 California and employed approximately 170 Aggrieved Employees.

18 This action primarily arises out of Plaintiff’s claims that he and other Aggrieved Employees were
19 not paid wages for all hours worked in a shift due to a failure to incorporate all wages earned (including
20 shift differentials and other non-discretionary bonuses) into the regular rate of pay, resulting in an
21 underpayment of minimum and overtime wages. Plaintiff also brought claims for failure to provide
22 proper meal periods or paid rest breaks, failure to provide accurate and complete wage statements and
23 failure to timely pay final wages. Defendant refutes these claims, arguing that Plaintiff and the
24 Aggrieved Employees were paid for all hours worked, were permitted to take all required breaks,
25 received compliant wage statements and received all pay due and owing at the time of termination.
26 Thus, the Parties fully dispute the merits of the claims and defenses.

27 Following informal discovery and an extensive exchange of information, the Parties mediated
28 the case on December 6, 2021, with a well-respected wage-and-hour mediator, Steve Serratore. The

1 case resolved at mediation pursuant to a mediator's proposal. Thereafter, the Parties finalized the
2 Settlement Agreement.

3 Now, with a comprehensive Settlement Agreement that resolves the claims alleged in this case,
4 Plaintiff seeks this Court's approval of a \$360,000 settlement involving approximately 170 total
5 employees. After payment of Plaintiff's attorneys' fees of \$120,000 (1/3 of the settlement) and actual
6 litigation costs (\$12,561.62), as well as the administration expenses (\$6,000), approximately
7 \$221,438.38 will be allocated to PAGA Penalties, of which 75% will be paid to the LWDA
8 (\$166,078.78). The remaining 25% (\$55,359.60) will be paid to the Aggrieved Employees, resulting in
9 an average payment of \$325.64.

10 The settlement merits full approval because it fulfills the purpose of PAGA (i.e., to deter
11 violations of the Labor Code and secure obedience of California's labor laws; to end ongoing violations
12 of the Labor Code either through injunctive relief or a defendant's voluntary change in light of a PAGA
13 action; and to provide relief that is genuine, meaningful, and consistent with California's goal of
14 benefitting the public through enforcement of labor laws).

15 The process for approving a PAGA settlement is straight-forward: "The superior court shall
16 review and approve any settlement of any civil action filed pursuant to this part." (Labor Code §
17 2699(1)(2).) Based on the California Supreme Court's holdings in *Arias v. Superior Court*, 46 Cal.4th
18 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014), there is no
19 requirement under PAGA for Plaintiff to establish the requirements of class certification (i.e.
20 numerosity, typicality, commonality and adequacy) nor is there the usual two-step preliminary and final
21 approval process as found in class actions. Rather, this PAGA-only settlement merely requires a one-
22 step review and approval process.

23 For these reasons and those discussed below, the Parties seek Court approval of the Settlement.

24 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

25 Plaintiff was employed by Defendants from 2019 through 2020 as a field technician. After
26 retaining counsel, Plaintiff submitted a January 8, 2021 letter to the California Labor & Workforce
27 Development Agency ("LWDA") and Defendant regarding the alleged violations. (Mankin Decl. ¶ 8,
28 **Exhibit "A"**). This notice is required under Labor Code § 2699.3(a)(1)(A) as a prerequisite to bringing

1 a PAGA claim against an employer. The LWDA did not respond or assume jurisdiction of the claims,
2 thereby deferring the prosecution of these violations to Plaintiff and his attorneys

3 After the 65- day waiting period elapsed without the LWDA asserting jurisdiction, Plaintiff filed
4 this PAGA-only complaint on June 15, 2020. (Mankin Decl. ¶ 9).

5 Defendant retained counsel and vowed to vehemently oppose the claims. Despite the disputed
6 nature of the claims, the Parties nevertheless agreed to table formal discovery and attempt an early
7 resolution. In preparation for the mediation, the Parties exchanged documents and information that
8 allowed both sides to calculate the potential damages and evaluate potential risk. During this process,
9 Plaintiff and his counsel analyzed, researched, and investigated the potential issues, including matters
10 related to the calculation of damages, trial, and appellate issues and risks. During this exchange of
11 information, pursuant to Plaintiff counsel's informal requests, Defendant produced extensive documents
12 and spreadsheets containing the timekeeping records, pay records and mileage records that enabled
13 Plaintiff and his expert to conduct a full analysis of the alleged unpaid wage, meal/rest break violations
14 and other claims. (Mankin Decl. ¶ 11).

15 The mediation took place on December 6, 2021, with Steve Serratore, a well-respected wage-
16 and-hour mediator. As noted, the Parties reached a settlement at mediation of the PAGA case as well
17 as Plaintiff's separate individual claims. Thereafter, the Parties memorialized the terms of the settlement
18 in a long-form Settlement Agreement, which is now presented to this Court for approval. (Mankin Decl.
19 ¶ 12, **Exhibit "B"**).

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

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

26 However, due to the lack of financing for California's agencies, and the substantial number of
27 Labor Code violations by California employers, the California Legislature found that it was in the public
28 interest to allow aggrieved employees to act as "private attorneys general" to enforce and recover civil

1 penalties on behalf of the State of California for Labor Code violations committed by employers. *Id.*
2 As the Legislature that adopted PAGA observed, “the only meaningful deterrent to unlawful conduct is
3 the vigorous assessment and collection of civil penalties as provided in the Labor Code.” Stats. 2003
4 ch. 906, § 1(b). Moreover, the Labor Code’s primary purpose is to “ensure employees are not required
5 or permitted to work under substandard unlawful conditions ... and to protect employers who comply
6 with the law from those who attempt to gain a competitive advantage at the expense of their workers by
7 failing to comply with minimum labor standards.” Labor Code § 90.5(a). Therefore, the Legislature
8 determined that “adequate financing of labor law enforcement was necessary to achieve maximum
9 compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined
10 and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in
11 the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil
12 penalties for Labor Code violations, with the understanding that labor law enforcement agencies were
13 to retain primacy over private enforcement efforts.” *Arias*, 46 Cal.4th at 980.

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

18 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
19 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the
20 employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the opportunity
21 to investigate and prosecute the claim. The employee may only sue on the state’s behalf if the LWDA
22 fails to respond to the notice within 65 days, responds that it does not intend to investigate, or investigates
23 and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In this case, Plaintiff
24 provided the LWDA with a notice letter advising it of the alleged Labor Code violations, but the LWDA
25 deferred the prosecution of these violations to Plaintiff and his attorneys. Accordingly, the Settlement
26 and the common fund created by it for the benefit of the State and Aggrieved Employees, is solely the
27 result of the work performed by Plaintiff and his attorneys on this case.

28 ///

1 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
2 court. Labor Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA approval
3 process and, more specifically, whether an aggrieved employee needs to meet class certification
4 requirements. *Arias*, 46 Cal.4th at 976. After a substantial review of the legislative history of PAGA,
5 the Court held that an aggrieved employee's representative action brought on behalf of the state and
6 other aggrieved employees against an employer for PAGA violations *does not* need to meet the
7 requirements for class certification nor does there need to be notice to the other employees. *Id.* at 975,
8 980-88. As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of
9 California's labor law enforcement agencies. *Id.* at 986. Thus, the Court simply reviews the settlement
10 and approves it if it is deemed to be fair and reasonable.

11 Accordingly, the Parties to this PAGA action have reached such an agreement and now seek this
12 Court's approval of the settlement.

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

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

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

16 The settlement provides that Defendant will pay a non-reversionary settlement amount of Three
17 Hundred Sixty Thousand Dollars (\$360,000) (the "Settlement Amount"), inclusive of payments to the
18 LWDA and Aggrieved Employees, attorneys' fees and litigation costs, as well as third party
19 administrator ("Administrator") costs. (S.A. ¶ 35, attached as Exhibit B to Mankin Decl.) After payment
20 of the attorneys' fees/costs and administration costs, the remainder of approximately \$221,438.38 will
21 form the PAGA Award and, pursuant to Labor Code § 2699(i), 75 percent shall be paid to the LWDA
22 (which shall be used to assist in the enforcement of labor laws and education of employers and
23 employees about their rights and responsibilities under the Labor Code), and the remaining 25 percent
24 being paid to the Aggrieved Employees on a pro rata basis. (*Id.*)

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The following chart reflects the estimated payments from the Settlement Agreement:

	Amount
<i>Settlement Amount</i>	\$ 360,000.00
Attorneys' Fees	\$ 120,000.00
Actual Litigation Costs	\$ 12,561.62
Administrator Costs	\$ 6,000.00
<i>Net Settlement Amount (PAGA Award)</i>	\$ 221,438.38
75% to the LWDA	\$ 166,078.78
25% to Aggrieved Employees	\$ 55,359.60
Balance	\$0

As such, the LWDA will receive approximately \$166,078.78 (75 percent of the PAGA Penalties) and the 170 Aggrieved Employees will collectively receive approximately \$55,359.60 (25 percent), which will be paid on a pro-rata basis according to the number of pay periods worked during the PAGA Period. The average payment to the Aggrieved Employees is approximately \$325.64, who collectively worked approximately 7,365 Pay Periods during the PAGA Period.

B. PAYMENT AND THE NOTICE

Defendant will wire the Settlement Amount to the Settlement Administrator within 30 calendar days of the Effective Date, which is defined as the date the Court enters the Final Order. (S.A. ¶¶ 9, 40). The payment to the Aggrieved Employees, the LWDA, and Plaintiff's counsel will be issued 10 days after the Administrator receives the Settlement Amount, and the Aggrieved Employees will then have 180 days to cash their checks. If for any reason a check is un-cashed, then the check will be voided and the funds issued to the California State Controller in the name of the Aggrieved Employee who may claim the funds at a later date. (S.A. ¶¶ 41-42).

A Notice informing the Aggrieved Employees of the nature of the payment will be provided with the settlement check. (See **Exhibit E** to Mankin Decl.)

C. SETTLEMENT ALLOCATION TO THE AGGRIEVED EMPLOYEES.

As noted, twenty-five percent (25%) of the PAGA Penalties will be allocated to the Aggrieved Employees. Based on the numbers provided by Defendant, approximately 170 workers will share in this fund on a pro rata basis according to the number of pay periods worked during the Statutory Period.

1 The portion of each Aggrieved Employees share will be treated as non-wage income and reported by
2 the Settlement Administrator on IRS Form 1099, as required by law. (S.A. ¶ 35(d)).

3 **D. THE RELEASE.**

4 The California Supreme Court has explained that a judgment in “a representative action brought
5 by an aggrieved employee under the California Labor Code Private Attorneys General Act of 2004 ... is
6 binding not only on the named employee plaintiff but also on government agencies and any aggrieved
7 employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 985-986. The release in the Settlement
8 Agreement narrowly binds the Aggrieved Employees for civil penalty claims brought in the Action.
9 (S.A. ¶ 45), as follows:

10 On the date that the Court issues a Final Order, Plaintiff, standing in the
11 shoes of the Labor Commissioner/LWDA, and on behalf of the State of
12 California and all Aggrieved Employees, will forever completely release
13 and discharge the Released Parties from any and all of the Released Claims.
The time period governing the Released Claims shall be the Statutory
Period.

14 The Settlement Agreement at Paragraph 19 defines “Released Claims” as follows:

15 [A]ny and all rights and claims for civil penalties that were asserted or could
16 have been asserted, assessed upon or collected from the Released Parties by
17 or on behalf of Plaintiff, the Aggrieved Employees and/or the State of
18 California under the Private Attorney General Act, Cal. Lab. Code §§ 2698
19 *et seq.*, or the California Labor Code, based on the facts and/or violations
20 alleged in the Complaint, including but not limited to the penalties sought
21 in Plaintiff’s PAGA causes of action for: (1) failure to pay minimum wages,
22 (2) failure to pay overtime wages, (3) failure to provide meal periods, (4)
23 failure to provide rest breaks, (5) failure to pay vested vacation wages, (6)
24 failure to timely pay wages each period, (7) failure to timely pay final
25 wages, (8) failure to provide accurate itemized wage statements, and all
26 other PAGA claims alleged or that could have been alleged based upon on
27 the facts, claims, or legal theories in the LWDA letter or the Complaint,
28 which include claims for alleged violations of California Labor Code §§
200, 201, 202, 203, 204, 208, 210, 218.6, 221, 222, 223, 226, 226.3, 226.7,
227.3, 256, 510, 512, 558, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and
Sections 3, 4, 9, 11 and 12 of the applicable Wage Order, arising during the
Statutory Period.

As the release is narrowly related to the claims alleged, the Parties contend that the release is
proper and reasonable.

1 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT**
2 **APPROVAL**

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

8 **A. EVALUATION OF THE PAGA SETTLEMENT**

9 Although PAGA and its legislative history do not seem to require a Court to analyze a PAGA
10 settlement in comparison to the “value” of the claims, the penalties herein are reasonable when
11 considered in this context as well.

12 Here, Plaintiff estimated that Defendants’ maximum potential penalty exposure in this case was
13 in the seven figures. But, as discussed below, the risks that continued litigation would entail show that
14 the Settlement is a reasonable compromise of the disputed claims at issue and resulted from extensive
15 arm’s length negotiations. Further, Defendants dispute that any liability exists, and if any does exist,
16 asserts the court would likely use its discretion to reduce the penalties since it claims that any issues
17 were unintentional and inconsequential.

18 During the course of discovery and based on Plaintiff’s counsel’s extrapolation of data and
19 information that Defendants provided prior to mediation, Plaintiff estimates that were approximately
20 170 employees who worked approximately 7,504 pay periods during the Statutory Period.

21 In terms of the assessment of civil penalties, the PAGA provides that the civil penalty is \$100
22 for each aggrieved employee per pay period for the initial violation and (generally) \$200 for each
23 aggrieved employee per pay period for each subsequent violation. Labor Code § 2699(f)(2). Relying
24 on *Amaral v. Cintas Corp.*, 163 Cal.App.4th 1157 (2008), Plaintiff argued that the trial court should
25 assess a \$200 civil penalty for each violation that occurred after Plaintiff submitted his PAGA letter to
26 the LWDA, thereby informing Defendant of his claim. However, Defendant vehemently objected to
27 this argument, relying on a later district court case construing *Amaral*, holding that the trial court can
28 only assess a \$200 civil penalty for “subsequent” violations after the date that “a court or commission”

1 notifies the employer of a violation. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*,
2 (S.D. Cal 2009) 2009 WL 2448430, at *9. Defendant argued that it had not been previously cited for a
3 wage statement violation and, therefore, the \$200 violation rate did not apply.

4 Plaintiff's strongest claim was for unpaid overtime, based on the allegation that Defendants paid
5 the Aggrieved Employees an hourly rate plus nondiscretionary bonuses based on performance but failed
6 to include the bonuses in the regular rate calculations and overtime compensation. And, although
7 Plaintiff believed this claim was suitable for summary judgment, the value was somewhat limited
8 because Plaintiff's expert opined that the violation only occurred on 12.6% of pay periods. Therefore,
9 the maximum potential penalty was \$94,550 (7,504 pay periods x 12.6% violation rate x \$100).

10 In addition, Plaintiff brought strong claims for meal and rest break violations. Based on the
11 sampled data, Plaintiff estimated that meal violations occurred during 56% of all pay periods, and rest
12 break violations occurred during 75% of pay periods. Thus, the maximum potential penalties for meal
13 and rest breaks total approximately \$983,000.

14 Plaintiff also alleged that Defendants violated Labor Code § 226 from February through August
15 2020 due to the failure to identify the "start date" on the wage statements. Plaintiff estimates that this
16 occurred for approximately 1,920 wage statements, resulting in a maximum potential value of \$192,000.

17 Plaintiff also alleged two violations that only applied for *former* employees: failure to timely pay
18 final wages (Labor Code §§ 201 – 203) and failure to pay all vested vacation upon separation of
19 employment (Labor Code § 227.3). But, because these only amount of one violation per terminated
20 employee, and because there were only 22 total former employees in this matter, that only results in a
21 maximum value of \$4,400.

22 Thus, in total, Plaintiff's calculated the maximum potential PAGA penalties to be \$1,273,950.
23 However, this maximum amount fails to take into account the various risks and defenses to the claims
24 herein. Additionally, Defendant argued that, even if the claims were proven, this figure fails to
25 acknowledge that courts have wide latitude to reduce the amount of civil penalties "based on the facts
26 and circumstances of a particular case" and if "to do otherwise would result in an award that is unjust,
27 arbitrary and oppressive, or confiscatory." Labor Code § 2699(h). Moreover, Defendant argued against
28 the merits of the underlying claims and particularly that the "wilfulness" standard and/or "good faith"

1 defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also
2 argued that it is improper to stack civil penalty claims on top of the underlying claim. For these reasons,
3 the Parties submit that the agreed-upon PAGA penalties is fair and reasonable.

4 Despite these defenses, Plaintiff still obtained a settlement of 28.3% of the total *maximum* value
5 – a great result that is extremely reasonable in light of the risks and uncertainties associated with the
6 PAGA claims in this case. The Settlement commits Defendants to pay \$221,438.38 in PAGA penalties
7 (after fees/costs and other expenses). This is sufficient to accomplish the objectives of PAGA while not
8 being unjust, arbitrary and oppressive, or confiscatory.

9 **B. PLAINTIFF’S SEPARATE INDIVIDUAL SETTLEMENT IS PROPER**

10 Plaintiff separately resolved his individual claims with Defendant in a confidential settlement.
11 Notably, the California Labor Code specifically permits a Plaintiff to separately resolve claims for
12 individual damages from PAGA claims on behalf of aggrieved employees. The PAGA statute at Labor
13 Code § 2699(g)(1) provides that “[n]othing in this part shall operate to limit an employee’s right to
14 pursue or recover *other remedies available under state or federal law, either separately or concurrently*
15 *with an action taken under this part*”. The rule permitting employees to pursue separate individual
16 claims while maintaining a PAGA claim aligns perfectly with the general understanding that PAGA
17 claims (which seek civil penalties on behalf of Aggrieved Employees) are separate and distinct from
18 individual claims for unpaid wages and statutory penalties.

19 The California Supreme Court explained this principal in the landmark *Iskanian* decision,
20 holding that “[t]he civil penalties recovered on behalf of the state under the PAGA *are distinct* from the
21 statutory damages to which employee may be entitled in their individual capacities.” *Iskanian v. CLS*
22 *Transportation, LLC*, (2014) 59 Cal.4th 348, 381 (hereinafter “*Iskanian*”). In fact, *Iskanian* directly
23 discussed the separation between individual and PAGA claims, and held that when an employee pursues
24 both types of cases, a defendant must respond to *both* cases: “*Iskanian* must proceed with bilateral
25 arbitration on his individual damages claims, and CLS must answer the representative PAGA claims in
26 some forum.” *Id.* at 391. In the event of a bifurcation of individual and PAGA actions one case may
27 proceed first, while the other case is stayed. *Id.*

28 ///

1 In addition, the California Supreme Court recently expounded upon this position in *ZB, N.A. v.*
2 *Superior Court* (2019) 8 Cal.5th 175. There, when discussing the difference between statutory
3 damages/penalties (for an individual) versus civil penalties (under PAGA), the court clearly held that
4 “[p]ursuing civil penalties does not prevent an employee from separately or concurrently pursuing
5 unpaid wages and other remedies already available to her.” *Id.* at 187.

6 This concurrent framework discussed in *Iskanian* is exactly what happened in this case. Plaintiff
7 initially filed a PAGA case, and while the PAGA case was pending, he prepared to file a separate
8 individual case. However, the Parties ultimately settled the individual claims prior to litigation.

9 This approach – settling the separate and distinct PAGA and individual claims – has been
10 accepted and approved by courts throughout California. *See ZB, N.A., supra*, 8 Cal.5th at 187 (“Pursuing
11 civil penalties does not prevent an employee from separately or concurrently pursuing unpaid wages and
12 other remedies already available to her”). For instance, in *Caliber Bodyworks, Inc. v Superior Court*,
13 (2005) 134 Cal.App.4th 365, the Court confirmed the appropriateness of bringing PAGA claims and
14 individual claims, noting that in addition to PAGA claims, an employee may bring claims directly
15 against an employer for *statutory penalties* and *unpaid wages* while PAGA permits an aggrieved
16 employee to initiate a private civil action on behalf of himself or herself and other current or former
17 employees to recover ***civil penalties*** if the LWDA does not do so. *Id.* at 370-374. This is because the
18 goals of these two actions are very different. The individual action permits the employees to recover
19 individual damages, whereas PAGA has the stated goal of improving enforcement of existing Labor
20 Code obligations. *Id.* Thus, “[i]n a lawsuit brought under [PAGA], the employee plaintiff represents
21 the same legal right and interest as state labor law enforcement agencies – namely, recovery of ***civil***
22 ***penalties*** that otherwise would have been assessed and collected by the Labor Workforce Development
23 Agency.” *Arias v. Sup. Ct.* (2009) 46 Cal. 4th 969, 986. A PAGA action “is fundamentally a law
24 enforcement action designed to protect the public and not to benefit private parties” and represents “a
25 dispute between an employer and the *state*, which alleged directly or through its agents – either [the
26 Agency] or aggrieved employees – that the employer has violated the Labor Code.” *Iskanian, supra*, 59
27 Cal. 4th at 381, 386-87 (emphasis in original). As such, PAGA actions “directly enforce *the state’s*
28 interest in penalizing and deterring employers who violate California’s labor laws” and, the State of

1 California is the “real party in interest.” *Id.* at 387 (emphasis in original). This is entirely distinct from
2 an individual claim, whereby an employee seeks individual relief for Labor Code violations.

3 Because Plaintiff is permitted to resolve his individual and the PAGA claims, Plaintiff
4 respectfully submits that this Court should approve the Settlement Agreement.

5 **VI. THE REQUESTED ATTORNEYS’ FEES AND LITIGATION COSTS ARE FAIR AND**
6 **REASONABLE**

7 For their efforts and the risk they undertook in obtaining a common fund settlement that benefits
8 the LWDA and Aggrieved Employees, the Parties allocated \$120,000 to Plaintiff’s Counsel for
9 reasonable attorneys’ fees, which is one third of the Settlement Amount. Additionally, the Parties agreed
10 to reimburse Plaintiff’s Counsel for their actual litigation costs. These fees are warranted under the law
11 and within the range of fees commonly awarded in similar cases.

12 **A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S FEES UNDER THE**
13 **COMMON FUND DOCTRINE IN THIS QUI TAM ACTION**

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

21 “A qui tam action is one brought under a statute that allows a private person to sue as a private
22 attorney general to recover damages or penalties, all or part of which will be paid to the government.”
23 *People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-492. “A qui tam
24 action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the qui tam plaintiff stands in
25 the shoes of the state or political subdivision [citation].’” *Id.* at p. 501. As the name of the PAGA statute
26 makes clear (e.g. “Labor Code Private Attorneys General Act”), a PAGA action is a qui tam action
27 because the statute allows the employee plaintiff, acting as the proxy of the state’s labor law enforcement
28 agency, to sue his or her employer for Labor Code violations and recover civil penalties that otherwise

1 would have been assessed and collected by the Labor and Workforce Development Agency (LWDA).
2 *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380. “A PAGA representative action
3 is therefore a type of *qui tam* action.” *Id.* at p. 382. Indeed, the majority of the civil penalties recovered
4 in a PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (e.g. 75%
5 paid to the state; 25% paid to the aggrieved employees). *See* Labor Code 2699(i).

6 As here, where a common fund is created in a *qui tam* action by the successful litigation of a
7 plaintiff and her attorneys, the plaintiff’s attorneys are entitled to recover their fees from the common
8 fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. In *Bank of America*, California
9 taxpayers compelled the State Controller to enforce the Unclaimed Property Law against banks who
10 were retaining accounts that should have been turned over to the State. Because of the success of the
11 taxpayers’ lawsuit, a common fund was created in favor of some depositors and the State of California.
12 *Id.* When the taxpayers’ attorneys sought recovery of their attorney’s fees from the judgment under the
13 common fund doctrine, the Controller opposed the request. The Court of Appeal affirmed the trial
14 court’s fee award to the taxpayers’ counsel under the common fund doctrine stating:

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

22 In this case, the PAGA Settlement created a common fund for the benefit of the employees and
23 the State of California. Thus, these beneficiaries must bear their share of the costs and attorney’s fees,
24 which fees and costs must be deducted from the settlement amount under the common fund theory. *Id.*
25 Moreover, such fees are deducted as a percentage of the settlement amount. *Boeing Co. v. Van Gemert*
26 (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904
27 F.2d 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027;
28 *Staton v. Boeing Co.*(9th Cir. 2003) 327 F.3d 938, 967.

The California Supreme Court recently upheld the use of the common fund theory of recovery
for attorney’s fees in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the settlement

1 created a common fund of \$19 million dollars. This ruling is consistent with the Court’s prior rulings
2 recognizing that “when a number of persons are entitled in common to a specific fund, and an action
3 brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such ...
4 plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34;
5 *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who recovers a common fund . . . is
6 entitled to reasonable attorneys’ fees from the fund as a whole;” *Mills v. Electric Auto-Lite Co.* (1970)
7 396 U.S. 375, 393-394 [discussing the acceptance of awarding attorneys’ fees and expenses from a
8 settlement where “litigation has conferred a substantial benefit on the members of an ascertainable
9 class”]; *see also Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26 “[f]ee spreading
10 occurs when a settlement or adjudication results in the establishment of a separate or so-called common
11 fund for the benefit of the class.”].).

12 Accordingly, the common fund doctrine allows a court to award attorneys’ fees based upon a
13 percentage of the total fund that is created for the satisfaction of beneficiaries’ claims when the fund
14 consists of a “certain or easily calculable sum of money.” *Dunk v. Ford Motor, Co.* (1996) 48
15 Cal.App.4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 1,282.91 [application of
16 the percentage of the fund recovery depended on “[t]he critical point” that “a fund was created from
17 which attorneys’ fees could be paid”]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th
18 ed. 2002).

19 California law has long upheld, and continues to uphold, the percentage of the recovery method
20 for awarding attorneys’ fees where a fund is established. *See e.g., Serrano v. Priest* (1977) 20 Cal.3d 25,
21 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v. Netflix, Inc.* (2008)
22 162 Cal.App.4th 43, 563 [“fees based on a percentage of the benefits are in fact appropriate in large
23 class actions...”]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 263
24 [affirming award of attorneys’ fee based on percentage of recovery]; *Chavez v. Netflix, Inc., supra*, 162
25 Cal.App.4th at pp. 65-66; *see also Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.*
26 (2005) 127 Cal.App.4th 387, 397 [the common fund doctrine is “frequently applied in class actions when
27 the efforts of the attorney for the named class representatives produce monetary benefits for the entire
28 class”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [“courts recognize two

1 methods for calculating attorney fees in class actions: the lodestar/multiplier method and the percentage
2 of recovery”].

3 Based on the foregoing, awarding attorneys’ fees of one-third of the Settlement Amount is fair
4 and warranted in light of the PAGA settlement that was reached on behalf of the State of California and
5 Aggrieved Employees. Accordingly, awarding fees on this basis in this amount is reasonable and
6 appropriate.

7 **B. THE PERCENTAGE FEE OF THE GROSS SETTLEMENT AMOUNT IS FAIR AND**
8 **REASONABLE, AND LESS THAN COUNSEL’S LODESTAR**

9 An award of fees from the gross settlement amount under the common fund doctrine prevents
10 unjust enrichment of those who benefit from the common fund created through the successful efforts of
11 plaintiff’s counsel and furthers the important goal of attracting competent counsel to handle
12 representative actions enforcing minimum labor standards. *Laffitte v. Robert Half Int’l. Inc.* (2016) 1
13 Cal.5th 480, 503. In affirming the use of the common fund doctrine in California, the California
14 Supreme Court summarized the benefits of the percentage method of recovery stating: “The recognized
15 advantages of the percentage method—including relative ease of calculation, alignment of incentives
16 between counsel and the class, a better approximation of market conditions in a contingency case, and
17 the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
18 the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied
19 our trial courts.” *Id.*

20 Among the factors considered in determining whether the requested fee percentage is reasonable
21 are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of plaintiff’s counsel
22 and the quality of work performed by plaintiff’s counsel; (4) the contingent nature of the fee and the
23 financial burden carried by the plaintiff; and (5) awards made in similar cases. *Vizcaino v. Microsoft*
24 *Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.

25 All these factors support an award here of one-third of the common fund. First, Plaintiff’s
26 counsel achieved a good PAGA settlement in a case that involved highly contested issues that were
27 primarily related to small periods of time that were allegedly unpaid, as well as meal and rest break
28 violations. Second, Plaintiff faced significant risks going forward with the litigation. As discussed

1 above, Defendant raised various defenses and, as such, Plaintiff faced risky issues going forward with
2 this litigation, and it would have taken significant time to realize any recovery in this action. Third,
3 Plaintiff's Counsel are experienced representative action litigators, including having been selected as a
4 "Super Lawyer" in employment litigation, and have achieved some of the largest PAGA awards.
5 (Mankin Decl. ¶¶ 2-6.) This experience and expertise, combined with the high quality of work
6 performed in this case by Plaintiff's Counsel, resulted in the settlement achieved in this case. Fourth, as
7 discussed above and as set forth in the Declaration of Plaintiff's Counsel, the request for attorney's fees
8 falls well within the norms accepted by state and federal courts in California in comparable wage and
9 hour actions actually handled by Plaintiff's Counsel.

10 For all of the above reasons, a fee award here in the amount of one-third of the Gross Settlement
11 Amount is fair and reasonable.

12 **C. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE FEE AWARD**

13 Despite recognized limitations of the so-called lodestar method, some California and federal
14 courts acknowledge the utility of a lodestar "cross-check."¹ (*Lealao, supra*, 82 Cal.App.4th at 46-47.)
15 Under the "lodestar multiplier" method of cross-checking the reasonableness of attorneys' fees in class
16 actions, the court ascertains Class counsel's total "lodestar" amount by multiplying the number of hours
17 reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or
18 reduces this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty or
19 difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v.*
20 *Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao,*
21 *supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the "fee awarded is
22 within the range of fees freely negotiated in the legal marketplace in comparable litigation"].

23 As set forth in the declaration of Plaintiff's Counsel submitted herewith, the actual aggregated
24 lodestar between the attorneys that worked on this case is \$116,455. This results in a slightly negative
25
26

27 ¹ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of
28 manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been
expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); *See also In re Activision* (N.D. Cal 1989) 723
F.Supp 1373.

multiplier, which clearly demonstrates that the requested fee is justified, reasonable and appropriate. The total lodestar is summarized in the following table and in the declaration of Plaintiff's counsel:

Lodestar Summary

Attorney	Experience	Hourly Rate	Hours	Total
Brian Mankin	21	\$775	78 ²	\$60,450
Peter Carlson	8	\$575	97.4	\$56,005
TOTAL				\$116,455

(See Mankin Decl. ¶ 19; Carlson Decl. ¶ 7)

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (i.e., the Laffrey Matrix at www.laffreymatrix.com indicates that the benchmark rate for a 8-10 year attorney to be \$676/hour and a 20+ year attorney at \$919/hour). Moreover, the Wolters Kluwer 2017 Real Rate Report ("Real Rate Report") provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer's ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual hours and fees billed by law firms. (Mankin Decl. ¶ 20).

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² Includes an estimated 30 hours of additional work in preparation for and attending the hearing, as well as work that is anticipated to be performed after the hearing with counsel, administrator, employees, and the court.

1 Thus, not only are Plaintiff's Counsel's rates reasonable and typical, but the attorneys' fees
2 requested are in line with the lodestar, which confirms that the fee request is fair and reasonable.

3 **D. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

4 Plaintiff's Counsel requests reimbursement of their actual out-of-pocket expenses incurred to
5 prosecute this action. These expenses were incidental and necessary to the effective representation of
6 the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19. Plaintiff's Counsel are permitted
7 to recover their litigation costs and expenses under the common fund doctrine. *See Serrano III*, 20 Cal.3d
8 at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San*
9 *Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f
10 necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys'
11 fees by . . . [Plaintiffs'] attorneys"). Furthermore, Plaintiff's Counsel are entitled to recover "those out-
12 of-pocket expenses that would normally be charged to a fee-paying client." *Harris v. Marhoefer* (9th
13 Cir. 1994) 24 F.3d 16, 19.

14 The Settlement Agreement authorized Plaintiff's Counsel to recover litigation costs up to
15 \$15,000. However, the actual costs through the approval hearing are projected to be \$12,561.62, which
16 is the amount requested. (Mankin Decl. ¶ 21; **Exhibit C**). The balance will be paid to the LWDA and
17 Aggrieved Employees. These costs are reasonable, uncontested, and should be approved.

18 **VII. SUBMISSION TO THE LWDA**

19 As set forth in the Mankin Declaration at ¶ 22, the settlement and this motion are concurrently
20 being submitted to the LWDA in accordance with Labor Code § 2699(l)(2). The proof of electronic
21 submission is attached as **Exhibit D** to the Mankin Declaration.

22 **VIII. THE SETTLEMENT ADMINISTRATOR**

23 CPT Group will serve as the Settlement Administrator and will be responsible for processing the
24 settlement payments and providing notice to the Aggrieved Employees. CPT Group provided an all-in
25 bid to administrator the Settlement for \$6,000, which is the amount that will be paid from the Settlement
26 Amount.

27 ///

28 ///

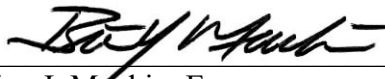
1 **IX. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests, and Defendant does not oppose, the Court's
3 approval of the Settlement under the PAGA.

4 Dated: June 2, 2022

LAUBY, MANKIN & LAUBY LLP

5
6 BY:



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

[illegible]

On June 2, 2022, I caused to be served the foregoing document(s) described as follows:

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

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

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

[X] **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 2, 2022, Riverside, California.

Tracie Chiarito
Tracie Chiarito, Declarant

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