

Jeremy F. Bollinger (SBN 240132)
Dennis F. Moss (SBN 77512)
Ari E. Moss (SBN 238579)
MOSS BOLLINGER LLP
15300 Ventura Blvd., Ste. 207
Sherman Oaks, California 91403
Telephone: (310) 982-2984
Facsimile: (818) 963-5954
jeremy@mossbollinger.com
dennis@mossbollinger.com
ari@mossbollinger.com

Attorneys for Plaintiff MAGDA CASTRO

Additional counsel listed on next page

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KERN

MAGDA CASTRO, an individual, on behalf
of herself, all others similarly situated, and the
State of California,

Plaintiffs,

vs.

ROSS DRESS FOR LESS, INC. and DOES
1-50,

Defendants.

Case No. BCV-21-101490

(Assigned for All Purposes to the Honorable
Gregory Pulskamp, Div. J]

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR APPROVAL OF
SETTLEMENT OF CLAIMS BROUGHT
UNDER THE PRIVATE ATTORNEYS
GENERAL ACT, REASONABLE
ATTORNEYS' FEES, COSTS, AND
ENHANCEMENT PAYMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Declarations of Jeremy F. Bollinger, Dennis F.
Moss, David Yeremian, Alvin Lindsay, Magda
Castro and Steven Diaz, and Jodey Lawrence;
Request for Judicial Notice; and [Proposed]
Order filed concurrently herewith]*

Hearing Date: July 1, 2024
Time: 8:30 a.m.
Division: J

1 DAVID YEREMIAN & ASSOCIATES, INC.

David Yeremian (SBN 226337)

2 david@yeremianlaw.com

880 E Broadway

3 Glendale, CA 91205

Telephone: (818) 962-6465

4 Fax: (818) 962-6469

5 D.LAW, INC.

Emil Davtyan (SBN 299363)

6 Emil@d.law

Alvin B. Lindsay (SBN 220236)

7 a.lindsay@d.law

880 E Broadway

8 Glendale, CA 91205

Telephone: (818) 962-6465

9 Fax: (818) 962-6469

10 Joseph M. Hekmat (SBN 265229)

HEKMAT LAW GROUP

11 2121 Avenue of the Stars, Ste. 800

12 Los Angeles, CA 90067

Tel.: (424) 888-4529

13 Fax: (424) 270-0242

14 Attorneys for Plaintiff STEVEN DIAZ

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on July 1, 2024, at 8:30 a.m., or as soon thereafter as the matter
3 may be heard in Division J of the Superior Court for the County of Kern located at 1215 Truxtun
4 Avenue, Bakersfield, CA, 93301, Plaintiffs Magda Castro and Steven Diaz (“Plaintiffs”),
5 individually, on behalf of other similarly aggrieved employees, and the State of California, will and
6 hereby do move this Court for entry of an Order as follows:

- 7 1. Granting approval, pursuant to California Labor Code § 2698 *et seq.*, and specifically §
8 2699(l), of the proposed Settlement of claims brought pursuant to the Private Attorneys
9 General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) and set forth in the Stipulation of
10 Settlement and Release of PAGA Action (“Settlement Agreement”), a true and correct
11 copy of which is attached as Exhibit 1 to the Declaration of Jeremy F. Bollinger filed
12 concurrently herewith;
- 13 2. Appointing Phoenix Settlement Administrators as the Settlement Administrator;
- 14 3. Approving the proposed Settlement Letter as to form and content, and directing the
15 Settlement Administrator to distribute it along with Settlement shares to the aggrieved
16 employees (“Settlement Group” or “Settlement Group Members”) pursuant to the terms
17 of the Settlement Agreement;
- 18 4. Directing the distribution of the Gross Settlement Amount pursuant to the terms of the
19 Settlement Agreement; and
- 20 5. Approving an award of attorneys’ fees to PAGA Counsel in the amount of \$872,354, an
21 award of attorneys’ costs to PAGA Counsel in the amount of \$18,845.53 (\$5,121.18 to
22 Moss Bollinger, LLP and \$13,724.35 to David Yeremian & Associates and D.Law,
23 Inc.), Enhancement Payment awards of \$10,000 per Plaintiff (for a total of \$20,000), and
24 \$49,750.00 in administration costs to Phoenix Settlement Administrator.

25
26 Defendants do not oppose this motion. Plaintiff bases this motion on this Notice, the attached
27 Memorandum of Points and Authorities, the declarations of Plaintiffs, their counsel, and the
28

1 Settlement Administrator, all exhibits attached thereto, the Request for Judicial Notice, the
2 [Proposed] Order, the Settlement Agreement, all other pleadings and papers on file in this action, and
3 on any further oral or documentary evidence or argument presented at the time of hearing.

4 Plaintiffs have submitted the proposed Settlement and this Motion to the Labor and Workforce
5 Development Agency (“LWDA”), by uploading them on the LWDA’s website concurrently with the
6 filing of this Motion as required by Labor Code § 2699(1)(2). (Declaration of Jeremy F. Bollinger
7 [“Bollinger Decl.”] ¶ 3, Exhs. 2-3.)

8 Defendants do not oppose this Motion, and given the multiplicity of issues addressed in this
9 Motion, Defendants have indicated their approval of Plaintiffs’ need to exceed the 20-page limit set
10 forth in California Rule of Court 3.764(c)(2). Therefore, Plaintiff respectfully requests that the Court
11 consider Plaintiff’s overlength memorandum of points and authorities.

12
13 Dated: June 3, 2024

14
15 By: _____



16 Jeremy F. Bollinger
17 David Yeremian
18 MOSS BOLLINGER LLP
19 DAVID YEREMIAN & ASSOCIATES, INC.
20 Attorneys for Plaintiffs, all similarly Aggrieved
21 Employees, and the State of California
22
23
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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY.....	1
A. LITIGATION OVERVIEW AND PROCEDURAL HISTORY	1
B. THE DISCOVERY PROCESS, MEDIATION AND SETTLEMENT.....	2
III. PAGA ACTIONS AND THE REQUIREMENTS.....	5
A. THE PAGA STATUTORY SCHEME	5
B. THE COURT HAS DISCRETION WHEN AWARDING THE AMOUNT OF PENALTIES.	6
C. THE MERITS OF PLAINTIFF’S LIABILITY THEORY WAS HIGHLY CONTESTED AND ANY RULING ON THE ISSUE WAS EXPECTED TO BE APPEALED.....	7
D. PAGA AUTHORIZES THE PAYMENT OF FEES AND COSTS TO THE PREVAILING PARTY/PRIVATE ATTORNEY GENERAL.	8
IV. THE SETTLEMENT.....	9
V. ARGUMENT.....	10
A. THE COURT SHOULD APPROVE THE SETTLEMENT AGREEMENT.	10
B. THE RISKS OF MOVING FORWARD WITH PLAINTIFFS’ PAGA CLAIM.....	10
1) <i>PAGA Penalties Based on Unpaid Minimum Wages</i>	10
1) <i>PAGA Penalties Based on Regular Rate Miscalculations for Break Premiums</i>	11
2) <i>PAGA Penalties Based on Wage Statement Violations</i>	12
3) <i>PAGA Penalties Based on Violations of Labor Code §§ 201, 201.3 and 202</i>	13
4) <i>Total Exposure</i>	13
C. TRIAL OF PLAINTIFFS’ PAGA CLAIMS PRESENTED MANY HURDLES.	13
D. HAD PLAINTIFFS TRIED THE CASE AND WON AS TO SOME PAY PERIODS AS TO SOME OF THE AGGRIEVED EMPLOYEES THE COURT HAD THE ABILITY TO EXERCISE ITS DISCRETION TO REDUCE THE MAXIMUM CIVIL PENALTIES.	14
D. WIN OR LOSE, THIS CASE FACED A LONG AND CERTAIN APPELLATE PROCESS.....	15
E. PLAINTIFFS WERE REQUIRED TO TAKE INTO CONSIDERATION THAT THE CASE WOULD NOT BE CONCLUDED THIS YEAR AND A LOOMING BALLOT INITIATIVE COULD WIPE IT OUT COMPLETELY	16
VI. THE REQUEST FOR ATTORNEYS’ FEES AND COSTS	17
A. THE COURT SHOULD APPROVE THE ATTORNEYS’ FEES AND COSTS IN THE PAGA SETTLEMENT.....	17
1) <i>Plaintiffs’ Counsel Are Entitled to a Fee from the Civil Penalties Represented by the Gross Settlement Amount</i>	18
2) <i>The Attorneys’ Fees Request Is Well Within the Range of Fees in Comparable Cases</i> . 20	
3) <i>The Court Should Approve the Reimbursement of Costs</i>	22

VII. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT PAYMENT TO PLAINTIFF.....	22
VIII. THE COURT SHOULD APPROVE THE COSTS OF ADMINISTRATION.....	24
IX. CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Aguilar v. Cingular Wireless LLC</i> (C.D. Cal. Mar. 17, 2011) No. CV 06-81997 DDP -----	23
<i>Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court</i> (2009) 46 Cal.4th 993---	6
<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157 -----	6, 14
<i>Amezquita v. Classic Beverage and Distributing Group, Inc.</i> (L.A. County Sup. Ct. May 17, 2012) Case No. BC412216 -----	23
<i>Arias v. Super. Ct.</i> (2009) 46 Cal.4th 969 -----	5, 9, 10, 18
<i>Been v. O.K. Indus., Inc.</i> (E.D. Okla. Aug. 16, 2011) 2011 WL 448766-----	24
<i>Bennett v. Simplexgrinnell LP</i> (N.D. Cal. 2015) 2015 WL 12932332-----	21
<i>Brotherton v. Cleveland</i> (S.D. Ohio 2001) 141 F. Supp. 2d 907 -----	24
<i>Brown v. Ralphs Grocery Co.</i> (2011) 197 Cal. App. 4th 489-----	5, 18
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal. App. 5th 504 -----	15
<i>Chamberlain v. Baker Hughes, a GE Co., LLC</i> (E.D. Cal. July 29, 2020) No. 119CV00831DADJLT, 2020 WL 4350207 -----	20
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal. App. 4th 43-----	21
<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal. App. 4th 785 -----	23
<i>Cook v. Niedert</i> (7th Cir. 1998) 142 F.3d 1004 -----	24
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794 -----	19
<i>Enterprise Energy Corp. v. Columbia Gas Transmission Corp.</i> (S.D. Ohio 1991) 137 F.R.D. 240 -----	24
<i>Folsom v. Butte County Ass’n of Gov’ts</i> (1982) 32 Cal. 3d 668-----	8
<i>Glass v. UBS Fin. Servs.</i> (N.D. Cal. Jan. 27, 2007) 2007 U.S. Dist. LEXIS 8476 -----	23
<i>Guippone v. BH S&B Holdings, LLC</i> (S.D.N.Y. Oct. 28, 2011) 2011 U.S. Dist. LEXIS 12602624	
<i>Hall v. O.C. Jones & Sons, Inc.</i> (San Francisco County Sup. Ct. May 10, 2013) Case No. CGC-12-523668 -----	23
<i>Heekin v. Anthem, Inc.</i> (S.D. Ind. Nov. 20, 2012) 2012 WL 5878032 -----	24
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> (S.D. Ohio 1990) 130 F.R.D. 366 -----	24
<i>In re Rite Aid Corp. Securities Litigation</i> (3d Cir. 2005) 396 F.3d 294 -----	20
<i>In re Titanium Dioxide Antitrust Litig.</i> (D. Md. Dec. 13, 2013) 2013 WL 6577029 -----	24
<i>Ingram v. The Coca-Cola Co.</i> (N.D. Ga. 2001) 200 F.R.D. 685 -----	24
<i>Iskanian v. CLS Transp. Los Angeles, LLC</i> (2014) 59 Cal.4th 348 -----	5, 18
<i>Kim v. Reins International California, Inc.</i> (2020) 9 Cal.5th 73 -----	18
<i>Laface v. Ralphs Grocery Company et al.</i> , Case No. BC632679-----	14
<i>Laffitte v. Robert Half Intern. Inc.</i> (2016) 205 Cal.Rptr.3d 555 -----	18, 19
<i>Lealao v. Beneficial Calif., Inc.</i> (2000) 82 Cal. App. 4th 19-----	20
<i>Louie v. Kaiser Permanente. et al.</i> (S.D. Cal. Feb. 2, 2009) S.D. Cal. Case No. 08CV0795 -----	23
<i>Magda Castro v. Ross Dress For Less, Inc., et al.</i> , Kern County Superior Court Case No. BCV-21-101490 JEB -----	2

1	<i>Magee v. American Residential Services, LLC</i> (L.A. County Super. Ct. Apr. 21, 2011) No. BC423798 -----	23
2	<i>Mares v. BFS Retail & Commercial Operations LLC</i> (L.A. County Super. Ct. June 24, 2010) No. BC375967 -----	23
3	<i>McKenzie v. Federal Exp. Corp.</i> (C.D. Cal. 2011) 765 F. Supp. 2d 1222 -----	6
4	<i>Medina v. Vander Poel</i> (E.D. Cal. 2015) 523 B.R. 820 -----	5
5	<i>Montano v. The Wet Seal Retail, Inc.</i> (2015) 232 Cal. App. 4th 1214-----	5
6	<i>Moreno v. Autozone, Inc.</i> (N.D. Cal. Jun. 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942 -6, 14	
7	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal. App. 4th 399-----	23
8	<i>Naranjo v. Spectrum Sec. Servs.</i> (2019) 40 Cal. App. 5th 444 -----	17
9	<i>Naranjo v. Spectrum Sec. Servs., Inc.</i> (Cal. May 6, 2024) No. S279397, 2024 WL 1979980 ----	12
10	<i>People v. Durbin</i> (1966) 64 Cal.2d 474-----	17
11	<i>Pineda v. Bank of America</i> (2009) 50 Cal.4th 1389-----	16
12	<i>Ralston v. US-Reports, Inc.</i> (Alameda County Sup. Ct. May 22, 2009) Case No. RG07328773-23	
13	<i>Rawlings v. Prudential-Bache Properties, Inc.</i> (6th Cir. 1993) 9 F.3d 513-----	20
14	<i>Roberts v. Texaco</i> (S.D.N.Y. 1997) 979 F. Supp. 185 -----	24
15	<i>Rodriguez v. West Publishing Corp.</i> (9th Cir. 2009) 563 F.3d 948 -----	22
16	<i>Santisas v. Goodin</i> (1998) 17 Cal.4th 599 -----	8
17	<i>Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.</i> (2015) 234 Cal. App. 4th 1109---	5
18	<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25-----	19
19	<i>Staton v. Boeing Co.</i> (9th Cir. 2003) 327 F.3d 938-----	23
20	<i>Steven Diaz v. DMSI Staffing, LLC, et al.</i> , Riverside County Superior Court Case No. RIC 2001550-----	1
21	<i>Stokes v. CSE Holdings, Inc., et al.</i> (San Francisco County Sup. Ct. Dec. 15, 2014) Case No. CGC-13-530640 -----	23
22	<i>Stokes v. Interline, San Francisco County Superior Court</i> , Case No. CGC-12-523274 -----	23
23	<i>Tate v. Kaiser</i> (Alameda County Sup. Ct. Nov. 24, 2009) Case No. RG07318416 -----	23
24	<i>Van Vranken v. Atlantic Richfield Co.</i> (N.D. Cal. 1995) 901 F. Supp. 294-----	23
25	<i>Velez v. Novartis Pharm. Corp.</i> (S.D.N.Y. Nov. 30, 2010) 2010 U.S. Dist. LEXIS 125945 -----	24
26	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal. App. 4th 224-----	19
27	<i>Will v. Gen. Dynamics Corp.</i> (S.D. Ill. Nov. 22, 2010) 2010 WL 4818174 -----	24
28	<i>Willner v. Manpower Inc.</i> (N.D. Cal. 2014) 35 F. Supp. 3d 1116-----	6
	<i>Woodland Hills Residents Assn., Inc. v. City Council</i> (1979) 23 Cal.3d 917-----	19
	<i>Yap v. Sumitomo Corp.</i> (S.D.N.Y. 1991) 1991 U.S. Dist. LEXIS 2124-----	24
	<i>Zamora v. Balboa Life & Casualty LLC</i> (L.A. County Super. Ct. Mar. 7, 2013) No. BC36002623	

STATUTES

Labor Code § 221 -----	1
Labor Code § 226.7 -----	11
Labor Code § 432.5 -----	2
Labor Code § 2698 -----	1
Labor Code § 2699 -----	passim

OTHER AUTHORITIES

Newberg on Class Actions, 3rd Ed., 1992, § 14.03 -----	20
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this motion, Plaintiffs Magda Castro and Steven Diaz (“Plaintiffs”) request that the
4 Court grant approval of the Settlement reached between the parties to resolve claims brought
5 exclusively under the Private Attorneys General Act of 2004, Labor Code section 2698, et seq.
6 (“PAGA”) seeking penalties for various alleged violations of the California Labor Code and
7 Industrial Wage Commission’s Wage Orders. Pursuant to the Settlement, Defendants Ross Dress For
8 Less, Inc. and DMSI Staffing, LLC (collectively, “Defendants”) will pay \$2,492,440.00.

9 Given the amount Defendants will pay to effectuate the Settlement and the formula for
10 distribution of the Settlement funds, Plaintiffs and their counsel believe that the Settlement is fair,
11 reasonable and in the best interests of the State and the aggrieved employees. Accordingly, Plaintiffs
12 request that the Court “review and approve” the Settlement pursuant to Labor Code §2699(1)(2). If
13 the Court deems the Settlement fair and acceptable, Plaintiffs request that Court enter an order
14 approving the Settlement in the form lodged herewith and ordering the Parties to carry out the terms
15 of the Settlement Agreement; and enter a Final Judgment thereon.¹

16 **II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

17 **A. Litigation Overview and Procedural History**

18 Pursuant to Labor Code section 2699.3, on March 23, 2020, Plaintiff Diaz notified Defendants
19 and the Labor and Workforce Development Agency (“LWDA”) of the alleged violations with his
20 PAGA letter. On June 8, 2020, Plaintiff Diaz filed a PAGA action entitled *Steven Diaz v. DMSI*
21 *Staffing, LLC, et al.*, Riverside County Superior Court Case No. RIC 2001550, alleging claims for
22 civil penalties based on failure to pay minimum and overtime wages, meal and rest break violations,
23 inaccurate wage statements, violation of Labor Code § 221 and failure to timely pay final wages upon
24

25
26 ¹ Plaintiff Castro has submitted this Motion to the LWDA, by uploading it on the LWDA’s website
27 concurrently with the filing of this Motion as required by Labor Code § 2699(1)(2). (Declaration of
28 Jeremy F. Bollinger [“Bollinger Decl.”] ¶¶ 3, 4, Exs. 2-3.) Proof of submission of the proposed
Settlement Agreement and Plaintiffs’ Motion, and a copy of the email from the LWDA confirming
receipt is attached to the Bollinger Declaration as Exhs. 2-3.

1 cessation of employment. Declaration of Alvin B. Lindsay (“Lindsay Decl.”) ¶ 4. On April 23, 2021,
2 Plaintiff Castro submitted her PAGA letter to the LWDA and Defendants.² On June 30, 2021,
3 Plaintiff Castro filed this PAGA Action, entitled *Magda Castro v. Ross Dress For Less, Inc., et al.*,
4 Kern County Superior Court Case No. BCV-21-101490 JEB, alleging claims for civil penalties based
5 on alleged failure to pay all minimum and overtime wages, failure to provide adequate meal breaks,
6 failure to pay meal break premiums, failure to pay meal and rest break premiums at the regular rate
7 of compensation, failure to pay sick leave at the regular rate of pay, failure to keep accurate records,
8 failure to provide accurate wage statements, and failure to timely pay all wages upon cessation of
9 employment. On August 2, 2021, Castro filed her First Amended Complaint to add a claim based on
10 violation of Labor Code § 432.5 and on September 21, 2021, she filed her Second Amended
11 Complaint which alleged the same claims as the First Amended Complaint but the First Amended
12 Complaint had been filed prematurely. (Bollinger Decl. ¶ 11.) To facilitate the Settlement, Plaintiff
13 Diaz will dismiss his complaint and a Third Amended Complaint is to be filed in this Action to add
14 Plaintiff Diaz and his claims for the purposes of this Settlement upon the Court’s granting of the
15 Parties’ stipulation. (Bollinger Decl. ¶ 11; Settlement ¶ 2.1.) Once the Court grants the stipulation
16 and Plaintiff files the Third Amended Complaint (“TAC”), the TAC will be the Operative Complaint.

17 Defendants deny each and all of Plaintiff’s allegations in their entirety (Settlement ¶ 4.1.) The
18 Agreement reached between the Parties does not constitute, is not intended to constitute, and will not
19 be deemed to constitute, an admission of liability by Defendants as to the merits, validity, or accuracy
20 of any of the allegations or claims made against Defendants in the Action. (*Id.*)

21 **B. The Discovery Process, Mediation and Settlement**

22 Prior to the first mediation, Plaintiff Diaz conducted informal discovery and Ross provided
23 total numbers and documents. Plaintiff Diaz served a full set of formal discovery requests on Ross in
24 April of 2023 after the second mediation. In the initial informal discovery process, Ross also provided
25

26
27 ² Pursuant to Labor Code §2699.3(a)(2)(A), Plaintiff did not receive notice from the LWDA
28 evidencing its intention to investigate within sixty-five (65) calendar days of the respective PAGA
letters. (Bollinger Decl. ¶ 11.)

1 samples of surveillance video from Ross's distribution centers from the entrance of the facilities
2 where the security screenings take place. (Bollinger Decl. ¶ 12.) Defendants provided substantial
3 data concerning PAGA Members, including 9,657 employees of Ross and DMSI during the PAGA
4 Period. (Bollinger Decl. ¶ 12.) Plaintiff Castro also propounded (and Ross responded to) discovery
5 prior to mediation, including special and form interrogatories, requests for admissions and requests
6 for production of documents. Leading up to the second mediation, Ross also provided additional
7 information on a voluntary basis, including access to the surveillance video from MVDC, CVDC and
8 SWDC distribution centers at issue in this lawsuit. Counsel for Castro and Diaz randomly selected
9 portions of the video from each of the distribution centers on multiple dates and at various times
10 throughout the day to view. Counsel's observations were consistent with Defendants' representations
11 that the amount of the time that it takes employees to pass through the security screening process
12 takes seconds, not minutes. Counsel were hard pressed to find examples of back-ups in lines to pass
13 through security or of individual employees being detained. (Bollinger Decl. ¶ 13.) Defense counsel
14 also provided Plaintiffs' counsel with copies of the patch and relevant communications confirming
15 that Ross had programmed its Kronos Timekeeping to automatically add one minute of compensable
16 time to each employees' daily earnings (purportedly to compensate those employees for the seconds
17 it took the employees to pass through security). The evidence provided shows that Ross has continued
18 that practice at least through the end of the PAGA Period. (*Id.* ¶ 14.) Defendants provided the number
19 of pay periods at issue prior to the implementation of the payment of an additional minute per day.
20 Plaintiffs used this information to allocate more shares of the civil penalties to those PAGA Members
21 who worked during that initial period as those employees would have stronger claims for unpaid work
22 time than those who were employed after Defendants modified its timekeeping system. Defendants
23 were also transparent about certain hiccups in their practices that resulted in at least one back-up at
24 security lines at Ross's CVDC in Bakersfield, California. Defendants provided the total number of
25 pay periods during which those delays occurred at the one distribution center (10,896). Plaintiffs were
26 able to use this information to allocate additional shares of the civil penalties to those PAGA Members
27 who experienced those back-ups and would have stronger claims than those employees who did not
28 experience the more apparent delays. (Note that Defendants still vigorously contend that those minor

delays did not result in liability for unpaid work time and that the payment of an additional minute per day was prophylactic and not an admission of liability.) (*Id.* ¶ 15.)

The information and data exchanged by Plaintiffs and Defendants (collectively, the “Parties”) prior to and during mediation and settlement negotiations were sufficient to reliably assess the merits of the Parties’ respective positions, to compromise the issues on a fair and equitable basis, and to devise a formula for distribution of civil penalties among PAGA Members that took into consideration the strength of each PAGA Member’s claims. (*Id.* ¶ 16; see also Settlement ¶ 5.2.)

All of these efforts took place under the guidance and with the assistance of a third party neutral. On September 23, 2021, Plaintiff Diaz and Defendants attended a mediation with Lisa Klerman, Esq. The mediation did not result in a settlement and the parties continued to litigate. (Lindsay Decl. ¶ 5.) On December 6, 2022, Plaintiffs Diaz and Castro attended a second mediation with Lisa Klerman, Esq. (*Id.*; Bollinger Decl. ¶ 17.) Plaintiffs requested, and received, informal discovery to evaluate the claims and theories alleged. Again, the mediation did not result in a settlement. However, the Parties, with the assistance of Ms. Klerman, continued to negotiate. Defendants provided additional information and videotape reviews requested by Plaintiffs. After months of negotiations, the Parties again reached a stalemate. Ms. Klerman made a mediator’s proposal that both parties accepted. With the continued assistance of the mediator, they were able to reach an agreement to settle the Action. (*Id.* ¶ 17; Lindsay Decl. ¶¶ 6, 7; Settlement ¶ 2.2.)

The Parties believe and agree that the Settlement provides for a fair, adequate, and reasonable resolution of the Action and have arrived at the Settlement in extensive, arm’s length negotiations, considering all relevant factors, present and potential. (Bollinger Decl. ¶ 18; Declaration of Dennis F. Moss [“Moss Decl.”] ¶ 3; Declaration of David Yeremian [“Yeremian Decl.”] ¶¶ 12-14, 24; Lindsay Decl. ¶ 24.) The Settlement presented to this Court reflects the agreement the Parties reached to settle the lawsuit.

As part of the Settlement, the Parties agreed that Plaintiff Castro would file a Third Amended Complaint (the “Operative Complaint”) to add Plaintiff Diaz and his claims. The Parties filed a stipulation for leave to file the amended complaint on May 20, 2024, which is pending before this Court. (*Id.* ¶ 11.)

1 The Parties recognize and acknowledge the expense and delay of continued lengthy
2 proceedings necessary to prosecute the Action against Defendants through trial and through appeals.
3 (Settlement at ¶ 3.2.) As private attorneys general and the proxies or agents of the state’s labor law
4 enforcement agencies, Plaintiffs believe that the Settlement is fair and reasonable and, therefore, ask
5 the Court to approve this settlement. (Declaration of Magda Castro [“Castro Decl.”] *passim*;
6 Declaration of Steven Diza [“Diaz Decl.”] *passim*.) PAGA Counsel believes that the Settlement
7 confers substantial benefits upon Plaintiffs and the Settlement Group Members and that an
8 independent review of the Settlement by the Court in the approval process will confirm this
9 conclusion. (Bollinger Decl. ¶ 18, Ex 1. at ¶ 3.2; Moss Decl. ¶ 3; Yeremian Decl. ¶¶ 12-14, 24;
10 Lindsay Decl. ¶ 24.)

11 **III. PAGA ACTIONS AND THE REQUIREMENTS**

12 **A. The PAGA Statutory Scheme**

13 PAGA creates a means of “deputizing” citizens as private attorneys general to enforce the
14 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal. App. 4th 489,
15 501, *review den.* (Oct. 19, 2011, No. S195850), *cert. denied* 132 S.Ct. 1910 (Apr. 16, 2012). A
16 plaintiff may not — and Plaintiffs here do not — bring a PAGA claim simply on his or her own behalf
17 as an individual claim, but “as the proxy or agent of the state’s labor law enforcement agencies.” *Id.*,
18 at 986; *see also Reyes v. Macy’s, Inc.* (2011) 202 Cal. App. 4th 1119, 1123-1124; *Iskanian v. CLS*
19 *Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380. When an aggrieved employee brings a PAGA
20 claim, “the government is always the real party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup.*
21 *Ct. of San Diego Cnty.* (2015) 234 Cal. App. 4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.*
22 (2015) 232 Cal. App. 4th 1214, 1222 (“[A] PAGA action is a dispute between an employer and the
23 State agency.”). Accordingly, a plaintiff that brings a PAGA claim represents “the same legal right
24 and interest as state labor law enforcement agencies,” in that the plaintiff seeks to recover those civil
25 penalties that the LWDA otherwise would assess and collect. *Arias v. Super. Ct.* (2009) 46 Cal.4th
26 969, 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal. App. 4th at 1119; *see also Medina*
27 *v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property
28

rights in their cases.”), and *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.

Therefore, when a plaintiff brings a PAGA claim, he or she is properly viewed as a private attorney general prosecuting violations of California’s labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of California Labor Code section 2699.3 (a)(1), which simply states:

The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and 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 (a)(1)

As explained above, Plaintiffs complied with the notice requirements and properly pled a PAGA cause of action. (Bollinger Decl. ¶ 11; Lindsay Decl. ¶ 4.)

B. The Court Has Discretion When Awarding The Amount Of Penalties.

PAGA provides for penalties in the amount of \$100 for each violation per aggrieved employee per pay period for the initial violation and \$200 for each violation per aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendants violated the Labor Code.³ *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213; *Moreno v. Autozone, Inc.* (N.D. Cal. Jun. 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3. However, PAGA provides the Court with discretion when it finds liability and awards these penalties as part of a judgment. Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendants deny each and all of Plaintiffs’ allegations in their entirety. (Settlement ¶ 4.1.)

³ See also *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116; *McKenzie v. Federal Exp. Corp.* (C.D. Cal. 2011) 765 F. Supp. 2d 1222, 1232.

1 Defendants also contend that they addressed any potential liability for unpaid work time due
2 to security and COVID screenings by paying their employees an additional minute every day to cover
3 more than the amount of time Defendants say it takes employees to walk through the screening
4 doorways. (Bollinger Decl. ¶ 19.)

5 The Parties agree that the Court, in assessing the Settlement, should consider Defendants
6 attempts to ameliorate any potential liability, along with the risk assessment, and the post-judgment
7 prerogative the Court possesses to lower penalties had Plaintiffs prevailed at trial. The Parties believe
8 that, based on these factors, the Court will find that this settlement is fair, reasonable.

9 **C. The Merits of Plaintiff's Liability Theory Was Highly Contested and Any Ruling**
10 **on the Issue Was Expected to Be Appealed.**

11 During the PAGA Period, employees at Ross's distribution centers in California were required
12 to undergo security checks before their scheduled shifts, and for a period of time were also required
13 to undergo COVID screenings. For a short period of time, employees were also required to clock out
14 before going through a security screening when they left the premises at the end of the work day, and
15 for their meal and rest periods. These security screenings were mandatory. Plaintiffs allege that
16 Defendants were required to pay these employees for this off-the-clock time and these violations
17 resulted in unpaid wages and break violations, entitling them to the recovery of civil penalties under
18 PAGA. Plaintiffs also alleged that Defendants violated these employees' rights to uninterrupted duty-
19 free meal and rest breaks because they were restricted to Ross's premises during their breaks.
20 (Bollinger Decl. ¶ 20.)

21 As discussed above, beginning in November 2020, less than a year into the PAGA Period,
22 Ross began its practice of paying PAGA Members an additional one minute of compensable time
23 each day on top of the payment for the time recorded by PAGA Members using time clocks.
24 Defendants argue that this additional payment covered any time that a court might find to have been
25 compensable due to security or COVID screenings. Ross's position is that it conducted its own study
26 which showed that the COVID/security screening took at most 8 to 12 seconds of time. Given an
27 average rate of pay at \$17.50 an hour, the PAGA Members earned about 30 cents a minute.
28 Defendants argued that the minute a day more than compensated PAGA Members for the time in

question. (Bollinger Decl. ¶ 21.) Plaintiffs’ counsel’s investigation, including its own viewing of multiple days of video surveillance from all three distribution centers, failed to uncover any examples of significant delays due to screenings at the entrance of the distribution centers, other than the one short period Defendants concede occurred at the CVDC, that would refute Ross’s own findings. Plaintiffs’ Counsel observed that individual employees spent only a few seconds walking through the metal detector, consistent with Ross’s own estimate. Plaintiffs understood that a court could conclude that this time was not compensable as the “screening” was equivalent to walking through a doorway for the vast majority of employees and that even if the time was found to be compensable, that the payment of one minute per day fully compensated the employee for the time spent undergoing to the screening. At the very least, these facts suggest a good faith attempt to comply with the law and a court could use its discretion to significantly reduce any civil penalties that it may have been required to impose. As such, the heart of Plaintiffs’ core allegations were vulnerable to Defendants’ defenses and Plaintiffs discounted them accordingly. (Bollinger Decl. ¶ 22.)

Plaintiffs’ Counsel also understood that Defendants were prepared to appeal any adverse ruling on this core novel issue as well. Plaintiffs and their counsel took into account the likelihood of an appeal, as well as the risks and delays involved in such an appeal, in deciding whether to accept the mediator’s settlement proposal. (Bollinger Decl. ¶ 23.)

Plaintiffs also alleged that Defendants failed to factor non-discretionary pay into the regular rate of pay for meal and rest break premiums. However, Defendants provided evidence that they began factoring such remuneration into the premiums after the California Supreme Court decision in *Ferra v. Loews Hollywood Hotels, LLC*. (Bollinger Decl. ¶ 24.)

D. PAGA Authorizes The Payment Of Fees And Costs To The Prevailing Party/Private Attorney General.

PAGA provides for the recovery of reasonable attorneys’ fees and costs. Lab. Code § 2699(g)(1) (“Any employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs, including any filing fee paid...”). The monetary settlement and programmatic relief make Plaintiff a “prevailing party.” *Folsom v. Butte County Ass’n of Gov’ts* (1982) 32 Cal. 3d 668,671; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 621. Even if Labor Code §

2699(g)(1) did not authorize fees, Plaintiffs would be entitled to fees as a Private Attorneys General under Code of Civil Procedure § 1021.5 because Plaintiffs brought this action to, and the action does, benefit the public. *Arias*, 46 Cal.4th at 985–986. PAGA Counsel seeks 35% of the monetary relief provided, or \$869,750 in fees, and \$18,845.53 (\$5,121.18 to Moss Bollinger, LLP and \$13,724.35 to David Yeremian & Associates and D.Law, Inc.), in actual costs.

Pursuant to PAGA, Labor Code § 2699(l)(2), Plaintiff provided the LWDA notice of the Settlement and this Motion. The LWDA therefore has the opportunity to object or otherwise comment on the terms of the Settlement, including the fee allocation. (Bollinger Decl. ¶¶ 3, 4, Exs. 2-3; Yeremian Decl. ¶ 3, Exh. A.)

IV. THE SETTLEMENT

Pursuant to the Settlement Agreement, Defendants will pay a Gross Settlement Amount of **\$2,492,440** in full and final settlement of the PAGA claim alleged. (Settlement at ¶ 1.10.) In no event shall Defendants be required to pay more than the Gross Settlement Amount. Per the Settlement Agreement, the amount is allocated as follows:

<u>Gross Settlement Amount (GSA):</u>	<u>\$2,492,440.00</u>
Settlement Payments to the State (LWDA):	\$908,380.47
Settlement Payments to Aggrieved Employees per L.C.:	\$623,110.00
(Combined Payment to State and Employees:	\$1,531,490.47 [61% of GSA])
Plaintiff’s Counsel’s fees (35% of GSA):	\$872,354.00
Requested Litigation Costs:	\$18,845.53
Service Awards to Plaintiffs:	\$20,000.00
Settlement Administrator Costs	\$49,750.00 (capped)

(Bollinger Decl. ¶ 11, Ex. 1 at ¶¶ 1.10, 1.13, 5.1 et seq.)

Each PAGA Member (or “Settlement Group Member”) shall receive a share of the \$623,110, pursuant to the methodology in subsections 1.11 and 5.2 of the Settlement Agreement (Settlement at ¶ 1.11, 5.2.) For settlement purposes, the aggrieved employees referred to as PAGA Members or Settlement Group Members are defined as: “All current and former non-exempt employees of Defendants who worked for Defendants at Defendants’ Moreno Valley Distribution Center

1 (“MVDC”), Southwest Distribution Center (“SWDC”) and/or the Central Valley Distribution Center
2 (“CVDC”) during the PAGA Period.” (*Id.* at ¶ 1.17.) The PAGA Period is defined as: March 18, 2019
3 through November 1, 2023 (*Id.* at ¶ 1.18.) Defendants estimate that there are approximately 21,908
4 PAGA Members. (Bollinger Decl. ¶ 12.) PAGA Members will receive an average of approximately
5 \$28 per person (\$623,110 divided by 21,908 PAGA Members) as their share of 25% of the civil
6 penalties recovered.

7 Settlement checks shall remain valid for one hundred eighty (180) calendar days from date of
8 issuance. Any funds associated with uncashed checks after one hundred eighty (180) calendar days
9 will be sent to the Labor & Workforce Development Agency. (Bollinger Decl., Ex. 1 at ¶ 7.3.)

10 **V. ARGUMENT**

11 **A. The Court Should Approve the Settlement Agreement.**

12 Pursuant to Labor Code section 2699(*I*), the Parties must obtain Court approval of a settlement
13 of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Ct.* (2009)
14 46 Cal.4th 969, the Parties need not follow the class action procedural rules in PAGA cases and
15 therefore need not obtain approval of the PAGA settlement through a motion for preliminary or final
16 approval. Nonetheless, to comply with the requirements of Labor Code section 2699, Plaintiffs
17 submitted this Motion and the Settlement Agreement (Exhibit “1” to the Bollinger Declaration) for
18 Court approval. (Bollinger Decl., Exs. 2-3.)

19 **B. The Risks of Moving Forward with Plaintiffs’ PAGA Claim**

20 To help the Court evaluate the fairness of the Settlement, below is a discussion of the risk
21 evaluation made by Plaintiffs and their Counsel. They considered the arguments and defenses asserted
22 by Defense Counsel at mediation, assessed the risks of moving forward to trial and what this Court
23 could do in awarding penalties even if Plaintiffs prevailed at trial.

24 **1) PAGA Penalties Based on Unpaid Minimum Wages**

25 There are 1,292,530 pay periods at issue during the entire PAGA Period. (Note, however, that
26 those PAGA Members paid directly by Ross were paid bi-weekly whereas those hired through DMSI
27 were paid weekly. Accordingly, some PAGA Members have more pay periods due to how they were
28 hired to work at the same distribution center.) During the PAGA Period, there were only 81,395 pay

1 periods during which Ross conducted COVID screenings, there were 10,896 pay periods during the
2 brief period when Ross acknowledges there were back-ups at the security lines at the CVDC in
3 Bakersfield, California, and there were 15,021 pay periods worked prior to Ross implementing the
4 payment of one additional minute per day. (Bollinger Decl. ¶ 25.)

5 If all pay periods were assessed a \$100 penalty for the alleged off the clock work (which is
6 alleged to have occurred in every pay period), the total exposure would be \$129,253,000, however,
7 Plaintiffs were not confident that they could establish entitlement to civil penalties in all 1,292,530
8 pay periods. As discussed above, some PAGA Members have stronger claims for civil penalties in
9 those pay periods where COVID screenings occurred (which would amount to \$8,139,500), during
10 those pay periods at the CVDC when the lines backed up (\$1,089,600), and prior to the
11 implementation of the dollar per day payment (\$1,502,100). Of course, there is overlap between these
12 periods and PAGA Members would only receive one civil penalty for the unpaid minimum wage
13 violation per pay period. And, Defendants still had defenses to those claims for the civil penalties
14 during the pay periods where Plaintiffs' arguments were stronger. (Bollinger Decl. ¶ 26.)
15 Accordingly, Plaintiffs had several reasons to discount their assessment of the Defendants' exposure
16 on the unpaid wages claims.

17 1) PAGA Penalties Based on Regular Rate Miscalculations for Break Premiums

18 Wage Order 7-2001(11) provides: "If an employer fails to provide an employee a meal period
19 in accordance with the applicable provisions of this order, the employer shall pay the employee one
20 (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period
21 is not provided." Wage Order 7-2001(11)(B), (12)(B) (same re rest periods) (emphasis added); see
22 also Labor Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery
23 period in accordance with a state law, ..., the employer shall pay the employee one additional hour
24 of pay at the employee's regular rate of compensation for each work day that the meal or rest period
25 is not provided.")

26 Plaintiffs alleged that Defendants paid break premiums to its distribution center employees at
27 their base hourly rates instead of their regular rate of compensation when paying break premiums
28 even when other non-discretionary remuneration (such as a shift differential or bonus) were required

1 to be factored into the regular rate. During the PAGA Period, Defendants paid 2,056 break premiums.
2 Assuming that a PAGA Employee had also earned some form of non-discretionary remuneration and
3 that none of those premiums were paid in the same pay period, Defendants’ total exposure would be
4 \$205,600 on this theory of liability. However, this number does not take into account that a penalty
5 would not be assessed if the PAGA Employee did not also earn some form of non-discretionary
6 remuneration that needed to be factored into the regular rate of pay for that premium. Nor does this
7 take into account that a PAGA Member would not be entitled to multiple civil penalties if two or
8 more of the premiums were earned during the same pay period. Accordingly, the \$205,600 was
9 subject to discount because it was inherently deflated. It was also subject to significant discount
10 because Ross had a good faith defense that it had been complying with the law prior to the Supreme
11 Court clarifying the law in the *Ferra*, after which Ross began calculating the premiums consistent
12 with that ruling. (Bollinger Decl. ¶ 27.)

13 2) PAGA Penalties Based on Wage Statement Violations

14 Labor Code Section 226(a) requires employers to list on an employee’s wage statement, inter
15 alia, “(1) Gross wages earned...” and “(2) total hours worked by an employee...”

16 Plaintiffs allege that during the one-year period before Plaintiffs notified Defendants and the
17 LWDA of their claims, they did not receive a wage statement that complied with Labor Code Section
18 226(a) for the pay periods in which they underwent security and COVID checks. This claim is
19 derivative of the other claims and would likely be discounted for the same reasons discussed above.
20 (Bollinger Decl. ¶ 28.) Significant discounting, or complete discounting, of the wage statement claim
21 was also appropriate due to the California Supreme Court’s ruling that an employer who reasonably
22 and in good faith believed it was providing a complete and accurate wage statement has a viable
23 defense to a claim for penalties under section 226. *Id.*; *Naranjo v. Spectrum Sec. Servs., Inc.* (Cal.
24 May 6, 2024) No. S279397, 2024 WL 1979980, at *1 (former employer’s objectively reasonable,
25 good faith, albeit mistaken, belief that it provided employees with adequate wage statements
26 precluded award of civil penalties for a knowing and intentional failure to report the same unpaid
27 wages, or any other required information, on a wage statement).

1 3) PAGA Penalties Based on Violations of Labor Code §§ 201, 201.3 and 202

2 As with the inaccurate wage statement claim, the following claims derive from the alleged
3 unpaid wages claim discussed above, the success of these claims depend entirely on whether Plaintiffs
4 can establish that the screening time is compensable, that Defendants failed to calculate break
5 premiums correctly, and that the violations were willful.

6 Even if Plaintiffs are correct that wages were owed for each screening or that the regular rate
7 of compensation for the break premiums was calculated incorrectly, Plaintiffs faced a steep hurdle to
8 show that these violations were willful given that the law is uncertain whether the time was
9 compensable or whether non-discretionary pay had to be factored into break premiums, and
10 Defendants had a good faith belief that the additional minute compensated employees for any
11 unaccounted for time spent during screenings. Moreover, a violation of section 201, 201.3 or 202
12 would only occur in one pay period per former employee. Accordingly, this derivative claim would
13 only add a nominal amount of civil penalties compared to those incurred by the underlying violations
14 themselves.

15 4) Total Exposure

16 In advance of the first mediation, Plaintiff Diaz estimated at least \$20 million in potential civil
17 penalties that Defendants would face. (Bollinger Dec. ¶ 29.) Plaintiffs estimate that number has
18 increased to well over \$30 million with the passage of time, but also note the exposure estimate was
19 based on stacking of multiple PAGA violations. Given the hesitancy to accept stacking claims at full
20 value and the Court's discretion to reduce penalties, Plaintiffs submit it is more appropriate to assess
21 the reasonableness of the Settlement amount under the totality of the circumstances rather than as a
22 percentage of some astronomical potential liability/penalty exposure. (Bollinger Dec. ¶ 29.) Those
23 circumstances and Plaintiffs' assessment of their totality is addressed below, and establish the sound
24 reasonableness of the Settlement now before the Court for approval.

25 **C. Trial of Plaintiffs' PAGA Claims Presented Many Hurdles.**

26 Before Defendants would have to pay substantial penalty for each pay period an employee
27 worked, Defendants could have insisted that Plaintiffs prove as to each pay period for each employee
28 that the employee was delayed more than a *de minimus* amount of time during the pay period, at least

once, if delayed at all, during the pay period. Assume the court found that in a pay period, an employee was delayed for three minutes once, and the employee lost more than the additional minute per shift provided for during that pay period. That would raise the question as to whether the minute paid for each other shift during the pay period compensated for the underpayment for one day. It would also justify a finding by the court that the penalties should be reduced because a \$100 penalty for a loss of perhaps a dollar or less in pay may be regarded as completely unfair. In considering the fairness of the Settlement, Plaintiffs considered the results of other PAGA trials. There have been very few PAGA trials. One of the latest occurred on March 20, 2020, when the Los Angeles County Superior Court issued a Statement of Decision in *Laface v. Ralphs Grocery Company et al.*, Case No. BC632679. (Bollinger Decl. ¶ 30, Ex. 9; *see also* Bollinger Decl. ¶¶ 31-32 [discussing other cases].)

In light of *Laface* and the other defense verdicts, the settlement achieved in this case achieves a fair result and benefit for the aggrieved employees and the State. (Bollinger Decl. ¶ 32.) Despite the real possibility that Plaintiffs could have faced a defense verdict at trial as in *Laface*, Plaintiffs successfully negotiated a Settlement where the Court could very well have reached a defense verdict.

Based on these factors, Plaintiff and his counsel determined that the Settlement is fair and reasonable, and in the best interests of the aggrieved employees and the State. This Settlement serves the LWDA's interest in deterring Labor Code violations by imposing a hefty monetary penalty on Defendants. (Bollinger Decl. ¶ 34.)

As such, in light of the risks posed by Defendants' arguments, the potential for a defense verdict as in *Laface*, as well as the Court's discretion to reduce the amount of penalties awarded at trial (see discussion in next section), Plaintiff's Counsel determined that the Settlement is fair and reasonable. (Bollinger Decl. ¶ 18; Moss Decl. ¶ 3; Yeremian Decl. ¶ 12-14, 24; Lindsay Decl. ¶ 24.)

D. Had Plaintiffs Tried the Case and Won As to Some Pay Periods As To Some Of The Aggrieved Employees The Court Had the Ability to Exercise Its Discretion to Reduce the Maximum Civil Penalties.

"PAGA penalties...are mandatory, not discretionary" and the Court must award penalties upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1213; *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ,

2007 WL 1650942, at *3. However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”

A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’s “good faith attempts” to comply and because the violations were minimal). Even if this Court agreed with Plaintiffs that the security and COVID screening time at issue is compensable, the Court could also conclude that Defendants acted in good faith given that the facts showed virtually no delay in entering the premises and that Defendants paid one additional dollar per day to each employee for the majority of the PAGA Period. Accordingly, Plaintiffs understood that this Court could reduce the award of penalties significantly. (Bollinger Decl. ¶ 33.)

Plaintiffs believe that even if he overcame other risks, and prevailed at trial as to most of the workweeks, Defendants could have argued that the Court should exercise its discretion under PAGA to significantly reduce penalties under PAGA. (Bollinger Decl. ¶ 34.) Given the Court’s discretion to reduce penalties, it is possible the Court could have awarded much less than the Parties agreed to in the Settlement had Plaintiff prevailed at trial. Although Plaintiff’s Counsel believe that this case warrants penalties, they acknowledge the risk posed by Defendants’ arguments. (Id. ¶ 34.)

D. Win or Lose, This Case Faced A Long and Certain Appellate Process.

As discussed *supra*, because this case presented novel issues regarding the compensability of security and COVID screenings that have not been decided by a California Court of Appeal, any result was certain to be appealed. Putting aside the uncertainty of such an appeal, the possibility that a Court could easily reduce the amount of penalties to the amount agreed to in this Settlement, and the delay of payment to aggrieved employees and the State of those penalties, was a factor supporting the compromise reached in this Settlement. (Bollinger Decl. ¶ 35.)

1 **E. Plaintiffs Were Required To Take Into Consideration That The Case Would Not**
2 **Be Concluded This Year And A Looming Ballot Initiative Could wipe It Out**
3 **Completely**

4 There is a ballot initiative that has qualified for the November 2024 ballot that, if passed,
5 repeals PAGA and requires the State to enforce Labor Code violations. (See Bollinger Decl., Exh. 10
6 [California Employee Civil Action Law Initiative].) The Initiative provides in Section 4(c):

7 “This initiative shall become operative and take effect pursuant to
8 Subdivision (a) of Section 10 of Article 2 of the constitution. After the
9 effective date of this initiative, no penalties shall accrue under former
10 Section 2699 in any pending civil action that has not resulted in a
11 judgment.”

12 Article 2 section 10 of the Constitution provides that:

13 “An initiative statute or referendum approved by a majority of votes cast
14 thereon takes effect on the fifth day after the Secretary of State files the
15 statement of the vote for the election at which the measure is voted on, but
16 the measure may provide that it becomes operative after its effective date.”

17 The foregoing suggests that passage of the initiative would have a *retroactive effect* on
18 pending litigation where a judgment has not been entered, thereby eliminating this Action. Since
19 PAGA contemplates penalties, not damages, due process violation claims would not impinge on
20 retroactive application.

21 In an analogous “penalty” context, the California Supreme Court concluded in *Pineda v. Bank*
22 *of America* (2009) 50 Cal.4th 1389 that “section 203 penalties cannot be recovered as restitution
23 under the UCL” because “[u]ntil awarded by a relevant body, employees have no... vested interest
24 in section 203 penalties.” The Court reasoned that, unlike wages, which are the property of employees
25 once earned, “Section 203 is not designed to compensate employees for work performed.” *Pineda*,
26 50 Cal.4th at 1401-1402.

27 “[I]t is the employers’ action (or inaction) that gives rise to section 203
28 penalties. The vested interest in unpaid wages, on the other hand, arises out
of the employees’ action, i.e., their labor.”
Id. at 1402. Under *Pineda*, employees do not have an ownership interest in unawarded waiting time
penalties, and “taking action to enforce” the right to such penalties only occurs once liability is

1 adjudicated. *Pineda*, 50 Cal.4th at 1401-1402; accord *People v. Durbin* (1966) 64 Cal.2d 474, 478-
2 479 (“it is settled that the repeal of a civil penalty or forfeiture running either to an individual or the
3 state, at any time before final judgment, extinguishes the right to recover the penalty. ... No person
4 has a vested right in an unenforced statutory penalty or forfeiture.”); *c.f. Naranjo v. Spectrum Sec.*
5 *Servs.* (2019) 40 Cal. App. 5th 444, 478-479 (holding that prejudgment interest may be applied to
6 claims for meal period premiums because such premiums are a wage, not a penalty).

7 Accordingly, Plaintiffs had to take into consideration the costs and burden of continuing to
8 litigate this Action when it might be mooted by the pending initiative at the ballot box.

9 **VI. THE REQUEST FOR ATTORNEYS’ FEES AND COSTS**

10 **A. The Court Should Approve the Attorneys’ Fees and Costs in the PAGA** 11 **Settlement.**

12 As detailed fully in the Settlement Agreement, the Settlement requires Defendants to create a
13 Gross Settlement Amount (“GSA”) of \$2,492,440. (Bollinger Decl., Ex. 1 at ¶ 1.10.) From that fund,
14 Plaintiff requests an award of attorneys’ fees for Plaintiff’s Counsel in the amount of \$872,354, or
15 35% of the GSA, and \$18,845.53 in reimbursement for litigation costs. (*Id.*, Ex. 1 at ¶¶ 1.17, 5.4.)

16 Prior to enactment of PAGA, when the State had the resources to seek civil penalties on behalf
17 of the public, it paid its employees (including their attorneys) their salaries and benefits for pursuing
18 such penalties. The Legislature enacted PAGA because the Labor Commissioner and other agencies
19 were hampered in their enforcement of civil penalties by inadequate funding and staffing constraints.
20 *Iskanian, supra*, 59 Cal.4th at 379. To facilitate broader enforcement, the Legislature enacted PAGA,
21 authorizing “aggrieved employees” to pursue civil penalties on the state’s behalf. Lab. Code § 2699,
22 subd. (a).

23 In creating PAGA, the Legislature expressly provided that the private counsel retained by the
24 plaintiffs to represent the public’s interest can recover fees if the plaintiffs are the prevailing party.
25 Lab. Code § 2699(g)(1).

26 One major difference between public and private enforcement is that when the State pursues
27 civil penalties directly, not through an aggrieved employee proxy, it must pay its attorneys for their
28 work, win or lose. Through PAGA, the State’s *de facto* attorneys, Plaintiffs’ Counsel, take a

1 substantial risk. They only get paid if they prevail through a judgment or settlement. Accordingly,
2 the State benefits substantially from the contingent nature of the PAGA enforcement mechanism—
3 expending no resources and getting the benefit of risk-taking attorneys’ willingness to take on risk.
4 In this case, the State, after payment of fees, costs and aggrieved employee shares will receive
5 approximately \$908,380.47, with an expenditure of essentially no time or money.

6 1) Plaintiffs’ Counsel Are Entitled to a Fee from the Civil Penalties Represented
7 by the Gross Settlement Amount.

8 As previously indicated, this is *not* a class action. However, like a class action, it is a
9 representative action where instead of a class the Plaintiffs represent the State, the public. As a matter
10 of law and substance, counsel’s client is the public at large and the State of California. Plaintiffs are
11 simply “proxies” for the State.

12 On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half*
13 *International*, which addressed, in a class action context, the correct methodology for awarding fees
14 in a representative action settlement. *Laffitte v. Robert Half Intern. Inc.* (2016) 205 Cal.Rptr.3d 555,
15 573. The *Laffitte* Court approved awarding fees as a percentage of the settlement fund.:

16 We join the overwhelming majority of federal and state courts in holding
17 that when class action litigation establishes a monetary fund for the benefit
18 of the class members, and the trial court in its equitable powers awards Class
Counsel a fee out of that fund, the court may determine the amount of a
reasonable fee by choosing an appropriate percentage of the fund created.

19 *Id.* at p. 573. Here, the fund created for the benefit of the public is, with Plaintiffs as proxies for the
20 State, not unlike the fund created in class action settlements, with the public the equivalent of the
21 class referenced in *Laffitte*. The Supreme Court in *Kim v. Reins International California, Inc.* (2020)
22 9 Cal.5th 73, reiterated the State-as-the-client aspect of PAGA actions, stating:

23 An employee suing under PAGA “does so as the *proxy or agent of the*
24 *state’s labor law enforcement agencies.*” (*Arias, supra*, 46 Cal.4th at p. 986,
25 italics added.) Every PAGA claim is “a dispute between an employer and
26 the *state.*” (*Iskanian, supra*, 59 Cal.4th at p. 386, Relief under PAGA is
27 designed primarily to benefit the general public, not the party bringing the
28 action. (*Arias*, at p. 986; *Brown v. Ralphs Grocery Co.* (2011) 197
Cal.App.4th 489, 501 (*Brown*).) “A PAGA representative action is therefore
a type of *qui tam* action,” conforming to all “traditional criteria, except that
a portion of the penalty goes not only to the citizen bringing the suit but to

1 all employees affected by the Labor Code violation.” (*Iskanian*, at p. 382,
2 9.) The “government entity on whose behalf the plaintiff files suit is always
3 the real party in interest.” (*Ibid.*)

4 *Id.* at 81.

5 The Court, in *Laffitte*, pointed out several reasons why the percentage-of-the-fund method is
6 preferred over the alternative lodestar-multiplier approach in California courts:

7 The recognized advantages of the percentage method—including relative
8 ease of calculation, alignment of incentives between counsel and the class,
9 a better approximation of market conditions in a contingency case, and the
10 encouragement it provides counsel to seek an early settlement and avoid
11 unnecessarily prolonging the litigation [citations]—convince us the
12 percentage method is a valuable tool that should not be denied our trial
13 courts.

14 *Id.* at 573.

15 An award of 35% of the civil penalties realized in the Settlement is appropriate here under the
16 “substantial benefit” theory. *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1810; *Wershba*
17 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254. That theory permits a litigant who has
18 sued in a representative capacity to recover fees from the beneficiaries of that representation – here,
19 the State and the public, when the litigant’s efforts have created a substantial, actual, and concrete
20 benefit for the party it represents. *Laffitte, supra, passim.*

21 This doctrine rests on the understanding that attorneys should normally be paid by their
22 clients, in this case the State/public, and that unless attorneys’ fees are paid out of the settlement fund,
23 those who benefitted from the fund would be unjustly enriched. *Woodland Hills Residents Assn., Inc.*
24 *v. City Council* (1979) 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal. App. 3d 544,
25 548-49. To prevent this unfair result, courts exercise their inherent equitable powers to assess
26 attorneys’ fees against the entire fund, thereby spreading the cost of those fees among the public who
27 benefits from PAGA actions. *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 (*Serrano III*) As this approach
28 “better approximates the workings of the marketplace than the lodestar approach,” there is “a greater
judicial willingness to evaluate a fee award as a percentage of the recovery.” *Lealao v. Beneficial*

1 *Calif., Inc.* (2000) 82 Cal. App. 4th 19, 31, 48.⁴

2 The Court should also take into account whether the LWDA opposes the fee request herein
3 after receiving the Settlement pursuant to Labor Code § 2699(1)(2); *see Chamberlain v. Baker*
4 *Hughes, a GE Co., LLC* (E.D. Cal. July 29, 2020) No. 119CV00831DADJLT, 2020 WL 4350207, at
5 *5 (E.D. Cal. July 29, 2020) (finding “the lack of objection from the LWDA despite being provided
6 timely notice of the terms of this proposed [PAGA] settlement ... weighs in favor of approval.”). The
7 Settlement Agreement was submitted to the LWDA on May 28, 2024. (Bollinger Decl. ¶ 3 & Ex. 2
8 [Castro]; Yeremian Decl. ¶ 3 & Ex. A [Diaz].)

9 2) The Attorneys’ Fees Request Is Well Within the Range of Fees in Comparable
10 Cases.

11 Plaintiffs’ Counsel at Moss Bollinger LLP, David Yeremian & Associates and D.Law, Inc.,
12 are experienced employment attorneys with expertise in wage and hour class and representative
13 actions. (*See* Bollinger Decl. ¶¶ 37-38; Moss Decl. ¶¶ 4-6; Yeremian Decl. ¶¶ 5-11; Lindsay Decl. ¶¶
14 15-23.) Plaintiffs’ Counsel have investigated and litigated this case extensively for four years. (*See*
15 Bollinger Decl. ¶¶ 11-17; Moss Decl. ¶ 2; Yeremian Decl. ¶ 2; Lindsay Decl. ¶¶ 15-23.)

16 Courts historically award fees in the twenty to fifty percent range, depending on the
17 circumstances of the case. As stated in Newberg:

18 No general rule can be articulated on what is a reasonable percentage of a common
19 fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a
20 common fund in order to assure that the fees do not consume a disproportionate
part of the recovery obtained for the Class, although somewhat larger percentages
are not unprecedented.

21 Newberg on Class Actions, 3rd Ed., 1992, § 14.03; *and see Chavez v. Netflix, Inc.* (2008) 162 Cal.

22
23
24 ⁴ *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of
25 the fund method for calculating attorney’s fees more accurately reflects the results achieved for
26 the putative class than the lodestar method and “establishes reasonable expectations on the part of
27 plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which avoids
28 protracted litigation.”); *In re Rite Aid Corp. Securities Litigation* (3d Cir. 2005) 396 F.3d 294, 300
 (“The percentage-of-recovery method is generally favored in common fund cases because it allows
courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it
for failure.’”)

1 App. 4th 43, 66, fn 11 (“Empirical studies show that, regardless whether the percentage method or
2 the lodestar method is used, fee awards in class actions average around one-third of the recovery.”);
3 *Bennett v. Simplexgrinnell LP* (N.D. Cal. 2015) 2015 WL 12932332 at *7 (awarding fee of 38.8%
4 plus costs of \$4,900,000 settlement fund); *In re Heritage Bond Litig.*, (C.D. Cal Jun. 10, 2005) 2005
5 WL 1594403, at *18, n.12 (noting that more than 200 federal cases have awarded fees higher than
6 30%).

7 Courts in this county and others have approved attorney fees’ awards in other PAGA
8 settlements on a common fund basis at the same percentage requested by Plaintiff here. (*See Bollinger*
9 *Decl.*, Exh. 4 [Final Judgment and Order of Dismissal ¶¶ 6, 8 (Feb. 22, 2022) in *Santiago v. Four*
10 *Star Fruit et al.*, Kern County Sup. Ct. Case No. BCV-20-100477 (awarding 35% attorneys’ fees of
11 PAGA Settlement); Exh 5 [Final Judgment and Order of Dismissal at ¶¶ 6, 8 (July 25, 2023) in
12 *Matimba v. EmployBridge LLC et al.*, Los Angeles County Sup. Ct. Case No. 21STCV46986 (same);
13 Exh. 6 [Final Judgment and Order of Dismissal at ¶¶ 5-6 (February 4, 2021) in *Thomas v. CVS Health*
14 *Corporation et al.*, Los Angeles County Sup. Ct. Case No. 18AVCV00120 (same)]; Exh. 7 [Final
15 Judgement and Order at ¶¶ 4-5 (Oct. 30, 2020) in *Verge v. Wal-Mart Stores, Inc.*, Los Angeles County
16 Sup. Ct. Case No. BC591286 (same)]; Exh. 8 [Order and Judgement Granting Unopposed Motion for
17 Settlement Approval at ¶¶ 8, 11 (Aug. 26, 2020) in *Bustillo v. Swissport SA, LLC*, Los Angeles County
18 Sup. Ct. Case No. BC 700752 (same)].)

19 Throughout this case, Plaintiffs’ Counsel has borne, and continues to bear, the entire risk and
20 cost of litigation associated with this PAGA action on a purely contingency basis. (*Bollinger Decl.* ¶
21 39.) As a result, Plaintiffs’ Counsel have yet to receive any compensation for the amount of time and
22 money invested in the case to date. They had to incur substantial risk and expense, and were precluded
23 from taking other fee generating employment for the attorney time devoted to this case. Litigating a
24 high-stakes case against well-funded and well-respected Defendants is both difficult and not
25 appealing to many lawyers. Here, Defendants are represented by a top-notch law firm which has left
26 no stone unturned in the defense of this action. There is no doubt that the high caliber of defense
27 counsel in this case, as well as the defense strategies employed, required Plaintiffs’ Counsel to spend
28 more time litigating this action than in other PAGA cases.

1 For these reasons, Plaintiffs' Counsel's requested fee of 35% is well within the range of
2 reasonableness and is fair compensation for undertaking this complex, risky, expensive, and time-
3 consuming litigation on a contingent basis.

4 3) The Court Should Approve the Reimbursement of Costs.

5 In addition to their requests for fees, Plaintiff's Counsel seek \$18,845.53 in reimbursement
6 for litigation costs (\$5,121.18 to Moss Bollinger, LLP and \$13,724.35 to David Yeremian &
7 Associates and D.Law, Inc.) (Bollinger Decl. ¶ 40 & Ex. 1 at ¶ 1.17 [providing for reimbursement of
8 \$18,845.53 in litigation expenses]; Yeremian Decl. ¶ 3 & Ex. B.) All the requested costs are
9 reasonable in amount and necessarily incurred by Plaintiffs' Counsel in prosecuting this litigation.
10 (*Id.*)

11 Expenses in this matter to date include costs for filing fees, research, mediation, discovery,
12 and additional costs for the prosecution of this case evidenced in the costs breakdown included in the
13 Declarations of Jeremy F. Bollinger and David Yeremian. All of these costs were incurred in the
14 course of this litigation, and all costs advanced were paid by Plaintiffs' Counsel.

15 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
16 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
17 should approve the request for reimbursement in the amount of \$18,845.53.

18 **VII. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT PAYMENT**
19 **TO PLAINTIFF.**

20 The Settlement Agreement calls for the payment of Enhancement Payments totaling \$20,000
21 (\$10,000.00 per Plaintiff). (Bollinger Decl., Ex. 1 at ¶ 5.6.) Incentive awards are within the equitable
22 powers of the Court in representative contexts. In a class action context, the Ninth Circuit pointed
23 out that they "are intended to compensate class representatives for work done on behalf of the class,
24 to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to
25 recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*
26 (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for
27 reasonable incentive payments to compensate them for the expense or risk they have incurred in
28 conferring a benefit on other members of the class." *Munoz v. BCI Coca-Cola Bottling Co. of Los*

1 *Angeles* (2010) 186 Cal. App. 4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009)
2 175 Cal. App. 4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977).

3 Here, the enhancement awards take into consideration the time, effort, and expense incurred
4 by Plaintiffs in coming forward to litigate this matter on behalf of the public. The time spent by
5 Plaintiffs includes finding competent counsel, providing information to Plaintiffs' Counsel regarding
6 their relevant employment experiences, compiling documents, identifying witnesses, conducting
7 several meetings and conferences with Plaintiffs' Counsel to discuss the status of the case,
8 participating in the mediation, calling Plaintiffs' Counsel for updates on the progress of the case and
9 negotiations, and reviewing settlement documents, including their declarations submitted in support
10 of this motion. (Castro Decl. ¶¶ 5-14; Diaz Decl. ¶¶ 13-17.) This was time Plaintiffs took away from
11 their family, work and other personal endeavors.

12 Plaintiffs' Counsel consider this to be a fair and reasonable service award in light of similar
13 or greater service awards awarded in other PAGA settlements.⁵ (See Bollinger Decl., Exh. 4 [Final
14

15 ⁵ Courts in other class cases have awarded plaintiffs service awards in excess of the \$7,500 requested
16 by Plaintiff here. See *Reyes v. Macy's, Inc.* (2011) 202 Cal. App. 4th 1119 (awarding \$25,000); *Glass*
17 *v. UBS Fin. Servs.* (N.D. Cal. Jan. 27, 2007) 2007 U.S. Dist. LEXIS 8476 at *51-*52 (awarding
18 \$25,000 service award in overtime class action); *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal.
19 1995) 901 F. Supp. 294, 300 (approving \$50,000); *Louie v. Kaiser Permanente, et al.* (S.D. Cal. Feb.
20 2, 2009) S.D. Cal. Case No. 08CV0795 (awarding \$25,000); *Ralston v. US-Reports, Inc.* (Alameda
21 County Sup. Ct. May 22, 2009) Case No. RG07328773 (order filed May 22, 2009) (awarding
22 \$12,000); *Tate v. Kaiser* (Alameda County Sup. Ct. Nov. 24, 2009) Case No. RG07318416 (awarding
23 \$25,000); *Amezquita v. Classic Beverage and Distributing Group, Inc.* (L.A. County Sup. Ct. May
24 17, 2012) Case No. BC412216 (awarding \$15,000); *Hall v. O.C. Jones & Sons, Inc.* (San Francisco
25 County Sup. Ct. May 10, 2013) Case No. CGC-12-523668 (awarding \$15,000); *Stokes v. CSE*
26 *Holdings, Inc., et al.* (San Francisco County Sup. Ct. Dec. 15, 2014) Case No. CGC-13-530640
27 (awarding \$25,000); *Stokes v. Interline, San Francisco County Superior Court*, Case No. CGC-12-
28 523274 (order filed April 6, 2015) (awarding \$15,000); *In re York Wage and Hour Class Actions*,
Sacramento County Sup. Ct. Judicial Council Coordination Proceeding No. 4560 May 27, 2015)
(awarding \$25,000); *Magee v. American Residential Services, LLC* (L.A. County Super. Ct. Apr. 21,
2011) No. BC423798 (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial*
Operations LLC (L.A. County Super. Ct. June 24, 2010) No. BC375967 (awarding \$15,000
enhancement payments to the named plaintiffs); *Zamora v. Balboa Life & Casualty LLC* (L.A.
County Super. Ct. Mar. 7, 2013) No. BC360026 (awarding \$25,000 enhancement payments to the
named plaintiffs); *Aguilar v. Cingular Wireless LLC* (C.D. Cal. Mar. 17, 2011) No. CV 06-81997
DDP (awarding \$14,767 enhancement payment); *In re Dun & Bradstreet Credit Servs. Customer*
(footnote continued)

Judgment and Order of Dismissal ¶ 8 (Feb. 22, 2022) in *Santiago v. Four Star Fruit et al.*, Kern County Sup. Ct. Case No. BCV-20-100477 (\$10K service award to the PAGA plaintiff); Exh. 6 [Final Judgment and Order of Dismissal at ¶ 6 (February 4, 2021) in *Thomas v. CVS Health Corporation et al.*, Los Angeles County Sup. Ct. Case No. 18AVCV00120 (\$12K service award to each PAGA plaintiff)]; Exh. 7 [Final Judgement and Order at ¶ 5 (Oct. 30, 2020) in *Verge v. Wal-Mart Stores, Inc.*, Los Angeles County Sup. Ct. Case No. BC591286 (\$10K service award to the PAGA plaintiff)].

Plaintiffs put their future employment prospects at risk by bringing this action as the fact that they filed a lawsuit against their employer “is searchable on the internet and may become known to prospective employers when evaluating” him for employment. *Guippone v. BH S&B Holdings, LLC* (S.D.N.Y. Oct. 28, 2011) 2011 U.S. Dist. LEXIS 126026, at *20; *see also* Bollinger Decl. ¶ 42 (discussing additional risks to employees who sue their employers). Accordingly, Plaintiffs should be awarded the agreed-upon service awards of \$10,000 per plaintiff.

VIII. THE COURT SHOULD APPROVE THE COSTS OF ADMINISTRATION

The Parties solicited bids from multiple settlement administrators and agreed to use Phoenix Settlement Administrators (“Phoenix”) as the third-party settlement administrator in this case. (Bollinger Decl. ¶ 44.) Phoenix has extensive experience administering class action matters, including PAGA settlements. (Declaration of Jodey Lawrence [“Admin Decl.”] ¶¶ 5-7 & Exh. A.) Phoenix

Litig. (S.D. Ohio 1990) 130 F.R.D. 366 (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 255 (approving \$50,000); *Yap v. Sumitomo Corp.* (S.D.N.Y. 1991) 1991 U.S. Dist. LEXIS 2124 *12, *24 (approving \$30,000); *Roberts v. Texaco* (S.D.N.Y. 1997) 979 F. Supp. 185, 203-204 (approving incentive payments of up to \$85,000); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000); *Ingram v. The Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 (approving \$300,000 to each class representative); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907, 913-14 (granting \$50,000 service award); *Will v. Gen. Dynamics Corp.* (S.D. Ill. Nov. 22, 2010) 2010 WL 4818174, at *4 (awarding \$25,000 each to three class representatives); *Velez v. Novartis Pharm. Corp.* (S.D.N.Y. Nov. 30, 2010) 2010 U.S. Dist. LEXIS 125945, at *69-75 (granting service awards between \$175,000 and \$425,000 to 26 named plaintiffs); *Been v. O.K. Indus., Inc.* (E.D. Okla. Aug. 16, 2011) 2011 WL 448766, at *12-13 (awarding \$100,000 service awards to representatives for assuming risk of retaliation); *Heekin v. Anthem, Inc.* (S.D. Ind. Nov. 20, 2012) 2012 WL 5878032, at *1 (awarding \$25,000 each to two named plaintiffs); *In re Titanium Dioxide Antitrust Litig.* (D. Md. Dec. 13, 2013) 2013 WL 6577029, at *1 (approving \$125,000).

1 shall be responsible for updating the addresses for PAGA Members, mailing the Notice of Settlement
2 and calculating and distributing the settlement checks, among other duties. (*Id.* ¶ 8.) Phoenix capped
3 its fees at \$49,750 for administering the settlement based on 22,000 PAGA Members. (Admin Decl.
4 ¶ 17 & Exh. B.) Many courts appointed Phoenix to administer many other complex class and PAGA
5 settlements, which is one of the reasons why the parties selected Phoenix. (Admin Decl. ¶¶ 5-6 &
6 Exh. A; Bollinger Decl. ¶ 44.) Phoenix also has security protocols and other safeguards in place for
7 protecting the data provided by Defendants. (Admin Decl. ¶¶ 11-12, Exh. B). Based on counsels'
8 experience in other class and PAGA settlements, Phoenix's costs for administering this settlement
9 are fair and reasonable. (Bollinger Decl. ¶ 44.)

10 **IX. CONCLUSION**

11 Plaintiffs and their Counsel submit that the proposed Settlement as documented in the
12 Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State
13 of California. Plaintiffs respectfully request that the Court approve the Settlement and Order the
14 Parties to carry out the Settlement according to the terms of the Settlement Agreement.

15 Dated: June 3, 2024

16
17 By: _____


Jeremy F. Bollinger
David Yeremian
MOSS BOLLINGER LLP
DAVID YEREMIAN & ASSOCIATES, INC.
Attorneys for Plaintiffs, all similarly
Aggrieved Employees, and the State of
California