

1 JULIAN HAMMOND (SBN 268489)
jhammond@hammondlawpc.com
2 POLINA BRANDLER (SBN 269086)
pbrandler@hammondlawpc.com
3 ARI CHERNIAK (SBN 290071)
acherniak@hammondlawpc.com
4 HAMMONDLAW, P.C.
11780 W. Sample Road, Suite 103
5 Coral Springs, FL, 33065
6 Tel. (310) 601-6766
Fax (310) 295-2385

7 *Attorneys for Plaintiff*

8
9 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11 **ARYTON COSTA**, individually and on behalf
12 of all others similarly situated,

13 Plaintiff,

14 vs.

15 **UNIVERSITY OF ANTELOPE VALLEY**, a
16 California Limited Liability Company,

17 Defendant.

Case No.: 21STCV18531

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
APPROVAL OF PAGA SETTLEMENT
PURSUANT TO LABOR CODE § 2699(l)**

Date: May 11, 2022
Time: 10:00 a.m.
Dept: 9 – Spring Street Courthouse
Hon. Yvette M. Palazuelos

Complaint Filed: May 14, 2021

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I. INTRODUCTION

Plaintiff Aryton Costa (“Plaintiff”) hereby seeks approval of a non-reversionary \$150,000 Private Attorneys General Act (“PAGA”) settlement reached in this action with Defendant University of Antelope Valley (“Defendant” or “UAV”). The settlement resolves only representative PAGA claims on behalf of 55 part-time instructors (“Aggrieved Employees” or “AEs”) employed by Defendant during the PAGA Period (defined as April 6, 2020 to the date the Court grants approval) for Defendant’s alleged failure to pay wages for all hours worked in violation of Labor Code §§ 1194, 226.2, to provide rest and meal breaks in violation of Labor Code §§ 226.2, 226.7, 512, to issue accurate itemized wage statements in violation of Labor Code § 226(a), to pay all wages due upon discharge in violation of Labor Code §§ 201-202, and to reimburse business expenses in violation of Labor Code § 2802. The settlement also resolves representative PAGA claims on behalf of 54 employees of Defendant, other than AEs (“Reimbursement AEs” or “RAEs”) employed during the Reimbursement PAGA Period (defined as April 6, 2020 to August 31, 2021) for Defendant’s alleged failure to reimburse business expenses incurred in working remotely from home during the Covid-19 pandemic, in violation of Labor Code § 2802. Declaration of Julian Hammond in Support of Plaintiff’s Unopposed Motion for Approval of PAGA Settlement (“Hammond Decl.”), filed herewith, at ¶¶ 28, 54, 57. A copy of the Settlement Agreement (“SA”) is attached as **Exhibit 1** to the Proposed Order filed herewith.

The proposed settlement is advantageous to the AEs and RAEs, and merits approval. It establishes a non-reversionary fund of \$150,000 (“Maximum Settlement Amount” or “MSA”). Of this amount, \$80,906.61 will be allocated to PAGA Penalties, of which 75% will be paid to the LWDA and 25% distributed among the AEs and RAEs as follows: 75% to the AEs and 25% to the RAEs pro rata based on the number of pay periods worked as an AE or RAE during the relevant periods. The average PAGA allocation per AE will be \$1,103.27, of which 25% (an average of \$275.81) will be paid to each AE, and the average PAGA allocation per RAE will be \$374.57, of which 25% (an average of \$93.64) will be paid to each RAE. Hammond Decl. ¶ 56. The remainder of the MSA is allocated to attorneys’ fees (\$49,500), litigation costs (\$9,593.19), service award for the Plaintiff (\$5,000), and settlement administration costs (capped at \$5,000). For these payments, AEs and RAEs are only releasing their claims for PAGA penalties and not the individual labor code claims of any aggrieved PAGA employees. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014).

As demonstrated below and in the accompanying Hammond Decl., the proposed Settlement is fair, reasonable and adequate and warrants the Court’s approval. Accordingly, Plaintiff requests that the Court (1) approve the proposed settlement, including the plan for allocation and distribution of settlement funds to AEs, RAEs, and to the LWDA, and (2) approve the requested attorneys’ fees and costs, in full.

II. BACKGROUND

A. Factual and Procedural History

UAV is a small, private, for-profit university in Lancaster, California. *See* Hammond Decl. ¶ 24. It offers masters, bachelors, and associate degrees as well as certificate and continuing education programs. *Id.* It has total enrollment of approximately 900. *Id.*

On April 22, 2021, Plaintiff submitted his PAGA Notice to the LWDA and Defendant alleging that, with respect to the AEs (i.e., its part-time instructors), that Defendant (1) failed to pay wages for all hours worked in violation of Labor Code §§ 1194, 226.2, (2) failed to authorize and permit them to take compliant rest breaks in violation of Labor Code §§ 226.2, 226.7, (3) failed to issue accurate itemized wage statements in violation of Labor Code § 226(a), (4) failed to pay wages due at the time of discharge. Plaintiff also alleged that Defendant (5) failed to reimburse business expenses of all those employees (RAEs), including part-time instructors (AEs), who worked remotely during the Covid-19 pandemic in violation of Labor Code § 2802. Hammond Decl. ¶ 16. Plaintiff subsequently filed an amended PAGA notice, adding allegations that Defendant failed to provide AEs meal periods in violation of Labor Code § 512. *Id.*

On May 14, 2021, Plaintiff filed a Complaint alleging class claims based on the same labor code violations asserted in the PAGA Notice, as well as a cause of action for the violation of Business & Professions Code §§ 17200 *et seq.* Hammond Decl. ¶ 17. Shortly after the Complaint was filed, the parties agreed to attend early mediation and to an informal exchange of documents and information. *Id.* at ¶ 18. As part of this agreement, Defendant provided the number of AEs (approximately 55) employed between April 6, 2020 and November 10, 2021 and the number of pay periods they worked between April 6, 2020 and November 10, 2021 (950), and the number of RAEs (54) and the number of pay period RAEs worked (781) during the Reimbursement PAGA Period. Defendant also provided Plaintiff's personnel file, including his contracts and wage statements; payroll calendar, UAV's faculty pay scale applicable to part-time adjunct instructors in 2019, 2020, and 2021; several versions of the Employee Handbook applicable during the PAGA Period and faculty job descriptions; a sample of contracts issued to part-time adjunct instructors. *Id.* at ¶¶ 21-22. In addition, Plaintiff's Counsel conducted its own investigation, including researching publicly available information and interviewing aggrieved employees. *Id.* at ¶ 22.

During the course of an informal exchange of documents and information, Defendant informed Plaintiff that 51 of 55 AEs and 52 of 54 RAEs, including Plaintiff, had signed arbitration agreements with class action waivers. Hammond Decl. ¶ 19. As a result, following an all-day mediation, with the assistance of a well-respected mediator, Marc Feder, the parties agreed to settle the case on a PAGA-only basis on the terms set out in the Settlement Agreement, and to dismiss class claims. *Id.* at ¶ 25.

On December 14, 2021, the parties filed a Joint Stipulation to file Plaintiff's First Amended Complaint dismissing class claims and adding a PAGA cause of action. The Court granted the Joint Stipulation on December 15, 2021 and Plaintiff filed the First Amended Complaint the same day, deleting the class claims and adding a claim for civil penalties pursuant to PAGA on behalf of AEs based on the Labor Code violations asserted in the PAGA Notice, namely Labor Code §§ 1194, 226.2, 226.7, 226(a), 512; 201-202, and 2802, and on behalf of RAEs based on the failure to reimburse business expenses in violation of Labor Code § 2802 for remote work during the Covid-19 pandemic. *Id.* at ¶ 27.

B. Terms of the Proposed PAGA Settlement

The Settlement resolves all claims for PAGA penalties of Plaintiff, the LWDA, AEs and RAEs, against UAV asserted in the First Amended Complaint and PAGA Notices. A summary of the Settlement terms are as follows:

a. Gross Settlement Amount ("GSA") – A non-reversionary \$150,000. SA at § III.2. Defendant will pay the GSA in three equal installments: the first installment of \$50,000 will be paid within 30 (thirty) days following approval of the settlement ("Approval Order"); the second installment will be paid no later than June 30, 2022; and the third installment will be paid no later than September 30, 2022. SA § III.2.

b. Aggrieved Employees and PAGA Periods – (1) the "Aggrieved Employees" are all part-time instructors employed by UAV in California during the PAGA Period, defined as April 6, 2020 to the date the Court enters Approval Order approving the Settlement Agreement; (2) the "Reimbursement Aggrieved Employees" are individuals who were employed by UAV in California and were required to work from home remotely as a result of the Covid-19 pandemic and incurred necessarily business expenses during the Reimbursement PAGA Period, defined as April 6, 2020 to August 31, 2021. SA at §§ I.4, 5.

c. Attorneys' Fees and Costs – as explained in detail below, Plaintiff's counsel seek attorneys' fees of \$49,500 (33% of the GSA), which is less than the 35% of the GSA allowed under the Settlement Agreement, and reimbursement of litigation costs of \$7,963.78. *See* SA at § III.5(a).¹

d. Settlement Administration – costs are capped at \$5,000. SA at § III.5(c). The Parties have mutually agreed to Simpluris, Inc. as the Settlement Administrator. SA at § IV.1. Within 10 calendar days of the Approval Date, Defendant will provide Simpluris with an Aggrieved Employee and Reimbursement Aggrieved Employees information. SA at § IV.2. Simpluris will update the addresses

¹ The Settlement Agreement allows Plaintiff's Counsel to seek up to 35% of the GSA in attorneys' fees, and up to \$25,000 in costs. *Id.*

1 for the AEs and RAEs using industry-standard mailing address databases, including the National Change
2 of Address. SA at § IV.3. The Settlement Administrator will mail the Notice of PAGA Settlement and
3 the Individual Settlement Payments by First-Class U.S. Mail to the last known address of each AE and
4 RAEs. SA at § IV.3. In the event a mailing is returned as undeliverable, the Settlement Administrator
5 will remail the mailing to the forwarding address provided or, if no forwarding address is provided, to
6 the address, if any, determined through standard skip trace or a manual “in-depth skip trace” if no new
information is ascertained by a standard skip trace. SA at § IV.4.

7 e. Net Settlement Amount and Calculation of Settlement Shares – the Net Settlement
8 Amount (“NSA”) is the portion of the GSA distributed to AEs after deducting Court-approved attorneys’
9 fees, litigation costs, Plaintiff’s service award, and administration costs. SA at § III.5. The NSA is
10 estimated to be \$80,906.81. Hammond Decl. ¶ 56. Simpluris will distribute portions of the NSA
11 pursuant to the allocations set out in the Settlement Agreement to the LWDA, and to the AEs pro rata
12 based on the number of pay periods worked during the PAGA Period and to the RAEs pro rata based on
the number of pay periods worked during the Reimbursement PAGA Period. SA at § 4.3.

13 f. PAGA Payment –\$80,906.81 will be allocated as civil penalties under Labor Code
14 § 2699(i), 75% of which will be distributed to the LWDA as its 75% portion of the PAGA penalties, and
15 25% will be distributed to the aggrieved employees as follows: 3/4 to the AEs *pro rata* based on the
16 number of pay period worked during the PAGA Period and 1/4 to the RAEs *pro rata* based on the number
of pay period worked during the Reimbursement PAGA Period. SA at § III.6.

17 g. Tax Consequences of Settlement Payments – 100% of the payments distributed to the AEs
18 and to the RAEs will be deemed civil penalties and interest and reported on IRS 1099 form. SA at § IV.7.
19 Plaintiff’s service award will reported on IRS 1099 form. SA § III.5.b.

20 h. Distribution of Uncashed Checks – AEs will have 90 calendar days after mailing by
21 Simpluris of the settlement share to cash their checks. SA at § IV.3. Any check that is not cashed within
22 90 calendar days will be transferred to the California State Controller’s Unclaimed Property Fund. SA
at § IV.3.

23 i. Scope of Release – Plaintiff, in his capacity as a private attorney general, and AEs will
24 release any and all claims for PAGA penalties arising during the PAGA Period asserted in the action or
25 that could have been asserted in the Action under PAGA based on the facts alleged, including for
26 Defendant’s violation of California Labor Code §§ 201-202, 226(a), 226.2, 226.7, 510, 512, 1194, 1194.2,
27 1198, and 2802. SA at § I.15, III.7. RAEs will also release any and all claims for PAGA penalties arising
28 during the PAGA Period asserted in the action or that could have been asserted in the Action under PAGA,
including for Defendant’s violation of Labor Code § 2802. SA at § I.16, III.8.

III. THE SETTLEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The proposed Settlement Agreement is fair, reasonable and adequate, as it provides for a meaningful recovery for the AEs and the RAEs and the LWDA for the release of PAGA penalties. The amount of the PAGA Settlement is reasonable in light of the potential recovery and the risks of non-recovery. Below, Plaintiff summarizes the potential PAGA exposure on each claim, the discount he has considered to account for the risks faced, and why Plaintiff's counsel's view the settlement as reasonable.

A. The Settlement is a Reasonable Compromise of PAGA Claims

"The superior court shall review and approve any penalties sought as part of a proposed PAGA Settlement pursuant to this part." Cal. Lab. Code § 2699(l). Although PAGA settlements need not satisfy the requirements of a class action settlement, PAGA plaintiffs do "take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment," and an analysis of the *Kullar* factors applicable to class action settlements is appropriate. *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016); see *Amicus Curiae* Brief Pursuant to May 11, 2017 Order filed by the LWDA on June 16, 2017 in *Price v. Uber Techs.*, Case No. BC554512 (L.A. Super. Ct.) attached as Exhibit 1 to Plaintiff's Request for Judicial Notice, filed herewith, at 5;² *Arias v. Superior Court*, 46 Cal. 4th 969, 984 (2009) (rejecting the argument that PAGA settlement violates the due process rights of "nonparty aggrieved employees who are not given notice of, and an opportunity to be heard in, a representative action that is not brought as a class action").

The *Kullar* factors include: (1) the strength of plaintiffs' case balanced against the settlement amount; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the extent of discovery completed and stage of proceedings; and (4) the experience and views of counsel. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008). A fifth *Kullar* factor, the reaction of the Class Members, is not relevant in a PAGA settlement because notice to the AEs is not required, nor contemplated by the PAGA statute. See Lab. Code § 2699(l)(2) (requiring notice to the LWDA, giving it an opportunity to object); see also *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 U.S. Dist. LEXIS 32774, *13 (N.D. Cal. April 2, 2010) ("Unnamed employees need not be given notice of the PAGA claim, nor do they have the ability to 'opt-out' or 'contest a settlement.'"). The real party in interest in a PAGA claim is not the AEs and RAEs, but the State. See *Iskanian*, 59 Cal.4th at 382 ("A PAGA representative action is [] a type of qui tam action . . . The government entity . . . is always the real party in interest in the

² ("[T]he Labor Commissioner believes that courts evaluating PAGA settlements should utilize the standards employed in *qui tam* and other representative actions: is the settlement fair, adequate, and reasonable under all of the circumstances in light of the public policies underlying California's labor standards? Part of this analysis is a consideration of the strength of the plaintiffs' case—something that courts have considered in both *qui tam* and class actions.")

suit.”); *Arias*, 46 Cal. 4th at 986 (“An employee plaintiff suing [under PAGA] does so as the proxy or agent of the state’s labor law enforcement agencies.”). That is why the State is the party with a right to notice and the opportunity to object.

The first *Kullar* factor – the strength of Plaintiff’s case – is the most important. *Kullar*, 168 Cal. App. 4th at 130. Although Plaintiff believes he has a strong case, he faced significant hurdles on the merits and manageability, and even if he prevailed, the Court would have discretion to reduce any PAGA penalties. See Lab. Code § 2699(e)(2) (discretion to reduce penalties if oppressive or unjust). Plaintiff also faced additional hurdles described below, including the fact that UAV suffered very significant financial losses in recent years, which could have led the Court to reduce any PAGA penalties and made UAV unable to satisfy a judgment.

The maximum total exposure for PAGA civil penalties for violation of the Labor Code provisions enumerated in the paragraph above were calculated as follows. When the violated Section does not specifically provide a “civil penalty,” an employee may recover \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).³ Two California Court of Appeals, and the Ninth Circuit Court of Appeals, recently held that the ‘initial violation’ rate is assessed per pay period, and the ‘subsequent violation rate’ rate cannot be assessed until the Defendant has been put on notice of the violation. See *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *Gunther v. Alaska Airlines*, 72 Cal. App. 5th 334, 355-356 (2021); *Bernstein v. Virgin Am., Inc.*, 2021 U.S. App. LEXIS 6641, *35-36 (9th Cir. Mar. 8, 2021). Here, Plaintiff calculated PAGA penalties based on only the \$100 initial penalty amount because Defendant could have argued that subsequent penalty amount was not available because Defendant was never notified by the LWDA of that it committed the violations alleged by the Plaintiff.

1. Unpaid Wages - Labor Code §§ 1194, 226.2

Plaintiff contended that AEs were non-exempt employees because they did not earn the minimum salary required to be exempt under IWC Wage Order No. 4, § 1(A) and were not paid a salary, but a piece rate (i.e. a flat amount per course taught), and as a result were entitled to minimum wage for all hours worked and separate and hourly pay from the piece rate compensation for nonproductive time and rest break time. See Lab. Code §§ 1194, 226.2. Plaintiff contends that AEs were required to perform tasks outside the classroom hours which were nonproductive and not covered by AEs’ course compensation, such as syllabi preparation, meeting with students outside the classroom, and grading. Hammond Decl. ¶ 31.

³ The actual amount of expenses or unpaid wages is immaterial to liability under the PAGA.

1 Plaintiff calculated Defendant's maximum liability for this claim, at 100% violation rate, as
2 \$104,500.⁴ *Id.* at ¶ 32. However, Defendant could have argued that AEs were properly classified as
3 exempt because the minimum salary required under the Wage Order No. 4, § 1(a)(3)(d) can be prorated
4 for part-time work and AEs did earn two times the minimum wage for each hour that they worked.
5 Although no California Court of Appeal has opined on the issue, the Superior Court in *Gola v. University*
6 *of San Francisco* No. CGC-18-565018 (San Francisco Super. Cty. Ct.) found that the better argument as
7 to the minimum salary required for professional exemption in California was that the minimum salary
8 could not be prorated for part-time work, and had to be calculated based on 40 hours per week even if an
9 employee worked fewer hours. Defendant also could have argued that the course compensation it paid
10 to AEs covered all the work that they were required to complete in order to successfully teach a course,
11 and that their compensation was not a piece rate because they could not earn more during each term by
12 e.g. working faster to produce more units. Defendant also could have argued that whether AEs performed
13 non-productive work during any pay period would lead to manageability issues. While Plaintiff believes
14 his claims are strong on the merits, Plaintiff also believes that some discount is warranted based on these
potential defenses. Plaintiff applied an overall 35% discounts for these risks, reducing the value of this
claim to **\$67,925**. *Id.* at ¶ 33.

15 **2. Failure to Provide Paid Rest Breaks – Labor Code §§ 226.7, 226.2**

16 Plaintiff contended that Defendant misclassified AEs as exempt and did not maintain a rest break
17 policy applicable to AEs. Defendant also did not pay separately and hourly for rest breaks as Labor Code
§ 226.2 requires employers pay to their piece rate employees. Hammond Decl. ¶ 34

18 Under the aggressive assumption that every single AE worked 3.5 hours or more in a row in every
19 single pay period and missed or was not paid for a rest break, Plaintiff calculated Defendant's total
20 possible exposure on this claim as \$104,500. *Id.* ¶ 35. However, as discussed above, Defendant could
21 have argued that AEs' compensation was not a piece rate, and that many of the AEs never taught classes
22 that were that 3.5-hours long and even those who did, were able to freely take rest breaks during
23 classroom breaks. Defendant also could have argued that whether AEs missed rest breaks during any
24 pay period would lead to manageability issues. Plaintiff believed this merited a 50% discount on the
merits, reducing the expected value of the claim to **\$52,250**. *Id.* ¶ 36.

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28 ⁴ The Settlement was based on 950 estimated pay periods worked by AEs between April 6, 2020 and November 10, 2021. If the number of pay periods exceeds 950 by more than 10% (i.e. more than 1,045 pay periods), the escalator clause will be triggered and the 75% portions of the GSA allocated to AEs will increase. SA § III.3.

1 **3. Failure to Provide Meal Breaks – Labor Code § 512**

2 Plaintiff contended that Defendant did not maintain a meal break policy applicable to AEs and as
3 a result failed to provide them with off-duty meal periods when they worked more than 5 hours in a row
4 and failed to pay them premium pay in lieu thereof, in violation of Labor Code § 512. Plaintiff calculated
5 PAGA penalties on the assumptions that AEs suffered a meal break violation every pay period during the
PAGA Period, for a total possible exposure of \$104,500. Hammond Decl. ¶¶ 37-38.

6 However, in addition to arguing that the Court could have found that AEs were properly classified
7 as exempt, Defendant also could have argued that very few classes were 5 hours or longer and a violation
8 did not occur during every single pay period. Further, Defendant could have argued that whether AEs
9 missed meal periods during any pay period would lead to manageability issues. Plaintiff believed this
merited a 60% discount on the merits, reducing the expected value of the claim to **\$41,800**. *Id.* at ¶ 39.

10 **4. Inaccurate Wage Statements – Labor Code § 226(a)**

11 The basis of this claim was the same as the basis of the unpaid wages claim, above. Hammond
12 Decl. ¶ 40. Plaintiff contended that as a result of misclassifying AEs as exempt and failing to treat them
13 as piece-rate employees, Defendant failed to track their hours worked and failed to issue accurate
14 itemized wage statements containing their hours worked and applicable hourly until December 31, 2021,
15 in violation of Labor Code § 226(a). *Id.* Plaintiff calculated Defendant's maximum liability for this
16 claim as \$104,500 applying the default penalty under Lab. Code § 2699(f)(2). *Id.* at ¶ 41. Because the
17 claim is derivative, the same discounts as apply to the claim for unpaid wages, resulting in risk-adjusted
exposure of **\$67,925**. *Id.* at ¶ 42.

18 **5. Failure to Pay Wages Due at Separation - Labor Code §§ 201-203**

19 Plaintiff contended that Defendant employed AEs on a semester-by-semester basis and they were
20 therefore discharged at the end of each academic term. Defendant was required to pay them all wages due
21 at the time of discharge, but as a result of following its regular payroll calendar often paid them wages
22 several days after the end of the semester i.e., their discharge date. Plaintiff also contended that as a result
23 of Defendant's failure to pay AEs for all hours worked and to pay premium pay for missed rest and meal
24 breaks, Defendant also failed to provide full compensation to certain AEs in their final paychecks, in
violation of Labor Code §§ 201-03. Hammond Decl. ¶ 43.

25 AEs taught during approximately 165 terms during the PAGA Period. Thus, Plaintiff calculated
26 penalties at \$100 for each of the terms (i.e. each time Plaintiff contended AEs were discharged), for total
27 penalties of \$16,500. *Id.* at ¶ 44. Defendant could have argued, however, based on the decision in *Elliot*
28 *v. Spherion Pac. Work, LLC*, 572 F. Supp. 2d 1169, 1176-77 (2008) that AEs were not discharged at the
end of each contract because they maintained a continuous relationship with the Defendant and were

1 offered to teach courses throughout each academic year until they left employment or were officially
2 terminated. However, Plaintiff believes that he has a strong claim because Defendant's written policies
3 provide that employment of adjunct instructors terminates at the end of their contracts that are award for
4 a fixed period of time. Therefore, Plaintiff believed that only a 30% discount was warranted, bringing the
risk-adjusted exposure down to **\$11,550**. Hammond Decl. ¶ 45.

5 **6. Expense Reimbursement Claim– Labor Code § 2802**

6 Plaintiff contended that AEs and RAEs were required to work remotely from home during the
7 Covid-19 pandemic, and as a result incurred home offices expenses associated with the use of their
8 computers, email, and/or videoconferencing, and mobile phones. Hammond Decl. ¶ 46. Plaintiff
9 contended that, by failing to reimburse AEs and RAEs for business use of their personal cell phones,
10 Defendant violated Labor Code § 2802. *Id.* Plaintiff calculated Defendant's maximum liability for this
claim for AEs as \$104,500 and for RAEs as \$78,100. Hammond Decl. ¶ 47.

11 However, Defendant could have asserted that Labor Code § 2802 does not require employers to
12 reimburse expenses on semi-monthly basis or each pay period and that it could have, as other universities
13 do, reimbursed AEs and RAEs on a monthly or even quarterly/semester basis. Accordingly, Defendant
14 could have argued that Plaintiff's calculations of PAGA penalties based on each semi-monthly pay period
15 worked is inflated. Defendant could have also contended that whether the expenses incurred by AEs and
16 RAEs were reasonable, and whether Defendant was aware that AEs and RAEs incurred such expenses,
17 will vary on a case-by-case basis, and would lead to manageability issues. Based on this potential defense,
18 Plaintiff believed a 65% discount was reasonable, bringing the risk-adjusted exposure to **\$33,250** on AEs'
claims and to **\$27,335** on RAEs' claims.⁵ *Id.* at ¶ 48.

19 **7. Risk of Reduction of Penalties by the Court**

20 Plaintiff took into account several risks that could have dramatically reduced the recovery even if
21 they prevailed on their claims. First, the Court has broad statutory discretion to reduce the penalties
22 assessed. Cal. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th
23 1112, 1135-36 (2012) (affirming reduction of PAGA penalties and emphasizing broad discretion). *See*
24 Hammond Decl. ¶ 49. For example, in *Fleming v. Covidien*, the court calculated the civil penalties for an
25 employer providing 8,000 non-compliant wage statements to be \$2.8 million (\$100 per violation)
(*Fleming v. Covidien, Inc.*, 2011 U.S. Dist. Lexis 154590 at *3-4 (C. D. Cal. August 12, 2011), vacated

26 _____
27 ⁵ The Settlement Agreement also releases claims for overtime wages and failure to keep accurate and complete time and payroll
28 records. As these claims are derivative and occurred during the same pay periods as the claims for unpaid wages statements/rest
breaks/inaccurate wage statements, and no class was schedules for more than 8 hours (and as any potential unpaid overtime
allegation is based on the instructor working before and after class), Plaintiff does not value these claims separately as they are
unlikely to result in any additional penalties.

1 and remanded in part on other grounds, 546 Fed. Appx. 616 (9th Cir. 2013).) Although the court found
2 that the employer had violated Labor Code § 226, it noted that none of the employees suffered any injury
3 because of this non-compliance (and none complained of the issues prior to filing suit.) *Id.* Pursuant to
4 Labor Code § 2699(e)(2), the court reduced PAGA civil penalties from \$2.8 million to \$500,000. *Id.*

5 In a recent case, Plaintiff's counsel prevailed on a PAGA claim at trial for a class of adjunct
6 professors, but the Court only awarded 15% of the maximum PAGA penalties. Hammond Decl. ¶ 50.
7 There is significant risk of a voluntary reduction here. Unlike defendant in the case in which the court
8 awarded only 15% of the maximum PAGA penalties, Defendant here could have argued that it attempted
9 to comply by listing on wage statements issued to AEs hours and hourly rates for non-teaching work that
10 was paid by the hour, and by listing "quantity" of "1," and "rate" earned during the pay period for the
11 quantity. *See Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 996-97 (1992) ("[C]ourts refuse to impose
civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or
her actions."); Hammond Decl. at ¶ 50.

12 Second, the Court might not permit "stacking" of PAGA penalties – *i.e.*, not award more than one
13 PAGA penalty for each employee in each pay period. On the one hand, Labor Code § 2699 implies that
14 a separate civil penalty may be recovered for each violation of the Labor Code. *See* Lab. Code § 2699(f)
15 (stating "*a* civil penalty for *a* violation") (emphasis added). On the other hand, Labor Code § 2699(g)(1)
16 states that "an aggrieved employee may recover *the* civil penalty described in subsection (f) . . . on behalf
17 of himself or herself and other current or former employees against whom *one or more of the alleged*
18 *violations* was committed" (emphasis added). Some courts have impliedly allowed stacking of PAGA
19 penalties for jurisdictional purposes. *See, e.g., Schiller v. David's Bridal, Inc.*, 2010 U.S. Dist. LEXIS
20 81128, at *27 (E.D. Cal. July 14, 2010) (defendant could aggregate PAGA penalties to establish amount
21 in controversy). Others have denied it. *See, e.g., Castillo v. ADT, LLC*, 2017 U.S. Dist. LEXIS 10579,
22 at *11 (E.D. Cal. Jan. 24, 2017). Even if the Court interpreted the statute to permit stacking, the Court
23 could decline to do so as a matter of discretion. *See* Hammond Decl. ¶ 51.

24 Third, the Court would likely take into account Defendant's deteriorating financial position.
25 Defendant represented to Plaintiff that both prior to Covid-19, and continuing and due to the effects of
26 Covid-19, Defendant suffered very significant financial losses and that if maximum penalties were to be
27 imposed, Defendant would not be able to satisfy the judgment and continue its operations. *See Id.* at ¶
28 52.

For these three reasons, even if Plaintiff were to prevail on the merits, there is substantial
uncertainty as to the ultimate award for PAGA penalties.

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8. Other Defenses

Defendant could argue that Plaintiff's PAGA claim was barred because Plaintiff left employment more than one year prior to the submission of his PAGA Notice. Plaintiff's position was that despite the fact that his last course ended on March 4, 2020 (more than one year prior to the April 22, 2021), his contract end date was April 29, 2020 and his PAGA notice was therefore timely. Additionally, Plaintiff contended that his right to waiting time penalties was triggered on April 29, 2020 based on Defendant's alleged failure to pay him all wages earned during his employment. Further, Plaintiff contended that his PAGA claims were stayed from April 6, 2020 until October 1, 2020 under the Emergency Rule 9. However, Plaintiff faced significant risk if the Court would find that his employment ended on March 4, 2020, the date his last course ended, and he had no standing to bring a PAGA lawsuit. Hammond Decl. ¶ 53.

9. Comparison of PAGA Settlement to Potential Recovery Absent Settlement

Given the risks described above, the \$150,000 PAGA settlement is a very substantial recovery for only 54 individuals employed as part-time instructors and 55 individuals on whose behalf Plaintiff alleged only one claim. If the Court permitted stacking, the risk-adjusted recovery (*i.e.*, the sum of the risk-adjusted numbers above) would be **\$268,785**. Hammond Decl. ¶ 54. However, if the Court did not permit stacking, the risk-adjusted expected recovery is at most **\$95,260** (\$67,925 for the AEs and \$27,335 for the RAEs). *Id.* AEs and RAEs might have been defeated on some or all of their claims, resulting in a recovery of less than the PAGA settlement of \$150,000. *Id.* Theoretically, if the AEs/RAEs prevailed on *every* claim as to *every* pay period of *every* AE/RAEs *and* the Court allowed stacking, *and* the Court did not exercise its discretion to reduce the maximum penalties, then the full exposure in this case is \$363,250, but that outcome is highly unlikely, and Plaintiff's counsel believe it would be unreasonable to continue this litigation in hopes of achieving that outcome. *Id.* The settlement amount compares reasonably to the realistic, risk-adjusted potential recovery if Plaintiff were to proceed with his claims. *Id.*

Courts have repeatedly approved smaller PAGA allocations. *See, e.g., Starks v. Vortex Indus., Inc.*, No. BC590955 (L.A. Super. Ct.) (Oct. 24, 2017 order approving \$35,000 in civil penalties, \$10,000 as service award, and \$630,000 in attorneys' fees and costs, submitted as Ex. 1. to Hammond Decl.), attached as Exhibit 2 to Hammond Decl.; *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (N.D. Cal. 2019), citing, among others, *Ceja-Corona v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (\$10,000 PAGA penalties, \$1.25m settlement); *Davis v. Cox Commc'ns Cal., LLC*, 2017 U.S. Dist. LEXIS 63514, at *3 (S.D. Cal. Apr. 26, 2017) (approving \$4,000 PAGA allocation in \$275,000 settlement).

1 The 25% share of the PAGA penalty paid to employees, allocated 3/4 to the AEs and 1/4 to the
2 RAEs, will average \$275.82 for the AEs, and \$93.64 for the RAEs. Hammond Decl. ¶ 56. This will
3 confer a meaningful benefit on AEs and RAEs and the LWDA. *Id.* The settlement does not release AEs’
Labor Code claims and they will remain free to pursue those claims. *Id.*

4 **B. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

5 Plaintiff has determined that each claim asserted in this case has merit as to some or all AEs and
6 RAEs and is supported by evidence. Hammond Decl. ¶ 58. Defendant has strongly asserted that there are
7 valid defenses to those claims and denied any liability in the action, but has stated that it desired to settle
8 to avoid the expense and business disruption associated with further legal proceedings. *Id.* In addition to
9 the defenses outlined above, Defendant could also point to financial hardship that the COVID-19
pandemic has presented for Defendant’s business. *Id.*

10 Plaintiff recognizes that further litigation poses significant risks and would result in significant
11 additional costs and delay including further discovery, motion practice, and trial preparation. Hammond
12 Decl. ¶ 59. Such litigation would result in significant additional out-of-pocket expenses and attorneys’
13 fees and could delay the final outcome by several years and put AEs and RAEs at a risk of recovering less
14 than the settlement amount, or nothing at all. *Id.* Indeed, within approximately one month of the
15 mediation in this case, the United States Supreme Court granted certiorari in *Viking River Cruises, Inc. v.*
16 *Moriana*, 2020 Cal. App. Unpub. LEXIS 6045 (2020), *cert. granted*, 142 S.Ct. 734 (2021), a case which
17 asks whether the Federal Arbitration Act (“FAA”) requires the enforcement of bilateral arbitration
18 agreements providing that an employee cannot raise representative claims, including PAGA claims. In
19 *Viking River Cruises*, the Supreme Court will decide whether its 2018 decision in *Epic Systems Corp. v.*
20 *Lewis*, 138 S. Ct. 1612 (2018), which upheld the use of class and collective action waivers in employment
21 arbitration agreements, effectively overruled the California Supreme Court’s 2014 decision in *Iskanian*,
22 59 Cal. 4th 348, which held that arbitration agreements waiving the right to bring PAGA representative
23 actions are unenforceable. This case promises to be the most consequential PAGA case in nearly a decade
and could decide whether, as here, Plaintiff, AEs and RAEs who signed arbitration agreement are
preempted from bringing PAGA claims. Hammond Final Decl. ¶ 60.

24 Similarly, a proposed ballot initiative for November 2022 entitled the “Fair Pay and Employer
25 Accountability Act” will take enforcement out of the hands of private “aggrieved” employees and their
26 attorneys by eliminating the recovery of civil penalties through a representative action, and would place
27 greater enforcement responsibilities on the DLSE and by requiring that the state sufficiently fund the
28 DLSE’s mandates and hire more Labor Commissioners. *Id.* at ¶ 61.

These developments dramatically underscore the contingent risks inherent in class and

1 representative action litigation. Instead, this settlement provides an early resolution of the dispute, and
2 AEs will obtain a recovery in the relatively near future if the settlement is approved. *Id.* at ¶ 65.

3 This settlement provides an early resolution of the dispute and ensures that AEs and RAEs obtain
4 a significant recovery on their claims. *Id.*

5 **C. The Extent of Discovery Completed and Stage of Proceedings**

6 As discussed above, the Parties agreed to an informal exchange of documents in aid of mediation.
7 *See* Hammond Decl. ¶¶ 18, 63. Plaintiff's Counsel spent a significant amount analyzing documents and
8 data produced by Defendant, requesting clarification and further data and information after receiving the
9 initial set of documents, and independently investigating Plaintiff's claims by interviewing potential class
10 members, and conducting online research among other things, and negotiating and finalizing this
11 Settlement and related documents. *See Id.* ¶¶ 21-24.

12 **D. Views of Experienced Counsel Support the Settlement's Reasonableness**

13 The Settlement is the result of extensive negotiations conducted at arm's length and informed by
14 substantial factual and legal investigation. *See* Hammond Decl. ¶ 64. Throughout this case, the Parties
15 have been represented by counsel with extensive experience in California wage and hour litigation.
16 Plaintiff's Counsel have represented adjunct instructors in dozens of class and PAGA cases, and were
17 particularly well situated to value this case and assess its risks. *Id.*

18 Plaintiff's Counsel consider the settlement to be fair, reasonable, and adequate. *Id.* ¶ 65. The
19 settlement funds will be paid directly to AEs and to the RAEs based on the number of pay periods worked
20 during the PAGA Period and Reimbursement PAGA Period, respectively. SA at § III.6. There is no
21 requirement to submit a claim, and no funds will revert back to Defendant. The payments to individuals
22 are significant, given that no underlying Labor Code claims are being released, and given the many risks
23 that would have confronted Plaintiff in continuing litigation. Hammond Decl. ¶ 65. The instant result is
24 a good one for the 54 AEs and the 55 RAEs. *Id.*

25 **IV. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

26 **A. Attorneys' Fees**

27 Plaintiff requests that the Court approve an award of attorneys' fees of \$49,500. *See* Hammond
28 Decl. ¶ 66. PAGA states that "[a]ny employee who prevails in an action [under PAGA] shall be entitled
to an award of reasonable attorney's fees and costs." Cal. Lab. Code § 2699(g)(1). It is well established
that courts may award attorneys' fees out of a "common fund." *See Laffitte v. Robert Half Int'l, Inc.*, 1
Cal. 5th 480, 504-05 (2016). Courts apply this approach in PAGA-only cases. *See Starks*, No. BC590955
(L.A. Super. Ct.) (Order Approving PAGA Settlement, Oct. 24, 2017); *see also Gonsales v. Acosta*, No.
17-cv-5767-VC (N.D. Cal.) (Apr. 1, 2019 Order approving PAGA only settlement and awarding fees of

one third of the gross settlement fund). Under *Laffitte*, California courts may award fees using a percentage-of-the-fund method, accompanied by a lodestar-multiplier cross-check. Ultimately, the goal is “the award of a reasonable fee to compensate counsel for their efforts.” *Laffitte*, 1 Cal. 5th at 504 (citing *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557-58 (2009)); see also *Cundiff v. Verizon Cal., Inc.*, 167 Cal. App. 4th 718, 724 (2008).

Here, under the percentage-of-the-fund analysis, the requested fee award of \$49,500 is 33% of the common fund (\$150,000). Hammond Decl. ¶ 67. The requested award is at (and even slightly lower than) the benchmark award of one-third that courts routinely accept, and is well justified under the lodestar-multiplier cross-check discussed below. See, e.g., *Glover v. 20/20 Commc’ns, Inc.*, No. RG14748879 (Super. Ct. Alameda Cty. Nov. 4, 2014) (awarding HammondLaw fees representing 46% of the PAGA settlement); see also *Singer v. Becton Dickinson*, 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. June 1, 2010) (citing cases awarding 40% of common fund in wage and hour class actions); *Cicero v. DirectTV, Inc.*, 2010 U.S. Dist. LEXIS 86920, at *17 (C.D. Cal. July 27, 2010) (“Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in case in which the common fund is relatively small.”). Indeed, in one PAGA-only case in this county, the court approved a settlement in which \$35,000 was paid in civil penalties, \$10,000 was paid as a service award to the representative plaintiff, and \$630,000 was paid in attorneys’ fees and costs. See Hammond Decl. ¶ 67 (citing *Starks* (Order Approving PAGA Settlement, Oct. 24, 2017)).

Here, several factors support awarding fees at slightly below the one-third benchmark. First, Plaintiff’s Counsel undertook significant risk in agreeing to litigate this case and advance costs on a contingency basis. See Hammond Decl. ¶ 68. Other risks on the merits are detailed above, and if the case had been unsuccessful, counsel would have received zero compensation for their work for Plaintiff and AEs and RAEs. Second, awards of common fund fees are important to attract competent counsel to handle complex contingency cases. *Melendres v. City of Los Angeles.*, 45 Cal. App. 3d 267, 273 (1975) (counsel “will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if [they are] assured that [they] will be promptly and directly compensated should [their] efforts be successful.”). Third, accepting this litigation on a contingency basis resulted in Counsel foregoing other employment. See Hammond Decl. ¶ 67; *Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977) (relevant factor is “the extent to which the nature of the litigation precluded other employment by the attorneys”). Because Counsel must maintain appropriate attorney and staff-to-case ratios, taking this case required that Counsel turn away other fee-generating work. See Hammond Decl. ¶ 67.

Plaintiff’s requested fee award of \$49,500 is modest in light of a lodestar multiplier cross-check. In determining the reasonableness of the fee under the lodestar method, the Court begins with the

1 “lodestar,” which is calculated by multiplying the number of hours the party reasonably expended on the
2 litigation by a reasonable hourly rate. *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983). “That
3 figure may then be increased or reduced by the application of a ‘multiplier’ after the trial court has
4 considered other factors concerning the lawsuit.” *Id.* The lodestar method underscores the principle that
5 Plaintiff’s Counsel are entitled to recover fees for all hours reasonably spent working on the case. *Vo v.*
Las Virgenes Mun. Water Dist., 79 Cal. App. 4th 440, 446 (2000).

6 Plaintiff’s Counsel has expended at least 169.2 hours in this litigation to date for a combined
7 lodestar of at least \$111,849.50 – making the requested fee award a negative multiplier of 0.44. Hammond
8 Decl. ¶¶ 68, 71. This lodestar amount is documented by detailed and contemporaneous billing records
9 maintained by Plaintiff’s Counsel.⁶ *Id.* at ¶ 68. Plaintiff’s Counsel’s hourly rates have been previously
10 approved and found reasonable by numerous courts. *See* Hammond Decl. ¶¶ 69-70. The reasonableness
11 of the requested fee award is supported by the fact that Plaintiff’s Counsel are requesting far less than
12 their lodestar to date. Hammond Decl. ¶ 68. Plaintiff thus asks the Court to approve an award of
attorneys’ fees in the amount of \$49,500.

13 **B. The Requested Attorneys’ Costs Are Fair and Reasonable**

14 Plaintiff also request reimbursement for out-of-pocket litigation costs incurred by Plaintiff’s
15 Counsel of \$9,593.19 (including \$233 in anticipated costs in connection with the filing of this Motion).
16 Hammond Decl. ¶ 74. Plaintiff is entitled to recover litigation costs and expenses reasonably incurred in
17 the litigation of this action. *See* Cal. Lab. Code § 2699(g)(1). Plaintiff’s Counsel seek reimbursement for
18 commonly reimbursed costs, including filing fees and process-serving fees, as detailed in counsel’s
declaration. *See* Hammond Decl. ¶ 74.

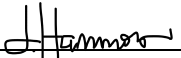
19 **V. CONCLUSION**

20 The Settlement provides substantial relief for the AEs and the RAEs. The \$150,000 GSA
21 represents a strong result considering the risks of further litigation and the fact that AEs and RAEs are
22 releasing only their claims for PAGA penalties and not their claims for the underlying substantive Labor
23 Code violations. Accordingly, Plaintiff respectfully requests that the Court enter the accompanying
24 proposed order approving the Settlement. Counsel will provide PAGA Approval Motion to the LWDA as
required, via its website on the date the motion is served and filed with the Court.

25 _____
26 ⁶ Detailed time records are not required for lodestar calculations. *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 255
27 (2001) (“California case law permits fee awards in the absence of detailed time sheets”). Declarations by counsel as to time
28 spent, even if only estimates are enough. *Id.* at 254-55 (“Here Plaintiffs’ attorneys submitted declarations evidencing the
reasonable hourly rate for their services and establishing the number of hours spent working on the case.”); *see also Dunk v.*
Ford Motor Co., 48 Cal. App. 4th 1794, 1810 (1996) (stating that lodestar calculation could be based on counsel’s estimate of
time spent). “An experienced trial judge is in a position to assess the value of the professional services rendered in his or her
court.” *Wershba*, 91 Cal. App. 4th at 255.

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2 Dated: March 4, 2022

Respectfully submitted,
HAMMONDLAW, P.C.

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4
5 By: 
Julian Hammond

6 *Counsel for Plaintiff, individually and on behalf of all*
7 *other aggrieved employees*
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