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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

CHRIS COPE, individually, on behalf of all
other persons similarly situated, and as a
representative of other aggrieved employees,

Plaintiff,

vs.

SPOTON TRANSACT, INC., a California
corporation, SPOTON TRANSACT LLC, a
California limited liability company; and DOES 1
through 10, inclusive,

Defendants.

CASE NO.: CVRI2200050

**NOTICE OF MOTION AND MOTION TO
APPROVE PAGA SETTLEMENT AND
RELEASE; MEMORANDUM OF POINTS
AN AUTHORITIES IN SUPPORT
THEREOF**

*[Declarations of Stephanie Banks, Dean Ho,
and Jonathan Wilson, M.S. and [Proposed]
Order filed concurrently herewith]*

HEARING DATE

Date: May 20, 2024
Time: 8:30 a.m.
Department: 1

Action Filed: January 5, 2022
Trial Date: None Set

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 20, 2024 at 8:30 a.m., or as soon thereafter as this matter may be heard by the Hon. Harold W. Hopp in Department 1 of Riverside Superior Court, located at the 4050 Main Street, Riverside, CA 92501, Plaintiff Chris Cope (“Plaintiff”) will and hereby does move this Court for an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”).

This motion is based upon this Memorandum of Points and Authorities; the Declarations of Dean Ho, Stephanie Banks, and Jonathan Wilson, M.S. in support thereof; the Private Attorneys’ General Act Settlement Agreement and Release (the “Settlement Agreement” and/or the “Settlement”); the [Proposed] Order granting approval of PAGA Settlement; all other records, pleadings, and papers on file in this action; and upon such other evidence or argument as may be presented to the Court at the hearing of this motion.

Dated: April 26, 2024

OPTIMUM EMPLOYMENT LAWYERS

BY: 

STEPHANIE BANKS, ESQ.
DEAN S. HO, ESQ.
Attorneys for Plaintiff Chris Cope

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.....3

III. THE PAGA AND ITS REQUIREMENTS.....5

IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES.....7

 A. PAGA Members and Terms of the Settlement7

 B. Settlement Allocation to the LWDA and PAGA Members.....8

 C. Settlement Share Payments and the Notice.....9

 D. The Limited Release.....11

 E. Attorneys’ Fees and Costs.....12

V. THE SETTLEMENT IS FAIR, REASONABLE, AND SHOULD BE
APPROVED.....12

 A. Standards for Approval of a PAGA Settlement.....12

 B. The Civil Penalties Are Appropriate Under the Circumstances.....14

VI. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND
REASONABLE.....16

 A. Attorneys’ Fees Are Recoverable Under the Common Fund
Doctrine.....17

 B. A Fee of One-Third of the Gross Settlement Amount is Fair and
Reasonable.....18

VII. THE REQUESTED LITIGATION COSTS ARE FAIR AND
REASONABLE.....21

VIII. SUBMISSION TO THE
LWDA.....21

IX. THE SETTLEMENT
ADMINISTRATOR.....22

X. CONCLUSION.....22

TABLE OF AUTHORITIES

CASES

<i>Arias v. Superior Court</i> , 46 Cal.4 th 969 (2009).....	2, 5, 7, 11
<i>Bank of America v. Cory</i> (1985) 164 Cal.App.3d 66.....	18
<i>Cabrera v. Advantage Sale & Marketing, LLC</i> , Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March 12, 2013).....	16
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4 th 105, 110.....	18
<i>Consumer Advocacy Group v. Kintetsu Enterprises of America</i> (2006) 141 Cal.App.4 th 46, 63.....	22
<i>Fleming v. Covidien Inc.</i> , 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).....	14, 15
<i>Harris v. Marhoefer</i> (9 th Cir. 1994) 24 F.3d 16.....	21
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4 th 116, 130.....	13
<i>Iskanian v. CLS Transp. Los Angeles, LLC</i> (2014) 59 Cal.4 th 348.....	1, 2, 13, 17
<i>Laffitte v. Robert Half Int’l. Inc.</i> (2016) 1 Cal.5 th 480.....	18, 20
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4 th 19.....	18
<i>Penaloza v. PPG Industries Inc.</i> , Case No BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20 2013).....	16
<i>People ex rel. Stratham v. Acacia Research Corp.</i> (2012) 210 Cal.App.4 th 487.....	17
<i>Rider v. County of San Diego</i> (1992) 11 Cal.App.4 th 1410.....	21
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25.....	21
<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> (2012) 203 Cal.App.4 th 1112, 1135.....	14
<i>Villalobos v. Calandri Sunrise Farms LP</i> (C.D. Cal July 2015) 2015 WL 12732709, at *5.....	14
<i>Vizcaino v. Microsoft Corp.</i> (9 th Cir. 2002 290 F.3d 1043.....	18

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This PAGA representative action stems from the alleged failures of Defendant SpotOn
4 Transact LLC (“Defendant”), as set forth herein, on behalf of all aggrieved employees and the
5 State of California for civil penalties under the Labor Code Private Attorneys General Act of 2004,
6 California Labor Code § 2698 *et seq.* (“PAGA”). The PAGA action is a type of qui tam action
7 filed on behalf of the state to assist it with labor law enforcement. *Iskanian v. CLS Transp. Los*
8 *Angeles, LLC* (2014) 59 Cal.4th 348, 380-382. As such, the state is the real party in interest in a
9 PAGA action. *Id.* at 382. The State of California was timely served with a copy of the Settlement
10 Agreement concurrently filed with this instant Motion to Approve the PAGA Settlement. (Banks
11 Decl. ¶ 27.)

13 Plaintiff and all Account Executives, Salespersons, and Outside Salespersons who worked
14 for Defendant in California from May 26, 2020 through the Effective Date¹ (the “PAGA
15 Members”) contend that Defendant, among other things: (1) failed to pay minimum and overtime
16 wages, (2) failed to provide compliant meal/rest periods, (3) failed to issue accurate wage
17 statements, (4) failed to pay all earned wages due to terminated/resigned employees, (5) failed to
18 provide required information upon hire, (6) failed to timely pay wages during employment, (7)
19 failed to reimburse business expenses, (8) failed to provide personnel records, (9) misclassified
20 employees, (10) failed to pay accrued sick/vacation pay, and (11) owes civil penalties under the
21 Private Attorneys General Act (“PAGA”). Plaintiff alleges that Defendant owes PAGA penalties
22 as a result of its alleged violations of various Labor Code sections and Industrial Welfare
23 Commission Wage Order No. 1-2001 (“Wage Order No. 1-2001”). Defendant denies these claims,
24 denies any fault or wrongdoing, and disputes Plaintiff’s characterization of liability, and
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28 ¹ “Effective Date” means the date of approval of the Settlement by the Court.

1 damages/penalties. Thus, the Parties fully dispute the merits of the claims and defenses.

2 Following extensive discussions, as well as negotiations, depositions, and the exchange of
3 formal written discovery, the Parties engaged in a full session of mediation on January 26, 2024
4 with Jeff Owensby serving as the mediator. Mr. Owensby has extensive experience in PAGA
5 actions, such as this one. At the conclusion of the mediation session, and with the mediator's
6 guidance, the Parties reached an informal agreement regarding the major terms of the Settlement.
7 The Parties subsequently memorialized the terms in the long-form Settlement Agreement as set
8 forth in the Private Attorneys' General Act Settlement Agreement and Release ("Settlement
9 Agreement") attached as **Exhibit "A"** to Declaration of Stephanie Banks ("Banks Decl.") filed
10 concurrently herewith.
11

12 Now with a comprehensive Settlement Agreement that resolves the claims alleged in this
13 case, Plaintiff seeks this Court's approval of the \$137,500.00 Gross Settlement Amount involving
14 approximately 538 PAGA Members. The aforementioned Gross Settlement Amount results in an
15 approximate payment to each PAGA Member of approximately \$33.65. This Settlement merits
16 approval because it fulfills the purpose of PAGA (*i.e.*, to deter violations of the Labor Code and
17 secure obedience of California's labor laws; and to provide relief that is genuine, meaningful, and
18 consistent with California's goal of benefitting the public through enforcement of labor laws).
19

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

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

4 **A. Factual Background**

5 Plaintiff was an Account Executive for Defendant. All Aggrieved Employees were
6 classified as either Account Executives, Salespersons, or Outside Salespersons. Among other
7 things, during the relevant time period, Plaintiff alleges that Defendant failed to keep and provide
8 accurate itemized wage statements, failed to reimburse for business expenses, and failed to pay all
9 wages due. (Banks Decl. ¶ 14.) For example, Defendant’s policy and/or practice of not
10 reimbursing employees for expenses, such as fuel resulted in unreimbursed expenses. (Banks Decl.
11 ¶ 15.) Moreover, Plaintiff and aggrieved employees were not consistently paid for time spent
12 during training resulting in underpayment of wages. (Banks Decl. ¶ 16.)
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15 **B. Procedural History**

16 On May 26, 2021, Plaintiff’s counsel sent notice to the California Labor & Workforce
17 Development Agency (“LWDA”) of his intent to pursue a representative action pursuant to
18 PAGA, on behalf of himself and the State of California, as well as on behalf of a group of
19 aggrieved employees (the “PAGA Notice”). (Banks Decl. ¶ 17.) This PAGA Notice is required
20 under Labor Code § 2699.3(a)(1)(A) as a prerequisite to bringing a PAGA representative claim
21 against an employer. The LWDA did not respond to this notice, thus allowing Plaintiff to file the
22 instant lawsuit. Labor Code § 2699.3(a)(2)(A). (Banks Decl. ¶ 18.)
23

24 On January 5, 2021, Plaintiff filed his Complaint in the action entitled *Chris Cope,*
25 *individually, on behalf of all other persons similarly situated, and as a representative of other*
26 *aggrieved employees, vs. SpotOn Transact, Inc. a California Corporation, SpotOn Transact, LLC,*
27 *a California limited liability company, and Does 1 through 10, Riverside County Superior Court,*
28

1 Case No. CVRI2200050 (the "Lawsuit"). (Banks Decl. ¶ 19.) Plaintiff's Complaint raised the
2 following claims against Defendant: (1) Failure to Keep and Provide Accurate Itemized Wage
3 Statements (Labor Code§ 226); (2) Failure to Reimburse Business Expenses (Labor Code §§ 2800
4 and 2802); (3) Failure to Provide Personnel Records (Labor Code§ 1198.5); (4) Private Attorneys
5 General Act ("PAGA") (Labor Code§§ 2698 et seq.); and (5) Unfair Business Practices (Business
6 & Professions Code §§ 17200 et seq. (*Id.*)

8 Although Defendant denies the allegations and vowed to vigorously defend against them,
9 the Parties agreed to attend mediation. (Banks Decl. ¶ 20.) Prior to the mediation, the parties took
10 key depositions and exchanged documents and information pertaining to the aggrieved employees.
11 (*Id.*) The same allowed both sides to evaluate the potential exposure and potential risk, such as a
12 discussion of time and payroll records for the PAGA Members, a review of Defendant's employee
13 handbook and relevant policies, along with timekeeping, pay, and reimbursement procedures,
14 wage statements, and the total number of potential employees and/or workweeks during the PAGA
15 period. (Banks Decl. ¶ 21.) During this process, Plaintiff's counsel analyzed, researched, and
16 investigated the potential issues, including matters related to the calculation of damages, trial
17 management, and appellate issues and risks. (Banks Decl. ¶ 22.)

19 On January 26, 2024, the Parties attended mediation with Jeff Owensby an experienced
20 mediator. (Banks Decl. ¶ 23.) During that mediation, the Parties exchanged further information
21 and discussed all aspects of the case, including the risks and delays of litigation, the risk
22 associated with proceeding in a representative capacity, liability under the claims asserted, and the
23 ability to recover and measure damages and/or penalties. (*Id.*)

25 The settlement negotiations were at all times at arm's length and although conducted in a
26 professional manner, were adversarial. (*Id.*) With guidance from the mediator, the Parties reached
27 agreement regarding the major terms of the settlement and subsequently finalized those terms in a
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1 long-form Settlement Agreement.² (Banks Decl. ¶ 24.) This Settlement was the culmination of
2 protracted discussions between the Parties following a thorough analysis of the pertinent facts and
3 law at issue. The Parties now present the Settlement Agreement to this Court for approval. (Banks
4 Decl. ¶ 25.)

5 On or about February 26, 2024, and in connection with the Settlement Agreement reached
6 by the Parties, Plaintiff amended his PAGA Notice to the LWDA to raise all claims and theories
7 upon which Plaintiff could have sought civil penalties under PAGA in his complaint. (Banks Decl.
8 ¶ 26.) Thereafter, the Parties filed a stipulation to allow Plaintiff to file a First Amended Complaint
9 after the expiration of the 65-day waiting period so as to allow Plaintiff to raise all applicable
10 claims and theories upon which such allegations, based upon factual contentions gave rise to civil
11 penalties under PAGA. (*Id.*) The 65-day waiting period expires on May 5, 2024. Plaintiff will file
12 his FAC accordingly. (*Id.*)

13 **III. PAGA AND ITS REQUIREMENTS**

14 PAGA provides an enforcement mechanism for California’s labor laws by enlisting
15 individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share
16 also going to the aggrieved employees. Due to the lack of financing for California’s agencies, and
17 the substantial number of Labor Code violations by California employers, the California
18 Legislature found that it was in the public interest to allow aggrieved employees to act as “private
19 attorneys general” to enforce and recover civil penalties on behalf of the State of California for
20 Labor Code violations committed by employers. *Arias, supra*, 46 Cal.4th at 980. As the
21 Legislature that adopted PAGA observed, “the only meaningful deterrent to unlawful conduct is
22 the vigorous assessment and collection of civil penalties as provided in the Labor Code.” Stats.
23 2003 ch. 906, § 1(b).

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28 ² The Parties have also agreed to enter into a separate settlement and release agreement with respect to Plaintiff’s individual claims. (Settlement Agreement § I(F)).

1 Moreover, the Labor Code’s primary purpose is to “ensure employees are not required or
2 permitted to work under substandard unlawful conditions ... and to protect employers who comply
3 with the law from those who attempt to gain a competitive advantage at the expense of their
4 workers by failing to comply with minimum labor standards.” Labor Code § 90.5(a). Therefore,
5 the Legislature determined that “adequate financing of labor law enforcement was necessary to
6 achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement
7 agencies had declined and were unlikely to keep pace with the future growth of the labor market,
8 and that it was therefore in the public interest to allow aggrieved employees, acting as private
9 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
10 labor law enforcement agencies were to retain primacy over private enforcement efforts.” Thus,
11 Plaintiff, acting as a private attorney general and proxy for the State of California, filed this action
12 seeking civil penalties for Defendant’s alleged violations of the Labor Code.
13
14

15 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor
16 and Workforce Development Agency for enforcement of labor laws and education of employers
17 and employees about their rights and responsibilities under this code ...; and 25 percent to the
18 aggrieved employees.” Lab. Code § 2699(i).
19

20 Before filing a PAGA action, an aggrieved employee must first provide written notice to
21 the LWDA and the employer of the particular Labor Code violations the aggrieved employee
22 alleges the employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA
23 with the opportunity to investigate and prosecute the claim. The employee may only sue on the
24 state’s behalf if the LWDA fails to respond to the notice within 65 days, responds that it does not
25 intend to investigate, or investigates and does not issue a citation within 185 days. Labor Code §§
26 2699.3(a)(2), 2699(h).
27

28 In this case, Plaintiff provided the LWDA with the PAGA Notice advising it of the alleged

1 Labor Code violations, but the LWDA deferred the prosecution of these violations to Plaintiff and
2 his attorneys. Thereafter, Plaintiff amended his PAGA Notice advising it of the additional alleged
3 Labor Code violations. Again, and as of the date of filing the present Motion, the LWDA had not
4 indicated its intention to prosecute these violations to Plaintiff and/or his attorneys. Accordingly,
5 the Settlement and the \$137,500.00 Gross Settlement Amount created by it for the benefit of the
6 State and PAGA Members, is solely the result of the work performed by Plaintiff and his attorneys
7 on this case – all while the PAGA Members will preserve their own separate individual claims
8 should they wish to pursue them.

10 Any settlement of a PAGA action brought by an aggrieved employee must be approved by
11 the court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA
12 approval process and, more specifically, whether an aggrieved employee needs to meet class
13 certification requirements. *Arias, supra*, 46 Cal.4th at 976. After a substantial review of the
14 legislative history of PAGA, the Court held that an aggrieved employee's representative action
15 brought on behalf of the state and other aggrieved employees against an employer for PAGA
16 violations **does not** need to meet the requirements for class certification nor does there need to be
17 notice to the other employees. *Id.* at 975, 980-88. As the Court held, a plaintiff bringing suit under
18 PAGA does so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986.
19 Thus, the Court reviews any proposed settlement and approves it if it is deemed to be fair and
20 reasonable.
21

22
23 Accordingly, the Parties to this current PAGA action have reached such an agreement and
24 now seek this Court's approval of the Settlement.

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

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

27 **A. PAGA Members and Terms of the Settlement**

28

1 PAGA Representative Group or PAGA Members are defined as “all Account Executives,
2 Salespersons, and Outside Salespersons who worked for Defendant in California from May 26,
3 2020 through the Effective Date.” (Settlement Agreement § II(P)). The number of PAGA
4 Members, including Plaintiff, is estimated to be 538 individuals. (Banks Decl. ¶ 13.)

5 The Settlement provides that Defendant will pay a ***Gross Settlement Amount One***
6 ***Hundred Thirty-Seven Thousand Five Hundred Dollars (\$137,500.00)*** (the “Gross Settlement
7 Amount”), inclusive of payments to the LWDA and PAGA Members, payment of Plaintiff’s
8 Incentive Award, attorneys’ fees and litigation costs,³ and third-party settlement administrator
9 costs.⁴ (Settlement Agreement §§ III(C)-(F)) After payment of the PAGA Counsel’s Fees, PAGA
10 Counsel’s Costs, Plaintiff’s Incentive Award and Administration Costs, approximately \$71,189.67
11 remains (the “Net Settlement Amount”).
12

13 **B. Settlement Allocation to the LWDA and PAGA Members**
14

15 Pursuant to the Settlement Agreement, the Net Settlement Amount in the amount of
16 approximately \$71,189.67 shall be designated as PAGA Penalties to be allocated between the
17 LWDA and the PAGA Members pursuant to Labor Code section 2699(i) with 75% paid to the
18 LWDA (the “LWDA PAGA Portion”) and 25% paid to the PAGA Members (the “PAGA
19 Representative Group Penalty Payment”).
20

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

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26 ³ Plaintiff’s Counsel will seek a standard fee of one-third (\$45,833.33) of the Gross Settlement Amount, and
27 reimbursement of actual litigation costs in the amount of \$7,748.34.

28 ⁴ The Parties have selected Simpluris as the Settlement Administrator, and its estimated costs of \$6,500 will be
deducted from the Gross Settlement Amount. (Settlement Agreement § III(E).)

	Total Amount
<i>Settlement Amount</i>	\$137,500.00
PAGA Counsel's Fees (1/3)	\$45,833.33
PAGA Counsel's Costs (<i>not to exceed</i> \$10,000)	\$7,748.34
Plaintiff's Incentive Award	\$5,000.00
Administration Costs	\$6,500.00
<i>The Net Settlement Amount (PAGA Penalties)</i>	\$72,418.33
• 75% to the LWDA • 25% to the PAGA Members	\$54,313.75 \$18,104.58

Based on these distributions, the LWDA PAGA Portion will be approximately \$54,313.75 (75 percent of the PAGA Penalties) and the amount paid to PAGA Members for civil penalties under PAGA is estimated to be \$18,104.58 (25 percent). (Banks Decl. ¶ 28.) The portion of the Net Settlement Amount to be paid to PAGA Members will be divided evenly by the total number of PAGA Members who were employed by Defendant during the PAGA Period. (Settlement Agreement § III(F)). Such a distribution will result in an approximate payment of \$33.65 to each of the 538 PAGA Members. (Banks Decl. ¶ 29.)

C. Settlement Share Payments and the Notice

As noted, twenty-five percent (25%) of the PAGA Penalties will be allocated to the PAGA Members. (Settlement Agreement § III(F)). Based on the numbers provided by Defendant, approximately 538 current and former PAGA Members will share in the PAGA Representative Group Penalty Payment. The Settlement Agreement provides a very fair and equitable means of allocating this fund. Each PAGA Member shall receive the same portion of the PAGA Representative Group Penalty Payment. This was believed to be the best formula in light of the fact that data supplied by Defendant and reviewed by Plaintiff's counsel evidenced that a majority of the alleged violations occurred during only one pay period. (Settlement Agreement § III(F)). All individual settlement payments made to PAGA Members will be reported on an IRS Form

1 1099. (Settlement Agreement § III(F)).

2 The Settlement is non-reversionary and does not require PAGA Members to submit a
3 claim form to reap financial benefit from the Settlement. Within 15 calendar days after the
4 Effective Date, Defendant shall deposit with the Settlement Administrator, into an interest-bearing
5 account, the Gross Settlement Amount and shall also provide the Settlement Administrator with
6 the PAGA Representative Group Member Data. (Settlement Agreement §§ III(J) and III(K)2)).
7 The PAGA Representative Group Member Data shall contain the: (1) full legal name; (2) social
8 security number; (3) last known address; and (4) telephone number and/or e-mail address, if
9 available. (Settlement Agreement § III(K)2)). Promptly upon receipt of the PAGA Representative
10 Group Member Data, the Settlement Administrator shall obtain updated forwarding addresses
11 from the United States Postal Service. (*Id.*)
12

13 Further, within 15 business days after the funding of the Gross Settlement Amount, the
14 Settlement Administrator shall remit a total of Seventy-Five percent (75%) of the Net Settlement
15 Amount to the California Labor & Workforce Development Agency in satisfaction of all PAGA
16 Claims in the Lawsuit (“LWDA PAGA Portion”); and also remit a total of Twenty-Five percent
17 (25%) of the Net Settlement Amount (i.e. the PAGA Representative Group Penalty Payment), as
18 penalty payments to the PAGA Members along with the PAGA Payment Letter - attached to the
19 Settlement Agreement as internal exhibit “A.” With respect to each PAGA Payment Letter and
20 PAGA Representative Group Penalty Payment which is returned as undeliverable, the Settlement
21 Administrator shall within ten (10) days attempt to determine a correct address by conducting a
22 skip-trace to locate the PAGA Members and shall re-send the PAGA Payment Letter with the
23 PAGA Representative Group Penalty Payment via first-class mail to any new address thereby
24 determined. (Settlement Agreement § III(K)(4).) Checks not negotiated within one hundred and
25 eighty (180) calendar days from their issue are void, but the Settlement Agreement and the release
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1 herein will nonetheless be binding as if they had cashed the checks. Any unclaimed funds in the
2 Settlement Administrator's account as a result of the failure to timely cash PAGA Representative
3 Group Penalty Payment checks, plus any interest that has accrued thereon, will be distributed to
4 the California State Controller's Unclaimed Property Fund in the name of the PAGA Member.

5 (*Id.*)

6
7 Finally, within (15) business days after the funding of the Gross Settlement Amount, the
8 Settlement Administrator shall distribute the PAGA Representative Group Counsel's attorney's
9 fees and litigation costs and administration costs. (Settlement Agreement § III(K)(5-7.)

10 **D. The Limited Release**

11 Importantly, the California Supreme Court has explained that other employees are bound
12 by a PAGA adjudication only with respect to civil penalties, just as they would be "bound by a
13 judgment in an action brought by the government." *Arias, supra*, 46 Cal.4th at 986. In accordance
14 with this rule, the release of the PAGA Members herein is narrowly tailored to include, release
15 from liability for claims seeking *civil penalties* under California Labor Code Section 2698 *et seq.*
16 predicated on the alleged California Labor Code and Wage Order No. 1-2001 violations asserted
17 in the operative Complaint. Specifically, the release states as follows:

18
19 Upon the payment of the Gross Settlement Amount to the Settlement Administrator
20 by Defendant, PAGA Members will fully release and discharge Defendant and
21 other Released Parties from any and all claims for civil penalties under PAGA that
22 were or could have been recovered based on the facts alleged in the Action from
23 May 26, 2020 through the Effective Date (collectively, "Released Claims"). The
24 Released Claims include all claims for civil penalties under PAGA for all
25 California Labor Code violations, including but not limited to : (1) Failure to pay
26 all minimum wages (Labor Code § § 1194, 1197, 1197 .1, 1198, and 1199); (2)
27 Failure to pay all overtime wages (Labor Code§§ 510, 558, 1194 and 1198; § 3 of
28 the Wage Orders); (4) Failure to provide compliant meal periods (Labor Code§§
226.7, 512 and 1198; § 11 of the Wage Orders); (5) Failure to authorize and permit
compliant rest periods (Labor Code§§ 226.7 and 1198; § 12 of the Wage Orders);
(6) Failure to provide at least one day's rest in seven (Labor Code§ 551); (7) Failure
to issue accurate and complete itemized wage statements and hours statements
(Labor Code§ 226 and 1174); (8) Failure to maintain complete and accurate payroll
records (Labor Code§ 1174; § 7 of the Wage Orders); (9) Failure to provide

1 required information upon hire (Labor Code § 2810.5); (10) Failure to timely pay
2 wages during employment (Labor Code §§ 204 and 210); (11) Failure to pay final
3 wages (Labor Code §§ 201-203); (12) Failure to reimburse business expenses
4 (Labor Code §§ 2800, 2802 and 2804); (13) Failure to pay accrued sick pay (Labor
5 Code § 246); (14) Failure to pay accrued vacation pay (Labor Code § 227.3); (15)
6 Requirement that employee agree in writing to multiple terms and conditions
7 prohibited by law as a condition of employment (Labor Code § 432.5); (16) Failure
8 to provide suitable seating (§ 14 of the Wage Orders); (17) Failure to provide
9 personnel records (Labor Code §§ 226, 432 and 1198.5); (18) Failure to pay wages
as required by statute or contract (Labor Code § 223); (19) Failure to keep and
provide accurate records (Labor Code § 226, 1174); (20) Willful misclassification
(Lab. Code § 226.8); Failure to Provide Commission Agreements (Labor Code §
2751) and (21) all claims for attorneys' fees and expenses and interest. The
Released Claims do not include any claims that cannot be released as a matter of
law. (Settlement Agreement III(G).)

10 **E. Attorneys' Fees and Costs**

11 Plaintiff's Counsel requests one-third of the Gross Settlement Amount, or \$45,833.33, in
12 attorneys' fees, and up to \$7,748.34 in reimbursement of actual litigation costs. (Settlement
13 Agreement § III(C).) Further discussion and support for the requested awards is set forth in
14 Sections VI and VII, *infra*, and the accompanying Banks Decl. ¶¶ 45-63 and Declaration of Dean
15 S. Ho ("Ho Decl.") ¶ 22-29 filed concurrently herewith.

17 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND SHOULD BE APPROVED**

18 In 2016, PAGA was amended to require the Court to "review and approve any settlement
19 of any civil action filed pursuant to this part." Labor Code § 2699(l)(2). The amendment also
20 requires that the "proposed settlement shall be submitted to the agency at the same time that it is
21 submitted to the court." As such, on the day of filing of this Motion, the Settlement (and this
22 Motion) are also being concurrently submitted to the LWDA in accordance with this section.
23 (Banks Decl. ¶ 43.)

25 **A. Standards for Approval of a PAGA Settlement**

26 The legislative history of PAGA makes little mention of the approval requirements in §
27 2699, subdivision (l). PAGA was passed by the legislature as Senate Bill ("SB") 796, and it was
28

1 signed by the Governor and filed with the Secretary of State on October 12, 2003. *See*, Legislative
2 Digest re Senate Bill No. 796. It took effect on January 1, 2004.

3 The original version of the act did not contain the court approval requirement now codified
4 in § 2699(l). That subdivision was added as part of the amendments to the Act that were
5 introduced as SB 1809 in February 2004 and signed by the Governor on August 11, 2004. *See*,
6 Legislative Digest re Senate Bill No. 1809. Those amendments took effect immediately, and the
7 Court approval requirement of § 2699(l) was one of the provisions that the legislature made
8 retroactive to January 1, 2004. *Id.*

10 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the
11 amendments (SB 1809). On July 29, 2004, during the consideration of the amendments in SB
12 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was
13 published in the Senate Daily Journal, “to clarify the extent of subdivision (l)” of what is now
14 section 2699. He was sending this letter “in response to an issue raised by the Judicial Council of
15 California.” *Id.* In the letter, Senator Dunn stated,

17 The purpose of court review of the penalties in subdivision (l) is to ensure that
18 settlements involving penalties arising out of Labor Code Section 2699 do not
19 undercut the dual statutory purposes of punishment or deterrence, or result in
unjust, arbitrary, and oppressive, or confiscatory settlements. *Id.*

20 The broad criteria appear to give the Court wide latitude in determining whether to approve the
21 penalties proposes as part of a PAGA settlement. Interestingly, the criteria focus on the effect the
22 penalties may have on the defendant-employer rather than the LWDA or the aggrieved employees
23 who will receive the penalties. *See, Iskanian, supra*, 59 Cal.4th at 313 (stating that while the State
24 clearly has an interest “in receiving the proceeds of civil penalties,” the penalties are “used to deter
25 violations.”) This is different than the analysis of a class action settlement, which typically focuses
26 on the amount received by the class and compares that to the reasonable range of potential
27 outcomes in this case. *C.f., e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
28

1 130. Moreover, “there is not requirement that the Court certify a PAGA claim for representative
2 treatment” as in a class action. *Villalobos v. Calandri Sunrise Farms LP* (C.D. Cal. July 2015)
3 2015 WL 12732709, at *5.

4 **B. The Civil Penalties are Appropriate Under the Circumstances**

5 Here, the penalties are appropriate when considered in light of the principles discussed in
6 Senator Dunn’s letter. Plaintiff contends that a *non-reversionary* Gross Settlement Amount of
7 \$137,500.00 represents an excellent recovery that is large enough to punish or deter Defendant.
8 The proposed Settlement provides a fair and reasonable monetary recovery for the LWDA and
9 PAGA Members in the face of hotly-disputed claims. (Banks Decl. ¶ 30.)

11 **First**, although PAGA and its legislative history do not seem to require a comparison with
12 the “maximum value” of the claims to the actual settlement amount, the penalties are reasonable
13 when considered in this context as well. The number of PAGA Members in the PAGA covered
14 period is estimated to be 538. (Banks Decl. ¶ 31.) While Plaintiff believes the claims are
15 meritorious and that he would have recovered unreduced penalties, Defendant asserts numerous
16 defenses to the claims. For example, a significant factor in evaluating the value of a PAGA-only
17 case is that all PAGA awards are discretionary and subject to potentially significant reduction by
18 the Court. Defendant maintains that given its good faith and *de minimis* defenses, this Court would
19 exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant
20 liable for any of Plaintiff’s claims. (Banks Decl. ¶ 32.) *See also*, Labor Code §§ 203, 2699(e)(2);
21 *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction
22 of PAGA penalties); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL
23 7563047, at *4 (reducing PAGA penalties from \$2.8 million to \$500,000). Plaintiff took this into
24 consideration in calculating penalties. (Banks Decl. ¶ 34.) Finally, many of the claims were
25 derivative of each other, which tended to undermine any stacking of penalties. In light of the
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1 foregoing, Plaintiff's Counsel took into consideration, when valuing the merits of these claims, the
2 chances of prevailing on the derivative violations, as well as the additional hurdles of prevailing
3 under each standalone violation in light of the defenses raised, and applied the appropriate
4 discounts. (Banks Decl. ¶ 35.)

5
6 Based on the data provided by Defendant and the analysis of their retained expert, the
7 proposed maximum exposure for the PAGA claims for PAGA Members was believed to be under
8 \$200,000.00. (Banks Decl. ¶ 36.) A vast majority of the alleged violations are believed to have
9 occurred during the first pay period worked by each PAGA Individual in connection with a
10 training session put on by Defendant. More specifically, Plaintiff alleges that many of these
11 individuals were not compensated for all time worked during training. (*Id.*) Courts can, and often
12 do, exercise their discretion to reduce the amount of PAGA penalties. *See, e.g., Fleming v.*
13 *Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011). Accordingly, the proposed
14 Settlement provides a good result for the PAGA Members. Thus, the PAGA settlement amount is
15 reasonable in light of significant risks and uncertainties associated with the PAGA claims in this
16 case.
17

18 Defendant vigorously disputed the merits of Plaintiff's claims. Specifically, Defendant
19 argued that Plaintiff's claims were false. (Banks Decl. ¶ 38.) Defendant further argued that it was
20 prepared to call current employees to testify as witnesses at trial. (Banks Decl. ¶ 39.)
21

22 **Second**, the scope of the release of the PAGA Settlement is necessarily strictly confined to
23 those PAGA civil penalties that were or could have been alleged in the operative Complaint. The
24 PAGA Released Claims do not release any PAGA Members' non-PAGA claims for alleged
25 violations of the Labor Code. Individual PAGA Members who believe they have been denied
26 other rights, can maintain those rights to pursue those claims in another proceeding. In that
27 respect, the settlement also requires that each PAGA Member receive a notice, *i.e.*, the PAGA
28

1 Notice, which describes this litigation and the settlement sum. Plaintiff contends that this notice
2 will educate PAGA Members as to the requirements of the Labor Code, something that is in the
3 public interest and consistent with PAGA's purposes. *See*, Labor Code § 2699(j) (stating that civil
4 penalties recovered under PAGA shall be distributed to the LWDA for [among other things]
5 "education of employers and employees about their rights and responsibilities under this code.")
6 (Banks Decl. ¶ 40.)

8 **Third**, the proposed Settlement, even with deductions, provides a substantial sum of
9 \$54,313.75 to the State and \$18,104.58 to PAGA Members. The Settlement secured by Plaintiff
10 here is in line, and actually greater than some other PAGA penalty awards approved by California
11 state courts, which often range between \$7,500.00 and \$15,000.00 for PAGA claims impacting
12 hundreds or thousands of individuals, resulting in much lower PAGA penalty payments on a per
13 capita basis. *See, e.g., Penaloza v. PPG Industries Inc.*, Case No. BC471369, 2013 WL 2917624
14 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving PAGA penalties of \$5,000.00 to class of
15 667 members); *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013 WL
16 1182822 (Super. Ct. L.A. County, March 12, 2013) (approving PAGA penalties of \$10,000.00 for
17 class of approximately 3,000 members). (Banks Decl. ¶ 41.)

19 **Fourth**, public policy strongly favors the settlement of litigation. *Consumer Advocacy*
20 *Group v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 63. Because the proposed
21 Settlement is neither unjust nor ignores the public interest, it should be approved. (Banks Decl. ¶
22 42.)

24 **VI. THE ATTORNEYS' FEES REQUEST IS FAIR AND REASONABLE**

25 For their efforts and the risk that they undertook in obtaining a common fund settlement
26 that benefits the LWDA and PAGA Members, the Parties allocated one-third of the Gross
27 Settlement Amount, (\$45,833.33), to Plaintiff's Counsel for reasonable attorneys' fees.
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1 (Settlement Agreement ¶ 3(C).) These fees are warranted under the law and within the range of
2 fees commonly awarded in similar cases.

3 **A. Attorneys' Fees Are Recoverable under the Common Fund Doctrine**

4 PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses,
5 and costs under section 2699(g)(1) of the California Labor Code, which states that, "Any
6 employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and
7 costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision
8 (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. As discussed
9 below, in a qui tam action, reasonable attorneys' fees and costs are typically awarded under the
10 common fund doctrine where, as here, the litigation creates a common fund of money in a specific
11 amount for the benefit of others.
12

13 "A qui tam action is one brought under a statute that allows a private person to sue as a
14 private attorney general to recover damages or penalties, all or part of which will be paid to the
15 government." *People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-
16 492. "A qui tam action 'is a type of private attorney general lawsuit' [citation], in which 'the qui
17 tam plaintiff stands in the shoes of the state or political subdivision [citation].'" *Id.* at p. 501. As
18 the name of the PAGA statute makes clear (e.g. "Labor Code Private Attorney General Act"), a
19 PAGA action is a qui tam action because the statute allows the employee plaintiff, acting as the
20 proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code
21 violations and recover civil penalties that otherwise would have been assessed and collected by the
22 Labor and Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC*
23 (2014) 59 Cal.4th 348, 380. "A PAGA representative action is therefore a type of *qui tam* action."
24 *Id.* at p. 382. Here, where a common fund is created in a qui tam action by the successful litigation
25 of a plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the
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1 common fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. (Banks Decl. ¶ 46.)

2 Moreover, a more generic application of the common fund doctrine is found “consistently
3 in California when an action brought by one party creates a fund in which other persons are
4 entitled to share.” *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110. An
5 award of fees from the gross settlement amount under the common fund doctrine prevents unjust
6 enrichment of those who benefit from the common fund through the successful efforts of
7 plaintiff’s counsel and furthers the important goal of attracting competent counsel to handle
8 representative actions enforcing minimum labor standards. *Laffitte v. Robert Half Int’l, Inc.* (2016)
9 1 Cal.5th 480, 503. (Banks Decl. ¶ 46.) In affirming the use of the common fund doctrine in
10 California, the California Supreme Court summarized the benefits of the percentage method of
11 recovery stating:
12

13 The recognized advantages of the percentage method – including relative ease of
14 calculation, alignment of incentives between counsel and the class, a better
15 approximation of market conditions in a contingency case, and the encouragement
16 it provides counsel to see an early settlement and avoid unnecessarily prolonging
17 the litigation [citations] – convince us the percentage method is a valuable tool that
18 should not be denied our trial courts. *Id.*

19 *See also, Lealao v. Beneficial Cal. Ins.* (2000) 82 Cal.App.4th 19, 48 (observing that the key
20 advantage of the common-fund method is that it focuses on the total benefit conferred on the
21 beneficiaries resulting from the efforts of counsel). Thus, the common fund approach is the most
22 reasonable one here given the nature of the case and of the Parties’ settlement.

23 **B. A Fee of One-Third the Gross Settlement Amount is Fair and Reasonable**

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

1 support an award here of one-third of the common fund.

2 First, the efforts of Plaintiff's Counsel resulted in a common fund Settlement amount of
3 \$137,500.00. This is a good PAGA settlement considering the contested issues. (Banks Decl. ¶
4 48.)

5 Second, Plaintiff faced significant risks going forward with the litigation. As discussed,
6 Defendant raised various defenses, such that Plaintiff faced risky issues going forward with this
7 litigation, as well as the fact that it would have taken significant time to realize any recovery in this
8 action along with the possibility of post-trial appeals. (Banks Decl. ¶ 49.)

9 Third, Plaintiff's Counsel are experienced representative and class action litigators, and
10 have previously achieved significant PAGA and class action awards. This experience and
11 expertise, combined with the high quality of work performed in this case by Plaintiff's Counsel,
12 resulted in the Settlement achieved. (Banks Decl. ¶ 50); (Ho Decl. ¶ 24.)

13 Fourth, Plaintiff's Counsel represented Plaintiff (and the State of California) in this matter
14 on a strictly contingency basis and, as such, had to forego other financial opportunities to litigate
15 other cases (contingency and hourly), incurred the risk of non-recovery after investment of time,
16 money, and resources, and have done so since the inception of this case without payment or
17 compensation. This is not an easy burden for Plaintiff's Counsel and, if the best that could be
18 hoped for is merely to be paid the customary hourly rate, such would not be sufficiently incentivize
19 future similar private attorney general/qui tam cases with contingency risks. (Banks Decl. ¶ 51)

20 Fifth, the request for attorney's fees in the amount of one-third of the common fund falls
21 well within the norms accepted by state and federal courts in California in comparable
22 representative actions. (Banks Decl. ¶ 52) The following list shows PAGA actions and mixes
23 PAGA/class action cases where attorney's fees were awarded on a common fund basis in a range
24 between 33.33% and 40%:
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1 *Banda v. Verizon California, Inc.*, Los Angeles Superior Court Case No. BC434587 (**35%**
2 **fee awarded** on \$15,000,000 settlement of mixed PAGA/class claims);

3 *Robles v. DCH*, Los Angeles County Superior Court Coordination Proceeding Case No.
4 4833 (**33.33% fee awarded** on \$4,035,600 settlement of mixed PAGA/class claims);

5 *Padilla v. Staffmark Investment, Inc.*, San Bernardino County Superior Court Case No.
6 CIVDS1408641 (**33.33% fee awarded** on \$2,000,000 settlement of a **PAGA only case**);

7 *Bengel v. Career Strategies Temporary, Inc.*, Los Angeles County Superior Court Case
8 No. BC 565227 (**33.33% fee awarded** on \$750,000 settlement of PAGA/class claims);

9 *Birch v. Office Depot*, United States District Court for the Southern District of California,
10 Case No. 06cv1690 DMS (**40% fee awarded** on \$16,000,000 settlement of mixed PAGA/class
11 claims);

12 *Brewer v. Connell Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123-
13 CU-OC-CXC (**33.33% fee awarded** on a **PAGA only case**);

14 *Garcia v. The Pep Boys*, Orange County Superior Court Case No. 30-20014-007205740-
15 CU-OE-CJC (**33.33% fee awarded** on \$1,030,000 settlement of a **PAGA only case**);

16 *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court Case No.
17 MCC1401137 (**33.33% fee awarded** on a \$650,000 settlement of a **PAGA only case**).

18 Moreover, the award of a one-third fee recovery under the common fund doctrine was recently
19 approved by the California Supreme Court in *Laffitte, supra*, 1 Cal.5th 480, 503. For all of the
20 above reasons, a common fund fee award here in the amount of one-third of the \$90,000.00
21 common fund created by Plaintiff and her attorneys is fair and reasonable.

22 Sixth, PAGA Counsel have also provided the hourly rate and hours expended information
23 requested by the Court in their concurrently filed declarations. (Banks Decl., Exh. D); (Ho Decl.,
24 Exh. A). Specifically, Class Counsel's lodestar to date totals \$78,010.00 broken down as follows:

Total Aggregated Lodestar of Class Counsel				
<i>Timekeeper</i>	<i>Yrs Experience</i>	<i>Hours</i>	<i>Hourly Rate</i>	<i>Lodestar</i>
Stephanie M. Banks, Esq.	8	85.6	\$450.00	\$38,520.00
Dean S. Ho, Esq.	9	71.8	\$550.00	\$39,490.00
TOTAL		157.4		\$78,010.00

Notwithstanding the aforementioned lodestar of Class Counsel, Class Counsel only seeks fees in the amount of 1/3 of the Gross Settlement Amount.

VII. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE

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

The Settlement Agreement authorized Plaintiff's Counsel to recover litigation costs not to exceed \$7,748.34. The specific costs incurred by Optimum Employment Lawyers are set forth in the accompanying Ho Decl. (Ho Decl. ¶ 30, Exh. B.) To date, the total litigation costs for Plaintiff's Counsel is **\$7,748.34**. Accordingly, Plaintiff's Counsel seeks this amount in litigation cost reimbursement.⁵

⁵ At the time of the mediation, and thereafter in connection with the execution of the settlement agreement, the costs were believed to be \$8,977.00. After further review of the case file, the costs were determined to be \$7,748.34.

1 **VIII. SUBMISSION TO THE LWDA**

2 As set forth in the Banks Decl. at ¶ 43, the Settlement and this Motion are concurrently
3 being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of
4 electronic submission is attached as **Exhibit B** to the Banks Decl.

5 **IX. THE SETTLEMENT ADMINISTRATOR**

6 The Parties have agreed to use Simpluris as the Settlement Administrator. The Settlement
7 Administrator will be responsible for processing the settlement payments and providing notice to
8 the PAGA Members. A true and correct copy of the Banks cost-estimate bid for settlement
9 administration is attached at **Exhibit C** to the Banks Decl. The Parties sought bids from multiple
10 administrators, and Simpluris was the least expensive bid. (Banks Decl. ¶ 33)

11 **X. CONCLUSION**

12 For the foregoing reasons, Plaintiff requests the Court approve the PAGA Settlement.

13 Dated: April 26, 2024

14 OPTIMUM EMPLOYMENT LAWYERS

15
16
17
18 BY: 

19 STEPHANIE BANKS, ESQ.

20 DEAN H. HO, ESQ

21 *Attorneys for Plaintiff Chris Cope*