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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

NANCY MARES, individually, and on behalf)
of all other aggrieved employees,)

Plaintiff,)

vs.)

COMMUNITY INTEGRATED WORK)
PROGRAM, INC., a California corporation)
and DOES 1-20, inclusive,)

Defendants,)

Case No.: RG21111310

**SUPPLEMENTAL BRIEFING IN
SUPPORT OF MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

**[Filed concurrently with the Declaration of
Daniel J. Bass in Support Thereof]**

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Pursuant to the Court’s July 21, 2022 Order, Plaintiff NANCY MARES (“Plaintiff”) submits the following further briefing in advance of the October 6, 2022 Continued Motion for PAGA Approval (“Motion”). Plaintiff respectfully moves for the Court’s approval of a settlement of Plaintiff’s claims under the Labor Code Private Attorneys General Act (“PAGA”) against the Defendant COMMUNITY INTEGRATED WORK PROGRAM, INC. (“Defendant”) (hereinafter collectively with Plaintiff referred to as the “Parties”) as detailed in the Parties’ Amended Private Attorneys General Act Settlement Agreement (“Agreement” or “Settlement” herein) attached as Exhibit 1 to the Supplemental Declaration of Daniel J. Bass filed concurrently in support hereof. Good cause exists for the granting of the Motion as the proposed Settlement is fair, adequate, and reasonable. The Motion is based upon the prior Notice, its attached Memorandum of Points and Authorities, the accompanying Declaration of Daniel J. Bass, this supplemental briefing, the Supplemental Declaration of Daniel J. Bass (“Bass Decl.”) and all exhibits thereto, the previously filed Declaration of Nancy Mares, the Declaration of Julie Green on Behalf of Settlement Administrator CPT Group, Inc. (“Green Decl.”), the complete files and records of this case, and any other evidence or oral argument which may be considered by the Court at the time of the hearing.

I. STANDARD FOR APPROVAL

“Labor Code section 2699, subdivision (l)(2) requires the trial court to review and approve any PAGA settlement, and the California Supreme Court has commented that in doing so, the court “ensur[es] that any negotiated resolution is fair to those affected.” *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549. Plaintiff, like the Court, recognizes that limited published California authority identifies the standard a trial court should employ in evaluating a PAGA-only settlement. *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 75 (“[N]either the Legislature, nor any published California authority has provided a definitive answer to this question. [] We do so now.”); *see also Flores v. Starwood Hotels & Resorts Worldwide* (C.D.Cal. 2017) 253 F.Supp.3d 1074, 1075.) In *Moniz*, the court held that “a trial court should

1 evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of
2 PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize
3 enforcement of state labor laws.” *Moniz*, 72 Cal.App.5th at 77. *Moniz* also indicated that because
4 “many of the factors used to evaluate class action settlements bear on a settlement's fairness—
5 including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity
6 and likely duration of further litigation, and the settlement amount—these factors can be useful
7 in evaluating the fairness of a PAGA settlement.” *Moniz*, 72 Cal.App.5th at 77.

8 Thus, the court must consider whether the settlement is sufficient to “remediate present
9 labor law violations, deter future ones, and to maximize enforcement of state labor laws.” As
10 noted in the Agreement, defendant denies any violations, however, the \$425,000 contribution
11 will clearly serve as a warning to defendants to review and, if necessary, tighten up their
12 practices. Moreover, the settlement supplements the LWDA’s funding so it can to “enforce []
13 labor laws” and “educat[e] employers and employees about their rights and responsibilities
14 under” the Labor Code. (Lab. Code § 2699, subd. (i).) Moreover, should the LWDA object, the
15 court can reconsider any position taken that would approve of the settlement.

16 **II. REASONABLENESS OF THE SETTLEMENT AMOUNT**

17 First, the Court consider that “in wage and hour class action cases that settle, which are
18 the overwhelming majority of such cases, very little of the total settlement is paid to PAGA
19 penalties in order to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.* (N.D.
20 Cal. 2019) 384 F. Supp. 3d 1058, 1101 (reversed on other grounds by 999 F.3d 668 (9th Cir.
21 2021)); *see also Smith v. Am. Greetings Corp.* (N.D. Cal.) 2016 U.S. Dist. LEXIS 66247
22 (granting final approval of class action settlement allocating \$37,500 of \$4 million settlement to
23 PAGA); *Willner v. Manpower Inc.*, (N.D. Cal.) 2015 U.S. Dist. LEXIS 80697 (granting final
24 approval of a class settlement allocating \$65,655 of \$8.75 million settlement to PAGA); *Chu v.*
25 *Wells Fargo Investments, LLC* (N.D. Cal.) 2011 U.S. Dist. LEXIS 15821 (approving \$10,000
PAGA allocation in \$6.9 million settlement).) In fact, courts have even held that no part of the

1 settlement must necessarily be allocated and distributed to the LWDA. *See, e.g., Nordstrom*
2 *Commissions Cases* (2010) 186 Cal.App.4th 576, 589 (affirming a settlement allocating \$0 of
3 \$6.4 million settlement to PAGA).

4 Here, the settlement far exceeds the aforementioned sums. Regardless, the Court
5 requested additional information to regarding Plaintiff's calculations and the range of recovery.
6 Plaintiff's Counsel conducted an extensive investigation of the facts and claims giving rise to the
7 action, including: (1) reviewing and analyzing time and payroll records and Defendants' written
8 policies and procedures; (2) researching the applicable law and evaluating potential defenses; (3)
9 evaluating the damages based on countervailing interpretations of California law; (4)
10 interviewing aggrieved employees; and, (5) reviewing other documentation provided in
11 litigation, including information relating to Defendants' operations. *See* Bass Decl., ¶ 6. Notably,
12 many of Defendants' wage statements failed to include the applicable dates on the issued wage
13 statements. *Id.*, ¶ 7. Moreover, Defendants maintained written policies which directed
14 employees to constantly supervise their clients during their work day, effectively make all breaks
15 "on-duty" and therefore potentially violative. *Id.* In this case, Plaintiff primarily sought penalties
16 under the PAGA for these wage statements, meal and rest break violations, and associated
17 derivative penalties. Bass Decl., ¶ 3. As explained further below, Plaintiff estimated Defendants'
18 total exposure to be approximately \$5,767,920. *Id.* As such, the settlement represents
19 approximately 7.37 % of Defendants' exposure in Plaintiff's calculations. *Id.* Plaintiff's Counsel
20 reached the current settlement after weighing the likelihood of recovery against probable
21 defenses and the wide discretion Courts have exercised in awarding penalties under the PAGA.

22 Defendants' counsel confirmed that no more than 446 potentially aggrieved employees
23 worked for the Defendants during the release period. Bass Decl., ¶ 8. At mediation, Plaintiff
24 reviewed time, payroll, wage statements and related information for 379 employees and
25 extrapolated damages for 412 as of the February 2022 mediation date. Bass Decl., ¶ 9. The

1 additional 34 employees included in the Covered Period is not unreasonable given it extends to
2 May 31, 2022. *Id.* Counsel’s prior statements that “Defendant represented that due to the
3 pandemic and the Shelter-in-Place Order, Defendant laid off well over a hundred employees
4 during the Covered Period so approximately one-third of the Defendant’s employees were not
5 aggrieved individuals during this time” went to violations, as further discussed below, not the
6 overall number of employees as appeared to be the Court’s concern. Bass Decl., ¶ 10. From the
7 time records, payroll records, and aggrieved employee information analyzed an estimated 9,811
8 person-pay periods were calculated. *Id.*, ¶ 11. Below, Plaintiff details the issues that necessitated
9 deductions from the maximum potential value of this case to arrive at the reasonable Gross
10 Settlement derived in this action for 446 employees. *Id.*

11 **A. Meal Periods and Rest Periods:**

12 As noted above, Defendants’ written break policies during the release period had
13 problematic language that would have caused employees to not be relieved of all work. Bass
14 Decl., ¶ 12. As such, Plaintiff was confident in these claims and estimated Defendants’ liability
15 at the maximum penalty of one meal and one rest break penalty per pay period for each
16 employee. *Id.* With employees working approximately 9,811 person-pay periods at an initial
17 violation of \$100 for each of the 446 employees and \$200 for each of the remaining 9,365 pay
18 periods Plaintiff estimated that Defendants’ exposure could be as high as \$1,917,600 for meal
19 breaks and \$1,917,600 for rest breaks, or \$3,835,200. *Id.* However, Plaintiff recognized that this
20 was a maximum amount and though based on a common policy would be harder to prove at the
21 time of trial. *Id.* Moreover, Defendants ceased their in-person client meetings during the March
22 2020 - August 2021 portion of the pandemic, which was confirmed by Plaintiff, greatly reducing
23 the application of the violating policies (applicable during in-person supervision of clients). *Id.*
24 As such, Plaintiff reasonably discounted these potential damages in order to reach a settlement
25

that was reasonable in light of the realities of the case and recognizing the benefit of an assured outcome through settlement. *Id.*

B. Wage Statement Penalties

Also as mentioned above, Plaintiff's wage statements did not include the covered dates when issued to her. Bass Decl. ¶ 13. As such, Plaintiff calculated potential penalties pursuant to Labor Code section 226 to be as much as \$958,800 (9,811 person-pay periods at an initial violation of \$50 for each of the 446 employees and \$100 for each of the remaining 9,365 pay periods in subsequent violations). *Id.* However, following mediation Defendants provided wage statements showing that the missing covered dates did not apply uniformly across aggrieved employees or during each pay period where wage statements were issued. *Id.* Moreover, Defendants provided evidence in the form of additional wage statements that the issue was resolved as of July 2021, cutting off the potential violations. *Id.* Plaintiff considered that Defendants would argue that Plaintiff could not show that employees suffered an "injury" as a result of wage statement violations, as required by Cal. Lab. Code § 226. *Id.* Finally, Plaintiff would not recover penalties for derivative claims if the underlying claims were unproven. *Id.*

C. Waiting Time Penalties

Finally, Plaintiff's analysis showed approximately 200 employees who quit or were terminated during the Covered Period. Bass Decl. ¶ 14. At a calculated average hourly rate of \$20.29 per hour and 8 hours of work per day for the statutory waiting period of 30 days, these 200 employees would have been due approximately \$973,920.00 in waiting time penalties pursuant to Cal. Lab. Code § 203. *Id.* However, Plaintiff considered that Defendants would argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Cal. Lab. Code § 203. Further, Plaintiff arguably could not recover any waiting time penalties for meal and rest claims or any penalties resulting from derivative claims if they failed to prove the underlying claims. *Id.* As such, Plaintiff reasonably discounted these potential

1 damages in order to reach a settlement that was reasonable in light of the realities of the case and
2 recognizing the benefit of an assured outcome through settlement. *Id.*

3 **III. RELEASE OF CLAIMS**

4 Based on the court’s recommendation the Parties revisited the release language in the
5 settlement agreement. *See* Bass Decl., Exhibit 1 at III.S.1-2. Specifically, Section III.S.1 was
6 modified to only cite to the California Labor Code Sections specifically mentioned in the Plaintiff’s
7 Complaint, as well as Wage Order 4 and California Code of Regulations, Title 8, section 11000
8 specifically stated in Plaintiff’s Complaint. *Compare* Bass Decl., Exhibit 1 at III.S.1 to Plaintiff’s
9 Complaint. Moreover, Section III.S.1 specifies that the release is of “all claims under PAGA against
10 the Released Parties” there is no Section 1542 release of those claims for the PAGA Settlement Group
11 Members. *See* Bass Decl., Exhibit 1 at III.S.1. The only Section 1542 release is specific to the
12 Plaintiff’s released claims “and only Plaintiff’s” as clarified in the revisions to the Parties’ Agreement.
13 *See* Bass Decl., Exhibit 1 at III.S.2.

14 **IV. PROPOSED NOTICE**

15 Based on the court’s recommendations the Parties have revised the proposed notice. *See*
16 Bass Decl., Exhibit 1 at Exhibit A. Parties believed that the current form of the proposed notice
17 gives sufficient information to the aggrieved employees to inform them as to why they are
18 receiving the notice and facilitate resolution of any questions they may still have thereafter.
19 (Bass Decl., ¶ 15). For instance, aggrieved employees cannot opt out of the settlement or contest
20 the number of workweeks listed for them in the notice, but are provided their workweeks to
21 provide information as to how their portion of the settlement was calculated, particularly if they
22 communicate with other recipients of a settlement check. (*Id.*). Moreover, checks will be mailed
23 with the notice, so Parties agreed to add the language proposed by the Court to state “You are
24 receiving this Notice and enclosed check because you are in the group of employees...” *See* Bass
25 Decl., Exhibit 1 at Exhibit A. Similarly, per the Court’s suggestion a reminder postcard will be

1 mailed to recipients who have not cashed their checks. *See* Bass Decl., ¶ 15; *see also* Green
2 Decl. at Exhibit B. Finally, while Plaintiff’s counsel does not represent Settlement Group
3 Members, their contact information has been added to the notice and will make themselves
4 available to answer basic questions about the Settlement (Bass Decl., ¶ 15), as will the
5 Settlement Administrator through call center support. Green Decl., ¶ 8.

6 **V. SETTLEMENT ADMINISTRATOR AND ADMINISTRATION COSTS**

7 Based on the court’s recommendation Plaintiff’s have provided a declaration from the
8 proposed settlement administrator, CPT Group, Inc. *See generally* Green Declaration.

9 **VI. INCENTIVE PAYMENT**

10 Incentive payments are of course long established and entirely appropriate. *Staton v.*
11 *Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. “These awards ... are intended to compensate
12 class representatives for work done on behalf of the class, to make up for financial or
13 reputational risk undertaken in bringing the action, and, sometimes, to recognize their
14 willingness to act as a private attorney general.” *Rodriguez v. West Publishing Corp.* (9th Cir.
15 2009) 563 F.3d 948, 958. (Emphasis added.)

16 Here, the Plaintiff has taken every necessary action to pursue the interests of the
17 aggrieved employees and the state and provided substantial, tangible benefits to the State of
18 California and other aggrieved employees. The degree of benefit for the aggrieved employees,
19 who have taken no action on their own and only released claims pursuant to the PAGA, is
20 substantial. Each of aggrieved employee will receive a tangible monetary settlement because of
21 the named Plaintiff’s courage to stand up and be counted, as well as her perseverance and
22 endurance in this litigation with limited benefit to herself.

23 Pursuant to the settlement agreement, the Parties agreed that the named Plaintiff—who
24 have also executed broad general individual release—may apply for an incentive award from the
25 Settlement fund of up to \$5,000.00. (Bass Decl., ¶ 17). Plaintiff assisted in every way possible

1 throughout the case, including in the pre-filing investigation and analysis; providing key insights
2 into the policies and practices of Defendants; and assisting with settlement considerations. *Id.*).
3 Plaintiff also placed Plaintiff’s future employment prospects at risk by putting her name on a
4 complaint filed against an employer within the State of California, thus fully exposing herself via
5 social media to the audience of all prospective employers for years to come. (*Id.*). Further still,
6 Plaintiff has executed a general release of claims, which is significantly broader than the release
7 attributed through the settlement to aggrieved employees of Defendants, which is limited to
8 specified PAGA claims. (Bass Decl. ¶ 18). This alone should be sufficient for the requested
9 enhancement award. The Court questioned “how much additional time Plaintiff spent on this
10 case, due to its representative nature, than she would have spent if it were an individual case”
11 however, Plaintiff’s release means that Plaintiff cannot bring such a claim, including the
12 underlying wage claims that form the basis of the PAGA action. Plaintiff’s counsel would assert
13 that a \$5,000 settlement for such individual claims would be far from excessive and low in fact
14 even for settlements of so called “nuisance” value. (*Id.*). Moreover, the current matter is
15 distinguishable from the citation to *Rodriguez v. Danell Custom Harvesting, LLC* (E.D. Cal.
16 2018) 327 F.R.D. 375, 391. There the class representatives were releasing the same claims as the
17 class. *Id.* at 395 (“The named plaintiffs, the settlement class, and FLSA class members are barred
18 from any future legal proceedings against Defendants concerning any of the released claims.”)

19 The requested incentive payment is well within the appropriate range of awards. As
20 such, it is submitted that the requested incentive payment should be approved for Plaintiff, who
21 is the only individual to put herself in the line of fire for the benefit of the State of California and
22 aggrieved employees, who are benefitting for the risks taken on solely by Plaintiff. Plaintiff who
23 executed a general release of all claims, including underlying wage claims which aggrieved
24 employees are not releasing, requests only a minor additional payment for this broader release.

25 **VII. LITIGATION COSTS**

1 Plaintiff's Counsel would like to clarify that it is only seeking its costs to date. The
2 \$20,000 set for in the Agreement represents an up to amount that was set before costs were
3 estimated. As set forth in the Supplemental Declaration of Daniel J. Bass, Plaintiff's Counsel has
4 expended over \$8,307.76 in costs and expenses on behalf of the aggrieved employees in this
5 matter. (Bass Decl. ¶ 18, Exh. 3). These costs and expenses were necessary and were an
6 important factor in bringing this matter to a successful conclusion. *Id.* All of the costs are typical
7 for a PAGA action, including filing fees, postage (U.S. Mail, FedEx, etc.), photocopies, attorney
8 service charges and mediation fees, without which this type of case cannot be pursued. *Id.* All of
9 these charges are the usual and reasonable types of litigation expenses incurred in a case such as
10 this one and counsel do not seek additional costs over the \$8,307.76, despite the settlement
11 agreement authorizing up to \$20,000 of such costs. *Id.*

12 **VIII. ATTORNEY FEES**

13 The requested fees are standard to those requested for similar claims, those that have
14 been granted to Plaintiff's counsel in similar matters, and supported by both the common fund
15 and lodestar methodologies of calculating fees as discussed below. Thus, in light of the fund
16 created by the settlement, which will provide substantial funds to the State of California and
17 recovery to the aggrieved employees, Counsel submits that the requested fee is appropriate.

18 **A. The Common Fund Method is Appropriate and the Fee Reasonable**

19 Counsel's application for an award of attorneys' fees is 33% of the settlement value
20 created and is reasonable and fair in light of the results achieved for the State of California and
21 the aggrieved employees. Counsel seeks a fee award calculated as a percentage of the total
22 value of the Settlement Amount, for the successful prosecution and resolution of this action.
23 California state and federal courts have recognized that an appropriate method for determining
24 an award of attorneys' fees is based on a percentage of the total value of benefits to the
25 beneficiaries of the settlement. *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480; *Serrano v.*

1 *Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gernert* (1980) 444 U.S. 472,478; *Vincent v.*
2 *Hughes Air West, Inc.* (9th Cir. 1977) 577 F.2d 759, 769. The purpose of this equitable doctrine
3 is to avoid unjust enrichment and to "spread litigation costs proportionally among all the
4 beneficiaries so that the active beneficiary does not bear the entire burden alone." *Id.* at 769. In
5 *Laffitte*, a wage and hour class action wherein counsel obtained a \$19 million non-reversionary
6 settlement on behalf of the class, approved the use of the percentage of fund or common fund
7 method to award 33.33% of the settlement amount or \$6,333,333.33 to class counsel for
8 attorneys' fees. The Court stated:

9 "[w]hatever doubts may have been created by *Serrano III*, *supra*, 20 Cal.3d 25, [],
10 or the Court of Appeal cases that followed, we clarify today that use of the
11 percentage method to calculate a fee in a common fund case, where the award
12 serves to spread the attorney fee among all the beneficiaries of the fund, does not
13 in itself constitute an abuse of discretion. We join the overwhelming majority of
14 federal and state courts in holding that when class action litigation established a
15 monetary fund for the benefit of the class members, and the trial court in its
16 equitable powers awards class counsel a fee out of that fund, the court may
17 determine the amount of a reasonable fee by choosing an appropriate percentage
18 of the fund created. The recognized advantages of the percentage method -
19 including relative ease of calculation, alignment of incentives between counsel
20 and the class, a better approximation of market conditions in a contingency case,
21 and the encouragement it provides counsel to seek an early settlement and avoid
22 unnecessarily prolonging the litigation[] convince us the percentage method is a
23 valuable tool that should not be denied our trial courts."

24 1 Cal.5th 480, 503, emphasis added.

25 Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund
for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee
from the fund as a whole." *Boeing*, 444 U.S. at 478. As explained: "The doctrine rests on the
perception that persons who obtain the benefit of a lawsuit without contributing to its costs are
unjustly enriched at the successful litigants expense. Jurisdiction over the fund involved in the
litigation allows a court to prevent this inequity by assessing attorney's fees against the entire
fund, thus spreading fees proportionately among those benefitted by the suit." *Id.*

1 The goal in a case such as this is to set a fee that approximates the probable terms of a
2 contingent fee contract negotiated between an attorney and client in comparable litigation. *See*
3 *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19 at 48. *In re Warner Communications*
4 *Sec. Lit.* (S.D.N.Y. 1985) 618 F. Supp. 735, *Newberg on Class Actions*, and other authorities in
5 various jurisdictions all support the conclusion that fees between 25% and 40% of a common
6 fund have normally been awarded for many years in the similar class litigation context. *See*
7 *Williams v. MGM-Pathe Communic'ns Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (awarding 33%
8 of total fund amount); *Paul, Johnson, Alston & Hunt v. Gaulty* (9th Cir. 1989) 886 F.2d 268,
9 272 (an award of attorneys' fees up to 33 1/3% of the fund can be reasonable); *Barbosa v.*
10 *Cargill Meat Solutions Corp.* (E.D. Cal. 2013) 297 F.R.D. 431, 451 (wage-and-hour class action
11 where the court approved a fee request of 33% of the fund where settlement was reached 1.5
12 years after case was filed and before class certification). Furthermore, "[e]mpirical studies show
13 that, regardless of whether the percentage method or the lodestar method is used, fee awards in
14 class actions average around one-third of the recovery." *Shaw v. Toshiba America Information*
15 *Systems, Inc.* (E.D. Tex. 2000) 91 F. Supp. 2d 942, 972 (emphasis added). In fact, in California,
16 "courts usually award attorneys' fees in the 30-40% range in wage-and-hour class actions that
17 result in recovery of a common fund under \$10 million." *Cicero v. DirecTV, Inc.* (C.D. Cal.
18 July 27, 2010) 2010 WL 2991486, *17 (citing three cases awarding fees in this range after
19 surveying other California fee awards in wage and hour class actions); *see also Vasquez v. Coast*
20 *Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 492 (citing five wage and hour class
21 actions in which courts awarded fees ranging from 30 to 33%).

22 To enable and encourage such actions to be tackled by well qualified counsel, California
23 law intentionally provides that attorney fee awards should be equivalent to fees paid in the legal
24 marketplace to compensate for the result achieved and risk incurred. *See Lealao*, 82 Cal.App.4th
25

1 at 47. Here, Plaintiffs’ counsel’s request for a 33% fee based on the GSF is certainly consistent
2 with contingency fee awards in this State’s legal marketplace. (Bass Decl. ¶¶ 19-22).

3 If this were a non-representative litigation, the customary fee arrangement would be
4 contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *Blum v.*
5 *Stenson* (1984) 465 U.S. 886, 903 (“In tort suits, an attorney might receive one-third of whatever
6 amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the
7 recovery.”); *In re M.D.C. Holdings Securities Litigation* (S.D. Cal. 1990) 1990 WL 454747, at
8 *22 (“In private contingent litigation, fee contracts have traditionally ranged between 30% and
9 40% of the total recovery.”). Thus, the customary contingent fee in the private marketplace –
10 30% to 40% of the fund recovered – further supports that the requested fee of 33% in this case is
11 reasonable and fair.

12 In *Lealao*, the court held that when an action leads to a recovery that can be “monetized”
13 with a reasonable degree of certainty, the court should “ensure that the fee awarded is within the
14 range of fees freely negotiated in the legal marketplace in comparable litigation.” *Id.* at 50.
15 Even in class cases where claim forms, as opposed to the guaranteed payment method being
16 made available to them in this case, are utilized the use of the percentage method is appropriate
17 according to prior holdings. *Id.* at 32. In this matter, however, all aggrieved employees will
18 receive a check and the State of California will receive a significant payment in accordance with
19 the distribution model set down in the PAGA. As *Lealao* also recognizes, fee awards that are too
20 small will “chill the private enforcement essential to the vindication of many legal rights and
21 obstruct the representative actions that often relieve the courts of the need to separately
22 adjudicate numerous claims.” *Id.* at 53. Finally, an attorney fee motion should not turn into “a
23 second major litigation.” *Id.* at p. 31 (citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437); see
24 also *Serrano*, 20 Cal.3d at 34 (*Serrano III*); *Boeing Co.*, 444 U.S. at 478; *Vincent v. Hughes Air*
25 *West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.

1 Where the amount of the available settlement is a “certain easily calculable sum of
2 money,” California courts may and in fact should calculate attorney fees as a reasonable
3 percentage of the settlement created. Weil and Brown, *California Practice Guide, Civil*
4 *Procedure Before Trial*, Chapter 14, section 14:145; *Laffitte*, 1 Cal.5th at 503; *Dunk v. Ford*
5 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1808. There is nothing more easily calculable than a
6 total paid-in non-reversionary settlement amount where the respective settlement shares are tied
7 to the full payment of an agreed total settlement amount, allocated based on the states statutory
8 provisions and pay periods derived from business records.

9 In the present case, Counsel’s efforts have created a common fund of \$425,000 from
10 which the State of California and all of the aggrieved employees will receive their respective
11 shares, tied to their respective pay periods as a percentage of the Net Settlement Fund. Thus, not
12 only is the percentage of recovery method applicable to this case, it is the preferred methodology
13 to use, in order to assure that Counsel are adequately compensated for the settlement in favor of
14 the state and the aggrieved employees. For Counsel, the fees here were wholly contingent in
15 nature and the case presented far more risk than the usual contingent fee case. There was the
16 prospect of the enormous cost inherent in representative litigation, as well as a potentially long
17 battle with Defendants in a complex proceeding. That prospect has previously become reality, in
18 both trial courts and the Court of Appeal in similar representative litigation. Counsel risked not
19 only a great deal of time, but also expense to ensure the successful litigation of this action on
20 behalf of all aggrieved employees. A 33% contingent fee on any recovery fund is common in the
21 marketplace and appropriately compensates counsel for the risks they undertook. Thus,
22 Counsel’s request herein for such a fee is demonstrably reasonable and should be granted in full.
23 Moreover, as also discussed, the fee is further validated by the lodestar/multiplier analysis. As
24 such, based upon the foregoing, Counsel respectfully requests that the Court award attorneys’
25 fees in the amount of \$140,250 and litigations costs in the amount of \$8,307.76.

1 **B. Counsel's Lodestar Supports the Fee Request**

2 While the lodestar method generally is considered secondary to a percentage-based fee
3 award in true common fund cases, its analysis can provide further validation – the so-called
4 “cross-check” - of the appropriateness of the percentage award. *See In re Prudential Ins. Co. of*
5 *America Sales Practice Litigation* (D.N.J. 2000) 106 F. Supp. 2d 721, 732. Where the lodestar
6 method is employed solely as a cross-check, it can be performed with a less exhaustive
7 cataloguing and review of counsel's hours. *See Laffitte*, 1 Cal. 5th at 505 (“trial courts
8 conducting lodestar cross-checks have generally not been required to closely scrutinize each
9 claimed attorney-hour, but... ‘focus on the general question of whether the fee award
10 appropriately reflects the degree of time and effort expended....”); *In re Rite Aid Corp. Secs.*
11 *Litig.* (3d Cir. 2005) 396 F.3d 294, 306 (“The lodestar cross-check calculation need entail neither
12 mathematical precision nor bean-counting”); *In re Immune Response Sec. Litig.* (S.D. Cal. 2007)
13 497 F. Supp. 2d 1166 (“although counsel have not provided a detailed cataloging of hours spent,
14 the Court finds the information provided to be sufficient for purposes of lodestar cross-check”).

15 Trial courts first calculate the “lodestar” by tabulating all the hours reasonably spent,
16 multiplied by reasonable hourly rates. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133. The
17 lodestar may then be enhanced, or multiplied, to take into account factors other than hours and
18 rates that go into the determination of a reasonable attorneys' fee, since it has been
19 acknowledged that “the unadorned lodestar reflects the general local hourly rate for a fee-bearing
20 case; it does not include any compensation for contingent risk, extraordinary skill, or any other
21 factors a trial court may consider” *Id.* at p. 1138. In other words, the lodestar does not
22 account for the “risk multiplier” often sought and/or applied to “cross-check” presentations.

23 **1. The Hours Counsel Spent on This Action Were Reasonable and Necessary**

24 In this case, Counsel has devoted over 173.1 hours to this litigation. The amount hours
25 spent on this action were reasonable and necessary to advance the claims of the state and

aggrieved employees and the total lodestar for the Makarem Law Firm is \$127,875. (Bass Decl. ¶ 23, Exh. 3). The time entries included in this calculation only run through September 16, 2022. (*Id.*) They therefore do not include additional time yet to be incurred for tasks that include, for example, preparing for the hearing on this motion, any time which will be spent corresponding with the settlement administrator and/or defense counsel and/or aggrieved employees after approval (e.g., questions or disbursement issues), or the time that will be spent preparing any subsequent reports with the Court. (*Id.*) It is conservatively estimated that those various tasks will cause counsel to incur at least another 15-20 hours of work, if not more. (*Id.*)

2. Counsels' Hourly Rates are Reasonable and Consistent with the Market

Counsels' hourly rates represent rates currently charged in connection with complex litigation matters such as this PAGA action. (Bass Decl. ¶ 23). They are also consistent with the marketplace in connection with this type of litigation and have been accepted by other courts throughout the state. *See Counts v. Meriweather* (C.D. Cal. 2016) 2016 WL 1165888, *3-4 (finding hourly rates of \$701.25, \$552.50, and \$446.25 per hour to be reasonable); *Rodriguez v. Cty. of L.A.* (C.D. Cal. 2014) 96 F. Supp. 3d 1012, 1023 (approving rates from \$500 to \$975). The United States Supreme Court has held that it is appropriate to use *current* billing rates when determining fee issues as a convenient method of compensating contingent attorneys for the delay they always incur before receiving payment on those cases on which they successfully achieve a settlement or a judgment. *Missouri v. Jenkins* (1989) 491 U.S. 274, 283-284.

The billing records of Makarem & Associates demonstrate 5 persons worked on this action. (Bass Decl. ¶ 24, Exh. 3). The managing attorney Ronald Makarem, with 25 years of extensive litigation experience including over 10 years of plaintiff side class action work, is billed out at \$810 per hour. *Id.* He worked approximately 21.5 hours on this case. Daniel Bass, the lead attorney on this case, with nearly 10 years of litigation experience—almost all of which

has dealt extensively with both national and state class actions—worked 136.6 hours on this matter and is billed at \$750 per hour. *Id.*¹

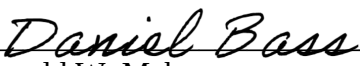
Applying the stated rates to the hours presented in this matter results in a total lodestar of \$127,875.00. (Bass Decl. ¶ 23, Exh. 3). Although it is not unusual for cross-check multipliers of greater than 2.0 to 3.0 to be applied to a lodestar, here, the fee requested, as compared to Class Counsels’ fee request results in a slight negative multiplier – a multiplier well below the range of commonly accepted multipliers. *See Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050-51 (upholding a fee award that constituted a 3.65 multiplier); *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2014) 306 F.R.D. 245, 264 (54% of lodestar multipliers fall within 1.5 to 3.0 range, and 83% of multipliers fell within the 1.0 to 4.0 range). As such, the lodestar cross-check fully validates the requested fee percentage.

IX. CONCLUSION

Based on the foregoing, the Plaintiff respectfully requests that the Court grant the Plaintiff’s motion and approve the Parties’ PAGA settlement, as amended herewith.

DATED: September 22, 2022

MAKAREM & ASSOCIATES, APLC



Ronald W. Makarem
Daniel J. Bass
Attorneys for Plaintiff

¹ Additional persons from the Makarem firm that billed on the file include Alex Hames, Cameron Stewart and Marina Serrano. Their billing rates and hours billed are set forth in Exhibit “3” to the Supplemental Declaration of Daniel J. Bass.