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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

RITCHIE ROBINSON, an individual, on
behalf of the State of California, as a private
attorney general,

PLAINTIFF,

v.

S T MOLL, INC. DBA INTEGRITY TIRE, a
corporation; BIG BRAND TIRE COMPANY,
INC., a corporation; CHRIS MOLL, an
individual; STEVE MOLL, an individual;
TINA MOLL, an individual; and DOES 1
thru 50, inclusive,

DEFENDANTS.

Case No. CIVSB2129140

[Case Assigned for All Purposes to Hon.
Judge David Cohn in Dept. S-26]

**NOTICE OF MOTION AND
MOTION FOR APPROVAL OF
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Filed concurrently with Declarations of
Ritchie Robinson and Kelsey M. Szamet;
[Proposed] Order and Judgment]*

Date: January 4, 2023

Time: 1:30p.m.

Dept.: S17

Complaint Filed: October 12, 2021

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

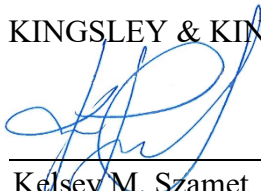
2 **PLEASE TAKE NOTICE** that on January 4, 2023 at 1:30p.m. in Department S-26 of
3 the above-entitled court, Plaintiff RITCHIE ROBINSON will move the Court for an Order
4 Granting Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Kelsey M. Szamet, the PAGA Settlement and Release (Exhibit
9 "1" to the concurrently filed Szamet Declaration), all other papers and records on file in this action,
10 and on such oral and documentary evidence as may be presented at the hearing on this Motion.

11
12 DATED: December 13, 2022

KINGSLEY & KINGSLEY, APC

13
14 By: 

Kelsey M. Szamet

15 Attorneys for Plaintiff RITCHIE ROBINSON and
16 All aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff RITCHIE ROBINSON (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of his Motion for Approval of Representative Action Settlement. Plaintiff
5 and Defendant S T MOLL, INC. DBA INTEGRITY TIRE, a corporation (“S T Moll”); Defendant
6 BIG BRAND TIRE COMPANY, INC., a corporation (“Big Brand”); Defendant CHRIS MOLL,
7 an individual; Defendant STEVE MOLL, an individual; and, Defendant TINA MOLL, an
8 individual (collectively, “Defendants”) (Plaintiff and Defendants together, the “Parties”) have
9 reached a proposed settlement documented in the PAGA Settlement and Release (“Settlement” or
10 “Settlement Agreement”), attached to the concurrently-filed declaration of Kelsey M. Szamet.

11 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code § 2699,
12 et seq. (“PAGA”). The Maximum Settlement Amount is \$400,000.00. After deduction of
13 attorney’s fees and litigation expenses, a requested litigation enhancement to the Plaintiff, and
14 settlement administration costs as discussed in the Settlement Agreement, the anticipated
15 remaining amount to be divided between the Labor and Workforce Development Agency
16 (“LWDA”) and the aggrieved employees as required by Labor Code section 2699)(i) is
17 \$231,666.67, with \$173,750.00 (or 75%) going to the LWDA and \$57,916.67 (or 25%)
18 distributed to the aggrieved employees.¹

19 Plaintiff requests that the Court “review and approve any settlement of any civil action
20 filed pursuant to this part.” (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement
21 Agreement fair and acceptable, Plaintiff requests that the Court: (1) enter an order approving the
22 Settlement and ordering the Parties to carry the terms of the Settlement Agreement; and (2) and
23 enter a Final Judgement thereon.²

24 ///

25 _____
26 ¹ Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the
Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ² As indicated on the Proof of Service, the instant Motion will be concurrently uploaded to the LWDA’s website
28 on the date this Motion is filed as required by Labor Code §2699(1)(2). (Declaration of Kelsey M. Szamet
¶86.) (“Szamet Decl.”) Proof of submission of Plaintiff’s Motion, all related documents, and copy of the email
from the LWDA confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “C.” (*Id.*)

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

Plaintiff is informed and believes that Defendants are joint employers of Plaintiff and other aggrieved employees. (Szamet Decl. ¶5.) Plaintiff contends that Defendants, directly and/or indirectly, or through an agent or any other person, engaged, suffered, and/or permitted Plaintiff and Defendants' aggrieved employees to work and exercised control over their wages, hours, or working conditions, such that Defendants are liable for the wage and hour violations alleged herein under *Martinez v. Combs*, 49 Cal. 4th 35, 60 (2010).

On August 5, 2021, pursuant to Labor Code § 2699.3(a)(1), Plaintiff submitted a Private Attorneys General Act ("PAGA") notice letter to Defendant S T MOLL and the LWDA. (Szamet Decl. ¶6.) (Settlement Agreement, Ex. 1 ("Ex. 1") at ¶2.1.) On October 8, 2021 filed an Amended PAGA Letter to the LWDA and mailed by certified mail, return receipt requested, to Defendants S T Moll and Big Brand. (Szamet Decl. ¶7.; Ex. 1 at ¶2.2.) On October 12, 2021, Plaintiff submitted a Second Amended PAGA Letter to the LWDA website and mailed by certified mail, return receipt requested to include additional Defendants Chris Moll, Steve Moll, and Tina Moll. (Szamet Decl. ¶8.; Ex. 1 at ¶2.3.)

After the exhaustion period, on October 12, 2021, Plaintiff filed a representative action under the California Labor Code's PAGA for penalties for violations of Labor Code sections 201, 202, 203, 226.7, 510, 512, 1194, 1194.2, 1199, and 2802. (Hereafter, the "Action".) (Szamet Decl. ¶9.; Ex. 1 at ¶¶2.4 and 2.6.) On December 21, 2021, Plaintiff filed a First Amended Complaint ("FAC") alleging the same cause of action in his original complaint, including an additional violation under PAGA for violation Labor Code §558.1 and adding Defendants Big Brand, Chris Moll, Steve Moll, and Tina Moll as named Defendants to the Action. (Szamet Decl. ¶10.; Ex. 1 at ¶2.5.)

B. The Discovery Process and Mediation

After the matter was at issue, the Parties engaged in informal fact discovery and exchanged pertinent information to understand the nature of the allegations and the scope of potential liability. (Szamet Decl. ¶11; Ex. 1 at ¶2.7.) Plaintiff requested relevant information such as the number of

1 pay periods and aggrieved employees at issue and any wage relevant policies. (Szamet Decl. ¶12.)

2 Through the exchange of information and attendant discussions between the Parties,
3 Plaintiff learned that the number of aggrieved employees is approximately 225 (including Plaintiff)
4 and there are approximately 12,464 Eligible Work Weeks during the Release Period.³ (Szamet
5 Decl. ¶13; Ex. 1 at ¶2.8.)

6 Thereafter, the Parties engaged in arms-length settlement discussions, which included a
7 full day mediation with esteemed mediator Barry Winograd, Esq. on June 2, 2022 (Szamet Decl.
8 ¶15; ¶2.8) With the assistance of the mediator, the Parties reached a settlement in principle. (*Ibid.*).
9 Thereafter, the Parties formalized the Settlement Agreement. (Szamet Decl. ¶16).

10 If the statutory penalty of \$100 for an initial violation and \$200 for each subsequent violation
11 applies, Plaintiff asserts that the maximum potential exposure for the PAGA claims for aggrieved
12 employees is \$1,246,400 (approximately 12,464 work weeks at issue × \$100 = \$1,246,400). (Szamet
13 Decl. ¶17.) In addition, there is an escalator provision in the Settlement Agreement (Settlement
14 Agreement, Ex. 1 (“Ex. 1”) at ¶8). It should be noted that Defendants pay weekly so its pay periods
15 are also weekly. (Szamet Decl. ¶18.) This is important to the exposure analysis because PAGA
16 penalties are tied to pay periods so if Defendants happened to have bi-weekly pay periods instead, the
17 maximum potential exposure would be cut approximately in half to \$623,200 (6,232 x \$100 =
18 \$623,200). *Id.*

19 Although Defendants deny that they violated any pertinent law, they recognized the risks
20 and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
21 finalization of a formal Settlement Agreement and the approval of the Court. (Szamet Decl. ¶19.)
22 The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon
23 Settlement to the Court for Approval. (*Id.*)

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

25 **A. The PAGA Statutory Scheme**

26 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
27

28 ³ The Release Period is from August 8, 2020 to October 18, 2021. (*See* Settlement Agreement, Ex. 1 at ¶1.19;
Szamet Decl. ¶14.)

1 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
2 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A
3 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
4 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
5 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
6 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

7 When an aggrieved employee brings a PAGA claim, “the government is always the real
8 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
9 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A]
10 PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff
11 that brings a PAGA claim represents “the same legal right and interest as state labor law
12 enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise
13 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code
14 § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D.
15 Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their
16 cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties
17 recovered; thus, recoveries are principally for the state and only secondarily for aggrieved
18 employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is
19 properly conceived of as a private attorney general prosecuting violations of California’s labor
20 laws on behalf of the state.

21 An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab.
22 Code § 2699.3 (a)(1), which simply states:

23 “The aggrieved employee or representative shall give written notice by
24 certified mail to the Labor and Workforce Development Agency and the
25 employer of the specific provisions of this code alleged to have been
violated, including the facts and theories to support the alleged violation.”

26 Lab. Code § 2699.3 (a)(1)

27 As explained above, Plaintiff has complied with the notice requirements and has properly
28 pled a PAGA cause of action. (Ex. 1 at ¶¶2.1–2.4.)

1 B. The Court Has Discretion When Awarding the Amount of Penalties

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

5 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing
6 that Defendant violated the Labor Code.⁴ *Amaral v. Cintas Corp. No. 2 163 Cal. App. 4th 1157,*
7 *1213 (2008); Moreno v. Autozone, Inc. (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL*
8 *1650942, at *3.*

9 However, PAGA does provide the Court with discretion when it awards these penalties.
10 Labor Code §2699(e)(2) states that “a court may award a lesser amount than the maximum civil
11 penalty amount specified by this part if, based on the facts and circumstances of the particular case,
12 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
13 Here, Defendants deny that they violated any law or that it engaged in any knowing or intentional
14 conduct giving rise to liability, and expressly deny that any employees suffered harm

15 **IV. THE SETTLEMENT**

16 Defendants will pay the total sum of \$400,000.00 in full and final settlement of the PAGA
17 claim alleged. (Szamet Decl. ¶20; Ex. 1 at ¶3.2.) Per the Settlement Agreement, the amount is
18 allocated as follows:

Gross Maximum Settlement Amount:	\$400,000.00
PAGA Counsel’s fees (33.33% of Gross Maximum Settlement Amount):	\$133,333.33
Requested Case Costs:	\$10,000.00
Litigation Enhancements to Plaintiff:	\$5,000.00
Settlement Administrator:	\$10,000.00
PAGA Penalty Allocation Amount:	\$231,666.67
	<i>(\$173,750.00 to the LWDA; \$57,916.67 to remain in the Net Settlement Amount for the aggrieved employees)</i>
Anticipated Net Settlement Amount:	\$57,916.67 to Aggrieved Employees

26 Each of the 255 allegedly aggrieved employees shall receive a relative portion of the
27 \$57,916.67 based on the number of Eligible Work Weeks worked for Defendants, during the
28

⁴ See also *Willner, supra*. 35 F. Supp. 3d at 1136; *McKenzie, supra*, 765 F.Supp.2d at 1232.

1 Release Period. (Ex. 1 at ¶3.3.4.1.) For settlement purposes, the “Aggrieved Employees” are
2 defined as: “All persons who are employed or have been employed as an hourly employee by S T
3 Moll, Inc. dba Integrity Tire, in the State of California who worked at any point from August 8,
4 2020 to October 18, 2021.” (Szamet Decl. ¶21; Ex. 1 at ¶1.2.)

5 **V. ARGUMENT**

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

7 The Parties recognize that in accordance with Labor Code §2699(l), Court approval is
8 required in the event of a settlement of a PAGA action on a representative basis. However, as
9 explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow
10 the class action procedural rules in PAGA cases and therefore need not obtain approval of the
11 PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply
12 with the requirements of Labor Code §2699, the Parties submit the instant Motion and the
13 Settlement Agreement (Exhibit “1” to the Szamet Declaration) for Court approval.

14 **B. The Risks of Moving Forward with Plaintiff’s PAGA Claim**

15 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
16 and discount taken follows. (Szamet Decl. ¶22.) PAGA Counsel had to consider the arguments
17 and defenses asserted by Defense Counsel. (Szamet Decl. ¶23.) PAGA Counsel also had to assess
18 the risks of moving forward to trial and what this Court would do in awarding penalties were
19 Plaintiff to prevail at trial. (*Id.*)

20 PAGA Counsel considered the following facts and arguments in determining that the
21 Settlement was fair and reasonable: First, PAGA Counsel had to consider Defendants’ financial
22 status and its ability to pay any sizeable judgment against it. (Szamet Decl. ¶25; Ex. 1 at ¶23.)
23 Second, Defendants contend that until the Lawsuit was filed, no employees complained about any
24 alleged violation of Labor Code §§510, 1194, 1194.2, 1199, and 2802. (Szamet Decl. ¶26.) While
25 Plaintiff maintains that violations under Labor Code §§510, 1194, 1194.2, 1199, and 2802 are not
26 curable as this is a specifically defined term of art in the PAGA statute, Plaintiff believed that
27 Defendants may persuasively argue that the Court should exercise its discretion to significantly
28 reduce any penalties under PAGA because Defendants’ contend changes were made to address

1 any alleged deficiencies at its facilities. (*Id.*)

2 In addition, Defendant vigorously contested liability. (Szamet Decl. ¶27.) Through the
3 exchange of informal discovery and extensive meet and confer efforts, Plaintiff learned that
4 Defendant maintained that it had strong defenses as to liability on the claims at issue. (Szamet
5 Decl. ¶28.) As to the wages/overtime claim, Plaintiff alleges he was required to work off the clock
6 before or after shifts, but acknowledges that this can be a difficult claim to prove because there are
7 no time records to substantiate or evaluate the claim. (Szamet Decl. ¶29.) Moreover, Defendant
8 would argue that if there was any issue, it was unique to the Plaintiff and this would necessitate
9 speaking to each and every Aggrieved Employee about their experiences and whether any off the
10 clock time was ever worked. (Szamet Decl. ¶30.) This type of inquiry, Defendant would argue,
11 make its very difficult to establish liability based on common proof.

12 As to the meal and rest break claims, Defendant argued that it maintained a valid written
13 policy and that all meal and rest periods were provided in compliance with the law. (Szamet Decl.
14 ¶31.) Defendant argued that if any meal or rest periods were missed, it would necessitate
15 individual inquiries as to each person on each day to determine if the meal/rest period was actually
16 “provided” but the person chose not to take it. (Szamet Decl. ¶32.) As to the Section 2802 claim,
17 Defendant argued that it provided all necessary tools and if Plaintiff chose to bring his own, that it
18 could not be liable for that choice as the necessary tools were made available. (Szamet Decl. ¶33.)
19 The same risk analysis of Defendant’s liability arguments would apply to the derivative claims.
20 (Szamet Decl. ¶34.)

21 Fourth and finally, and in accordance with PAGA, the Court in a PAGA action has the
22 same discretion “to assess a civil penalty” that the Labor Commissioner would have, as well as
23 complete discretion to “award a lesser amount than the maximum civil penalty amount specified
24 [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would
25 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (Labor Code
26 §2699(e)(1) and (e)(2). (Ex. 1 at ¶23(c).) PAGA Counsel anticipated that, at trial, Counsel for
27 Defendants could make potentially persuasive arguments that: (1) all PAGA Members were
28 properly paid in accordance with Defendants’ lawful policies and practices, and that PAGA

1 Members were not required to work off the clock; (2) all PAGA Members were provided with
2 meal and rest break areas in compliance with California law; (3) until this Lawsuit was filed, no
3 employees had complained about any alleged failure to reimburse the cost of using any cell phones,
4 tools, and vehicles; and (4) none of Defendants' employees suffered any harm from or actual
5 damage as a result of the conduct that forms the basis for Plaintiff's allegations. (Szamet Decl.
6 ¶35.) All of which, Counsel for Defendants would argue, should mitigate in favor of significantly
7 reducing any PAGA penalties. (*Id.*) While Plaintiff disagreed that this analysis is legally correct
8 or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they
9 might impact any judgement ultimately awarded to Aggrieved Employees if the Court were
10 persuaded by them. (*Id.*)

11 For these reasons, and in light of the risks posed by Defendants' arguments and the
12 potential risk, PAGA Counsel believes that the proposed Settlement is fair and reasonable. (Szamet
13 Decl. ¶36.)

14 C. There is a Strong Risk the Higher \$200 Civil Penalty Triggered for "Subsequent"
15 Violations Will Not Apply

16 Plaintiff has to acknowledge that there is a very strong risk that the \$200 civil penalty
17 triggered for "subsequent" violations would not be triggered. Labor Code § 2699(f)(2). If this case
18 were to proceed to trial, Plaintiff would argue that a "subsequent" violation simply means that
19 Defendants violated § 226(a) more than once for a given employee. Plaintiff is not aware of any
20 case law that interprets "subsequent" in the context of § 2699. However, Defendants are likely to
21 rely on *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008) because it rejected a purely
22 temporal understanding of the term "subsequent" and interpreted its use in Labor Code sections
23 210 and 225.5 to require that "the employer has been notified that it is violated a Labor Code
24 provision" before higher penalties are triggered. *Id.* at 1209. Defendants presumably will take the
25 position that it has not been notified that it actually violated § 226 until the Labor Commissioner
26 has issued a formal citation. Even if the Court would agree with Plaintiff that Defendants were
27 put on "notice" on October 8, 2021, October 12, 2021, and December 21, 2021, the dates
28 Defendants were served with Plaintiff's PAGA letters, the \$200 civil penalty would only apply to

violations for a period of 3 months, occurring between October 8, 2021 and October 18, 2021 (the end of the Release Period). Based on this analysis, Plaintiff used \$100 to evaluate the maximum potential penalty recovery in this matter. (Szamet Decl. ¶37.)

D. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp.* No. 2 163 Cal. App 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code § 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbuck’s “good faith attempts” to comply and because the violations were minimal).

Here, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendants would argue that the Court should exercise its authority to reduce any civil penalties awarded.

VI. THE REQUEST FOR ATTORNEYS’ FEES AND COSTS

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

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to create a Maximum Settlement Amount of \$400,000.00. (Szamet Decl. ¶43; Ex. 1 at ¶3.3.1.) From that fund, Plaintiff requests an award of attorneys’ fees for PAGA Counsel in the amount of \$133,333.00, or 33.33% of the Maximum Settlement Amount, and \$10,000.00 in reimbursement for litigation costs. (*Id.*; Ex. 1 at ¶3.3.1.)

1. Plaintiff’s Counsel are Entitled to a Fee from the Common Fund

On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half*

1 *International*, which addressed the correct methodology for awarding fees in a class action
2 settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte*
3 Court approved awarding fees as a percentage of the settlement fund in cases like the present one,
4 where a settlement results in the creation of a common fund on behalf of a class:

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

11 (*Id.* at p. 573.) The Court then set out several reasons why the percentage-of-the-fund method is
12 preferred over the alternative lodestar-multiplier approach in California courts:

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 seek 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.

19 (*Id.* at p. 573.)

20 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
21 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
22 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
23 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
24 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
25 subject matter makes possible an award which spreads the cost proportionately among the
26 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
27 563, 578.)

28 This doctrine rests on the understanding that attorneys should normally be paid by their
clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against

1 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
2 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
3 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
4 98 Cal.App.3d at p. 548.) As this approach “better approximates the workings of the marketplace
5 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
6 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
7 Cal. App. 4th 19, 31, 48.)

8 2. The Attorneys’ Fees Request Are Well Within the Range of Fees in
9 Comparable Cases

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

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

16 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
17 Cal.App.4th 43, 66, fn 11 [“Empirical studies show that, regardless whether the percentage method
18 or the lodestar method is used, fee awards in class actions average around one-third of the
19 recovery.”] Thus, PAGA Counsel’s requested fee of 33.33% is not only well within the range of
20 reasonableness, but lower than the average fee award of 1/3 and is fair compensation for
21 undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

22 3. PAGA Counsel’s Fee Request is Reasonable Under a Loadstar Crosscheck

23 Courts may “cross-check” the results of the common fund method against the lodestar
24 method. (*See In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is
25 calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v.*
26 *Priest*, 20 Cal.3d 25, 48-49 (1977) (“*Serrano III*”).) Those rates reflect “the general local hourly
27 rate for a fee-bearing case” and do “not include any compensation for contingent risk,
28 extraordinary skill, or any other factors.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The

1 court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254;
2 *Serrano III, supra*, 20 Cal.3d at p. 49.)

3
4 (i) Requested Multiplier

5 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
6 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
7 enhancement is often awarded so that the fee received is commensurate with what attorneys could
8 expect to be compensated for services in similar circumstances. (*See San Bernardino Valley*
9 *Audubon Soc., Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755 [an award must
10 be large enough “to entice competent counsel to undertake difficult public interest cases”].) No
11 specific findings reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th
12 at p. 254; *Rebney, supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney
13 fees were awarded according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

14 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet
15 Decl. ¶50.) PAGA Counsel have an aggregate lodestar in the amount of \$68,275, which represents
16 106.1 hours of attorney work on this litigation from its inception through the date of this filing of
17 Plaintiff’s instant Motion. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.95.
18 (Szamet Decl. ¶51.) Typically, the lodestar is merely the starting point of the calculation of a
19 reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-
20 payment, delay in payment, the quality of work, and the novelty and difficulty of the issues
21 involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank*, (1991)
22 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*, (1997) 76
23 Cal.App.3d 24 1, 251.)

24 **VII. ENHANCEMENT TO PLAINTIFF**

25 The Settlement Agreement calls for an enhancement payment of \$5,000.00, to be paid from
26 the Maximum Settlement Amount. (Szamet Decl. ¶82; Ex. 1 at ¶3.3.3.) Incentive awards “are
27 intended to compensate class representatives for work done on behalf of the class, to make up for
28 financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their
willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th Cir.

2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. The time spent by Ritchie Robinson includes identifying competent counsel, providing information to PAGA Counsel regarding her relevant employment experience, compiling documents, conducting several meetings and conferences with PAGA Counsel to discuss the status of the case and the theories of liability, and reviewing settlement documents. (Szamet Decl. ¶83.) Plaintiff has also agreed to a broader release than the Aggrieved Employees and expressly waived the rights provided under California Civil Code section 1542. (*Id.*; Ex. 1 at ¶3.4.)

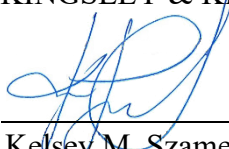
PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶84.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Szamet Decl. ¶85.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

VIII. CONCLUSION

Plaintiff and Plaintiff’s Counsel submit that the proposed Settlement as documented in the Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff respectfully requests that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Settlement Agreement.

DATED: December 13, 2022

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Attorneys for Plaintiff RITCHIE ROBINSON and
All Aggrieved Employees

(PROOF OF SERVICE)

[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 San Bernardino Boulevard, Suite 1200, Encino, California 91436.

On December 13, 2022, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

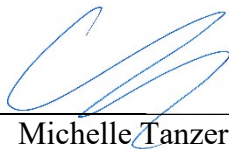
Terence Greene
Ross Poole
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One America Plaza
600 West Broadway, Suite 400
San Diego, CA 92101

[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] (BY ELECTRONIC SERVICE): I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 13, 2022, at Encino, California.



Michelle Tanzer