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5 Attorneys for Plaintiff Patrick O’Beirne, on behalf
of himself and others similarly situated
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF MERCED**
11

12 PATRICK O’BEIRNE, on behalf of himself
and others similarly situated,
13

14 Plaintiffs,

15 v.

16 INSPERITY SUPPORT SERVICES, L.P., a
Delaware limited partnership; INSPERITY,
17 INC., a Delaware corporation; and DOES 1
through 100, inclusive,
18

19 Defendants.
20
21

Case No.: 23CV-00481

Assigned for all purposes to:
Hon. Brian McCabe, Dept. 8

**NOTICE OF MOTION AND
PLAINTIFF’S MOTION FOR
APPROVAL OF PAGA
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

**[DECLARATION OF BRYAN A.
KABAHAH AND PROPOSED ORDER
SUBMITTED CONCURRENTLY
HEREWITH]**

PAGA Settlement Approval Hearing

Date: September 19, 2023

Time: 8:15 a.m.

Dept.: 8
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1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 19, 2023 at 8:15 a.m., or as soon thereafter
3 as this matter may be heard by the Honorable Brian L. McCabe in Department 8 of the above-
4 captioned court located at 627 W. 21st Street, Merced, California 95340, Plaintiff Patrick O’Beirne
5 (“Plaintiff”) will and hereby does move this Court for an order approving a settlement pursuant to
6 the Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, including approval
7 of an award of attorneys’ fees and reimbursement of litigation costs to Plaintiff’s counsel and an
8 incentive payment to Plaintiff.

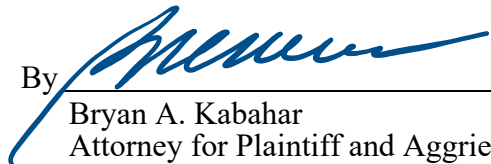
9 This Motion is based on the attached Memorandum of Points and Authorities; the
10 Declaration of Bryan A. Kabahar filed concurrently herewith, the Settlement Agreement; all other
11 records, pleadings, and papers on file in this action; and upon such other evidence or argument as
12 may be presented to the Court at the hearing on this motion.

13 Finally, given the multiplicity of issues addressed in this Motion, Plaintiff believes that there
14 is good cause to exceed the 15-page and 20-page limits set forth in California Rules of Court, rule
15 3.1113, subdivision (d), and rule 3.764, subdivision (c)(2), respectively, and respectfully requests
16 that the Court consider the attached Memorandum of Points and Authorities, which is 22 pages in
17 length.

18
19
20 DATED: August 23, 2023

Respectfully submitted,

LAW OFFICES OF BRYAN A. KABAHAH

21
22 By 
23 Bryan A. Kabahar
24 Attorney for Plaintiff and Aggrieved
25 Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In this case, Plaintiff Patrick O’Beirne (“Plaintiff”) filed an action against Defendants
4 Insperity Support Services, L.P. and Insperity, Inc. (“Defendants”) for civil penalties under the
5 Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.* (“PAGA”). Plaintiff
6 claims that Defendants owe PAGA penalties as a result of alleged violations of various Labor Code
7 sections and applicable Industrial Welfare Commission (“IWC”) Wage Order(s). Plaintiff’s
8 operative PAGA representative action complaint thus seeks civil penalties as authorized by the
9 PAGA on behalf of the State of California’s Labor and Workforce Development Agency
10 (“LWDA”), and on behalf of all current and former Business Performance Advisors who worked
11 for Defendants, and/or their predecessors or merged entities, in the State of California, from April
12 1, 2020 through April 30, 2023¹ (hereafter, “Aggrieved Employees”). Plaintiff and Defendants are
13 collectively referred herein as the “Parties.”

14 As will be explained in further detail below, based on the California Supreme Court’s
15 decision in *Arias v. Superior Court* (2009) 46 Cal.4th 969, Plaintiff can seek appropriate civil
16 penalties as called for under the PAGA on behalf of the State of California and other similarly
17 situated employees without seeking class certification or meeting the requirements of class
18 certification (*i.e.*, numerosity, typicality, commonality, and adequacy). (*See also Mendoza v.*
19 *Nordstrom, Inc.* (2017) 2 Cal.5th 1974.) As such, the usual two-step preliminary and final approval
20 process is not required.

21 Rather, as called for under Labor Code section 2699, subdivision (l), all that is required is
22 an order of approval by this Court of the PAGA settlement. The Parties have reached such an
23 agreement, and thus Plaintiff, as an aggrieved employee under the PAGA, now respectfully moves
24 this Court for an order granting approval of the Parties’ Settlement Agreement (“Settlement
25 Agreement” or “Settlement”), a true and correct copy of which is attached to the concurrently filed
26 Declaration of Bryan A. Kabahar (“Kabahar Decl.”) as **Exhibit A**, and attached to the Settlement
27

28 ¹ The “PAGA Period,” *see* Settlement Agreement § I.11.

1 Agreement as internal Exhibit 1 is a copy of the Parties’ mutually agreed-upon explanatory letter
2 (i.e., required notice to aggrieved employees regarding the settlement and its terms) that, if approved
3 by this Court, will be sent to Aggrieved Employees with their settlement payments, as discussed in
4 further detail *infra*.

5 As set forth herein, the settlement is fair, reasonable, and adequate, and this Court should
6 enter an order approving the settlement.

7 **II. FACTUAL AND PROCEDURAL HISTORY**

8 Plaintiff, who was employed as a Business Performance Advisor, alleges that during the
9 relevant time period, Defendants engaged in a series of unlawful wage and hour practices, including,
10 but not limited to: (1) failure to pay minimum and overtime wages; (2) failure to provide compliant
11 meal and rest breaks; (3) failure to maintain and provide accurate itemized wage statements; (4)
12 failure to reimburse business expenses; and (5) failure to pay all wages owed timely and upon
13 separation of employment. (Settlement Agreement § II.1.) Plaintiff contends that Defendants
14 misclassified their Business Performance Advisors as exempt in violation of California’s wage and
15 hour laws, specifically to sidestep obligations of such wage and hour laws. (Kabahar Decl. ¶¶ 36-
16 38.)

17 On September 14, 2021, Plaintiff, through his counsel (hereafter, “Plaintiff’s Counsel”) gave
18 written notice on behalf of himself and other Aggrieved Employees via certified mail to the LWDA
19 and Defendants, outlining the facts and legal theories to support the claims of Defendants’ alleged
20 violations of wage-and-hour laws (Kabahar Decl. ¶ 12 and Exhibit B [9/14/21 Notice to LWDA].)
21 This notice is required under Labor Code section 2699.3, subdivision (a)(1), as a prerequisite to
22 bringing a PAGA representative claim against an employer. (Kabahar Decl. ¶ 12.) The LWDA did
23 not respond to this notice of its intent to investigate within the allotted 65-calendar days timeframe,
24 thus allowing Plaintiff to file the instant lawsuit against Defendants. (*Ibid.*)

25 On February 8, 2023, Plaintiff filed his representative action against Defendants for penalties
26 under the PAGA, contending that (as noted above), ostensibly as a corporate policy, Defendants
27 have been engaged in the widespread practice of misclassifying Business Performance Advisors as
28 “outside salespersons” to sidestep many wage-and-hour obligations to the detriment of Plaintiff and

1 Aggrieved Employees—including all provisions in the California Labor Code and IWC Wage
2 Orders. (Kabahar Decl. ¶ 14.) Although Defendants vowed to vigorously defend the action, the
3 Parties agreed to participate in mediation to explore early resolution. (*Id.* at ¶ 15.)

4 As of September 2021, even prior to filing the complaint, Plaintiff’s counsel began his
5 investigation into the at-issue allegations. (Kabahar Decl. ¶ 13.) Such investigation continued
6 following the complaint’s filing. Specifically, in preparation for mediation, the Parties exchanged
7 documents and information that allowed both sides to evaluate the potential exposure and potential
8 risks, such as Plaintiff’s personnel file, a random sampling of time and payroll records Aggrieved
9 Employees, Defendants’ employee handbooks, timekeeping policies, relevant meal and rest break
10 procedures, the total number of Aggrieved Employees during the PAGA Period, along with counts
11 of former Aggrieved Employees, pay periods during the PAGA Period, and the average hourly pay
12 rate. (*Id.* at ¶ 16.)

13 The Parties met and conferred regarding the information and documents produced by
14 Defendants. (Kabahar Decl. ¶ 16.) Furthermore, Plaintiff’s Counsel analyzed, researched, and
15 investigated the law as applied to the facts and potential defenses to the claims, engaged in the
16 calculation of potential penalties under the PAGA, interviewed Plaintiff and other Aggrieved
17 Employees, consulted with an expert, obtained supporting facts and documents, and assessed trial
18 management, appellate issues, and litigation risks. (*Id.* at ¶ 17.)

19 The Parties attended two mediation sessions with the Hon. Peter D. Lichtman (Ret.), a well-
20 respected mediator with considerable experience mediating wage and hour class actions and PAGA
21 representative actions. (Kabahar Decl. ¶ 18.) During the mediation, the Parties exchanged further
22 information and discussed all aspects of the case, including the risks and delays of litigation, the
23 risk associated with proceeding in a representative capacity, liability under the claims asserted, and
24 the ability to recover and measure penalties. (*Ibid.*) The settlement negotiations were at all times at
25 arm’s-length and although conducted in a professional matter, were adversarial. (*Ibid.*) As a result
26 of the mediation sessions, the Parties ultimately reached an agreement to resolve the matter in full,
27 and memorialized the terms of such in the Settlement Agreement. (*Ibid.*)

1 The Settlement was the culmination of protracted discussions between the Parties following
2 a thorough analysis of the pertinent facts and law at issue. The Parties now present the Settlement
3 Agreement to this Court for approval. (Kabahar Decl. ¶ 20.)

4 **III. THE PAGA AND ITS REQUIREMENTS**

5 Prior to the enactment of the PAGA, many of the penalties provided for violations of certain
6 Labor Code provisions were exclusively within the province of the State of California and its
7 agencies to seek, enforce, and assess. (*Arias, supra*, 46 Cal.4th at p. 980.) However, due to the lack
8 of financing and the substantial number of Labor Code violations by employers, the California
9 Legislature found that it was in the public interest to allow aggrieved employees to act as “private
10 attorneys general” to enforce and recover penalties on behalf of similarly situated aggrieved
11 employees for Labor Code violations committed by their employers. (*Ibid.*)

12 The PAGA was enacted to allow such enforcement and recovery by private individuals who
13 have been aggrieved by their employers. The statute calls for 75 percent of any penalties recovered
14 to be paid to the LWDA and the remaining 25 percent to the aggrieved employees. (*See* Lab. Code,
15 § 2699.3, subd. (a)(1).)

16 In order to enforce and seek penalties under the PAGA in a civil action, an aggrieved
17 employee must first provide written notice to the LWDA and the employer of the particular Labor
18 Code violations the aggrieved employee alleges the employer has violated. (*See* Lab. Code, §
19 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not intend to
20 investigate the alleged violations, or if the LWDA does not respond within a certain period of time,
21 the aggrieved employee is then allowed to proceed in a civil action against the employer on behalf
22 of the LWDA and all other similarly situated aggrieved employees. (*See* Lab. Code, § 2699.3, subd.
23 (a)(2)(A).)

24 In 2009, the California Supreme Court considered the issue of whether the aggrieved
25 employee who brings a PAGA representative claim needs to meet class action requirements. (*Arias*,
26 *supra*, 46 Cal.4th at p. 976.) After substantial review of the legislative history of the PAGA, the
27 Court held that an aggrieved employee’s representative action brought on behalf of other aggrieved
28 employees against an employer for PAGA violations does not need to meet requirements for class

1 certification. (*Id.* at pp. 975, 980-988.) As the Court held, a plaintiff bringing suit under the PAGA
2 does so as a proxy or agent of California’s labor law enforcement agencies. (*Id.* at p. 986.) Because
3 the employee’s PAGA action functions as a substitute for an action brought by the government
4 itself, a judgment in the PAGA action binds all those who would be bound by a judgment in an
5 action brought by the government. (*Ibid.*)

6 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court shall
7 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code, §
8 2699, subd. (1)(2).) The Parties to this current PAGA action have reached such a settlement, and
9 now seek this Court’s approval of the settlement. Concurrently with the filing of this Motion,
10 Plaintiff’s Counsel is submitting the Settlement Agreement to the LWDA as required by section
11 2699, subdivision (1)(2). (Kabahar Decl. ¶ 32.)

12 **IV. DEFENDANTS’ DENIAL OF WRONGDOING OR LIABILITY**

13 From this case’s inception, Defendants have denied and continue to deny any liability or
14 wrongdoing as to all of the claims alleged, and the Settlement is not an admission by Defendants of
15 any fault, wrongdoing, or liability. (Kabahar Decl. ¶ 19; Settlement Agreement § III.1.) Defendants
16 further denied and continue to deny that the lawsuit is appropriate for representative treatment for
17 any purpose other than this settlement. (Kabahar Decl. ¶ 19.) There has been no determination by
18 this Court or any other court as to the merits of the claims asserted by Plaintiff against Defendants.
19 (*Ibid.*) Defendants state that they have concluded that given the risks and costs of litigation, it is
20 desirable that the lawsuit be fully and finally settled in the manner and upon the terms and conditions
21 set forth in the Settlement Agreement. (*Ibid.*)

22 **V. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

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

24 **A. Aggrieved Employees and Terms of the Settlement**

25 Aggrieved Employees are defined in the Settlement Agreement as “all current and former
26 Business Performance Advisors who worked for Defendants, and/or their predecessors or merged
27 entities, in the State of California, from April 1, 2020 through April 30, 2023” (Settlement
28 Agreement § I.2.) The PAGA Period is defined as April 1, 2020 to April 30, 2023. (*Id.* at § I.11.)

1 Based on information provided by Defendants, Plaintiff estimates that there are approximately 265
2 Aggrieved Employees (as of the date of the Settlement Agreement). (*Id.* at § I.2.)

3 The Settlement provides that Defendants will pay a total ***non-reversionary amount of Seven***
4 ***Hundred and Fifty-Five Thousand Dollars (\$755,000.00)*** (the “Gross Settlement Amount”), which
5 is inclusive of payments to the LWDA and Aggrieved Employees, payment of Plaintiff’s Counsel’s
6 Attorneys’ Fees and Costs, the Incentive Payment to Plaintiff, as well as payment of Settlement
7 Administration Costs. (Settlement Agreement §§ I.9, III.3.)

8 Plaintiff’s Counsel requests a fee award of 35 percent (*i.e.*, \$264,250) of the Gross
9 Settlement Amount, and reimbursement of litigation costs in the amount of \$19,055.96.² (Settlement
10 Agreement § III.3(a); Kabahar Decl. ¶¶ 22, 75.) Plaintiff requests an Incentive Payment, to be paid
11 in recognition of his time and service to Aggrieved Employees and the State of California in
12 pursuing the lawsuit, in fulfilling his obligations as the lead Aggrieved Employee, in the amount of
13 \$10,000. (Settlement Agreement § III.3(b); Kabahar Decl. ¶¶ 22, 77.) The Parties selected CPT
14 Group, Inc. as the Settlement Administrator, and its costs allocated up to \$18,000 are to be deducted
15 from the Gross Settlement Amount. (Settlement Agreement § III.3(c); Kabahar Decl. ¶¶ 22, 29.)
16 After payment of the Attorneys’ Fees and Costs, Plaintiff’s Incentive Payment, and Settlement
17 Administration Costs, approximately \$443,694.04³ will remain as the estimated net proceeds for
18 distribution to the LWDA and Aggrieved Employees (the “Net Settlement Amount”). (Settlement
19 Agreement §§ I.9, III.3; Kabahar Decl. ¶ 22.)

20 **B. Settlement Allocation to the LWDA and Aggrieved Employees**

21 Pursuant to the Settlement Agreement, the entire Net Settlement Amount shall be designated
22 as PAGA civil penalties to be allocated as follows: 75 percent (estimated at \$332,770.53) shall be
23 distributed to the LWDA and 25 percent (estimated at \$110,923.51) to the Aggrieved Employees
24 (divided pro rata based on each Aggrieved Employee’s proportionate number of pay periods during
25

26 ² Notwithstanding that the Settlement Agreement allocated up to \$22,000 (*see* Settlement
27 Agreement § III.3(a)), Plaintiff’s Counsel’s total costs are \$19,055.96 (*see* Kabahar Decl. ¶¶ 22,
75).

28 ³ Note, Plaintiff Counsel’s costs are \$19,055.96 (\$2,944.04 less than the amount allocated under the
Settlement Agreement). (*See* Settlement Agreement § III.3(a)).

1 the PAGA Period). (Settlement Agreement § III.4; Kabahar Decl. ¶ 23; *see* Lab. Code, § 2699, subd.
2 (i) [“Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall
3 be distributed as follows: 75 percent to the [LWDA] enforcement of labor laws and education of
4 employers and employees about their rights and responsibilities under this code ... and 25 percent
5 to the aggrieved employees.”].)

6 Assuming, *arguendo*, that distribution was pro rata across an approximate 265 Aggrieved
7 Employees, the average payment to each Aggrieved Employee is estimated to be \$418.58 (though,
8 in reality, distribution will be pro rata based on pay periods worked). (Kabahar Decl. ¶ 24.)

9 **C. Settlement Payments and Explanatory Notice**

10 The settlement is non-reversionary and does not require Aggrieved Employees to submit a
11 claim form to reap financial benefit from the settlement. (Settlement Agreement §§ I.8, III.2, IV;
12 Kabahar Decl. ¶ 25.) Within twenty (20) calendar days after the Effective Date,⁴ Defendants will
13 provide to the Settlement Administrator a list of the Aggrieved Employees (in a computer-readable
14 format, such as an Excel spreadsheet), containing each Aggrieved Employee’s: (a) full name, (b)
15 last known mailing address, (c) last known telephone number, (d) pay period information, and (e)
16 Social Security number. (Settlement Agreement § IV.2.)

17 Thereafter, the Settlement Administrator will distribute payments to Aggrieved Employees
18 (“Individual Settlement Payments”),⁵ along with the Parties’ mutually agreed-upon explanatory
19 letter providing notice of the Settlement under the PAGA (*see* Kabahar Decl. Exh. 1 [Settlement
20 Agreement] at internal Exhibit A), via First-Class U.S. Mail. (Settlement Agreement § IV.3.) Before
21 mailing, the Settlement Administrator will perform a National Change of Address database search
22 to locate the most current addresses for Aggrieved Employees. (*Id.* at § IV.2.) Any payments
23 returned undeliverable on or before the check cashing deadline (which deadline is discussed below)
24 will be promptly sent to the forwarding address affixed thereto. (*Id.* at § IV.4.) For any payments

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26
27 ⁴ “Effective Date” is defined as the date upon which the Court signs an order approving the Settlement.

28 ⁵ Payment to the LWDA of its 75% share of the Net Settlement Amount will also be made within the same time period.

1 returned without a forwarding address, the Settlement Administrator shall attempt to locate a correct
2 address using a skip-trace or other search, and will perform a single re-mailing. (*Ibid.*)

3 Aggrieved Employees will have 180 days after the date of mailing by the Settlement
4 Administrator to cash their checks. (Settlement Agreement § IV.3.) Any settlement checks
5 remaining uncashed after 180 days shall be cancelled, and the funds associated with such cancelled
6 checks will be transmitted to a *cy pres* recipient to be agreed upon by the parties. (*Ibid.*) In the event
7 that an Aggrieved Employee does not negotiate his or her check, the terms of the final judgment
8 will nevertheless be binding upon that Aggrieved Employee.

9 **D. Release of Claims by Plaintiff and Aggrieved Employees**

10 Importantly, the California Supreme Court has explained that other employees are bound by
11 a PAGA adjudication only with respect to civil penalties, just as they would be “bound by a
12 judgment in an action brought by the government.” (*Arias, supra*, 46 Cal.4th at p. 986.) In
13 accordance with this rule, the release of Aggrieved Employees is narrowly tailored to release from
14 liability for “all claims for civil penalties under the PAGA that are, were, or reasonably could have
15 been alleged or asserted based upon the facts alleged in the Action for violations of Labor Code
16 sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1194, 1194.2, 1197,
17 1197.1, 1198, 2800, and 2802, that occurred, arose, or accrued at any time during the PAGA Period.”
18 (Settlement Agreement § I.12; *see also* Settlement Agreement § III.5; Kabahar Decl. ¶ 28.)

19 **VI. THE PAGA SETTLEMENT SHOULD BE APPROVED**

20 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
21 any civil action filed pursuant to this part.” (Lab. Code, § 2699, subd. (1)(2).) The amendment to
22 Labor Code section 2699, subdivision (1)(2), also requires that the “proposed settlement shall be
23 submitted to the agency at the same time that it is submitted to the court.” As such, and as noted
24 above, the Settlement Agreement is being submitted to the LWDA concurrently with the filing of
25 this Motion, in accordance with this section. (Kabahar Decl. ¶ 32.)

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

27 The legislative history of the PAGA makes little mention of the approval requirement in
28 section 2699, subdivision (1). The PAGA was passed by the legislature as Senate Bill No. 796 (2003-

2004 Reg. Sess.), and it was signed by the Governor and filed with the Secretary of State on October 12, 2003. (See Legis. Counsel’s Dig., Sen. Bill No. 796, Ch. 906, 2003 (2003-2004 Reg. Sess.) <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB796>.) It took effect on January 1, 2004.

The original version of the act did not contain the court approval requirement now codified in section 2699, subdivision (l). That subdivision was added as part of the amendments to the Act that were introduced as Senate Bill No. 1809 in February 2004 and signed by the Governor on August 11, 2004. (See Legis. Counsel’s Dig., Sen. Bill No. 1809, Ch. 221, 2004 (2003-2004 Reg. Sess.) <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200320040SB1809>.) Those amendments took effect immediately, and the court-approval requirement of section 2699, subdivision (l), was one of the provisions that the Legislature made retroactive to January 1, 2004. (Legislative Digest re Senate Bill No. 1809.)

Senator Joseph L. Dunn authored both the original PAGA bill (Sen. Bill. No. 796) and the amendments (Sen. Bill. No. 1809). On July 29, 2004, during the consideration of the amendments in Senate Bill No. 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was published in the Senate Daily Journal, “to clarify the extent of subdivision (1)” of what is now section 2699. He was sending this letter “in response to an issue raised by the Judicial Council of California.” In the letter, Senator Dunn stated:

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

(Sen. Dunn Letter to Senate President Pro Tem re Sen. Bill. No. 1809 (2003-2004 Reg. Sess.) July 29, 2004.) The broad criteria appear to give the Court wide latitude in determining whether to approve the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on the effect the penalties may have on the defendant-employer rather than the LWDA or the aggrieved employees who will receive the penalties. (See *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 383 [abrogated on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906] [stating that while the State clearly has an interest “in receiving the proceeds of civil

penalties,” the penalties are “used to deter violations.”].) This is different than the analysis of a class action settlement, which typically focuses on the amount received by the class and compares that to the reasonable range of potential outcomes in this case. (*C.f., e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.) Moreover, “there is not [sic] requirement that the Court certify a PAGA claim for representative treatment” as in a class action. (*Villalobos v. Calandri Sunrise Farms LP* (C.D.Cal. July 2015) 2015 WL 12732709, at *5.)

B. The Penalties Are Appropriate Under the Circumstances

Here, the penalties are appropriate when considered in light of the principles discussed in Senator Dunn’s letter. Plaintiff contends that the non-reversionary Gross Settlement Amount of \$755,000 represents an excellent recovery, and is large enough to punish or deter Defendants. (Kabahar Decl. ¶ 33.)

Procedurally, among other things, the United States Supreme Court’s decision in *Viking River Cruises, supra*, 142 S.Ct. 1906, posed significant risk to recovery. In *Viking River*, the Court held that the Federal Arbitration Act preempted California’s rule preventing courts from dividing PAGA claims into their individual (arising from Labor Code violations allegedly suffered by the named plaintiff) and representative (arising from Labor Code violations allegedly suffered by someone else) component parts. PAGA claims *could* be so split and, correspondingly, an employee’s individual PAGA claims could be compelled to arbitration under an otherwise enforceable agreement. Without the individual claims, Justice Alito wrote, a PAGA plaintiff would lack standing to pursue representative claims, and those claims should, therefore, be dismissed. It was not until July 17, 2023—after this instant action settled—that the California Supreme Court in *Adolph v. Uber Techs.* (July 17, 2023, No. S274671) [2023 WL 4553702] held that a plaintiff whose individual PAGA claims are compelled to arbitration retains standing to pursue representative (non-individual) PAGA claims in court.

Substantively, Plaintiff contended that Defendants misclassified their Business Performance Advisors as exempt, thereby violating California’s wage and hour laws. (Kabahar Decl. ¶ 36.) Plaintiff argued that Defendants failed to meet their burden of proving the applicability of the outside salesperson exemption or the administrative exemption. (*Ibid.*)

1 More specifically, Plaintiff argued that even from even before the COVID-19 pandemic,
2 ostensibly as a corporate policy, Defendants have been engaged in the widespread practice of
3 misclassifying Plaintiff and Aggrieved Employees in order to avail of the “outside salesperson”
4 exemption under federal and California law. (Kabahar Decl. ¶ 37.) Indeed, by misclassifying
5 Plaintiff and Aggrieved Employees to Defendants’ benefit, Defendants sidestep many wage-and-
6 hour obligations to the detriment of Plaintiff and Aggrieved Employees—including all provisions
7 in the Wage Orders, such as minimum wage protections and payment of overtime. (*Ibid.*)

8 Further, according to IWC Wage Order No. 4-2001(2)(M), an “outside salesperson” is one
9 who “customarily and regularly works more than half the working time away from the employer’s
10 place of business selling tangible or intangible items or obtaining orders or contracts for products,
11 services or use of facilities.” Plaintiff contended Aggrieved Employees routinely work more than
12 half their working time at Defendants’ offices and—now that COVID-19 has reshaped the
13 employment landscape—at their respective home offices. (Kabahar Decl. ¶ 38.) Indeed, the practical
14 impact of COVID-19 forced Plaintiff and Aggrieved Employees to conduct their sales activities
15 from home, whether by phone or through video conferencing, given the general reluctance of most
16 clients/customers to accept sales visits at their offices. (*Ibid.*) Under both federal and California law,
17 “employer’s place of business” is a broad construct that encompasses employees’ home offices.⁶
18 Furthermore, the narrowness of the “outside salesperson” exemption was reinforced by the
19 California Supreme Court in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, when it held
20 that the phrase “more than half the employee’s working time” indicated that employees could not
21 qualify for the California exemption if they consistently worked more than one-half of their time on
22 anything besides “outside sales” work.

23 Defendants vigorously disagreed with Plaintiff’s arguments and countered them on both
24 procedural and substantive grounds. (Kabahar Decl. ¶ 39.) First, Defendants argued that Business
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26 ⁶ 29 C.F.R. § 541.502 defines the phrase to include home offices (“any fixed site, whether home or
27 office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered
28 one of the employer’s places of business, even though the employer is not in any formal sense the
owner or tenant of the property”), and this breadth is likewise reflected by California’s Labor
Commissioner in DLSE Opinion Letter 1998.09.08.

1 Performance Advisors executed valid and enforceable arbitration agreements, therefore barring
2 recovery on a representative basis under *Viking River*. (Kabahar Decl. ¶ 39.) Second, nearly all
3 former Business Performance Advisors executed severance and settlement agreements, thereby
4 releasing Defendants from any and all known and unknown claims. (*Ibid.*) Further, Defendants
5 argued that (1) Business Performance Advisors are exempt outside salespersons and not subject to
6 the overtime requirements of the FLSA, (2) Business Performance Advisors are subject to the
7 combined exemption provided for under the FLSA due to their outside sales and administrative
8 duties; and (3) Business Performance Advisors did not work more than 40 hours per week during
9 the relevant time period. (*Id.* at ¶ 40.)

10 Defendants denied that they misclassified their Business Performance Advisors, asserting
11 that the outside salesperson exemption applies because Business Performance Advisors' primary
12 duty is to make sales. (Kabahar Decl. ¶ 41.) Defendants explained that Business Performance
13 Advisors were expected to spend the majority of their time out in the field meeting with potential
14 customers, calling on area businesses in efforts to sell Defendants' services. (*Ibid.*) Business
15 Performance Advisors visited existing and prospective clients to determine how they could be better
16 served and prepared proposals. (*Ibid.*) Further, Business Performance Advisors target commercial
17 accounts, create marketing campaigns, and schedule meetings based on their availability. (*Ibid.*)
18 Defendants also contend that the administrative exemption applies because the Business
19 Performance Advisors' duties involved the performance of office or non-manual work directly
20 related to management policies or general business operations. (*Ibid.*)

21 Defendants emphasized that Business Performance Advisors' duties are directly related to
22 sales and that they are exempt employees due to the combination of their outside sales and
23 administrative duties; Defendants contend that Business Performance Advisors qualify as exempt
24 employees because they are employed as outside salespersons and that, alternatively, they are
25 employed as exempt administrative employee. (Kabahar Decl. ¶ 42.) The FLSA regulations permit
26 employers to "tack" two or more exemptions if the employee's duties consist of more than one form
27 of exempt work. (*See* 29 C.F.R. § 541.708.) Defendants explained that the "combination exemption"
28 can be applied in those situations where the court finds that an employee's primary duty falls under

1 two or more exemptions, no single one of which constitutes the employee’s primary duty but, when
2 “tacked” together, constitute the employee’s primary duty. (*See Jimmy Trinh v. JP Morgan Chase*
3 *& Co.* (S.D.Cal. Apr. 22, 2008, No. 07-CV-1666 W (WMC)) 2008 WL 1860161; *In Re Wells Fargo*
4 *Home Mortgage Overtime Pay Litigation* (2009) 571 F.3d 953; *Auer v. Robbins* (8th Cir. 1995) 65
5 F.3d 702, 722 [employee 37, whose primary duty is neither management nor administration, may
6 fall under combination exemption based on his administrative and management responsibilities];
7 *Shockley v. City of Newport News* (4th Cir. 1993) 997 F.2d 18, 29; *Int’l Assoc. of Firefighters,*
8 *Alexandria Local 2141 v. City of Alexandria* (E.D.Va. 1989) 720 F.Supp. 1230, 1232 & 1233-34
9 [training lieutenants whose work consisted in part of exempt administrative duties and exempt
10 executive duties—neither one of which alone was a primary duty, but which taken together formed
11 their primary duty—qualified for the combination exemption]; *see* Kabahar Decl. ¶ 43.)

12 Defendants argued that Business Performance Advisors spent time determining and
13 negotiating pricing, drafting proposals, creating marketing campaigns, and maintained databases to
14 assist in selling efforts. (Kabahar Decl. ¶ 44.) Even if these in-office activities could be interpreted,
15 solely for the sake of argument, as administrative functions, Defendants contended that they are
16 related to the general business operations of Defendants and should be combined with time spent
17 devoted to outside sales. (*Ibid.*) Thus, Defendants maintained, through the combination of these
18 activities, Business Performance Advisors should be considered exempt employees under 29 C.F.R.
19 § 541.708. (Kabahar Decl. ¶ 44.)

20 Further, Defendants argued that Business Performance Advisors are not entitled to overtime
21 because they do not work more than 40 hours per week or 8 hours a day and had full control of their
22 schedules to take compliant meal and rest breaks. (Kabahar Decl. ¶ 45.)

23 As a result, the Settlement provides a fair and reasonable monetary recovery for the LWDA
24 and Aggrieved Employees in the face of hotly disputed claims (Kabahar Decl. ¶ 46), specifically
25 when analyzed via the following three points.

26 **First**, although the PAGA and its legislative history do not seem to require a comparison
27 with the “maximum” value of the claims to the actual settlement amount, the penalties are
28 reasonable when considered in this context as well. The number of Aggrieved Employees employed

1 during the PAGA Period is approximately 265, and the estimated number of PAGA-eligible pay
2 periods totals 9,062. (*See* Settlement Agreement § I.2; Kabahar Decl. ¶ 47.) Using the most
3 straightforward formulation of applying the “catch-all” initial violation \$100 penalty amount
4 specified in Labor Code section 2699, subdivision (f)(2), to each of the pay periods, the maximum
5 plausible exposure is \$906,200. (Kabahar Decl. ¶ 47.) The Settlement of \$755,000 is about 83.3%
6 of the estimated maximum exposure value. (*Ibid.*) When considering the serious risks discussed
7 herein, and the Court’s inherent power to adjust penalties downward to reflect an employer that
8 sought to be in compliance with wage and hour laws, the compromise figure is reasonable. (*Ibid.*)

9 In order for Plaintiff to prevail on the PAGA claim, Plaintiff would have to prove the
10 underlying Labor Code violations, demonstrate that Aggrieved Employees suffered, and
11 demonstrate that Defendants’ conduct gives rise to penalties. (*See, e.g., Elliot v. Spherion Pac.*
12 *Work, LLC* (C.D.Cal. 2008) 572 F.Supp.2d 1169, 1181-82 [“Plaintiff’s claim under [PAGA] is
13 wholly dependent upon her other claims. Because all of plaintiff’s other claims fail as a matter of
14 law, so does her PAGA claim.”].) Although wage-and-hour actions are amenable to resolution as to
15 a group of employees, some courts have also found that, for various reasons, the issues raised by
16 Plaintiff are individualized issues and/or are unmanageable and thus not suitable for adjudication as
17 to a group of employees. Defendants contended that courts have required, and that due process
18 requires, that the adjudication of PAGA claims meet a “manageability” requirement (*see, e.g., Liu*
19 *v. Merrill Lynch & Co.* (C.D.Cal. Nov. 10, 2014, No. CV-14-0425-PA) 2014 WL 5904904, at *3-4
20 [court dismissed the PAGA claim because a multitude of individualized assessments would be
21 necessary, making the PAGA claim unmanageable]). (Kabahar Decl. ¶ 48.) Defendants maintained,
22 and continue to maintain, that they had compliant employment policies and practices throughout the
23 relevant time period. (*Id.* at ¶ 49.) Defendants denied, and continue to deny, that they ever violated
24 any provision of the Labor Code, including, but not limited to, those sections for which Plaintiff
25 seeks penalties under the PAGA. (*Ibid.*) Defendants further denied, and continue to deny, that
26 Plaintiff’s lawsuit is appropriate for representative treatment for any purpose other than settlement.
27 (*Ibid.*) Defendants contended that the work experiences of Aggrieved Employees varied across
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1 different locations, and that these factors would pose a challenge to proving injuries to all Aggrieved
2 Employees and to the manageability and viability of representative adjudication. (*Id.* at ¶ 51.)

3 Defendants also argued that an important feature of the PAGA is that the Court retains
4 discretion to lower the penalties if, based on the facts and circumstances of the particular case, to do
5 otherwise would result in an award that is “unjust, arbitrary and oppressive, or confiscatory” (*see*
6 Lab. Code, § 2699, subd. (e)(2); *see also Thurman v. Bayshore Transit Management, Inc.* (2012)
7 203 Cal.App.4th 1112, 1136 [holding that a court may reduce PAGA penalties awarded to an
8 employee based upon discretionary factors]). (Kabahar Decl. ¶ 52.) Again, Defendants deny that
9 they ever violated any provision of the Labor Code. (*Ibid.*) Even assuming, *arguendo*, that such
10 violations occurred, which Defendants deny, Defendants contended that said violations would only
11 be considered “initial violations,” and thus, heightened “subsequent violation” penalties would not
12 be warranted (*see* Lab. Code, § 2699, subd. (f)(2); *see also Amaral v. Cintas Corp. No. 2* (2008) 163
13 Cal.App.4th 1157, 1208-09 [“Until the employer has been notified that it is violating a Labor Code
14 provision [...], the employer cannot be presumed to be aware that its continuing underpayment of
15 employees is a ‘violation’ subject to penalties.”]). (Kabahar Decl. ¶ 52.)

16 Moreover, Defendants contended that the Court was unlikely to assess cumulative PAGA
17 penalties for the maximum number of possible, separate Labor Code violations, because it would
18 be unjust, arbitrary, oppressive, and/or confiscatory, especially where certain conduct may be
19 regulated by multiple provisions of the Labor Code that are interrelated and work in tandem.
20 (Kabahar Decl. ¶ 53.) As such, Defendants contended that cumulative penalties and heightened
21 penalties would be unjust, arbitrary, oppressive, and confiscatory. (*Ibid.*) Finally, many of the claims
22 were derivative of each other, which tended to undermine any stacking of penalties. (*Ibid.*)

23 While Plaintiff disagrees with Defendants’ contentions and maintains that his PAGA claim
24 has merit, in reaching the settlement, Plaintiff and his counsel took into account the strengths and
25 weaknesses of each side’s position, and the uncertainty of how the case might have concluded as
26 litigation continued, at trial, and/or appeals. (Kabahar Decl. ¶ 54.) The settlement amount is
27 reasonable in light of significant risks and uncertainties associated with the PAGA claim in this
28 case.

1 **Second**, the scope of the release is strictly confined to those PAGA civil penalties that are
2 asserted in the Lawsuit or could have been asserted based on the facts alleged in the Lawsuit.
3 (Settlement Agreement § I.12.) The PAGA Released Claims do not release any Aggrieved
4 Employee's non-PAGA claims for alleged violations of the Labor Code. (*Ibid.*) The Settlement also
5 requires that each Aggrieved Employee receive a notice, (*see* Settlement Agreement § IV.3 and
6 internal Exhibit A), which describes this litigation and the settlement. (Kabahar Decl. ¶ 55.)

7 **Third**, the settlement here, even with deductions, provides a substantial sum of
8 approximately \$332,770.53 to the State of California (via the LWDA), and \$110,923.51 to
9 Aggrieved Employees. (Kabahar Decl. ¶ 56.) The settlement is a compromise of highly disputed
10 claims. (*Ibid.*) Plaintiff and his counsel recognize the expense and length of continued proceedings
11 necessary to litigate the matter through trial and any possible appeals. (*Ibid.*) They have also
12 considered the uncertainty and risk of the outcome of further litigation, and the difficulties and
13 delays inherent in such litigation. (*Ibid.*) Plaintiff and his counsel are also aware of the burdens of
14 proof necessary to establish liability, both generally and in response to Defendants' defenses thereto,
15 and the difficulties in establishing Defendants' liability for, and the right to recovery of, penalties
16 on behalf of Plaintiff, the State of California, and other Aggrieved Employees. (*Ibid.*) Plaintiff and
17 his counsel have also taken into account Defendants' agreement to enter into a settlement that
18 confers significant relief upon Aggrieved Employees and the State of California. (*Ibid.*)

19 **Fourth**, the settlement secured by Plaintiff here is greater than other PAGA penalty awards
20 approved by California state courts, which often range between \$7,500.00 and \$15,000.00 for
21 PAGA claims impacting hundreds or thousands of individuals, resulting in much lower PAGA
22 penalty payments on a per capita basis. (*See, e.g., Penaloza v. PPG Industries Inc.* (Super. Ct. L.A.
23 County May 20, 2013, No. BC471369) 2013 WL 2917624, at *2 [approving PAGA penalties of
24 \$5,000.00 to class of 667 members]; *Cabrera v. Advantage Sale & Marketing, LLC* (Super. Ct. L.A.
25 County March 12, 2013, No. BC485259) 2013 WL 1182822 [approving PAGA penalties of
26 \$10,000.00 for class of approximately 3,000 members].) The monetary recovery provided by this
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1 settlement is well-within the range of an acceptable settlement under the circumstances, especially
2 when compared to the settlement of PAGA claims in other cases.⁷ (Kabahar Decl. ¶ 57.)

3 **Fifth**, public policy strongly favors the settlement of litigation. (*Consumer Advocacy Group*
4 *v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 63.) Because the proposed settlement
5 is neither unjust nor ignores the public interest, it should be approved.

6 Considering all of the facts in this case, Plaintiff and his counsel have determined that the
7 settlement represents a fair, adequate, and reasonable resolution of Plaintiff's PAGA claim, and that
8 it is in the best interests of Aggrieved Employees and the State of California.

9 **VII. THE ATTORNEYS' FEES AND COSTS REQUESTED ARE REASONABLE**

10 Here, Plaintiff's Counsel moves for approval of an award of attorneys' fees consisting of 35
11 percent, or \$264,250, of the common fund. (Settlement Agreement § III.3(a); Kabahar Decl. ¶ 60.)
12 Pursuant to Labor Code section 2699, subdivision (g)(1), the prevailing party in a PAGA action is
13 entitled to reasonable attorney's fees and costs. Plaintiff is not claiming that he is the prevailing
14 party, but nevertheless the settlement of a PAGA action must consider the fees that have been
15 incurred as an element of the liability analysis and ultimate settlement. (Kabahar Decl. ¶ 60.)

16 This request for attorneys' fees is supported by California law under the common fund
17 doctrine. The main advantage of the settlement here is that it creates a significant fund to benefit the
18 LWDA and Aggrieved Employees. (Kabahar Decl. ¶ 61.) As noted by the trial court in *Harrington*
19 *v. Payroll Entertainment Services, Inc.* (2008) 160 Cal.App.4th 589, plaintiff's attorneys should
20 share in this recovery. These circumstances are analogous to cases, like wage and hour class actions,
21 where the common fund doctrine is applied. The common fund doctrine has been applied

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23 ⁷ See, e.g., *DCH Auto Wage and Hour Cases* (May 2017) Los Angeles County Super. Ct. Case No.
24 JCCP4833 [approving the amount of \$15,000 out of \$4 million toward settlement of PAGA claims];
25 *Garcia v. Gordon Trucking, Inc.* (E.D.Cal. Oct. 31, 2012) 2012 WL 5364575, at *3 [approving the
26 amount of \$10,000 out of \$3.7 million toward settlement of PAGA claims]; *Schiller v. David's*
27 *Bridal, Inc.* (E.D.Cal. June 11, 2012) 2012 WL 2117001, at *14 [approving the amount of \$10,000
28 out of \$518,245 toward settlement of PAGA claims]; *Chu v. Wells Fargo Investments, LLC*
(N.D.Cal. Feb. 16, 2011) 2011 WL 672645, at *1 [approving the amount of \$10,000 out of \$6.9
million toward settlement of PAGA claims]; *Franco v. Ruiz Food Products, Inc.* (E.D.Cal. Nov. 27,
2012) 2012 WL 5941801, at *14 [approving the amount of \$10,000 out of \$2.5 million toward
settlement of PAGA claims]; *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576 [finding no abuse
of discretion by the trial court in approving a settlement that allocates \$0 toward the settlement of
PAGA claims that were at issue in the lawsuit].

1 “consistently in California when an action brought by one party creates a fund in which other persons
2 are entitled to share.” (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.)

3 An award of fees from the gross settlement amount under the common fund doctrine
4 prevents unjust enrichment of those who benefit from the common fund through the successful
5 efforts of plaintiff’s counsel and furthers the important goal of attracting competent counsel to
6 handle representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Int’l, Inc.*
7 (2016) 1 Cal.5th 480, 503.) In affirming the use of the common fund doctrine in California, the
8 California Supreme Court summarized the benefits of the percentage method of recovery stating:

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

13 (*Laffite, supra*, 1 Cal.5th at p. 503; *see also Lealao v. Beneficial Cal. Ins.* (2000) 82 Cal.App.4th 19,
14 48 [observing that the key advantage of the common fund method is that it focuses on the total
15 benefit conferred on the beneficiaries resulting from the efforts of counsel.]) Thus, the common fund
16 approach is the most reasonable one here, given the nature of the case and of the Parties’ settlement.

17 The attorneys’ fees award requested is also consistent with what courts have awarded in
18 other cases. The following list shows PAGA actions and PAGA/class action cases where attorney’s
19 fees were awarded on a common fund basis in a range between 33.33% and 40%:

- 20 • *Banda v. Verizon California, Inc.*, Los Angeles County Superior Court Case No.
21 BC434587 (**35% fee awarded** on \$15,000,000 settlement of mixed PAGA/class claims);
- 22 • *Padilla v. Staffmark Investment, Inc.*, San Bernardino County Superior Court Case
23 No. CIVDS1408641 (**33.33% fee awarded** on \$2,000,000 settlement of a PAGA only case);
- 24 • *Birch v. Office Depot*, United States District Court for the Southern District of
25 California Case No. CV06-1690-DMS (**40% fee awarded** on \$16,000,000 settlement of mixed
26 PAGA/class claims);
- 27 • *Zelada v. Majestic Terminal Services*, San Bernardino County Superior Court Case
28 No. CIVDS1916968 (**38% fee awarded** on \$1,800,000 settlement of a PAGA only case); and

1 • *Garcia v. The Pep Boys*, Orange County Superior Court Case No. 30-2014-
2 00720574-CU-OE-CXC (**33.33% fee awarded** on \$1,030,000 settlement of a PAGA only case).

3 Plaintiff's Counsel's application for attorneys' fees in light of the facts and circumstances
4 surrounding the case is well within the range of reasonableness. In fact, historically, courts have
5 awarded fees as high as fifty percent (50%) of the settlement in complex actions. (*See In re*
6 *Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494 [**awarding attorneys' fees in the**
7 **amount of 45%** of the \$7.3 million total settlement amount]; *Beech Cinema, Inc. v. Twentieth-*
8 *Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195 [awarding approximately **53% of the**
9 **settlement as attorneys' fees**].) California courts routinely approve attorneys' fees awards
10 "average[ing] around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
11 43, 66 fn. 11 [lower court found the range of contingency fees in marketplace to be up to 40 percent
12 and determined such a percentage fee was appropriate].)

13 Based on the foregoing, awarding attorneys' fees based on a percentage of the settlement
14 amount is favored by California Courts when a fund established for the common benefit of other is
15 involved, such as here. (*See Laffitte, supra*, 1 Cal.5th at p. 503 [finding trial court did not abuse its
16 discretion in approving fee award of 1/3 of the common fund].)

17 Here, Plaintiff's Counsel represented Plaintiff (and the State of California) in this matter on
18 a strictly contingency basis and, as such, had to forego other financial opportunities to litigate other
19 cases (contingency and hourly), incurred the risk of non-recovery after investment of time, money,
20 and resources, and has done so since the inception of this case without payment or compensation.
21 (Kabahar Decl. ¶ 66.) This is not an easy burden for Plaintiff's Counsel and, if the best that could
22 be hoped for is merely to be paid the customary hourly rate, such would not sufficiently incentivize
23 future similar private attorney general/qui tam cases with contingency risks. (*Id.* at ¶ 67.) Given that
24 the request for attorneys' fees here falls well within the norms accepted in comparable California
25 court cases, Plaintiff's Counsel's request for \$264,250 in attorneys' fees is fair and reasonable.

26 Significantly, *Laffitte* also held that trial courts have discretion to assess reasonableness of
27 fee awards with tools such as the lodestar cross-check, though they need not do so. (*Laffitte, supra*,
28 1 Cal.5th at p. 506.) This Court can and should award attorneys' fees and costs based on the

percentage fee in light of the excellent results achieved and for the reasons stated. Nevertheless, the lodestar “cross-check” here also supports the requested contingency-fee percentage. (*Serrano v. Priest* (1975) 20 Cal.3d 25, 48.) Specifically, Plaintiff’s Counsel, with a total lodestar of \$142,500 requires a multiplier of approximately 1.85 to yield the requested fees. (Kabahar Decl. ¶¶ 68-73.)

The requested multiplier in this case is within even the modest multipliers that are approved by California courts. (*See Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050-1051 [looking to multipliers awarded in comparable cases as evidence of reasonableness; affirming 3.65 multiplier].) Multipliers routinely range from 3 to 5, and it is not uncommon that multipliers of between 5 and 10, or higher, are applied. (*See, e.g., Wilson v. Bank of Am. Natl. Trust & Savs. Assn.* (Cal. Sup. Ct., Aug. 16, 1982, No. 643872) [multiplier of 10]; *Glendora Comm. Redev. Agency v. Demeter* (1984) 155 Cal.App.3d 456, 465 [affirming multiplier of 12, and expressly rejecting argument that fee was either exorbitant or unconscionable]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 [noting that “[m]ultipliers can range from 2 to 4 or even higher”]; *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 298 [3-4 are in the “range [of] common” multipliers for class actions]; *Laffitte, supra*, 1 Cal.5th at pp. 487-88 [multiplier of 2.03 to 2.13]; *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 [affirming a 2.34 multiplier without remand]; *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 [applying a 2.52 multiplier]; *Chavez, supra*, 162 Cal.App.4th at p. 66 [applying a 2.5 multiplier]; *Chau, et al v. CVS RX Services, Inc.*, Los Angeles County Superior Court Case No. BC349224, Order Granting Final Approval of Class Action Settlement, Reasonable Attorneys’ Fees and Costs and Service Payments to the Class Representatives [a 3.8 multiplier was applied based primarily on contingent risk and the “excellent results [] obtained [] with relative efficiency”].) Recently, on September 29, 2020, the California Court of Appeal (Fourth Appellate District, Division Three) issued its ruling in *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, affirming the trial court’s award of fees to plaintiff’s attorneys in a contingency case utilizing a 2.0 multiplier, explaining:

Under our precedents, the unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider under *Serrano III*. The adjustment to the lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed,

1 constitutes earned compensation; unlike a windfall, it is neither unexpected nor
2 fortuitous. Rather, it is intended to approximate market-level compensation for such
3 services, which typically includes a premium for the risk of nonpayment or delay in
4 payment of attorney fees.

5 (*Id.* at p. 351 [citing *Ketchum v. Moss* (2001) 24 Cal.4th 1122, 1138] [internal quotation marks
6 omitted] [italics in original].) The *Santana* court concluded a multiplier was appropriate to account
7 for the contingency factor. Accordingly, the lodestar cross-check affirms that the fee award
8 requested does in fact fall within the range of reasonableness. (Kabahar Decl. ¶ 74.)

9 The Settlement Agreement authorized Plaintiff's Counsel to recover actual litigation costs
10 of up to \$22,000. (Settlement Agreement § III.3(a).) In actuality, Plaintiff's Counsel has incurred a
11 total of \$19,055.96 in litigation costs. (Kabahar Decl. ¶ 75.) These expenses include: (1) court filing,
12 service, and messenger fees; (2) LWDA filing fees; (3) mediation fees; (4) expert fees; and (4)
13 postage. (*Id.* at ¶ 75 at and Exhibit C [Cost Breakdown].) The expenses incurred by Plaintiff's
14 Counsel in this matter benefited Plaintiff, the LWDA, and Aggrieved Employees, and are of the
15 type routinely billed by attorneys in such litigation. (*Id.* at ¶ 76.) Given that the \$19,055.96 in actual
16 litigation costs are reasonable and uncontested, they should be approved.

17 **VIII. THE INCENTIVE PAYMENT TO PLAINTIFF IS REASONABLE**

18 As part of the settlement, the Parties seek an Incentive Payment to be paid to Plaintiff in
19 recognition of his time and service to Aggrieved Employees and the State of California in pursuing
20 this action, and in fulfilling his obligations as the lead Aggrieved Employee, in the amount of
21 \$10,000. (Settlement Agreement § III.3(b); Kabahar Decl. ¶ 77) The Parties acknowledge that
22 Plaintiff took significant risks in bringing this litigation and actively supported its prosecution. (*Id.*
23 at ¶ 78.) Numerous other state courts have previously approved service awards and/or individual
24 settlement payments to PAGA representatives in amounts that demonstrate the reasonableness of
25 Plaintiff's request. (*See, e.g. Garrett v. Bank of America* (Oct. 28, 2016) Alameda County Superior
26 Court Case No. RG13699027 [awarding three PAGA plaintiffs \$25,000.00 each as service awards];
27 *Brewer v. Connell Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123
28 [approving a PAGA representative awarded as an individual settlement payment of \$15,000.00];
Jones v. J.C. Penny Corp., Los Angeles County Superior Court Case No. BC451823 [awarding

1 PAGA representative a service award of \$10,000.00]; *Garcia v. Macy's West Stores*, San Bernardino
2 County Superior Court Case No. CIVDS1516007 [approving a PAGA settlement and service award
3 of \$10,000.00].)

4 Here, Plaintiff spent a significant amount of time helping Plaintiff's Counsel with the
5 prosecution of this action and performing the following tasks: (1) regularly speaking with counsel;
6 (2) providing relevant legal and factual information; (3) evaluating and producing relevant
7 documents; (4) identifying potential witnesses; (5) discussing discovery and penalties issues; (6)
8 participating and being available during the mediation process; (7) reviewing, discussing, evaluating
9 the terms of, and signing the Settlement Agreement; and (8) regularly requesting updates on the
10 status of the case. (Kabahar Decl. ¶ 79.) Plaintiff will not "benefit financially" from this settlement
11 in any meaningful sense, yet he has obtained a substantial payment for the State of California and
12 for other Aggrieved Employees. (*Id.* at ¶ 80.) Thus, Plaintiff's modest requested Incentive Payment
13 is reasonable, and should be approved. (*Ibid.*)

14 **IX. CONCLUSION**

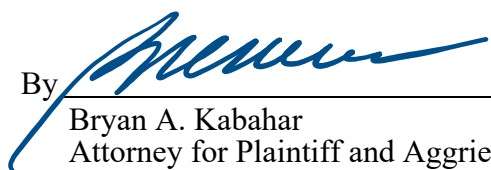
15 For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order
16 approving the proposed settlement of this PAGA representative action.

17
18
19 DATED: August 23, 2023

Respectfully submitted,

LAW OFFICES OF BRYAN A. KABAHAH

20
21 By


Bryan A. Kabahar
Attorney for Plaintiff and Aggrieved
Employees