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 individually and on behalf of similarly situated employees

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

BARBARA LEAR, individually and on behalf
 of all other similarly situated employees,

Plaintiff,

vs.

RAXIUM, INC., a Delaware Corporation; and
 DOES 1 to 100, inclusive,

Defendants.

Case No. 21CV004358

ASSIGNED FOR ALL PURPOSES TO:
 JUDGE EVELIO GRILLO
 DEPARTMENT 21

**MEMORANDUM OF POINTS &
 AUTHORITIES IN SUPPORT OF
 PLAINTIFF'S MOTION TO APPROVE
 PRIVATE ATTORNEYS GENERAL ACT
 SETTLEMENT**

Reservation No. 420139153988

Date: August 17, 2022
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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT**

2 This Motion is brought seeking approval of a Private Attorneys General Act (“PAGA”)
3 settlement in the gross amount of \$135,000.00. *See generally* Exhibit A (Proposed PAGA Settlement).
4 Plaintiff Barbara Lear (“Plaintiff”) brought this PAGA lawsuit on behalf of the Labor and Workforce
5 Development Agency (“LWDA”) and Aggrieved Employees employed by Raxium, Inc. (“Defendant”).
6 Plaintiff worked for Defendant in California from May 6, 2019, to September 19, 2021, and was subject
7 to all the same policies and practices that are alleged to be unlawful in this litigation. *See generally*
8 Exhibit B (Plaintiff’s Operative Complaint); Declaration of Barbara Lear (“Decl. Lear”) ¶ 2. Plaintiff
9 has alleged that Defendant violated California law by failing to pay overtime, failing to pay minimum
10 wages, failing to provide meal periods or pay premiums in lieu thereof, failing to provide rest periods or
11 pay premiums in lieu thereof, failing to provide accurate wage statements, failing to timely pay all final
12 wages owed, failing to maintain accurate records, failing to provide all required sick pay, and violating
13 California Labor Code sections 558 & 558.1. *See generally* Exhibit B. These violations primarily stem
14 from Plaintiff’s allegations that she and other Aggrieved Employees 1) were required to work off the
15 clock in donning and doffing personal protective equipment as well as engaging in information hand-off
16 meetings pre and post shift, 2) were not properly paid overtime and other premium wage rates due to
17 Defendant’s failure to incorporate the value of all non-discretionary remuneration into the regular rate of
18 pay for overtime, meal and rest period premium, and sick leave wage payments, 3) were not authorized
19 and permitted to take meal periods before completion of the fifth hour worked or second meal periods
20 and third rest periods when working longer than ten (10) hours in a day, 4) were not provided accurate
21 wage statements showing the total hours worked and premiums owed, and 5) were not timely paid all
22 final wages, including the unpaid overtime, meal and rest period premiums, and sick leave wages. *See*
23 *id.*

24 Defendant has denied all of Plaintiff’s allegations and any liability or wrongdoing of any kind.
25 *See* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶ 5. However, subject to approval by the
26 Court, the parties have been able to compromise and settle all asserted claims for monetary
27 compensation as a result of extensive investigations, informal document and data exchanges, and
28 extended negotiations relating to all aspects of the asserted claims. *See* Exhibit A.

1 Plaintiff's counsel believes the proposed settlement is fair, reasonable, and adequate based on the
2 investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues
3 in this case. *See* Decl. Rodriguez, ¶¶ 6-7, 9-10. The prospect of a potential adverse summary judgment
4 ruling, difficulties of complex litigation, Defendant's possible good faith defense to wage statement and
5 waiting time penalty claims, the lengthy and uncertain process of establishing specific violations as to
6 each individual within the scope of the PAGA claims for each pay period, the Court's discretion to cut
7 PAGA penalties, and various possible delays and appeals were carefully considered by Plaintiff and
8 Plaintiff's Counsel in agreeing to the proposed PAGA settlement. *See id.* at ¶ 6.

9 It is well within the discretion of this Court to approve of the proposed Agreement. Accordingly,
10 Plaintiff requests that the Court: (1) make a finding that Plaintiff has exhausted all administrative
11 remedies and is authorized to enter into the proposed PAGA settlement on behalf of the LWDA; (2)
12 approve the proposed Agreement; (3) set dates for and direct distribution of payment and the Notice of
13 Settlement (Exhibit E) to Aggrieved Employees affected by the settlement as set forth in the Agreement;
14 and (4) adopt the implementation schedule contained in the proposed order.

15 **II. PROCEDURAL AND LITIGATION HISTORY**

16 Plaintiff filed this lawsuit on December 20, 2021. On November 24, 2021, Plaintiff gave written
17 notice to the LWDA and Defendant providing facts and the legal basis for all claims asserted in the
18 Complaint and the claims that are being resolved under the Agreement. *See* Exhibit C (Plaintiff's Ltr. to
19 the Labor and Workforce Development Agency). Plaintiff also submitted the \$75.00 filing fee. *See*
20 Decl. Rodriguez ¶ 3. The November 24, 2021, notice was also sent via certified mail to Defendant on
21 the same day. *See* Exhibit C. The LWDA did not provide any response to Plaintiff's notice
22 correspondence within the statutorily required time frame and, as a result, Plaintiff became authorized to
23 act as a Private Attorney General for the asserted claims. *See* Decl. Rodriguez ¶ 3. Plaintiff uploaded a
24 copy of the filed Complaint to the LWDA on March 18, 2022. *See id.* No trial date has been set in this
25 matter. *See id.*

26 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

27 Plaintiff thoroughly investigated the merits of the claims and potential damages for such claims.
28 *See id.* at ¶¶ 7, 9-10. Plaintiff worked during the time all of Defendant's policies and practices at issue in

the Complaint were in effect and provided information regarding these policies and practices, enabling pre-filing investigations to take place. *See* Decl. Lear ¶ 2-3; Decl. Rodriguez ¶ 7. The parties engaged in informal discovery and exchange of documents, including the review and analysis of all Aggrieved Employee data, such as timecards and payroll data, as well as relevant policies for the entirety of the statute of limitations applicable to the PAGA claims. The discovery covered all aspects of the asserted claims, including merits issues, damages, the scope and configuration of Aggrieved Employees, the content and implementation of the wage and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas. *See* Decl. Rodriguez ¶ 7. The information allowed Plaintiff to determine the extent and frequency of any violations in accordance with Plaintiff's contentions and create an accurate damages model to assess the reasonableness of any settlement. *See id.* at ¶¶ 7, 9-10.

IV. NEGOTIATION AND PROPOSED SETTLEMENT

a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations

The final settlement occurred only after extended, and sometimes contentious, arm's length negotiations. Over the course of approximately six (6) months, Plaintiff has been investigating the claims and discussing with Defendant's counsel the merits of the claims and issues present in this case. *See id.* at ¶¶ 5-8. The parties exchanged substantial amounts of information and legal analysis regarding the asserted claims. *See id.* Then, only after nearly six (6) months of litigation and negotiation, which included a full day mediation with Timothy J. Long, the parties were able to reach a mutually agreeable settlement. *See id.* at ¶ 8. In light of the claims and defenses at issue, the parties agreed to a Gross Settlement Amount of \$135,000. *See* Exhibit A.

b. The Terms of the Settlement

Under the Agreement, Defendant has agreed to the following:

1. The scope of individuals falling within the PAGA settlement would include all non-exempt employees who have or continue to work for Defendant in California from November 24, 2020, up to and including May 3, 2022. *See* Exhibit A, ¶¶ 1.2, 1.19. The estimated number of Aggrieved Employees is 53.

1 2. Pay the Gross Settlement Amount of \$135,000 to resolve and release the PAGA claims
2 alleged in the Complaint and Plaintiff's individual claims. *See id.* at ¶¶ 1.13, 1.25-1.27, 5.1, 5.9, and
3 6.1.

4 3. The parties agree the cost of administering this settlement shall be paid from the Gross
5 Settlement Amount. Subject to Court approval, the parties selected Simpluris, Inc. to act as the Claims
6 Administrator, who has provided a maximum cost estimate of 3,000.00 to administer the settlement.
7 Exhibit D (Simpluris, Inc. Quote). The difference between any actual administration costs and the
8 \$7,500 allocated under the Agreement, will be added to the Net Settlement Amount. *See* Exhibit A, ¶
9 5.3.

10 4. The parties agree that up to thirty-five percent (35%) of the Gross Settlement Amount
11 will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant will not
12 oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
13 Additionally, the parties agree that Plaintiff will also be entitled to the actual litigation costs as approved
14 by the Court in an amount not to exceed \$13,500. *See id.* At the time this Motion was filed, the
15 estimated total costs incurred and that will be incurred in the future as a result of the litigation and
16 implementing the terms of the Agreement is \$9,625.26. *See* Decl. Rodriguez ¶ 17; Exhibit G (Plaintiff's
17 Itemized Costs). The difference between any actual costs and the \$13,500 will be added to the Net
18 Settlement Amount. *See* Exhibit A, ¶ 5.2.

19 5. The parties agree that up to \$7,500.00, will be paid to Plaintiff as a Service Award for the
20 work performed on behalf of the LWDA and Aggrieved Employee as well as for a separate general
21 release of all Plaintiff's individual claims. *See id.* at ¶¶ 1.27, 5.9. This amount will be in addition to any
22 amount Plaintiffs may be entitled to under the terms of the Agreement. *See id.*

23 6. Any Claims Administrator Costs, amounts paid for attorneys' fees and costs, and
24 payments to the LWDA will be paid from the Gross Settlement Amount, not in addition to the Gross
25 Settlement Amount. *See id.* at ¶¶ 1.13, 1.16, 5.1-5.3, 5.8, 5.9.

26 7. The Claims Administrator will perform searches to locate Aggrieved Employees based
27 on the last contact information in Defendant's possession. *See id.* at ¶¶ 7.2, 7.5-7.7. The searches will
28 include reference to the U.S. Postal Service's National Change of Address Database and, for any notice

1 returned as undeliverable, skip tracing using the individual's social security number and other pertinent
2 identifying information. *See id.* In addition to their settlement share, Aggrieved Employees will receive
3 a notice that provides them with information concerning all material terms of the settlement. *See id.* at ¶
4 7.5; Exhibit E.

5 8. For any portion of the Net Settlement Amount allocated to Aggrieved Employees that is
6 not claimed by them by cashing their respective settlement checks within 120 days, the remaining
7 amount shall be donated equally, *i.e.* 50/50, to Capital Pro Bono, Inc., and the Center for Workers'
8 Rights under the doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.4. No portion of the settlement will revert to
9 Defendant for any reason. *See id.*

10 **c. Allocation of Settlement Funds**

11 Under the terms of the PAGA settlement, a Net Settlement Amount will be determined. *See*
12 Exhibit A, ¶ 1.16. The Net Settlement Amount will equal the total Gross Settlement Amount (\$135,000)
13 less Plaintiff's attorneys' fees and costs, the Service Award, and Claims Administrator Costs. *See id.*
14 After Court approved attorneys' fees and costs, Service Award, and Claims Administrator Costs are
15 determined and a Net Settlement Amount has been established, that Net Settlement Amount shall be
16 divided between the PAGA Payment and payment to Aggrieved Employees. The LWDA Payment will
17 be 75% of the Net Settlement Amount pursuant to California Labor Code section 2699(i). 25% of the
18 Net Settlement Amount will be paid to Aggrieved Employees pursuant to California Labor Code section
19 2699(i) (*i.e.* the Aggrieved Employee Fund). Each individual Aggrieved Employees' Claim Amount
20 shall be determined by taking the Qualifying Pay Periods for the individual Aggrieved Employee and
21 dividing that by the Qualifying Pay Periods for all Aggrieved Employees and multiplying that fraction
22 by the 25% share of the Net Settlement Amount. Payment to Aggrieved Employees of their Claim
23 Amount will not require the submission of any claim form. *See* Exhibit A, ¶¶ 1.2, 1.5, 1.16, 5.7.

24 **V. ARGUMENT**

25 **a. PAGA Settlements Are Subject To Court Review and Approval Under The California** 26 **Labor Code**

27 A PAGA settlement is not effective unless the statutory requirements for becoming an authorized
28 representative of the LWDA have been complied with and the Court has reviewed and approved the

1 terms of the settlement. *See* Cal. Lab. Code §§ 2699(l)(2), 2699.3(a), (c). The Court necessarily has
2 broad discretion in making the decision to approve or reject a settlement for civil penalties as the
3 statutory scheme authorizes the Court to determine whether, in certain circumstances, penalties should
4 be assessed and, if so assessed, the appropriate amount of penalties based on the facts and circumstances
5 of the particular case. *See id.* at § 2699(e)(1)-(2). Although the PAGA does not set forth the particular
6 standards against which a PAGA settlement should be evaluated, the LWDA has provided guidance for
7 approval that mirrors the standards for evaluating class action settlements. *See, e.g., Salazar v. Sysco*
8 *Cent. Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the
9 LWDA’s guidance, that approval of PAGA settlements may be had where the statutory requirements of
10 the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and adequate).
11 The established standards for evaluating whether class action settlements are fair, reasonable, and
12 adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and have
13 been adopted by several courts. *See id.*; *Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n.4 (E.D.
14 Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d
15 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9
16 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v.*
17 *Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*,
18 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018
19 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

20 In making the determination whether a settlement taken as a whole is fair, reasonable, and
21 adequate, the Court should be careful to still give “proper deference to the private consensual decision of
22 the parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement
23 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned
24 judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the
25 negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors settlement of lawsuits, particularly
26 complex litigation cases where substantial resources can be conserved by avoiding the time, expense,
27 and rigors of formal litigation. *See Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In*
28

1 *re Synacor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32
2 Cal.App.4th 344, 382 (1995).

3 **b. Plaintiff has Met All Statutory Requirements For Proceeding With PAGA Claims**

4 Prior to commencing a lawsuit under PAGA, an aggrieved employee must give written notice of
5 the facts, theories, and statutes supporting the violations to the LWDA by online filing and by certified
6 mail to the employer as well as pay a filing fee of \$75.00. *See* Cal. Lab. Code §§ 2699.3(a)(1)(A)-(B),
7 (c)(1)(A)-(B). An “aggrieved employee” means any person who was employed by the alleged violator
8 and against whom one or more of the alleged violations was committed.” *id.* at § 2699(c). If the
9 LWDA does not provide notice of its intent to investigate the violation of statutes identified in Labor
10 Code section 2699.5 within 65 calendar days of the notice, the aggrieved employee may commence a
11 civil action. *See id.* at § 2699.3(a)(2)(A). For alleged violations of Labor Code statutes not enumerated
12 in Labor Code section 2699.5, an aggrieved employee may commence a civil action if the employer has
13 not cured the alleged violations within 33 calendar days of the notice. *See id.* at § 2699.3(c)(2)(A). An
14 aggrieved employee must also submit a copy of any proposed PAGA settlement to the LWDA at the
15 same time the agreement is submitted to Court. *See id.* at § 2699(1)(2).

16 As set forth above, Plaintiff complied with all statutory requirements to commence a civil action.
17 *See* Decl. Rodriguez ¶ 3; Exhibit C. The notice letter to the LWDA sets forth all claims and theories of
18 liability stated in the Complaint as well as supporting facts. *See* Exhibit C. Plaintiff also paid the
19 \$75.00 filing fee. *See* Decl. Rodriguez ¶ 3. Plaintiff became authorized to commence a civil action on
20 all claims asserted in the notice as of November 24, 2021. Plaintiff's operative Complaint was
21 appropriately filed after this date on March 15, 2022. *See* Exhibit B. Furthermore, Plaintiff has
22 provided a copy of the Agreement *and* the entire motion for approval of the PAGA settlement to the
23 LWDA for its consideration at the same time this motion was filed. *See* Decl. Rodriguez ¶ 24; Exhibit F
24 (Proof of Submission of Proposed Settlement Agreement to LWDA). As a result, Plaintiff has met all
25 procedural and statutory requirements for commencing and settling a PAGA action.

26 **c. The Terms of The Settlement Are Fair, Reasonable, and Adequate**

27 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the Court
28 may consider several factors, including:

the strength of the Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, and the experience and views of counsel

Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886, *6. However, this Court should begin its analysis with a presumption that the proposed settlement is fair. "A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation" *Dunk*, 48 Cal. App. 4th at 1802.

i. The Settlement is a Result of Extensive, Non-Collusive Arm's Length Negotiations Between the Parties

Settlement in this case was reached only after litigation and extensive arm's length negotiations lasting nearly six (6) months, which included a full day mediation with Timothy J. Long. *See Decl. Rodriguez*, ¶¶ 6-8. At all times, the negotiations were adversarial and contentious, although still professional in nature. *See id.* Further, while Plaintiff contends she would ultimately prevail on the claims and the issue of manageability, this is not a certainty and there is substantial risk in proceeding to further litigation. *See id.* at ¶¶ 6-10.

ii. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter into an Informed and Reasonable Settlement

The parties were in possession of all necessary information during the negotiations. The parties engaged in substantial informal discovery and exchange of documents, including reviewing all Aggrieved Employee data, such as timecards, payroll data, and relevant policies for the entirety of the statute of limitations applicable to the alleged claims, which covered all aspects of the PAGA claims and helped thoroughly vet the extent of Plaintiff's claims against Defendant and create an accurate damages model. *See id.* at ¶ 6-10. Plaintiff was in possession of this information prior to calculating the potential damages in this case. *See id.* As a result, Plaintiff was able to make a reasonable estimation of Defendant's potential liability. *See id.* For these reasons, the settlement now before the Court was

reached at a stage where “the parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

iii. Plaintiff’s Counsel is Experienced in Similar Litigation

Plaintiff’s Counsel have considerable experience in class and PAGA actions and wage and hour litigation. Plaintiff’s Counsel have brought and are currently bringing several wage and hour class and/or PAGA actions. Thus, Plaintiff’s Counsel are qualified to evaluate the PAGA claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. *See* Decl. Rodriguez, ¶¶ 12-17. Plaintiff’s Counsel believe that the settlement is fair, reasonable, and adequate in light of the risks associated with the merits of Plaintiff’s claims, the uncertainties of complex litigation, the Court’s discretion to lower the amount of penalties ultimately awarded, and the secured benefit to the Aggrieved Employees and LWDA promoting compliance with the Labor Code. *See id.* at ¶¶ 6-10.

iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation

A review of the Agreement’s terms does not give rise to any doubts about its fairness. Based on the records and facts of this case, Plaintiff has secured a gross recovery of approximately 30%-116.5% of the claims’ maximum likely value and a net recovery of approximately 15%-58.4% of the claims’ maximum likely value. *See id.* at ¶¶ 9-10. This settlement is a reasonable compromise of the PAGA claims, and exceeds approved settlement ranges in other cases comparing either absolute numbers or as a percentage of total available damages in a class action context. *See Davis v. Cox Commc’ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int’l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation when attorneys’ fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009)

(approving \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in a \$3,950,000 settlement even though PAGA exposure was calculated at \$53,600,000); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Wershba*, 91 Cal. App. 4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers for Justice*, 688 F.2d at 628 (9th Cir. 1982); *see also In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that the median percentage for recoveries in shareholder class action settlements averaged 2.2%-3% from 2000 through 2002).

v. The Proposed Settlement is a Reasonable Compromise of Claims

The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) required additional information be presented to the Court in representative action settlements “to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399 (2010), clarified that *Kullar* does not require the parties to submit an illusory prediction of the outer reaches of exposure without taking into account the actual risks associated with the litigation such as dispositive motions and trial. *Kullar* also does not require an explicit statement of the maximum amount to be recovered if Plaintiff prevailed on all the claims, provided there is a record that allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Id.* at 409. The *Munoz* court found the record before the trial court was sufficient, having included the number of class members, payroll data, declarations describing hours and overtime worked, as well as variances in duties and rest and meal period experience, and a companion action alleging less than \$5,000,000 in damages. This information constituted “an adequate basis from which to garner a reasonably adequate understanding of the amount that is in controversy within the meaning of *Kullar*.” *Id.*

Plaintiff similarly relied upon payroll data and Aggrieved Employee data to determine the realistic potential civil penalties at issue. *See Decl. Rodriguez*, ¶¶ 7, 9. This analysis allowed Plaintiff to determine the extent and frequency of potential violations on all claims as to all Aggrieved

Employees. *See* Decl. Rodriguez ¶¶ 7, 9-10. Ultimately, Plaintiff secured a percentage of the total demand for the PAGA that is well within, and in fact exceeds, the range of what has been found to be sufficient in several other cases. *See, supra*, Section V.c.iv; *see also, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed v. 1-800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of \$11.7 million where the maximum range of damages was \$5,000 for each of the alleged 300,000 instances of unlawful recording violations (\$1.5 billion), equaling approximately .78% of the total demand and approximately \$800 per class member). This settlement represents a reasonable compromise given the facts of the case, potential defenses, and potential likely recoverable damages.

vi. The Service Award to the Named Plaintiff for Plaintiff's Services to the Aggrieved Employees, State of California, and For Her General Release of All Her Individual Claims Is Reasonable

The Service Award to the named Plaintiff is intended to not only recognize the time and effort expended on behalf of Aggrieved Employees and the State of California, but also provide consideration for her general release of all her individual claims, which no other Aggrieved Employee is subject to. Indeed, Courts routinely approve enhancement payments to compensate named plaintiffs for the services they provide and the risks they incurred during the course of representative litigation. *See Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001). In *Ingram*, the Court approved enhancement payments of \$300,000.00 to each named plaintiff in recognition of the services they provided by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *See id.* at 694; *see also Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D. Cal. 1995) (approving a \$50,000.00 enhancement payment).

In this case, Plaintiff provided and explained documents, being available at all times to discuss the case with Plaintiff's counsel. *See* Decl. Rodriguez, ¶ 7; Decl. Lear, ¶¶ 3-6. Plaintiff spent a significant amount of time pursuing this litigation for the benefit of all Aggrieved Employees and the State of California and has entered into a general release of all claims. *See id.* Plaintiff's individual recovery is consistent with the percentage of recovery obtained for Aggrieved Employees and the LWDA, making clear there is no inappropriate allocation or favoritism between the two types of claims. *See* Decl. Rodriguez, ¶ 22; Decl. Lear, ¶ 7. Payment of \$7,500, to Plaintiff is appropriate given

1 the risk, assistance, and time required in bringing this case to a resolution as well as the fact that it
2 provides consideration for Plaintiff waiving her individual claims.

3 **i. Awarding Attorneys' Fees as a Percentage of the Common Fund Is**
4 **Reasonable and Customarily Approved by Courts**

5 California state and federal courts have recognized that when a litigant's efforts create or
6 preserve a fund from which others derive benefits, the Court may spread litigation costs proportionally
7 among all the beneficiaries to compensate those who created the fund. *See Boeing Co. v. Van Gemert*,
8 444 U.S. 472, 478 (1980) ("A lawyer who recovers a common fund for the benefit of persons other than
9 . . . his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Vincent v. Hughes Air*
10 *West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *see*
11 *also Serrano v. Priest*, 20 Cal.3d 25, 34-35 (1977); *Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480,
12 506 (2016). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to
13 "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not
14 bear the entire burden alone." *Vincent*, 557 F.2d at 769; *Williams v. MGM-Pathe Communications Co.*,
15 129 F.3d 1026, 1027 (9th Cir. 1977). Courts have approved use of a percentage of the fund to calculate
16 reasonable attorney fee awards where the amount of the settlement is certain or is an easily calculable
17 sum of money. *See Dunk*, 48 Cal. App. 4th at 1808.

18 The Ninth Circuit has also held that the common fund doctrine applies when: (1) the class of
19 beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be
20 shifted with some exactitude to those benefitting. *See Paul, Johnson, Alston & Hunt v. Gaulty*, 886
21 F.2d 268, 271 (9th Cir. 1989). These criteria are "easily met" when "each member of a represented
22 group has an undisputed and mathematically ascertainable claim to part of a lump-sum settlement
23 recovered on his behalf." *Id.* at 271 (citations omitted). Although this litigation is under the PAGA and
24 not a class action, the basis for a common fund applies with equal force in PAGA litigation. The three
25 (3) factors set forth in *Paul, Johnson, Alston & Hunt*, exist in this case because there is a sufficiently
26 identifiable class of beneficiaries (*e.g.* Plaintiff, Aggrieved Employees recovering under the settlement,
27 and the LWDA), the benefits can be accurately traced to the settlement Plaintiff and her counsel were
28 able to negotiate on behalf of the beneficiaries, and the fee can be shifted with exactitude to those

benefiting as the fee request is a specific, lump-sum percentage of the common fund. As set forth in the fee award examples provided below for the Court's reference, it is an accepted practice in wage and hour litigation, which includes PAGA settlements, to award attorneys' fees based on a percentage of the common fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967-972 (9th Cir. 2003); *Sanders v. City of Los Angeles*, 3 Cal.3d 252, 261, 263 (1970); *Wershba*, 91 Cal. App. 4th at 254; *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 726, 765 (2004); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

Historically, attorneys' fee awards in common fund cases in general range from 20% to 50% of the fund, depending on the circumstances of the case. *See Newberg on Class Actions*, (3rd Ed.), 1992, §14.03 (finding 50% to be the upper limit). Awards ranging between 30% and 40% of the fund are generally approved as reasonable in wage and hour settlements below \$10 million:

More particularly, courts may award attorneys fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million. *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-492 (E.D. Ca. 2010) (citing to five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30 to 33%); *Singer v. Becton Dickenson and Co.*, 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104, *8 (S.D. Ca. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and holding that award was similar to awards in three other wage and hour class action cases where fees ranged from 33% to 40%); *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841 (E.D. Ca. Nov. 14, 2007).

See Martin v. Ameripride Servs., 2011 U.S. Dist. LEXIS 61796 at *22-23 (S.D. Cal. 2011); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (affirming 33% of fund as fee in securities case); *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (same). Both California Courts and Federal District Courts regularly award fees within these ranges. *See Watson v. Raytheon Company*, USDC Southern District, Case No. 3:10-cv-00634 (33-1/3% fee award); *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. 3:09-cv-02745 (33-1/3% fee award); *Green, et al. v. Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. 3:09-cv-00069 (33% fee award); *Benitez et al. v. Wilbur*, USDC Eastern District, Case No. 1:08-cv-01122 (33.3% fee award); *Chavez et al. v. Petrissans et al.*, USDC Eastern District, Case No. 1:08-cv-00122 (33.3% fee award); *Willis et al. v. Cal-Western Transport*, USDC Eastern District, Case No. 1:00-cv-05695 (33% fee award); *Birch v. Office Depot, Inc.*, USDC Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a

1 \$16 million wage and hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern
2 District, Case No. 05cv1359 BTM (JMA) (awarding a 40% fee on a \$3.75 million wage and hour class
3 action settlement). To determine whether a percentage is reasonable, a Court may consider: (1) the
4 percentage that would likely be negotiated between parties in a similar case; (2) the percentage applied
5 in other representative actions; (3) the quality of counsel; and (4) the size of the award. *See In re Ikon*
6 *Office Solutions, Inc. Secur. Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000).

7 These factors support Plaintiff's request for reasonable attorneys' fees. The typical percentage
8 negotiated between parties ranges from thirty-five to forty percent (35% to 40%) in individual litigation
9 depending on the complexity of the case. In class action and PAGA litigation, the typical percentage
10 negotiated between parties ranges from thirty to forty percent (30% to 40%) based on the same factors.
11 Plaintiff's request of \$47,250.00 (35%) falls within these typical fee arrangements. *See Decl. Rodriguez*,
12 ¶ 18. The size of the PAGA settlement also supports the fee request when compared to other PAGA
13 settlements that have been deemed to protect the public's interest. *See Davis*, 2017 U.S. Dist. LEXIS
14 63514, *1 (\$4,000 PAGA allocation); *Moore*, 2014 U.S. Dist. LEXIS 8358, *5 (\$2,500 PAGA
15 allocation); *Jack*, 2011 U.S. Dist. LEXIS 118764, *6 (\$3,000 PAGA allocation); *Singer*, 2010 U.S. Dist.
16 LEXIS 53416, *2 (\$3,000 PAGA allocation); *Hopson*, 2009 U.S. Dist. LEXIS 33900, *9 (approving
17 \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880,
18 *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in a \$3,950,000 settlement even though
19 PAGA exposure was calculated at \$53,600,000); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist.
20 LEXIS 160052, at *7 (E.D. Cal. 2012) (\$10,000 PAGA allocation). As a percentage of the total likely
21 recovery at trial, the settlement ranges from 15%-116.5% of the likely recovery depending on the
22 amount of discretion the Court may have otherwise used to reduce awarded penalties. *See Decl.*
23 *Rodriguez* ¶ 10. The size of the recovery also speaks to the high quality of representation Plaintiff's
24 Counsel was able to effect in this case. Furthermore, Plaintiff's counsel took this case on a contingency
25 basis and has not received any compensation for the work done in this case at all, while shouldering the
26 immense financial risk attendant to complex civil litigation. *See id.* at ¶¶ 11, 18. A lodestar cross check
27 confirms the reasonableness of Plaintiff's fee request as the \$47,250 fee award would represent a
28

1 negative multiplier (0.875x). *See id.* at ¶¶ 19-21. For these reasons, Plaintiff's request for fees in the
2 amount of 35% of the common fund should be granted.

3 Plaintiff's Counsel seeks reimbursement of \$9,625.26 for the expenses they have incurred and
4 will continue to incur though carrying out the terms of this settlement. *See* Exhibit G. This is less than
5 the \$13,500 provided for in the settlement. These expenses include postage charges, photocopying and
6 printing expenses, mediation expenses, and research and filing expenses, among other expenses
7 necessarily incurred to properly litigate this case. *See id.* For these reasons, Plaintiff's request for
8 reimbursement of litigation expenses should be granted.

9 VI. CONCLUSION

10 For all of the foregoing reasons, Plaintiff respectfully requests that this Court find that Plaintiff
11 has met all statutory requirements to commence a PAGA civil action; approve the Agreement, including
12 Plaintiff's Counsel's application for reasonable attorneys' fees and costs, the Service Award, and the
13 Claims Administrator Costs; approve the notice and payment distribution procedures; adopt the
14 implementation schedule identified in the proposed order, which is being filed concurrently herewith.

15
16
17 Dated: July 21, 2022

Shimoda & Rodriguez Law, PC

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19 By: 

20 Galen T. Shimoda
21 Justin P. Rodriguez
22 Attorneys for Plaintiff
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