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individually and on behalf of similarly situated employees

**SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN**

SAM KEOPHIMANE and LUIS MEDINA,
individually and on behalf of all other
similarly situated employees,

Plaintiffs,

vs.

TRACY AUTO L.P. (DBA TRACY
TOYOTA), a California Limited Partnership;
LOTT AUTOMOTIVE, INC., a California
Corporation; RONALD M. LOTT, an
individual; and DOES 1 to 100, inclusive,

Defendants.

Case No. STK-CV-UOE-2022-0001117

*Assigned for All Purposes to Hon. Robert T. Waters,
Department 11B*

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

Date:

Time: 9:00 a.m.

Dept.: 11B

Judge: Hon. Robert T. Waters

Filed: February 14, 2022

Trial Date: None Set

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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT**

2 Plaintiffs Sam Keophimane and Luis Medina (“Plaintiffs”) seek approval of a Private Attorneys
3 General Act (“PAGA”) Settlement in the gross amount of \$222,000. *See generally* Exhibit A (Proposed
4 PAGA Settlement [“Agreement”]). Plaintiffs brought this PAGA lawsuit on behalf of the Labor and
5 Workforce Development Agency (“LWDA”) and Aggrieved Employees who worked for Defendants
6 Tracy Auto L.P. (Dba Tracy Toyota), Lott Automotive, Inc., and Ronald M. Lott, (“Defendants”)
7 (Plaintiffs and Defendants sometimes collectively referred to as the “Parties”). *See generally* Exhibit B
8 (Plaintiffs’ Operative Complaint). There are approximately 143 Aggrieved Employees.

9 Plaintiffs have alleged that Defendants failed to pay overtime wages, failed to pay minimum
10 wages, failed to provide meal periods or pay premiums in lieu thereof, failed to provide rest periods or
11 pay premium in lieu thereof, failed to provide accurate wage statements, failed to pay final wages, failed
12 to pay reimbursement for expenses, failed to pay contract wages and unlawful deductions, failed to
13 maintain accurate records, failed to provide paid sick leave, untimely paid wages, and violated
14 California Labor Code sections 558, 558.1. *See generally* Exhibit B; *see also* Declaration of Justin P.
15 Rodriguez (“Decl. Rodriguez”), ¶¶ 2, 9-10. Defendants have denied all of Plaintiffs’ allegations and any
16 liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 5. However, subject to Court approval, the
17 Parties have been able to compromise and settle all asserted claims as a result of extensive
18 investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiffs and
19 Plaintiffs’ counsel believe the proposed Agreement is fair, reasonable, and adequate based on the
20 investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues
21 in this case. *See* Decl. Rodriguez, ¶¶ 6-7, 9-10. The Agreement was entered into in good faith by the
22 Parties to resolve heavily contested claims and guarantees a reasonable recovery for Aggrieved
23 Employees and the LWDA. Accordingly, Plaintiffs request that the Court: (1) make a finding that
24 Plaintiffs have exhausted all administrative remedies and that Plaintiffs are authorized to enter into the
25 proposed Agreement on behalf of the LWDA; (2) approve the proposed Agreement as fair, reasonable,
26 and adequate; (3) set dates for and direct distribution of payment and the Notice of Settlement (Exhibit
27 E) to Aggrieved Employees affected by the settlement as set forth in the Agreement and (4) adopt the
28 implementation schedule contained in the proposed order.

II. PROCEDURAL AND LITIGATION HISTORY

On November 23, 2021, Plaintiffs gave written notice to the LWDA and Defendants providing facts and the legal basis for all claims asserted in the Complaint and the claims that are being resolved under the Agreement. *See* Exhibit C (Plaintiffs' Ltr. to the Labor and Workforce Development Agency). Plaintiffs also submitted the \$75.00 filing fee. *See* Decl. Rodriguez ¶ 3. The November 23, 2021, notice was also sent via certified mail to Defendants on the same day. *See* Exhibit C. The LWDA did not provide any response to Plaintiffs' notice correspondence within the statutorily required time frame and, as a result, Plaintiffs became authorized to act as a Private Attorney General for the asserted claims. *See* Decl. Rodriguez ¶ 3. Plaintiffs filed this lawsuit on February 14, 2022 and uploaded a copy of the filed Complaint to the LWDA on February 16, 2022. *See* Decl. Rodriguez ¶ 3. No trial date has been set in this matter. *See id.* Defendants appealed the decision, and the case had been pending, but stayed, while the Parties participated in the Appellate Court's mediation program. Pursuant to the terms of the Agreement, the appeal was abandoned, reinstating the Court's jurisdiction to consider the terms of the settlement and its approval. *See id.*

III. INVESTIGATION AND DISCOVERY CONDUCTED

Plaintiffs thoroughly investigated the merits of the claims and potential damages for such claims. *See id.* at ¶¶ 7, 9-10. Plaintiffs worked during the time all of Defendants' 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* Declaration of Sam Keophimane ("Decl. Keophimane") ¶¶ 2-3, 5-6; Declaration of Luis Medina ("Decl. Medina") ¶¶ 2-3, 5-6; Decl. Rodriguez ¶ 7. The Parties engaged in informal discovery and exchange of documents, including payroll data and relevant policies for the entirety of the statute of limitations applicable to the asserted 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 Plaintiffs to determine the extent and frequency of any violations in accordance with Plaintiffs' contentions and create an accurate damages model to assess the reasonableness of any settlement. *See id.* at ¶¶ 7, 9-10.

1 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

2 **a. Plaintiffs and Defendants Engaged in Extensive Arm's Length Negotiations**

3 The final settlement occurred only after extended, arm's length negotiations. Over the course of
4 nearly two years, Plaintiffs have been investigating the claims and discussing with Defendants' counsel
5 the merits of the claims and issues present in this case. *See id.* at ¶¶ 5-8. The Parties exchanged
6 substantial amounts of information and legal analysis in connection with these discussions. *See id.* It
7 was only after these extended discussions, which included a full day mediation with Lisa Klerman and a
8 mediator's proposal, that the Parties were able resolve all claims and enter into the Agreement. *See id.*
9 at ¶ 8.

10 **b. The Terms of the Agreement**

11 1. The scope of Aggrieved Employees covered under the Agreement includes all of
12 Defendants' nonexempt, employees who have or continue to work for Defendants from November 23,
13 2020, up to either (1) the Final Approval Date or (2) sixty (60) days after the Agreement was signed,
14 whichever is earlier. *See* Exhibit A, ¶ 1.2. There are approximately 143 Aggrieved Employees. *See id.*

15 2. Defendants will pay the Gross Settlement Amount of \$222,000. *See id.* at ¶ 5.1. No
16 portion of the Gross Settlement Amount will revert to Defendants. *See id.* at ¶ 5.5.

17 3. Subject to Court approval, the Parties have selected ILYM Group, Inc. to act as the
18 Settlement Administrator, who has provided a maximum cost estimate of \$3,050. *See* Exhibit D (ILYM
19 Group, Inc. Quote); Exhibit A, ¶ 1.27; Decl. Rodriguez, ¶ 23.

20 4. The Parties agree that up to Thirty Five Percent (35%) of the Gross Settlement Amount
21 (\$77,700) will be paid for Plaintiffs' attorneys' fees incurred in the litigation of this case. Defendants
22 will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
23 Additionally, the Parties agree that Plaintiffs will also be entitled to the actual litigation costs as
24 approved by the Court in an amount not to exceed \$15,000. *See id.* At the time this motion was filed,
25 the estimated total costs incurred and that will be incurred in the future as a result of the litigation and
26 implementing the terms of the Agreement are \$13,128.85. *See* Decl. Rodriguez ¶ 22; Exhibit G
27 (Plaintiffs' Itemized Costs).
28

1 5. The parties agree that Plaintiffs will be paid an Enhancement Payment of up to
2 \$10,000.00 each for the work performed on behalf of the LWDA and Aggrieved Employee as well as
3 for the general release of all Plaintiffs' individual claims. *See id.* at ¶¶ 1.8, 5.4. No other Aggrieved
4 Employee is subject to this type of release and waiver of individual claims. This amount will be in
5 addition to any amount Plaintiffs may be entitled to under the terms of the Agreement. *See id.*

6 6. Any allocated amounts under the Agreement for Settlement Administrator Costs,
7 Enhancement Payments, and attorney's fees and costs that are not ultimately awarded by the Court will
8 remain part of the Net Settlement Amount and be paid out to the LWDA and Aggrieved Employees as
9 set forth in the Agreement. *See* Exhibit A, ¶¶ 1.11, 1.14, 1.18, 5.2-5.4, 5.8. These amounts will be paid
10 from the Gross Settlement Amount, not in addition to the Gross Settlement Amount. *See id.* at ¶¶ 1.14,
11 1.18, 5.1-5.4, 5.8.

12 7. Any and all claims for civil penalties under the PAGA that asserted in the Complaint or
13 that could have been asserted based on the facts alleged will be deemed fully, finally, and forever
14 released against the Released Parties. *See* Exhibit A, ¶¶ 1.17, 1.25-1.26, 6.1.

15 8. The Settlement Administrator will perform searches to locate Aggrieved Employees
16 based on the last contact information in Defendants' possession. *See id.* at ¶¶ 7.2, 7.5-7.7. The searches
17 will include reference to the U.S. Postal Service's National Change of Address Database and, for any
18 notice returned as undeliverable, skip tracing using the individual's social security number and other
19 pertinent identifying information. *See id.* Although not required to provide a notice of settlement to
20 Aggrieved Employees in connection with the Individual Settlement Amount, the Agreement provides
21 that Aggrieved Employees will receive a notice giving them information concerning all material terms
22 of the settlement. *See id.* at ¶ 7.5; Exhibit E; *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL
23 1340777, at *5 (N.D. Cal. 2010) ("Unnamed employees need not be given notice of the PAGA claim,
24 nor do they have the ability to opt-out of the representative PAGA claim"); *see also Arias v. Superior*
25 *Ct.*, 46 Cal.4th 969, 984-988 (2009) (rejecting a defendant's due process argument that aggrieved
26 employees must be given notice similar to class members in class actions).

27 9. For any portion of the Net Settlement Amount allocated to Aggrieved Employees that is
28 not claimed by them by cashing their respective settlement checks within 180 days of issuance, the

1 remaining amount shall be donated to Children’s Advocacy Centers of California (“CACC”) under the
2 doctrine of *cy pres*. See Exhibit A, at ¶ 5.5. California law has specifically approved *cy pres*
3 beneficiaries aimed at helping children, thus CACC is an appropriate beneficiary in this case. See Cal.
4 Civ. Proc. Code § 384(b) (identifying an appropriate beneficiary includes “child advocacy programs”);
5 see also Decl. Rodriguez, ¶¶ 26-27.

6 **c. Allocation of Settlement Funds**

7 A Net Settlement Amount will be determined by subtracting from the Gross Settlement Amount
8 any attorneys’ fees and costs and Settlement Administrator Costs awarded by the Court. See Exhibit A,
9 ¶¶ 1.14, 5.8. The Net Settlement Amount shall be divided between the PAGA Payment and payment to
10 Aggrieved Employees. The PAGA Payment to the LWDA will be 75% of the Net Settlement Amount.
11 See Cal. Lab. Code § 2699(i). 25% of the Net Settlement Amount will be paid to Aggrieved Employees
12 See *id.* Each Individual Settlement Amount shall be determined by taking the Qualifying Pay Periods
13 for the individual Aggrieved Employee and dividing that by the Qualifying Pay Periods for all
14 Aggrieved Employees and multiplying that fraction by the 25% share of the Net Settlement Amount.
15 See Exhibit A, ¶¶ 1.2, 1.11, 1.12, 1.14, 5.8.

16 **V. THE AGREEMENT SHOULD BE APPROVED AS PLAINTIFFS MET ALL**
17 **STATUTORY REQUIREMENTS FOR PROCEEDING WITH THE PAGA CLAIM AND**
18 **THE AGREEMENT IS FAIR, REASONABLE, AND ADEQUATE**

19 A PAGA settlement is not effective unless the statutory requirements for becoming an authorized
20 representative of the LWDA have been complied with and the Court has reviewed and approved the
21 terms of the PAGA settlement. See Cal. Lab. Code §§ 2699(1)(2), 2699.3(a), (c). The Court has broad
22 discretion in making the decision to approve or reject a settlement for civil penalties as the statutory
23 scheme authorizes the Court to determine whether, in certain circumstances, penalties should be
24 assessed and, if assessed, the appropriate amount of penalties based on the facts and circumstances of
25 the case. See *id.* at § 2699(e)(1)-(2). In evaluating a PAGA settlement, the Court must determine
26 “whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law
27 violations, deter future ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA,*
28 *Inc.*, 72 Cal.App.5th 56, 77 (2021). In setting this standard, the *Moniz* Court invoked the same
established framework Courts use to evaluate whether class action settlements are fair, reasonable, and

adequate. *See id.*; *see also Chamberlain v. Baker Hughes, a GE Co., LLC*, 2020 WL 4350207, *4 n.5 (E.D. Cal. 2020) (expressly incorporating the multi-factor test used in class cases); *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1132-1134 (N.D. Cal. 2016) (evaluating the settlement by comparing the amount paid in relation to the likely available damages and risks of litigation); *Jordan v. NCI Group, Inc.*, 2018 WL 1409590, *1–*2 (C.D. Cal. 2018) (same). This framework has been used many times over by multiple Courts. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017); *Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n.4 (E.D. Cal. 2017); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018); *Patel v. Nike Retail Services, Inc.*, 2019 WL 2029061 at *2 (N.D. Cal. 2019). An important difference in the analysis, however, is that the evaluation should focus on the amount of the settlement as a whole rather than any individual aggrieved employee's share because a PAGA lawsuit is fundamentally a law enforcement action where the "relief is designed to protect the public[,] not to benefit private parties." *See Moniz*, 72 Cal.App.5th at 74 (internal quotation and citations omitted).

a. Plaintiffs have Met All Statutory Requirements For Proceeding With A PAGA Claim

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

1 As set forth above, Plaintiffs complied with all statutory requirements to commence a civil
2 action. See Decl. Rodriguez ¶ 3; Exhibit C. The notice letter to the LWDA sets forth all claims and
3 theories of liability stated in the Complaint as well as supporting facts. See Exhibit C. Plaintiffs also
4 paid the \$75.00 filing fee. See Decl. Rodriguez ¶ 3. As the LWDA did not provide any notice of its
5 intent to investigate within the required time frame and no cure under the statute took place, Plaintiffs
6 are authorized resolve those claims contained in the notice letter(s) and the operative Complaint. See
7 *id.*; Exhibit B; Exhibit C. Furthermore, Plaintiffs have provided a copy of the Agreement *and* this entire
8 motion for approval to the LWDA for its consideration at the same time this motion was filed. See
9 Rodriguez ¶ 24; Exhibit F (Proof of Submission of Proposed Settlement Agreement to LWDA).

10 **b. The Terms of The Settlement Are Fair, Reasonable, and Adequate**

11 Factors to consider in determining whether the PAGA Settlement Agreement is fair, reasonable,
12 and adequate include the strength of the case, the risk, expense, complexity and likely duration of further
13 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the
14 extent of discovery completed and the stage of the proceedings, and the experience and views of
15 counsel. See *Chamberlain*, 2020 WL 4350207, *4 n.5; *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
16 1801 (1996). However, this Court should begin its analysis with a presumption that the proposed
17 settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s
18 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
19 intelligently; (3) counsel is experienced in similar litigation . . .” *Dunk*, 48 Cal.App.4th at 1802.
20 Indeed, the law favors settlement of lawsuits, particularly complex litigation cases where substantial
21 resources can be conserved by avoiding the time, expense, and rigors of formal litigation. See *Neary v.*
22 *Regents of Univ. of Cal.*, 3 Cal.4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
23 1101 (9th Cir. 2008).

24 **i. The Agreement is a Result of Extensive, Non-Collusive Arm’s Length Negotiations**
25 **Between the Parties**

26 Settlement of the PAGA claims was reached only after substantial litigation and extensive arm’s
27 length negotiations lasting nearly two years, which included a full day mediation and resolution through
28

1 a mediator's proposal. *See* Decl. Rodriguez, ¶¶ 6-8. At all times, the negotiations were adversarial,
2 although still professional in nature. *See id.*

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

5 The Parties were in possession of all necessary information during the negotiations. The Parties
6 engaged in substantial informal discovery, which included all necessary components for evaluating the
7 PAGA claims and creating an accurate damages model. *See id.* at ¶¶ 6-10. Plaintiffs were in
8 possession of this information prior to calculating any damages in this case. *See id.* As a result,
9 Plaintiffs were able to make a reasonable estimation of Defendants' potential liability. *See id.* For these
10 reasons, the settlement now before the Court was reached at a stage where "the parties certainly have a
11 clear view of the strengths and weaknesses of their cases" sufficient to support the settlement. *See Boyd*
12 *v. Bechtel Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

13 **iii. Plaintiffs' Counsel is Experienced in Similar Litigation**

14 Plaintiffs' counsel have considerable experience in complex litigation such as class and PAGA
15 actions. *See* Decl. Rodriguez, ¶¶ 13-21. Thus, Plaintiffs' counsel are qualified to evaluate the PAGA
16 claims, the value of settlement versus moving forward with litigation, and viability of possible
17 affirmative defenses. Plaintiffs' counsel believe that the Agreement is fair, reasonable, and adequate in
18 light of the risks associated with the claims, the uncertainties of complex litigation, and the secured
19 benefit to Aggrieved Employees and the LWDA that the Agreement provides. *See id.*

20 **iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiffs' Case**
21 **and the Risks and Costs of Further Litigation**

22 Plaintiffs' claims and the manageability of the litigation proceeding as a PAGA action were
23 heavily disputed by Defendants. *See* Decl. Rodriguez, ¶¶ 5-9. Based on the records and facts of this
24 case, Plaintiffs have secured a gross recovery of approximately 9% of the maximum potential value of
25 the claims in this matter and between 28.4% and 110.5% of the more realistic range of recovery. *See*
26 Decl. Rodriguez, ¶¶ 9-10. The \$222,000 Gross Settlement Amount is a reasonable compromise and
27 exceeds approved settlement ranges in other PAGA cases whether comparing either absolute numbers or
28 as a percentage of total available damages. *See id.* at ¶ 11; *see also Junkersfeld v. Med. Staffing Sols.*,

1 *Inc.*, 2022 WL 2318173, at *8 n.2 (E.D. Cal. 2022) (collecting cases with PAGA settlement values
2 ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal.
3 2018) (approving settlement of PAGA claims at 0.6% of total estimated value due to risk of no
4 recovery); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, *7 (N.D. Cal. 2016) (approving \$10,00
5 PAGA settlement allocation where total PAGA penalty exposure was approximately \$5.2 million, or
6 0.2% of total estimated value); *Davis v. Cox Commc’ns California, LLC*, 2017 U.S. Dist. LEXIS 63514,
7 *1 (S.D. Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v.*
8 *Fitness Int’l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA
9 allocation when attorneys’ fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*,
10 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000
11 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010)
12 (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S.
13 Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement);
14 *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA
15 allocation in a \$3,950,000 settlement even though PAGA exposure was calculated at \$53,600,000, or
16 0.2% of total estimated value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7
17 (E.D. Cal. 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz Food*
18 *Prod., Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. 2012) (\$10,000 in PAGA payment from \$2,500,000
19 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011)
20 (approving PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund
21 settlement).

22 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

23 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional
24 information be presented in representative action settlements “to ensure that the recovery represents a
25 reasonable compromise, given the magnitude and apparent merit of the claims being released,
26 discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing
27 the litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th
28 399 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure

1 without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar*
2 also does not require an explicit statement of the maximum amount to be recovered if Plaintiff prevailed
3 on all the claims, provided there is a record that allows “an understanding of the amount that is in
4 controversy and the realistic range of outcomes of the litigation.” *Id.* at 409.

5 Plaintiffs have thoroughly set forth the realistic range of outcomes in this litigation as well as the
6 data points relied upon in reaching these ranges. *See* Decl. Rodriguez ¶¶ 9-10. The record demonstrates
7 that the compromises made by Plaintiffs were reasonable and have resulted in a settlement with recovery
8 percentage well within the range of what has been found to be sufficient in several other cases. *See,*
9 *supra*, Section V.b.iv; *see also* *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)
10 (“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not,
11 in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved”);
12 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“In fact there is no reason, at least in
13 theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a
14 single percent of the potential recovery”).

15 **VI. THE AMOUNTS REQUESTED FOR ATTORNEY’S FEES AND COSTS,**
16 **ENHANCEMENT PAYMENTS, AND CLAIMS ADMINISTRATION COSTS ARE**
17 **REASONABLE AND SHOULD BE APPROVED**

18 **i. Awarding Attorneys’ Fees as a Percentage of the Common Fund Is Reasonable**
19 **and Customarily Approved by Courts**

20 California state and federal courts have recognized that when a litigant’s efforts create or
21 preserve a fund from which others derive benefits, the Court may spread litigation costs proportionally
22 among all the beneficiaries to compensate those who created the fund. *See Boeing Co. v. Van Gemert*,
23 444 U.S. 472, 477-481 (1980) (“A lawyer who recovers a common fund for the benefit of persons other
24 than . . . his client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Vincent v.*
25 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375
26 (1970); *see also* *Serrano v. Priest*, 20 Cal.3d 25, 34-35 (1977); *Laffitte v. Robert Half Internat., Inc.*, 1
27 Cal.5th 480, 506 (2016); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.
28 1977). Courts have approved use of a percentage of the fund to calculate reasonable attorney fee awards
where the amount of the settlement is certain or is an easily calculable sum of money. *See Dunk*, 48

1 Cal.App.4th at 1808. The Ninth Circuit has also held that the common fund doctrine applies when: (1)
2 the class of beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the
3 fee can be shifted with some exactitude to those benefitting. *See Paul, Johnson, Alston & Hunt v.*
4 *Graulity*, 886 F.2d 268, 271 (9th Cir. 1989). These criteria are “easily met” when “each member of a
5 represented group has an undisputed and mathematically ascertainable claim to part of a lump-sum
6 settlement recovered on his behalf.” *Id.* at 271 (citations omitted).

7 Although this litigation is under the PAGA and not a class action, the basis for a common fund
8 applies with equal force. The three (3) factors set forth in *Paul, Johnson, Alston & Hunt*, exist in this
9 case because there is a sufficiently identifiable class of beneficiaries (*e.g.* Aggrieved Employees and the
10 LWDA), the benefits can be accurately traced to the Agreement Plaintiffs and Plaintiffs’ counsel were
11 able to negotiate on behalf of the LWDA and Aggrieved Employees, and the fee can be shifted with
12 exactitude to those benefitting as the fee request is a specific, lump-sum of the common fund.

13 Historically, attorneys’ fee awards in common fund cases in general range from 20% to 50% of
14 the fund, depending on the circumstances of the case. *See Newberg on Class Actions*, (3rd Ed. 1992),
15 §14.03 (finding 50% to be the upper limit). Awards ranging between 30% and 40% of the fund are
16 generally approved as reasonable in representative litigation settlements below \$10 million. *See Martin*
17 *v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796, *22-23 (S.D. Cal. 2011) (collecting cases); *Birch v.*
18 *Office Depot, Inc.*, USDC Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a
19 \$16 million wage and hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern
20 District, Case No. 05cv1359 BTM (JMA) (awarding a 40% fee on a \$3.75 million wage and hour class
21 action settlement). Plaintiffs’ request of \$77,700 (35%) falls within these typical fee arrangements and
22 should be awarded based on the excellent results achieved on behalf of the Aggrieved Employees and
23 the LWDA. *See Decl. Rodriguez*, ¶ 22.

24 Plaintiffs’ counsel seeks reimbursement of \$13,128.85 for the expenses they have and will
25 continue to incur while prosecuting this litigation through any compliance hearing(s). This is less than
26 the \$15,000 provided for in the Agreement. An itemization for these costs is being filed with this
27 motion as Exhibit G. All expenses were necessarily incurred to properly litigate this case. *See id.* The
28 appropriate analysis in determining whether particular costs are compensable is whether they are of the

1 type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16,
2 19 (9th Cir. 1994) (“Harris may recover as part of the award of attorney’s fees those out-of pocket
3 expenses that ‘would normally be charged to a fee paying client.’”); *Abrams v. Lightolier, Inc.*, 50 F.3d
4 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Bratcher v. Bray-*
5 *Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if normally
6 billed to client). The categories of expenses for which Plaintiffs’ counsel seek reimbursement here are
7 categories normally charged to hourly clients and, therefore, should be reimbursed out of the common
8 fund. See Decl. Rodriguez, ¶ 22.

9 **ii. The Enhancement Payments to the Named Plaintiffs for Their Services to the**
10 **Aggrieved Employees and the State of California As Well As For Their General**
Release of All Individual Claims Is Reasonable

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

22 In this case, Plaintiffs provided and explained documents, being available at all times to discuss
23 the case with Plaintiff’s counsel. See Decl. Rodriguez, ¶ 7; see generally Decl. Keophimane; Decl.
24 Medina. Plaintiffs spent a significant amount of time pursuing this litigation for the benefit of all
25 Aggrieved Employees and the State of California and has entered into a general release of all claims.
26 See *id.* Payment of \$10,000, to Plaintiffs is appropriate given the risk, assistance, and time required in
27 bringing this case to a resolution as well as the fact that it provides consideration for Plaintiffs waiving
28 their individual claims.

1 **iii. Settlement Administrator Costs Are Reasonable**

2 The \$3,050 in Settlement Administrator Costs is also within ranges approved by Courts and
3 should be approved in this case. *See Patel*, 2019 WL 2029061, *2 (\$5,261 for settlement
4 administrator's fees was not excessive where PAGA group consisted of 40 employees); Exhibit D;
5 Decl. Rodriguez, ¶ 23.

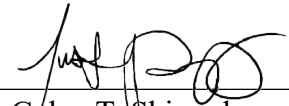
6 **VII. CONCLUSION**

7 For all of the foregoing reasons, Plaintiffs respectfully requests that this Court find that Plaintiffs
8 have met all statutory requirements to commence a PAGA civil action; approve the Agreement,
9 including Plaintiffs' Counsel's application for reasonable attorneys' fees and costs and Settlement
10 Administrator Costs; approve the Notice of Settlement and payment distribution procedures; and adopt
11 the implementation schedule identified in the proposed order, which is being filed concurrently
12 herewith.

13
14 Dated: August 7, 2023

Shimoda & Rodriguez Law, PC

15
16 By: _____

17 
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20 Renald Konini
21 Attorneys for Plaintiffs
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