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

BRENDA BALTAZAR RAMIREZ, an
individual, on behalf of herself, the State of
California, as a private attorney general, and on
behalf of all others similarly situated,

Plaintiff,

v.

W.K.S. FROSTY CORPORATION, a California
Corporation; and DOES 1 TO 50,

Defendants.

Case Number: 56-2021-00560191-CU-OE-VTA

**Plaintiff's Notice of Motion and Motion for
Approval of Settlement Pursuant to the
California Labor Code Private Attorneys
General Act of 2004 ("PAGA")**

Date: July 10, 2023

Time: 8:30 a.m.

Dept.: 20

Judge: Hon. Matthew P. Guasco

Complaint Filed: November 18, 2021

FAC Filed: February 15, 2022

Trial Date: None Set

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, please take notice that, on the date and time listed above, or as soon thereafter as the matter may be heard, in Department 20 of the Ventura County Superior Court for the State of California, located at the Ventura Courthouse (Hall of Justice), 800 South Victoria Avenue, Ventura, California 93009, before the Honorable Matthew P. Guasco, pursuant to section 2699, subdivision (1)(2), of the California Labor Code, Plaintiff Brenda Baltazar Ramirez (“Plaintiff”) on behalf of herself and all other aggrieved employees, will and hereby does move this Court for entry of an order:

1. Approving the terms of the *Stipulation and Agreement for PAGA Representative Action Settlement* (“Settlement Agreement”) entered into between Plaintiff, acting in her capacity as private attorney general for the State of California, and Defendant W.K.S. Frosty Corporation (“Defendant”), including payment by Defendant of the non-reversionary gross settlement amount of \$450,000.00 (“Gross Settlement Amount”);

2. Approving payment from the Gross Settlement Amount of attorneys’ fees in an amount of one-third of the Gross Settlement Amount (i.e., \$150,000.00) and costs in the amount of \$11,999.29, as provided for in the Settlement Agreement;

3. Approving a service award to the named Plaintiff in an amount of \$10,000.00 from the Gross Settlement Amount to compensate her for the responsibilities, time, effort, and risks involved in coming forward on behalf of the aggrieved employees and the State of California;

4. Appointing Phoenix Settlement Administrators (the “Settlement Administrator”) as the settlement administrator to handle the notice, distribution, and administration process, and approving settlement administration costs estimated to be \$14,000.00;

5. Approving distribution of the proposed PAGA the PAGA settlement notice attached as **Exhibit A** to the Settlement Agreement, along with the individual settlement payments, to the aggrieved employees, in English and Spanish;

6. Contingent on the Court’s approval of the Settlement Agreement, and pursuant to rule 3.770 of the California Rules of Court, dismissing the remaining non-PAGA class claims without prejudice;

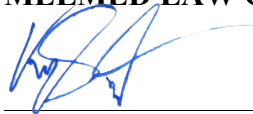
1 7. Granting Plaintiff leave to file the overlength brief included with this motion; and

2 8. Entering final judgment.

3 This motion is based on the included memorandum of points and authorities; the *Declaration*
4 *of Jonathan Melmed in Support of Motion for Approval of Settlement Pursuant to PAGA*; the Settlement
5 Agreement, a true and correct copy of which is attached to the Declaration of Jonathan Melmed as
6 **Exhibit 1**; the proposed order granting approval of the Settlement Agreement; all other records,
7 pleadings, and papers filed in this action; and upon such other evidence or argument as may be
8 presented to the court at the hearing of this motion.

9 Dated: May 9, 2023

MELMED LAW GROUP P.C.



KYLE D. SMITH

Attorney for Plaintiff and the Aggrieved Employees

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND.....	2
A.	The Parties	2
B.	Procedural History	3
III.	RELEVANT LAW	5
IV.	SUMMARY OF THE SETTLEMENT AGREEMENT	7
A.	Allocation of the Gross Settlement Amount.....	7
B.	The Proposed Settlement Administrator.....	8
C.	Tax Treatment of Settlement Amounts	9
D.	PAGA Payment and Notice Procedure.....	9
E.	The Release.....	10
F.	No Ability to Object or Opt-Out	11
V.	THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT APPROVAL	11
A.	Standards for Approval of a PAGA Settlement	11
B.	The Civil Penalties Are Appropriate under the Circumstances	12
1.	<i>Summary of the Claims and Defenses</i>	<i>13</i>
(a)	Overtime Claims.....	13
(b)	Rest Break Claims	14
(c)	Meal Break Claims	16
(d)	Fingerprinting Claims.....	17
(e)	Derivative Claims	18
2.	<i>Exposure Analysis</i>	<i>19</i>
3.	<i>The Results Achieved.....</i>	<i>21</i>
VI.	THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR AND REASONABLE.....	23

1	A.	Plaintiff’s Counsel Are Entitled to Recover Attorneys’ Fees under the Common	
2		Fund Doctrine in This Qui Tam Action	24
3	B.	A Fee of One-Third of the Gross Settlement Amount Is Fair and Reasonable	
4		Based upon the Factors Developed by the Courts and Serves the Public Policy of	
5		Attracting Competent Counsel to Litigate These Cases	26
6	C.	The Lodestar Multiplier Approach Confirms the Reasonableness of the Fee	
7		Request	30
8	D.	The Contingent Nature of Plaintiff’s Counsel’s Representation Further Supports	
9		the Fee Award	32
10	E.	Public Policy Considerations Require the Award of Adequate Fees So Competent	
11		and Experienced Counsel Will Undertake Such Representations	33
12	VII.	THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE.....	35
13	VIII.	THE REQUESTED SERVICE AWARD IS FAIR AND REASONABLE.....	35
14	IX.	SUBMISSION TO THE LWDA	36
15	X.	DISMISSAL OF THE CLASS CLAIMS	37
16	XI.	CONCLUSION	38

TABLE OF AUTHORITIES

CASES

<i>Alvarado v. Dart Container Corp. of Cal.</i> (2018) 4 Cal.5th 542	13
<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157	19, 21
<i>Arias v. Superior Court</i> (2009) 46 Cal.4th 969	5, 6, 7, 10
<i>Atempa v. Pedrazzani</i> (2018) 27 Cal.App.5th 809	19
<i>Augustus v. ABM Security Services, Inc.</i> (2016) 2 Cal.5th 257	15, 16
<i>Bank of America v. Cory</i> (1985) 164 Cal.App.3d 66	24, 25
<i>Bell v. Farmers Ins. Exchange</i> (2004) 115 Cal.App.4th 715	26, 35
<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472 [100 S.Ct. 745]	25
<i>Boyd v. Bank of America Corp.</i> (C.D. Cal., Nov. 18, 2014, No. SACV 13-0561-DOC) 2014 WL 6473804	29
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	15, 17
<i>Cabrera v. Advantage Sale & Marketing, LLC</i> (Super. Ct. L.A. County, March 12, 2013) Case No. BC485259, 2013 WL 1182822	23
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal.App.5th 504	19, 20, 21, 22
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	26
<i>Cheng-Canindin v. Renaissance Hotel Associates</i> (1996) 50 Cal.App.4th 676	37
<i>Coalition for L. County Planning etc. Interest v. Board of Supervisors</i> (1977) 76 Cal.App.3d 241 ...	32
Code Civ. Proc., § 384	10
<i>Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America</i> (2006) 141 Cal.App.4th 46	23
<i>Crommie v. State of Cal., Public Utilities Com’n</i> (N.D. Cal. 1994) 840 F.Supp. 719	32
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	26, 31
<i>Epic Sys. Corp. v Lewis</i> (2018) 138 S.Ct. 1612	37
<i>Estrada v. Royalty Carpet Mills, Inc.</i> (2022) 76 Cal.App.5th 685	15, 21
<i>Fleming v. Covidien Inc.</i> (C.D. Cal., Aug. 12, 2011, No. (OPX)) 2011 WL 7563047	20, 22
<i>Flores v. Starwood Hotels & Resorts Worldwide, Inc.</i> (C.D. Cal. 2017) 253 F.Supp.3d 1074	7
<i>Galarsa v. Dolgen California, LLC</i> (2023) 88 Cal.App.5th 639	38

1	<i>General Atomics v. Superior Court</i> (2021) 64 Cal.App.5th 987	13
2	<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553	31
3	<i>Gregg v. Uber Technologies, Inc.</i> (2023) 89 Cal.App.5th 786	37
4	<i>Harris v. Marhoefer</i> (9th Cir. 1994) 24 F.3d 16	35
5	<i>Hernandez v. Restoration Hardware, Inc.</i> (2018) 4 Cal.5th 260	31
6	<i>In re Activision Securities Litigation</i> (N.D. Cal. 1989) 723 F.Supp. 1373	29
7	<i>In re Mego Financial Corp. Securities Litigation</i> (9th Cir. 2000) 213 F.3d 454.....	29
8	<i>In re Stauffer’s Estate</i> (1959) 53 Cal.2d 124.....	34
9	<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> (2014) 59 Cal.4th 348.....	12, 24, 37
10	<i>Keres Romero v. Producers Dairy Foods, Inc.</i> (E.D. Cal., Nov. 14, 2007, No. 1:05CV0484 DLB)	
11	2007 WL 3492841	29
12	<i>Ketchum v. Moses</i> (2001) 24 Cal.4th 1122.....	30, 31, 32
13	<i>Kraus v. Trinity Management Services, Inc.</i> (2000) 23 Cal.4th 116	34
14	<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	12
15	<i>Laffitte v. Robert Half Internat. Inc.</i> (2016) 1 Cal.5th 480	25, 26, 27, 28
16	<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4th 19	26
17	<i>Martin v. FedEx Ground Package System, Inc.</i> (N.D. Cal., Dec. 31, 2008, No. C 06-6883 VRW)	
18	2008 WL 5478576.....	28
19	<i>McClellan v. Chase Home Finance LLC</i> (C.D. Cal. Aug. 31, 2015, No. SACV 12-1331-JGB) 2015	
20	U.S. Dist. LEXIS 118005	29
21	<i>McCrary v. Elations Company, LLC</i> (C.D. Cal., Feb. 25, 2016, No. EDCV130242JGBSPX) 2016	
22	WL 769703	29
23	<i>Miller v. CEVA Logistics USA, Inc.</i> (E.D. Cal., Aug. 10, 2015, No. 2:13-CV-01321-TLN) 2015 WL	
24	4730176	29
25	<i>Mills v. Electric Auto-Lite Co.</i> (1970) 396 U.S. 375 [90 S.Ct. 616]	26
26	<i>Miranda v. Anderson Enterprises, Inc.</i> (2015) 241 Cal.App.4th 196	35
27	<i>Munoz v. Chipotle Mexican Grill, Inc.</i> (2015) 238 Cal.App.4th 291	35
28	<i>Nickson v. Shemran, Inc.</i> (Cal. Ct. App. 2023) 306 Cal.Rptr.3d 835.....	38

1	<i>Pearce v. Superior Court</i> (1983) 149 Cal.App.3d 1058.....	33
2	<i>Penaloza v. PPG Industries Inc.</i> (Super. Ct. L.A. County, May 20, 2013) Case No. BC471369, 2013	
3	WL 2917624.....	23
4	<i>People ex rel. Strathmann v. Acacia Research Corp.</i> (2012) 210 Cal.App.4th 487	24
5	<i>Petersen v. CJ America, Inc.</i> (S.D. Cal., Sept. 30, 2016, No. 14-CV-2570 DMS JLB) 2016 WL	
6	5719823	29
7	<i>Piplack v. In-N-Out Burgers</i> (2023) 88 Cal.App.5th 1281	37
8	<i>PLCM Group v. Drexler</i> (2000) 22 Cal.4th 1084	30
9	<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311.....	30
10	<i>Rider v. County of San Diego</i> (1992) 11 Cal.App.4th 1410.....	35
11	<i>Robinson v. Southern Counties Oil Company</i> (2020) 53 Cal.App.5th 476.....	11
12	<i>Rodriguez v. West Publishing Corp.</i> (9th Cir. 2009) 563 F.3d 948	35, 36
13	<i>Sanders v. City of Los Angeles</i> (1970) 3 Cal.3d 252	26
14	<i>Sav-On Drug Stores, Inc. v. Superior Court</i> (2004) 34 Cal.4th 319	33, 34
15	<i>Seifu v. Lyft, Inc.</i> (2023) 89 Cal.App.5th 1129.....	38
16	<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25.....	25, 26, 30, 31, 35
17	<i>Shahbazian v. Fast Auto Loans, Inc.</i> (C.D. Cal., June 20, 2019, No. 218CV03076ODWKSX) 2019	
18	WL 8955420.....	30
19	<i>Singer v. Becton Dickinson and Co.</i> (S.D. Cal., June 1, 2010, No. 08-CV-821-IEG (BLM)) 2010 WL	
20	2196104	29
21	<i>Singh v. Roadrunner Intermodal Services, LLC</i> (E.D. Cal., Jan. 24, 2019, No.	
22	115CV01497DADBAM) 2019 WL 316814	30
23	<i>Staton v. Boeing Co.</i> (9th Cir. 2003) 327 F.3d 938	36
24	<i>Sternwest Corp. v. Ash</i> (1986) 183 Cal.App.3d 74	32
25	<i>Stuart v. Radioshack Corp.</i> (N.D. Cal., Aug. 9, 2010, No. C-07-4499 EMC) 2010 WL 3155645 28, 29	
26	<i>Syers Properties III, Inc. v. Rankin</i> (2014) 226 Cal.App.4th 691	31
27	<i>Thurman v. Bayshore Transit Management, Inc.</i> (2012) 203 Cal.App.4th 1112.....	20
28	<i>Van Vranken v. Atlantic Richfield Co.</i> (N.D. Cal. 1995) 901 F.Supp. 294	32

1	<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800	33
2	<i>Viking River Cruises, Inc. v. Moriana</i> (2022) 142 S.Ct. 1906	37
3	<i>Villalobos v. Calandri Sonrise Farm LP</i> (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015	
4	WL 12732709	12
5	<i>Vizcaino v. Microsoft Corp.</i> (9th Cir. 2002) 290 F.3d 1043	27, 32
6	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224	26, 31
7	<i>Wesson v. Staples the Office Superstore, LLC</i> (2021) 68 Cal.App.5th 746	15, 21
8	<i>Westmoreland v. Kindercare Education LLC</i> (Cal. Ct. App., Apr. 24, 2023, No. A164090) 2023 WL	
9	3052080	38
10	<i>Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.</i> (E.D. Cal., Mar. 27, 2020, No.	
11	117CV00853DADEPG) 2020 WL 1492672	29
12	<i>ZB, N.A. v. Superior Court</i> (2019) 8 Cal.5th 175	20
13		
14	STATUTES	
15	Lab. Code, § 1051	3, 4, 11, 17, 18
16	Lab. Code, § 1054	3, 4, 11, 17, 18
17	Lab. Code, § 1174	3, 11
18	Lab. Code, § 1174.5	11
19	Lab. Code, § 1185	3, 11
20	Lab. Code, § 1194	3, 11
21	Lab. Code, § 1194.2	3, 11
22	Lab. Code, § 1197	3, 11
23	Lab. Code, § 1197.1	3, 11
24	Lab. Code, § 1198	3, 11
25	Lab. Code, § 1198.5	3, 11
26	Lab. Code, § 1199	3, 11
27	Lab. Code, § 201	3, 11, 18, 19
28	Lab. Code, § 202	3, 18, 19

1	Lab. Code, § 203	3, 18, 19
2	Lab. Code, § 204	3, 11
3	Lab. Code, § 210	3, 11
4	Lab. Code, § 216	11
5	Lab. Code, § 218.5	11
6	Lab. Code, § 218.6	11
7	Lab. Code, § 226	3, 4, 11, 18
8	Lab. Code, § 226.3	3, 4, 11
9	Lab. Code, § 226.7	3, 11, 14, 16
10	Lab. Code, § 256	11
11	Lab. Code, § 2698	3, 4, 5, 10
12	Lab. Code, § 2699	1, 6, 11, 19, 20, 22, 24, 35, 36
13	Lab. Code, § 2699.3	6, 24
14	Lab. Code, § 2699.5	18, 19
15	Lab. Code, § 2699.6	3, 4, 5
16	Lab. Code, § 510	3, 11, 13
17	Lab. Code, § 512	3, 11, 16
18	Lab. Code, § 90.5	5
19	Stats. 2003, ch. 906, § 1.....	5
20	Stats. 2004, ch. 221 (S.B.1809), § 3	11
21		
22	OTHER AUTHORITIES	
23	2003–2004 Sen. Daily J., Vol. 3 (July 29, 2004)	12
24	97 Ops.Cal.Atty.Gen. 5 (2014).....	18
25		
26	RULES	
27	Cal. Rules of Court, rule 3.770.....	38
28		

TREATISES

Newberg on Class Actions (5th ed. 2011)36

REGULATIONS

Cal. Code Regs. Tit. 8, § 110503, 11, 16

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Brenda Baltazar Ramirez (“Plaintiff”) seeks approval of a settlement entered into
4 pursuant to the California Labor Code Private Attorneys General Act of 2004 (“PAGA”) between
5 Plaintiff and Defendant W.K.S. Frosty Corporation (“Defendant”) (collectively, the “Parties”).
6 Pursuant to Labor Code section 2699, subdivision (l)(2), the superior court is required to “review and
7 approve any settlement of any civil action filed pursuant to [PAGA].” A true and correct copy of the
8 *Stipulation and Agreement for PAGA Representative Action Settlement* (“Settlement Agreement”) is
9 attached as **Exhibit 1** to the concurrently-filed *Declaration of Jonathan Melmed in Support of Motion*
10 *for Approval of Settlement Pursuant to PAGA* (“Declaration of Jonathan Melmed” or “Melmed Decl.”).
11 The Settlement Agreement, in its entirety, is incorporated herein by reference.

12 The Settlement Agreement provides for a gross settlement amount of **\$450,000** (“Gross
13 Settlement Amount”), to be distributed to the California Labor and Workforce Development Agency
14 (“LWDA”) and a group of approximately 4,014 aggrieved employees (Lab. Code, § 2699, subd. (i)),
15 less applicable deductions. (Settlement Agreement, at p. 6.) The “Aggrieved Employees” are defined
16 in the Settlement Agreement as: “[A]ll individuals who are or were employed by Defendant as non-
17 exempt employees in California during the PAGA Period.” (Settlement Agreement, at p. 2.) The
18 “PAGA Period” is defined by the Settlement Agreement to mean November 10, 2020, through
19 December 31, 2022. (Settlement Agreement, at p. 3.)

20 The Settlement Agreement further provides for deductions from the Gross Settlement Amount
21 for: Plaintiff’s counsel’s fees of one-third of the Gross Settlement Amount (or \$150,000.00); Plaintiff’s
22 counsel’s out-of-pocket costs not to exceed \$15,000, but which Plaintiff’s counsel currently estimates
23 to be \$11,999.29; a service award to the named Plaintiff in an amount of \$10,000.00 to compensate her
24 for the responsibilities, time, effort, and risks involved in coming forward on behalf of the Aggrieved
25 Employees and the State of California; and settlement administration costs estimated to be \$14,000.00.
26 (Settlement Agreement, at pp. 6–7; Melmed Decl., ¶ 4.)
27
28

1 If the Court grants approval of this settlement, each Aggrieved Employee is expected to receive
2 a pro-rata share of approximately **\$66,000.18** (the “Net Settlement Amount”), which is calculated as
3 follows:

Gross Settlement Amount	\$450,000.00
Attorneys’ Fees	(\$150,000.00)
Litigation Costs	(\$11,999.29)
Service Award to Plaintiff	(\$10,000.00)
Settlement Administration Costs	(\$14,000.00)
PAGA payment to the LWDA	(\$198,000.53)
Net Settlement Amount	\$66,000.18

12 The Settlement Agreement, which was negotiated in light of all known facts and
13 circumstances—including the difficulty of proving some of Plaintiff’s claims and the potential defenses
14 asserted by Defendant—represents an excellent result in this litigation based upon the risk factors
15 associated with the claims and provides substantial benefits to the Aggrieved Employees and the State
16 of California. (Melmed Decl., ¶ 5.) As such, Plaintiff believes the Settlement Agreement is fair,
17 reasonable, adequate, and in the best interests of the State of California and the aggrieved employees
18 given the issues in this action. Accordingly, Plaintiff respectfully requests that the Court grant approval
19 of the Parties’ proposed Settlement Agreement.

20 **II. BACKGROUND**

21 **A. THE PARTIES**

22 Defendant is a large chain operator of various fast-food restaurants, headquartered in Cypress,
23 California, and operating since approximately 1987. Defendant is a licensed franchisee of El Pollo
24 Loco, Wendy’s, Denny’s, Krispy Kreme Doughnuts, Blaze Pizza, and Corner Bakery Café. (Melmed
25 Decl., ¶ 14.)

26 Plaintiff is a citizen of California and worked for Defendant during the PAGA period at one of
27 Defendant’s Wendy’s locations in Ventura County, California. Plaintiff began her employment on or
28

1 about August 9, 2017, and ended her employment on or about April 26, 2021. Plaintiff was employed
2 by Defendant as an hourly worker, in the position of a cook, preparing food for customers and
3 performing other kitchen-related duties. During the PAGA Period, Plaintiff’s hourly rate was exactly
4 minimum wage (\$13.00 per hour in 2020 and \$14.00 per hour in 2021). (Melmed Decl., ¶ 15.)

5 **B. PROCEDURAL HISTORY**

6 On November 11, 2021, Plaintiff submitted a letter to the California Labor and Workforce
7 Development Agency (“LWDA”) to notify the LWDA pursuant to the Private Attorneys General Act
8 of 2004, Labor Code sections 2698 through 2699.6 (“PAGA”), of Plaintiff’s intent to seek civil
9 penalties under PAGA for violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7,
10 510, 512, 1051, 1054, 1174, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199 as well as Industrial
11 Welfare Commission (“IWC”) Wage Order 5-2001 (the “Applicable Wage Order”). (Melmed Decl., ¶
12 16; Cal. Code Regs. Tit. 8, § 11050.) A true and correct copy of Plaintiff’s PAGA letter is attached as
13 **Exhibit 2** to the Declaration of Jonathan Melmed. (Melmed Decl., ¶ 16.) On November 18, 2021,
14 Plaintiff submitted a supplemental letter to the LWDA notifying it that Plaintiff had made minor
15 modifications to Plaintiff’s fingerprinting claims, but the substantive claims remained otherwise
16 unchanged. (Melmed Decl., ¶ 16.)

17 On November 18, 2021, Plaintiff filed a class action complaint in the Superior Court of
18 California for the County of Ventura case number 56-2021-00560191-CU-OE-VTA (the “Action”).
19 (Melmed Decl., ¶ 17.) The initial complaint brought causes of action for: **(1)** failure to pay minimum
20 wage for all hours worked in violation of Labor Code sections 1194 and 1194.2, and the Applicable
21 Wage Order; **(2)** failure to pay proper overtime wages in violation of Labor Code sections 510, 1197,
22 and 1198, and the Applicable Wage Order; **(3)** failure to provide compliant rest periods and pay missed
23 rest break premiums in violation of Labor Code section 226.7 and the Applicable Wage Order;
24 **(4)** failure to provide compliant meal periods and pay missed meal period premiums in violation of
25 Labor Code sections 226.7 and 512, and the Applicable Wage Order; **(5)** failure to maintain accurate
26 employment records in violation of Labor Code section 1174; **(6)** failure to pay timely wages during
27 employment in violation of Labor Code sections 204, 210; **(7)** failure to pay all wages due and owing
28 at separation in violation of Labor Code sections 201, 202, and 203; **(8)** failure to provide complete

1 and accurate wage statements in violation of Labor Code sections 226 and 226.3; **(9)** unlawful
2 fingerprinting practices in violation of Labor Code sections 1051 and 1054; and **(10)** deceptive,
3 fraudulent, or otherwise unlawful business practices based on the foregoing in violation of California’s
4 Unfair Competition Law. (Melmed Decl., ¶ 17.)

5 On February 15, 2022, Plaintiff filed a first amended complaint alleging causes of action against
6 Defendant for those described in the original complaint and adding one cause of action for penalties
7 based on the foregoing pursuant to PAGA. (Lab. Code, §§ 2698–2699.6.) The first amended complaint
8 is the operative complaint in the action (the “Operative Complaint”). (Melmed Decl., ¶ 18.)

9 Thereafter, the Parties agreed to participate in mediation with experienced wage-and-hour
10 mediator Lisa Klerman. (Melmed Decl., ¶ 19.) Prior to the mediation, Plaintiff’s counsel conducted
11 significant informal discovery. (Melmed Decl., ¶ 19.) Discovery, investigation, and prosecution has
12 included, among other things, numerous telephonic conferences with Plaintiff; inspection and analysis
13 of thousands of pages of documents, including Defendant’s relevant policies and employee handbook,
14 and other information produced by Plaintiff and Defendant; analysis of work-related data from a sample
15 of Aggrieved Employees; an analysis of the legal positions taken by Defendant; analysis of potential
16 PAGA-wide damages, including information sufficient to understand Defendant’s potential defenses
17 to Plaintiff’s claims; research of the applicable law with respect to the claims asserted in the Operative
18 Complaint and the potential defenses thereto; and assembling and analyzing of data for calculating
19 damages. (Melmed Decl., ¶ 19.)

20 Among other key pieces of information, Plaintiff’s counsel requested in its informal discovery
21 letter the wage statements and time records for a statistically significant sample size of Aggrieved
22 Employees during the PAGA Period. (Melmed Decl., ¶ 20.) In response, Defendant produced a 22.7%
23 sampling of randomly-selected employees, which Plaintiff’s counsel determined would provide a
24 statistically significant sample size with a high-degree of confidence for Plaintiff’s expert’s statistical
25 analysis. (Melmed Decl., ¶ 20.) This sampling included payroll records and timesheets for the
26 Aggrieved Employees’ shifts during the PAGA Period, including approximately 187,398 lines of
27 timekeeping data and 13,214 lines of payroll records. (Melmed Decl., ¶ 20.) From these records,
28

1 Plaintiff's expert was able to carefully craft a damages model for each of the categories of alleged
2 claims for which the data would reflect violations. (Melmed Decl., ¶ 20.)

3 On October 7, 2022, the Parties participated in a full-day mediation with Lisa Klerman who is
4 a full-time mediator with extensive experience in California wage and hour class and PAGA action
5 lawsuits. (Melmed Decl., ¶ 21.) The mediation negotiations were contentious, but the Parties were
6 eventually able to reach the broad terms of an agreement. The Parties concluded that there were benefits
7 associated with settling the matter, and concluded—after taking into account the sharply disputed
8 factual and legal issues involved in this litigation, the risks associated with further prosecution, and the
9 substantial benefits to be received pursuant to the compromise and settlement of the PAGA
10 representative penalty claims—that settlement on the terms set forth in the Settlement Agreement was
11 and is in the best interest of the Plaintiff, Defendant, the State of California, and the Aggrieved
12 Employees. (Melmed Decl., ¶ 21.) After further negotiation, the Parties executed the longform
13 Settlement Agreement now before the Court for approval. (Melmed Decl., ¶ 21.)

14 **III. RELEVANT LAW**

15 PAGA provides an enforcement mechanism for California's labor laws by enlisting individual
16 plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to
17 the individual plaintiffs and other aggrieved employees. (Lab. Code, §§ 2698–2699.6.) Due to the lack
18 of financing for California's agencies, and the substantial number of Labor Code violations by
19 California employers, the California Legislature found that it was in the public interest to allow
20 aggrieved employees to act as “private attorneys general” to enforce and recover civil penalties on
21 behalf of the State of California for Labor Code violations committed by employers. (*Arias v. Superior*
22 *Court* (2009) 46 Cal.4th 969, 980.) As the Legislature that adopted PAGA observed, “the only
23 meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties
24 as provided in the Labor Code.” (Stats. 2003, ch. 906, § 1(b).)

25 Moreover, the Labor Code's primary purpose is to “ensure employees are not required or
26 permitted to work under substandard unlawful conditions . . . and to protect employers who comply
27 with the law from those who attempt to gain a competitive advantage at the expense of their workers
28 by failing to comply with minimum labor standards.” (Lab. Code, § 90.5, subd. (a).) Therefore, the

1 Legislature determined that “adequate financing of labor law enforcement was necessary to achieve
2 maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had
3 declined and were unlikely to keep pace with the future growth of the labor market, and that it was
4 therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to
5 recover civil penalties for Labor Code violations, with the understanding that labor law enforcement
6 agencies were to retain primacy over private enforcement efforts.” (*Arias v. Superior Court, supra*, 46
7 Cal.4th at p. 980.) Thus, Plaintiff, acting as a private attorney general and proxy for the State of
8 California, filed this action seeking civil penalties for Defendant’s alleged violations of the Labor Code.

9 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor and
10 Workforce Development Agency for enforcement of labor laws and education of employers and
11 employees about their rights and responsibilities under this code and 25 percent to the aggrieved
12 employees.” (Lab. Code, § 2699, subd. (i).)

13 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
14 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the
15 employer has violated. (Lab. Code, § 2699.3, subd. (a)(1).) This notice provides the LWDA with the
16 opportunity to investigate and prosecute the claim, if it so chooses. The employee may only sue on the
17 state’s behalf if the LWDA fails to respond to the notice within 65 days, responds that it does not intend
18 to investigate, or investigates and does not issue a citation within 185 days. (Lab. Code, §§ 2699,
19 2699.3, subd. (a)(2).) In this case, Plaintiff provided the LWDA with a notice letter advising it of the
20 alleged Labor Code violations, but the LWDA deferred the prosecution of these violations to Plaintiff
21 and her attorneys by failing to respond to Plaintiff’s notice within 65 days. (Melmed Decl., ¶ 16.)
22 Accordingly, the Settlement Agreement and the \$450,000 common fund created by it for the benefit of
23 the State of California and the Aggrieved Employees, is solely the result of the work performed by
24 Plaintiff and her attorneys on this case—all while the Aggrieved Employees will preserve their own
25 separate individual claims should they wish to pursue them.

26 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
27 Court. (Lab. Code, § 2699(l)(2).) In 2009, the California Supreme Court held that an aggrieved
28 employee’s representative action brought on behalf of the state and other aggrieved employees against

1 an employer for PAGA violations does not need to meet the requirements for class certification nor
2 does there need to be notice to the other employees. (*Arias v. Superior Court*, *supra*, 46 Cal.4th 969,
3 975.) Thus, the court simply reviews the settlement and approves it if it is deemed to be fair and
4 adequate in view of the purposes and policies of PAGA. (See *Flores v. Starwood Hotels & Resorts*
5 *Worldwide, Inc.* (C.D. Cal. 2017) 253 F.Supp.3d 1074, 1077 [reviewing a PAGA settlement to
6 determine whether it was “fair and adequate in view of the purposes and policies of the statute”].)

7 **IV. SUMMARY OF THE SETTLEMENT AGREEMENT**

8 The following is a summary of the key terms of the Settlement Agreement. In short, Defendant
9 will be released of all PAGA claims asserted in the complaint in exchange for Defendant’s agreement
10 to pay a non-reversionary settlement Gross Settlement Amount of \$450,000.00. (See generally,
11 Settlement Agreement.)

12 **A. ALLOCATION OF THE GROSS SETTLEMENT AMOUNT**

13 Pursuant to the Settlement Agreement, Defendant has agreed to pay the Gross Settlement
14 Amount of \$450,000 in full settlement of the PAGA claims in this Action. (Settlement Agreement, at
15 p. 3.) The Gross Settlement Amount is to be allocated as follows:

16 1. Plaintiff’s counsel’s attorneys’ fees request of one-third of the Gross Settlement
17 Payment (i.e., \$150,000.00). (Settlement Agreement, at pp. 6, 7.) As will be explained below, the
18 attorneys’ fees are reasonable based on case law, the experience and case work by Plaintiff’s counsel,
19 and the effort put into securing the Gross Settlement Amount for the State of California and the
20 Aggrieved Employees. (Melmed Decl., ¶¶ 53–69.)

21 2. Plaintiff’s counsel’s request for actual litigation costs and expenses up to the additional
22 amount of \$15,000.00, but which Plaintiff’s counsel currently estimates to be \$11,999.29. (Settlement
23 Agreement, at pp. 6, 7; Melmed Decl., ¶ 70; Melmed Decl., Exh. 3.)

24 3. A service award to the named Plaintiff of up to \$10,000.00, in addition to whatever
25 payment she is otherwise entitled to receive as an Aggrieved Employee, to compensate her for the time
26 and effort she devoted to this case, the valuable assistance she provided to Plaintiff’s counsel, and the
27 fact that she entered into a general release of claims that is broader than the release of the Settlement
28 Class. (Settlement Agreement, at pp. 6, 7, 9; Melmed Decl., ¶¶ 74–75.)

1 4. Actual administration costs of up to \$14,000.00, based on a quote from the proposed
2 settlement administrator, Phoenix Settlement Administrators. (Settlement Agreement, at pp. 6–7;
3 Melmed Decl., ¶ 73.) A true and correct copy of the quote received by counsel is attached as **Exhibit B**
4 to the *Declaration of Jodey Lawrence on Behalf of Phoenix Settlement Administrators in Support of*
5 *Motion for Approval of Private Attorneys General Act Representative Action Settlement* (“Admin.
6 Decl.”). (Admin. Decl., ¶ 16.)

7 5. The remainder of the Gross Settlement Amount, after deducting the items above—
8 which is anticipated to be at least \$261,000.00, and which is currently estimated to be \$264,000.71—
9 is designated as PAGA penalties to be allocated between the LWDA and the Aggrieved Employees
10 pursuant to Labor Code section 2699, subdivision (i), with 75% paid to the LWDA (i.e., \$198,000.53)
11 and 25% paid to the Aggrieved Employees (i.e., \$66,000.18) on a pro-rata basis. (Settlement
12 Agreement, at pp. 7–8.) The allocation among the Aggrieved Employees shall be determined by the
13 number of compensable pay periods he or she worked, dividing that number by the total aggregate
14 number of compensable pay periods worked by all Aggrieved Employees, and then multiplying that
15 amount by the portion of the Net Settlement Amount allocated to the Aggrieved Employees.
16 (Settlement Agreement, at p. 8.)

17 **B. THE PROPOSED SETTLEMENT ADMINISTRATOR**

18 Under the Settlement Agreement, the Parties agreed to use Phoenix Settlement Administrators
19 (“Phoenix” or “Settlement Administrator”) as the settlement administrator and allocated up to \$14,000
20 in settlement administration costs from the Gross Settlement Amount. (Settlement Agreement, at pp.
21 6, 7.) Plaintiff’s counsel gathered settlement administration quotes and the quote of \$14,000 from
22 Phoenix was the lowest qualified bid from an administrator acceptable by the Parties. (Melmed Decl.,
23 ¶ 73.) Accordingly, the Parties propose using Phoenix as the settlement administrator, which is an entity
24 with significant experience in settlement administration and who is well-qualified to administer any
25 wage-and-hour class or PAGA settlement of this size. (Admin. Decl., ¶¶ 5–11.) The Settlement
26 Administrator will be responsible for processing the settlement payments and providing notice to the
27 Aggrieved Employees as outlined in the Settlement Agreement. (Settlement Agreement, at pp. 10–12.)
28

Neither of the Parties, nor their counsel, has a financial interest or other relationship that could create a conflict of interest. (Admin. Decl., ¶ 4.)

C. TAX TREATMENT OF SETTLEMENT AMOUNTS

Because all settlement payments to the Aggrieved Employees constitute civil penalties under PAGA, and not wages or any other form of income from which payroll taxes or other taxable amounts would be withheld, payments to the Aggrieved Employees will be disbursed outright and IRS Form 1099s will be issued. (Settlement Agreement, at p. 8.)

D. PAGA PAYMENT AND NOTICE PROCEDURE

The “Effective Date” of the Settlement Agreement is the 61st day after the date upon entry of an order by the Court approving the settlement if no appeal, review, or writ has been filed. (Settlement Agreement, at p. 2.) No later than 10 calendar days after the Effective Date, Defendant is required to provide the Settlement Administrator with a list of all Aggrieved Employees, containing the following information for each Aggrieved Employee: **(i)** their name; **(ii)** last known home address; **(iii)** number of pay periods worked; and **(iv)** social security number. (Settlement Agreement, at p. 11.)

Defendant is required to remit the Gross Settlement Amount to the Settlement Administrator by December 31, 2023. (Settlement Agreement, at p. 10.) Within 20 calendar days, the Settlement Administrator will issue all payments required by the Settlement Agreement. (Settlement Agreement, at pp. 10-11.) The individual settlement awards will be paid in the form of a check delivered to each Aggrieved Employee at the last known address on file with Defendant accompanied by an explanatory letter in both English and Spanish. (Settlement Agreement, at p. 11.)

The individual settlement award checks issued to Aggrieved Employees will remain valid for 180 calendar days, and thereafter, will be cancelled. (Settlement Agreement, at pp. 11–12.) If a PAGA mailing is returned to the Settlement Administrator with a forwarding address, the Settlement Administrator will re-send the PAGA mailing to the forwarding address identified. (Settlement Agreement, at p. 11.) If no forwarding address is provided, then the Settlement Administrator will promptly conduct a “standard search,” sometimes called a “Skip Trace” or “Credit Header” search, to locate a better address. (Settlement Agreement, at p. 11.) If a better address is found, the Settlement Administrator will promptly re-send the PAGA mailing. (Settlement Agreement, at p. 11.)

1 Funds associated individual settlement award checks that are not cashed, deposited, or
2 negotiated after 180 calendar days shall be void and the amount of those checks will be distributed to
3 the California State Controller’s Unclaimed Property Fund. (Settlement Agreement, at p. 12.) As this
4 case is not being resolved on a class action basis, the provisions of Code of Civil Procedure section
5 384 are not applicable. But even if they were, because all funds and interest under the Settlement
6 Agreement are to be completely distributed to the Aggrieved Employees, or to the Unclaimed Property
7 Fund in the name of the individual whose check was uncashed, this disposition results in no “unpaid
8 residue” or “unclaimed or abandoned” funds under Code of Civil Procedure section 384. (Settlement
9 Agreement, at p. 12.)

10 **E. THE RELEASE**

11 The California Supreme Court has explained that a judgment in “a representative action brought
12 by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 . . . is binding
13 not only on the named employee plaintiff but also on government agencies and any aggrieved employee
14 not a party to the proceeding.” (*Arias v. Superior Court, supra*, 46 Cal.4th 969, 985.) The order that
15 Plaintiff requests this Court to enter is intended to be binding not only on the named employee plaintiff
16 but also on the State of California and any Aggrieved Employee not a party to the proceeding. (*Arias*
17 *v. Superior Court, supra*, 46 Cal.4th 969, 985.)

18 In accordance with *Arias*, the “Released Claims” by the Aggrieved Employees as provided in
19 the Settlement Agreement narrowly include only the claims that were or could have been asserted in
20 Plaintiff’s PAGA letters and pleaded in the Operative Complaint, based on the Labor Code sections
21 alleged in those documents, that arose between November 10, 2020 (i.e., one year prior to the date of
22 Plaintiff’s first PAGA letter), and December 31, 2022. (Settlement Agreement, at pp. 3–4.) The release
23 in the Settlement Agreements specifically includes the following claims:

24 “[A]ll claims or causes of action for PAGA penalties that were, or could have been
25 asserted in Plaintiff’s November 11, 2021 and November 18, 2021 notice letters to the
26 LWDA and in the first amended complaint in the Action, pursuant to the California
27 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*, based
28

1 on the alleged violations of Labor Code §§ 201-204, 210, 216, 218.5, 218.6, 226, 226.3,
2 226.7, 256, 510, 512, 1051, 1054, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1,
3 1198, 1198.5, 1199, and IWC California Wage Order 5-2001, whether for civil penalties
4 or attorneys’ fees and costs arising out of the PAGA claims at issue, including: failure
5 to pay minimum wages for all hours worked; failure to pay all overtime wages earned;
6 failure to provide lawful rest breaks and pay missed rest break premiums; failure to
7 provide lawful meal periods and pay missed meal period premiums; failure to maintain
8 accurate records; failure to provide accurate and complete wage statements; failure to
9 pay all wages in full and on time during employment; failure to pay all wages due upon
10 termination; and unlawful fingerprinting practices.” (Settlement Agreement, at pp. 3–
11 4.)

12 Each of these claims and statutory sections were alleged or could have been alleged based on
13 the facts stated in Plaintiff’s PAGA letter and the Operative Complaint. (Melmed Decl., Exh. B.)

14 **F. NO ABILITY TO OBJECT OR OPT-OUT**

15 There is no right under PAGA or the Settlement Agreement for the Aggrieved Employees to
16 opt-out or object to the Settlement Agreement. (*Robinson v. Southern Counties Oil Company* (2020)
17 53 Cal.App.5th 476, 483.)

18 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT**
19 **APPROVAL**

20 **A. STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT**

21 The legislative history of PAGA makes little mention of the approval requirements in Labor
22 Code section 2699, subdivision (l). The original version of PAGA did not contain the court approval
23 requirement now codified in subdivision (l). That subdivision was added as part of the amendments to
24 PAGA that became effective on August 11, 2004. (Stats. 2004, ch. 221 (S.B.1809), § 3, eff. Aug. 11,
25 2004.) Senator Joseph L. Dunn authored both the original PAGA bill (S.B. 796) and the amendments
26 (S.B. 1809). On July 29, 2004, during the consideration of the amendments in S.B. 1809, Senator Dunn
27 sent a letter addressed to the President Pro Tempore of the Senate, which was published in the Senate
28

1 Daily Journal, “to clarify the intent of subdivision (1)” of Labor Code section 2699. (2003–2004 Sen.
2 Daily J., Vol. 3, at pp. 4754–4755 (July 29, 2004).) In the letter, Senator Dunn stated:

3 “The purpose of the court review of penalties in subdivision (1) is to ensure that
4 settlements involving penalties arising under Labor Code Section 2699 do not undercut
5 the dual statutory purposes of punishment and deterrence, or result in unjust, arbitrary
6 and oppressive, or confiscatory settlements.” (*Id.* at pp. 4754–4755.)
7

8 These broad criteria appear to give the Court wide latitude in determining whether to approve
9 the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on the effect the
10 penalties may have on the defendant-employer rather than the LWDA or the aggrieved employees who
11 will receive the penalties. (See *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th
12 348, 383 [while the state has an interest “in receiving the proceeds of civil penalties,” the penalties are
13 “used to deter violations.”].) This is different than the analysis of a class action settlement, which
14 typically focuses on the amount received by the class and compares that to the reasonable range of
15 potential outcomes in this case. (See, e.g., *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th
16 116, 130.) Moreover, “there is no requirement that the Court certify a PAGA claim for representative
17 treatment” as in a class action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No.
18 CV122615PSGJEMX) 2015 WL 12732709, at *5.)

19 **B. THE CIVIL PENALTIES ARE APPROPRIATE UNDER THE**
20 **CIRCUMSTANCES**

21 Plaintiff’s claims arise from several of Defendant’s employment practices she alleged were
22 unlawful. Specifically, Plaintiff alleged that Defendant failed to properly provide meal and rest breaks,
23 pay out meal and rest period premiums, pay overtime wages at the lawful overtime rate, and generally
24 pay its employees in a lawful manner. These allegations resulted in several categories of derivative
25 claims, such as wage statement deficiencies, which Plaintiff alleged independently triggered penalties
26 under PAGA. (Melmed Decl., ¶ 22.)

27 Defendant has persistently denied all liability or wrongdoing of any kind associated with the
28 claims alleged in this Action. (Melmed Decl., ¶ 23.) Defendant further denies that this Action is

1 appropriate for PAGA representative treatment for any purpose other than settling the Action. (Melmed
2 Decl., ¶ 23.) Defendant contends that it has complied at all times with the California Labor Code and
3 the Applicable Wage Order, and further contends that this Action is without merit. Defendant has
4 denied and continues to deny every material factual allegation and alleged claim asserted against it in
5 this Action and denies that Plaintiff or any other alleged Aggrieved Employee has been harmed based
6 on the allegations raised by Plaintiff. (Melmed Decl., ¶ 23.)

7 These claims, defenses, and potential damages are summarized in more detail below.

8 **1. Summary of the Claims and Defenses**

9 Plaintiff alleged four core Labor Code violations: **(1)** failure to pay overtime at the correct rate,
10 **(2)** failure to provide rest periods or pay rest period premiums, **(3)** failure to provide meal periods or
11 pay meal period premiums, and **(4)** fingerprinting violations. (Melmed Decl., ¶ 24.) The remaining
12 Labor Code claims plead were derivative—in some form or another—of these four core violations.
13 (Melmed Decl., ¶ 24.)

14 **(a) Overtime Claims**

15 In California, overtime wages must generally be paid out at no less than one and one-half times
16 the employees' regular rate of pay or twice the employees' regular rate of pay, depending on the number
17 of hours worked. (Lab. Code, § 510; *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542,
18 553.) The regular rate of pay is not merely the employee's base hourly rate, but must instead include
19 several different kinds of remuneration, for example: hourly earnings, salary, piece work earnings,
20 commissions, certain bonuses, and the value of meals and lodging. (*General Atomics v. Superior Court*
21 (2021) 64 Cal.App.5th 987, 996.)

22 In this case, Plaintiff alleged that Defendant's overtime payments failed to include the
23 Aggrieved Employees' additional, nondiscretionary compensation in calculating the Aggrieved
24 Employees' regular rate of pay. Specifically, Plaintiff alleged that Defendant provided several
25 categories of referral bonuses, sign-on bonuses, and holiday bonuses that were not properly factored
26 into the Aggrieved Employees' regular rate when calculating overtime. Plaintiff alleged that those
27 bonuses were non-discretionary in nature. (Melmed Decl., ¶ 25.)
28

1 Defendant argued that it fully complied with the law. First, Defendant pointed to its express
2 written policy which informed the Aggrieved Employees that over would be paid out at “1.5 times the
3 non-exempt team member’s regular hourly rate of pay.” (Melmed Decl., ¶ 26.) Second, Defendant
4 argued that all bonuses issued to the Aggrieved Employees were fully discretionary and thus was not
5 a factor in calculating the Aggrieved Employees’ regular rate of pay for overtime purposes. (Melmed
6 Decl., ¶ 26.) Plaintiff conceded that, if the bonus was found by a factfinder to be discretionary, their
7 regular rate of pay arguments would fail. (Melmed Decl., ¶ 26.) Third, Defendant argued that, even if
8 such bonuses were found to be nondiscretionary, the allegations for unpaid overtime wages would yield
9 minimal exposure. (Melmed Decl., ¶ 26.) Plaintiff conceded that, based on the informal discovery
10 produced, Defendant’s exposure for this claim appeared to be limited to approximately 3.8% of all pay
11 periods—the percentage of pay periods with both overtime and bonus compensation. (Melmed Decl.,
12 ¶ 26.)

13 (b) *Rest Break Claims*

14 Pursuant to Labor Code section 226.7 and the Applicable Wage Order, Defendant was required
15 to provide the Employees with compensated, duty-free rest periods of not less than ten minutes for
16 every major fraction of four hours worked. Likewise, Labor Code section 226.7 provides that “[a]n
17 employer shall not require an employee to work during a meal or rest or recovery period mandated
18 pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare
19 Commission” (Lab. Code, § 226.7, subd. (b).) Labor Code section 226.7 also provides that
20 employers must pay their employees one additional hour of pay at the employee’s regular rate for each
21 workday that a “meal or rest or recovery period is not provided.” (Lab. Code, § 226.7, subd. (c).)

22 Plaintiff alleged that Defendant maintained a practice of failing to provide the Aggrieved
23 Employees with their rest periods. Plaintiff alleged that she was routinely denied her 10-minute rest
24 periods during her employment and the same was true for the other Aggrieved Employees. Plaintiff
25 further argued that Defendant’s rest period policy misstates California law, as it only permits “a net 10-
26 minute rest break per 4 hours worked or major fraction thereof (3.5 hours or more).” (Melmed Decl., ¶
27 27.) This policy violates California law in that a “major fraction” of each four hours worked should be
28 defined as anything more than 2 hours, not 3.5 hours. (*Brinker Restaurant Corp. v. Superior Court*

1 (2012) 53 Cal.4th 1004, 1029.) The policy also arguably permitted employees to break up their 10-
2 minute rest periods if a “net” period of 10 minutes of rest had been taken, allowing employees to have
3 their rest periods interrupted and only being given the remaining portion of their rest period thereafter.
4 (Melmed Decl., ¶ 27; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 270 [rest breaks
5 must be “truly uninterrupted time”].) Of note, the informal discovery produced by Defendant did not
6 reflect any rest period premium payments as having been issued to the Aggrieved Employees. (Melmed
7 Decl., ¶ 27.)

8 Defendant asserted that its rest period policies and practices were compliant. First, Defendant’s
9 handbook provided a chart for meal and rest periods that accurately delineated the number of rest
10 periods each employee was entitled to take based on the number of hours they worked. Defendant
11 therefore argued that its rest period policies correctly informed the Aggrieved Employees of their rest
12 period rights. (Melmed Decl., ¶ 28.) Defendant also emphasized the language in its rest period policy
13 that stated the Aggrieved Employees were to be “relieved of all work duties” during their rest periods,
14 and that “[t]eam members are free to leave the premises during their rest break.” (Melmed Decl., ¶ 28.)

15 Defendant further argued that Plaintiff’s rest period claims were highly individualized, such
16 that Plaintiff would not be able to successfully argue that her case was manageable. (See *Wesson v.*
17 *Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 765 [“courts have inherent authority to
18 ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike a claim that
19 cannot be rendered manageable.”]; but see *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th
20 685, 709 [a court cannot dismiss a Private Attorneys General Act (PAGA) representative claim based
21 on manageability].) Different locations, different supervisors, and different shifts would all potentially
22 be subject to different enforcement of Defendant’s rest period policies, making this claim very difficult
23 to manage. (Melmed Decl., ¶ 29.)

24 Along these same lines, Defendant further argued that Plaintiff would face insurmountable
25 difficulties in proving this claim, as rest periods were not tracked by Defendant or the Aggrieved
26 Employees, and identifying which employees missed which rest breaks would require significant
27 investigation and evidence. (Melmed Decl., ¶ 30.)
28

1 (c) *Meal Break Claims*

2 Under California Labor Code Section 512 and the Applicable Wage Order, no employer may
3 employ any person for a work period of more than five hours without providing a meal period of not
4 less than thirty minutes. Additionally, an employee who works more than ten hours per day is entitled
5 to receive a second thirty-minute uninterrupted and duty-free meal period. (Lab. Code, § 512, subd.
6 (a).) As with rest periods, meal periods are required to be duty-free, and the employee must be permitted
7 to go about their business as they please. (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th
8 257, 269.) Labor Code section 226.7, subdivision (c), and the Applicable Wage Order further obligate
9 employers to pay employees one additional hour of pay at the employee's regular rate of compensation
10 for each workday that the meal period is not provided. (Lab. Code, § 226.7, subd. (c); Cal. Code of
11 Regs., tit. 8, § 11050.)

12 Here, Plaintiff alleged that Defendant failed to provide the Aggrieved Employees with duty-
13 free meal periods as required by law. Although Plaintiff conceded that Defendant maintained a facially
14 compliant meal period policy in its handbook, Plaintiff alleged that Defendant, in practice, routinely
15 required the Aggrieved Employees to take their meal periods late, short, or not at all when the workload
16 was too high. Based on the informal discovery produced, Plaintiff alleged that approximately 14.4%
17 of all meal-period-eligible shifts involved a meal period violation. (Melmed Decl., ¶ 31.) Plaintiff
18 further alleged that Defendant rarely provided second meal periods in shifts longer than 10 hours. Based
19 on the informal discovery produced, Plaintiff alleged that 94% of all shifts longer than 10 hours and
20 79.3% of all shifts longer than 12 hours involved no second meal period. (Melmed Decl., ¶ 31.)

21 Unlike rest periods, Plaintiff observed that Defendant often paid meal period premiums to the
22 Aggrieved Employees. Plaintiff alleged, however, that the number of meal period premiums fell far
23 short of what was actually required. Based on the informal discovery produced, Plaintiff alleged that
24 Defendant only paid meal period premiums in approximately 15.8% of all shifts in which a meal period
25 violation appeared to have occurred. (Melmed Decl., ¶ 32.)

26 As with Plaintiff's rest period claims, Defendant asserted that its meal period policies and
27 practices were compliant. First, Defendant's handbook provided a chart for meal and rest periods that
28 correctly delineated the number of meal periods each employee was entitled to take based on the

1 number of hours they worked. Defendant therefore argued that its meal period policies correctly
2 informed the Aggrieved Employees of their meal period rights. (Melmed Decl., ¶ 33.) Defendant also
3 emphasized the language in its meal period policy that stated: “During a meal period, the team member
4 will be relieved of all work duties and is free to leave the premises. . . . Under no circumstances should
5 a team member clock out for a meal period and continue working.” Defendant therefore argued that
6 the Aggrieved Employees were authorized and permitted to take their meal periods to the full extent
7 required by law. (Melmed Decl., ¶ 33.)

8 Defendant further argued that it had a process in place for requesting premium pay when
9 employees miss meal periods—which was demonstrated by the fact that many meal period premiums
10 were in fact paid. Indeed, the informal discovery data showed that approximately 962 meal period
11 premiums were paid to the Aggrieved Employees. (Melmed Decl., ¶ 34.) In *Brinker Restaurant Corp.*
12 *v. Superior Court* (2012) 53 Cal.4th 1004, the California Supreme Court held an employer is required
13 only to “provide” breaks, but is not required (and, in this context, simply cannot as a practical matter)
14 to ensure that they are taken. Given that Defendant had a policy of offering the Aggrieved Employees
15 meal periods, and offering meal period premium pay if requested, any meal periods that might appear
16 noncompliant were presumably voluntarily waived by the Aggrieved Employees. (Melmed Decl., ¶
17 34.)

18 (d) *Fingerprinting Claims*

19 Labor Code sections 1051 and 1054 prohibit employers from requiring, as a condition of
20 employment, that an employee be fingerprinted if those fingerprints are disclosed to a third party.

21 Here, Plaintiff alleged that the Aggrieved Employees were required by Defendant, as a
22 condition of their employment, to record their fingerprints with Defendant, which were electronically
23 stored by Defendant through disclosure to a third-party cloud service provider. Their fingerprints were
24 then used to clock-in when reporting to work and clock-out when leaving for the day. Plaintiff alleged
25 that the use and disclosure of the Aggrieved Employees’ fingerprints could be used to their detriment.
26 As such, Plaintiff alleged that Defendant violated Labor Code sections 1051 and 1054 because the
27 fingerprints were shared with a third party and not kept just by Defendant. (Melmed Decl., ¶ 35.)
28

1 Plaintiff's argument faced significant legal challenges. First, to the extent the fingerprint data
2 was stored with a third-party cloud provider, that cloud provider would likely be an agent of Defendant,
3 storing the fingerprint data for the sole benefit of Defendant, and using the fingerprint data for the sole
4 purpose of ensuring accurate clock-in and clock-out times. Under applicable guidance provided by the
5 California Attorney General, such uses of biometric data would arguably not violate Labor Code
6 sections 1051 or 1054. (97 Ops.Cal.Atty.Gen. 5 (2014) [video file inspected by a third party and used
7 as a basis for discipline by the employer did not violate Labor Code section 1051].) Additionally, there
8 is significant legal uncertainty about whether PAGA's default penalties apply to alleged violations of
9 Labor Code sections 1051 or 1054. (See Lab. Code, § 2699.5 [omitting sections 1051 and 1054 from
10 the list of alleged violations recoverable through PAGA].)

11 (e) *Derivative Claims*

12 Plaintiff argued that, due to the alleged violations described above, Defendant committed
13 several derivative Labor Code violations, including minimum wage violations (by failing to pay the
14 employees for all time worked, including overtime and time spent during on-duty meal and rest
15 periods), waiting time violations, and wage statement violations. (Melmed Decl., ¶ 37.) Labor Code
16 section 226, subdivision (a), for example, obligates employers, semi-monthly or at the time of each
17 payment to furnish an itemized wage statement. Plaintiff alleged that, by virtue of the allegations that
18 Defendant failed to properly pay the Aggrieved Employees their wages as described above, Defendant
19 likewise failed to provide the Aggrieved Employees with compliant wage statements reflecting their
20 gross wages earned and their net wages earned. (Melmed Decl., ¶ 37.) Plaintiff argued that due to
21 Defendant's failure to pay to Plaintiff and the Aggrieved Employees the correct amount of overtime
22 wages, the wage statements issued by Defendant arguably did not indicate the correct amount of gross
23 wages earned, the correct hourly rate in effect during overtime hours worked, or the correct net wages
24 earned. (Melmed Decl., ¶ 37.)

25 Plaintiff also argued that, under Labor Code sections 201 and 202, an employer must provide
26 an employee their wages at the time of discharge or within up to seventy-two (72) hours of their
27 resignation. (Melmed Decl., ¶ 38.) Labor Code section 203 provides "if an employer willfully fails to
28 pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall

1 continue as a penalty” for up to 30 days. (Lab. Code, § 203.) As described above, Plaintiff alleged that
2 Defendant failed to pay the Aggrieved Employees whose employment ended during the relevant period
3 all overtime wages owed within the time constraints proscribed in Labor Code sections 201 and 202 at
4 the time of their separation. Thus, as result of Defendant’s policies and practices described above,
5 Plaintiff alleged that the Aggrieved Employees whose employment ended without being compensated
6 for each and every hour worked at the appropriate overtime rate were owed waiting time penalties (or
7 at least are owed PAGA penalties for Defendant’s failure to pay all wages due upon termination).
8 (Melmed Decl., ¶ 38.)

9 As with Plaintiff’s other claims, Defendant argued that the Aggrieved Employees were fully
10 compensated and that such violations were rare and nominal in value, if they occurred at all. Defendant
11 thus concluded that Plaintiff could not claim PAGA penalties for any derivative claims. (Melmed Decl.,
12 ¶ 39.)

13 2. Exposure Analysis

14 Under Labor Code section 2699, subdivision (f)(2), and section 2699.5, employers that violate
15 certain provisions of the Labor Code are subject to penalties according to the following formula:

- 16 1. \$100.00 for the initial violation per employee per pay period; and
- 17 2. \$200.00 for each subsequent violation per employee per pay period.

18 In ascertaining Defendant’s PAGA exposure, Plaintiff considered several important cases. First,
19 courts to consider the issue have refused to “stack” PAGA penalties, severely limiting the recoverable
20 PAGA penalties. (See *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 [approving
21 PAGA penalty reduction to \$5 per pay period]; accord *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th
22 809.) Second, Defendant argued that Plaintiff is not entitled to recover PAGA penalties at the
23 subsequent violation rate of \$200 per pay period. (Melmed Decl., ¶ 40.) California’s appellate courts
24 have held that “[u]ntil the employer has been notified that it is violating a Labor Code provision
25 (whether or not the commissioner or court chooses to impose penalties), the employer cannot be
26 presumed to be aware [of the violation]” and therefore, until a Court or the Commissioner issues a
27 finding of a violation, the initial \$100 violation rate applies for each pay period in which the alleged
28 violation occurred. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.) Thus,

1 Defendant argued that even if the Plaintiff were able to establish any violation of the Labor Code, the
2 PAGA penalties assessed for these violations will be computed at the \$100 rate, as opposed to the \$200
3 per pay period rate maximum. (Melmed Decl., ¶ 40.)

4 Defendant further argued that even if Plaintiff was able to recover some PAGA penalties on
5 behalf of other aggrieved employees, courts frequently use their discretion under Labor Code section
6 2699, subdivision (e)(2), to significantly reduce PAGA penalties where such penalties would be unjust,
7 arbitrary, and improper. (Melmed Decl., ¶ 41; see, e.g., *Carrington v. Starbucks Corp.*, *supra*, 30
8 Cal.App.5th 504, 529.) Thus, Plaintiff faced the risk that a further reduction of the penalty to \$5 per
9 pay period as approved in *Carrington* could apply given Defendant’s efforts at compliance with the
10 Labor Code as discussed above. (Melmed Decl., ¶ 41.)

11 Defendant argued the lack of willfulness or intent to commit violations of the Labor Code is
12 key in this case because the court has discretion to adjust the award of PAGA penalties “if, based on
13 the facts and circumstances of the particular case, to do otherwise would result in an award that is
14 unjust, arbitrary and oppressive, or confiscatory.” (Lab. Code, § 2699, subd. (e)(2); Melmed Decl., ¶
15 42.) Defendant thus argued that, given that there is no evidence Defendant willfully, knowingly, or
16 intentionally violated California law, it is exceedingly unlikely that a court would award the full amount
17 (if any) of the civil penalties Plaintiff sought for the above-noted alleged violations. (Melmed Decl., ¶
18 42.)

19 Defendant maintained that, given its good faith and *de minimis* defenses, this Court would
20 exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable
21 for any of Plaintiff’s claims. (Melmed Decl., ¶ 43; see also Lab. Code, § 2699, subd. (e)(2); *Thurman*
22 *v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1136 [“We conclude that the trial
23 court reasonably determined that an award of the maximum penalty amount would be unjust under the
24 facts and circumstances of this case.”], disapproved on other grounds by *ZB, N.A. v. Superior Court*
25 (2019) 8 Cal.5th 175; *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No. (OPX)) 2011 WL
26 7563047, at *4 [reducing PAGA penalties for wage statement violations from \$2,800,000 to \$500,000,
27 because “the aggrieved employees suffered no injury” as a result of the violations and the defendants
28 “were not aware” their wage statements violated the law].)

1 Plaintiff also considered the possibility that PAGA relief could be denied entirely by a Court
2 due to Defendant's argument that numerous individualized inquiries might have to be made into
3 whether particular violations were experienced by any given Aggrieved Employee, thus rendering the
4 case potentially unmanageable. (*Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th
5 746, 775 [trial court did not abuse its discretion in striking a PAGA claim due to unmanageability];
6 contra, *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 712; Melmed Decl., ¶ 44.)

7 Here, Defendant has represented that there were no more than 78,100 pay periods within the
8 applicable PAGA Period. (Settlement Agreement, at p. 6.) Based on the data produced through informal
9 discovery, however, Plaintiff's expert identified only 54,725 pay periods for the relevant sample
10 group—not all of which necessarily involved Labor Code violations. (Melmed Decl., ¶ 45.) Using an
11 unstacked initial penalty of \$100 per pay period pursuant to *Amaral v. Cintas Corp. No. 2, supra*, 163
12 Cal.App.4th 1157, Plaintiff estimated that Defendant's maximum exposure for the PAGA Period under
13 the Settlement Agreement was likely no more than \$5,472,500. (*Id.* at p. 1209; Melmed Decl., ¶ 45.)
14 This amount, however, likely represented a significant overestimation of Defendant's realistic
15 exposure, as there was a likelihood that the pay period violation rate was lower than 100% (i.e., that
16 not all pay periods involved a violation). Plaintiff's overtime claims, for example, appeared to be
17 limited to approximately 3.8% of all pay periods analyzed—the percentage of pay periods with both
18 overtime and bonus compensation. (Melmed Decl., ¶ 45.) Likewise, Plaintiff's expert only identified
19 potential meal period violations in only 38.9% of all pay periods analyzed. (Melmed Decl., ¶ 45.)

20 Given the likelihood that the pay period violation rate was significantly lower than 100% and
21 the very real risks that a factfinder might agree with Defendant's arguments, its strong good faith
22 defenses, or that this Court might reduce the available PAGA penalties, Plaintiff adopted an approach
23 slightly higher than that approved in *Carrington* and ascribed a \$10 per-pay-period penalty rate to
24 Defendant's likely exposure, and concluded that Defendant's total realistic exposure was
25 approximately **\$547,250**. (Melmed Decl., ¶ 46.)

26 **3. The Results Achieved**

27 Here, the penalties are appropriate when considered in light of the principles discussed in
28 Senator Dunn's letter, discussed above. A non-reversionary Gross Settlement Amount of \$450,000.00

1 represents an excellent recovery that is large enough to punish or deter Defendant, while not being so
2 great as to be unjust, arbitrary, oppressive, or confiscatory. The proposed Settlement Agreement
3 provides a fair and reasonable monetary recovery for the LWDA and the Aggrieved Employees in the
4 face of hotly-disputed claims. (Melmed Decl., ¶ 47.) If approval is granted, Plaintiff will have recovered
5 **82.2%** of the estimated realistic settlement value in this case. (Melmed Decl., ¶ 47.)

6 As mentioned above, courts can, and regularly do, exercise their discretion to reduce the amount
7 of PAGA penalties. (See, e.g., *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No. (OPX)) 2011
8 WL 7563047, at *4.) For example, in *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, the
9 California Court of Appeals deemed it reasonable to award just five dollars per PAGA violation. (*Id.*
10 at 517.) Here, with between 54,725 and 78,100 pay periods at issue among 4,014 Aggrieved
11 Employees, under *Carrington* an appropriate settlement amount could be as low as **\$273,625**. (Melmed
12 Decl., ¶ 48.) Accordingly, the proposed settlement reflects a better result than some actual PAGA trials
13 that were litigated to completion. Thus, the Gross Settlement Amount is reasonable considering the
14 significant risks and uncertainties associated with the PAGA claims in this case.

15 Moreover, the scope of the release of the Settlement Agreement is necessarily strictly confined
16 to civil penalties under PAGA. The released claims do not, for example, release any Aggrieved
17 Employee's non-PAGA claims for alleged violations of the Labor Code. (Settlement Agreement, at pp.
18 3–4.) Individual Aggrieved Employees who believe they have been denied, for example, minimum
19 wages, overtime, meal periods, or rest periods can maintain those rights and pursue those claims in
20 another proceeding. In that respect, the Settlement Agreement also requires that each Aggrieved
21 Employee receive an explanatory letter with their check that describes this litigation and the settlement
22 amounts. (Settlement Agreement, at p. 11.) This letter will educate Aggrieved Employees as to the
23 requirements of the Labor Code, something that is in the public interest and consistent with PAGA's
24 purposes. (See Lab. Code, § 2699, subd. (j) [stating that civil penalties recovered under PAGA shall be
25 distributed to the LWDA for, among other things, "education of employers and employees about their
26 rights and responsibilities under this code"].)

27 Additionally, the proposed Settlement, even with deductions, provides a substantial sum of
28 approximately \$198,000.53 to the State of California and \$66,000.18 to Aggrieved Employees. The

1 Settlement Agreement secured by Plaintiff and her counsel here is greater than other PAGA penalty
2 awards approved by California state courts, which often range between \$7,500 and \$15,000 for PAGA
3 claims impacting hundreds or thousands of individuals, resulting in much lower PAGA penalty
4 payments on a per-employee basis. (See, e.g., *Penaloza v. PPG Industries Inc.* (Super. Ct. L.A. County,
5 May 20, 2013) Case No. BC471369, 2013 WL 2917624 at *2 [approving PAGA penalties of \$5,000.00
6 to class of 667 members]; *Cabrera v. Advantage Sale & Marketing, LLC* (Super. Ct. L.A. County,
7 March 12, 2013) Case No. BC485259, 2013 WL 1182822 [approving PAGA penalties of \$10,000.00
8 for class of approximately 3,000 members]; Melmed Decl., ¶ 50.)

9 Accordingly, the Gross Settlement Amount is extremely reasonable considering the risks and
10 uncertainties associated with the PAGA claims in this case. (Melmed Decl., ¶ 51.) The Settlement
11 Agreement commits Defendant to pay no less than \$264,000.71 in PAGA penalties (after fees and
12 costs), which is large enough to punish Defendant for alleged violations and to deter such alleged
13 conduct in the future. (Melmed Decl., ¶ 51.) At the same time, it is not so large as to be unjust,
14 oppressive, or confiscatory. (Melmed Decl., ¶ 51.) Based upon the foregoing, the proposed settlement
15 is fair, reasonable, and in the best interest of the State of California and the Aggrieved Employees.
16 (Melmed Decl., ¶ 51.)

17 Finally, public policy strongly favors the settlement of litigation. (*Consumer Advocacy Group,*
18 *Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 63.) Because the proposed
19 Settlement Agreement is neither unjust nor ignores the public interest, it should be approved. (Melmed
20 Decl., ¶ 52.)

21 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**
22 **AND REASONABLE**

23 For their efforts and the risk that they undertook in obtaining a common fund settlement that
24 benefits the State of California and the Aggrieved Employees, the Parties allocated one-third of the
25 Gross Settlement Amount to Plaintiff's counsel for reasonable attorneys' fees, plus actual litigation
26 costs. These fees are warranted under the law and within the range of fees commonly awarded in similar
27 cases.
28

1 **A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEYS’**
2 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
3 **ACTION**

4 PAGA provides for mandatory recovery of reasonable attorneys’ fees, expenses, and costs
5 under Labor Code section 2699, subdivision (g)(1), which states that, “Any employee who prevails in
6 any action **shall** be entitled to an award of reasonable attorney’s fees and costs, including any filing fee
7 paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph
8 (1) of subdivision (c) of Section 2699.3.” (Lab. Code, § 2699, subd. (g)(1), emphasis added.) As
9 discussed below, in a *qui tam* action, reasonable attorneys’ fees and costs are typically awarded under
10 the common fund doctrine where, as here, the litigation creates a common fund of money in a specific
11 amount for the benefit of others.

12 “A qui tam action is one brought under a statute that allows a private person to sue as a private
13 attorney general to recover damages or penalties, all or part of which will be paid to the government.”
14 (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491–492.) “A qui
15 tam action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the qui tam plaintiff stands
16 in the shoes of the state or political subdivision [citation].’” (*Id.* at p. 501.)

17 As the name of PAGA statute makes clear (i.e., the “Labor Code Private Attorneys General Act
18 of 2004”), a PAGA action is a qui tam action because the statute allows the employee-plaintiff, acting
19 as the proxy of the state’s labor law enforcement agency, to sue his or her employer for Labor Code
20 violations and recover civil penalties that otherwise could only have been assessed and collected by the
21 LWDA. (*Iskanian v. CLS Transportation Los Angeles, LLC*, supra, 59 Cal.4th 348, 380.) “A PAGA
22 representative action is therefore a type of qui tam action.” (*Id.* at p. 382.) Indeed, the majority of the
23 civil penalties recovered in a PAGA action are paid to the State of California, with a smaller portion
24 paid to the aggrieved employees (e.g., 75% paid to the state; 25% paid to the aggrieved employees).
25 (Lab. Code, § 2699, subd. (i).)

26 As here, where a common fund is created in a qui tam action by the successful litigation of
27 plaintiffs and their attorneys, the plaintiffs’ attorneys are entitled to recover their fees from the common
28 fund. (*Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89–91.) In *Bank of America*, California

1 taxpayers compelled the State Controller to enforce the Unclaimed Property Law against banks who
2 were retaining accounts that should have been turned over to the State. Because of the success of the
3 taxpayers’ lawsuit, a common fund was created in favor of some depositors and the State of California.
4 (*Id.* at pp. 89–91.) When the taxpayers’ attorneys sought recovery of their attorney’s fees from the
5 judgment under the common fund doctrine, the Controller opposed the request. The Court of Appeal
6 affirmed the trial court’s fee award to the taxpayers’ counsel under the common fund doctrine stating:

7 “Those benefiting from the recovery of the fund, in this case some depositors and
8 eventually the People of the State of California, must bear their share of the cost of
9 litigation. Fees for taxpayers’ attorneys will be deducted from the judgment, and each
10 claimant’s share reduced proportionately. To the extent the judgment relies upon section
11 1021.5 for recovery of attorney fees, it must be modified to confine the award of fees to
12 the common fund theory.” (*Id.* at pp. 90–91.)
13

14 Likewise, in this case, through the successful efforts of Plaintiff and her attorneys, a common
15 fund was created in the amount of \$450,000 for the benefit of the Aggrieved Employees and the State
16 of California. Thus, these beneficiaries must bear their share of the costs and attorney’s fees, which
17 fees and costs must be deducted from the \$450,000.00 Gross Settlement Amount under the common
18 fund theory. (*Id.* at pp. 89–91.)

19 The California Supreme Court upheld the use of the common fund theory of recovery for
20 attorney’s fees in *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480. There, the settlement
21 created a common fund of \$19 million dollars. The court approved the award of attorneys’ fees in the
22 amount of one-third of the gross \$19 million-dollar settlement (e.g. awarded \$6.33 million in attorney’s
23 fees) under the common fund theory of recovery. (*Id.* at pp. 505–506.)

24 The *Laffitte* ruling is consistent with the California Supreme Court’s other cases recognizing
25 that “when a number of persons are entitled in common to a specific fund, and an action brought
26 by . . . plaintiffs for the benefit of all results in the creation or preservation of that fund,
27 such . . . plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d
28 25, 34; see also *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 [100 S.Ct. 745, 749] “[A] lawyer

1 who recovers a common fund for the benefit of persons other than himself or his client is entitled to a
2 reasonable attorney's fee from the fund as a whole."]; *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S.
3 375, 393–394 [90 S.Ct. 616, 626] [discussing the acceptance of awarding attorneys' fees and expenses
4 from a settlement where "litigation has conferred a substantial benefit on the members of an
5 ascertainable class"]; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26 ["[f]ee
6 spreading occurs when a settlement or adjudication results in the establishment of a separate or so-
7 called common fund for the benefit of the class."].) Moreover, the common fund doctrine allows a
8 court to award attorneys' fees based on a percentage of the total fund that is created for the satisfaction
9 of beneficiaries' claims when the fund consists of a "certain or easily calculable sum of money."
10 (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1809.)

11 California law has long upheld, and continues to uphold, the percentage of the recovery method
12 for awarding attorneys' fees where a fund is established. (See, e.g., *Serrano v. Priest* (1977) 20 Cal.3d
13 25, 34; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v. Netflix, Inc.* (2008)
14 162 Cal.App.4th 43, 63 ["fees based on a percentage of the benefits are in fact appropriate in large
15 class actions"]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261–263 [affirming award of
16 attorneys' fees based on percentage of recovery]; *Wershba v. Apple Computer, Inc.* (2001) 91
17 Cal.App.4th 224, 254 ["courts recognize two methods for calculating attorney fees in class actions: the
18 lodestar/multiplier method and the percentage of recovery."], cited with approval in *Laffitte v. Robert*
19 *Half Internat. Inc., supra*, 1 Cal.5th 480, 502.)

20 Given these considerations, awarding attorneys' fees based on a one-third percentage of the
21 gross settlement amount is favored by California courts when a fund established for the common
22 benefit of others is involved, such as here. Accordingly, awarding fees on this basis in the amount of
23 one-third of the \$450,000.00 gross settlement amount is reasonable and appropriate.

24 **B. A FEE OF ONE-THIRD OF THE GROSS SETTLEMENT AMOUNT IS FAIR**
25 **AND REASONABLE BASED UPON THE FACTORS DEVELOPED BY THE**
26
27
28

1 **COURTS AND SERVES THE PUBLIC POLICY OF ATTRACTING**
2 **COMPETENT COUNSEL TO LITIGATE THESE CASES**

3 When awarding attorneys’ fees, courts have discretion to choose among two different methods
4 for calculating a reasonable attorneys’ fees award: **(1)** the common fund approach, or **(2)** the lodestar
5 approach. (See *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 504 [“The choice of a fee
6 calculation method is generally one within the discretion of the trial court, the goal under either the
7 percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their
8 efforts.”]). In *Laffitte*, the California Supreme Court noted that “[t]he recognized advantages of the
9 percentage method-including relative ease of calculation, alignment of incentives between counsel and
10 the class, a better approximation of market conditions in a contingency case, and the encouragement it
11 provides counsel to seek an early settlement and avoid unnecessarily prolonging litigation-convince us
12 the percentage method is a valuable tool that should not be denied by our trial courts.” (*Id.* at p. 503,
13 emphasis added). Similarly the Ninth Circuit has found that counsel should not “receive a lesser fee
14 for settling a case quickly.” (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050 fn. 5).

15 An award of fees from the gross settlement amount under the common fund doctrine prevents
16 unjust enrichment of those who benefit from the common fund created through the successful efforts
17 of Plaintiff’s counsel and furthers the important goal of attracting competent counsel to handle
18 representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Internat. Inc.*, *supra*,
19 1 Cal.5th 480, 503.)

20 Among the factors considered in determining whether the requested fee percentage is
21 reasonable are: **(1)** the results achieved; **(2)** the risk of further litigation; **(3)** the skill required of
22 plaintiff’s counsel and the quality of work performed by plaintiff’s counsel; **(4)** the contingent nature
23 of the fee and the financial burden carried by the plaintiff; and **(5)** awards made in similar cases.
24 (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048–1050.) All these factors support an
25 award here of one-third of the common fund.

26 First, Plaintiff’s counsel’s efforts resulted in a common fund settlement amount of \$450,000.00.
27 As discussed above, this is an excellent PAGA settlement considering the contested issues, the number
28 of violations at issue, and the severity of those violations.

1 Second, Plaintiff and her counsel faced significant risks going forward with the litigation. As
2 discussed above, Defendant raised various defenses and, as such, Plaintiff faced significant uncertainty
3 about recovery going forward with this litigation, as well as the potential for substantial delays to realize
4 any recovery in this action along with the possibility of post-trial appeals.

5 Moreover, Plaintiff's counsel took this case on a contingency basis. (Melmed Decl., ¶ 54.)
6 There are always risks attendant to billing cases on a contingency basis. It is not a foregone conclusion
7 that every case taken on a contingency fee basis will result in a recovery or that the attorneys' fees
8 recovered will actually compensate the attorneys' firm for the amount of time expended in an action.
9 And, even when successful, a PAGA representative action contingency law firm may only receive a
10 small percentage of the amount of attorneys' fees incurred during the prosecution of a case. Where
11 plaintiff's counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the
12 firm regularly undertakes. There is also always the possibility that the plaintiff will not prevail and
13 PAGA Counsel will not receive any compensation whatsoever for its services or that the defendant will
14 declare bankruptcy or lack the assets necessary to satisfy any judgment obtained against it—as has
15 happened in cases handled by Plaintiff's counsel's firm. (Melmed Decl., ¶ 56.)

16 Third, Plaintiff's counsel are experienced representative and class action litigators, and have
17 previously achieved significant PAGA and class action awards. (Melmed Decl., ¶¶ 7–13.) This
18 experience and expertise, combined with the high-quality of work performed in this case by Plaintiff's
19 counsel, resulted in the settlement achieved.

20 Fourth, as discussed above, the request for attorneys' fees in the amount of one-third of the
21 common fund falls well-within the norms accepted by state and federal courts in California in
22 comparable wage and hour actions. (See, e.g., *Laffitte v. Robert Half Internat. Inc.*, *supra*, 1 Cal.5th
23 480, 503; see also *Martin v. FedEx Ground Package System, Inc.* (N.D. Cal., Dec. 31, 2008, No. C 06-
24 6883 VRW) 2008 WL 5478576, at *8 [federal district court approved attorneys' fees of one-third of
25 the common fund]; *Stuart v. Radioshack Corp.* (N.D. Cal., Aug. 9, 2010, No. C-07-4499 EMC) 2010
26 WL 3155645, at *6 [approving fee award of one-third of the total maximum settlement and noting that
27 the fee award of one-third of the total settlement was “well within the range of percentages which courts
28 have upheld as reasonable”]; *Keres Romero v. Producers Dairy Foods, Inc.* (E.D. Cal., Nov. 14, 2007,

1 No. 1:05CV0484 DLB) 2007 WL 3492841, at *4 [awarding fees of one-third of common fund in a
2 wage and hour class action, noting: “[f]ee awards in class actions average around one-third of the
3 recovery.”]; *McCrary v. Elations Company, LLC* (C.D. Cal., Feb. 25, 2016, No.
4 EDCV130242JGBSPX) 2016 WL 769703, at *10; *Petersen v. CJ America, Inc.* (S.D. Cal., Sept. 30,
5 2016, No. 14-CV-2570 DMS JLB) 2016 WL 5719823, at *1; *McClellan v. Chase Home Finance LLC*
6 (C.D. Cal. Aug. 31, 2015, No. SACV 12-1331-JGB) 2015 U.S. Dist. LEXIS 118005, at *20 [explaining
7 that, while the attorneys’ fee award that approximated 32% of all sums paid under the settlement was
8 reasonable after citing numerous other cases, finding that an award of 33% of the common fund was
9 common in class actions]; *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373,
10 1377 [“nearly all common fund awards range around 30%”].)

11 In reaching its decision in *McClellan*, the court recognized that courts in California “routinely
12 award attorneys’ fees in the range of 30–40% in class actions that result in the recovery of a common
13 fund under \$10 million.” (*McClellan v. Chase Home Finance LLC*, *supra*, 2015 U.S. Dist. LEXIS
14 118005, at *20 [quoting *Miller v. CEVA Logistics USA, Inc.* (E.D. Cal., Aug. 10, 2015, No. 2:13-CV-
15 01321-TLN) 2015 WL 4730176, at *8, and citing *In re Mego Financial Corp. Securities Litigation*
16 (9th Cir. 2000) 213 F.3d 454, 463]; see also *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal., Nov.
17 14, 2007, No. 1:05CV0484 DLB) 2007 WL 3492841, at *4 [awarding 33% of the settlement fund in a
18 wage-and-hour case involving allegations of unpaid wages after explaining that “fee awards in class
19 actions average around one-third of the recovery.”]; *Stuart v. Radioshack Corp.* (N.D. Cal., Aug. 9,
20 2010, No. C-07-4499 EMC) 2010 WL 3155645, at *6 [noting that a fee award of one-third of the
21 settlement was “well within the range of percentages which courts have upheld as reasonable in other
22 class action lawsuits.”]; *Singer v. Becton Dickinson and Co.* (S.D. Cal., June 1, 2010, No. 08-CV-821-
23 IEG (BLM)) 2010 WL 2196104, at *8 [approving fee award of 33.33% of the common fund]; *Boyd v.*
24 *Bank of America Corp.* (C.D. Cal., Nov. 18, 2014, No. SACV 13-0561-DOC) 2014 WL 6473804, at
25 *12 [awarding a 33.34% fee on a \$5,800,000 settlement].) Although this case is a PAGA representative
26 action, and not a class action, there is no reason for the attorney fee standards to deviate from the norms
27 established in class action cases. (See, e.g., *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.* (E.D.
28 Cal., Mar. 27, 2020, No. 117CV00853DADEPG) 2020 WL 1492672, at *9 [awarding attorneys’ fees

1 of one-third the gross settlement amount, which included both PAGA penalties and class damages];
2 *Singh v. Roadrunner Intermodal Services, LLC* (E.D. Cal., Jan. 24, 2019, No. 115CV01497DADBAM)
3 2019 WL 316814, at *11 [same]; *Shahbazian v. Fast Auto Loans, Inc.* (C.D. Cal., June 20, 2019, No.
4 218CV03076ODWKSX) 2019 WL 8955420, at *2 [preliminarily approving the same]).

5 Plaintiff's counsel's diligent and efficient litigation of this action resulted in the creation of an
6 ascertainable gross settlement amount of \$450,000 that will substantially benefit the State of California
7 and the Aggrieved Employees. As explained above, and based on Plaintiff's counsel's extensive
8 experience in litigating PAGA representative actions, Plaintiff's counsel's request is consistent with
9 fee awards in other similar cases. Consistent with numerous cases, including those identified above,
10 Plaintiff's counsel's seeks approval of an award of attorneys' fees in the amount of \$150,000.00
11 representing one-third of the Gross Settlement Amount.

12 For all of the above reasons, a common fund fee award here in the amount of one-third of the
13 \$450,000.00 common fund created by Plaintiff and her attorneys is fair and reasonable.

14 **C. THE LODESTAR MULTIPLIER APPROACH CONFIRMS THE**
15 **REASONABLENESS OF THE FEE REQUEST**

16 A lodestar cross-check further confirms that the percentage requested is patently reasonable.
17 The "lodestar-multiplier" is an alternative accepted approach of evaluating the reasonableness of
18 attorneys' fees whereby the court computes the "lodestar" amount by multiplying the number of hours
19 reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances
20 this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty or difficulty
21 of the case, its contingent nature, and the degree of success achieved. (See *PLCM Group v. Drexler*
22 (2000) 22 Cal.4th 1084, 1095–1096; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Serrano v.*
23 *Priest, supra*, 20 Cal.3d 25, 48–49.) As noted, using the loadstar approach, the court first computes the
24 reasonable market value of the service rendered. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138, fn.
25 3.) The first step is to calculate the lodestar, which is determined by multiplying the time spent by the
26 attorneys and other timekeepers by their reasonable hourly rates. (*Id.* at p. 1132.)

27 When a court adopts the "lodestar multiplier" method, after initially calculating the combined
28 total lodestar, the court may then adjust the lodestar based on several factors in order to "fix a fee at

1 the fair market value for the particular action.” (*Id.* at p. 1132; *Graham v. DaimlerChrysler Corp.*
2 (2004) 34 Cal.4th 553, 574.) As noted, these additional factors include the contingent risk of the
3 litigation, the novelty and complexity of the issues, and exceptional results obtained. (*Ketchum v.*
4 *Moses, supra*, 24 Cal.4th at p. 1132; *Serrano v. Priest, supra*, 20 Cal.3d at p. 48.)

5 A lodestar calculation need not be supported by detailed time records. (*Wershba v. Apple*
6 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 [“California case law permits fee awards in the absence
7 of detailed time sheets”], disapproved on other grounds by *Hernandez v. Restoration Hardware, Inc.*
8 (2018) 4 Cal.5th 260.) Declarations by counsel as to time spent, even if only estimates, are enough.
9 (See *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 254–255 [“Here plaintiff’s
10 attorneys submitted declarations evidencing the reasonable hourly rate for their services and
11 establishing the number of hours spent working on the case”]; see also *Dunk v. Ford Motor Co., supra*,
12 48 Cal.App.4th 1794, 1810 [stating that lodestar calculation could be based on counsel’s estimate of
13 time spent]; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698 [“It is well established
14 that ‘California courts do not require detailed time records, and trial courts have discretion to award
15 fees based on declarations of counsel describing the work they have done and the court’s own view of
16 the number of hours reasonably spent. [Citations]’”].)

17 As set forth above, Plaintiff’s counsel are not requesting attorneys’ fees under the lodestar
18 multiplier approach. Nevertheless, Plaintiff’s counsel have provided a summary of the hours they
19 expended throughout the course of the litigation, including drafting and filing of the complaint,
20 defending the pleadings, engaging in discovery, preparing damages analyses, reviewing the informal
21 discovery, preparing and negotiating the settlement agreement, preparing the PAGA notices, extensive
22 legal research, and preparing papers for and moving for PAGA approval.

23 To date, Plaintiff’s counsel’s lodestar to date is approximately \$79,031.90 after collectively
24 expending 117.1 hours on this matter. (Melmed Decl., ¶¶ 61–62.) Thus, the fees sought here reflect a
25 lodestar multiplier of only 1.898 (i.e., \$150,000.00 ÷ \$79,031.90). Moreover, it is anticipated that
26 Plaintiff’s counsel will expend time which cannot yet be accounted for in the hours in Plaintiff’s
27 counsel’s declarations. Therefore, the unadjusted lodestar will increase and the multiplier will decrease
28 by the conclusion of this matter.

Historically, courts in California have commonly approved multipliers between two and four. (See, e.g., *Coalition for L. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251 [multiplier of 2+ approved]; *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76 [directing the trial court “to enhance the lodestar award by such factor (two, three, four or otherwise) that the court, in its discretion shall deem proper”]; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 298 [“Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation.”].) The fact that Plaintiff’s counsel’s lodestar multiplier falls well-below those approved by Courts further confirms the reasonableness of the fee request.

**D. THE CONTINGENT NATURE OF PLAINTIFF’S COUNSEL’S
REPRESENTATION FURTHER SUPPORTS THE FEE AWARD**

An additional factor militating in favor of the granting of the requested fee award is the fact that this case was both legally and financially risky for Plaintiff’s counsel, who accepted this representation on a contingency basis. (See *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048–1049 [noting that “[r]isk is a relevant circumstance” when considering attorneys’ fees].) Specifically, there was the prospect of enormous cost inherent in PAGA litigation, and the many additional risks. Those risks include the risk of Defendant prevailing on the merits; the risk that a court may not award the damages or penalties sought; difficulties in establishing bad faith; and the difficulty in proving a sustainable injury. In light of these risks, the chances of recovery were far from certain.

This risk further justifies the requested fee award. As explained by the California Supreme Court, “[a] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.” (*Ketchum v. Moses, supra*, 24 Cal.4th 1122, 1133, quotation marks omitted; see also *Crommie v. State of Cal., Public Utilities Com’n* (N.D. Cal. 1994) 840 F.Supp. 719, 725 [“The purpose of contingent risk inquiry is to determine a fee that is likely to entice competent counsel to undertake difficult public interest cases.”].)

1 **E. PUBLIC POLICY CONSIDERATIONS REQUIRE THE AWARD OF**
2 **ADEQUATE FEES SO COMPETENT AND EXPERIENCED COUNSEL WILL**
3 **UNDERTAKE SUCH REPRESENTATIONS**

4 In many complex actions such as this one, able counsel for plaintiffs can be retained only on a
5 contingent basis. A large segment of the public would be denied a remedy and the ability to retain
6 counsel to pursue low value individual claims in actions such as the current case if fees awarded by the
7 courts in successful cases did not fairly and adequately compensate counsel for the services provided,
8 the serious risks undertaken, and the delay before any compensation is received.

9 Fair fee awards in successful cases ensure that competent legal services will be available. The
10 complexity and societal importance of this type of litigation calls for the most able counsel obtainable
11 for plaintiffs. To encourage first-rate attorneys to represent plaintiffs on a contingent basis in this type
12 of important litigation, attorneys' fees awarded should reflect this goal. In its landmark decision,
13 *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, a unanimous Supreme Court noted:

14 “Thirty years ago commentators, in urging the utility of the class suit to vindicate the
15 rights of stockholders, made this incisive observation: ‘Modern society seems
16 increasingly to expose men to . . . group injuries for which individually they are in a
17 poor position to seek legal redress, either because they do not know enough or because
18 such redress is disproportionately expensive. If each is left to assert his rights alone if
19 and when he can, there will at best be a random and fragmentary enforcement, if there
20 is any at all. This result is not only unfortunate in the particular case, but it will operate
21 seriously to impair the deterrent effect of the sanctions which underlie much
22 contemporary law. The problem of fashioning an effective and inclusive group remedy
23 is thus a major one.’ [Citation.]” (*Vasquez v. Superior Court, supra*, 4 Cal.3d 800, 807.)
24

25 The same rationale applies to this litigation. The express judicial policy of California is to favor
26 the maintenance of these types of representative actions. (See, e.g., *Sav-On Drug Stores, Inc. v.*
27 *Superior Court* (2004) 34 Cal.4th 319, 340; *Pearce v. Superior Court* (1983) 149 Cal.App.3d 1058,
28

1 1065; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.) As recognized by the
2 California Supreme Court in *Sav-On Drug Stores, Inc.*:

3 “Considerations of sound public policy buttress our conclusion. Labor Code section
4 1194 confirms ‘a clear public policy . . . that is specifically directed at the enforcement
5 of California’s minimum wage and overtime laws for the benefit of workers.’ [Citation.]
6 As defendant’s own authority reminds us, California’s overtime laws are remedial and
7 are to be construed so as to promote employee protection. [Citation.] And, as we have
8 recognized, ‘this state has a public policy which encourages the use of the class action
9 device.’ [Citation.] “‘By establishing a technique whereby the claims of many
10 individuals can be resolved at the same time, the class suit both eliminates the possibility
11 of repetitious litigation and provides small claimants with a method of obtaining redress
12 for claims which would otherwise be too small to warrant individual litigation.’”
13 [Citation.]” (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th 319, 340.)
14

15 Although this case involves a PAGA representative action, rather than a class action, the
16 rationale for awarding reasonable and fair attorneys’ fees remains the same. One of the purposes for
17 awarding fees in such a situation is:

18 “[E]ncouragement of the attorney for the successful litigant, who will be more willing
19 to undertake and diligently prosecute proper litigation for the protection of recovery of
20 the fund if he is assured that he will be promptly and directly compensated should his
21 efforts be successful.” (*In re Stauffer’s Estate* (1959) 53 Cal.2d 124, 132.)
22

23 Conversely, a reduction in attorneys’ fees due to the size of the settlement in this case would
24 create perverse incentives for class action attorneys—effectively penalizing them for obtaining more
25 favorable results on behalf of the State of California and the Aggrieved Employees. Public policy would
26 be best served by encouraging well-qualified attorneys to recover the greatest amount reasonably
27 possible on behalf of the injured class members.

28 These important public policy considerations support the Court’s approval of the fee requested.

1 **VII. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

2 Plaintiff's counsel requests reimbursement of their actual out-of-pocket expenses incurred to
3 prosecute this action. These expenses were incidental and necessary to the effective representation of
4 the employees. (See *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Plaintiff's counsel are
5 permitted to recover their litigation costs and expenses under PAGA as well as the common fund
6 doctrine. (Lab. Code, § 2699, subd. (g)(1) ["Any employee who prevails in any action shall be entitled
7 to an award of reasonable attorney's fees and costs, including any filing fee paid"]; *Munoz v.*
8 *Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, 311 ["A prevailing PAGA plaintiff may
9 recover his or her attorney fees and costs as well."]; *Miranda v. Anderson Enterprises, Inc.* (2015) 241
10 Cal.App.4th 196, 202 fn. 4 [same]; *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 [common fund doctrine
11 permits recovery of fees and costs from the fund]; *Rider v. County of San Diego* (1992) 11 Cal.App.4th
12 1410, 1424 fn.6 [costs are recoverable from the common fund "[o]f necessity, and for precisely the
13 same reasons discussed above with respect to the recovery of attorneys' fees by . . . [Plaintiffs']
14 attorneys".])

15 The Settlement Agreement authorizes Plaintiff's counsel to recover their actual litigation costs
16 of up to \$15,000. (Settlement Agreement, at pp. 6, 7.) The actual litigation costs in this case by
17 Plaintiff's counsel to date amount to \$11,749.29 but are estimated to be \$11,999.29 at the conclusion
18 of this case. (Melmed Decl., ¶ 70.) Plaintiff's counsel is therefore requesting that the Court approve a
19 distribution of \$11,999.29 from the Gross Settlement Amount. (Melmed Decl., ¶ 70.)

20 **VIII. THE REQUESTED SERVICE AWARD IS FAIR AND REASONABLE**

21 The Settlement Agreement contemplates a service award to Plaintiff in the amount of
22 \$10,000.00 to recognize the time, effort, and risk that she undertook in bringing this case and helping
23 to secure the relief obtained for the State of California and the Aggrieved Employees. (See *Bell v.*
24 *Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 [upholding "service payment" to named
25 plaintiff for his efforts in bringing class case]; *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563
26 F.3d 948, 958 [explaining that enhancement awards are "intended to compensate class representatives
27 for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
28 the action, and, sometimes, to recognize their willingness to act as a private attorney general."].)

Further, public policy considerations require the award of adequate enhancement awards reflective of the risks and efforts undertaken by representative plaintiffs. “Many courts have also noted a fourth rationale for incentive payments: that such payments do precisely what their name hopes they will—incentivize [representatives] to step forward on behalf of the class.” (*Newberg on Class Actions* (5th ed. 2011) § 17:3.) From a public policy standpoint, the failure to approve fair and adequate service payments would result in individuals being less willing to come forward on behalf of others similarly situated, thereby depriving significant benefits, such as those obtained here, to the aggrieved. To determine the propriety of a service award, courts consider the actions protecting the group’s interests, the benefit provided to the group based on those actions, and the amount of time and effort expended by the plaintiff. (*Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 976–977.) Although this case is being resolved on a PAGA-only basis, the same rationale applies: Plaintiff’s efforts in obtaining the recovery in this case entitles her to a service award “to recognize [her] willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.*, *supra*, 563 F.3d 948, 958.)

Here, Plaintiff actively and aggressively represented the State of California and the Aggrieved Employees throughout this litigation. (Melmed Decl., ¶¶ 74–75.) Plaintiff was an essential element in the successful prosecution and ultimate settlement of this case and was always available to provide her input on the litigation, gather evidence and provide other information that proved critical to the prosecution. (Melmed Decl., ¶¶ 74–75.) The proposed service award is also fair given the amount of time and effort Plaintiff spent on assisting in the prosecution of this case and the personal hardship and pressure faced as a result of filing this lawsuit against her former employer. (Melmed Decl., ¶¶ 74–75.) Moreover, Plaintiff executed a general release that far exceeds the scope of the claims being released by the Aggrieved Employees. (Melmed Decl., ¶¶ 74–75.)

IX. SUBMISSION TO THE LWDA

The Settlement Agreement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code section 2699, subdivision (1)(2). (Melmed Decl., ¶ 77.) The proof of electronic submission is attached as **Exhibit 4** to the Declaration of Jonathan Melmed. (Melmed Decl., ¶ 77.)

1 **X. DISMISSAL OF THE CLASS CLAIMS**

2 An arbitration agreement is, as the name implies, an agreement that certain disputes arising out
3 of a relationship will be submitted to arbitration instead of pursued in court. (See *Cheng-Canindin v.*
4 *Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.) In *Epic Sys. Corp. v Lewis* (2018) 138
5 S.Ct. 1612, 1623, the Court held that valid arbitration agreements between employers and employees
6 that call for individualized proceedings must be enforced. Thus, an otherwise valid arbitration
7 agreement requiring an employee as a condition of employment to give up their right to pursue relief
8 on a class-wide basis is generally enforceable. (*Iskanian v. CLS Transportation Los Angeles, LLC*
9 (2014) 59 Cal.4th 348, 362–366.)

10 Representative PAGA actions, however, are treated somewhat differently. An arbitration
11 agreement generally *cannot* require employees to give up the right to bring representative PAGA
12 actions—such a waiver would be contrary to public policy. (*Iskanian v. CLS Transportation Los*
13 *Angeles, LLC, supra*, 59 Cal.4th 348, 384 [“[W]here, as here, an employment agreement compels the
14 waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a
15 matter of state law.”]; *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1925 [“*Iskanian’s*
16 rule remains valid to that extent.”].) Accordingly, in cases where there is widespread adoption of an
17 arbitration agreement waiving collective action employment claims, class action cases can be precluded
18 but not PAGA representative actions generally cannot (with a limited exception for “individual” PAGA
19 claims as articulated in *Viking River Cruises, Inc. v. Moriana, supra*, 142 S.Ct. 1906).

20 Here, through discovery it was determined that many, if not all, of the putative class members
21 had signed an arbitration that included an enforceable class action waiver. (Melmed Decl., ¶ 71.)
22 Plaintiff’s counsel has analyzed these arbitration agreements and concluded that there is a strong
23 argument they are enforceable. (Melmed Decl., ¶ 71.) Rather than waste judicial resources on
24 challenging these arbitration agreements, Plaintiff sought the relief that was actually available to the
25 Aggrieved Employees: the PAGA claims that arguably could not be waived under the arbitration
26 agreements. (Melmed Decl., ¶ 71; see *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1291
27 [“paring away the plaintiff’s individual claims does not deprive the plaintiff of standing to pursue
28 representative claims under PAGA”]; *Gregg v. Uber Technologies, Inc.* (2023) 89 Cal.App.5th 786;

1 *Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, 652; *Westmoreland v. Kindercare*
2 *Education LLC* (Cal. Ct. App., Apr. 24, 2023, No. A164090) 2023 WL 3052080, at *9; *Seifu v. Lyft,*
3 *Inc.* (2023) 89 Cal.App.5th 1129; *Nickson v. Shemran, Inc.* (Cal. Ct. App. 2023) 306 Cal.Rptr.3d 835,
4 845.) Having resolved the PAGA claims in the Action, Plaintiff requests that the class-based claims in
5 this case be dismissed contingent on this Court’s approval of the Settlement Agreement.

6 Importantly, no consideration is being given for the dismissal of these claims and the Parties
7 are requesting their dismissal *without prejudice*. Moreover, no class has been certified in this case and
8 no notice has been sent to any members of the putative class. (See Cal. Rules of Court, rule 3.770,
9 subd. (c).) As such, any prospective plaintiff who wishes to pursue relief on these issues, whether
10 individually or as a class action, has every right to attempt to do so. A dismissal here would not impede
11 any employee’s ability to seek recovery for their wage and hour violations in whatever way they see
12 fit.

13 For these reasons, Plaintiff respectfully requests that this court dismiss the class claims without
14 prejudice.

15 **XI. CONCLUSION**

16 For the foregoing reasons, Plaintiff requests the Court approve the Settlement Agreement.

17 Dated: May 9, 2023

MELMED LAW GROUP P.C.

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19 

20 **KYLE D. SMITH**

21 Attorneys for Plaintiff and the Aggrieved Employees
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