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6 Attorneys for Plaintiff Carlos A. Salcido, on behalf of himself and all “aggrieved employees”
7 pursuant to Labor Code § 2698 *et seq.*

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF KERN**

10 CARLOS A. SALCIDO, on behalf of himself
11 and all “aggrieved employees” pursuant to
12 Labor Code § 2698 *et seq.*,

13 Plaintiffs,

14 v.

15 NCRC, Inc. d/b/a Nationwide Construction
and Repair Company, and DOES 1 through
16 10, inclusive,

17 Defendants.
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CASE NO: BCV-22-101027

Assigned to the Hon. Bernard C. Barmann, Div. H

**NOTICE OF UNOPPOSED MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004,
AWARDING ATTORNEYS’ FEES, COSTS,
ENHANCEMENT AND GENERAL RELEASE
PAYMENT, AND REIMBURSEMENT OF
SETTLEMENT ADMINISTRATION
EXPENSES, AND DISMISSING ACTION
WITH PREJUDICE; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: April 10, 2024

Time: 8:30 A.M.

Div.: H

Complaint Filed: April 28, 2022

1 **PLEASE TAKE NOTICE THAT** on April 10, 2024 at 8:30 a.m., or as soon thereafter as
2 the matter may be heard, in Division H, of the above-entitled Court, located at 1415 Truxtun
3 Avenue, Bakersfield, California 93301, Plaintiff Carlos A. Salcido will and hereby does move
4 unopposed for an Order: (1) granting approval of the proposed settlement of claims brought
5 pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”)
6 set forth in the Parties’ Settlement Agreement and Release of Individual Claims and Private
7 Attorneys General Act Claim (the “Settlement Agreement”); (2) appointing Phoenix Settlement
8 Administrators as the Settlement Administrator and approving payment of its fees not to exceed
9 \$4,000 from the Gross Settlement Amount; (3) directing disbursement of the Gross Settlement
10 Amount pursuant to the terms of the Settlement Agreement; (4) directing payment of attorneys’
11 fees and litigation costs from the Gross Settlement Amount not to exceed \$24,750 to Plaintiff’s
12 counsel; (5) directing an enhancement and general release payment from the Gross Settlement
13 Amount in the amount of \$15,000 to Plaintiff Carlos A. Salcido; and (6) dismissing this action with
14 prejudice.

15 This motion will be based on this Notice, the supporting memorandum of points and
16 authorities, the Parties’ Settlement Agreement, the Declarations of Daniel F. Gaines, Carlos A.
17 Salcido, and Jodey Lawrence, the documents and records on file in this matter, and such additional
18 arguments, authorities, and evidence and other matters as may be presented by the Parties hereafter.

19 Date: March 18, 2024

Respectfully submitted,

GAINES & GAINES, APLC

22 By: 
23 DANIEL F. GAINES
24 ALEX P. KATOFISKY
25 Attorneys for Plaintiff
26 Carlos A. Salcido

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Carlos A. Salcido (“Plaintiff” or “Salcido”) and PAGA Members under the Labor
4 Code’s Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order
5 granting approval of the proposed Settlement of the above-captioned lawsuit against Defendant
6 NCRC, Inc. d/b/a Nationwide Construction and Repair Company (“Defendant”). The proposed
7 Settlement will dispose of the Released Claims asserted on behalf of Plaintiff and approximately
8 94 individuals who were employed by Defendant in a non-exempt position for at least one Eligible
9 Pay Period in California during the PAGA Period [February 15, 2021 through January 17, 2024]
10 (the “PAGA Release Period”) (the “PAGA Members” or “Aggrieved Employees”). *See* Settlement
11 Agreement, at §§ A(16) and A(18). This case addresses claimed violations of employee protections
12 embodied in the California Labor Code and penalties stemming therefrom for the violation of the
13 PAGA. Plaintiff alleged that Defendant: (1) failed to pay all wages to Plaintiff and other non-
14 exempt PAGA Members due under Labor Code §§ 510, 558, 1194 and 1194.2 and IWC Wage
15 Order 16-2001; (2) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members
16 who were denied rest periods, in violation of Labor Code § 226.7 and IWC Wage Order No. 16-
17 2001; (3) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members who
18 were denied proper meal periods, in violation of Labor Code §§ 226.7, 512, 558 and IWC Wage
19 Order 16-2001; (4) failed to reimburse Plaintiff and other PAGA Members for necessary business
20 expenses incurred in direct consequence of the discharge of their duties, in violation of Labor Code
21 § 2802; (5) failed to timely pay Plaintiff and other PAGA Members all wages due during their
22 employment, in violation of Labor Code §§ 204 and 210; (6) failed to provide Plaintiff and other
23 non-exempt PAGA Members with wage statements that fully and accurately itemized the
24 requirements set forth in Labor Code § 226(a); and (7) failed to pay Plaintiff and other PAGA
25 Members all wages due at the separation of their employment based on the time frames required
26 by Labor Code §§ 201 and 202. As a result of Defendant’s alleged violations of the Labor Code,
27 approximately 94 employees are claimed to have suffered Labor Code violations for up to 1,207
28

1 aggregate pay periods at the rate of \$100 each based on PAGA's penalty provisions. Gaines Decl.,
2 ¶ 22.

3 As discussed throughout the Motion, this Settlement achieves great value for Plaintiff,
4 PAGA Members, and the State of California. While Defendant's potential liability could be up to
5 \$844,900, if penalties were stacked [*see* Motion at § II(D)], there is no California authority that
6 expressly permits the practice of stacking penalties [*see* Motion at § III(B)(2)]. Additionally, Courts
7 have held that a defendant may not be subject to heightened penalties if it was not notified by the
8 Labor Commissioner or any court in California that it was subject to the California Labor Code
9 [*see id.*]. Therefore, the more accurate measure of Defendant's potential liability is to multiply the
10 1,207 aggregate pay periods by \$100 each, which totals approximately \$120,700 in theoretical
11 exposure. *See* Gaines Decl. at ¶ 27.

12 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
13 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
14 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is
15 the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage and
16 hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative
17 strength and value of the PAGA claim, and (4) it reflects a reasoned compromise based directly on
18 the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and
19 likely duration of further litigation.

20 The value achieved by the Settlement may be gleaned from the fact that the Labor and
21 Workforce Development Agency ("LWDA") and the approximately 94 PAGA Members
22 encompassed by the Settlement will receive no less than \$27,500 under the terms of the Settlement,
23 which, pursuant to the operative statute, shall be allocated "75 percent to the Labor and Workforce
24 Development Agency . . . and 25 percent to the Aggrieved Employees." *See* Cal. Lab. Code §
25 2699(i). This is a reasonable recovery, not only because further litigation may have resulted in a
26 net-zero recovery based on the defenses available to Defendant, but because the amount secured by
27 Plaintiff is sizable and in line with similar settlements of these types of claims under PAGA. It is
28 also important to underscore that all penalty amounts paid to PAGA Members will be an

1 unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA
2 penalties. Such employees preserve their right to assert claims against Defendant for unpaid wages
3 and statutory penalties.

4 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
5 Court enter the Order submitted herewith.

6 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

7 **A. The Parties**

8 Defendant operates as a construction and repair company in Kern County, California.
9 Plaintiff worked for Defendant in Kern County, California. Gaines Decl. at ¶ 8.

10 Defendant employed Plaintiff as a non-exempt employee from 2015 through July, 2021.
11 The PAGA Members/Aggrieved Employees are all individuals who were employed by Defendant
12 in California as hourly and/or non-exempt employees at any time from February 15, 2021 through
13 January 17, 2024. Gaines Decl. at ¶ 9.

14 **B. The Claims Asserted**

15 Plaintiff asserts claims that Defendant: (1) failed to pay all wages to Plaintiff and other non-
16 exempt PAGA Members due under Labor Code §§ 510, 558, 1194 and 1194.2 and IWC Wage
17 Order 16-2001; (2) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members
18 who were denied rest periods, in violation of Labor Code § 226.7 and IWC Wage Order No. 16-
19 2001; (3) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members who
20 were denied proper meal periods, in violation of Labor Code §§ 226.7, 512, 558 and IWC Wage
21 Order 16-2001; (4) failed to reimburse Plaintiff and other PAGA Members for necessary business
22 expenses incurred in direct consequence of the discharge of their duties, in violation of Labor Code
23 § 2802; (5) failed to timely pay Plaintiff and other PAGA Members all wages due during their
24 employment, in violation of Labor Code §§ 204 and 210; (6) failed to provide Plaintiff and other
25 non-exempt PAGA Members with wage statements that fully and accurately itemized the
26 requirements set forth in Labor Code § 226(a); and (7) failed to pay Plaintiff and other PAGA
27 Members all wages due at the separation of their employment based on the time frames required
28 by Labor Code §§ 201 and 202. Plaintiff asserts these claims under PAGA, on behalf of herself,

1 individually, and on behalf of the State of California and other PAGA Members, seeking civil
2 penalties for the alleged Labor Code violations. Gaines Decl. at ¶ 10.

3 **C. Procedural Posture**

4 On February 15, 2022, pursuant to Labor Code section 2699.3, Plaintiff gave written notice
5 by online filing with the LWDA and by certified mail, return receipt requested, to Defendant of the
6 specific provisions of the Labor Code alleged to have been violated, including the facts and theories
7 to support the alleged violation. Gaines Decl., ¶¶ 6-7; **Exhibit B** (LWDA Notice Letter). On April
8 28, 2022, and after the LWDA declined to take action within the statutorily permissible time with
9 respect to Plaintiff's February 15, 2022 letter, Plaintiff filed his representative action complaint in
10 this Court. Gaines Decl. ¶ 6.

11 On or about August 12, 2022, Defendant successfully petitioned the Court to compel
12 Plaintiff's individual claims to arbitration and stay the Action. Gaines Decl. ¶ 11.

13 On or about January 18, 2023, Plaintiff filed a Complaint in Arbitration for individual
14 damages and penalties under PAGA. Gaines Decl. ¶ 12.

15 On or about December 12, 2023, the Court granted Plaintiff's motion to terminate the
16 Arbitration, lift the stay, and issued the Sanctions Award to Plaintiff's Counsel. Gaines Decl. ¶ 13.

17 Defendant filed an appeal of the Sanction Award and the Court's order terminating the
18 arbitration, Court of Appeal, Fifth Appellate District of California, case number F087369, which
19 has been dismissed in connection with this Settlement. Gaines Decl. ¶ 14.

20 **D. Plaintiff's Counsel's Investigation.**

21 Counsel for Plaintiff engaged in targeted, informal discovery of Defendant's alleged Labor
22 Code violations, which specifically evaluated the strength and value of the PAGA claims in
23 preparation for a resolution of this Action. Gaines Decl. at ¶ 16.

24 Plaintiff's Counsel obtained and reviewed multiple documents, including (i) Plaintiff's
25 wage statements, (ii) policy documents relating to the employment of Plaintiff and PAGA
26 Members, and (iii) data relating to the number of alleged violations and the value of the recoverable
27 penalties, including time and payroll data. Gaines Decl. at ¶ 17.

28 Based on the information received, as well as through discussions with Defendant's

1 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
2 within the definition of "Aggrieved Employee" for the relevant statutory period, (ii) the number of
3 affected pay periods at issue among them, and (iii) construct a damage model that calculated the
4 maximum realistic amount of PAGA penalties that could be levied against Defendant within the
5 PAGA Release Period based on employee timekeeping and payroll data produced by Defendant.
6 Gaines Decl. at ¶ 18. At all relevant times, Defendant has disputed Plaintiff's claims and contested
7 both the existence of and extent of liability as alleged by Plaintiff. *Id.*

8 Plaintiff's Counsel's experience in litigating similar "representative" wage and hour claims,
9 the degree of investigation that was conducted here, the amount of data that was obtained, and
10 several informal settlement discussions was sufficient to determine the potential value of the PAGA
11 claim and to evaluate the strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5,
12 12-21, 27-31. Defendant, however, disputed Plaintiff's claims and disputed both the existence of
13 and extent of liability as alleged by Plaintiff.

14 Plaintiff contends that Defendant: (1) failed to pay all wages to Plaintiff and other PAGA
15 Members due under Labor Code §§ 510, 558, 1194 and 1194.2 and IWC Wage Order 16-2001; (2)
16 failed to pay premium wages to Plaintiff and other PAGA Members who were denied rest periods,
17 in violation of Labor Code § 226.7 and IWC Wage Order No. 16-2001; (3) failed to pay premium
18 wages to Plaintiff and other PAGA Members who were denied proper meal periods, in violation of
19 Labor Code §§ 226.7, 512, 558 and IWC Wage Order 16-2001; (4) failed to reimburse Plaintiff and
20 other PAGA Members for necessary business expenses incurred in direct consequence of the
21 discharge of their duties, in violation of Labor Code § 2802; (5) failed to timely pay Plaintiff and
22 other PAGA Members all wages due during their employment, in violation of Labor Code §§ 204
23 and 210; (6) failed to provide Plaintiff and other PAGA Members with wage statements that fully
24 and accurately itemized the requirements set forth in Labor Code § 226(a); and (7) failed to pay
25 Plaintiff and other PAGA Members all wages due at the separation of their employment based on
26 the time frames required by Labor Code §§ 201 and 202. Gaines Decl. at ¶ 19.

27 If Plaintiff stacked penalties, the maximum value of the PAGA claims would be
28 approximately \$844,900 (assuming one violation per pay period for all seven claims). However,

1 recovery on these claims was not certain. PAGA claims are discretionary, such that the Court could
2 (and almost certainly would) decline to award their full value. The Court could award far less than
3 the maximum value on these penalty claims, particularly where, as here, they greatly exceed the
4 value of the underlying wage claims. Considering the numerous claims asserted by Plaintiff and
5 the obstacles to prevailing on many of them, it is possible that he would not prevail on one or more
6 of them, such that his PAGA claims as to some or all of her claims would also fail. The
7 compromised settlement amount takes these risks into account. A discount on the maximum value
8 of PAGA Members' claims was required (and warranted) to resolve the matter at this stage of the
9 litigation. Gaines Decl. at ¶ 20.

10 **E. The Proposed Settlement**

11 The Parties jointly prepared and executed a Settlement Agreement and Release of Individual
12 Claims and Private Attorneys General Act Claim (the "Settlement" or "Settlement Agreement").
13 Gaines Decl., ¶ 21; **Exhibit C**. The Settlement Agreement sets forth the terms of the Settlement
14 reached by the Parties, including the following key points:

15 1. Defendant agrees to settle this matter for the payment of \$71,250 (hereinafter the
16 "Gross Settlement Amount"), which shall be all inclusive, encompassing (i) all payments to the
17 LWDA and PAGA Members, (ii) any and all costs of third-party administration of the settlement,
18 (iii) Plaintiff's Counsel's attorneys' fees and costs of suit, and (iv) a general release payment to
19 Plaintiff. *See* Settlement Agreement, at §§ 12, 39.

20 2. The total sum available for payment of PAGA penalties shall be calculated by
21 deducting from the \$71,250 Gross Settlement Amount, \$24,750 for the payment of Plaintiff's
22 Counsel's fees and costs (\$23,750 in fees and \$1,000 in costs), \$15,000 for the payment of
23 Plaintiff's general release payment, and the costs of administration not to exceed \$4,000, which
24 yields \$27,500, and of which seventy-five percent (75%) or \$20,625, shall be distributed to the
25 LWDA, and the remaining twenty-five percent (25%) or \$6,875, to the PAGA Members. *See*
26 Settlement Agreement, at § 39(e).

27 3. All PAGA Members will receive a pro rata share of the \$6,875 allocated to PAGA
28 Members, which shall be distributed based on the number of pay periods each Aggrieved Employee

1 worked for Defendant in California during the PAGA Release Period. *See* Settlement Agreement,
2 at § 39(e). Although these calculations will not be made until after approval, a rough estimation of
3 the value to the approximately 94 individuals falling within the definition of “Aggrieved
4 Employee” may be gleaned from the fact that an equal division would provide about \$73.14 to each
5 Aggrieved Employee, net of payments to the LWDA, the Settlement Administrator, attorney’s fees
6 and costs, and an enhancement and general release payment to Plaintiff. The LWDA will be paid
7 a substantial \$20,625. *See* Gaines Decl., at ¶ 23.

8 4. In exchange for the above settlement consideration, Defendant and the Released
9 Parties shall be entitled to a limited release from each and every Aggrieved Employee, including
10 Plaintiff¹:

11 Upon approval by the Court of this Settlement, and subject to Defendant’s payment
12 of the GSA and the Sanctions Award, Plaintiff, individually and in his representative
13 capacity on behalf the State of California and the PAGA Members will fully and
14 finally release and discharge the Released Parties from all claims, rights, demands,
15 liabilities, costs, Attorneys’ fees, and causes of action for civil penalties under the
16 PAGA, arising during employment by Defendant in California in a non-exempt
17 position during the PAGA Period, based on the factual and legal allegations pled in
18 the operative Representative Action Complaint that support or relate to the
19 following alleged violations of law asserted by Plaintiff in the Action pursuant to
20 PAGA: (1) failure to pay all wages due under Labor Code §§ 510, 558, 1194 and
21 1194.2 and IWC Wage Order 16-2001; (2) failure to pay premium wages to Plaintiff
22 and other non-exempt Aggrieved Employees who were denied rest periods, in
23 violation of Labor Code § 226.7 and IWC Wage Order No. 16-2001; (3) failure to
24 pay premium wages to Plaintiff and other non-exempt Aggrieved Employees who
25 were denied proper meal periods, in violation of Labor Code §§ 226.7, 512, 558 and
IWC Wage Order 16-2001; (4) failure to reimburse Plaintiff and other Aggrieved
Employees for necessary business expenses incurred in direct consequence of the
discharge of their duties, in violation of Labor Code § 2802; (5) failure to timely pay
Plaintiff and other Aggrieved Employees all wages due during their employment, in
violation of Labor Code §§ 204 and 210; (6) failure to provide Plaintiff and other
non-exempt Aggrieved Employees with wage statements that fully and accurately
itemized the requirements set forth in Labor Code § 226(a); and (7) failure to pay
Plaintiff and other Aggrieved Employees all wages due at the separation of their
employment based on the time frames required by Labor Code §§ 201 and 202 (the
“Released PAGA Claims”).

26
27 ¹ This comports with settled California Supreme Court authority. *See* *Arias v. Superior Court*
28 (2009) 46 Cal. 4th 969, 986 (concluding that “with respect to the recovery of civil penalties,
nonparty employees as well as the government are bound by the judgment in an action brought
under the act . . .”).

1 See Settlement Agreement, at § 40.

2 5. Settlement administration, which is to be paid from the Gross Settlement Amount,
3 shall not exceed \$4,000. See Settlement Agreement at § 39(a). Phoenix Settlement Administrators,
4 a reputable settlement administration company, has agreed to administer the settlement for this
5 amount, submitting a competitive bid. Gaines Decl., ¶ 24.

6 6. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
7 litigation costs totaling \$24,750, and Plaintiff seeks an enhancement and general release payment
8 of \$15,000. See Settlement Agreement, at § 39.

9 7. Finally, under the terms of the Settlement Agreement, the value of checks
10 uncashed more than 180 days after issuance shall be remitted to the Unclaimed Property Fund of
11 the California State Controller's Office to be held in the name of the Aggrieved Employee. See
12 Settlement Agreement, at § 52. The Parties agree that it is in the best interest of the PAGA
13 Members for the value of checks uncashed more than 180 days after issuance to be remitted to
14 the Unclaimed Property Fund of the California State Controller's Office to be held in the name
15 of the Aggrieved Employee. *Id.* Counsel for Plaintiff attests that their office regularly receives
16 calls from class members or aggrieved employees years after a case has settled to inquire about
17 obtaining their settlement share because they did not cash their check in time, lost their check, or
18 never received their check. Gaines Decl. at ¶ 25. By remitting the unclaimed checks to the State
19 Controller, the PAGA Members have a chance to receive their individual settlement payment
20 after the check cashing deadline. *Id.*

21 *Cy pres*, expanded to its "full implication," is *cy pres comme possible*, which means "as
22 near as possible." *Estate of Jackson* (1979) 92 Cal.App.3d 486, 489. *Cy pres* "is the doctrine that
23 equity will, when a charity is originally or later becomes impossible, inexpedient, or
24 impracticable of fulfillment, substitute another charitable object which is believed to approach
25 the original purpose as closely as possible." *Id.* Here, the nearest possibility for the PAGA
26 Members to obtain their recoveries is to allow the uncashed checks to be remitted to the
27 Unclaimed Property Fund of the California State Controller's Office to be held in the name of
28 the Aggrieved Employee.

1 **III. LEGAL ARGUMENT**

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

3 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
4 statute, which states that the “[t]he superior court shall review and approve any settlement of any
5 civil action filed pursuant to this part.” *See Labor Code* § 2699(1)(2).

6 As with any settlement, the Court must be mindful in conducting its inquiry that
7 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
8 litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
9 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
10 absolutes and an abandoning of highest hopes”’ [*Officers for Justice v. Civil Service Com.*, 688
11 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
12 of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such,
13 “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits”
14 or “judged against a hypothetical or speculative measure of what might have been achieved by the
15 negotiators.” *See id.*

16 Although the operative PAGA statute does not set forth the criteria on which a PAGA
17 settlement is to be judged, California law does state that some of the factors for review of a class
18 action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. section 382 and Cal. Rules of Court,
19 Rule 3.769, may be “useful in evaluating the fairness of a PAGA settlement” to the reviewing court.
20 *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56, 77 (“Thus, while PAGA does not require
21 the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for
22 settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public
23 and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors
24 used to evaluate class action settlements bear on a settlement's fairness—including the strength of
25 the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of
26 further litigation, and the settlement amount—these factors can be useful in evaluating the fairness
27 of a PAGA settlement.”) Courts within California have continued to approve settlements of PAGA
28

1 claims using Rule 23 criteria². However, it is important to underscore that not all Rule 23 factors
2 can be applied, as “a PAGA claim asserted on a non-class representative basis . . . is not considered
3 a class action but a law enforcement action, and therefore does not have to meet the requirements
4 of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan.
5 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2,
6 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010).
7 Based thereon, a court’s review of a PAGA settlement necessarily implicates the following unique
8 features that render the approval process completely distinct from approval of a class action
9 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

10 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not
11 concerned with the amount which “PAGA Members” are to receive, but rather, must focus on the
12 total settlement amount in achieving PAGA’s objective.

13 While “[a PAGA] action is . . . designed to protect the public and penalize the employer for
14 past illegal conduct” [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
15 into account the fact that settlement of a PAGA claim – like any settlement – involves a
16 “compromise” that stops short of rendering findings of liability and damages. Moreover, the Court
17 must not lose sight of the fact that “[u]nlike a class action seeking damages or injunctive relief for
18 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
19 for the government that otherwise may not have been assessed and collected by overburdened state
20 enforcement agencies.” *See Ochoa-Hernandez v. CJADER Foods, Inc.*, 2010 U.S. Dist. LEXIS
21 32774, 12 (N.D. Cal. Apr. 2, 2010).

22
23 ² As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
24 balancing of several factors which may include, among others, some or all of the following: [1] the
25 strength of plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further
26 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
27 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
28 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
reaction of the class members to the proposed settlement.” *See Linney v. Cellular Alaska P’ship*,
151 F.3d 1234, 1242 (9th Cir., 1998). “Not all of these factors will apply to every class action
settlement” and “[u]nder certain circumstances, one factor alone may prove determinative in
finding sufficient grounds for court approval.” *See Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*,
221 F.R.D. 523, 525-526 (C.D. Cal., 2004).

1 **B. The Settlement Meets All the Criteria For Approval**

2 Applying the Rule 23 fairness factors – limited to those compatible with the unique PAGA
3 considerations detailed above – the proposed Settlement embodies all of the key features of a
4 settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for
5 approval.

6 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

7 In conducting a review of a settlement, it is generally recognized that an “agreement . . .
8 reached through arms-length negotiation between experienced parties . . . is entitled to a
9 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS
10 43377, 44 (C.D. Cal. Apr. 12, 2010).

11 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
12 length negotiations brokered through competent counsel [Gaines Decl. at ¶ 21], (2) was negotiated
13 by Counsel with significant experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5, 30-31
14 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient investigation to evaluate
15 the strength and potential value of the PAGA claims, as well as evaluating the risks of litigating
16 this claim through trial. *See id.*, at ¶¶ 16-21, 27-29. Based thereon, the Court should give
17 considerable weight to the competency and integrity of counsel in assuring itself that the Settlement
18 Agreement represents an arms-length transaction entered without self-dealing or other potential
19 misconduct.

20 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of**
21 **Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

22 The relative strength of the PAGA claim brought by Plaintiff weighs in favor of the Court
23 finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous
24 defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the
25 potential to completely eliminate any recovery.

26 This case addresses violations of important employee protections embodied in the
27 California Labor Code – namely, that Defendant: (1) failed to pay all wages to Plaintiff and other
28 non-exempt PAGA Members due under Labor Code §§ 510, 558, 1194 and 1194.2 and IWC Wage

1 Order 16-2001; (2) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members
2 who were denied rest periods, in violation of Labor Code § 226.7 and IWC Wage Order No. 16-
3 2001; (3) failed to pay premium wages to Plaintiff and other non-exempt PAGA Members who
4 were denied proper meal periods, in violation of Labor Code §§ 226.7, 512, 558 and IWC Wage
5 Order 16-2001; (4) failed to reimburse Plaintiff and other PAGA Members for necessary business
6 expenses incurred in direct consequence of the discharge of their duties, in violation of Labor Code
7 § 2802; (5) failed to timely pay Plaintiff and other PAGA Members all wages due during their
8 employment, in violation of Labor Code §§ 204 and 210; (6) failed to provide Plaintiff and other
9 non-exempt PAGA Members with wage statements that fully and accurately itemized the
10 requirements set forth in Labor Code § 226(a); and (7) failed to pay Plaintiff and other PAGA
11 Members all wages due at the separation of their employment based on the time frames required
12 by Labor Code §§ 201 and 202. *See* Gaines Decl. at ¶ 26.

13 Defendant's realistic maximum theoretical exposure in this Action, without stacking
14 penalties, totals approximately \$120,700 computed by multiplying 1,207 aggregate pay periods by
15 \$100 each. *See* Gaines Decl. at ¶ 27. There is no California authority that expressly permits the
16 practice of counting multiple violations/penalties that occur within the same pay period, known as
17 "stacking" penalties. Plaintiff's Counsel is aware of no court that has actually stacked such PAGA
18 penalties for multiple violations (meaning the "market" for PAGA settlements is based on no
19 stacking of penalties) and given the circumstances of this case, it is unlikely that this Court would
20 impose a massive penalty by stacking the PAGA penalty claims against Defendant. *See* Gaines
21 Decl. at ¶ 27. Although stacking penalties is not unlawful, the majority of cases that address awards
22 of PAGA penalties focus on the court's discretion to reduce awards. *See Romo v. GMRI, Inc.*, 2014
23 WL 11320647, at *7 (C.D. Cal. Feb. 18, 2014) ("The court retains discretion over awards under a
24 PAGA claim . . ."); *Cardenas v. McLane Foodservice, Inc.*, 2011 WL 379413, at *4 (C.D. Cal.
25 Jan. 31, 2011) ("The PAGA text also provides the Court with the discretion to limit the amount
26 Plaintiffs may recover from the employer."); *Bright v. 99c Only Stores* (2010) 189 Cal. App. 4th
27 1472, 1480 n.8 ("The trial court has discretion to award less than the maximum amount of the civil
28 penalty . . ."). Based thereon, the non-stacking/one penalty per pay period is an appropriate

1 evaluation for maximum potential exposure in this case. Gaines Decl. at ¶ 27.

2 Additionally, the Ninth Circuit has held that heightened penalties are not appropriate where,
3 as here, the defendant was not notified by the Labor Commissioner or any court that it was subject
4 to the California Labor Code. *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021).
5 *See also Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 340 (reversing heightened
6 penalties awarded by trial court for Labor Code § 226.3 because “the plain language of the statute
7 [Labor Code § 226.3] provides that heightened penalties apply only where the employer fails to
8 provide wage statements or fails to keep required records.”) Further, courts are often hesitant to
9 award a heightened penalty where there is no prior citation by the Labor Commissioner. *See*
10 *Bernstein* at 1144. *See also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209
11 (holding that “[u]ntil the employer has been notified that it is violating a Labor Code provision...the
12 employer cannot be presumed to be aware that its continuing underpayment of employee’s is a
13 violation subject to penalties.”) (internal quotations omitted). Defendant was not notified by the
14 Labor Commissioner or any court that it was subject to the California Labor Code, and has not been
15 previously cited by the Labor Commissioner for Labor Code violations. Therefore, any violations
16 prior to Plaintiff’s February 15, 2022 LWDA letter are not subject to heightened penalties.

17 Furthermore, Defendant contends it acted within the requirements of California law at all
18 times as to all PAGA Members. In particular, Defendant contends that it timely paid all employees
19 all wages due. Defendant also contends that it has compliant meal and rest break and expense
20 reimbursement practices. Defendant further contends that not every pay period at issue involved
21 an alleged Labor Code violation subject to civil penalties. Moreover, Defendant maintained that
22 even if the Court did award penalties, the Court could and would *substantially* reduce the penalties
23 awarded based on the discretionary factors contained in Labor Code § 2699(e)(2) (“In any action
24 by an aggrieved employee . . . , a court may award a lesser amount than the maximum civil penalty
25 amount specified by this part if, based on the facts and circumstances of the particular case, to do
26 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”).
27 Defendant also argued that it had valid and enforceable arbitration agreements, which could
28 preclude the litigation of PAGA claims on a representative basis altogether, given the United States

1 Supreme Court’s ruling in *Viking River Cruises v. Moriana*, 142 S.Ct. 734 (2022). See Gaines Decl.,
2 ¶ 28.

3 Based on these disputes, which had the potential to completely eliminate Plaintiff’s
4 recovery, the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined
5 by a “maximum possible liability” amount of approximately \$844,900 [Gaines Decl., ¶ 29], and a
6 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
7 such issues, the Settlement achieves a significant benefit – approximately 59% recovery of the
8 realistic maximum liability. As such, this factor weighs very heavily in favor of resolution by way
9 of the compromise set forth in the Settlement Agreement. Gaines Decl., ¶ 29.

10 **3. The Risk, Expense, and Complexity of Further Litigation Balances** 11 **Strongly in Favor of Approval of the Settlement**

12 Approval of the Settlement Agreement is also appropriate in light of the risk, expense, and
13 complexity of further litigation. As discussed above, the Settlement Agreement takes into
14 consideration the specific factual and legal hurdles faced by Plaintiff in establishing Defendant’s
15 penalty-liability in this case, which again, may have resulted in a net-zero recovery. Any recovery
16 on these claims is not certain. And even when liability is found, PAGA claims are discretionary,
17 such that the Court could decline to award their full value. Some of Plaintiff’s claims are also
18 derivative, and as such, Plaintiff must prevail on her underlying Labor Code claims in order to
19 prevail on the derivative claims. These risks – when balanced with the fact that the settlement
20 achieved a very significant recovery (as demonstrated below), and that further litigation posed a
21 risk of diminishing such recovery by increasing litigation expenses – weigh strongly in favor of
22 settlement approval.

23 **4. The Benefits Conferred by the Settlement Balance in Favor of Approval**

24 The Settlement Agreement provides a significant monetary benefit that falls well within
25 “the range of an acceptable settlement” under the circumstances, which is the standard on which
26 the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and
27 reasonable even where it only provides a fraction of what could have been obtained at trial:

28 The proposed settlement is not to be judged against a hypothetical or
speculative measure of what might have been achieved by the

1 negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at
2 625 (emphasis in original). Thus, "the very essence of a settlement is
3 compromise, 'a yielding of absolutes and an abandoning of highest
4 hopes.'" *Id.* at 624 (citations omitted). As the Second Circuit has
5 pointed out: "The fact that a proposed settlement may only amount
6 to a fraction of the potential recovery does not, in and of itself, mean
7 that the proposed settlement is grossly inadequate and should be
8 disapproved." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
9 n.2 (2nd Cir. 1974).

10 *See Linney, supra*, 151 F.3d at 1242.

11 Here, after all deductions are made for administration, an enhancement award, attorneys'
12 fees and costs, \$27,500 will be paid out, of which \$20,625 (i.e. 75%) will go to the LWDA, and
13 \$6,875 (i.e. 25%) will go to the PAGA Members, as required by Labor Code § 2699(i) ("civil
14 penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor
15 and Workforce Development Agency . . . and 25 percent to the aggrieved employees."). *See*
16 Settlement Agreement, at §§ 4.02(a)(1) – (4).

17 This result is exceptional, as settlements of PAGA claims impacting thousands of
18 individuals have been approved as reasonable for amounts far less than the payment in this case.
19 *See e.g., Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27,
20 2012) ("Defendant has agreed to pay \$10,000 as civil penalties pursuant to the PAGA Of the
21 \$10,000, 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will
22 benefit the class The Court finds that the PAGA payment is set at a reasonable amount, and it
23 shall be approved."); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D.
24 Cal. Oct. 29, 2012) ("GTI agrees to allocate \$10,000 to Plaintiff's PAGA claims, and will pay
25 \$7,500 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports
26 with settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the
27 allocation of the Settlement to Plaintiff's PAGA claim."); *Schiller v. David's Bridal, Inc.*, 2012
28 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) ("Pursuant to the Settlement Agreement, the
parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency . .
. . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it
be approved."); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11,
2012) ("Pursuant to the Settlement Agreement, Defendant has agreed to pay \$15,000 to the

1 California Labor and Workforce Development Agency The Court finds that the PAGA
2 payment is set at a reasonable amount, and it shall be approved.”).³

3 Thus, notwithstanding the existence of issues having the potential to completely eliminate
4 recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds
5 typical PAGA awards routinely approved by the courts, but it also recovers monies for PAGA
6 Members which they otherwise would not receive. As such, this factor balances strongly in favor
7 of approval of the Settlement.

8 **5. The Scope of the Release is Narrowly Tailored**

9 As discussed above, the California Supreme Court has concluded that in the context of
10 PAGA “the nonparty employees, because they were not given notice of the action or afforded any
11 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
12 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the limited release provided in
13 exchange for the foregoing consideration is limited to the civil penalties asserted in the Action
14 under Labor Code §§ 2698 *et seq.* *See Settlement Agreement*, at § 40. As such, the scope of the
15 release in the Settlement Agreement is narrowly tailored and favors approval of the Settlement.

16
17 **6. The Experience and Views of Plaintiff’s Counsel Favor Approval of the Settlement**

18 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
19 litigation. *See Gaines Decl.*, ¶¶ 2-5; 30-31; **Exhibit A**. In the view of Plaintiff’s Counsel, the
20 benefit conferred by the proposed Settlement is fair, reasonable, and adequate under the
21 circumstances, as it reflects a reasoned compromise which takes into consideration the risks
22 inherent in this case, which had the potential to completely eliminate recovery. *Gaines Decl.*, ¶¶
23 16-21; 27-29. As such, this factor balances in favor of approval of the Settlement.

24
25
26 ³ Significantly, each of the above-cited actions involved a *higher* number of “aggrieved employees”
27 than at issue here. *See Franco*, 2012 U.S. Dist. LEXIS 169057, 14 (“2,055 Class Members were
28 ultimately identified”); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of
“approximately 1,869 individuals”); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16 (“3,327 California
Class members were ultimately identified”); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051
California Class Members were ultimately identified”).

1 **7. The Extent of Discovery Completed And The Stage Of The Proceedings**
2 **Favor Approval of the Settlement**

3 In evaluating this element, the Court should be mindful that “formal discovery is not a
4 necessary ticket to the bargaining table” [*Linney*, 151 F.3d at 1239], as the relevant consideration
5 is “whether ‘the parties have sufficient information to make an informed decision about
6 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
7 26 (C.D. Cal. Nov. 9, 2011).

8 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
9 Counsel to evaluate the strength and value of the claim for purposes of settlement. *Gaines Decl.*,
10 ¶¶ 16-21; 27-29. Prior to settlement, Defendant provided Plaintiff with documents related to the
11 policies and practices at issue in this PAGA action. As discussed above, Plaintiff’s Counsel’s
12 investigation was sufficient to, among other things, tabulate with precision the total number of
13 alleged Labor Code violations at issue during the PAGA Period and identify the total number of
14 individuals falling within the definition of “Aggrieved Employee” for the PAGA Period.

15 Based on Plaintiff’s Counsel’s experience litigating wage and hour claims, such
16 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
17 the strength of this claim for purposes of settlement. *See Gaines Decl.*, ¶¶ 2-5; 30-31.

18 **8. Additional Factors Weigh In Favor Of Finding The Terms Of The Proposed**
19 **Settlement To Be Fair, Adequate, And Reasonable**

20 In addition to the factors presented above, the proposed Settlement does not possess any
21 obvious deficiencies. The Settlement contemplates entry of an Order (submitted concurrently
22 herewith) which approves the Settlement and dismisses the Action with prejudice. Section 10 of
23 the Settlement Agreement and paragraph 8 of the Proposed Order authorize the Court to retain
24 jurisdiction to enforce the Settlement Agreement. This procedure effectively disposes of the Action
25 in its entirety, documents the Court’s approval of the Settlement as required by PAGA, and allows
26 for Court intervention if necessary to enforce the terms of the Settlement Agreement. In sum, under
27 the applicable standards for approval of PAGA settlements in California, the settlement in this case
28 meets the standards for approval.

1 **IV. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR**
2 **REASONABLE FEES AND COSTS**

3 Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of one-
4 third of the Gross Settlement Amount (\$23,750) and reimbursement of litigation costs of \$1,000,
5 falling within the bounds authorized by the Settlement Agreement. *See* Settlement Agreement, at §
6 39(b). Plaintiff's Counsel's entitlement to an award of attorneys' fees and costs is warranted on
7 multiple independent grounds. Further, the amount of fees requested falls well within the range of
8 reasonableness under applicable standards, as the amount requested constitutes a "percentage of
9 the fund" deemed reasonable in similar wage and hour settlements of this size and approved by
10 California courts, which is not only warranted based on the contingency risk Plaintiff's Counsel
11 has agreed to incur for the benefit of the State of California and PAGA Members, but also based
12 on the significant results achieved, as the Settlement obtains a recovery substantially above the
13 range approved as reasonable by California state and federal courts. Based thereon, Plaintiff's
14 Counsel respectfully requests that the Court enter an order approving the fee and cost amounts
15 requested.

16 **A. Plaintiff's Counsel Are Entitled To Recover Their Reasonable Fees And**
17 **Costs As A Matter Of Right**

18 Plaintiff's Counsel are entitled to recover attorneys' fees and costs under the "common
19 fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a
20 common fund for the benefit of persons other than herself or his client is entitled to a reasonable
21 attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

22 Courts have long recognized the "common fund" or "common benefit" doctrine, under
23 which attorneys who create a common fund or benefit for a group of persons may be awarded their
24 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
25 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
26 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
27 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
28 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

 The California Supreme Court has held that, "when a number of persons are entitled in

1 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
2 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
3 attorneys' fees out of the fund." *Serrano III*, *supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d
4 1; *see also Boeing*, *supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit
5 of persons other than herself or his client is entitled to a reasonable attorney's fee from the fund as
6 a whole."); *Mills*, *supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
7 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
8 Group) at § 17:172.3 explains the common fund doctrine as follows:

9 Where the lawsuit results in the recovery of a fund or property
10 benefiting others as well as Plaintiffs (e.g., a class action), the court
11 has inherent equitable power to order Plaintiffs' attorney fees paid
12 out of the common fund or property [citations]. Such fee spreading
 assures that all of those benefited by the litigation pay their fair share
 of obtaining the recovery.

13 The percentage-of-the-fund approach appears to be the preferred method of awarding fees
14 in traditional common fund cases, such as this case. Where the settlement amount is a "certain or
15 easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. *Serrano*
16 *III*, 20 Cal. 3d at 35.

17 In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341
18 fn.19, the California Supreme Court upheld an attorney's fee award based on a percentage of the
19 common benefit obtained in a lawsuit by a city employee's association for retroactive wages:

20 It is not necessary to find this suit a proper class action in order to
21 uphold the portion of the judgment awarding counsel for Plaintiffs
22 25 percent of all retroactive salaries and wages received. That award
23 may be sustained under the rule that a litigant who creates a fund in
24 which others enjoy beneficial rights may require those beneficiaries
 to pay their fair share of the expense of litigation. (*See Sprague v.*
 Ticonic National Bank (1939) 307 U.S. 161, 159; *Estate of Stauffer*
 (1959) 53 Cal.2d 124, 132).

25 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court
26 stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which
27 others derive benefits may require those passive beneficiaries to bear a fair share of the litigation
28 costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,
 the California Supreme Court recognized that the common benefit doctrine has been applied

1 “consistently in California when an action brought by one party creates a fund in which other
2 persons are entitled to share.”

3 Numerous appellate courts have ruled similarly. *See e.g., Knoff v. City and County of San*
4 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a “contingent percentage” award of
5 attorneys’ fees in a representative action as the proper exercise of the court’s broad equitable
6 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys’ fees and
7 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
8 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
9 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
10 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
11 of residential property in an inverse condemnation action).

12 Moreover, at least eight federal courts of appeal—the First, Third, Sixth, Seventh, Ninth,
13 Tenth, Eleventh and the D.C. Circuit—have endorsed the “percentage fee” method for determining
14 reasonable attorneys’ fees in common benefit cases. *See e.g., In re Sumitomo Copper Litig.* 74 F.
15 Supp. 2d 393, 396-398 (S.D.N.Y. 1999) (describing the overwhelming weight of federal authority
16 in favor of the percentage fee method); *see also, Lealao v. Beneficial California, Inc.* (2000) 82
17 Cal.App.4th 19, 30-31 (describing same).

18 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
19 a \$71,250 settlement fund for the LWDA and PAGA Members [*Schiller*, 2012 U.S. Dist. LEXIS
20 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have resulted
21 in the preservation or recovery of a certain or easily calculable sum of money-out of which sum or
22 ‘fund’ the fees are to be paid.”)], and in doing so, has exclusively borne the risk of loss for such
23 expenditures of time and expenses (as the LWDA elected not to take the case after receiving the
24 PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
25 applicable precedent.⁴

26 ⁴ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
27 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
28 entitled to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the
instant PAGA action was by definition “for the public benefit” and secured monetary awards for

1 **B. The Fee Amount Requested Is Reasonable**

2 In addition to the forgoing, Plaintiff's Counsel's request for attorneys' fees in the amount
3 of one-third of the \$71,250 Gross Settlement Amount falls well within the "zone of
4 reasonableness." It is important to highlight at the outset that the fee amount presently sought is
5 not extraordinary, but actually falls at the "average" fee deemed reasonable under California State
6 court authority, as it is recognized that "courts may award attorney's fees in the 30-40% range in
7 wage and hour class actions that result in recovery of a common fund under \$10 million." *See e.g.,*
8 *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). This fee
9 falls directly within that range.

10 Moreover, Plaintiff's Counsel agreed to incur the contingency risk for the benefit of the
11 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
12 Decl., ¶¶ 32-37. The significant results achieved, and the underlying facts therefrom, justify
13 Plaintiff's Counsel's requested fee as reasonable under all applicable standards.

14 **C. The Fee Amount Allocated by The Settlement Agreement Is Within the**
15 **Zone of Reasonableness Under the "Percentage of the Fund" Method**

16 The amount of fees requested by Plaintiff's Counsel is reasonable based on standards
17 applicable to the "percentage of the fund" method. "When assessing whether the percentage
18 requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of
19 litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the
20 financial burden; and (f) the awards made in similar cases." *See Vasquez v. Coast Valley Roofing,*
21 *Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

22 First, the results achieved by Plaintiff's Counsel are significant as Defendant has agreed to
23 pay \$71,250 under the Settlement. This is a significant recovery given the risks associated with
24 obtaining any recoverable penalties. Gaines Decl., ¶¶ 16-21; 27-29. Further, the settlement of

25 _____
26 approximately 94 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
27 (2007) 154 Cal.App.4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the fact
28 that he pursued this public interest class action not only for himself but on behalf of a class
comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers. []
No more is required to satisfy the 'significant benefit,' 'public interest,' and 'large class of persons'
requirements of Code of Civil Procedure section 1021.5.").

1 PAGA claims impacting a comparable number of individuals have been approved as reasonable for
2 between \$7,500.00 and \$15,000.00. *See* Section III.B.4., *supra*.

3 Second, such results were achieved in the face of significant risks. As explained above,
4 Defendant maintained defenses to Plaintiff's PAGA claims that very well could have resulted in a
5 net-zero recovery at trial.

6 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
7 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
8 Decl. at ¶¶ 32-37. This required Plaintiff's Counsel to personally assume the risk of nonpayment
9 in securing the substantial financial benefit the State of California stands to receive, and also
10 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors that warrant fee
11 enhancement under applicable California Supreme Court authority:

12 One of the most common fee enhancers . . . is for contingency risk.
13 We reaffirmed the propriety of a contingency risk enhancement in
14 Ketchum: "The economic rationale for fee enhancement in
15 contingency cases has been explained as follows: 'A contingent fee
16 must be higher than a fee for the same legal services paid as they are
17 performed. The contingent fee compensates the lawyer not only for
18 the legal services he renders but for the loan of those services. The
19 implicit interest rate on such a loan is higher because the risk of
20 default (the loss of the case, which cancels the debt of the client to
21 the lawyer) is much higher than that of conventional loans.' (Posner,
22 *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) 'A lawyer
23 who both bears the risk of not being paid and provides legal services
24 is not receiving the fair market value of his work if he is paid only
25 for the second of these functions. If he is paid no more, competent
26 counsel will be reluctant to accept fee award cases.'"

27 *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580.

28 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,
29 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
30 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that
31 result in recovery of a common fund under \$10 million." *See also Crandall v. U-Haul*
32 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common
33 fund).

Attorneys' fee awards in the amount sought here are well-established by California law and

1 practice. Accordingly, Plaintiff's Counsel's fee request is fair and reasonable, and is consistent with
2 the awards in California and the Ninth Circuit. It is also reasonable given the history of this action
3 and the results obtained.

4 **D. Plaintiff's Counsel's Request for Costs is Reasonable**

5 In the course of this litigation, Plaintiff's Counsel incurred out-of-pocket costs exceeding
6 \$1,027.24.⁵ See Gaines Decl. at ¶ 38, **Exhibit D**. As demonstrated in the Gaines Declaration
7 submitted herewith, the incurred costs included filing fees, postage, and other typical litigation
8 expenses. *Id.* Such costs are appropriate for cost reimbursement in these types of cases. See e.g.,
9 *In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (C.D. Cal. 1989)
10 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); see also, *In re GNC Shareholder*
11 *Litigation* 668 F.Supp. 450, 452 (W.D. Pa. 1987).

12 The costs incurred by Plaintiff's Counsel in this litigation benefited Plaintiff, PAGA
13 Members, and the State. Plaintiff's cost request is reasonable and represents the costs that
14 Plaintiff's Counsel was required to incur to prosecute this action and should therefore be granted.

15 **V. THE ENHANCEMENT AND GENERAL RELEASE PAYMENT SOUGHT BY**
16 **PLAINTIFF IS REASONABLE AND SHOULD BE APPROVED**

17 The Parties have agreed that Plaintiff will be paid an enhancement and general release
18 payment in the amount of \$15,000. This payment is intended to recognize the time and effort that
19 Plaintiff spent on behalf of other PAGA Members and the State and for Plaintiff's full general
20 release of claims against Defendant. See Settlement Agreement at §§ 21, 39(c), 42-44. See
21 Declaration of Carlos A. Salcido, submitted herewith. See Gaines Decl., ¶ 39.

22 As to an incentive award, case law supports the award of incentive payments in private
23 attorney general actions. The Ninth Circuit has recognized that a named plaintiff's "willingness to
24 act as a private attorney general" may justify the award of an incentive payment. *Rodriguez v. West*
25 *Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub*
26 *LLC*, 2013 WL 12415482 (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern

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28 ⁵ Plaintiff's Counsel incurred out-of-pocket costs higher than what is allotted for in the Settlement Agreement. Accordingly, Plaintiff's Counsel is only seeking reimbursement of litigation costs of \$1,000.

1 District of California approved a similar PAGA-only settlement and awarded a service payment to
2 the representative plaintiff in recognition of his efforts.

3 The traditional bases for awarding incentive awards in class settlements support the award
4 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
5 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
6 awards and held that “the rationale for making enhancement or incentive awards to named Plaintiffs
7 is that he or she should be compensated for the expense or risk he has incurred in conferring a
8 benefit” on others. *Id.* at 806. That rationale applies synonymously in this Action.

9 Without Plaintiff’s efforts, there would be no recovery at all. The requested award is
10 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
11 the PAGA Members and the State of California, as well as for his full general release of all claims
12 against Defendant. As a result of the named Plaintiff’s efforts, the PAGA Members will receive
13 monetary settlement payments, and the State of California will receive \$20,625 to be put toward
14 education about and enforcement of California’s labor laws. *See* Gaines Decl., ¶ 40.

15 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
16 investigating and substantiating the claims alleged in this action, including multiple interviews with
17 counsel to review facts, documents, and Defendant’s policies; (2) assisted in the preparation of the
18 Complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
19 settlement of this litigation. *See generally*, Salcido Declaration. Moreover, as with any plaintiff
20 who files a civil action, the named Plaintiff undertook the financial risk that, in the event of a
21 judgment for Defendant in this action, he could have been personally responsible for any attorneys’
22 fees and costs awarded in Defendant’s favor. The award of such payment to Plaintiff is especially
23 warranted in a case like this one. It is necessary to ensure that employees continue to bring forth
24 claims that enforce their rights. Individuals like the named Plaintiff (and most PAGA Members)
25 would have little, if any, recourse without the representative action device. Most PAGA Members
26 – like the named Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much
27 less a representative action suit. Plaintiff must be commended for pursuing his claims; the modest
28 payment sought here is an appropriate means of doing so.

1 Plaintiff is also entering into a full general release against Defendant and its Released
2 Parties, which is far broader than the release by other PAGA Members. Specifically, PAGA
3 Members are releasing only limited PAGA civil penalty claims, while Plaintiff is releasing all
4 claims which he asserts or could assert against Defendant. *See* Settlement Agreement at §§ 42-44.
5 The value of his individual wage and hour claims is substantial. Gaines Decl. at ¶¶ 41-42; **Exhibit**
6 **E.** No other Aggrieved Employee is subject to this broad form of release. *Id.* at ¶ 41. This broad
7 release by Plaintiff was negotiated (and necessary) to resolve the Action. To resolve the Action,
8 Defendant sought a full general release of Plaintiff's claims. *Id.* at ¶ 41.

9 Without the resolution and release of Plaintiff's individual claims, litigation would continue
10 in a piecemeal fashion. The Parties wished to avoid further litigation, and agreed that a global
11 resolution of Plaintiff's individual claims and the PAGA claims asserted in the Complaint was in
12 the best interest of all parties involved, and thus, a general release by Plaintiff was appropriate.
13 Gaines Decl. at ¶ 43.

14 **VI. CONCLUSION**

15 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents
16 a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth
17 above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order Approving
18 Settlement, do the following:

- 19 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
20 2699, subpart 1;
- 21 2. Appoint Phoenix Settlement Administrators as the Settlement Administrator and
22 approve its administration fees up to \$4,000 for payment out of the Gross Settlement Amount;
- 23 3. Approve the award of attorneys' fees of \$23,750, and costs of \$1,000, to Plaintiff's
24 Counsel, payment of which shall come from the Gross Settlement Amount;
- 25 4. Approve the enhancement and general release payment to Plaintiff Carlos Salcido
26 in the amount of \$15,000 from the Gross Settlement Amount;
- 27 5. Direct disbursement of the Net Settlement Fund to the LWDA and all PAGA
28 Members as provided for in the Settlement Agreement; and

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6. Dismiss the Action with prejudice.

Date: March 18, 2024

Respectfully submitted,
GAINES & GAINES, APLC

By: 

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