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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

JOSHUA SHEETS, individually, on a
representative basis, and on behalf of all others
similarly situated;

Plaintiff,

vs.

KAYDAN LOGISTICS LLC, a California
limited liability company; KIRK
MORRISON; CARLENE MORRISON; and
DOES 3 through 20, inclusive;

Defendants.

Case No.: CVRI2200610

*[Assigned to Hon. Harold Hopp, Dept 1, for all
purposes]*

**NOTICE OF MOTION AND MOTION TO
APPROVE THE SETTLEMENT PURSUANT
TO THE PRIVATE ATTORNEYS GENERAL
ACT OF 2004; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

*Filed Concurrently with: Declarations of Brian J.
Mankin, Esq., Kristina Bui Carlson, Esq., Plaintiff
Joshua Sheets, Tim L. Johnson, Esq., and Lisa
Mullins of ILYM Group, Inc.; and [Proposed]
Order*

Hearing

Date: May 28, 2024

Time: 8:30 a.m.

Dept.: 1

Complaint filed: February 14, 2022

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

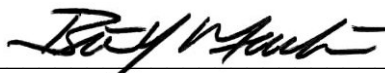
2 PLEASE TAKE NOTICE that on May 28, 2024, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard in Department 1 of the Riverside County Superior Court, located at 4050 Main
4 Street, Riverside, CA 92501, Plaintiff Joshua Sheets will move this Court for an order approving a
5 settlement pursuant to the Private Attorneys General Act of 2004, Labor Code § 2698 *et seq.*, (the
6 “PAGA”).

7 This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities;
8 the Declarations of Plaintiff, Plaintiff’s counsel (Brian Mankin and Kristina Bui Carlson of Lauby
9 Mankin and Lauby LLP), Defendants’ counsel (Tim L. Johnson of Ogletree, Deakins, Nash, Smoak &
10 Stewart), and Settlement Administrator (Lisa Mullins of ILYM Group, Inc. in support thereof; the
11 PAGA Memorandum of Understanding (the “Settlement Agreement”); the [Proposed] Order granting
12 Approval of the PAGA Settlement and entry of Judgment thereon; and all other records, pleadings,
13 and papers filed in this action; and upon such other evidence or argument as may be presented to the
14 Court at the hearing of this Motion.

15
16 Dated: May 2, 2024

LAUBY, MANKIN & LAUBY LLP

17
18 BY:



Brian J. Mankin, Esq.
Attorneys for Plaintiff, on behalf of the State of
California and Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF THE ACTION AND SETTLEMENT**

3 In this PAGA-only action, Plaintiff Joshua Sheets – serving as the representative for the State
4 of California – and his counsel sought civil penalties against Defendants Kaydan Logistics LLC
5 (“Kaydan”), Kirk Morrison, and Carlene Morrison (collectively “Defendants”) under the Private
6 Attorneys General Act of 2004, Labor Code § 2698 *et seq.* (commonly referred to as “PAGA”)¹ on
7 behalf of all similarly situated non-exempt employees who worked for Defendant Kaydan in California
8 (the “PAGA Class Members” or “Aggrieved Employees”) at any time during the period of February 9,
9 2021 through August 29, 2022 (the “PAGA Period”). (This case originated as a Class and PAGA case.
10 However, in light of an arbitration agreement, the Court previously approved a dismissal of all class
11 claims without prejudice, leaving only the PAGA claims as alleged in Plaintiff’s operative Second
12 Amended Complaint).

13 Here, Defendant Kaydan employed Plaintiff and the Aggrieved Employees to carry out its core
14 business: the last mile delivery leg of Amazon deliveries from the warehouse to residential homes.
15 While performing their duties for Defendant Kaydan, Plaintiff alleges that he and the Aggrieved
16 Employees were subjected to various Labor Code violation, including: failure to provide compliant
17 meal periods and rest breaks, the failure to pay proper minimum and overtime wages, the failure to
18 timely pay wages each period and upon separation of employment, and the failure to provide accurate
19 itemized wage statements.

20 Kaydan raised a variety of defenses to these claims, including that the company had compliant
21 written policies and there was an enforceable arbitration agreement with class action waiver.
22 Additionally, Kaydan moved its entire business out of state in approximately August 2022, thereby
23 ending all California operations and the employment of all California workers, which is why the
24 PAGA Period ends on August 29, 2022.

25
26
27 ¹ The PAGA action is a type of qui tam action filed on behalf of the state to assist it with labor law enforcement. *Iskanian*
28 *v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380-382. As such, the state is the real party in interest in a
PAGA action. *Id.* at 382. The State of California was timely served with a copy of the Settlement Agreement in this case
and this Motion to Approve the Settlement.

1 The Parties attempted early mediation with Philip Cha, Esq. in April 2023, which was
2 unsuccessful. Thereafter, Defendants filed a motion to compel arbitration of Plaintiff's individual
3 claims and dismiss all class claims, pursuant to an arbitration agreement that was signed by Plaintiff
4 that contained a class action waiver. Months of litigation and negotiations continued after mediation
5 which ultimately culminated in a settlement that calls for the dismissal of the class claims without
6 prejudice, pursuant to the arbitration agreement, and a resolution of all PAGA claims.

7 Now with a Settlement Agreement that resolves the PAGA claims alleged in this case, Plaintiff
8 seeks this Court's approval of a \$90,000 PAGA-only settlement on behalf of approximately 278
9 Aggrieved Employees employed by Defendant during the PAGA Period. The settlement merits full
10 approval because it fulfills the purpose of PAGA (i.e., to deter violations of the Labor Code and secure
11 obedience to California's labor laws; to end ongoing violations of the Labor Code either through
12 injunctive relief or a defendant's voluntary policy change in light of a PAGA action; and to provide
13 relief that is genuine, meaningful, and consistent with California's goal of benefitting the public
14 through enforcement of labor laws).

15 Because this is a PAGA-only settlement, the process for approval is very straight-forward
16 under PAGA: "The superior court shall review and approve any settlement of any civil action filed
17 pursuant to this part." (Labor Code § 2699(1)(2).) Based on the California Supreme Court's holdings
18 in *Arias v. Superior Court* (2009) 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los*
19 *Angeles, LL* (2014) 59 Cal.4th 348, there is no requirement under PAGA for a Plaintiff to establish the
20 requirements of class certification (i.e. numerosity, typicality, commonality and adequacy) nor is there
21 the usual two-step preliminary and final approval process as found in class actions. Rather, this
22 PAGA-only settlement merely requires a one-step review and approval process.

23 For these reasons and those discussed below, the Parties now seek the Court's approval of the
24 Settlement.

25 **II. BACKGROUND**

26 **A. PROCEDURAL HISTORY**

27 On February 9, 2022, Plaintiff Sheets submitted his notice via online filing to the California
28 Labor Workforce Development Agency (the "LWDA"), notifying the agency of Plaintiff's claims

1 under the PAGA. (Mankin Decl. ¶ 7; Exhibit A to same). Then, on February 14, 2022, Plaintiff filed a
2 putative class action complaint alleging causes of action mirroring those alleged in the LWDA notice.
3 On April 20, 2022, and because the LWDA did not assert jurisdiction over the PAGA claims within
4 the 65-day exhaustion period, Plaintiff filed a First Amended Complaint (“FAC”) adding PAGA
5 causes of action.

6 The FAC alleged the following class causes of action: (1) failure to pay minimum wages, (2)
7 failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to provide rest breaks, (5)
8 failure to pay all final wages, (6) failure to provide accurate itemized wage statements, (7) failure to
9 provide accurate itemized wage statements, and (8)-(14) related PAGA claims. (Mankin Decl. ¶ 8).

10 Soon after, counsel for Defendants sent correspondence and documents to Plaintiff’s counsel,
11 including evidence that Plaintiff allegedly signed a binding arbitration agreement with a class action
12 waiver. Defendants also removed this matter to Federal court – but after meeting and conferring,
13 Defendants then stipulated to remand this matter back to this Court. Then, after early discussions
14 among counsel, the Parties agreed to attend private mediation. (Mankin Decl. ¶¶ 9-10).

15 In preparation for the mediation, the Parties informally exchanged documents and information
16 that allowed both sides to calculate the potential damages and evaluate potential risk, including
17 policies and procedures pertaining to each claim alleged, and statistics relating to the number of
18 current and former employees, number of shifts, pay periods worked and other things. Defendants
19 also provided their written policies and practices and a robust sampling of payroll and timekeeping
20 records for Class Members. This information enabled both parties to take a deep dive into the claims.
21 Additionally, during this process, Plaintiff and his counsel analyzed, researched, and investigated the
22 potential issues, including matters related to the calculation of damages, trial, and appellate issues and
23 risks. (Mankin Decl. ¶ 9).

24 On April 27, 2023, the Parties participated in a mediation before Phillip Cha, Esq. However,
25 that mediation was unsuccessful as Defendants raised various defenses as well as potential financial
26 concerns (Mankin Decl. ¶ 10).

27 After months of continued negotiations, the Parties reached a settlement that would resolve the
28 PAGA claims and result in a dismissal, without prejudice, of the putative class claims due to the

1 existence of the arbitration agreement with class waiver – in conjunction with a filing of a Second
2 Amended Complaint (“SAC”). The SAC contains only seven PAGA causes of action for (1) failure to
3 pay minimum wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure
4 to provide rest breaks, (5) failure to timely pay wages, (6) failure to timely pay final wages, and (7)
5 failure to provide accurate itemized wage statements. (Mankin Decl. ¶¶ 10-11).

6 The Parties entered into a Settlement Agreement, which contains all necessary and material
7 terms of this settlement. (Mankin Decl. ¶ 12; Exhibit B to same). Pursuant to the Court’s CMO,
8 Plaintiff’s separate individual settlement is discussed in the Mankin Declaration at ¶¶ 40-47.

9 The Parties now seek the Court’s approval of the PAGA-only Settlement. (Mankin Dec. ¶ 10).

10 **B. SUMMARY OF PLAINTIFF’S CLAIMS AND DEFENDANT’S DEFENSES**

11 Plaintiff alleged seven causes of action on behalf of the Aggrieved Employees. However, as
12 discussed herein, some of the claims are overlapping due to the nature of the violation (so, in essence,
13 there are not 7 distinct penalties recoverable). (Mankin Decl. ¶ 14).

14 *First*, Plaintiff claimed that Defendant Kaydan failed to provide compliant meal periods and
15 rest breaks to the Aggrieved Employees due to the requirement that Plaintiff and Aggrieved
16 Employees were continually driving and making Amazon deliveries – thus, they could not take rest
17 breaks or meal periods. However, Defendants vehemently opposed this claim based on the argument
18 that Defendant Kaydan had compliant written policies. Additionally, Defendants argued that it
19 provided and made available meal and rest breaks to all employees, and any employee who did not
20 take a meal or rest break did so entirely of his or her own volition. As such, Defendants argued that
21 these claims were without merit because, for each violation, a fact-finder would have to determine
22 why a break was noncompliant/nonexistent, because if it was by the employee’s choice, no liability
23 attaches to Defendants. (Mankin Decl. ¶ 15).

24 *Second*, Plaintiff alleged unpaid minimum and overtime wage claims due to Plaintiff and the
25 Aggrieved Employees having short meal periods (less than 30 minutes). However, Plaintiff and the
26 Aggrieved Employees were paid as if they took a full 30-minute meal break. Therefore, this resulted in
27 unpaid minimum and overtime wages (for shifts over 8 hours in a day). (Mankin Decl. ¶ 16).

1 *Third*, Plaintiff alleged overtime wage claims due to Defendant Kaydan’s failure to pay
2 overtime at 1.5 times the regular rate. For example, Plaintiff alleged that Defendant Kaydan paid
3 Plaintiff and the Aggrieved Employees a base hourly rate non-discretionary bonuses. However, during
4 weeks when an Aggrieved Employee worked overtime and earned a bonus, Defendant Kaydan
5 illegally paid overtime at only 1.5 times the base hourly rate of pay and failed to incorporate the bonus
6 into the regular rate calculation. (Mankin Decl. ¶ 17).

7 *Fourth*, Plaintiff alleged what are often referred to as “derivative” violations. For instance,
8 Plaintiff argued that, due to the unpaid wages, Defendants are liable to each *former* Aggrieved
9 Employee for failure to timely pay all wages due and owing upon separation of employment (Labor
10 Code § 203) and, moreover, that Defendant Kaydan’s wage statements failed to comply with Labor
11 Code § 226 since the wage statements did not accurately state total hours worked, gross and net wages
12 earned, all deductions, among other violations. However, as Defendants argued that the overarching
13 claims had no merit, Defendants also argued that these derivative claims would fail as well. (Mankin
14 Decl. ¶ 18).

15 Further, as to all claims, Defendants alleged that the Company had written compliant policies
16 and there existed an enforceable arbitration agreement with class action waiver.

17 Despite that each of the claims were disputed, the Parties concluded that further litigation of
18 the Action would be protracted and expensive, and that it is desirable that the Action be fully and
19 finally settled in order to limit further risk, expense and protracted litigation.

20 Finally, Defendants provided financial documents to Plaintiff’s counsel as finances were a
21 concern. Plaintiff’s counsel had an expert review and analyze Defendants’ financial documents. After
22 review, Plaintiff’s counsel further believed an additional discount was warranted due to Defendants’
23 finances. (Mankin Decl. ¶ 19).

24 **III. PAGA AND ITS REQUIREMENTS**

25 PAGA provides an enforcement method for California’s Labor Code by enlisting individual
26 plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to
27 the individual plaintiffs and other employees. Prior to the enactment of PAGA in 2003, the recovery
28 of civil penalties for violations of certain Labor Code provisions were solely within the province of the

1 California Department of Labor. *Arias*, 46 Cal.4th at 980.

2 However, due to the lack of financing for California’s agencies, and the substantial number of
3 Labor Code violations by California employers, the California Legislature found that it was in the
4 public interest to allow aggrieved employees to act as “private attorneys general” to enforce and
5 recover civil penalties on behalf of the State of California for Labor Code violations committed by
6 employers. *Id.* As the Legislature that adopted PAGA observed, “the only meaningful deterrent to
7 unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor
8 Code.” Stats. 2003 ch. 906, § 1(b). Moreover, the Labor Code’s primary purpose is to “ensure
9 employees are not required or permitted to work under substandard unlawful conditions ... and to
10 protect employers who comply with the law from those who attempt to gain a competitive advantage at
11 the expense of their workers by failing to comply with minimum labor standards.” Labor Code §
12 90.5(a). Therefore, the Legislature determined that “adequate financing of labor law enforcement was
13 necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law
14 enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor
15 market, and that it was therefore in the public interest to allow aggrieved employees, acting as private
16 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
17 labor law enforcement agencies were to retain primacy over private enforcement efforts.”

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

22 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
23 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the
24 employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the
25 opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf if
26 the LWDA fails to respond to the notice within 65 days, responds that it does not intend to investigate,
27 or investigates and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In
28 this case, Plaintiff provided the LWDA with notice letters advising it of the alleged Labor Code

1 violations, but the LWDA deferred the prosecution of these violations to Plaintiff and his attorneys.
2 Accordingly, the Settlement and the common fund created by it for the benefit of the State and
3 Aggrieved Employees, is solely the result of the work performed by Plaintiff and his attorneys.

4 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
5 court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA approval
6 process and, more specifically, whether an aggrieved employee needs to meet class certification
7 requirements. *Arias*, 46 Cal.4th at 976. After a substantial review of the legislative history of PAGA,
8 the Court held that an aggrieved employee's representative action brought on behalf of the state and
9 other aggrieved employees against an employer for PAGA violations *does not* need to meet the
10 requirements for class certification nor does there need to be notice to the other employees. *Id.* at 975,
11 980-88. As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of
12 California's labor law enforcement agencies. *Id.* at 986. Thus, the Court simply reviews the
13 settlement and approves it if it is deemed to be fair and reasonable.

14 Accordingly, the Parties to this PAGA action have reached such an agreement and now seek
15 this Court's approval of the settlement.

16 **IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

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

18 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

19 The settlement provides that Defendant will pay a non-reversionary settlement amount of
20 Ninety Thousand Dollars (\$90,000) (the "Settlement Amount"), inclusive of payments for Attorneys'
21 Fees and Attorneys' Costs,² and Settlement Administration Costs.³ (the Settlement Agreement
22 ["S.A."] ¶ IV(A), attached as Exhibit B to the Mankin Decl.) After these payments, approximately
23 \$39,150.15 will remain as the estimated PAGA Award for payment to the LWDA and Aggrieved
24 Employees and, pursuant to Labor Code § 2699(i), 75% shall be paid to the LWDA (which shall be
25

26 _____
27 ² Plaintiff's Counsel will seek a standard fee of one-third (\$30,000.00) of the Settlement Amount, and reimbursement of
actual attorney costs of \$9,349.85. Since the Settlement Agreement authorized up to \$15,000 for costs, the savings will be
placed in the PAGA Award and paid to the LWDA and Aggrieved Employees.

28 ³ The Parties selected ILYM Group, Inc. as the Settlement Administrator who provided an all-in flat fee of \$4,000 to
administer the settlement, which will be deducted from the Settlement Amount.

used to assist in the enforcement of labor laws and education of employers and employees about their rights and responsibilities under the Labor Code), and the remaining 25% being paid to the Aggrieved Employees on a pro rata basis based the number of pay periods each Aggrieved Employee worked during the PAGA Period. (S.A. ¶ IV(E)).

The following chart reflects the estimated payments from the Settlement Amount:

Total Amount(s)	
<i>Settlement Amount</i>	\$90,000.00
Attorneys' Fees (1/3)	\$ 30,000.00
Actual Litigation Costs	\$ 9,349.85
Administrator Costs	\$ 4,000.00
Plaintiff's Service Award	\$ 7,500.00
<i>PAGA Award</i>	\$39,150.15
75% to the LWDA	\$29,362.61
25% to the Aggrieved Employees	\$9,787.54
<i>Balance</i>	\$0

As such, the LWDA will receive approximately \$29,362.61 and the Aggrieved Employees will receive \$9,787.54. Assuming 278 employees, the average payment will be \$35.21. Each Aggrieved Employee's share will be treated as non-wage income and reported by the Settlement Administrator on IRS Form 1099 to the respective Aggrieved Employee and applicable governmental authorities.

B. PAYMENT AND THE NOTICE LETTER

Pursuant to the terms of the Settlement Agreement, Defendants are required to fund the Settlement Amount within 30 days of the Effective Date. (S.A. ¶ IV(A)). Within 10 days after receiving the funds, the Administrator shall issue payments to cover all court-approved payments. (S.A. ¶ V(A)).

The Aggrieved Employees will have 180 days to cash their checks, and if for any reason a check is un-cashed, that share will be forwarded to State Controller's Office for the State of California in the name of the Aggrieved Employee. (S.A. ¶ V(C)).

A Notice will be sent to the Aggrieved Employees advising of the settlement and payment. (see Exhibit E to Mankin Decl.).

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1 **C. SETTLEMENT ALLOCATION TO THE AGGRIEVED EMPLOYEES.**

2 As noted, 25% of the PAGA Award (totaling \$9,787.54) will be paid to approximately 278
3 Aggrieved Employees on a pro-rata basis according to the number of pay periods each Aggrieved
4 Employee worked during the PAGA Period. (S.A ¶ V(B)). The portion of the PAGA Award allocated
5 to each Aggrieved Employee shall be referred to as the Aggrieved Employee’s “Individual PAGA
6 Payment.” The Aggrieved Employees will receive \$35.21 on average while preserving all potential
7 claims for unpaid wages and statutory penalties, if any exist.

8 **D. THE RELEASE**

9 The California Supreme Court has explained that a judgment in “a representative action
10 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004... is
11 binding not only on the named employee plaintiff but also on government agencies and any aggrieved
12 employee not a party to the proceeding.” *Arias*, 46 Cal.4th at 985-986.

13 The release in the Settlement Agreement strictly complies with CMO ¶ G(3)(e)(iv). For
14 instance, it was agreed that the “[u]pon entry of the Final Approval Order and Defendant’s funding of
15 the Settlement Amount, Plaintiff – in their individual capacity and on behalf of the State of California
16 and LWDA – shall completely release and discharge the Released Parties from the Released PAGA
17 Claims for the PAGA Period” (S.A. ¶ VI(A)).

18 Additionally, the release claims are limited, as required by the CMO and set forth in the
19 Settlement Agreement, include the following:

20 PAGA claims “based on the facts stated in the Operative Complaint in the
21 Action and in the PAGA Notice letter(s), including all PAGA claims
22 seeking civil penalties that premised upon (a) failure to pay overtime wages
23 (including failure to properly calculate the regular rate of pay to those who
24 worked overtime and earned incentive pay); (b) meal period violations
25 (including failure to pay meal period premiums at the regular rate of pay);
26 (c) failure to pay minimum wages; (d) rest period violations (including
27 failure to pay rest period premiums at the regular rate of pay); (e) failure to
28 provide accurate itemized wage statements; (f) failure to pay all final wages;

(g) failure to pay wages timely during employment; (h) waiting time penalties; (i) collection of due and unpaid wages; and (j) failure to maintain accurate records, that occurred during the PAGA Period and ascertained during the Action.” (S.A. ¶ I(R)).

Furthermore, the Released Parties are defined as follows: “Released Parties means Defendants and its past and present directors, officers, owners, employees, managing agents, attorneys, Amazon Logistics, Inc., and Amazon.com Services LLC (formerly Amazon.com Services, Inc. d/b/a Amazon) (including its parent corporation and any affiliated corporations), *solely as it relates to the Aggrieves Employees’ employment claims at KayDan Logistics, LLC.*” (S.A. ¶ I(S)). (See the concurrently filed Declaration of Tim L. Johnson, Esq. – counsel for Defendants – for the discussion of the rationale behind the addition of Amazon as a Released Party.)

Separate and apart from Plaintiff’s PAGA claims *civil* penalties, Plaintiff also alleged individual claims for the underlying *unpaid wage and statutory* penalty claims. To resolve Plaintiff’s separate claims, Defendant agreed to pay a total sum of \$20,000, less applicable withholdings, in exchange for a full release of his individual claims. (The Court has previously evaluated the individual settlement as part of the dismissal of class claims, wherein a copy of the Plaintiff’s Individual Settlement Agreement was submitted to this Court as Exhibit 1 to the Declaration of Kristina Bui Carlson filed concurrently with the Request for Dismissal of Class Claims on or about April 10, 2024).

For these reasons, the Parties contend that the release in the Settlement Agreement narrowly applies only to the claims alleged, and only binds the named Plaintiff as is consistent with the California Supreme Court’s ruling in *Arias*, 46 Cal.4th at 986.

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

In 2016, PAGA was amended to require the Court to “review and approve any settlement of any civil action filed pursuant to this part.” Labor Code § 2699(1)(2). The amendment also required that the “proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.” As such, the Settlement Agreement and this Motion have been concurrently submitted to the LWDA in accordance with this section. (Mankin Decl. ¶ 64; Exhibit D).

1 On April 19, 2022, this Court issued its Case Management Order #1 to govern the Class and
2 PAGA matter. However, in light of the Request to Dismiss Class Claims, Plaintiff is operating under
3 the assumption that the Court would then require the Parties to follow a CMO for a PAGA-only
4 matter. Therefore, Plaintiff will also conform this Motion to requirements of a CMO for a PAGA-only
5 matter (“PAGA CMO”). To the extent not already discussed herein, the Mankin Declaration contains
6 the requested information, as follows:

7 • PAGA CMO ¶ D(1) requests information regarding the settlement, whether a neutral
8 was utilized and whether the settlement was submitted to the LWDA. This is addressed at Mankin
9 Decl. ¶¶ 12-13 and 64.

10 • PAGA CMO ¶ D(2) requests information regarding the maximum penalties for which
11 Defendant could be liable, including many distinct subparts. These topics are addressed at Mankin
12 Decl. ¶¶ 14-30.

13 • PAGA CMO ¶ D(3) requires support for Plaintiff’s counsel’s requested attorneys’ fees
14 and costs. This is addressed at Mankin Decl. ¶¶ 35-38 and Carlson Decl. ¶¶ 6-11.

15 • PAGA CMO ¶ D(4) seeks information regarding Plaintiff’s separate individual
16 settlement. This is addressed at Mankin Decl. ¶¶ 41-56.

17 • PAGA CMO ¶ D(5) seeks information regarding support for Plaintiff’s service award
18 request. This is addressed in the Joshua Sheets Declaration (“Sheets Decl.”) ¶¶ 1-3.

19 • PAGA CMO ¶ D(6) does not apply because this settlement results in a judgment, not
20 dismissal.

21 • PAGA CMO ¶ D(7) [re: the release] is addressed above and compliant (*see also*
22 Mankin Decl. ¶¶ 57-59) (S.A. ¶¶ I(R)-(S), VI(A)). Additionally, the Declaration of Tim L. Johnson,
23 Esq., includes the facts and justification for inclusion of any additional parties.

24 • PAGA CMO ¶ D(8) seeks information regarding the administrator and bidding process
25 for the same. This is addressed at Mankin Decl. ¶¶ 60-61 and Lisa Mullins of ILYM Group, Inc. Decl.
26 ¶¶ 1-7 and Exhibits A-C to same.

27 • PAGA CMO ¶ D(9), which addresses settlements that do **not** use an administrator, does
28 not apply here.

1 • PAGA CMO ¶ D(10) seeks information as to how uncashed checks will be distributed.
2 Here, the Settlement called for them to go to the State Controller's office. (S.A. ¶ V(C)).

3 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**
4 **AND REASONABLE**

5 For their efforts and the substantial risk they undertook in obtaining a common fund settlement
6 that benefits the LWDA and Aggrieved Employees, the Parties allocated one-third of the Settlement
7 Amount to Plaintiff's Counsel for attorneys' fees (which is substantially less than Plaintiff Counsel's
8 lodestar), plus actual litigation costs. These fees are warranted under the law and within the range of
9 fees commonly awarded in similar cases.

10 **A. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY'S FEES UNDER THE**
11 **COMMON FUND DOCTRINE IN THIS QUI TAM ACTION**

12 PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and
13 costs under Labor Code § 2699(g)(1), which provides that, "Any employee who prevails in any
14 action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee
15 paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of
16 paragraph (1) of subdivision (c) of Section 2699.3." As discussed below, in a qui tam action,
17 reasonable attorney's fees and costs are typically awarded under the common fund doctrine where, as
18 here, the litigation creates a common fund of money in a specific amount for the benefit of others.

19 A PAGA action is a qui tam action because the statute allows the employee plaintiff, acting
20 as the proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code
21 violations and recover civil penalties that otherwise would have been assessed and collected by the
22 Labor and Workforce Development Agency (LWDA). *Iskanian*, 59 Cal.4th at 380. "A PAGA
23 representative action is therefore a type of *qui tam* action." *Id.* at p. 382. Indeed, the majority of the
24 civil penalties recovered in a PAGA action are paid to the state, with a smaller portion paid to the
25 aggrieved employees (e.g. 75% paid to the state; 25% paid to the aggrieved employees). See Lab. C.
26 2699(i).

27 As here, where a common fund is created in a qui tam action by the successful litigation of a
28 plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the common

1 fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. In *Bank of America*, attorneys were
2 awarded their fees from the common fund in a taxpayer action to enforce unclaimed property law.

3 Affirming the award, the Court stated:

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

11 Likewise, in this case, through the efforts of Plaintiff and his attorneys, a common fund was
12 created in the amount of \$90,000 for the benefit of the employees and the State of California. Thus,
13 these beneficiaries must bear their share of the costs and attorney’s fees, which fees and costs must
14 be deducted from the \$90,000 settlement amount under the common fund theory. *Id.* Moreover, such
15 fees are deducted as a percentage of the settlement amount. *Boeing Co. v. Van Gemert* (1980) 444
16 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d
17 1301, 1311; *Williams v. MGM-Pathe Communicatioins Co.* (9th Cir. 1997) 129 F.3d 1026, 1027;
18 *Staton v. Boeing Co.*(9th Cir. 2003) 327 F.3d 938, 967.

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 Int’l Inc.* (2016) 1 Cal.5th 480, 506, approving attorney’s fees
21 of \$6.33M on a \$19M settlement. This ruling is consistent with the Court’s prior rulings recognizing
22 that “when a number of persons are entitled in common to a specific fund, and an action brought
23 by...plaintiffs for the benefit of all results in the creation or preservation of that fund, such...plaintiffs
24 may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing*,
25 444 U.S. at 478 (“[A] lawyer who recovers a common fund...is entitled to reasonable attorneys’ fees
26 from the fund as a whole;” *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 393-394 [discussing
27 the acceptance of awarding attorneys’ fees and expenses from a settlement where “litigation has
28 conferred a substantial benefit on the members of an ascertainable class”]; see also *Lealao v.*
Beneficial California, Inc. (2000) 82 Cal.App.4th 19, 26 “[f]ee spreading occurs when a settlement or
adjudication results in the establishment of a separate or so-called common fund for the benefit of the
class.”].).

1 Accordingly, the common fund doctrine allows a court to award attorneys' fees based upon a
2 percentage of the total fund that is created for the satisfaction of beneficiaries' claims when the fund
3 consists of a "certain or easily calculable sum of money." *Dunk v. Ford Motor, Co.* (1996) 48
4 Cal.App.4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 110 [application of the
5 percentage of the fund recovery depended on "[t]he critical point" that "a fund was created from which
6 attorneys' fees could be paid"]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed.
7 2002).

8 California law has long upheld, and continues to uphold, the percentage of the recovery
9 method for awarding attorneys' fees where a fund is established. See e.g., *Serrano*, 20 Cal.3d at 34;
10 *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v. Netflix, Inc.* (2008)
11 162 Cal.App.4th 43, 563 ["fees based on a percentage of the benefits are in fact appropriate in large
12 class actions..."]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 263 [affirming award of
13 attorneys' fee based on percentage of recovery]; see also *Consumer Cause, Inc. v. Mrs. Gooch's*
14 *Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 [the common fund doctrine is
15 "frequently applied in class actions when the efforts of the attorney for the named class representatives
16 produce monetary benefits for the entire class"]; *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"].

19 Accordingly, awarding fees on this basis in the amount of one-third of the \$90,000 gross
20 settlement amount is reasonable and appropriate.

21 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE FEE AWARD**

22 Despite recognized limitations of the so-called lodestar method, some California and federal
23 courts acknowledge the utility of a lodestar "cross-check."⁴ (*Lealao, supra*, 82 Cal.App.4th at 46-47.)
24 Under the "lodestar multiplier" method of cross-checking the reasonableness of attorneys' fees in class
25

26
27 ⁴ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of
28 manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been
expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); See also *In re Activision* (N.D. Cal 1989) 723
F.Supp 1373.

1 actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of
2 hours reasonably expended by each attorney or legal staff member by their hourly rates, and then
3 enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the
4 novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM*
5 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d
6 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that
7 the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable
8 litigation”].)

9 Here, the fees requested by Class Counsel are unquestionably reasonable as the requested
10 amount represents a ***negative multiplier***. As set forth in the Declaration of Kristina Carlson, who was
11 the handling attorney on this matter, she spent 192.6 hours and generated a lodestar of \$105,930.
12 (Carlson Decl. ¶¶ 6-11). Thus, the attorneys’ fees requested confirm that the fee request is fair and
13 reasonable under the lodestar cross-check.

14 **C. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

15 Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses incurred to
16 prosecute this action. These expenses were incidental and necessary to the effective representation of
17 the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19. Plaintiff’s Counsel are
18 permitted to recover their litigation costs and expenses under the common fund doctrine. *See Serrano*
19 *III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v.*
20 *County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common
21 fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery
22 of attorneys’ fees by . . . [Plaintiff’s] attorneys”). Furthermore, Plaintiff’s Counsel are entitled to
23 recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” *Harris*
24 *v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.)

25 The Settlement Agreement authorized Plaintiff’s Counsel to recover litigation costs not to
26 exceed \$15,000. (S.A ¶ IV(D)). Plaintiff’s Counsel’s actual costs are \$9,349.85 through the
27 conclusion of this matter, which includes costs of filing, serving, and attending the approval hearing.
28 (Mankin Decl. ¶ 63; Exhibit C). The savings will be placed in the PAGA Award and paid to the

1 LWDA and Aggrieved Employees based on the percentages set forth above. These costs include
2 mediation fees, filing fees, and other costs that include Attorney Service charges, CourtCall charges,
3 and process service fees. These costs are reasonable and uncontested, and should be approved.

4 **VII. SERVICE AWARD REQUEST IS FAIR AND REASONABLE**

5 The Settlement Agreement provides an incentive award payment of \$7,500⁵ to the Plaintiff,
6 which is reasonable given the time and effort he devoted to this case. His efforts included providing
7 factual background for the Class and PAGA complaint; providing documents and information about
8 Defendant's compensation plan; participating in phone calls to discuss litigation and settlement
9 strategy; making himself available throughout the litigation to assist with analyzing the claims and
10 defenses; helping Class Counsel prepare for the mediation; and reviewing the settlement documents.
11 The Class Representative also assumed significant risk in bringing this litigation—namely, had he lost,
12 he could have been ordered to pay Defendants' costs.

13 The requested service award falls within the range of incentive payments typically awarded to
14 Class Representatives in similar class actions. See, e.g., *Bond v. Ferguson Enterprises, Inc.* (E.D. Cal.
15 2011) 2011 WL 2648879 (approving \$11,250 service awards in trucker meal break class action); *Ross*
16 *v. US Bank National Association* (N.D. Cal. 2010) 2010 WL 3833922, at *2 (approving \$20,000
17 enhancement award in California wage-and-hour class action settlement); *Vasquez v. Coast Valley*
18 *Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 415, 493 (approving service awards of \$15,000 from a
19 \$300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc.* (E.D. Cal. 2006)
20 2006 U.S. Dist. LEXIS 76558, at *28 (finding service awards "of \$ 15,000 each to be reasonable.");
21 *Glass v. UBS Fin. Servs.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 8476, at *52 (finding "requested
22 payment of \$25,000 to each of the named Plaintiff is appropriate" in wage and hour settlement).

23 **VIII. SUBMISSION TO THE LWDA**

24 As set forth in the Mankin Declaration at ¶ 64, the settlement and this motion are concurrently
25 being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic
26 submission is attached as Exhibit D to the Mankin Declaration.

27 _____
28 ⁵ Plaintiff separately settled his claims for his individual wage claims pursuant to a separate individual settlement agreement.

1 **IX. THE COURT SHOULD APPOINT ILYM AS THE ADMINISTRATOR**

2 Subject to the Court's approval, the parties stipulated to ILYM serving as the Settlement
3 Administrator who will process the settlement payments and provide notice to the Aggrieved
4 Employees. ILYM is highly experienced in administering class/PAGA settlements, and provided a
5 capped proposal to administer the settlement for \$4,000. (Lisa Mullins from ILYM Decl. ¶7 and
6 Exhibit C to same).

7 ILYM was the lowest bidder in the competitive bidding process, which revealed the following
8 results: ILYM (\$4,000), Rust (\$5,300), CPT Group (\$7,000). (Mankin Decl. ¶ 61).

9 **X. CONCLUSION**

10 For the foregoing reasons, Plaintiff requests the Court approve the Settlement under the PAGA.
11

12 Dated: May 2, 2024

LAUBY, MANKIN & LAUBY LLP

13
14 BY:



Brian J. Mankin, Esq.
Attorneys for Plaintiff, on behalf of the State of
California and Aggrieved Employees

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

[illegible]

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On May 2, 2024, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION TO APPROVE THE SETTLEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT OF 2004; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

By Mail I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

[] By Facsimile I sent this document via fax to all parties as listed on attached service list, on

[] **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

[X] By Email or Electronic Transmission: Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

By Certified Mail-Return Receipt Requested I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

[] By Personal Service I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

[X] **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 2, 2024, Riverside, California.

[] Federal I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Tracie Chiarito
Tracie Chiarito, Declarant

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