

DANIEL F. GAINES, ESQ. SBN 251488
daniel@gaineslawfirm.com
ALEX P. KATOFISKY, ESQ. SBN 202754
alex@gaineslawfirm.com
EVAN S. GAINES, ESQ. SBN 287668
evan@gaineslawfirm.com
GAINES & GAINES, APLC
4550 East Thousand Oaks Boulevard, Suite 100
Westlake Village, CA 91362
Telephone: (818) 703-8985
Facsimile: (818) 703-8984

Attorneys for Plaintiff Mireya Serrato Martinez

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

MIREYA SERRATO MARTINEZ, on behalf
of herself and all "aggrieved employees"
pursuant to Labor Code § 2698 *et seq.*,

Plaintiffs,

v.

EM TORTILLAS, LLC, a California limited
liability company, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO: 30-2022-01263512-CU-OE-CXC

*Assigned to Hon. Melissa R. McCormick,
Dept. C13*

**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,
GENERAL RELEASE PAYMENT, AND
REIMBURSEMENT OF SETTLEMENT
ADMINISTRATION EXPENSES, AND
ENTERING JUDGMENT THEREON;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: December 14, 2023

Time: 2:00 p.m.

Dept.: CX104

Complaint Filed: June 3, 2022

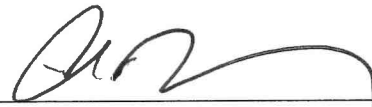
1 **PLEASE TAKE NOTICE THAT** on December 14, 2023 at 2:00 p.m., or as soon
2 thereafter as the matter may be heard, in Department CX104 of the above-entitled Court, located at
3 751 W Santa Ana Blvd., Santa Ana, CA 92701, Plaintiff Mireya Serrato Martinez will and hereby
4 does move unopposed for an Order: (1) granting approval of the proposed settlement of claims
5 brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*)
6 (“PAGA”) set forth in the Parties’ Settlement Agreement and Release of Private Attorneys General
7 Act Claim (the “Settlement Agreement”); (2) appointing Phoenix Settlement Administrators
8 (“Phoenix”) 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 of \$15,551.37 to Plaintiff’s counsel;
12 (5) directing a General Release Payment from the Gross Settlement Amount in the amount of
13 \$10,000 to Plaintiff Mireya Serrato Martinez; and (6) entering judgment in accordance with the
14 Settlement Agreement.

15 This motion will be based on this Notice, the supporting memorandum of points and
16 authorities, the Parties’ Settlement Agreement and Release of Private Attorneys General Act Claim,
17 the Declarations of Daniel F. Gaines, Plaintiff Mireya Serrato Martinez, and Jodey Lawrence, the
18 documents and records on file in this matter, and such additional arguments, authorities, and
19 evidence and other matters as may be presented by the Parties hereafter.

20 Date: September 13, 2023

Respectfully submitted,

21 GAINES & GAINES, APLC

22
23 By: 

24 DANIEL F. GAINES
25 ALEX P. KATOFSKY
26 Attorneys for Plaintiff
27 Mireya Serrato Martinez
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mireya Serrato Martinez (“Plaintiff”) and aggrieved employees under the Labor
4 Code’s Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order
5 and Judgment granting approval of the proposed Settlement of the above-captioned lawsuit against
6 Defendant EM Tortillas, LLC (“Defendant”). The proposed Settlement will dispose of the
7 Released Claims asserted on behalf of Plaintiff and approximately 50 non-exempt employees who
8 worked for Defendant and in California at any time between March 14, 2021 and May 15, 2023
9 (the “PAGA Period”) (the “Aggrieved Employees”). See Settlement Agreement, at ¶¶ 14, 16, and
10 30.

11 This case addresses claimed violations of employee protections embodied in the California
12 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
13 Defendant failed to compute shift differential wages and other non-base hourly wages earned by
14 Plaintiff and other Aggrieved Employees into their regular rate of pay for purposes of paying them
15 sick pay, meal and rest period premiums and overtime wages at the correct rates, in violation of
16 Labor Code §§ 226.7, 246, 510, 512, 558 and 1194; failed to provide Plaintiff and Aggrieved
17 Employees with legally compliant rest periods, or correct compensation in lieu thereof, in violation
18 of Labor Code § 226.7; failed to provide Plaintiff and Aggrieved Employees with legally compliant
19 meal periods, or correct compensation in lieu thereof, in violation of Labor Code §§ 226.7, 510,
20 512, 558, and 1194; failed to pay Plaintiff and Aggrieved Employees all minimum and overtime
21 wages earned, in violation of Labor Code §§ 510, 558, and 1194; failed to reimburse Plaintiff and
22 Aggrieved Employees for necessary business expenses, in violation of Labor Code § 2802; failed to
23 issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in violation of
24 Labor Code §§ 226(a) and 226.3, and failed to timely pay certain Aggrieved Employees all wages
25 due at the separation of their employment, in violation of Labor Code §§ 201-202. As a result of
26 Defendant’s alleged violations of the Labor Code, approximately 50 employees are claimed to have
27
28

1 suffered Labor Code violations for no more than 4,500 aggregate pay periods at the rate of \$100
2 each based on PAGA's penalty provisions. Gaines Decl., ¶ 19.

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

11 The value achieved by the Settlement may be gleaned from the fact that the LWDA and the
12 approximately 50 Aggrieved Employees encompassed by the Settlement will receive no less than
13 \$120,448.63 under the terms of the Settlement, which, pursuant to the operative statute, shall be
14 allocated "75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
15 Aggrieved Employees." *See Cal. Lab. Code § 2699(i)*. This is a reasonable recovery, not only
16 because further litigation may have resulted in a net-zero recovery based on the defenses available
17 to Defendant, but because the amount secured by Plaintiff is sizable and in line with similar
18 settlements of these types of claims under PAGA. It is also important to underscore that all penalty
19 amounts paid to Aggrieved Employees will be an unexpected windfall, as employees typically do
20 not bring individual lawsuits asserting only PAGA penalties.

21 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
22 Court enter the Order and Judgment submitted herewith.

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

24 **A. The Parties**

25 Defendant is a Tortilla Company that manufactures and distributes tortillas to its wholesale
26 customers in Orange, Los Angeles and San Bernardino counties and employed Plaintiff and
27 Aggrieved Employees. Gaines Decl. at ¶ 8.

1 Defendant employed Plaintiff Mireya Serrato Martinez as a non-exempt employee from
2 January 2018 through November 2021. The Aggrieved Employees are any and all individuals who
3 were employed by Defendant for at least one Eligible Pay Period in non-exempt position in
4 California from March 14, 2021 through May 15, 2023 (the “PAGA Period”). Gaines Decl. at ¶ 9.

5 **B. The Claims Asserted**

6 Plaintiff asserts claims that Defendant failed to compute bonuses and other non-base hourly
7 wages earned by Plaintiff and other Aggrieved Employees into their regular rate of pay for purposes
8 of paying them sick pay, meal and rest period premiums and overtime wages at the correct rates,
9 failed to reimburse Plaintiff and Aggrieved Employees for all business expenses incurred, failed to
10 provide Plaintiff and Aggrieved Employees all minimum and overtime wages due, failed to provide
11 Plaintiff and Aggrieved Employees with legally compliant rest periods, or correct compensation in
12 lieu thereof, failed to provide Plaintiff and Aggrieved Employees with legally compliant meal
13 periods, or correct compensation in lieu thereof, failed to issue accurately itemized wage statements
14 to Plaintiff and Aggrieved Employees, and failed to timely pay certain Aggrieved Employees all
15 wages due at the separation of their employment. Plaintiff asserts these claims under PAGA,
16 seeking civil penalties for the alleged Labor Code violations. Gaines Decl. at ¶ 10.

17 **C. Procedural Posture**

18 On March 14, 2022, pursuant to Labor Code § 2699.3, Plaintiff gave written notice by
19 online filing with the Labor and Workforce Development Agency (“LWDA”) and by certified mail,
20 return receipt requested, to Defendant of the specific provisions of the Labor Code alleged to have
21 been violated, including the facts and theories to support the alleged violations. Gaines Decl., ¶¶ 6-
22 7; **Exhibit B** (LWDA Notice Letter). On June 3, 2022, and after the LWDA declined to take action
23 within the statutorily permissible time with respect to Plaintiff’s March 14, 2022 letter, Plaintiff
24 filed her representative action complaint in this Court. *Id.*, ¶ 6.

25 **D. Plaintiff’s Counsel’s Investigation**

26 Counsel for Plaintiff engaged in targeted, informal discovery of Defendant’s alleged Labor
27 Code violations, which specifically targeted evaluating the strength and value of the PAGA claims

1 in preparation for a resolution of this Action. Gaines Decl. at ¶ 12.

2 Plaintiff's Counsel obtained and reviewed relevant data and documents, including (i)
3 Plaintiff's employee file and wage statements, (ii) policy documents relating to the employment of
4 Plaintiff and other Aggrieved Employees, and (iii) the number of alleged violations and the value
5 of the recoverable penalties, including the number of Aggrieved Employees and pay periods during
6 the PAGA Period. Gaines Decl. at ¶ 13.

7 Based on the information received, as well as through discussions with Defendant's
8 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
9 within the definition of "Aggrieved Employee" for the relevant statutory period, and (ii) construct
10 a damage model that calculated the maximum realistic amount of PAGA penalties that could be
11 levied against Defendant within the PAGA Period based on conversations with Defendant's
12 Counsel. Defendant, however, disputed Plaintiff's claims and disputed both the existence of and
13 extent of liability as alleged by Plaintiff. Based on the information received, as well as through
14 discussions with Defendant's Counsel, Plaintiff's Counsel was able to ascertain (i) the size of the
15 Aggrieved Employee group, (ii) the number of affected pay periods at issue among them, and (iii)
16 the strength of Plaintiff's claims. Gaines Decl. at ¶ 14. Plaintiff's Counsel's experience in litigating
17 similar "representative" wage and hour claims, the degree of investigation that was conducted here,
18 and the amount of information that was obtained, was sufficient to determine the potential value of
19 the PAGA claim, and to evaluate the strength of this claim for purposes of settlement. Gaines Decl.
20 at ¶¶ 2-5, 12-15, 23-25.

21 **E. Settlement Negotiations**

22 On May 15, 2023, following the exchange of information and documents regarding the
23 Aggrieved Employees and the claims and defenses asserted by the Parties, the Parties engaged in
24 arm's-length negotiations with the assistance of mediator Steve Pearl, Esq., through which they
25 were able to reach the resolution of the Action set forth in the Settlement Agreement. Gaines Decl.
26 at ¶ 15. During the course of mediation, the Parties engaged in arm's-length negotiations and
27 reached a resolution of the PAGA claims asserted in this Action. *Id.*

1 **F. The Proposed Settlement**

2 The Parties jointly prepared and executed a Settlement Agreement and Release of Private
3 Attorneys General Act Claim (the “Settlement Agreement”). Gaines Decl., ¶ 15; **Exhibit C**. The
4 Agreement sets forth the terms of the Settlement reached by the Parties, including the following
5 key points:

6 1. Defendant shall pay Two Hundred Twenty-Five Thousand Dollars (\$225,000)
7 (hereinafter the “Gross Settlement Amount”), which shall be all inclusive, encompassing (i) all
8 payments to the LWDA and Aggrieved Employees, (ii) any and all costs of third-party
9 administration of the settlement, (iii) Plaintiff’s Counsel’s attorneys’ fees and costs of suit, and (iv)
10 a modest General Release Payment/enhancement to Plaintiff. See Settlement Agreement, at ¶ 29.
11 The settlement shall be paid and disbursed in two installments, 90 days apart. *Id.* at ¶¶ 9; 36.

12 2. The total sum available for payment of PAGA penalties shall be calculated by
13 deducting \$90,551.37 for the payment of Plaintiff’s Counsel’s fees and costs (projected to be
14 \$75,000 in fees and \$15,551.37 in costs¹), \$10,000 for Plaintiff’s General Release
15 Payment/enhancement payment, and the costs of administration, not to exceed \$4,000, from the
16 \$225,000 Gross Settlement Amount, yielding \$120,448.63. Seventy-five percent (75%) of this
17 amount, or \$90,336.47, shall be distributed to the LWDA, and the remaining twenty-five percent
18 (25%) or \$30,112.16, shall be distributed to the Aggrieved Employees. See Settlement Agreement,
19 at ¶ 29.

20 3. All Aggrieved Employees will receive a pro rata share of the \$30,112.16 allocated
21 to Aggrieved Employees, which shall be distributed based on the number of pay periods each
22 Aggrieved Employee worked during the PAGA Period. See Settlement Agreement, at ¶ 29e.
23 Although these calculations will not be made until after approval, a rough estimation of the value
24 to the 50 individuals falling within the definition of “Aggrieved Employee” may be gleaned from
25 the fact that an equal division would provide about \$602 to each Aggrieved Employee, net of
26

27 ¹ Plaintiff’s Counsel’s cost request is less than the \$16,000 allotted in the Settlement Agreement.
28 See Settlement Agreement, at ¶ 27.

1 payments to the LWDA, the Settlement Administrator, attorney's fees, and costs. The LWDA will
2 be paid a substantial \$90,336.47. *See* Gaines Decl., at ¶ 17; Settlement Agreement, at ¶ 29.

3 4. In exchange for the above settlement consideration, Defendant and the Released
4 Parties shall be entitled to a limited release from each and every Aggrieved Employee, including
5 Plaintiff²:

6 Upon approval by the Court of this Settlement, and subject to
7 Defendant's full payment of the GSA, Plaintiff, individually and in
8 her representative capacity on behalf the State of California and the
9 PAGA Members, will fully and finally release and discharge the
10 Defendant, and each of and all of its respective past, present and
11 future agents, employees, officers, directors, partners, trustees,
12 representatives, shareholders, stockholders, members, attorneys,
13 parents, subsidiaries, equity sponsors, related
14 companies/corporations and/or partnerships, divisions, assigns,
15 predecessors, successors, insurers, consultants, joint venturers, joint
16 employers, affiliates, alter-egos, co-employers, dual employers,
17 service providers, contracting partners, subcontractors, employee
18 benefit plans and fiduciaries thereof, and all other persons and/or
19 entities acting under, by, through or in concert with any of them
20 ("Released Parties") from all claims, rights, demands, liabilities,
21 costs, attorney's fees, and causes of action for civil penalties under
22 the PAGA, for the duration of employment in a non-exempt position
23 in California during the PAGA Period, based on the factual and legal
24 allegations pled in the operative Representative Action Complaint
25 that support or relate to the following alleged violations of law
26 asserted by Plaintiff in the Action pursuant to PAGA: (1) failure to
27 pay all wages under Labor Code §§ 246, 510 and 1194; (2) failure to
28 authorize and provide rest periods under Labor Code § 226.7; (3)
failure to provide meal periods under Labor Code §§ 226.7 and 512;
(4) failure to issue accurate wage statements under Labor Code §§
226(a) and 226.3; (5) failure to reimburse expenses under Labor
Code §§ 2802; and (6) failure to pay wages timely at separation of
employment under Labor Code §§ 201-203 (the "Released PAGA
Claims").

See Settlement Agreement, at ¶¶ 19 and 30.

² This comports with settled California Supreme Court authority. *See* *Arias v. Superior Court* (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 6. Settlement administration, which is to be paid from the Gross Settlement Amount,
2 will not exceed \$4,000. Phoenix Settlement Administrators, a reputable settlement administration
3 company, has agreed to administer the settlement for this amount, submitting a competitive bid.
4 *See* Settlement Agreement, at ¶ 29.

5 7. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
6 litigation costs totaling \$90,551.37, and Plaintiff Mireya Serrato Martinez seeks a General Release
7 Payment/enhancement payment of \$10,000. *See* Settlement Agreement, at ¶ 29.

8 8. Finally, under the terms of Settlement, the value of checks uncashed more than
9 180 calendar days after issuance shall be remitted to the Unclaimed Property Fund of the
10 California State Controller's Office to be held in the name of the Aggrieved Employee. *See*
11 Settlement Agreement, at ¶ 40.

12 **III. LEGAL ARGUMENT**

13 **A. Standards for Approval of A PAGA Settlement**

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

17 As with any settlement, the Court must be mindful in conducting its inquiry that
18 "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
19 litigating further." *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
20 24 (N.D. Cal. Sept. 12, 2011). Indeed, "the very essence of a settlement is ... 'a yielding of
21 absolutes and an abandoning of highest hopes'" [*Officers for Justice v. Civil Service Com.*, 688
22 F.2d 615, 624 (9th Cir., 1982)], as "it is the very uncertainty of outcome in litigation and avoidance
23 of wasteful and expensive litigation that induce consensual settlements." *See id.*, at 625. As such,
24 "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits"
25 or "judged against a hypothetical or speculative measure of what might have been achieved by the
26 negotiators." *See id.*

27 Although the operative PAGA statute does not set forth the criteria on which a PAGA
28

1 settlement is to be judged, California law does state that some of the factors for review of a class
2 action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. § 382 and Cal. Rules of Court, Rule
3 3.769, may be “useful in evaluating the fairness of a PAGA settlement” to the reviewing court. *See*
4 *Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56, 77 (“Thus, while PAGA does not require
5 the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for
6 settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public
7 and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors
8 used to evaluate class action settlements bear on a settlement’s fairness—including the strength of
9 the plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely duration of
10 further litigation, and the settlement amount—these factors can be useful in evaluating the fairness
11 of a PAGA settlement.”) Courts within California have continued to approve settlements of PAGA
12 claims using Rule 23 criteria³. However, it is important to underscore that not all Rule 23 factors
13 can be applied, as “a PAGA claim asserted on a non-class representative basis . . . is not considered
14 a class action but a law enforcement action, and therefore does not have to meet the requirements
15 of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan.
16 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2,
17 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010).
18 Based thereon, a court’s review of a PAGA settlement necessarily implicates the following unique
19 features that render the approval process completely distinct from approval of a class action
20 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

21
22 ³ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
23 balancing of several factors which may include, among others, some or all of the following: [1] the
24 strength of plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further
25 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
26 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
27 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
28 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 First, in evaluating the adequacy of the settlement amount, the Court's focus is not
2 concerned with the amount which "Aggrieved Employees" are to receive, but rather, must focus on
3 the total settlement amount in achieving PAGA's objective.

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

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

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

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

19 In conducting a review of a settlement, it is generally recognized that an "agreement . . .
20 reached through arms-length negotiation between experienced parties . . . is entitled to a
21 presumption of fairness." See *Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
22 44 (C.D. Cal. Apr. 12, 2010).

23 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
24 length negotiations [Gaines Decl. at ¶ 15], (2) that was negotiated by Counsel with significant
25 experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5, 23-25 and **Exhibit A**], (3) which
26 occurred after Counsel had conducted sufficient investigation to evaluate the strength and potential
27 value of the PAGA claims, as well as evaluating the risks of litigating this claim through trial. See

1 *id.*, at ¶¶ 12-14, 20-21. Based thereon, the Court should give considerable weight to the competency
2 and integrity of counsel in assuring itself that the Settlement Agreement represents an arm's-length
3 transaction entered without self-dealing or other potential misconduct.

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

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

10 This case addresses violations of important employee protections embodied in the
11 California Labor Code – namely, that Defendant failed to compute bonuses and other non-base
12 hourly wages earned by Plaintiff and other Aggrieved Employees into their regular rate of pay for
13 purposes of paying them sick pay, meal and rest period premiums and overtime wages at the correct
14 rates, in violation of Labor Code §§ 226.7, 246, 510, 512, 558 and 1194, failed to provide Plaintiff
15 and Aggrieved Employees all minimum and overtime wages due, in violation of Labor Code §§
16 510, 558, and 1194, failed to provide Plaintiff and Aggrieved Employees with legally compliant
17 rest periods, or correct compensation in lieu thereof, in violation of Labor Code § 226.7, failed to
18 provide Plaintiff and Aggrieved Employees with legally compliant meal periods, or correct
19 compensation in lieu thereof, in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194, failed
20 to reimburse Plaintiff and Aggrieved Employees for necessary business expenses, in violation of
21 Labor Code § 2802, failed to issue accurately itemized wage statements to Plaintiff and Aggrieved
22 Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay certain
23 Aggrieved Employees all wages due at the separation of their employment, in violation of Labor
24 Code §§ 201-202. Defendant's maximum theoretical exposure in this Action, without stacking
25 penalties, totals approximately \$450,000, computed by multiplying 4,500 aggregate pay periods by
26 \$100 each. *See* Gaines Decl. at ¶ 19. If penalties are stacked – i.e. the Court awards multiple
27 PAGA penalties per employee pay period, the maximum value of the case is \$2,053,200 at the \$100

1 per pay period rate. While the PAGA does provide the potential for a heightened penalty for
2 subsequent violations, courts are often hesitant to award a heightened penalty where there is no
3 prior citation by the Labor Commissioner, as is the case here. *See Bernstein v. Virgin Am., Inc.*, 3
4 F.4th 1127, 1144 (9th Cir. 2021) (holding no heightened penalty where defendant was not notified
5 by Labor Commissioner or any court that it was subject to the California Labor Code). The Ninth
6 Circuit’s holding in *Bernstein* also supports that a settlement valuation that does not “stack”
7 penalties. *Id.*

8 Defendant, however, contends it acted within the requirements of California law at all times
9 as to all Aggrieved Employees. For example, Defendant contends that the company has compliant
10 meal and rest break practices and compensates its employees for all minimum and overtime wages
11 due. Defendant further contends that not every pay period at issue involved an alleged Labor Code
12 violation potentially subject to civil penalties. Moreover, it maintained that even if the Court did
13 award penalties, the Court could and would *substantially* reduce the penalties awarded based on
14 the discretionary factors contained in Labor Code § 2699(e)(2) (“In action by an aggrieved
15 employee . . . , a court may award a lesser amount than the maximum civil penalty amount specified
16 by this part if, based on the facts and circumstances of the particular case, to do otherwise would
17 result in an award that is unjust, arbitrary and oppressive, or confiscatory.”). *See* Gaines Decl., ¶
18 20.

19 Based on these disputes, which had the potential to completely eliminate Plaintiff’s
20 recovery, the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined
21 by a “realistic maximum possible liability” amount of approximately \$450,000 [Gaines Decl., ¶
22 19], and a net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the
23 existence of such issues, the Settlement achieves a significant benefit – 50% of the maximum
24 possible realistic liability. As such, this factor weighs very heavily in favor of resolution by way
25 of the compromise set forth in the Settlement. *Gaines Decl.*, ¶ 21.

1
2 **3. The Risk, Expense, and Complexity of Further Litigation Balances**
3 **Strongly in Favor of Approval of the Settlement**

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

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

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

20 The proposed settlement is not to be judged against a hypothetical or
21 speculative measure of what might have been achieved by the
22 negotiators.” *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d at
23 625 (emphasis in original). Thus, “the very essence of a settlement is
24 compromise, ‘a yielding of absolutes and an abandoning of highest
25 hopes.’” *Id.* at 624 (citations omitted). As the Second Circuit has
26 pointed out: “The fact that a proposed settlement may only amount
27 to a fraction of the potential recovery does not, in and of itself, mean
28 that the proposed settlement is grossly inadequate and should be
disapproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
n.2 (2nd Cir. 1974).

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

Here, after all deductions are made for administration, a General Release

1 Payment/enhancement payment, attorneys' fees and costs, \$120,448.63 will be paid out, of which
2 \$90,336.47 (i.e. 75%) will go to the LWDA, and \$30,112.16 (i.e. 25%) will go to the Aggrieved
3 Employees, as required by Labor Code § 2699(i) ("civil penalties recovered by aggrieved
4 employees shall be distributed as follows: 75 percent to the Labor and Workforce Development
5 Agency . . . and 25 percent to the aggrieved employees."). *See* Settlement Agreement, at ¶ 29.

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

24 Thus, notwithstanding the existence of issues having the potential to completely eliminate
25 recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds
26 typical PAGA awards routinely approved by the courts, but it also recovers monies for Aggrieved
27 Employees which they otherwise would not receive. As such, this factor balances strongly in favor

1 of approval of the Settlement.

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

3 As discussed above, the California Supreme Court has concluded that, in the context of
4 PAGA, “the nonparty employees, because they were not given notice of the action or afforded any
5 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
6 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the limited release provided in
7 exchange for the foregoing consideration is limited to the civil penalties asserted in the Action
8 under Labor Code §§ 2698 *et seq.* *See Settlement Agreement*, at ¶ 30.

9 As such, this factor balances strongly in favor of approval of the Settlement.

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

12 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
13 litigation. *See* Gaines Decl., ¶¶ 2-5, 23-25, Gaines Decl. at **Exhibit A**. In the view of Plaintiff’s
14 Counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under
15 the circumstances, as it reflects a reasoned compromise which takes into consideration the risks
16 inherent in this case which had the potential to completely eliminate recovery. Gaines Decl., ¶¶
17 20-21, 28. As such, this factor balances in favor of approval of the Settlement.

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

20 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
21 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration
22 is “whether ‘the parties have sufficient information to make an informed decision about
23 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
24 26 (C.D. Cal. Nov. 9, 2011).

25 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
26 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
27 ¶¶ 12-15. Prior to settling, Defendant provided Plaintiff with documents related to the policies and
28 practices at issue in this PAGA action, as well as Plaintiff’s personnel file. As discussed above,

1 Plaintiff's Counsel's investigation was sufficient to, among other things, tabulate with precision
2 the total number of alleged Labor Code violations at issue during the PAGA Period and identify
3 the total number of individuals falling within the definition of "Aggrieved Employee" for the
4 PAGA Period.

5 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such
6 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
7 the strength of this claim for purposes of settlement. *See* Gaines Decl., ¶¶ 2-5; 23-25.

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

10 In addition to the factors presented above, the proposed Settlement does not possess any
11 obvious deficiencies. The Settlement contemplates entry of an order and judgment (submitted
12 concurrently herewith) which approves the Settlement. Paragraph 50 of the Settlement Agreement
13 and paragraph 17 of the proposed order authorize the Court to retain jurisdiction over the Parties,
14 the Action, and the Settlement. This procedure effectively disposes of the Action in its entirety,
15 documents the Court's approval of the Settlement as required by PAGA, and allows for Court
16 intervention if necessary to enforce the terms of the Settlement Agreement. In sum, under the
17 applicable standards for approval of PAGA settlements in California, the settlement in this case
18 meets the standards for approval.

19 **IV. PLAINTIFF'S COUNSEL IS ENTITLED TO RECOVER THEIR**
20 **REASONABLE FEES AND COSTS**

21 Pursuant to the terms of the Settlement, Plaintiff's Counsel seek attorneys' fees of one-third
22 of the Gross Settlement Amount (projected to be \$75,000) and reimbursement of litigation costs of
23 \$15,551.37, falling within the bounds authorized by the Settlement Agreement. *See* Settlement
24 Agreement, at ¶ 29. Plaintiff's Counsel's entitlement to an award of attorneys' fees and costs is
25 warranted on multiple independent grounds. Further, the amount of fees requested falls well within
26 the range of reasonableness under applicable standards, as the amount requested constitutes a
27 "percentage of the fund" deemed reasonable in similar wage and hour settlements of this size and
28 approved by California courts, which is not only warranted based on the contingency risk Plaintiff's

Counsel has agreed to incur for the benefit of the State of California and Aggrieved Employees, but also based on the significant results achieved, as the Settlement obtains a recovery substantially above the range approved as reasonable by California state and federal courts. Based thereon, Plaintiff's Counsel respectfully requests that the Court enter an order approving the fee and cost amounts requested.

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

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

Courts have long recognized the “common fund” or “common benefit” doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. *Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal.3d 25, 34, quoting *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees’ Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995) 15 Cal.3d 162, 167; see also *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric 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 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III, supra*, 20 Cal.3d at 34, quoting *D’Amico*, 11 Cal.3d 1; *see also Boeing, supra*, 444 U.S. at 478 (“[A] lawyer who recovers a common fund for the benefit of persons other than herself or her client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter Group) at § 17:172.3 explains the common fund doctrine as follows:

1 Where the lawsuit results in the recovery of a fund or property
2 benefiting others as well as Plaintiffs (e.g., a class action), the court
3 has inherent equitable power to order Plaintiffs' attorney fees paid
4 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.

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

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

12 It is not necessary to find this suit a proper class action in order to
13 uphold the portion of the judgment awarding counsel for Plaintiffs
14 25 percent of all retroactive salaries and wages received. That award
15 may be sustained under the rule that a litigant who creates a fund in
16 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).

17 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court
18 stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which
19 others derive benefits may require those passive beneficiaries to bear a fair share of the litigation
20 costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,
21 the California Supreme Court recognized that the common benefit doctrine has been applied
22 "consistently in California when an action brought by one party creates a fund in which other
persons are entitled to share."

23 Numerous appellate courts have similarly reached the same conclusion. *See e.g., Knoff v.*
24 *City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent
25 percentage" award of attorneys' fees in a representative action as the proper exercise of the court's
26 broad equitable powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423
27 (attorneys' fees and expenses properly awarded from common benefit composed of illegally
28

1 imposed sales and use tax); *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees
2 awarded from common benefit created by action compelling state to claim dormant bank accounts);
3 *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-
4 third of the damages to owners of residential property in an inverse condemnation action).

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

11 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
12 a \$225,000 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
13 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
14 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
15 sum or ‘fund’ the fees are to be paid.’”)], and in doing so, has exclusively bore the risk of loss for
16 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
17 the PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
18 applicable precedent.⁴

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

20 In addition to the forgoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount
21 of one-third of the \$225,000 Gross Settlement Amount, falls well within the “zone of

22 ⁴ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
23 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
24 entitled to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the
25 instant PAGA action was by definition “for the public benefit” and secured monetary awards for
26 approximately 110 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
28 fact 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 reasonableness.”

2 It is important to highlight at the outset that the fee amount presently sought is not
3 extraordinary, but actually falls at the “average” fee deemed reasonable under California State court
4 authority, as it is recognized that “courts may award attorney’s fees in the 30-40% range in wage
5 and hour class actions that result in recovery of a common fund under \$10 million.” *See e.g. Martin*
6 *v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). This fee falls
7 directly within that range.

8 Moreover, Plaintiff’s Counsel agreed to incur the contingency risk for the benefit of the
9 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
10 Decl., ¶¶ 26-31. The significant results achieved, and the underlying facts therefrom, justify
11 Plaintiff’s Counsel’s requested fee as reasonable under all applicable standards.

12 **C. The Fee Amount Allocated by The Settlement Agreement Is Within the**
13 **Zone of Reasonableness Under the “Percentage of the Fund” Method**

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

20 First, the results achieved by Plaintiff’s Counsel are significant, as Defendant has agreed to
21 pay \$225,000 under the Settlement. This is a significant recovery given the risk of success in
22 obtaining any recoverable penalties [Gaines Decl., ¶¶ 20-21, 28], and further, as the settlement of
23 PAGA claims impacting a comparable number of individuals have been approved as reasonable for
24 between \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

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

1 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
2 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
3 Decl. at ¶¶ 26-31. This required Plaintiff's Counsel to personally assume the risk of nonpayment in
4 securing the very substantial financial benefit the State of California stands to receive, and also
5 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors that warrant fee
6 enhancement under applicable California Supreme Court authority:

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

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

23 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,
24 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
25 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that
26 result in recovery of a common fund under \$10 million." *See also Crandall v. U-Haul*
27 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common
28 fund).

29 Attorneys' fee awards in the amount sought here are well-established by California law and
30 practice. Accordingly, Plaintiff's Counsel's fee request is fair and reasonable and is consistent with
31 the awards in California and the Ninth Circuit. It is also reasonable given the history of this action
32 and the results obtained.

1 **D. While the Requested Award of Attorneys' Fees is Reasonable as a**
2 **Percentage of the Common Fund, It is Further Confirmed by a**
3 **Lodestar Cross-Check**

4 The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.* (2016) 1
5 Cal.5th 480, 506, that “[t]he percentage of fund method survives in California class action cases.”
6 Specifically, the *Laffitte* Court held:

7 The recognized advantages of the percentage method—including relative
8 ease of calculation, alignment of incentives between counsel and the class, a
9 better approximation of market conditions in a contingency case, and the
10 encouragement it provides counsel to seek an early settlement and avoid
11 unnecessarily prolonging the litigation—convince us the percentage method
12 is a valuable tool that should not be denied our trial courts.

13 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
14 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
15 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
16 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d
17 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial
18 court acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v.*
19 *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund
20 method for calculating attorneys’ fees more accurately reflects the results achieved for the putative
21 class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’
22 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
23 litigation.”); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The
24 percentage-of-recovery method is generally favored in common fund cases because it allows courts
25 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
26 failure.’”).

27 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
28 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
29 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed
30 to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-

1 06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold
2 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the
3 court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
4 evaluate the reasonableness of a requested percentage fee.”)

5 Here, Plaintiff’s Counsel’s fee request of one-third of the Gross Settlement Amount is fair
6 and reasonable based on a percentage of the recovery, and as well as when confirmed with a lodestar
7 cross-check. First, “regardless whether the percentage method or the lodestar method is used, fee
8 awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.* (2008)
9 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff’s Counsel’s experience in
10 similar wage and hour class action matters. *Gaines Decl.*, ¶¶ 2-5; 23-25. Thus, the percentage
11 sought by Plaintiff’s Counsel here is reasonable.

12 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
13 multiplying the number of hours reasonably expended by each attorney or legal staff member by
14 their reasonable hourly rates. *See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 48. The court then
15 enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty
16 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49;
17 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *Thayer v. Wells Fargo Bank* (2001) 92
18 Cal.App.4th 819, 834 (“There is no hard-and-fast rule limiting the factors that may justify an
19 exercise of judicial discretion to increase or decrease a lodestar calculation”).

20 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
21 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
22 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition*
23 *for L. County Planning etc. Interest v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251 (approving
24 multiplier of ~2.04). In representative actions such as this one, where the value of the benefit
25 conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust
26 the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is
27 reasonable and within the range of fees freely negotiated in the legal marketplace in comparable

litigation.” *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. In doing so, “the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$75,000. Based on a projected final lodestar of \$45,050, this yields a multiplier of approximately 1.66 over the \$75,000 fee request. Gaines Decl., ¶ 22; **Exhibit D** to Gaines Decl. The billing rates used to compute the lodestar are reasonable in view of the evidence submitted herewith. Gaines Decl., ¶¶ 2-5; 23-25; **Exhibit D**.

Based thereon, and for the reasons discussed above (the significant risk in continuing to litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and burden involved in representation on a contingency basis; the knowledge and experience of Plaintiff’s Counsel; and the value obtained by Plaintiff’s Counsel for the Aggrieved Employees), it is fair and reasonable to account for these risks and compensate Plaintiff’s Counsel with a fee award of one-third of the Gross Settlement Amount.

E. Plaintiff’s Counsel’s Request for Costs is Reasonable

In the course of this litigation, Plaintiff’s Counsel incurred out-of-pocket costs of \$15,551.37. *See* Gaines Decl. at ¶ 33, **Exhibit E**. As demonstrated in the Gaines Declaration submitted herewith, the incurred costs included filing fees, service of process fees, postage fees, and other charges typical of litigation of this nature. *Id.* Such costs are appropriate for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (C.D. Cal. 1989) (quoting *Newberg, Attorney Fee Awards*, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* 668 F. Supp. 450, 452 (W.D. Pa. 1987).

The costs incurred by Plaintiff’s Counsel in this litigation benefited Plaintiff, Aggrieved Employees, and the State. Plaintiff’s cost request is reasonable and represents the costs that Plaintiff’s Counsel was required to incur to prosecute this action and should therefore be granted.

V. THE GENERAL RELEASE PAYMENT SOUGHT BY PLAINTIFF IS

1 **REASONABLE AND SHOULD BE APPROVED**

2 The Parties have agreed that Plaintiff Mireya Serrato Martinez will be paid a General
3 Release Payment/enhancement payment in the amount of \$10,000. This payment is intended to
4 recognize the time and effort that Ms. Martinez spent on behalf of other Aggrieved Employees and
5 the State and compensates her for her general release of all claims against Defendant. *See*
6 Settlement Agreement at ¶ 31. *See* Declaration of Mireya Serrato Martinez, submitted herewith.
7 *See* Gaines Decl., ¶ 36.

8 As to an incentive award, case law supports the award of incentive payments in private
9 attorney general actions. The Ninth Circuit has recognized that a named Plaintiff's "willingness to
10 act as a private attorney general" may justify the award of an incentive payment. *Rodriguez v. West*
11 *Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub*
12 *LLC*, 2013 WL 12415482 (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern
13 District of California approved a similar PAGA-only settlement and awarded a service payment to
14 the representative Plaintiff in recognition of her efforts.

15 The traditional bases for awarding incentive awards in class settlements support the award
16 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
17 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
18 awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs
19 is that he or she should be compensated for the expense or risk he has incurred in conferring a
20 benefit" on others. *Id.* at 806. That rationale applies synonymously in this Action.

21 Without Plaintiff's efforts, there would be no recovery at all. The requested award is
22 appropriate to compensate Plaintiff for the risk and expense she incurred in conferring a benefit on
23 other of Defendant's employees and the State of California. As a result of the named Plaintiff's
24 efforts, Aggrieved Employees will receive monetary settlement payments, and the State of
25 California will receive \$90,336.47 to be put toward education about and enforcement of
26 California's labor laws. *See* Gaines Decl., ¶ 37.

27 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
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1 investigating and substantiating the claims alleged in this action, including multiple interviews with
2 counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the
3 complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
4 settlement of this litigation. *See generally*, Martinez Declaration. Moreover, as with any Plaintiff
5 who files a civil action, the named Plaintiff undertook the financial risk that, in the event of a
6 judgment for Defendant in this action, she could have been personally responsible for any
7 attorneys' fees and costs awarded in Defendant's favor.

8 The award of such payment to Plaintiff is especially warranted in a case like this one. It is
9 necessary to ensure that employees continue to bring forth claims that enforce their rights.
10 Individuals like the named Plaintiff (and most Aggrieved Employees) would have little, if any,
11 recourse without the representative action device. Most Aggrieved Employees – like the named
12 Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much less a
13 representative action suit. Plaintiff must be commended for pursuing her claims; the modest
14 payment sought here is an appropriate means of doing so.

15 Plaintiff is also entering into a full general release against Defendant and its Released
16 Parties, which is far broader than the release by other Aggrieved Employees. Specifically,
17 Aggrieved Employees are releasing only limited PAGA civil penalty claims, including Labor Code
18 §§ 201-203, 226.3, 226.7, 246, 510, 512, 558, 1194, 2698, 2699, 2802 for underlying PAGA claims,
19 while Plaintiff is releasing all claims which she asserts or could assert against Defendant. *See*
20 Settlement Agreement at ¶ 31. No other Aggrieved Employee is subject to this broad form of
21 release. Gaines Decl. at ¶ 30.

22 This broad release by Plaintiff was negotiated (and necessary) to resolve the Action.
23 Plaintiff threatened to assert her individual claims and Defendant required that they be resolved in
24 connection with the resolution of the Action. Without the resolution and release of Plaintiff's
25 individual claims, litigation would continue in a piecemeal fashion. Defendant is buying peace with
26 this settlement, such that its objectives would not be achieved absent the general release. Gaines
27 Decl. at ¶ 39.

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