

THE MARKHAM LAW FIRM

David R. Markham (SBN 71814)

dmarkham@markham-law.com

Lisa R. Brevard (SBN 323391)

lbrevard@markham-law.com

888 Prospect Street, Suite 200

La Jolla, CA 92037

Telephone: (619) 399-3995/Facsimile: (619) 615-2067

COHELAN KHOURY & SINGER

Isam C. Khoury (SBN 58759)

ikhoury@ckslaw.com

Michael D. Singer (SBN 115301)

msinger@ckslaw.com

Maggie K. Realin (SBN 263639)

mrealin@ckslaw.com

605 C Street, Suite 200

San Diego, CA 92101

Telephone: (619) 595-3001/Facsimile: (619) 595-3000

UNITED EMPLOYEES LAW GROUP

Walter L. Haines (SBN 71075)

whaines@uelglaw.com

8605 Santa Monica Blvd., #63354

West Hollywood, CA 90069

Telephone: (562) 256-1047/Facsimile: (562) 256-1006

Attorneys for Plaintiff Kevin Hickey

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

KEVIN HICKEY, an individual, on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

TRANSFORM SEARS HOME SERVICES,
LLC, a Delaware corporation; and DOES 1
through 10, inclusive,

Defendants.

Case No. 34-2022-0321759

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Lauri A. Damrell

REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT (PAGA)
SETTLEMENT**

Date: March 28, 2025

Time: 9:00 a.m.

Dept: 22

Reservation No: A-321759-001

Complaint filed: June 14, 2022

Trial date: None Set

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	5
II. FACTS AND PROCEDURE	5
III. DISCOVERY AND INVESTIGATION	6
IV. SETTLEMENT NEGOTIATIONS	7
V. SUMMARY OF SETTLEMENT	7
A. Settlement Terms	7
B. The Release	8
C. Settlement Administration	9
VI. THE COURT SHOULD GRANT APPROVAL OF THE PAGA SETTLEMENT	9
A. The Standard of Review and Approval of PAGA Settlements	9
B. The Settlement is Fair, Reasonable, and Adequate	10
VII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE	14
A. The Results Achieved Support the Fee Request	15
B. The Requested Fees Are Reasonable Under the Common Fund Method	15
C. The Requested Fees Are Reasonable Under the Lodestar Cross-Check	17
1. Plaintiffs' Counsel's Hours Are Reasonable	18
2. Counsel's Rates Are Reasonable	19
D. Litigation Expenses Are Reasonable	20
VIII. THE REQUESTED ADMINISTRATION COSTS ARE REASONABLE	20
IX. SETTLEMENT OF PLAINTIFF'S INDIVIDUAL CLAIMS	20
X. CONCLUSION	21

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Adolph v. Uber Technologies, Inc.</i> (2023) 14 Cal.5th 1104	6
<i>Aguirre v. Genesis Logistics</i> (C.D. Cal. Dec. 30, 2013) 2013 WL 10936035	14
<i>Amaral v. Cintas</i> (2008) 163 Cal. App. 4th 1157	13
<i>Arias v. Super. Ct.</i> (2009) 46 Cal.4th 969	9, 10
<i>Bernstein v. Virgin Am., Inc.</i> (9th Cir. 2021) 990 F.3d 1157.....	13
<i>Bouman v. Block</i> (9th Cir. 1991) 940 F.2d 1211.....	19
<i>Brinker Rest. Corp. v. Super. Ct.</i> (2012) 53 Cal.4th 1004	11
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal. App. 5th 504	11, 14
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	16
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105	16
<i>Donohue v. AMN Servs., LLC</i> (2021) 11 Cal.5th 58	12
<i>Dunk v. Ford Motor Company</i> (1996) 48 Cal.App.4th 1794	17
<i>Glass v. UBS Fin. Servs., Inc.</i> (N.D. Cal. Jan. 26, 2007) 2007 WL 221862	18
<i>Gomez v. Lincare, Inc.</i> (2009) 173 Cal.App.4th 508	12
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	15
<i>Guinn v. Dotson</i> (1994) 23 Cal.App.4th 262	19
<i>Gunther v. Alaska Airlines, Inc.</i> (2021) 72 Cal. App. 5th 334	13
<i>Hensley v. Eckerhart</i> (1983) 461 U.S. 424.....	15

1	<i>Hertz v. Woodbury County</i>	
2	(8th Cir. 2009) 566 F.3d 775.....	11
3	<i>In re Consumer Privacy Cases</i>	
4	(2009) 175 Cal.App.4th 545	16
5	<i>In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.</i>	
6	(C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627.....	15
7	<i>Iskanian v. CLS Transportation, Los Angeles</i>	
8	(2014) 59 Cal.4th 348	10
9	<i>Jong v. Kaiser Found. Health Plan, Inc.</i>	
10	(2014) 226 Cal.App.4th 391	11
11	<i>Jordan v. Multnomah County</i>	
12	(9th Cir. 1987) 815 F.2d 1258.....	18
13	<i>Kim v. Space Pencil, Inc.</i>	
14	(N.D. Cal. Nov. 28, 2012) 2012 WL 5948951.....	18
15	<i>Laffitte v. Robert Half Int'l, Inc.</i>	
16	(2016) 1 Cal.5th 480	15, 16
17	<i>Lealao v. Beneficial California, Inc.</i>	
18	(2000) 82 Cal.App.4th 19	15, 16
19	<i>Lopez v. Youngblood</i>	
20	(E.D. Cal. Sept. 2, 2011) 2011 WL 10483569.....	18
21	<i>MBNA Am. Bank, N.A. v. Gorman</i>	
22	(2006) 147 Cal.App.4th 1	19
23	<i>Moniz v. Adecco USA, Inc.</i>	
24	(2021) 72 Cal.App.5th 56	10
25	<i>Moreno v. City of Sacramento</i>	
26	(9th Cir. 2008) 534 F.3d 1106.....	18
27	<i>Nightengale v. Hyundai Motors America</i>	
28	(1994) 31 Cal.App.4th 99	17
29	<i>Parkinson v. Hyundai Motor Am.</i>	
30	(C.D. Cal. 2010) 796 F.Supp.2d 1160	19
31	<i>PLCM Group, Inc. v. Drexler</i>	
32	(2000) 22 Cal.4th 1084	19
33	<i>Quinn v. State of California</i>	
34	(1975) 15 Cal.3d 162	16
35	<i>Ramirez v. Benito Valley Farms, LLC</i>	
36	(N.D. Cal. 2017) 2017 U.S. Dist. LEXIS 137272.....	15
37	<i>Ramos v. Countrywide Home Loans, Inc.</i>	
38	(2000) 82 Cal.App.4th 615	17
39	<i>Rocha v. U-Haul Co. of California</i>	
40	(2023) 88 Cal.App.5th 65	11

1	<i>Salton Bay Marina, Inc. v. Imperial Irrigation Dist.</i>	
2	(1985) 172 Cal.App.3d 914.....	18
3	<i>Serrano v. Priest</i>	
4	(1977) 20 Cal.3d 25	16, 17
5	<i>Thurman v. Bayshore Transit Mgmt, Inc.</i>	
6	(2012) 203 Cal. App. 4th 1112	13
7	<i>Turrieta v. Lyft, Inc.</i>	
8	(2021) 69 Cal.App.5th 955	9
9	<i>United Steelworkers of Am. v. Phelps Dodge Corp.</i>	
10	(9th Cir. 1990) 896 F.2d 403.....	19
11	<i>Vasquez v. Sup. Court</i>	
12	(1971) 4 Cal.3d 800	15
13	<i>Vizcaino v. Microsoft Corp.</i>	
14	(9th Cir. 2002) 290 F.3d 1043.....	15, 18
15	<i>Wershba v. Apple Computer</i>	
16	(2001) 91 Cal.App.4th 224	17, 18
17	<i>Williams v. MGM-Pathe Commc'n Co.</i>	
18	(9th Cir. 1997) 129 F.3d 1026.....	16

STATUTES AND REGULATIONS

PAGE(S)

California Civil Code

§ 1542.....	20
-------------	----

California Labor Code

§ 204.....	13
§ 2698 <i>et seq.</i>	5
§ 2699 <i>et seq.</i>	8
§ 2699(e)(2).....	11, 13
§ 2699(g)(l)	20
§ 2699(1)(2)	5, 9

I. INTRODUCTION

Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698 *et seq.*, Plaintiff Kevin Hickey seeks court approval of the Representative Action Settlement Agreement and Release (“Settlement Agreement” or “SA”)¹ reached by Plaintiff and Defendant Transform Sears Home Services, LLC (“Transform Sears” or “Defendant”). Plaintiff filed this PAGA representative action on behalf of other aggrieved employees employed by Defendant in California seeking PAGA civil penalties due to Defendant’s alleged failure to: (1) pay minimum, regular, and overtime wages; (2) provide meal and rest breaks; (3) maintain accurate payroll records; (4) furnish accurate wage statements; (5) pay wages due upon termination; and (6) pay wages within the required time period. The Settlement resolves all claims for civil penalties based on the alleged Labor Code violations on behalf of Service Technicians who worked for Defendant in California from April 8, 2021 and through the date the Court approves this Settlement (“PAGA Period”).²

Defendant will pay a Gross Settlement Amount of \$1,390,000.00 to settle Plaintiff’s PAGA claims. The civil penalties secured by the Settlement are significant in light of the claims and defenses and fulfill PAGA’s underlying purpose to benefit the public and to deter future labor law violations. As such, the Court should approve the Settlement. Plaintiff’s request for attorneys’ fees in the amount of \$463,333.33, reimbursement of costs in the amount of \$16,936.23, and settlement administration costs to Simpluris, Inc. in the amount of \$5,800 are also reasonable and should be approved. Thus, Plaintiff respectfully requests that the Court enter an order and judgment granting approval of the Settlement, under Labor Code § 2699(1)(2).

II. FACTS AND PROCEDURE

Plaintiff Kevin Hickey filed a class and representative action complaint on June 14, 2022 in Sacramento Superior Court, alleging claims for unpaid wages, including overtime for time spent working off the clock, failure to provide meal and rest periods, derivative wage

¹ A copy of the Settlement Agreement is attached as Exhibit 1 to the Declaration of Michael Singer, (“Singer Decl.”), ¶14.

² From April 8, 2021 through October 16, 2024, Defendant estimated there were 851 Service Technicians employed in California.

1 statement and waiting time penalty claims, and violations of the UCL and PAGA. Singer Decl.,
2 ¶15. Plaintiff sent a PAGA letter on April 8, 2022, and the relevant time period for PAGA
3 penalties started on April 8, 2021. *Id.*, Ex. 2.

4 Upon discovery of an arbitration agreement, on March 30, 2023, Plaintiff voluntarily
5 dismissed his class action claims without prejudice, and amended the complaint to a PAGA-
6 only action on April 10, 2023. Following the California Supreme Court’s decision in *Adolph v.*
7 *Uber Technologies, Inc.* 14 Cal.5th 1104 (2023), on July 31, 2023, Plaintiff agreed to submit
8 his individual PAGA claims to individual arbitration, and Plaintiff filed a petition for
9 arbitration on August 31, 2023. Shortly after initiating the proceedings, the parties agreed to
10 stay arbitration pending this mediation. Singer Decl., ¶16.

11 Transform Sears is in the business of providing and servicing home appliances. It
12 employs Service Technicians who are dispatched to residential locations to provide repair
13 services and make warranty and appliance sales to customers. *Id.* at ¶17.

14 Plaintiff was employed by Defendant in California between December 2020 and July
15 2021, as a Service Technician. Decl. of Kevin Hickey (“Hickey Decl.”), ¶3. Plaintiff worked in
16 appliance and refrigeration repair, and was dispatched to residential areas to repair customers’
17 appliances, and also provided customer service, sold warranties, took inventory, and kept an
18 organized and stocked truck. *Id.* at ¶3. Plaintiff alleged he typically had 7 to 10 jobs per day to
19 complete along with very long travel times. *Id.* at ¶3. Plaintiff alleged he did not have time to
20 take timely and uninterrupted meal and rest breaks. *Id.* at ¶5. Plaintiff was often completing a
21 job or driving when the time to take his break came so he was unable to take an off-duty break.
22 Nonetheless, Plaintiff alleged he was often required to record his meal breaks as if they were
23 compliant and timely taken. *Id.* at ¶5. Additionally, Plaintiff and other technicians were
24 responsible for taking inventory of their vans and restocking the necessary supplies for the
25 following day. Due to quotas and appointment schedule they had to adhere to during the
26 workday, Plaintiff alleged the restocking and inventory counts would be done off the clock,
amounting to hours of unpaid time each week. *Id.* at ¶¶4, 6.

27 **III. DISCOVERY AND INVESTIGATION**

28 Plaintiff and his counsel conducted extensive investigation and discovery into the claims

alleged in this action. Before the mediation, Defendant produced timekeeping and payroll data for over 80% of employees (692 employees out of 851), which Plaintiff's expert analyzed, and assisted Plaintiff's counsel in preparing a model of the potential civil penalties. Singer Decl., ¶18. In addition, Defendant produced relevant wage-and-hour policies and procedures. Based on this discovery and investigation, Plaintiff's counsel was able to act intelligently and effectively in negotiating the proposed Settlement. *Id.* at ¶19.

IV. SETTLEMENT NEGOTIATIONS

On October 16, 2024, the Parties participated in a full-day mediation with Hunter Hughes, a very well-regarded mediator vastly experienced in wage and hour class actions. Although Settlement was not reached at the mediation, Mr. Hughes tendered a mediator's proposal that the Parties accepted. After many conversations and emails, a detailed Settlement Agreement was fully signed on February 27, 2025. SA ¶2.2.1; Singer Decl., ¶20.

On the same date this motion is filed with the Court, it will be served upon Defendant and provided to the Labor and Workforce Development Agency ("LWDA") electronically through the LWDA's website using the appropriate intake form. SA ¶7.3; Singer Decl., ¶48, Ex. 7 - LWDA Confirmation of Receipt.

V. SUMMARY OF SETTLEMENT

A. Settlement Terms

The Aggrieved Employee Group consists of all non-exempt, hourly-paid Service Technician employees of Defendant during the PAGA Period. SA, ¶1.1. The PAGA claims of the Aggrieved Employee Group shall be settled for the Gross Settlement Amount ("GSA") of \$1,390,000, which is inclusive all attorneys' fees and costs to Plaintiff's Counsel, Settlement Administration Costs, and payment to the LWDA and the Aggrieved Employee Group.

The GSA shall be allocated as follows:

<u>GROSS SETTLEMENT AMOUNT:</u>	\$ 1,390,000.00
Plaintiffs' Counsel's Fees:	-\$ 463,333.33
Plaintiffs' Counsel's Litigation Costs:	-\$ 16,936.23
Administration Costs:	-\$ 5,800.00
<u>NET SETTLEMENT FUND:</u>	\$ 903,930.44
Labor Workforce & Development Agency: 75%	\$ 677,947.83
Aggrieved Employees: 25%	\$ 225,982.61

1 Due to Defendant's financial condition,³ the settlement funds will be administered in
2 three equal installments; the first installment six months after the Effective Date, the second
3 installment three months after the first one, and the third installment three months after the
4 second one. SA, ¶9.1-9.1.3. The funds from the first installment will be used to issue checks to
5 the Aggrieved Employees, the administrator, and Plaintiff's counsel for the litigation costs. The
6 funds from the second installment will be used to pay PAGA penalties to the LWDA, and the
7 third installment will be used to pay attorneys' fees in full. SA, ¶9.2.1-9.2.3. Plaintiff will
8 receive monetary compensation from Defendant separately, in exchange for a general release, as
9 specified in the confidential individual agreement, lodged as an exhibit to Defendant's motion
10 to seal.

11 Pursuant to the PAGA, 25% of PAGA penalties estimated at \$225,982.61 will be
12 distributed proportionately to Aggrieved Employees who worked for Defendant during the
13 PAGA Period based on the number of pay periods each worked during the PAGA Period. With
14 an aggregate 34,669 pay periods worked by all Aggrieved Employees as of the date of the
15 mediation, each will receive an estimated \$6.52 per pay period. SA, ¶4.1.1.

16 **B. The Release**

17 The Settlement releases "all claims for penalties, attorneys' fees and costs" under PAGA
18 "that were or could have been alleged in the Action based on the facts or claims alleged in any
19 version of the filed complaints or enumerated in the letter sent by Plaintiff to the LWDA
20 irrespective of the underlying theory of recovery supporting the claim for PAGA penalties." SA,
21 ¶1.21. This includes any claims for civil penalties under Labor Code section 2699, including
22 but not limited to, claims for failure to pay all wages due (including minimum wage, overtime,
23 and double time wages), failure to pay for all hours worked (including off-the-clock work),
24 failure to provide meal periods, failure to authorize and permit rest and recovery periods,
25 short/late meal and rest periods, failure to relieve of all duties during meal and rest periods,
26 failure to pay or properly compensate meal or rest break premiums, failure to provide accurate
27 and itemized wage statements, record keeping violations (including failure to maintain adequate
28

³ See Declaration of Shane Hansen, which is lodged under seal with Defendant's Motion to Seal.

1 and accurate payroll records), failure to pay wages timely during employment, failure to pay
2 final wages upon separation of employment, claims related to, pre and post-shift work, and
3 failure to properly calculate or pay the regular rate of pay, claims derivative and/or related to
4 these claims. SA, ¶1.21.

5 A PAGA “judgment [] is binding not only on the named employee plaintiff but also on
6 government agencies and any aggrieved employee not a party to the proceeding.” *Arias v.*
7 *Super. Ct.* (2009) 46 Cal.4th 969, 986. Aggrieved employees are not given notice, nor an
8 opportunity to opt-out or object, and are not bound by the judgment except as to civil penalties.
9 *Id.* at p. 987; *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 970-71.

10 “Released Parties” means Defendant, and its predecessors, successors, subsidiaries,
11 parent companies, other corporate affiliates, and assigns, and all of their officers, directors,
12 employees, agents, servants, attorneys, and insurers. SA, ¶1.22.

13 **C. Settlement Administration**

14 Defendant will provide contact information to Simpluris, who will mail each Aggrieved
15 Employee a cover letter explaining the settlement, the basis for the payment, that an employee
16 cannot opt out of the settlement, and a settlement check. SA, ¶¶1.13, 8.2; Ex. A – Settlement
17 Cover Letter; Declaration of Denise Islas on behalf of Simpluris, Inc., (“Simpluris Decl.”), ¶¶6-
18 8. Simpluris will perform all services reasonably necessary to locate mailing addresses,
19 calculate, issue and mail payments to aggrieved employees and the LWDA, with tax forms, and,
20 180 days after mailing, will send the amount of uncashed settlement checks to the California
21 State Controller for deposit in the Unclaimed Property Fund in each employee’s name. SA,
22 ¶¶1.24, 4.3.4, 4.4, 6.2, 9.3.2.

23 **VI. THE COURT SHOULD GRANT APPROVAL OF THE PAGA SETTLEMENT**

24 **A. The Standard of Review and Approval of PAGA Settlements**

25 The PAGA statute provides that “[t]he superior court shall review and approve any
26 settlement of any civil action filed pursuant to this part.” Lab. Code § 2699(1)(2). The statute,
27 however, does not require a two-step (preliminary and final approval) process or otherwise
28 mimic the class action approval requirements when the parties reach a settlement only as to

1 PAGA civil penalties. *See Arias*, 46 Cal.4th at 975 (class action requirements “need not be met
2 when an employee’s representative action against an employer is seeking civil penalties” under
3 PAGA). “[A] trial court should evaluate a PAGA settlement to determine whether it is fair,
4 reasonable, and adequate in view of PAGA’s purpose to remediate present labor law violations,
5 deter future ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.*
6 (2021) 72 Cal.App.5th 56, 77.

7 A PAGA representative action to recover civil penalties “is fundamentally a law
8 enforcement action designed to protect the public and not to benefit private parties.” *Iskanian v.*
9 *CLS Transportation, Los Angeles* (2014) 59 Cal.4th 348, 381. When evaluating a PAGA
10 settlement, a trial court “must scrutinize whether, in resolving the action, a PAGA plaintiff has
11 adequately represented the state’s interests, and hence the public interest.” *Moniz*, 72
12 Cal.App.5th at 89. In addition, a court must independently determine whether a PAGA
13 settlement is fair, adequate, and reasonable using similar factors that apply to the evaluation of
14 the fairness of a class action settlement, “including the strength of the plaintiff’s case, the risk,
15 the stage of the proceeding, the complexity and likely duration of further litigation, and the
16 settlement amount.” *Id.* at 77.

17 **B. The Settlement is Fair, Reasonable, and Adequate**

18 The Gross Settlement Amount of \$1,390,000.00 is consistent with PAGA’s goal of
19 penalizing Defendant for the alleged violations, deterring future violations, and providing a
20 benefit to the public through enforcement of state labor laws. Singer Decl., ¶21. The Settlement
21 provides a substantial benefit to the State of California, with the LWDA receiving \$677,947.83,
22 as 75% of the Net Settlement Amount, to assist with future enforcement of state labor laws. The
23 Settlement also provides a substantial benefit to the Aggrieved Employees, who will share
24 approximately \$225,982.61 as 25% of the Net Settlement Amount. *Id.* at ¶22. Accordingly, the
25 Settlement fulfills the underlying purposes of the statute and confers a benefit to the public.

26 In assessing whether the Settlement is fair, reasonable, and adequate, the Court may
27 balance the amount in penalties with the risks of further litigation. Here, Plaintiff obtained a
28 meaningful amount in civil penalties despite facing significant challenges and risks had the

litigation continued. Plaintiff considered several factors in reaching the decision to settle at this point in the litigation, including (a) the risk the Plaintiff would not prevail on his claims in arbitration, foreclosing his ability to represent aggrieved employees and the LWDA in the PAGA case; (b) the risk that the Plaintiff's claims could not be manageably tried; (c) the risk and uncertainty in proving liability and PAGA penalties at trial; (d) the prospect that the Court could substantially reduce any award of civil penalties on the grounds that "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory," pursuant to Labor Code § 2699(e)(2);⁴ and (e) the risk that Defendant would appeal any unfavorable judgment. Continued litigation would be an expensive, time-consuming and uncertain proposition, and could lead to an unfavorable judgment and/or a lengthy and unsuccessful appeal. Singer Decl., ¶23.

As a preliminary matter, should Transform Sears prevail on the arbitration of Plaintiff's individual claims, Transform Sears might argue Plaintiff will be foreclosed from representing other aggrieved employees in the PAGA action under the issue preclusion doctrine. *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 79. If the PAGA representative action continues, there are risks Plaintiff would not prevail on the merits. For example, with respect to Plaintiff's off-the-clock claims, Defendant might contend that where an employer provides a means to record work time, the employer is entitled to rely on those time records, and is not required to audit other available records to ascertain if any off-the-clock work is occurring. *Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1051 (2012) ("that employees are clocked out creates a presumption they are doing no work"); *Hertz v. Woodbury County* (8th Cir. 2009) 566 F.3d 775, 781-782 (no duty to audit other available records); *Jong v. Kaiser Found. Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 398-399 (same). Further, Defendant's timekeeping policy specifically forbids off-the-clock work, and Defendant paid substantial overtime during the relevant time period. Defendant will further argue that Technicians did not know a full-day schedule ahead of their shifts, so thus, they were not responsible for taking inventory of their vans and restocking the supplies necessary for a full day of work, and in

⁴ See *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 528 (awarding PAGA penalties of only 0.2% of the maximum penalties).

1 addition, most of the time the supplies were at the warehouse or sent directly to the customer's
2 house, so Technicians would be on the clock when stocking/organizing their vans. Singer Decl.,
3 ¶24.

4 Plaintiff will further argue that almost 40% of shifts (representing 96% of pay periods)
5 had a missed, short or late meal break, raising a presumption under *Donohue v. AMN Servs.,*
6 *LLC* (2021) 11 Cal.5th 58 that meal breaks were not provided. *Id.* at 75-76. However, this
7 violation rate mostly applies to second meal breaks, and Defendant will argue that most
8 employees signed a second meal break waiver, resulting in a decreased violation rate which
9 affects only 54% pay periods. Singer Decl., ¶25. Also, the payroll records reveal meal break
10 premiums, which shows Defendant had a policy or practice of paying them. Also, Defendant
11 will likely contend that individualized issues of Service Technicians' meal break practices will
12 be needed to rebut the *Donohue* presumption, which might affect the manageable prosecution of
13 this action. Also, beginning in April 2023, Defendant introduced meal break attestations
14 (requiring employees to confirm if they took compliant meal breaks), which, according to
15 Transform Sears, cuts off all liability after that time. Singer Decl., ¶26.

16 To Plaintiff's argument that 88% of shifts (representing 86% of pay periods) show
17 missed rest breaks, Transform Sears will counter-argue that rest break recordings were not
18 mandatory, and hence, those records are not reliable. *Id.* at ¶27.

19 Lastly, with respect to Plaintiff's wage statement and untimely wages claims, they are
20 derivative of Plaintiffs' unpaid time and meal and rest break claims, so if Plaintiff does not
21 prevail on these underlying claims, his derivative claims would also fail. *See Gomez v. Lincare,*
22 *Inc.* (2009) 173 Cal.App.4th 508, 524-25.

23 Should the Court accept Defendant's evidence and arguments, the possibility of
24 penalties could be significantly reduced, if not eliminated. Singer Decl., ¶28. Considering the
25 risks of continued litigation, the uncertainties involved in the split of authority on the issue of
26 issue preclusion should Defendant prevail on arbitration, the burdens of proof necessary to
27 establish liability, and the probability of appeal of a favorable judgment, it is clear that the non-
28 reversionary settlement amount of \$1,390,000 is fair, adequate, and reasonable in light of

PAGA's purpose to remediate present labor law violations, to deter future violations, and to maximize enforcement of the Labor Code. Singer Decl., ¶29.

Courts have found that the "subsequent" penalty under PAGA applies only after a court or the Labor Commissioner determines that the employer has violated the Labor Code. *See Amaral v. Cintas* (2008) 163 Cal. App. 4th 1157, 1209; *Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal. App. 5th 334, 356 ("the increased \$200 civil penalty for 'subsequent violation[s]' does not apply unless [Plaintiff] presents evidence that the Labor Commission or a court notified [Defendant] that it was in violation of the Labor Code."); *Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 990 F.3d 1157, 1173 (reversing judgment as to "heightened civil penalties" because the defendant was not given notice by the Labor Commissioner when the "subsequent" violations occurred.) Defendant argues it complied with the law and, if any violations could be shown, Plaintiff can only recover the "initial violation" rates of \$100 per pay period. There are 851 Technicians during the PAGA period, 509 former and 342 current employees, who worked a total of 34,669 pay periods during the PAGA Period. Thus, Defendant's exposure is as follows:

- Failure to pay wages including overtime: 34,669 total pay periods x \$100 = \$3,466,900;
- Failure to provide meal periods: 18,547 pay periods subject to the 1st meal break violation x \$100 = \$1,854,700;
- Failure to provide rest periods: 29,781 affected pay periods (85.9% of 34,669 total pay periods with no rest break recorded) x \$100 = \$2,978,100;
- Failure to provide wage statements: 34,669 total pay periods x \$100 = \$3,466,900;
- Failure to pay wages at termination of employment: 509 former employees x \$100 = \$50,900.
- Failure to provide timely earned wages (§204): 342 current employees x \$100 = \$34,200 (Singer Decl., ¶30.)
- **Maximum PAGA Penalties: \$11,851,700**

However, the Court could exercise its discretion to reduce the amount of PAGA penalties under Labor Code § 2699(e)(2). *Thurman v. Bayshore Transit Mgmt, Inc.* (2012) 203 Cal. App. 4th 1112, 1135 (affirming 30% reduction under specified PAGA claim where the

1 employer produced evidence that it took its obligations seriously); *Aguirre v. Genesis Logistics*
2 (C.D. Cal. Dec. 30, 2013) 2013 WL 10936035 at **2-3 (reducing penalty for past PAGA
3 violations from \$1.8 million to \$500,000, after rejecting numerous other PAGA claims). In
4 *Carrington*, 30 Cal. App. 5th, the court awarded only 0.21% of the maximum penalties, and the
5 court of appeal affirmed. *Id.* at 529. If a similar reduction had been applied here, Plaintiff would
6 have recovered only approximately \$25,000 (\$11.8 million $\times$ 0.0021 reduction).

7 The proposed \$1,390,000 settlement obviates all of these risks, and represents 11.7% of
8 Defendant's maximum potential exposure (11.7% of \$11,851,700 maximum exposure), of what
9 may have been obtained through lengthy, expensive, and risky litigation, or 16.7% for
10 Plaintiff's direct unpaid time and meal and rest break claims (16.7% of \$8,299,700). The
11 settlement amount is reasonable, fulfills the purpose of PAGA and provides a substantial
12 amount to the LWDA for education and enforcement. Singer Decl., ¶31.

13 The settlement was reached after extensive informal discovery, review and analysis of
14 all relevant policies, expert analysis, and protracted negotiation. Taking all factors into
15 consideration, Plaintiff's Counsel concluded the settlement is more than "fair, reasonable, and
16 adequate," and avoids the risk, that after extended litigation, there could be little or no recovery.
17 Singer Decl., ¶32. For these reasons, the Court should find that the Settlement is fair,
18 reasonable, and adequate.

19 **VII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE**

20 Plaintiffs' Counsel requests \$463,333.33 for their attorneys' fees,⁵ (33.33% of the GSA),
21 and \$16,936.23 in litigation costs. As of the date of the filing of this Motion, Plaintiff's Counsel
22 will have incurred \$120,148.50 in attorneys' fees and \$16,936.23 in litigation costs to obtain
23 approval of the Settlement. Singer Decl., ¶33, Exs. 3-5; Declaration of David R. Markham,
24 ("Markham Decl."), ¶¶11, 13-16; Ex. 1; Declaration of Walter L. Haines ("Haines Decl."), ¶¶7,
25 8.

26 ///

27
28 ⁵ The fee split is as follows: 50.34% is allocated to Cohelan, Khoury & Singer, 16.33% to The Markham Law Firm, and 33.33% to United Employees Law Group. The client consented to this split in writing. Singer Decl., ¶34.

The PAGA provides for reasonable attorney's fees and costs, but “does not provide a specific standard for evaluating attorney’s fees in connection with a settlement of PAGA claims.” “Under Ninth Circuit [and California] law, the district court has discretion in common fund cases to choose either the ‘percentage-of-the-fund or the lodestar method’ to determine a reasonable attorney’s fee.” *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047; *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503; *Ramirez v. Benito Valley Farms, LLC*, *supra*, at *18.⁶ “Despite its primacy, the lodestar method is not necessarily utilized in common fund cases.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.

The California Supreme Court affirmed the granting of attorneys’ fees in common fund cases based on a percentage of the recovery. *Laffitte*, *supra*, at p. 503. A fee award based on a percentage of the common fund recovery here is proper as it spreads the attorneys’ fees among all beneficiaries of the fund, aligns the incentives between plaintiffs’ counsel, the State, and the aggrieved employees, is a better approximation of the market conditions in a contingency case, and encourages counsel to seek early settlement and avoid unnecessarily prolonging the litigation. *Id.* The Court also approved an optional lodestar cross-check. *Id.* at p. 504.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.* (C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627, at *27 (citing *Hensley v. Eckerhart* (1983) 461 U.S. 424). In the face of uncertainties associated with continued litigation of Plaintiff’s claims, Defendant’s vigorous denials and affirmative defenses, the results achieved are excellent. Counsel fulfilled the purpose of PAGA by obtaining \$1,390,000 in penalties to distribute to the State, the LWDA for enforcement and education, and to the allegedly aggrieved employees, as well as to compensate the Plaintiff’s Counsel representing the interests of the State.

B. The Requested Fees Are Reasonable Under the Common Fund Method

A request for attorneys’ fees as a percentage of the gross settlement amount is supported

⁶ California trial courts may use cases applying Federal Rule 23 for guidance in class issues. *Vasquez v. Sup. Court*, 4 Cal.3d 800, 821(1971); *Green v. Obledo*, 29 Cal.3d 126, 145-146 (1981).

1 by the “common fund theory,” where “one who expends attorney fees in winning a suit which
2 creates a fund from which others derive benefits, may require those passive beneficiaries to bear
3 a fair share of the litigation costs.” *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 (citing *Quinn v.*
4 *State of California* (1975) 15 Cal.3d 162); *Laffitte*, 1 Cal.5th at 503 (trial court “may determine
5 the amount of a reasonable fee by choosing an appropriate percentage of the fund created”). The
6 percentage is properly based upon the maximum settlement amount, rather than upon the
7 amount of funds distributed to class members. *Williams v. MGM-Pathe Commc’n Co.* (9th Cir.
8 1997) 129 F.3d 1026. In *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the
9 California Supreme Court recognized that the common fund doctrine has been applied
10 “consistently in California when an action brought by one party creates a fund in which other
11 persons are entitled to share.” *Id.* at 110, fn. omitted.

12 The lodestar analysis may be used to cross-check a percentage-of-recovery award. *In re*
13 *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-558. However, the Supreme Court
14 of California clarified that:

15 [W]hen an attorney fee is awarded out of the common fund preserved or recovered by
16 means of litigation [citation], the award is not per se unreasonable merely because it is
calculated as a percentage of the common fund.

17 *Laffitte*, 1 Cal.5th at 486. The *Laffitte* court further held that “trial courts have discretion
18 to conduct a lodestar cross-check on a percentage fee . . . [and] also retain the discretion to
19 forego a lodestar cross-check and use other means to evaluate the reasonableness of a requested
20 percentage fee.” *Id.* at 506.

21 California courts routinely award attorneys’ fees equaling one-third or more of the
22 common fund. *See, e.g., Laffitte*, 1 Cal.5th at 506 (affirming fee award representing one-third of
23 a non-reversionary fund); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 (“fee
24 awards in class actions average around one-third of the recovery”). In addition, a fee award in
25 the amount of one-third of the common fund is reasonable because it best reflects the market
26 rate for contingency fees. *See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 47
27 (“[A]ttorneys providing the essential enforcement services must be provided incentives roughly
28 comparable to those negotiated in the private bargaining that takes place in the legal

1 marketplace.”).

2 Here, Plaintiff’s request for attorneys’ fees in the amount of 33.33% of the GSA is
3 reasonable given the significant result achieved on behalf of the State of California and
4 Aggrieved Employee. First, the settlement amount of \$1,390,000 represents 11.7% of the
5 realistic value of the PAGA claims. Singer Decl., ¶35. Second, Plaintiff’s counsel litigated this
6 case on a contingent basis, incurring almost \$17,000 in costs with no guarantee of recovery. *Id.*
7 at ¶40. Plaintiff’s counsel invested over 217 hours of attorney and support staff time into this
8 action, with payment deferred to the end and entirely contingent on the outcome. *Id.* at ¶33, 40;
9 Markham Decl., ¶¶13-17; Haines Decl., ¶¶4, 8. In fact, Plaintiff’s Counsel will have to wait one
10 year after the settlement becomes effective to recover their attorneys’ fees under the
11 Settlement’s installment plan. SA, ¶9.2.3. Thus, Plaintiff’s request for attorneys’ fees of
12 \$463,333.33, or 33.33% of the GSA, is reasonable under California law.

13 **C. The Requested Fees Are Reasonable Under the Lodestar Cross-Check**

14 Plaintiff’s request for attorneys’ fees is reasonable based upon a crosscheck of PAGA
15 Counsel’s lodestar with the application of a multiplier. Under the lodestar method, the court
16 considers a compilation of the time spent and a reasonable hourly compensation of each
17 attorney to evaluate the reasonableness of the fee requested. *Ramos v. Countrywide Home*
18 *Loans, Inc.* (2000) 82 Cal.App.4th 615, 622. The moving party meets its burden in this regard
19 by submitting “declarations evidencing the reasonable hourly rate for their services and
20 establishing the number of hours spent working on the case” as “California case law permits fee
21 awards in the absence of detailed time sheets.” *Wershba v. Apple Computer* (2001) 91
22 Cal.App.4th 224, 254-55; *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1810;
23 *Nightengale v. Hyundai Motors America* (1994) 31 Cal.App.4th 99, 103. The hours spent and
24 the reasonable hourly compensation are computed to arrive at a “lodestar” figure which may
25 then be augmented or diminished by the court taking into account various “multiplier” factors.
26 See *Ramos*, 82 Cal.App.4th at 622 (citing *Serrano*, 20 Cal.3d at 48-49).

27 While a percentage fee may be cross-checked against a lodestar increased by a risk
28 multiplier, courts are not required to engage in this exercise, and many California courts decline

1 to do so. *See, e.g. Glass v. UBS Fin. Servs., Inc.* (N.D. Cal. Jan. 26, 2007) 2007 U.S. Dist
2 LEXIS 8476, at *11 (finding “no need to conduct a lodestar cross-check [as] [c]lass counsel’s
3 prompt action in negotiating a settlement while the state of the law remained uncertain should
4 be fully rewarded”); *Lopez v. Youngblood* (E.D. Cal. Sept. 1, 2011) 2011 U.S. Dist LEXIS
5 99289 10483569, *39 (“A lodestar cross-check is not required in this circuit, and in a case such
6 as this, is not a useful reference.”)

7 Here, the lodestar of Plaintiff’s counsel is \$120,148.50 which is based on 217.2 hours of
8 attorney and support staff time at customary hourly rates. Singer Decl., ¶¶33, Ex. 3; Markham
9 Decl., ¶¶13-16; Haines Decl., ¶¶7-9. This results in a multiplier of 3.85. “Multipliers can range
10 from 2 to 4, or even higher.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255.
11 “The customary range for multipliers is between 1.0 and 4.0.” *Kim v. Space Pencil, Inc.*, 2012
12 WL 5948951, at * 7 (N.D. Cal. Nov. 28, 2012) (citing *Vizcaino v. Microsoft Corp.* (9th. Cir.
13 2002) 290 F.3d 1043, 1051 n. 6). In *Vizcaino*, 290 F.3d 1043, the court approved a similar
14 multiplier of 3.65, and in an appendix to the opinion, determined that a range of multipliers in
15 common fund cases is generally between 0.6 and 19.6, with most cases having multipliers
16 between 1.0 and 4.0. *Id.* at 1052. Thus, this multiplier is reasonable.

17 **1. Plaintiffs’ Counsel’s Hours Are Reasonable**

18 In determining whether the number of hours expended on the litigation was reasonable,
19 the court must determine that “the time spent was reasonably necessary and that [] counsel
20 made ‘a good faith effort to exclude from the fee request hours that are excessive, redundant, or
21 otherwise unnecessary.” *Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263 n.8.
22 The court “should defer to the winning lawyer’s professional judgment as to how much time he
23 was required to spend on the case.” *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d
24 1106, 1112 (noting that “[l]awyers are not likely to spend unnecessary time on contingency fee
25 cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the
26 amount of the fee.”). It is well established that reasonable fees for support staff services may be
27 included as part of a fee award. *See Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985)
28 172 Cal.App.3d 914, 951 (“necessary support services for attorneys, e.g. secretarial and

1 paralegal services, are includable within an award of attorney fees”); *Guinn v. Dotson* (1994) 23
2 Cal.App.4th 262, 268-270 (“[a]n award of attorney’s fees which does not compensate for
3 paralegal service time would not fully compensate the attorney”).

4 Here, the 217.2 hours expended to litigate and settle this action were reasonable. Singer
5 Decl., ¶33, Ex. 3.

6 **2. Counsel’s Rates Are Reasonable**

7 The reasonable hourly rate is that prevailing in the community for similar work. *PLCM*
8 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. “[I]n assessing a reasonable hourly rate,
9 the trial court is allowed to consider the attorneys’ skill as reflected in the quality of work, as
10 well as the attorneys’ reputation and status.” *MBNA Am. Bank, N.A. v. Gorman* (2006) 147
11 Cal.App.4th 1, 3. The trial court may also “find hourly rates reasonable based on evidence of
12 other courts approving similar rates.” *Parkinson v. Hyundai Motor Am.* (C.D. Cal. 2010) 796
13 F.Supp.2d 1160, 1172. “Affidavits of the plaintiff’s attorney and other attorneys regarding
14 prevailing fees in the community, and rate determinations in other cases, particularly those
15 setting a rate for the plaintiff’s attorney, are satisfactory evidence of the prevailing market rate.”
16 *United Steelworkers of Am. v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407; *Bouman*
17 *v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235 (9th Cir. 1991) (the submission of “declarations
18 stating that the rate was the prevailing market rate in the relevant community [was]... sufficient
19 to establish the appropriate rate for lodestar purposes”).

20 Plaintiff’s Counsel’s skill and experience support their hourly rates and are in line with
21 rates typically approved in California wage and hour class actions. Cohelan Khoury & Singer’s
22 practice is limited to litigating class and representative actions on behalf of employees and
23 consumers, and our firm has been appointed Class Counsel or co-Class Counsel in over 300
24 such cases. Singer Decl., ¶¶2-13; *see also* Markham Decl., ¶¶3-9; Haines Decl., ¶¶3-4.
25 Plaintiffs’ Counsel’s skill and experience support their hourly rates: Cohelan Khoury & Singer:
26 Managing Partner, Michael D. Singer - \$995; Founding Partner Isam C. Khoury - \$925, Partner,
27 Maggie Realin - \$700; The Markham Law Firm: Founding Partner, David R. Markham - \$815,
28 Associate Lisa Brevard, \$400; The United Employees Law Group, Founding Partner Walter L.

Haines, \$725. These rates are in line with those typically approved in California wage-and hour class action litigation. Indeed, the Laffey Matrix would actually provide for a rate increase. Singer Decl., ¶41, Ex. 6 - Laffey Matrix; Markham Decl., ¶12; Haines Decl., ¶7. Given Counsel's skill and experience, these rates are reasonable.

D. Litigation Expenses Are Reasonable

Plaintiff's Counsel are entitled to reimbursement of reasonable litigation costs under PAGA. See Lab. Code § 2699(g)(l). The Settlement provides for reimbursement of costs not to exceed \$20,000. Plaintiff's Counsel seeks reimbursement of actual costs of \$16,936.23. These costs are reasonable and were necessary to prosecute this case. Singer Decl., ¶43, Ex.5; Markham Decl., ¶11, Ex. 1. Accordingly, Plaintiff's Counsel requests the Court approve the reimbursement of costs in the amount of \$16,936.23.

VIII. THE REQUESTED ADMINISTRATION COSTS ARE REASONABLE

The Settlement provides for settlement administration costs not to exceed \$5,800 to be paid from the Gross Settlement Amount to Simpluris. SA, ¶¶1.24, 4.3. The parties requested bids from four different administrators, and Simpluris's bid for the capped amount of \$5,800 was the most competitive. Simpluris Decl., ¶8, Ex. C. Given the number of Aggrieved Employees and the scope of the duties to be performed by the administrator, the Court should approve the settlement administration costs as reasonable.

IX. SETTLEMENT OF PLAINTIFF'S INDIVIDUAL CLAIMS

Defendant's arbitration agreements prevented Plaintiff from bringing individual damages claims in court. Singer Decl., ¶44. The Parties avoided the time and cost of arbitration to resolve Plaintiff's individual claims. Although by definition not a part of the PAGA action, and court approval is not required, in the interest of providing the Court with all information as it considers approval of the PAGA settlement, the individual settlement for Plaintiff is described here.

Plaintiff released all claims in this Action, and waived Civil Code section 1542, in exchange for a monetary compensation as specified in a separate confidential settlement

1 agreement.⁷ Mr. Hickey was employed as a Service Technician for about seven months, and
2 earned \$23.50 per hour. Hickey Decl., ¶3. As with the representative PAGA claims, Defendant
3 strongly denies the merits of the individual claims, asserted credible defenses, and resolved the
4 claims only to buy peace and avoid the inconvenience and expense of arbitration. Singer Decl.,
5 ¶45. Subject to the usual litigation risks, the settlement amount is less than what Plaintiff may
6 have reasonably obtained in arbitration if successful. If considered only as a payment for a
7 general release of claims, no part of the payment is consideration for agreeing to settlement of
8 PAGA claims. Singer Decl., ¶46.

9 **X. CONCLUSION**

10 Based on the foregoing, Plaintiff respectfully requests that the Court grant approval of
11 the Settlement and enter the proposed judgment.

12 Respectfully submitted,

13 COHELAN KHOURY & SINGER
14 THE MARKHAM LAW FIRM
15 UNITED EMPLOYEES LAW GROUP

16 Dated: March 4, 2025

17 By:  _____

18 Maggie K. Realin

19 Attorneys for Plaintiff KEVIN HICKEY, on
20 behalf of himself and all others similarly situated

21
22
23
24
25
26
27
28 ⁷ This release does not extent to Plaintiff's claims asserted against the Released Parties in Plaintiff's separate
action for discrimination and failure to accommodate claims under FEHA titled *Hickey v. Transform Sears Home
Services LLC, et al.*, Case No. 23STCV23723, pending in Los Angeles Superior Court. SA, ¶1.21.