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on behalf of herself and all others similarly situated

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

RAYLYNN HOLMES, individually and on
behalf of herself and all others similarly situated,

Plaintiff,
v.

PET FOOD EXPRESS, LTD., a California
Corporation; and DOES 1-10, inclusive,

Defendant.

Case No. 22CV014140

Assigned to: Hon. Noël Wise
Dept.: 21

Reservation ID: 947388561448

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF THE
SETTLEMENT AGREEMENT AND
RELEASE OF PAGA CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*(Filed concurrently with Declarations of
James R. Hawkins, Plaintiff, and Proposed
Order)*

Date: January 23, 2024
Time: 1:30 p.m.

Complaint Filed: July 12, 2022
CMC: December 8, 2023
Trial: Not Set

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 23, 2024, at 1:30 p.m., Plaintiff Raylynn Holmes
3 (“Plaintiff”) will, and hereby does, move this Court for an Order (1) approving the Parties’ settlement
4 and ordering the Parties to carry out the terms of the Settlement Agreement; and (2) and entering a
5 Final Judgment thereon.

6 This Motion will be based on this notice, the attached memorandum of points and authorities
7 filed contemporaneously herewith, the Parties’ Settlement Agreement and Release of PAGA Claims,
8 the attached Declarations of James R. Hawkins and Plaintiff, as well as upon the pleadings, documents,
9 memoranda, and other records on file with the Court in this matter, and upon such other and further
10 oral and/or documentary evidence as may be properly presented at the hearing on this matter.

11 Pursuant to California Labor Code § 2699(1)(2), a copy of the Settlement Agreement and
12 Release of PAGA Claims was filed with the LWDA on December 27th, 2023. (See Exhibit 4 attached
13 to the Declaration of James R. Hawkins.)

14 Given the multiplicity of issues addressed herein, Plaintiff’s memorandum of points and
15 authorities necessitates exceeding the 15-page limit set forth in California Rule of Court 3.113(d). As
16 this Motion is unopposed, Plaintiff respectfully requests that the Court consider the entire Motion,
17 which is 18 pages in length.

18
19
20 DATED: December 27, 2023

JAMES HAWKINS APLC

21
22 By:



23 James R. Hawkins
Christina M. Lucio
24 Mitchell J. Murray

25 Attorneys for Plaintiff
26 RAYLYNN HOLMES on behalf of herself and
27 all others similarly situated
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MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. INTRODUCTION**

2 Plaintiff Raylynn Holmes brings this Motion pursuant to Cal. Lab. Code § 2699(1)(2) for
3 approval of the Parties' settlement. Plaintiff filed this case solely as an enforcement action pursuant
4 to the Private Attorneys General Act of 2004 ("PAGA"). "Such an action is fundamentally a law
5 enforcement action designed to protect the public and penalize the employer for past illegal conduct.
6 Restitution is not the primary object of a PAGA action, as it is in most class actions." (*Brown v. Ralphs*
7 *Grocery Co.* (2011) 197 Cal. App. 4th 489, 499.). Plaintiff and Defendant Pet Food Express, LLC
8 ("Defendant") (erroneously sued as "Pet Food Express, Ltd.") have reached a settlement that
9 effectuates the purposes of PAGA and, by this motion, Plaintiff, pursuant to California Labor Code §
10 2699(l), seeks Court approval of such settlement.

11 The terms of the settlement are more fully set forth in the Settlement Agreement and Release
12 of PAGA Claims ("Settlement Agreement") attached as **Exhibit 1** to the Declaration of James R.
13 Hawkins ("Hawkins Decl.") filed in support of this Motion. Under the Settlement Agreement,
14 Defendant will pay a Gross Settlement Amount of \$612,500.00 to settle the PAGA claim.

15 As detailed below, the Settlement, including all allocations are fair, reasonable, and adequate.
16 As such, Plaintiff requests that the Court: (1) enter an Order approving the settlement pursuant to the
17 Private Attorneys General Act of 2004, California Labor Code § 2698, *et seq.* and ordering the Parties
18 to carry out the terms of the Settlement Agreement; and (2) and enter a Final Judgement thereon.

19 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL**
20 **HISTORY**

21 **A. Procedural History**

22 The above-entitled PAGA-only action was filed on July 12, 2022, in Alameda Superior Court.
23 The complaint seeks PAGA penalties for Defendant's alleged violations of various provisions of the
24 California Labor Code and IWC Wage Order including: (1) failure to accurately pay all wages earned,
25 including minimum wage and overtime; (2) failure to provide lawful meal periods, or pay one hour of
26 premium pay at the regular rate, in lieu thereof; (3) failure to authorize and permit lawful rest breaks,
27 or pay one hour of premium pay at the regular rate, in lieu thereof; (4) failure to timely pay wages due
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1 and payable during employment; (5) failure to provide compliant wage statements to employees; (6)
2 failure to reimburse employees for necessary business expenses; (7) failure to keep accurate payroll
3 records; (8) failure to timely pay all wages owed upon separation of employment; and (9) failure to
4 provide suitable seating. Defendant denies the allegations, any failure to comply with the laws, and
5 all liability for the claims and causes alleged in the complaint. (Hawkins Decl. ¶ 4.)

6 Pursuant to California Labor Code § 2699.3(a), Plaintiff gave timely written notice to
7 Defendant and to the LWDA on May 6, 2023. (Hawkins Decl. at ¶ 5; see also Exhibit 2, Notice to the
8 LWDA, attached to Hawkins Decl. (“Ex. 2.”)

9 **B. Discovery and Investigation**

10 In preparation for mediation, the Parties exchanged documents and information that allowed
11 both sides to calculate the potential damages and evaluate potential risks. Plaintiff and her counsel
12 analyzed, researched, and investigated the allegations, defenses and potential obstacles to prevailing
13 on the merits, including potential evidentiary issues, risks at trial, and appellate issues and risks.
14 Pursuant to Plaintiff’s counsel’s informal discovery requests, Defendant produced documents and pay
15 records that enabled Plaintiff to analyze Defendant’s potential exposure for the alleged unpaid wages,
16 meal period/rest break violations and other claims. To that end, Plaintiff’s counsel obtained a random
17 sampling of time and payroll records, data, and policies, among other documents and information, to
18 aid in Plaintiff’s evaluation of the claims and formulation of a damages model with an expert.
19 (Hawkins Decl. at ¶¶ 10-14, 19.) This shared data facilitated a precise evaluation of the Defendant’s
20 liability and potential damages based on the presented claims. (*Id.*). In addition, Plaintiff’s counsel
21 engaged in research and interviews which aided in the analysis. (*Id.*)

22 The Parties’ counsel also engaged in thorough discussions regarding this data, evaluating the
23 strengths of their respective claims, defenses, and other pivotal factors for settlement considerations.
24 (*Id.* at ¶14.). Throughout the discovery phase, both Parties remained committed and worked
25 meticulously to ensure comprehensive information sharing, thus ensuring well-informed discussions
26 leading up to the mediation. (*Id.*).

27 **C. Mediation**

Following extensive discussions, as well as negotiations and the exchange of informal discovery, the Parties engaged in a full-day session of mediation on August 1, 2023, with Gig Kyriacou. (Hawkins Decl. at ¶ 16.). The case did not settle at mediation. However, following the session, Mr. Kyriacou presented a mediator’s proposal outlining the key elements of a potential PAGA settlement. (*Id.*) The Parties accepted the proposal and formalized their agreement through a memorandum of understanding capturing these essential terms. (*Id.*) Thereafter, the Parties memorialized the settlement terms in a long-form Settlement Agreement, executed in late-November 2023, which is now presented to this Court for approval. (*Id.* at ¶ 17.)

D. Other Affected Litigation

The Parties and their respective counsel represent that they are unaware of any other pending matter or action asserting claims that will be extinguished or otherwise affected by the Settlement.

III. SUMMARY OF THE SETTLEMENT

Plaintiff and her counsel— after mediation with a distinguished mediator specializing in wage and hour class and representative actions—believe that the settlement is balanced and just for all parties involved. It is fair, reasonable and adequate. The terms are fully detailed in the Settlement Agreement attached as **Exhibit 1** to the Hawkins Declaration:

A. Aggrieved Employees

The Aggrieved Employees include “All current and former hourly non-exempt employees of Defendant in California from July 12, 2021, to the date the Court grants approval (the “PAGA period”). (Ex. 1 at ¶¶ 2,18.) Based on the escalator provision, this is subject to change should the number of pay periods worked by the Aggrieved Employees increase by more than 10% above 48,952 pay periods. (*Id.* at ¶ 39.)

B. Amount of the Settlement and Allocation of Settlement Amounts

1. *Gross Settlement Amount*

In consideration for this Settlement and a release by Plaintiff, Aggrieved Employees, and the LWDA, as provided herein, Defendant has agreed to pay \$612,500.00. (Ex. 1 at ¶¶ 14, 39.)

1 2. *Settlement Allocation*

2 The Gross Settlement is allocated as follows:

3 Costs Of Settlement Administration	\$14,000.00
4 Plaintiff's Counsel's Costs	\$15,933.06
5 PAGA Individual Settlement Payment	\$10,000.00
6 Plaintiff's Counsel's Attorneys' Fees	\$204,166.67
7 PAGA Fund	\$368,400.27
8 LWDA Payment	\$276,300.20
9 Individual PAGA Payments to Aggrieved Employees	\$92,100.07

10 3. *Formula for Division of Individual PAGA Payments*

11 Individual PAGA Payments will be calculated by (1) dividing the Aggrieved Employees' 25%
12 share of PAGA Fund by the total number of Qualifying Pay Periods worked by all Aggrieved
13 Employees during the PAGA Period ("Pay Period Value") and (2) multiplying the Pay Period Value
14 by each Aggrieved Employee's Qualifying Pay Periods. (Ex. 1 at ¶ 39(a).) Aggrieved Employees
15 assume full responsibility for any taxes owed on their Individual PAGA Payment. (*Id.* at ¶ 35) The
16 Administrator will report the Individual PAGA Payments on IRS 1099 Forms. (Ex. 1 at ¶ 39(a)(iii).)

17 The settlement is based upon the representations that there were 2,641 Aggrieved Employees
18 and 48,952 PAGA Pay Periods to the date of mediation. (Hawkins Decl. at ¶ 25.) Defendant shall
19 have an option to either: (1) end the PAGA Period on a date where the Released Claims are for no
20 more than 53,848 pay periods; or (2) increase the Gross Settlement Amount on a *pro-rata* basis equal
21 to the percentage increase in the number of pay periods worked by the Aggrieved Employees above
22 53,848. (Ex. 1 at ¶ 39.)

23 4. *Release by Aggrieved Employees*

24 Upon the Effective Date, Plaintiff, on behalf of herself, the State of California, and all
25 Aggrieved Employees, releases the Released Parties from all claims for civil penalties under PAGA
26 arising from the same facts and/or claims alleged in the complaint as well as those included in
27 Plaintiff's letter to the LWDA, including, but not limited to, claims under California Labor Code
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1 sections 201, 202, 203, 204, 210, 216, 218.6, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5,
2 1182.12, 1194, 1197, 1197.1, 1198, 2698, 2699, 2699.3, 2802, 3287, and 3288, as well as the IWC
3 Wage Orders, including, but not limited to, Wage Orders 4 and 7, or claims that were pled or that could
4 have been pled based on the facts alleged in the Complaint during the PAGA Period. The period of the
5 release shall be that of the PAGA Period: from July 12, 2021, through the Effective Date. The *res*
6 *judicata* effect of the Judgment will be the same as that of the release. (Ex. 1 at ¶ 38(a).) As the release
7 is narrowly related to the claims alleged, the Parties contend that the release is proper and reasonable.

8 Plaintiff also entered into an Individual Release which is much broader and includes all claims,
9 whether known or unknown, including a waiver of the rights and benefits of section 1542 of the
10 California Civil Code. (*Id.* at ¶ 38(b).)

11 **IV. PAGA ACTIONS AND THE REQUIREMENTS**

12 **A. Relevant Statutory History**

13 In 2003, the California Legislature enacted PAGA after declaring: (1) that adequate financing
14 of labor law enforcement was necessary to achieve maximum compliance; (2) that staffing levels for
15 state labor law enforcement agencies were unable to keep up with a growing labor market; (3) that
16 vigorous assessment and collection of civil penalties provides a meaningful deterrent to unlawful
17 conduct; and (4) that it was therefore in the public interest to allow Aggrieved Employees, acting as
18 private attorneys general, to seek and recover civil penalties for Labor Code violations. 2003 Cal. Stat.
19 § 6629. Under PAGA, an “aggrieved employee” may bring an action for civil penalties for labor code
20 violations on behalf of herself and other current or former employees. (Cal. Lab. Code § 2699(a).)

21 A plaintiff suing under PAGA “does so as the proxy or agent of the state’s labor law
22 enforcement agencies.” (*Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986.) Accordingly, a PAGA
23 judgment in a PAGA action “binds all those, including nonparty Aggrieved Employees, who would
24 be bound by a judgment in an action brought by the government.” (*Id.* (emphasis added); see also
25 *Iskanian v. CLS Transp. Los Angeles LLC* (2014) 59 Cal. 4th 348, 381 (“When a government agency
26 is authorized to bring an action on behalf of an individual or in the public interest, and a private person
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1 lacks an independent legal right to bring the action, a person who is not a party but who is represented
2 by the agency is bound by the judgment as though the person were a party.”.)

3 **B. Penalties for Violations of PAGA**

4 Where the underlying Labor Code section does not already provide a civil penalty, the PAGA
5 penalty is equal to \$100 for each employee per pay period for the initial violation, and \$200 for each
6 employee per pay period for each subsequent violation. (Cal. Lab. Code §2699(f)(1)-(2).) The
7 penalties themselves are not intended to compensate unnamed employees because the action “is
8 fundamentally a law enforcement action”; the PAGA statute permits a trial court to “exercise its
9 discretion to award lesser penalties based on the enumerated considerations.” (*Thurman v. Bayshore*
10 *Transit Mgmt., Inc.* (2012) 203 Cal. App .4th 1112, 1135; see also Cal. Lab. Code § 2699(e)(2) (“a
11 court may award a lesser amount than the maximum civil penalty amount specified by this part if,
12 based on the facts and circumstances of the particular case, to do otherwise would result in an award
13 that is unjust, arbitrary and oppressive, or confiscatory.”).)

14 PAGA requires that any civil penalties recovered must be distributed as follows: 75 percent to
15 the LWDA and the remaining 25 percent to the Aggrieved Employees. (Cal. Lab. Code § 2699(i).)

16 **C. Standards for Court Approval of PAGA Enforcement Settlement**

17 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
18 Court. (Cal. Lab. Code § 2699(1)(2).) The Labor Code does not require the two-step settlement
19 approval process utilized in class actions—instead, PAGA settlements are approved on a single
20 motion. (See *Salazar v. Sysco Central Cal*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal.
21 Feb. 2, 2017) (rejecting the application of class action settlement rules and procedures for PAGA
22 settlement approval).) When trial courts review PAGA settlements, they should consider whether
23 “the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying
24 purpose of the statute to benefit the public.” (*O’Connor v. Uber Techs., Inc.*, No. 13-03826-EMC
25 (N.D. Cal. Jul. 29, 2016), ECF No. 736 at 2-3; see also *Salazar*, 2017 WL 1135801, *2 (quoting the
26 above passage).) Nothing in PAGA changes the strong judicial preference in support of approving
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1 settlements. (See, e.g., *Osumi v. Sutton* (2007) 151 Cal. App. 4th 1355, 1357 (confirming the “[s]trong
2 public policy in favor of the settlement of civil cases”).)

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

5 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
6 any civil action filed pursuant to this part.” (Cal. Lab. Code § 2699(l)(2).) The amendment also
7 required that the “proposed settlement shall be submitted to the agency at the same time that it is
8 submitted to the court.” As such, the Settlement and this Motion have been concurrently submitted to
9 the LWDA in accordance with this section. (Hawkins Decl. at ¶ 29.)

10 **A. The PAGA Settlement is Fair and Reasonable and Accomplishes the Objectives of**
11 **PAGA**

12 Although PAGA and its legislative history do not seem to require a Court to analyze a PAGA
13 settlement in comparison to the “value” of the claims, the penalties herein are reasonable when
14 considered in this context as well.

15 Based on Defendant’s representations, Plaintiff estimates there were approximately 2,641
16 Aggrieved Employees and 48,952 PAGA Pay Periods as of the date of mediation. (Id. at ¶ 32.) Here,
17 Plaintiff calculated that Defendant’s likely maximum potential penalty exposure was approximately
18 \$4,895,200. (Hawkins Decl. at ¶ 31 .) But, as discussed below, the risks that continued litigation
19 would entail show that the Settlement is a reasonable compromise of the disputed claims at issue and
20 resulted from extensive arm’s length negotiations. Further, Defendant disputes that any liability exists,
21 and if any were found to exist for any reason, asserts the Court would likely use its discretion to reduce
any penalties since it claims that any issues were unintentional and inconsequential. (Id.)

22 In *Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, the plaintiff argued that the trial
23 court should assess a \$200 civil penalty for each violation that occurred after the plaintiff submitted
24 their PAGA letter(s) to the LWDA, thereby informing defendant of their claims. However, the
25 defendant objected to this argument, relying on a later district court case construing *Amaral*, holding
26 that the trial court can only assess a \$200 civil penalty for “subsequent” violations after the date that
27 “a court or commission” notifies the employer of a violation. (*Amalgamated Transit Union Local*
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1309 v. *Laidlaw Transit Servs.* (C.D. Cal 2009) U.S. Dist. LEXIS 69842, *26; see also *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); *Vieyara-Flores v. Sika Corp.* (C.D. Cal. June 10, 2019) No. EDCV19606JVSKKX, 2019 WL 2436998, at *5 (“employers are not subject to heightened penalties . . . until a court or commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them of PAGA violations [thus] PAGA’s heightened penalty of \$200 for subsequent violations will not be calculated to determine the amount in controversy”); *Chen v. Morgan Stanley Smith Barney, LLC* (C.D. Cal., October 2, 2014) No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (“Under the Labor Code, if an employer does not have notice that they are committing a violation, they are not subject to the heightened penalties.”); *Trang v. Turbine Engine Components Technologies Corp.* (C.D. Cal. Dec. 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”).)

While Plaintiff argued that stacking was allowed, and that it was appropriate to award \$100 for each initial violation and \$200 for each subsequent violation, and that each violation of the Labor Code gave rise to a separate penalty such that Defendant could ultimately face liability in excess of \$42 million for initial and subsequent violations, Defendant argued that under no circumstances should Plaintiff be awarded more than \$100 per pay period for alleged PAGA violations and cited various cases (as set forth above) supporting such a result. (Hawkins Decl. at ¶ 34.) Defendant contended that PAGA penalties cannot and should not be stacked and that, even if they could, very few Courts have ever exercised discretion to stack them. (*Id.*) In this case, Plaintiff’s Counsel is cognizant that there is at least an argument that Defendant’s maximum exposure for Plaintiff’s primary claims (unpaid minimum and overtime wages, regular rate violations, meal period/rest break violations, and derivative claims for wage statement violations and waiting time penalties) would be approximately \$4,895,200.00 (48,952 violative pay periods multiplied by \$100 per pay period). (*Id.*)

However, this maximum amount does not take into account the various risks and defenses to the claims. For example, Defendant denies that a violation for each pay period can be established as

1 to each allegedly Aggrieved Employee due to its legally compliant policies and practices. Thus,
2 Defendant contends the claims would fail on the merits and the exposure numbers are overstated.
3 (Hawkins Decl. at ¶ 35). Defendant also alleges that any violations (which it denies) are limited to a
4 small group of employees and impact a limited number of workweeks, as the conduct alleged involved
5 only keyholders. (*Id.*) Defendant also maintains that its written policies were legally compliant and
6 any deviation from the policies was an issue of manager discretion which could not be tried on a
7 group-wide basis. (*Id.*) Defendant also claims that the nature of the work in its retail environment was
8 not such that it reasonably permitted the use of seats. (*Id.*) In sum, Defendant asserts unwavering
9 compliance with legal requirements, emphasizing punctual and complete payment to all employees,
10 proper staffing, provision of proper breaks, and accurate wage statements. Defendant is firm in its
11 stance that no employee, including the Plaintiff, was injured due to its actions or omissions. (*Id.*)

12 Defendant also generally asserts that individualized issues predominate the PAGA claims,
13 making the claims unmanageable for trial (despite Plaintiff’s contentions that there is no manageability
14 requirement for trial). (Hawkins Decl. at ¶ 35-36.) By way of example, Defendant argued that the
15 aggrieved employees operated in disparate roles at numerous locations throughout the state with
16 differing sales volumes, location sizes, product mix, and traffic. (Hawkins Decl., ¶ 36.)

17 Additionally, Defendant asserts that, even if the claims were proven, Plaintiff’s alleged
18 maximum exposure figure fails to acknowledge that courts have wide latitude to reduce the amount
19 of civil penalties “based on the facts and circumstances of a particular case” and if “to do otherwise
20 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code
21 § 2699(h).) (Hawkins Decl. at ¶ 37.) Moreover, Defendant argues against the merits of the underlying
22 claims and particularly to the extent that the “wilfulness” standard and/or “good faith” defenses
23 mitigate the civil penalty claims and rendered any such penalties as untenable. For these reasons, the
24 Parties submit that the agreed-upon PAGA Settlement is fair and reasonable. (*Id.*)

25 Despite these defenses, Plaintiff still obtained a settlement which commits Defendant to pay
26 \$612,500.00 for resolution of the action – a reasonable result in light of the risks and uncertainties
27 associated with the PAGA claims in this case. This is sufficient to accomplish the objectives of PAGA
28 while not being unjust, arbitrary and oppressive, or confiscatory. (Hawkins Decl. at ¶ 38.)

1 **B. Plaintiff's Separate Individual Settlement is Proper**

2 Plaintiff is a former employee of Defendant who took the extraordinary step to challenge her
3 former employer's actions by bringing this action. (Declaration of Raylynn Holmes ("Holmes Decl.")
4 at ¶¶ 1-22.) She did so in the belief that Defendant should be held accountable for its alleged Labor
5 Code violations. (Id. at ¶¶ 3-4, 10-11.) Plaintiff's actions have resulted in a substantial recovery under
6 PAGA. Plaintiff fully participated in the case's preparation, initiation, litigation, and mediation. (Id.
7 at ¶¶ 6-18.) She provided valuable information and documents pertaining to the claims and kept well
8 informed of the nature and extent of settlement discussions, and approved the same. (Id.).

9 Plaintiff has also resolved her individual claims against Defendant in exchange for receiving
10 an Individual Settlement Payment. (Ex. 1. at ¶¶ 9, 38(b); Hawkins Decl. at ¶ 40.) Notably, the
11 California Labor Code specifically permits a plaintiff to separately resolve claims for individual
12 damages from PAGA claims on behalf of aggrieved employees. California Labor Code section
13 2699(g)(1) provides that "[n]othing in this part shall operate to limit an employee's right to pursue or
14 recover ***other remedies available under state or federal law, either separately or concurrently with***
15 ***an action taken under this part***") (emphasis added). The rule permitting employees to pursue separate
16 individual claims while maintaining a PAGA claim aligns perfectly with the general principle that
17 PAGA claims (which seek civil penalties on behalf of Aggrieved Employees) are separate and distinct
18 from individual claims for unpaid wages and statutory penalties.

19 The California Supreme Court explained this principal in *Iskanian*, holding that "[t]he civil
20 penalties recovered on behalf of the state under the PAGA ***are distinct*** from the statutory damages to
21 which employee may be entitled in their individual capacities." (*Iskanian v. CLS Transportation, LLC*
22 (2014) 59 Cal. 4th 348, 381.) *Iskanian* directly discussed the separation between individual and PAGA
23 claims, and held that when an employee pursues both types of cases, a defendant must respond to ***both***
24 cases: "Iskanian must proceed with bilateral arbitration on his individual damages claims, and CLS
25 must answer the representative PAGA claims in some forum." (*Id.* at 391.) In the event of bifurcation
26 of individual and PAGA actions, one case may proceed first, while the other case is stayed. (*Id.*) In
27 addition, the California Supreme Court recently expounded upon this position in *ZB, N.A. v. Superior*
28 *Court* (2019) 8 Cal. 5th 175. There, when discussing the difference between statutory

1 damages/penalties (for an individual) versus civil penalties (under PAGA), the court clearly held that
2 “[p]ursuing civil penalties does not prevent an employee from separately or concurrently pursuing
3 unpaid wages and other remedies already available to her.” (*Id.* at 187.)

4 This approach – settling the separate and distinct PAGA and individual claims – has been
5 approved by courts throughout California. (See *ZB, N.A.*, *supra*, 8 Cal. 5th at 187 (“Pursuing civil
6 penalties does not prevent an employee from separately or concurrently pursuing unpaid wages and
7 other remedies already available to her.”); *Caliber Bodyworks, Inc. v Superior Court* (2005) 134 Cal.
8 App. 4th 365, 370-74 (confirming propriety of bringing PAGA claims and individual claims, noting
9 that in addition to PAGA claims, an employee may bring claims directly against employer for *statutory*
10 *penalties* and *unpaid wages*, while PAGA permits an aggrieved employee to initiate a private civil
11 action on behalf of himself and other current or former employees to recover **civil penalties** if the
12 LWDA does not do so.) (emphasis added).) This is because the goals of these two types of action are
13 very different. The individual action permits employees to recover individual damages, whereas
14 PAGA has the stated goal of improving enforcement of existing Labor Code obligations. (*Id.*) Thus,
15 “[i]n a lawsuit brought under [PAGA], the employee plaintiff represents the same legal right and
16 interest as state labor law enforcement agencies – namely, recovery of **civil penalties** that otherwise
17 would have been assessed and collected by the Labor Workforce Development Agency.” (*Arias v.*
18 *Sup. Ct.* (2009) 46 Cal. 4th 969, 986 (emphasis added).) A PAGA action “is fundamentally a law
19 enforcement action designed to protect the public and not to benefit private parties” and represents “a
20 dispute between an employer and the *state*, which alleged directly or through its agents – either [the
21 Agency] or aggrieved employees – that the employer has violated the Labor Code.” (*Iskanian, supra*,
22 59 Cal. 4th at 381, 386-87 (emphasis in original).) As such, PAGA actions “directly enforce *the state’s*
23 interest in penalizing and deterring employers who violate California’s labor laws” and, the State of
24 California is the “real party in interest.” (*Id.* at 387 (emphasis in original).) This is entirely distinct
from an individual claim, whereby an employee seeks individual relief for Labor Code violations.

25 The Individual Settlement Payment is reasonable and represents less than two percent of the
26 Gross Settlement Amount. Absent the actions taken by Plaintiff, neither the LWDA nor the Aggrieved
27 Employees would have reaped the rewards of this action. Plaintiff respectfully requests that this Court
28 approve the Settlement Agreement and the Individual Settlement Payment.

1 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE**
2 **FAIR AND REASONABLE**

3 For their efforts and risks undertaken in obtaining a common fund settlement that benefits the
4 LWDA and Aggrieved Employees, Plaintiff seeks a payment of \$204,166.67 (1/3 of the GSA) to
5 Plaintiff's Counsel for reasonable attorneys' fees. Additionally, the Parties agreed to reimburse
6 Plaintiff's Counsel for their actual litigation costs up to \$18,500.00 (requested \$15,933.06). These
7 fees and costs are warranted and within the range of fees commonly awarded in similar cases.

8 **A. Plaintiff's Counsel are Entitled to Recover Attorney's Fees Under The Common Fund**
9 **Doctrine In This Qui Tam Action**

10 PAGA provides that a plaintiff is entitled to recover reasonable attorneys' fees, expenses, and
11 costs under section 2699(g)(1) of the California Labor Code, which provides that, "Any employee
12 who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs...." As
13 discussed below, in a *qui tam* action, reasonable attorney's fees and costs are typically awarded under
14 the common fund doctrine where, as here, the litigation creates a common fund of money in a specific
15 amount for the benefit of others.

16 "A qui tam action is one brought under a statute that allows a private person to sue as a private
17 attorney general to recover damages or penalties, all or part of which will be paid to the government."
18 (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal. App. 4th 487, 491-492.) "A qui
19 tam action 'is a type of private attorney general lawsuit' [citation], in which 'the qui tam plaintiff
20 stands in the shoes of the state or political subdivision [citation].'" (*Id.* at p. 501.) As the name of the
21 PAGA statute makes clear (*e.g.* "Labor Code Private Attorney General Act"), a PAGA action is a qui
22 tam action because the statute allows the employee plaintiff, acting as the proxy of the state's labor
23 law enforcement agency, to sue his or her employer for Labor Code violations and recover civil
24 penalties that otherwise would have been assessed and collected by the LWDA. (*Iskanian v. CLS*
25 *Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380.) "A PAGA representative action is therefore
26 a type of *qui tam* action." (*Id.* at p. 382.) Indeed, the majority of the civil penalties recovered in a
27 PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (*e.g.*, 75%
28 paid to the state; 25% paid to the aggrieved employees). (See Cal. Lab. Code § 2699(i).)

1 As here, where a common fund is created in a qui tam action by the successful litigation of a
2 plaintiff and her attorneys, the plaintiff's attorneys are entitled to recover their fees from the common
3 fund. (*Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 89-91.) In *Bank of America*, California
4 taxpayers compelled the State Controller to enforce the Unclaimed Property Law against banks who
5 were retaining accounts that should have been turned over to the State. Because of the success of the
6 taxpayers' lawsuit, a common fund was created in favor of some depositors and the State of California.
7 (*Id.*) When the taxpayers' attorneys sought recovery of their attorney's fees from the judgment under
8 the common fund doctrine, the Controller opposed the request. The Court of Appeal affirmed the trial
9 court's fee award to the taxpayers' counsel under the common fund doctrine stating:

10 "Those benefiting from the recovery of the fund, in this case some depositors and
11 eventually the People of the State of California, must bear their share of the cost of
12 litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each
13 claimant's share reduced proportionately. To the extent the judgment relies upon
14 section 1021.5 for recovery of attorney fees, it must be modified to confine the award
15 of fees to the common fund theory." *Id.* at p. 91.

16 In this case, the Settlement creates a common fund for the benefit of the employees and the
17 State of California. Thus, these beneficiaries must bear their share of the costs and attorney's fees,
18 which must be deducted from the settlement amount under the common fund theory. (*Id.*) Moreover,
19 such fees are deducted as a percentage of the settlement amount. (*Boeing Co. v. Van Gemert* (1980)
20 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d
21 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027;
22 *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.)

23 The California Supreme Court also upheld the use of the common fund theory of recovery for
24 attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, 506. In *Laffitte*, the settlement
25 created a common fund of \$19 million. This ruling was consistent with the Court's prior rulings
26 recognizing that "when a number of persons are entitled in common to a specific fund, and an action
27 brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such
28 ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest* (1977) 20 Cal. 3d
29 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who recovers a common
30 fund . . . is entitled to reasonable attorneys' fees from the fund as a whole;" *Mills v. Electric Auto-Lite*

Co. (1970) 396 U.S. 375, 393-394 (discussing the acceptance of awarding attorneys’ fees and expenses from a settlement where “litigation has conferred a substantial benefit on the members of an ascertainable class”); see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 26 (“[f]ee spreading occurs when a settlement or adjudication results in the establishment of a separate or so-called common fund for the benefit of the class.”).)

Accordingly, the common fund doctrine allows a court to award attorneys’ fees based upon a percentage of the total fund created for the satisfaction of beneficiaries’ claims...” (*Dunk v. Ford Motor, Co.* (1996) 48 Cal. App. 4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal. App. 3d 102, 1,282.91 [application of the percentage of the fund recovery depended on “[t]he critical point” that “a fund was created from which attorneys’ fees could be paid”]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed. 2002).)

California law has long upheld the percentage of the recovery method for awarding attorneys’ fees where a fund is established. (See e.g., *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 726; *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 563 (“fees based on a percentage of the benefits are in fact appropriate in large class actions...”); *Sanders v. City of Los Angeles* (1970) 3 Cal. 3d 252, 261, 263 (affirming award of attorneys’ fee based on percentage of recovery); *Chavez v. Netflix, Inc.*, *supra*, 162 Cal. App. 4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets, Inc.* (2005) 127 Cal. App. 4th 387, 397 (the common fund doctrine is “frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class”); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 (“courts recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method and the percentage of recovery”).)

Based on the foregoing, awarding attorneys’ fees of one-third of the Settlement Amount is fair and warranted in light of the PAGA settlement that was reached on behalf of the State of California and Aggrieved Employees. Accordingly, the requested fees are reasonable and appropriate.

B. The Percentage Fee of the Gross Settlement Amount Is Fair And Reasonable

An award of fees from the Gross Settlement Amount under the common fund doctrine prevents unjust enrichment of those who benefit from the common fund created through Plaintiff’s Counsel’s

1 successful efforts and furthers the important goal of attracting competent counsel to handle
2 representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Int'l. Inc.* (2016) 1
3 Cal. 5th 480, 503.) In affirming the use of the common fund doctrine, the California Supreme Court
4 summarized the benefits of the percentage method of recovery stating: “The recognized advantages
5 of the percentage method—including relative ease of calculation, alignment of incentives between
6 counsel and the class, a better approximation of market conditions in a contingency case, and the
7 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the
8 litigation [citations]—convince us the percentage method is a valuable tool that should not be denied
9 our trial courts.” (*Id.*)

10 Among the factors considered in determining whether the requested fee percentage is
11 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
12 plaintiff’s counsel and the quality of work performed by plaintiff’s counsel; (4) the contingent nature
13 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.
14 (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.) All these factors support an
award here of one-third of the common fund.

15 First, Plaintiff’s counsel achieved a significant PAGA-only settlement in a case that involved
16 highly contested issues that were primarily related to short periods of time that were allegedly unpaid,
17 as well as meal period and rest break violations. (Holmes Decl. at ¶¶ 2-3; Hawkins Decl. ¶38.)

18 Second, Plaintiff faced substantial risks going forward with the litigation. As discussed above,
19 Defendant raised numerous defenses which threatened all recovery and it would have taken significant
20 time to realize any recovery in this action through trial. (Hawkins Decl. at ¶¶ 20-21, 38.)

21 Third, Plaintiff’s Counsel are experienced class and representative PAGA action litigators, and
22 have achieved some of the largest representative awards in the State of California. (Hawkins Decl. at
23 ¶¶ 42-51.) This experience and expertise, combined with the high quality of work performed in this
24 case by Plaintiff’s Counsel, resulted in the settlement achieved in this case. (*Id.*)

25 Fourth, the request for attorney’s fees falls well within the norms accepted by state and federal
26 courts in California in comparable wage and hour actions actually handled by Plaintiff’s Counsel.
27 (Hawkins Decl. ¶¶ 53-57, Ex. 5-6.)

For all of the above reasons, a fee award here in the amount of one-third of the Gross Settlement Amount is fair and reasonable.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar “cross-check.”¹ (*Lealao, supra*, 82 Cal. App. 4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal. App. 4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”).)

As set forth in the Hawkins Declaration submitted herewith, the lodestar between the attorneys that worked on this case is approximately \$180,140. (Hawkins Decl. at ¶ 53; Exs. 5-6.) This results in a reasonable **1.13** multiplier, which demonstrates that the requested fee is justified, reasonable and appropriate. The total lodestar is summarized in the following table:

Lodestar Summary

Attorney	Experience	Hourly Rate	Hours	Total
James R. Hawkins	25	\$1050	94.9	\$99,645
Christina M. Lucio	16	\$775	86.6	\$67,115
Eric D. Tims	1.5	\$450	25.2	\$11,340
Hawkins (paralegals)		\$200	10.2	\$2,040
TOTAL				\$180,140

¹ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended. (Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); see also *In re Activision* (N.D. Cal 1989) 723 F. Supp 1373.)

(*Id.*) The hourly rates above are comparable to those of other attorneys with equal or similar experience. The starting point in determining the appropriate hourly fee is to discern the prevailing rate for similar work in the pertinent geographic region. (See Herr, *Manual for Complex Litigation*, § 14.122 (1984) (“reasonable fees ... are to be calculated according to the prevailing market rates in the relevant community.”).) Thus, not only are Plaintiff’s Counsel’s rates reasonable and typical, but the attorneys’ fees requested are in line with the lodestar, which further confirms that the fee request is fair and reasonable. (Hawkins Decl. ¶¶ 55-57, Exs. 5-6.)

D. The Requested Litigation Costs are Fair and Reasonable

Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. (See *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Plaintiff’s Counsel are permitted to recover their litigation costs and expenses under the common fund doctrine. (See *Serrano v. Priest* (1977) 20 Cal. 3d 25, 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal. App .4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by . . . [Plaintiffs’] attorneys”).) Furthermore, Plaintiff’s Counsel are entitled to recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” (*Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.)

The Settlement Agreement authorizes Plaintiff’s Counsel to recover litigation costs up to \$18,500.00. However, the actual costs through the approval hearing are projected to be \$15,933.06, which is the amount requested. (Hawkins Decl. at ¶ 58, Ex. 7.) The remaining balance will be added to the PAGA Fund. These costs are reasonable, uncontested, and should be approved. (*Id.*)

VII. SUBMISSION TO THE LWDA

The Settlement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code section 2699(l)(2). The proof of electronic submission is attached as **Exhibit 4** to the Hawkins Declaration. (Hawkins Decl. at ¶ 29.)

VIII. THE SETTLEMENT ADMINISTRATOR

Phoenix Settlement Administrators will serve as the Settlement Administrator and will be

1 responsible for processing the settlement payments and providing notice to the Aggrieved Employees.
2 They have estimated that the costs of administration will not exceed \$14,000.00.

3 **IX. CONCLUSION**

4 In the present case, a thorough evaluation of Plaintiff's claims supports a finding that the
5 settlement is fair, adequate and reasonable. The statutory purposes of PAGA may be fulfilled even
6 with a relatively small award on the PAGA claim itself, because such "a settlement not only vindicates
7 the rights of the class members as employees but may have a deterrent effect upon the defendant
8 employer and other employers, an objective of PAGA." (*Viceral v. Mistras Group, Inc.* (N.D. Cal.,
9 Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *9 (citing *O'Connor v. Uber*
10 *Technologies, Inc.* (N.D. Cal. Aug. 18, 2016) No. 13-CV-03826-EMC, 2016 WL 4398271, at *18.))
11 Here, the settlement sum obtained is reasonable and should be approved.

12 Based on the above, Plaintiff respectfully requests that this Court: 1) approve the Parties'
13 settlement and order the Parties to carry out the terms of the Settlement Agreement, and 2) enter a
14 Final Judgment thereon.

15
16 DATED: December 27, 2023

17 **JAMES HAWKINS APLC**

18
19 By: /s/ Christina M. Lucio

20 James R. Hawkins
21 Christina M. Lucio
22 Mitchell J. Murray

23 Attorneys for Plaintiff
24 RAYLYNN HOLMES on behalf of herself and
25 all others similarly situated
26
27
28



Superior Court of Alameda County Public Portal

Make a Reservation

HOLMES vs PET FOOD EXPRESS, LTD., A CALIFORNIA CORPORATION, et al.

Case Number: 22CV014140 Case Type: Civil Unlimited Category: Other Employment Complaint Case

Date Filed: 2022-07-12 Location: Rene C. Davidson Courthouse - Department 21

Reservation

Case Name:

HOLMES vs PET FOOD EXPRESS, LTD., A CALIFORNIA CORPORATION, et al.

Case Number:

22CV014140

Type:

Motion (Motion for Approval of PAGA Settlement)

Status:

RESERVED

Filing Party:

RAYLYNN HOLMES (Plaintiff)

Location:

Rene C. Davidson Courthouse - Department 21

Date/Time:

12/29/2023 9:00 AM

Number of Motions:

1

Reservation ID:

947388561448

Confirmation Code:

CR-ZAKFY8FOWNIKHNFEW

Fees

Description	Fee	Qty	Amount
Motion (name extension)	0.00	1	0.00
Court Technology Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount:

\$1.00

Type:

Visa

Account Number:

XXXX6358

Authorization:

02062D

Payment Date:

n/a

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