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on behalf of themselves and all others similarly situated

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF KERN

ROSIO VENTURA and DUANA MARTINEZ,
individually and on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

CONDUENT COMMERCIAL SOLUTIONS,
LLC, a Nevada Limited Liability Company, and
DOES 1-50, inclusive,

Defendant.

Case No. BCV-22-102043-TSC

Assigned to: Hon. Thomas S. Clark
Dept.: 17

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

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

Date: March 14, 2024
Time: 8:30 AM
Dept: 17

Complaint Filed: August 9, 2022
FAC Filed: February 16, 2024
Trial: Not Set

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

3 **PLEASE TAKE NOTICE** that on March 14, 2024, at 8:30 AM, Plaintiffs Rosio Ventura
4 and Duana Martinez (“Plaintiffs”) will, and hereby do, move this Court for an Order (1) approving the
5 Parties’ settlement and ordering the Parties to carry out the terms of the PAGA Settlement and Release
6 Agreement (attached as **Exhibit 1** to the Declaration of James R. Hawkins, submitted concurrently
7 herewith); and (2) and entering a Final Judgment thereon.

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

14 Pursuant to California Labor Code § 2699(1)(2), a copy of the Settlement Agreement and
15 Release of PAGA Claims was filed with the LWDA on February 20, 2024. (Declaration of James R.
16 Hawkins, **Exhibit 4.**)

17
18 DATED: February 20, 2024

JAMES HAWKINS APLC

19
20 By:



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

21
22
23 Attorneys for Plaintiffs
24 ROSIO VENTURA AND DUANA
25 MARTINEZ on behalf of herself and
26 all others similarly situated
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As detailed below, the Settlement is fair, reasonable, and adequate. Plaintiffs request that the Court: (1) enter an Order approving the settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698, *et seq.* and ordering the Parties to carry out the terms of the Settlement Agreement; and (2) enter a Final Judgement thereon.

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Procedural History

This PAGA action was filed on August 9, 2022, in Alameda Superior Court, Case No. 22CV014140.¹ The complaint seeks PAGA penalties for Defendant’s alleged violations of various provisions of the California Labor Code and IWC Wage Order including: (1) failure to accurately pay all wages earned, including minimum wage and overtime; (2) failure to provide lawful meal periods, or pay one hour of premium pay at the regular rate, in lieu thereof; (3) failure to authorize and permit lawful rest breaks, or pay one hour of premium pay at the regular rate, in lieu thereof; (4) failure to timely pay wages due and payable during employment; (5) failure to provide compliant wage statements to employees; (6) failure to reimburse employees for necessary business expenses; (7) failure to keep accurate payroll records; (8) failure to timely pay all wages owed upon separation of employment; and (9) failure to pay sick leave at the proper rate. Defendant denies the allegations, any failure to comply with the laws, and all liability for the claims and causes alleged in the complaint. (Declaration of James R. Hawkins (“Hawkins Decl.”), ¶¶ 5-6.)

Pursuant to California Labor Code § 2699.3(a), Plaintiff Ventura and Plaintiff Martinez gave timely written notice to Defendant and to the LWDA on June 3, 2022, and January 6, 2023, respectively. (Hawkins Decl. at ¶¶ 4 and 8; see also **Exhibits 2 and 3**).

On February 16, 2024, in connection with the Settlement, Plaintiffs filed an Amended Complaint to add Plaintiff Duana Martinez as a named Plaintiff. (Hawkins Decl., ¶ 13-14).

B. Discovery and Investigation

¹ Plaintiff Ventura initially filed a class action which was subsequently dismissed without prejudice as a result of an arbitration agreement with class action waiver between the Parties. She separately filed this PAGA action. (Hawkins Decl. ¶ 4.)

1 In preparation for mediation, the Parties exchanged documents and information that allowed
2 both sides to calculate the potential damages and evaluate potential risks. During the litigation and in
3 the mediation preparation process, Plaintiffs' Counsel analyzed, researched, and investigated the
4 potential legal and factual issues, including matters related to calculating damages, trial, and appellate
5 issues and risks. During this exchange of information, Defendant produced documents and pay records
6 that enabled Plaintiffs to analyze the alleged unpaid wages, meal period/rest break violations and other
7 claims at issue. To that end, PAGA Counsel engaged in interviews, obtained personnel records, a
8 random sampling of time and payroll records, aggrieved employee data, policy and procedure
9 documents, exemplar wage statements, exemplar arbitration agreements, among other documents and
10 information, to aid in preparing Plaintiffs' evaluation of the claims and formulation of a damages
11 model. (Hawkins Decl. at ¶¶ 15-21.) This shared data facilitated a precise evaluation of the
12 Defendant's liability and potential damages based on the presented claims. (*Id.*).

13 The Parties' counsel also engaged in thorough discussions regarding the documents and data,
14 evaluating the strengths of their respective claims, defenses, and other pivotal factors for assessment
15 and settlement considerations. (*Id.* at ¶ 21.). Throughout this preparatory and information exchange
16 phase, both Parties remained committed and worked to ensure comprehensive information sharing,
17 thus ensuring well-informed discussions leading up to the mediation. (*Id.*).

20 **C. Mediation**

21 Following extensive discussions, as well as negotiations and the exchange of informal
22 discovery, the Parties engaged in a full-day session of mediation on October 16, 2023, with
23 experienced wage-and-hour mediator Steven G. Mehta, Esq. (Hawkins Decl. at ¶ 22.). The Parties
24 were unable to reach a resolution on their own, but after the mediation, Mr. Mehta made a mediator's
25 proposal that set forth the material terms of a proposed PAGA settlement. The Parties accepted the
26 mediator's proposal and entered into a Settlement Terms Sheet, memorializing the key settlement
27
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terms. (*Id.*) Thereafter, the Parties memorialized the settlement terms in a long-form Settlement Agreement which is now presented for approval. (*Id.* at ¶ 23.).

III. SUMMARY OF THE SETTLEMENT

Plaintiffs and their counsel believe that the settlement (which is the product of a mediator’s proposal) is balanced and just for all parties involved. It is fair, reasonable and adequate. The settlement’s terms are detailed in the Settlement Agreement attached as **Exhibit 1** to the Hawkins Declaration, hereby incorporated by reference, encompassing the primary conditions:

A. Aggrieved Employees

The Aggrieved Employees includes “all current and former non-exempt employees employed in California by Conduent Commercial Solutions, LLC between August 1, 2021, and through January 14, 2024.” (Ex. 1, Settlement, at ¶ 9.) It is estimated that the number of Aggrieved Employees is 610 (Hawkins Decl. ¶ 32.)²

B. Amount of the Settlement and Allocation of Settlement Amounts

1. Gross Settlement Amount

In consideration for this Settlement and a release by Plaintiffs, Aggrieved Employees, and the LWDA, as provided herein, Defendant has agreed to pay \$500,000. (Ex. 1, Settlement, at ¶¶ 18, 40.)

2. Settlement Allocation

The Gross Settlement Amount is allocated as follows:

Settlement Administration Costs	\$7,550.95
PAGA Counsel’s Costs	\$13,427.31
Enhancement and General Release Payments	\$15,000 (\$7,500 to each representative)
PAGA Counsel’s Attorneys’ Fees	\$166,666.67
LWDA Share (75% of General PAGA Penalty Fund)	\$223,016.30
AE Share (25% of General PAGA Penalty Fund)	\$74,338.77

² It is currently estimated that there are 610 Aggrieved Employees for the period August 1, 2021, to January 4, 2024 and 19,688 pay periods.

1
2
3 **3. *Formula for Division of Individual PAGA Payments***

4 AE Share is the portion (25%) of the General PAGA Penalty Fund distributed to the Aggrieved
5 Employees. The AE Share Variable is the AE Share multiplied by the quotient of (a) the number of
6 Eligible Pay Periods worked by that Aggrieved Employee during the applicable Covered Period
7 divided by (b) the total number of Eligible Pay Periods worked by all Aggrieved Employees during
8 the Covered Period. Each Aggrieved Employee (including Plaintiffs) shall receive a pro rata share of
9 the AE Share equal to the AE Share multiplied by the Aggrieved Employee's AE Share Variable.

10 The Administrator will report the Individual AE Shares on IRS 1099 Forms. (Ex. 1 at ¶ 45.)

11 It is estimated that there are approximately 610 Aggrieved Employees and 19,688 Pay Periods
12 from August 1, 2021, to January 4, 2024. (Hawkins Decl. at ¶ 32.).

13 **4. *Release by Aggrieved Employees***

14 Upon the entry of Judgement and funding of the Gross Settlement Amount, Plaintiffs, the State
15 of California on whose behalf Plaintiffs have brought the Litigation, and all the Aggrieved Employees
16 will be forever barred from pursuing against Defendant and Defendant Releasees any and all claims
17 for civil penalties under PAGA arising during the applicable Covered Period that were alleged in the
18 Litigation or any associated LWDA submissions by Plaintiffs, or that could have been alleged based
19 on the facts alleged in Plaintiffs' complaint or any associated LWDA submission by Plaintiffs.

20 The claims released by the Settlement include all claims for civil penalties and associated fees
21 or costs related to claims for unpaid regular or premium wages (as defined by the Labor Code),
22 meal/rest period violations and/or premium payments for meal and/or rest period violations, wage
23 statement violations, wage notice violations, wage payment timing violations, record-keeping
24 violations, business expense reimbursement violations, sick and vacation pay rate violations, violation
25 of the unfair competition law, and to the extent not covered above, any and all claims pled in the
26 Litigation or the associated notices to the LWDA, including without limitation all associated claims
27 for civil penalties and associated fees or costs related to alleged or actual violations of Labor Code
28 sections 201, 202, 203, 204, 210, 216, 218.6, 226, 226.3, 226.7, 246, 256, 432.5, 510, 512, 558, 1174,

1 1175, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2802, 2698, and 2699; actual or alleged violations
2 of IWC Wage Orders 4-2001, 5-2001, and 7-2001; and actual or alleged violations of Civil Code
3 section 3287 and Business & Professional Code section 17200, et seq. (Ex. 1, Settlement, ¶ 46).

4 The Aggrieved Employees, other than the Plaintiffs, will not be deemed to have released any
5 individual, non-PAGA claims by virtue of this PAGA Settlement and the associated entry of Judgment.
6 As the release is narrowly related to the claims alleged, the Parties contend that the release is proper
7 and reasonable. (*Id.*)

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

9 **A. Relevant Statutory History**

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

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

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

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

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

C. Standards for Court Approval of PAGA Enforcement Settlement

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

1
2 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS**
3 **COURT APPROVAL**

4 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
5 any civil action filed pursuant to this part.” (Cal. Lab. Code § 2699(1)(2).) The amendment also
6 required that the “proposed settlement shall be submitted to the agency at the same time that it is
7 submitted to the court.” As such, the Settlement and this Motion have been concurrently submitted to
8 the LWDA in accordance with this section. (Hawkins Decl. at ¶ 39; See Ex. 4.)

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

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

14 Based upon the current estimates provided by Defendant, Plaintiff’s Counsel estimates that
15 maximum realistic liability that Defendant faced during the PAGA period is approximately
16 \$1,968,800.00 based on approximately 610 Aggrieved Employees for the period of August 1, 2021,
17 to January 4, 2024 and 19,688 pay periods (19,688 violative pay periods x \$100 per pay period). The
18 risks associated with continuing the litigation underscore that the Settlement represents a fair
19 resolution of the contested claims, achieved through thorough arm's length negotiations. (Hawkins
20 Decl. at ¶ 43-50). Further, Defendant disputes that any liability exists, and if any were found to exist
21 for any reason, asserts the Court would likely use its discretion to reduce any penalties since it claims
22 that any issues were unintentional and inconsequential. (*Id.* at 43.)

23 While Plaintiffs argued that Defendants could face over \$20 million in penalties based upon
24 the assessment of initial and subsequent penalties, Plaintiffs are aware of adverse authority and the
25 attendant risk. In *Amaral v. Cintas Corp.* (2008) 163 Cal. App. 4th 1157, the plaintiff argued that the
26 trial court should assess a \$200 civil penalty for each violation that occurred after the plaintiff
27 submitted their PAGA letter(s) to the LWDA, thereby informing defendant of their claims. However,
28 the defendant objected to this argument, relying on a later district court case construing *Amaral*,

1 holding that the trial court can only assess a \$200 civil penalty for “subsequent” violations after the
2 date that “a court or commission” notifies the employer of a violation. (*Amalgamated Transit Union*
3 *Local 1309 v. Laidlaw Transit Servs.* (C.D. Cal 2009) U.S. Dist. LEXIS 69842, *26; see also *Bernstein*
4 *v. Virgin Am., Inc.* (9th Cir. 2021) 990 F.3d 1157, 1173 (reversing judgment as to “heightened civil
5 penalties” because the defendant was not given notice by the Labor Commissioner when the
6 “subsequent” violations occurred); *Vieyara-Flores v. Sika Corp.* (C.D. Cal. June 10, 2019) No.
7 EDCV19606JVSKKX, 2019 WL 2436998, at *5 (“employers are not subject to heightened penalties
8 . . . until a court or commissioner notifies the employer that it is in violation of the Labor Code . . .
9 [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them of PAGA
10 violations [thus] PAGA’s heightened penalty of \$200 for subsequent violations will not be calculated
11 to determine the amount in controversy”); *Chen v. Morgan Stanley Smith Barney, LLC* (C.D. Cal.,
12 October 2, 2014) No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (“Under the Labor Code, if
13 an employer does not have notice that they are committing a violation, they are not subject to the
14 heightened penalties.”); *Trang v. Turbine Engine Components Technologies Corp.* (C.D. Cal. Dec.
15 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (“courts have held that employers are
16 not subject to heightened penalties for subsequent violations unless and until a court or commissioner
17 notifies the employer that it is in violation of the Labor Code”).)

17 While Plaintiffs argued that stacking was allowed, and that it was appropriate to award \$100
18 for each initial violation and \$200 for each subsequent violation, and that each violation of the Labor
19 Code gave rise to a separate penalty such that Defendant could ultimately face liability in excess of
20 \$23 million for initial and subsequent violations, Defendant argued that under no circumstances should
21 Plaintiffs be awarded more than \$100 per pay period for alleged PAGA violations and cited various
22 cases (as set forth above) supporting such a result. (Hawkins Decl. at ¶ 41, 44-45.). Defendant
23 contended that PAGA penalties cannot and should not be stacked and that, even if they could, very
24 few Courts have ever exercised discretion to stack them. (*Id.*) In this case, Plaintiffs’ Counsel is
25 cognizant that there is at least an argument that Defendant’s maximum realistic exposure for Plaintiffs’
26 primary claims would be approximately \$1,968,800.00 (19,688 violative pay periods multiplied by
27 \$100 per pay period). (*Id.* at ¶ 45.)

1 However, this maximum amount does not take into account the various risks and defenses to
2 the claims herein. For example, Defendant asserts that it adheres to a comprehensive time reporting
3 policy, ensuring employees are paid for all time worked, including overtime. (Hawkins Decl. at ¶¶
4 46-49). It asserted that its policies are facially compliant and that the timekeeping system
5 automatically compensates for breaks and that employees are encouraged to report any policy
6 violations; managers are prohibited from asking employees to work off the clock; and Defendant
7 contends that it adds five minutes to each remote worker's daily timecard to account for login and boot
8 up time. (*Id.* at ¶ 47)

9 Defendant also argues that it provides more than the required rest breaks and meal periods in
10 accordance with the law. It argued that employees are provided with two 15-minute paid rest breaks
11 and an unpaid 30-minute meal break for shifts exceeding five hours. (*Id.* at ¶ 48.) For shifts longer
12 than ten hours, a second meal break is provided. Defendant contends that its rest period policies exceed
13 the state law requirements, which mandate a 10-minute paid rest break. As such, Defendant contends
14 there are no rest break violations. (*Id.*) Defendant also argues that they provide necessary equipment,
15 like computers and software, for remote work and reimburse employees for internet expenses. (*Id.*)

16 Additionally, Defendant asserts that, even if the claims were proven, Plaintiff's alleged
17 maximum exposure figure fails to acknowledge that courts have wide latitude to reduce the amount
18 of civil penalties "based on the facts and circumstances of a particular case" and if "to do otherwise
19 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Cal. Lab. Code
20 § 2699(h).) (Hawkins Decl. at ¶ 49-50.) Moreover, Defendant argues against the merits of the
21 underlying claims and particularly to the extent that the "wilfulness" standard and/or "good faith"
22 defenses mitigate the civil penalty claims and rendered any such penalties as untenable. For these
23 reasons, the Parties submit that the agreed-upon PAGA Settlement is fair and reasonable. (*Id.*)

24 Despite these defenses, Plaintiffs still obtained a settlement which commits Defendant to pay
25 \$500,000 for resolution of the action (approximately 46% of the realistic liability)– a reasonable result
26 in light of the risks and uncertainties associated with the PAGA claims in this case. This is sufficient
27 to accomplish the objectives of PAGA while not being unjust, arbitrary and oppressive, or
28 confiscatory. (Hawkins Decl. at ¶ 24, 26-28, 50.)

B. Plaintiffs' Enhancement and General Release Payments are Proper

1 Plaintiffs are former employees of Defendant who took the extraordinary step to challenge
2 their former employer's actions by bringing this action. (See Declaration of Rosio Ventura (“Ventura
3 Decl.”) at ¶¶ 9-23; Declaration of Duana Martinez (“Martinez Decl.”) at ¶¶ 9-23.) Plaintiffs did so in
4 the belief that Defendant should be held accountable for its alleged Labor Code violations. (*Id.*)
5 Plaintiffs’ actions have resulted in a substantial recovery under PAGA. Plaintiffs fully participated in
6 the case’s preparation, initiation, litigation, and mediation. (*Id.*) They provided valuable information
7 and documents pertaining to the claims and kept well informed of the nature and extent of settlement
8 discussions, and approved the same. (*Id.*).

9 Plaintiffs have also resolved their individual claims against Defendant in exchange for
10 receiving an Enhancement and General Release Payments. (Ex. 1. at ¶¶ 40(d), 44; Hawkins Decl. at ¶
11 52-53.) Notably, the California Labor Code specifically permits a plaintiff to separately resolve claims
12 for individual damages from PAGA claims on behalf of aggrieved employees. California Labor Code
13 section 2699(g)(1) provides that “[n]othing in this part shall operate to limit an employee’s right to
14 pursue or recover ***other remedies available under state or federal law, either separately or***
15 ***concurrently with an action taken under this part***”) (emphasis added). The rule permitting employees
16 to pursue separate individual claims while maintaining a PAGA claim aligns perfectly with the general
17 principle that PAGA claims (which seek civil penalties on behalf of Aggrieved Employees) are
18 separate and distinct from individual claims for unpaid wages and statutory penalties.

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

1 difference between statutory damages/penalties (for an individual) versus civil penalties (under
2 PAGA), the court clearly held that “[p]ursuing civil penalties does not prevent an employee from
3 separately or concurrently pursuing unpaid wages and other remedies already available to her.” (*Id.* at
4 187.)

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

28 The Enhancement and General Release Payments are reasonable and represent only a small
percentage of the Gross Settlement Amount. Absent the actions taken by Plaintiffs, neither the LWDA

1 nor the Aggrieved Employees would have reaped the rewards of this action. Plaintiffs respectfully
2 request that this Court approve the Settlement Agreement and the Enhancement and General Release
3 Payments in amount of \$7,500 to each Plaintiff.

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

6 For their efforts and the risk undertaken in obtaining a common fund settlement that benefits
7 the LWDA and Aggrieved Employees, the Parties allocated \$166,666.67 to PAGA Counsel for
8 reasonable attorneys' fees, or one-third of the Settlement Amount. Additionally, the Parties agreed to
9 reimburse PAGA Counsel for their actual litigation costs of \$13,427.31. These fees and costs are
10 warranted under the law and within the range of fees commonly awarded in similar cases.

11 **A. PAGA Counsel are Entitled to Recover Attorney's Fees Under the Common Fund**
12 **Doctrine In This *Qui Tam* Action**

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

21 "A *qui tam* action is one brought under a statute that allows a private person to sue as a private
22 attorney general to recover damages or penalties, all or part of which will be paid to the government."
23 (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal. App. 4th 487, 491-492.) "A *qui*
24 *tam* action 'is a type of private attorney general lawsuit' [citation], in which 'the *qui tam* plaintiff
25 stands in the shoes of the state or political subdivision [citation].'" (*Id.* at p. 501.) As the name of the
26 PAGA statute makes clear (*e.g.* "Labor Code Private Attorney General Act"), a PAGA action is a *qui*
27 *tam* action because the statute allows the employee plaintiff, acting as the proxy of the state's labor
28 law enforcement agency, to sue his or her employer for Labor Code violations and recover civil
penalties that otherwise would have been assessed and collected by the LWDA. (*Iskanian v. CLS*

1 *Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380.) “A PAGA representative action is therefore
2 a type of *qui tam* action.” (*Id.* at p. 382.) Indeed, the majority of the civil penalties recovered in a
3 PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (e.g., 75%
4 paid to the state; 25% paid to the aggrieved employees). (See Cal. Lab. Code § 2699(i).)

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

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

20 In this case, the Settlement creates a common fund for the benefit of the employees and the
21 State of California. Thus, these beneficiaries must bear their share of the costs and attorney’s fees,
22 which must be deducted from the settlement amount under the common fund theory. (*Id.*) Moreover,
23 such fees are deducted as a percentage of the settlement amount. (*Boeing Co. v. Van Gemert* (1980)
24 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d
25 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027;
26 *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.)

27 The California Supreme Court also upheld the use of the common fund theory of recovery for
28 attorney’s fees in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal. 5th 480, 506. In *Laffitte*, the settlement
created a common fund of \$19 million. This ruling was consistent with the Court’s prior rulings
recognizing that “when a number of persons are entitled in common to a specific fund, and an action

1 brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such
2 ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest* (1977) 20 Cal. 3d
3 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who recovers a common
4 fund . . . is entitled to reasonable attorneys' fees from the fund as a whole;" *Mills v. Electric Auto-Lite*
5 *Co.* (1970) 396 U.S. 375, 393-394 (discussing the acceptance of awarding attorneys' fees and expenses
6 from a settlement where "litigation has conferred a substantial benefit on the members of an
7 ascertainable class"); see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 26
8 ("[f]ee spreading occurs when a settlement or adjudication results in the establishment of a separate
9 or so-called common fund for the benefit of the class.").

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

16 California law has long upheld, and continues to uphold, the percentage of the recovery method
17 for awarding attorneys' fees where a fund is established. (See e.g., *Serrano v. Priest* (1977) 20 Cal.
18 3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 726; *Chavez v. Netflix,*
19 *Inc.* (2008) 162 Cal. App. 4th 43, 563 ("fees based on a percentage of the benefits are in fact
20 appropriate in large class actions..."); *Sanders v. City of Los Angeles* (1970) 3 Cal. 3d 252, 261, 263
21 (affirming award of attorneys' fee based on percentage of recovery); *Chavez v. Netflix, Inc., supra,*
22 162 Cal. App. 4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets,*
23 *Inc.* (2005) 127 Cal. App. 4th 387, 397 (the common fund doctrine is "frequently applied in class
24 actions when the efforts of the attorney for the named class representatives produce monetary benefits
25 for the entire class"); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 ("courts
26 recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method
27 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 PAGA Counsel's successful efforts and furthers the important goal of attracting competent counsel to handle representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Int'l. Inc.* (2016) 1 Cal. 5th 480, 503.) In affirming the use of the common fund doctrine in California, the California Supreme Court summarized the benefits of the percentage method of recovery stating: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts." (*Id.*)

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of PAGA Counsel and the quality of work performed by PAGA Counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. (*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.

First, PAGA Counsel achieved a respectable PAGA-only settlement in a case that involved highly contested issues that were primarily related to periods of time that were allegedly unpaid, as well as meal period and rest break violations. (Hawkins Decl. at ¶ 5, 43).

Second, Plaintiffs faced significant risks going forward with the litigation. As discussed above, Defendant raised various defenses which threatened recovery and, as such, Plaintiffs faced significant risk going forward with this litigation, and it would have taken significant time to realize any recovery in this action. (Hawkins Decl. at ¶¶ 43-50.)

1 Third, PAGA Counsel are experienced class and representative PAGA action litigators and
2 have achieved some of the largest representative awards in the State of California. (Hawkins Decl. at
3 ¶¶ 54-70.) This experience and expertise, combined with the high quality of work performed in this
4 case by PAGA Counsel, resulted in the settlement achieved in this case. (*Id.*)

5 Fourth, as discussed above and as set forth in the Declaration of James Hawkins, the request
6 for attorney's fees falls well within the norms accepted by state and federal courts in California in
7 comparable wage and hour actions actually handled by PAGA Counsel. (Hawkins Decl. ¶ 70.)

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

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

11 Despite recognized limitations of the so-called lodestar method, some California and federal
12 courts acknowledge the utility of a lodestar "cross-check."³ (*Lealao, supra*, 82 Cal. App. 4th at 46-
13 47.) Under the "lodestar multiplier" method of cross-checking the reasonableness of attorneys' fees
14 in class actions, the court ascertains class counsel's total "lodestar" amount by multiplying the number
15 of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then
16 enhances or reduces this lodestar figure by a "multiplier" to account for a range of factors, such as the
17 novelty or difficulty of the case, its contingent nature, and the degree of success achieved. (*PLCM*
18 *Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d
19 311, 322; *Lealao, supra*, 82 Cal. App. 4th at 43 (court has discretion to use a multiplier to ensure that
20 the "fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable
litigation").)

21 As set forth in the Declaration of James Hawkins submitted herewith, the actual aggregated
22 lodestar between the attorneys and the paralegals that worked on this case is approximately
23 \$184,380.00 (Hawkins Decl. at ¶ 64.) Thus no lodestar multiplier is required for the fee request.
24 Indeed, the requested fee is justified, reasonable and appropriate. The total lodestar is summarized in
25 the following table:

26 ³ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in
27 result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the
28 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.)

James Hawkins APLC Lodestar Summary				
Timekeeper	Years	Hours	Rate	Total
James Hawkins, Esq.	26	82.7	\$1050	\$86,835.00
Christina Lucio	16	65.2	\$775	\$50,530.00
Mitchell Murray	12	38.9	\$750	\$29,175.00
Associate Attorneys	1-2	22	\$450	\$9,900.00
Paralegal Staff		39.7	\$200	\$7,940.00
TOTALS		248.5		\$184,380.00

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, *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 PAGA 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. ¶ 70.)

D. The Requested Litigation Costs are Fair and Reasonable

PAGA 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.) PAGA 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, PAGA 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 PAGA Counsel to recover litigation costs up to \$15,000. (Ex. 1, Settlement, ¶ 43.) However, the actual costs through the approval hearing are projected to be

1 \$13,427.31, which is the amount requested. (Hawkins Decl. at ¶ 71.) The remainder will go the
2 General PAGA Penalty Fund. These costs are reasonable, uncontested, and should be approved.

3 **VII. SUBMISSION TO THE LWDA**

4 The Settlement and this Motion are concurrently being submitted to the LWDA in accordance
5 with Labor Code section 2699(l)(2). The proof of electronic submission is attached as **Exhibit 4** to
6 the Hawkins Declaration. (Hawkins Decl. at ¶ 39.)

7 **VIII. THE SETTLEMENT ADMINISTRATOR**

8 The Parties gave mutually selected ILYM Group, Inc. to serve as the Settlement Administrator
9 and will be responsible for processing the settlement payments and providing notice to the Aggrieved
10 Employees. They have estimated that the costs of administration will not exceed \$7,550.95.

11 **IX. CONCLUSION**

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

20 Based on the above, Plaintiffs respectfully requests that this Court: 1) approve the Parties’
21 settlement and order the Parties to carry out the terms of the Settlement Agreement, and 2) enter a
22 Final Judgment thereon.

23 DATED: February 20, 2024

24 **JAMES HAWKINS APLC**

25 By:  _____

26 James R. Hawkins
27 Christina M. Lucio
28 Mitchell J. Murray

Eric Tims

Attorneys for Plaintiffs

Rosio Ventura and Duana Martinez on behalf of
herself and all others similarly situated