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pursuant to Labor Code § 2698 *et seq.*

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CLARA**

11 ANTHONY BATISTA, on behalf of himself
and all “aggrieved employees” pursuant to
12 Labor Code § 2698 *et seq.*,

13 Plaintiffs,

14 v.

15 HUMANSIZE CORPORATION, a New
York corporation, and DOES 1 through 10,
16 inclusive,

17
18 Defendants.
19

CASE NO: 22CV403325

Assigned to the Hon. Theodore C. Zayner, Dept. 19

**NOTICE OF UNOPPOSED MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004,
AWARDING ATTORNEYS’ FEES, COSTS,
ENHANCEMENT AWARD, AND
REIMBURSEMENT OF SETTLEMENT
ADMINISTRATION EXPENSES, AND
ENTERING JUDGMENT THEREON;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: May 17, 2023

Time: 1:30 PM

Dept.: 19

Complaint Filed: September 21, 2022
FAC Filed: January 20, 2023

1 **PLEASE TAKE NOTICE THAT** on May 17, 2023 at 1:30 p.m., or as soon thereafter as
2 the matter may be heard, in Department 19 of the above-entitled Court, located at 161 N First St.,
3 San Jose, CA 95113, Plaintiff Anthony Batista will and hereby does move unopposed for an Order:
4 (1) granting approval of the proposed settlement of claims brought pursuant to the Private Attorneys
5 General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”) set forth in the Parties’ Stipulation
6 and Settlement Agreement for PAGA Representative Action Settlement (the “Settlement
7 Agreement”); (2) appointing Phoenix Settlement Administrators (“Phoenix”) as the Settlement
8 Administrator and approving payment of its fees not to exceed \$3,000 from the Gross Settlement
9 Amount; (3) directing disbursement of the Gross Settlement Amount pursuant to the terms of the
10 Settlement Agreement; (4) directing payment of attorneys’ fees and litigation costs from the Gross
11 Settlement Amount of \$35,186.03 to Plaintiff’s counsel; (5) directing an Enhancement Award from
12 the Gross Settlement Amount in the amount of \$5,000 to Plaintiff Anthony Batista; and (6) entering
13 judgment in accordance with the Settlement Agreement.

14 This motion will be based on this Notice, the supporting memorandum of points and
15 authorities, the Parties’ Stipulation and Settlement Agreement for PAGA Representative Action
16 Settlement, the Declarations of Daniel F. Gaines and Plaintiff Anthony Batista, the documents and
17 records on file in this matter, and such additional arguments, authorities, and evidence and other
18 matters as may be presented by the Parties hereafter.

19 Date: March 6, 2023

Respectfully submitted,

GAINES & GAINES, APLC

21
22 By: 
23 DANIEL F. GAINES
24 ALEX P. KATOFISKY
25 Attorneys for Plaintiff
26 ANTHONY BATISTA
27
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Anthony Batista (“Plaintiff”) and aggrieved employees under the Labor Code’s
4 Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order and
5 Judgment granting approval of the proposed Settlement of the above-captioned lawsuit against
6 Defendant HUMANSIZE CORPORATION (“Defendant”). The proposed Settlement will
7 dispose of the Released Claims asserted on behalf of Plaintiff and approximately 58 non-exempt
8 employees who worked for Defendant and in California at any time between July 18, 2021 and
9 January 31, 2023 (the “PAGA Period”) (the “Aggrieved Employees”). See Settlement Agreement,
10 at ¶¶ 2, 15, and 58.

11 This case addresses claimed violations of employee protections embodied in the California
12 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
13 Defendant failed to compute bonuses and other non-base hourly wages earned by Plaintiff and other
14 Aggrieved Employees into their regular rate of pay for purposes of paying them sick pay, meal and
15 rest period premiums and overtime wages at the correct rates, in violation of Labor Code §§ 204,
16 226.7, 246, 248.2, 248.5, 248.6, 510, 512, 558, 1194, 1197, and 1197.1, failed to provide Plaintiff
17 and Aggrieved Employees all minimum and overtime wages due, in violation of Labor Code §§
18 204, 510, 558, and 1194, failed to provide Plaintiff and Aggrieved Employees with legally
19 compliant rest periods, or correct compensation in lieu thereof, in violation of Labor Code § 226.7,
20 failed to provide Plaintiff and Aggrieved Employees with legally compliant meal periods, or correct
21 compensation in lieu thereof, in violation of Labor Code §§ 226.7, 512, 558, 1174, and 1174.5,
22 failed to issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in
23 violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay certain Aggrieved Employees
24 all wages due at the separation of their employment, in violation of Labor Code §§ 201-202. As a
25 result of Defendant’s alleged violations of the Labor Code, approximately 58 employees are
26
27

1 claimed to have suffered Labor Code violations for up to 1,676 aggregate pay periods at the rate of
2 \$100 each based on PAGA's penalty provisions. Gaines Decl., ¶ 16.

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

11 The value achieved by the Settlement may be gleaned from the fact that the LWDA and the
12 approximately 58 Aggrieved Employees encompassed by the Settlement will receive no less than
13 \$56,813.97 under the terms of the Settlement, which, pursuant to the operative statute, shall be
14 allocated "75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
15 Aggrieved Employees." *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only
16 because further litigation may have resulted in a net-zero recovery based on the defenses available
17 to Defendant, but because the amount secured by Plaintiff is sizable and in line with similar
18 settlements of these types of claims under PAGA. It is also important to underscore that all penalty
19 amounts paid to Aggrieved Employees will be an unexpected windfall, as employees typically do
20 not bring individual lawsuits asserting only PAGA penalties.

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

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

24 **A. The Parties**

25 Defendant is a designer and manufacturer of ergonomic products and employed Plaintiff
26 and Aggrieved Employees throughout the State of California, including in Santa Clara County,
27 where Plaintiff worked. Gaines Decl. at ¶ 8.

1 Defendant employed Plaintiff Anthony Batista as a non-exempt employee from 2017
2 through July 2022. The Aggrieved Employees are all current and former non-exempt employees of
3 Defendant and were employed in California between July 18, 2021 and January 31, 2023. Gaines
4 Decl. at ¶ 9.

5 **B. The Claims Asserted**

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

16 **C. Procedural Posture**

17 On July 13, 2022, pursuant to Labor Code § 2699.3, Plaintiff gave written notice by online
18 filing with the Labor and Workforce Development Agency (“LWDA”) and by certified mail, return
19 receipt requested, to Defendant of the specific provisions of the Labor Code alleged to have been
20 violated, including the facts and theories to support the alleged violations. Gaines Decl., ¶¶ 6-7;
21 **Exhibit B** (LWDA Notice Letter). On September 21, 2022, and after the LWDA declined to take
22 action within the statutorily permissible time with respect to Plaintiff’s July 13, 2022 letter, Plaintiff
23 filed his representative action complaint in this Court. *Id.*, ¶ 6. On January 20, 2023, as a part of
24 the Settlement, Plaintiff filed his First Amended Representative Action Complaint in this Court. *Id.*
25 *See also* Settlement Agreement, ¶ 23.

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

27 Counsel for Plaintiff engaged in targeted, informal discovery of Defendant’s alleged Labor

1 Code violations, which specifically targeted evaluating the strength and value of the PAGA claims
2 in preparation for a resolution of this Action. Gaines Decl. at ¶ 12.

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

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

22 **E. Settlement Negotiations**

23 The Parties directly negotiated the settlement. Gaines Decl. at ¶ 15. During the course of
24 litigation, the Parties engaged in arm's-length negotiations and reached a resolution of the PAGA
25 claims asserted in this Action. *Id.*

26 **F. The Proposed Settlement**

27 The Parties jointly prepared and executed a Stipulation and Settlement Agreement for

1 PAGA Representative Action Settlement (the “Settlement Agreement”). Gaines Decl., ¶ 15;
2 **Exhibit C.** The Agreement sets forth the terms of the Settlement reached by the Parties, including
3 the following key points:

4 1. Defendant shall pay One Hundred Thousand Dollars (\$100,000) (hereinafter the
5 “Gross Settlement Amount”), which shall be all inclusive, encompassing (i) all payments to the
6 LWDA and Aggrieved Employees, (ii) any and all costs of third-party administration of the
7 settlement, (iii) Plaintiff’s Counsel’s attorneys’ fees and costs of suit, and (iv) a modest
8 enhancement award/general release payment to Plaintiff. *See* Settlement Agreement, at ¶ 27.

9 2. The total sum available for payment of PAGA penalties shall be calculated by
10 deducting \$35,186.03 for the payment of Plaintiff’s Counsel’s fees and costs (projected to be
11 \$33,333.33 in fees and \$1,852.70 in costs¹), \$5,000 for Plaintiff’s enhancement award/general
12 release payment, and the costs of administration, not to exceed \$3,000, from the \$100,000 Gross
13 Settlement Amount, yielding \$56,813.97. Seventy-five percent (75%) of this amount, or
14 \$42,610.48, shall be distributed to the LWDA, and the remaining twenty-five percent (25%) or
15 \$14,203.49, shall be distributed to the Aggrieved Employees. *See* Settlement Agreement, at ¶¶ 27
16 and 28d.

17 3. All Aggrieved Employees will receive a pro rata share of the \$14,203.49 allocated
18 to Aggrieved Employees, which shall be distributed based on the number of pay periods each
19 Aggrieved Employee worked during the PAGA Period. *See* Settlement Agreement, at ¶ 28d.
20 Although these calculations will not be made until after approval, a rough estimation of the value
21 to the 58 individuals falling within the definition of “Aggrieved Employee” may be gleaned from
22 the fact that an equal division would provide about \$244.89 to each Aggrieved Employee, net of
23 payments to the LWDA, the Settlement Administrator, attorney’s fees, and costs. The LWDA will
24 be paid a substantial \$42,610.47. *See* Gaines Decl., at ¶ 17; Settlement Agreement, at ¶¶ 27 and
25 28d.

26 _____
27 ¹ Plaintiff’s Counsel’s cost request is less than the \$5,000 allotted in the Settlement Agreement. *See*
28 Settlement Agreement, at ¶ 27.

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

4 Subject to the occurrence of the Effective Date and Defendant's full
5 payment of the Gross Settlement Amount, in exchange for the
6 consideration recited in this Settlement Agreement, Plaintiff, as a
7 representative for the State of California and all Aggrieved
8 Employees, and on behalf of their current, former, and future heirs,
9 executors, administrators, attorneys, agents, and assigns, will forever
10 completely release and discharge Defendant and its respective
11 current and former parents, predecessors or successors, holding
12 companies, affiliated companies or entities, owners, investors,
13 shareholders, members, partners, officers, directors, managers,
14 employees, agents, attorneys, insurers, assigns, and any individual or
15 entity which could be jointly liable with Defendant (the "Released
16 Parties") of any and all PAGA claims arising during the PAGA
17 Period that were or could have been asserted against Defendant in
18 the Action on behalf of the Aggrieved Employees based on or arising
19 from the facts or claims alleged in the Action and/or in Plaintiff's
20 LWDA Notice. Without limiting the foregoing, and in addition to the
21 foregoing, the release includes all claims and civil penalties under
22 California Labor Code Sections 2699 et seq., attorneys' fees and
23 costs, and interest arising out of the claims at issue, for Defendant's
24 alleged failure to: provide meal periods; provide rest breaks; pay and
properly calculate meal period and rest break premiums; pay
minimum wages; pay and properly calculate overtime wages;
provide sick time; properly calculate the regular rate of pay including
with respect to overtime, meal period and rest break premiums, and
sick time; furnish accurate itemized wage statements; properly
calculate and pay wages for all hours worked; timely pay all wages
due during employment and upon separation; and maintain accurate
payroll records, pursuant to the corresponding alleged violations of
California Labor Code sections including, but not limited to, 201,
202, 203, 204, 226, 226.3, 226.7, 246, 248.2, 248.5, 248.6, 510, 512,
558, 1174, 1174.5, 1194 et seq., 1197, 1197.1, 2698-2699, 2699.3,
2699.5, and the applicable IWC Wage Order provisions (the
"Released Claims"). The Aggrieved Employees and the State of
California are deemed by operation of the Final Order and Judgment

25 ² This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009)
26 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties, nonparty
27 employees as well as the government are bound by the judgment in an action brought under the act
....").

1 to have agreed not to sue or otherwise make a claim against any of
2 the Released Parties for any Released Claims.

3 See Settlement Agreement, at ¶¶ 17, 18, and 29a.

4 6. Settlement administration, which is to be paid from the Gross Settlement Amount,
5 will not exceed \$3,000. Phoenix Settlement Administrators, a reputable settlement administration
6 company, has agreed to administer the settlement for this amount, submitting a competitive bid.
7 See Gaines Decl., ¶ 18.

8 7. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
9 litigation costs totaling \$35,186.03, and Plaintiff Anthony Batista seeks an enhancement
10 award/general release payment of \$5,000. See Settlement Agreement, at ¶¶ 27, 28b. and 28c.

11 8. Finally, under the terms of Settlement, the value of checks uncashed more than
12 180 days after issuance shall be remitted to the Unclaimed Property Fund of the California State
13 Controller's Office to be held in the name of the Aggrieved Employee. See Settlement
14 Agreement, at ¶ 35d.

15 **III. LEGAL ARGUMENT**

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

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

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

1 or “judged against a hypothetical or speculative measure of what might have been achieved by the
2 negotiators.” *See id.*

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

21
22 ³ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
23 balancing of several factors which may include, among others, some or all of the following: [1] the
24 strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further
25 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
26 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
27 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
28 reaction of the class members to the proposed settlement.” *See Linney v. Cellular Alaska P'ship*,
151 F.3d 1234, 1242 (9th Cir., 1998). “Not all of these factors will apply to every class action
settlement” and “[u]nder certain circumstances, one factor alone may prove determinative in
finding sufficient grounds for court approval.” *See Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*,
221 F.R.D. 523, 525-526 (C.D. Cal., 2004).

1 Based thereon, a court's review of a PAGA settlement necessarily implicates the following unique
2 features that render the approval process completely distinct from approval of a class action
3 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

4 First, in evaluating the adequacy of the settlement amount, the Court's focus is not
5 concerned with the amount which "Aggrieved Employees" are to receive, but rather, must focus on
6 the total settlement amount in achieving PAGA's objective.

7 While "[a PAGA] action is ... designed to protect the public and penalize the employer for
8 past illegal conduct" [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
9 into account the fact that settlement of a PAGA claim – like any settlement – involves a
10 "compromise" that stops short of rendering findings of liability and damages. Moreover, the Court
11 must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for
12 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
13 for the government that otherwise may not have been assessed and collected by overburdened state
14 enforcement agencies." See *Ochoa-Hernandez v. CJADER Foods, Inc.*, 2010 U.S. Dist. LEXIS
15 32774, 12 (N.D. Cal. Apr. 2, 2010).

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

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

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

22 In conducting a review of a settlement, it is generally recognized that an "agreement . . .
23 reached through arms-length negotiation between experienced parties . . . is entitled to a
24 presumption of fairness." See *Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
25 44 (C.D. Cal. Apr. 12, 2010).

26 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
27 length negotiations [Gaines Decl. at ¶ 15], (2) that was negotiated by Counsel with significant

1 experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5, 23-25 and **Exhibit A**], (3) which
2 occurred after Counsel had conducted sufficient investigation to evaluate the strength and potential
3 value of the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *See*
4 *id.*, at ¶¶ 12-14, 20-21. Based thereon, the Court should give considerable weight to the competency
5 and integrity of counsel in assuring itself that the Settlement Agreement represents an arm's-length
6 transaction entered without self-dealing or other potential misconduct.

7
8 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

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

13 This case addresses violations of important employee protections embodied in the
14 California Labor Code – namely, that Defendant failed to compute bonuses and other non-base
15 hourly wages earned by Plaintiff and other Aggrieved Employees into their regular rate of pay for
16 purposes of paying them sick pay, meal and rest period premiums and overtime wages at the correct
17 rates, in violation of Labor Code §§ 204, 226.7, 246, 248.2, 248.5, 248.6, 510, 512, 558, 1194,
18 1197, and 1197.1, failed to provide Plaintiff and Aggrieved Employees all minimum and overtime
19 wages due, in violation of Labor Code §§ 204, 510, 558, and 1194, failed to provide Plaintiff and
20 Aggrieved Employees with legally compliant rest periods, or correct compensation in lieu thereof,
21 in violation of Labor Code § 226.7, failed to provide Plaintiff and Aggrieved Employees with
22 legally compliant meal periods, or correct compensation in lieu thereof, in violation of Labor Code
23 §§ 226.7, 512, 558, 1174, and 1174.5, failed to issue accurately itemized wage statements to
24 Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to
25 timely pay certain Aggrieved Employees all wages due at the separation of their employment, in
26 violation of Labor Code §§ 201-202. Defendant's maximum theoretical exposure in this Action,
27 without stacking penalties, totals approximately \$167,600, computed by multiplying 1,676

1 aggregate pay periods by \$100 each. *See* Gaines Decl. at ¶ 19. While the PAGA does provide the
2 potential for a heightened penalty for subsequent violations, courts are often hesitant to award a
3 heightened penalty where there is no prior citation by the Labor Commissioner, as is the case here.
4 *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no heightened penalty
5 where defendant was not notified by Labor Commissioner or any court that it was subject to the
6 California Labor Code). The Ninth Circuit’s holding in *Bernstein* also supports that a settlement
7 valuation that does not “stack” penalties. *Id.*

8 Defendant, however, contends it acted within the requirements of California law at all times
9 as to all Aggrieved Employees. For example, Defendant contends that the company has compliant
10 meal and rest break practices. Defendant further contends that not every pay period at issue
11 involved an alleged Labor Code violation potentially subject to civil penalties. Moreover, it
12 maintained that even if the Court did award penalties, the Court could and would *substantially*
13 reduce the penalties awarded based on the discretionary factors contained in Labor Code §
14 2699(e)(2) (“In action by an aggrieved employee . . . , a court may award a lesser amount than the
15 maximum civil penalty amount specified by this part if, based on the facts and circumstances of the
16 particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
17 confiscatory.”). *See* Gaines Decl., ¶ 20. Defendant also argued that it had a valid and enforceable
18 arbitration agreement, which could preclude the litigation of PAGA claims on a representative basis
19 altogether, given the United States Supreme Court’s recent ruling in *Viking River Cruises v.*
20 *Moriana*, 142 S.Ct. 734 (2022). *Id.*

21 Based on these disputes, which had the potential to completely eliminate Plaintiff’s
22 recovery, the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined
23 by a “maximum possible liability” amount of approximately \$167,600 [Gaines Decl., ¶ 19], and a
24 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
25 such issues, the Settlement achieves a significant benefit – approximately 60% of the maximum
26 possible liability. As such, this factor weighs very heavily in favor of resolution by way of the
27 compromise set forth in the Settlement. Gaines Decl., ¶ 21.

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

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

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

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

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

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

 Here, after all deductions are made for administration, an enhancement award/general

1 release payment, attorneys' fees and costs, \$56,813.97 will be paid out, of which \$42,610.47 (i.e.
2 75%) will go to the LWDA, and \$14,203.49 (i.e. 25%) will go to the Aggrieved Employees, as
3 required by Labor Code § 2699(i) ("civil penalties recovered by aggrieved employees shall be
4 distributed as follows: 75 percent to the Labor and Workforce Development Agency . . . and 25
5 percent to the aggrieved employees."). See Settlement Agreement, at ¶¶ 27 and 28d.

6 This result is exceptional, as settlements of PAGA claims impacting thousands of
7 individuals have been approved as reasonable for amounts far less than the payment in this case.
8 See *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27, 2012)
9 ("Defendant has agreed to pay \$10,000 as civil penalties pursuant to the PAGA Of the \$10,000,
10 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will benefit
11 the class The Court finds that the PAGA payment is set at a reasonable amount, and it shall be
12 approved."); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D. Cal.
13 Oct. 29, 2012) ("GTI agrees to allocate \$10,000 to Plaintiff's PAGA claims, and will pay \$7,500
14 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports with
15 settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the
16 allocation of the Settlement to Plaintiff's PAGA claim."); *Schiller v. David's Bridal, Inc.*, 2012
17 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) ("Pursuant to the Settlement Agreement, the
18 parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency . .
19 . . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it
20 be approved."); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11,
21 2012) ("Pursuant to the Settlement Agreement, Defendant has agreed to pay \$15,000 to the
22 California Labor and Workforce Development Agency The Court finds that the PAGA
23 payment is set at a reasonable amount, and it shall be approved.").⁴

24 ⁴ Significantly, each of the above-cited actions involved a larger number of "aggrieved employees"
25 as at issue here. See *Franco*, 2012 U.S. Dist. LEXIS 169057, 14 ("2,055 Class Members were
26 ultimately identified"); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of
27 "approximately 1,869 individuals"); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16 ("3,327 California
Class members were ultimately identified"); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 ("2,051
California Class Members were ultimately identified").

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

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

7 As discussed above, the California Supreme Court has concluded that in the context of
8 PAGA “the nonparty employees, because they were not given notice of the action or afforded any
9 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
10 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the limited release provided in
11 exchange for the foregoing consideration is limited to the civil penalties asserted in the Action
12 under Labor Code §§ 2698 *et seq.* *See* Settlement Agreement, at ¶¶ 17, 18, and 29a.

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

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

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

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

24 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
25 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration
26 is “whether ‘the parties have sufficient information to make an informed decision about
27 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
28 26 (C.D. Cal. Nov. 9, 2011).

1 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff's
2 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
3 ¶¶ 12-15. Prior to settling, Defendant provided Plaintiff with documents related to the policies and
4 practices at issue in this PAGA action, as well as Plaintiff's personnel file. As discussed above,
5 Plaintiff's Counsel's investigation was sufficient to, among other things, tabulate with precision
6 the total number of alleged Labor Code violations at issue during the PAGA Period and identify
7 the total number of individuals falling within the definition of "Aggrieved Employee" for the
8 PAGA Period.

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

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

14 In addition to the factors presented above, the proposed Settlement does not possess any
15 obvious deficiencies. The Settlement contemplates entry of an order and judgment (submitted
16 concurrently herewith) which approves the Settlement. Paragraph 38 of the Settlement Agreement
17 and paragraph 17 of the proposed order authorize the Court to retain jurisdiction over the Parties,
18 the Action, and the Settlement. This procedure effectively disposes of the Action in its entirety,
19 documents the Court's approval of the Settlement as required by PAGA, and allows for Court
20 intervention if necessary to enforce the terms of the Settlement Agreement. In sum, under the
21 applicable standards for approval of PAGA settlements in California, the settlement in this case
22 meets the standards for approval.

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

25 Pursuant to the terms of the Settlement, Plaintiff's Counsel seek attorneys' fees of one-third
26 of the Gross Settlement Amount (projected to be \$33,333.33) and reimbursement of litigation costs
27 of \$1,852.70, falling within the bounds authorized by the Settlement Agreement. *See* Settlement
28

1 Agreement, at ¶¶ 27 and 28c. Plaintiff's Counsel's entitlement to an award of attorneys' fees and
2 costs is warranted on multiple independent grounds. Further, the amount of fees requested falls well
3 within the range of reasonableness under applicable standards, as the amount requested constitutes
4 a "percentage of the fund" deemed reasonable in similar wage and hour settlements of this size and
5 approved by California courts, which is not only warranted based on the contingency risk Plaintiff's
6 Counsel has agreed to incur for the benefit of the State of California and Aggrieved Employees,
7 but also based on the significant results achieved, as the Settlement obtains a recovery substantially
8 above the range approved as reasonable by California state and federal courts. Based thereon,
9 Plaintiff's Counsel respectfully requests that the Court enter an order approving the fee and cost
10 amounts requested.

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

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

17 Courts have long recognized the "common fund" or "common benefit" doctrine, under
18 which attorneys who create a common fund or benefit for a group of persons may be awarded their
19 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
20 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
21 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
22 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
23 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

24 The California Supreme Court has held that, "when a number of persons are entitled in
25 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
26 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
27 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d

1; *see also Boeing, supra*, 444 U.S. at 478 (“[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter Group) at § 17:172.3 explains the common fund doctrine as follows:

Where the lawsuit results in the recovery of a fund or property benefiting others as well as Plaintiffs (e.g., a class action), the court has inherent equitable power to order Plaintiffs' attorney fees paid out of the common fund or property [citations]. Such fee spreading assures that all of those benefited by the litigation pay their fair share of obtaining the recovery.

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

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

It is not necessary to find this suit a proper class action in order to uphold the portion of the judgment awarding counsel for Plaintiffs 25 percent of all retroactive salaries and wages received. That award may be sustained under the rule that a litigant who creates a fund in which others enjoy beneficial rights may require those beneficiaries to pay their fair share of the expense of litigation. (*See Sprague v. Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer* (1959) 53 Cal.2d 124, 132).

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

1 persons are entitled to share.”

2 Numerous appellate courts have similarly found. *See e.g., Knoff v. City and County of San*
3 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a “contingent percentage” award of
4 attorneys’ fees in a representative action as the proper exercise of the court’s broad equitable
5 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys’ fees and
6 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
7 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
8 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
9 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
10 of residential property in an inverse condemnation action).

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

17 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
18 a \$100,000 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
19 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
20 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
21 sum or ‘fund’ the fees are to be paid.”)], and in doing so, has exclusively bore the risk of loss for
22 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
23 the PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
24 applicable precedent.⁵

25 _____
26 ⁵ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
27 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
entitled to an award of reasonable attorney’s fees and costs.”)], and under *C.C.P.* § 1021.5, as the

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

2 In addition to the forgoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount
3 of one-third of the \$100,000 Gross Settlement Amount, falls well within the “zone of
4 reasonableness.”

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

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

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

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

23 _____
24 instant PAGA action was by definition “for the public benefit” and secured monetary awards for
25 approximately 110 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
26 (2007) 154 Cal. App. 4th 1, 16-17 (2007) (“Estrada’s personal motivation does not diminish the
27 fact that he pursued this public interest class action not only for himself but on behalf of a class
28 comprised of FedEx’s past and present drivers and ultimately obtained awards for 209 drivers. []
No more is required to satisfy the ‘significant benefit,’ ‘public interest,’ and ‘large class of persons’
requirements of Code of Civil Procedure section 1021.5.”).

1 First, the results achieved by Plaintiff's Counsel are significant, as Defendant has agreed to
2 pay \$100,000 under the Settlement. This is a significant recovery given the risk of success in
3 obtaining any recoverable penalties [Gaines Decl., ¶¶ 20-21, 28], and further, as the settlement of
4 PAGA claims impacting a comparable number of individuals have been approved as reasonable for
5 between \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

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

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

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

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

25 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,
26 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
27

23 (“[C]ourts may award attorney’s fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.” *See also Crandall v. U-Haul International, Inc.*, LASC Case No. BC178775 (awarding attorneys’ fees of 40% of a common fund).

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

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

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

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—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Id. at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorneys’ fees more accurately reflects the results achieved for the putative class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted

1 litigation.”); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The
2 percentage-of-recovery method is generally favored in common fund cases because it allows courts
3 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
4 failure.”).

5 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
6 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
7 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed
8 to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-
9 06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold
10 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the
11 court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
12 evaluate the reasonableness of a requested percentage fee.”)

13 Here, Plaintiff’s Counsel’s fee request of one-third of the Gross Settlement Amount is fair
14 and reasonable based on a percentage of the recovery, and as well as when confirmed with a lodestar
15 cross-check. First, “regardless whether the percentage method or the lodestar method is used, fee
16 awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.* (2008)
17 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff’s Counsel’s experience in
18 similar wage and hour class action matters. *Gaines Decl.*, ¶¶ 2-5; 23-25. Thus, the percentage
19 sought by Plaintiff’s Counsel here is reasonable.

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

1 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
2 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
3 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition*
4 *for L. County Planning etc. Interest v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251 (approving
5 multiplier of ~2.04). In representative actions such as this one, where the value of the benefit
6 conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust
7 the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is
8 reasonable and within the range of fees freely negotiated in the legal marketplace in comparable
9 litigation.” *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. In doing so, “the court
10 determines, retrospectively, whether the litigation involved a contingent risk or required
11 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate
12 the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

13 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$33,333.33.
14 Based on a projected final lodestar of \$41,707.50, this yields a “negative multiplier” of
15 approximately 0.80 under the \$33,333.33 fee request. Gaines Decl., ¶ 22; **Exhibit D** to Gaines Decl.
16 The billing rates used to compute the lodestar are reasonable in view of the evidence submitted
17 herewith. Gaines Decl., ¶¶ 2-5; 23-25; **Exhibit D**.

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

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

25 In the course of this litigation, Plaintiff’s Counsel incurred out-of-pocket costs of \$1,852.70.
26 *See* Gaines Decl. at ¶ 32, **Exhibit E**. As demonstrated in the Gaines Declaration submitted herewith,
27 the incurred costs included filing fees, service of process fees, postage fees, and other charges

1 typical of litigation of this nature. *Id.* Such costs are appropriate for cost reimbursement in these
2 types of cases. *See e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1,
3 *6 (C.D. Cal. 1989) (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); *see also, In re GNC*
4 *Shareholder Litigation* 668 F. Supp. 450, 452 (W.D. Pa. 1987).

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

8 V. **THE ENHANCEMENT AWARD SOUGHT BY PLAINTIFF IS REASONABLE**
9 **AND SHOULD BE APPROVED**

10 The Parties have agreed that Plaintiff Anthony Batista will be paid an enhancement
11 award/general release payment in the amount of \$5,000. This payment is intended to recognize the
12 time and effort that Mr. Batista spent on behalf of other Aggrieved Employees and the State and
13 compensates him for his general release of all claims against Defendant. *See Settlement Agreement*
14 *at ¶¶ 27 and 28b. See Declaration of Anthony Batista*, submitted herewith. *See Gaines Decl.*, ¶ 36.

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

22 The traditional bases for awarding incentive awards in class settlements support the award
23 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
24 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
25 awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs
26 is that he or she should be compensated for the expense or risk he has incurred in conferring a
27 benefit" on others. *Id.* at 806. That rationale applies synonymously in this Action.

1 Without Plaintiff's efforts, there would be no recovery at all. The requested award is
2 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
3 other of Defendant's employees and the State of California. As a result of the named Plaintiff's
4 efforts, Aggrieved Employees will receive monetary settlement payments, and the State of
5 California will receive \$42,610.47 to be put toward education about and enforcement of
6 California's labor laws. *See* Gaines Decl., ¶ 37.

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

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

22 Plaintiff is also entering into a full general release against Defendant and its Released
23 Parties, which is far broader than the release by other Aggrieved Employees. Specifically,
24 Aggrieved Employees are releasing only limited PAGA civil penalty claims, including Labor Code
25 §§ 201, 202, 203, 204, 226, 226.3, 226.7, 246, 248.2, 248.5, 248.6, 510, 512, 558, 1174, 1174.5,
26 1194 *et seq.*, 1197, 1197.1, 2698-2699, 2699.3, 2699.5 for underlying PAGA claims, while Plaintiff
27 is releasing all claims which he asserts or could assert against Defendant. *See* Settlement

1 Agreement at ¶ 30. No other Aggrieved Employee is subject to this broad form of release. Gaines
2 Decl. at ¶ 38. The value of Plaintiff's wage claims exceeds \$58,598. *Id.*; **Exhibit F**.

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

9 **VI. CONCLUSION**

10 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents
11 a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth
12 above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order and
13 Judgment Approving Settlement, do the following:

- 14 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
15 2699, subpart 1;
- 16 2. Appoint Phoenix Settlement Administrators as the Settlement Administrator and
17 approve its administration fees up to \$3,000 for payment out of the Gross Settlement Amount;
- 18 3. Approve the award of attorneys' fees of one-third of the Gross Settlement Amount,
19 and costs of \$1,852.70, to Plaintiff's Counsel, payment of which shall come from the Gross
20 Settlement Amount;
- 21 4. Approve the enhancement award/general release payment to Plaintiff Anthony
22 Batista in the amount of \$5,000 from the Gross Settlement Amount;

23 ///

24 ///

25 ///

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27 ///

1 5. Direct disbursement of the PAGA Payment Fund to the LWDA and all Aggrieved
2 Employees as provided for in the Settlement Agreement; and

3 6. Enter judgment in accordance with the Settlement Agreement.

4
5 Date: March 6, 2023

Respectfully submitted,

6 GAINES & GAINES, APLC

7
8 By: 

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10 ALEX P. KATOFISKY
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