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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CHRISS SORENSEN, on behalf of
himself and other aggrieved employees

Plaintiff,

v.

P.F. AUTOMOTIVE, LLC, a California
limited liability company; and DOES 1
through 100, inclusive,

Defendants.

CASE NO. 37-2023-00025169-CU-OE-
CTL

[Assigned for all purposes to the Hon. Joel
R. Wohlfeil, Dept. C-73]

RESERVATION ID. 3075449

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
PRIVATE ATTORNEYS GENERAL
ACT SETTLEMENT AGREEMENT,
FOR ATTORNEYS' FEES AND COSTS
AND ADMINISTRATIVE FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declarations of Aaron A. Bartz, Chriss
Sorensen, Walter Haines and Jonathan Paul,
and [proposed] Order filed concurrently
herewith]

Date: March 15, 2024
Time: 9:00 a.m.
Dept.: C-73

PLEASE TAKE NOTICE that on March 15, 2024, at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Joel R. Wohlfeil, Dept. C-73 of the Superior Court of the State of California, County of San Diego, in the Central Division, Hall of Justice, 330 W. Broadway, San Diego, California 92101, Plaintiff Chriss Sorensen ("Plaintiff") will and hereby does move for entry of an order and judgment as follows:

1. Granting approval, pursuant to California Labor Code section 2699, subd. (l)(2) of the proposed settlement between Plaintiff and Defendant P.F. Automotive, LLC ("Defendant") of the claims brought pursuant to the Private Attorneys General Act of 2004 ("PAGA") as set forth in the PAGA Settlement Agreement ("Settlement Agreement"), attached as Exhibit 1 to the Declaration of Aaron A. Bartz;

2. Approving the Net Settlement Amount payable to the State of California and Aggrieved Employees as authorized by California Labor Code section 2699, subd. (i);

3. Appointing Xpand Legal as the Settlement Administrator;

4. Directing Defendant to transmit settlement funds to the Settlement Administrator in the total amount of \$115,000 pursuant to the Settlement Agreement;

5. Directing the Settlement Administrator to distribute the settlement funds to the Aggrieved Employees, and distributing funds to the Labor and Workforce Development Agency ("LWDA"), Plaintiff's Counsel, and for Settlement Administration Costs, in accordance with the terms of the Settlement Agreement;

6. Awarding to Plaintiff's Counsel the amount of \$38,333 as compensation for reasonable attorneys' fees ("Attorneys' Fees Payment"), \$1,407 for reimbursement of litigation costs and expenses ("Litigation Costs Payment"), and \$4,750 for Settlement Administration Costs.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Settlement Agreement, the Declarations of Aaron A. Bartz, Chriss Sorensen, Walter Haines, and Jonathan Paul, the pleadings and other records on file with the Court in this matter, and such evidence and oral argument as may be presented at the hearing on this Motion.

1
2 Dated: January 14, 2024

3 BARTZ LAW GROUP, APC

4
5 By: /s/Aaron A. Bartz/s/
6 Aaron A. Bartz
7 Attorneys for Plaintiff CHRISS SORENSEN
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I.

INTRODUCTION AND SUMMARY OF MOTION

This is an action brought by Plaintiff Chriss Sorensen (“Plaintiff”), pursuant to the Private Attorneys General Act of 2004 (“PAGA”), to recover civil penalties for himself, and other aggrieved employees and the State of California. Defendant is P.F. Automotive, LLC (“Defendant”). Plaintiff alleges California wage and hour violations including failure to pay wages, failure to authorize and permit meal and rest periods, and related violations.

Plaintiff has agreed to settle the PAGA penalties for a Gross Settlement Fund of **\$115,000**. The Gross Settlement Fund includes all attorneys’ fees and costs, settlement administration expenses, and penalties payments to the aggrieved employees and the Labor and Workforce Development Agency (LWDA). The Net Settlement Amount to be distributed to the aggrieved employees and the LWDA is approximately \$70,510. The Net Settlement Amount will be distributed 75% to the LWDA (\$52,882.50), and 25% to the aggrieved employees (\$17,627.50).

The number of aggrieved employees is 189. As such, each of the aggrieved employees will receive, on average, approximately \$93 in penalties. In exchange for such payment, the aggrieved employees are giving up no rights whatsoever to recover for underlying violations of the Labor Code other than for PAGA penalties. Any aggrieved employee retains the right to file a claim against Defendant for such violations.

This settlement is fair, reasonable and adequate, and therefore should be approved by this Court.

II.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Defendant was an auto dealership in San Diego.¹ Plaintiff and other aggrieved employees worked for Defendant as non-exempt employees during the applicable time period.

Plaintiff served his PAGA letter on the Labor and Workforce Development Agency (LWDA) on November 21, 2022. Thereafter, the parties engaged in settlement discussions, and

¹ Defendant has since sold its dealership, and so any violations ceased as of the date of the sale, or in or around February 2023.

1 entered into several tolling agreements related to the claims asserted in Plaintiff's PAGA letter.
2 Ultimately, Plaintiff filed his PAGA Complaint on June 15, 2023, on behalf of himself and other
3 aggrieved employees for Civil Penalties under PAGA based on Defendant's wage and hour
4 violations, including failure to pay all wages, meal period and rest break violations, and other
5 wage violations. (Bartz Decl., ¶ 9, and Ex. 3 thereto).

6 Before conducting formal discovery, the parties exchanged substantial informal discovery
7 in an attempt to settle this matter. To that end, Defendant produced hundreds of pages of time,
8 payroll and personnel records from Defendant, including a sampling of time and payroll records
9 for aggrieved employees, and related data and information pertaining to the aggrieved group.
10 After months of back and forth, arms-length negotiations, the parties were able to reach a fair
11 resolution of this matter. (Bartz Decl., ¶¶ 10-12.)

12 III.

13 **SUMMARY OF SETTLEMENT**

14 **A. Aggrieved Employees**

15 The Settlement covers the following aggrieved employees:

16 Any and all employees who worked for Defendant in the State of California at any time
17 from November 21, 2021 to the Effective Date. (Bartz Decl., ¶ 7, Ex. 1).

18 Based upon Defendant's records, there are 189 aggrieved employees through the date of
19 the PAGA period. (Bartz Decl., ¶ 7).

20 **B. Settlement Fund**

21 Defendant will pay into a common fund the total amount of \$115,000 within 14 days of
22 the Effective Date. (Bartz Decl., ¶ 3.) Prior to distributing the settlement checks to aggrieved
23 employees, the Settlement Administrator shall review the addresses provided using the National
24 Change of Address database. Should any of the settlement checks be returned as undeliverable,
25 the Settlement Administrator will have seven (7) days after it receives the returned undeliverable
26 mail to search for a more current address for the Aggrieved Employee (via a skip trace or other
27 reasonable method) and to re-mail the settlement checks to any alternative or updated address
28 obtained by the Settlement Administrator. (Bartz Decl., ¶ 4). The Net Settlement Amount shall

1 be calculated by deducting the PAGA Counsel Fees Payment, PAGA Counsel Litigation
2 Expenses Payment, and the Administration Expenses Payment from the Gross Settlement
3 Amount.

4 A breakdown of the Gross Settlement Fund of **\$115,000** is provided below:

- 5 1. Individual PAGA Payments to Aggrieved Employees: \$17,627.50;
- 6 2. LWDA PAGA Payment to the LWDA: \$52,882.50;
- 7 3. PAGA Counsel Fees Payment: \$38,333;
- 8 4. PAGA Counsel Litigation Expenses Payment: \$1,407;
- 9 5. Administration Expenses Payment: \$4,750.

10 **C. Release**

11 The “Released Parties” are the Defendant, and each of Defendant’s former and present
12 directors (including but not limited to William W. Knight, Jr. and Roger S. Penske, Jr.), officers
13 (including but not limited to William W. Knight, Jr. and Roger S. Penske, Jr.), shareholders
14 (including but not limited to William W. Knight, Jr. and Roger S. Penske, Jr.), owners, employees
15 (including but not limited to William W. Knight, Jr. and Roger S. Penske, Jr.), members,
16 attorneys, insurers, predecessors, successors, assigns, parents, subsidiaries, and affiliates.

17 “Released Claims” include:

18 All claims for PAGA penalties that were alleged, or could have been alleged, in the
19 Operative Complaint under the Labor Code and PAGA and that arose during the PAGA
20 Period.

21 (Exhibit 1 to Bartz Decl., ¶ 5.1).

22 **IV.**

23 **LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT**

24 The PAGA statute allows an “aggrieved employee” to bring a civil action on behalf of
25 himself or herself and on behalf of other aggrieved employees and the State to recover civil
26 penalties which are specifically established by PAGA with respect to provisions of the California
27 Labor Code which does not otherwise provide for civil penalties (Lab. Code § 2699(g)), and also,
28 civil penalties which, outside of PAGA, only the LWDA can assess upon and collect from an

1 employer (Lab. Code § 2699(a)). Before bringing a civil action under PAGA, an employee must
2 comply with California Labor Code section 2699.3. *See* Labor Code § 2699(a).

3 The settlement of a PAGA claim requires court approval. *See* Labor Code § 2699, subd.
4 (1)(2) (“The superior court shall review and approve any settlement of any civil action pursuant
5 to this part”). However, “[a] PAGA claim asserted on a non-class representative basis . . . is not
6 considered a class action but a law enforcement action” and therefore one does not have to meet
7 the requirements of a class action. *Casida v. Sears Holding Corp.*, 2012 WL 253217, at *3 (E.D.
8 Cal. Jan. 26, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 WL 2173715, at * 11 (E.D. Cal.
9 June 2, 2011); *Arias v. Superior Court*, 46 Cal.4th 969, 980-88 (2009) (affirming lower court’s
10 holding that “plaintiff need not satisfy class action requirements” to assert a PAGA claim);
11 *Pedroza v. PetSmart, Inc.*, 2013 WL 1490667, at *15 (C.D. Cal. Jan. 28, 2013). As such, a court’s
12 review of a PAGA settlement involves analysis of several unique features that render the approval
13 process distinct from approval of a class action settlement. A court reviewing a PAGA settlement
14 need only “ensur[e] that a negotiated resolution is fair to those affected.” *Williams v. Superior*
15 *Court*, 3 Cal.5th 531, 549 (2017).

16 In a PAGA case, the Court’s focus is not the monetary amount which aggrieved employees
17 or the State are to receive, but instead, whether the total settlement amount achieves the PAGA’s
18 objectives. The purpose of the PAGA is “to incentivize private parties to recover civil penalties
19 for the government that otherwise may not have been assessed and collected by overburdened
20 state enforcement agencies.” *See Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777,
21 at *4 (N.D. Cal. Apr. 2, 2010) (citing *Arias, supra*, 46 Cal.4th at 986). Penalties recovered under
22 the PAGA are, in part, to “be distributed to the [LWDA] for enforcement of labor laws . . . and
23 for education of employers and employees about their rights and responsibilities under this code,
24 to be continuously appropriated to supplement and not supplant the finding to the agency for those
25 purposes.” *See* Labor Code § 2699(j). The recovery of penalties on behalf of the state, by way of
26 a PAGA claim, is essentially a law enforcement action. *See Amalgamated Transit Union, Local*
27 *1756, AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003 (2009) (stating that the PAGA is mechanism for
28 “an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise

would be sought by state labor law enforcement agencies”).

V.

THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE

This Settlement resulted from Plaintiff’s thorough and extensive review of informal discovery, and aggressive negotiating stance to obtain a reasonable recovery. This PAGA settlement should therefore be approved.

A. The Settlement Is Presumed Fair

A representative settlement is presumed fair where: (1) the settlement is reached through arm’s length bargaining, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) [and] counsel is experienced in similar litigation. *See Dunk v. Ford Motor Company*, 48 Cal. App. 4th 1794, 1802 (1996). Similar to class actions, PAGA settlements are subject to a court’s approval under a fair, adequate and reasonable standard. *See Moniz v. Adecco USA, Inc.*, 72 Cal.App.5th 56, 76-77 (2021). A court may also consider relevant factors such as the strength of the plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [and] the presence of a governmental participant. . . . *See Officers of Justice v. Civil Service Com’n of City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1995). “This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties.” (*Dunk, supra*, 48 Cal. App. 4th at 1801.) Moreover, the trial court has broad powers to determine whether a proposed [representative action] settlement is fair. (*See Mallick v. Superior Court*, 89 Cal. App. 3d 434 (1979).

B. The Settlement Is The Product of Arm’s Length Negotiations

In this action, Defendant has produced hundreds of pages of personnel and policy documents, detailed data regarding the aggrieved employees’ pay records, and related employment information for aggrieved employees. (Bartz Decl., ¶ 10). After a thorough review

1 of those records, Plaintiff compiled a damages summary reflecting the total asserted exposure to
2 PAGA penalties in this case. (*Ibid.*)

3 The negotiations in this case were hard fought and lengthy, and took many months to
4 finally reach a deal. At all times, the settlement negotiations were non-collusive, and involved
5 considerable disputes over payment terms. (Bartz Decl., ¶ 12).

6 Plaintiff did not settle this case until he had conducted sufficient investigation into the
7 claims, and reviewed sufficient data to make a settlement determination. (Bartz Decl., ¶ 12).
8 Plaintiff believes that this is a very good settlement of the PAGA claims, which will not affect
9 any aggrieved employee's right to pursue underlying Labor Code violations against Defendant if
10 he or she chooses to do so. (*Ibid.*).

11 **C. Plaintiff's Counsel Is Experienced In Similar Litigation And Endorse The**
12 **Settlement**

13 The view of attorneys in representative litigation is "entitled to significant weight."
14 *Fisher Bros. v. Cambridge-Lee Industries, Inc.*, 630 F.Supp. 482, 488 (E.D. Pa. 1985); *see also*
15 *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980). Plaintiff's counsel have
16 significant experience in complex representative and class action wage and hour litigation. (Bartz
17 Decl., ¶¶ 13-15.) As such, they are experienced and qualified to evaluate the claims and defenses
18 in this case, and unequivocally support the settlement reached herein.

19 **D. The Strength of Plaintiff's Case, The Amount Offered In Settlement, and**
20 **The Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement**

21 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon*
22 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, "[t]he expense and possible
23 duration of the litigation should be considered in evaluating the reasonableness of [a] settlement."
24 *In re Mega Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

25 In this case, Plaintiff seeks PAGA penalties only. The sole PAGA claim that is at issue
26 in this settlement concerns Defendant's failure to: (1) pay all wages owed, including overtime
27 compensation; (2) provide duty-free meal periods; (3) authorize and permit duty-free rest periods;
28 (4) pay all wages due upon termination; and (5) properly maintain and submit accurate itemized

1 wage statements. (Bartz Decl., ¶ 16).

2 1. Unpaid wages

3 California Labor Code § 510(a) and the applicable Wage Orders regulating payment of
4 wages in the State of California, provide that eight (8) hours of labor constitutes a day's work and
5 any work in excess of eight (8) hours in one (1) workday and any work in excess of forty (40)
6 hours in any one workweek shall be compensated at the rate of no less than one and one-half
7 times the regular rate of pay for each employee and any work in excess of twelve (12) hours in
8 any one workday shall be compensated at the rate of no less than twice the regular rate of pay for
9 each employee.

10 Plaintiff contends that Defendant has committed wage violations in that it borrows from
11 different pay periods to satisfy the minimum wage, as set forth in *Peabody v. Time Warner Cable,*
12 *Inc.*, 59 Cal.4th 662 (2014). Plaintiff further contends that Defendant fails to pay all overtime
13 owed because it does not pay the proper regular rate of pay on all overtime hours worked.

14 Defendant contends that it has numerous defenses to Plaintiff's unpaid wage claims,
15 including that it did pay the proper minimum wage and overtime compensation, and that
16 Defendant fully complies with Labor Code section 204.1, which deals with paying commissioned
17 car salespersons. Defendant further argues that its detailed pay plans are lawful under *Vaquero*
18 *v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017).

19 Pursuant to Labor Code § 558, penalties for regular rate violations are \$50 for the first pay
20 period, and \$100 for each subsequent pay period. Thus, the maximum potential PAGA penalties
21 for the unpaid wage claim is \$402,500, which is calculated as follows: 189 [number of aggrieved
22 employees] x \$50 [first pay period penalty] + 3929 [number of subsequent pay periods] x \$100
23 [subsequent pay period penalty] = \$402,350. Plaintiff believes this is one of his strongest claims,
24 and therefore believes he had a 50% chance of success on the unpaid wage theory. Nevertheless,
25 Labor Code section 2699(e)(2) also gives a trial court broad discretion to reduce PAGA penalties:
26 "[A] court may award a lesser amount than the maximum civil penalty amount specified by this
27 part if, based on the facts and circumstances of the particular case, to do otherwise would result
28 in an award that is unjust, arbitrary and oppressive, or confiscatory." Case law supports a trial

1 court's discretion in downgrading penalties based on these factors. *See Thurman v. Bayshore*
2 *Transit Management, Inc.*, 203 Cal.App.4th 1112, 1135-1136 (2012) (no abuse of discretion by
3 reducing penalty by 30 percent). Thus, Plaintiff believes that the real value of the unpaid wage
4 penalties is \$140,823 ($\$402,350 \times .5$ [chances of success] $\times .7$ [court discretion] = \$140,823).
5 (Bartz Decl., ¶ 16.a).

6 2. Meal period violations

7 Plaintiff contends that Defendant failed to provide Plaintiff and other aggrieved
8 employees thirty-minute duty-free meal periods for every five hours of work as is required by
9 Labor Code § 512, the applicable wage orders, and in violation of *Brinker Restaurant Corp. v.*
10 *Superior Court*, 53 Cal.4th 1004 (2012). In *Brinker*, the California Supreme Court held that
11 “under ... Labor Code § 512, subdivision (a), an employer must relieve the employee of all duty
12 for the designated period.” *Id.* at 1034.

13 Plaintiff alleges that Defendant fail to provide duty-free, uninterrupted meal periods, and
14 that because of the staffing of Defendant's dealership, meal periods were difficult to take.
15 Defendant contends that it fully complied with California's meal period requirements, has specific
16 compliant policies governing the taking of meal periods, and Defendant had no duty to ensure
17 that meal periods were taken, pursuant to *Brinker*. Defendant further argues that individual issues
18 will predominate because of the various scenarios affecting different classes of employees
19 working for Defendant. As such, Defendant claims that PAGA claims must meet a manageability
20 requirement. *See Wesson v. Staples The Office Superstore, LLC*, 68 Cal.App.5th 746 (2021)
21 (holding that courts have inherent authority to ensure the manageability of PAGA claims).

22 The maximum potential PAGA penalties recoverable for meal period violations are
23 approximately \$805,000. Given that PAGA allows penalties of \$100 per pay period and a
24 subsequent penalty of \$200 per pay period, the amount is calculated as follows: 189 [number of
25 aggrieved employees] $\times$ \$100 [first penalty amount] + 3929 [subsequent pay periods] $\times$ \$200
26 [subsequent penalty amount] = \$805,000. Based on the various issues raised above regarding
27 proving meal period violations, Plaintiff believes that he has a 10% chance of proving all of those
28 penalties. Thus, Plaintiff believes that the real value of the meal period penalties is \$56,350.

1 (\$805,000 x .1 [chances of success] x .7 [court discretion] = \$56,350). (Bartz Decl., ¶ 16.b).

2 3. Rest period claims

3 Section 12(A) of the IWC Wage Order(s) states: “Every employer shall authorize and
4 permit all employees to take rest periods, which insofar as practicable shall be in the middle of
5 each work period. The authorized rest period time shall be based on the total hours worked daily
6 at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However,
7 a rest period need not be authorized for employees whose total daily work time is less than three
8 and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which
9 there shall be no deduction from wages.”

10 Section 12(B) of the IWC Wage Order(s) states: “If an employer fails to provide an
11 employee a rest period in accordance with the applicable provisions of this order, the employer
12 shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for
13 each workday that the rest period is not provided.”

14 Under *Brinker, supra*, the California Supreme Court found that employers have a “duty
15 to make a good faith effort to authorize and permit rest breaks in the middle of each work period.
16 . . .” *Brinker, supra*, 53 Cal.4th at 1031. Plaintiff alleges that rest periods were not authorized or
17 permitted because he and other aggrieved employees were not able to take them due to the
18 demands of work, and because of the short staffing at Defendant’s dealership.

19 Defendant contends that it complied with California’s rest period requirements, and
20 produced a rest period policy that facially complies with California law. Defendant also contends
21 each employee knew and actually took their rest breaks as desired.

22 Plaintiff calculates total penalties on the rest period claim of \$805,000. Given that PAGA
23 allows penalties of \$100 per pay period and a subsequent penalty of \$200 per pay period, the
24 amount is calculated as follows: 189 [number of aggrieved employees] x \$100 [first penalty
25 amount] + 3929 [subsequent pay periods] x \$200 [subsequent penalty amount] = \$805,000.
26 Given Defendant’s facially valid rest period policy, and potential individual issues relating to
27 proving rest break violations, Plaintiff believes he had a 5% chance of recovering all of the above
28 penalties on the rest period claim, in the absence of other mitigating factors. Given that a court

1 has discretion regarding the amount of penalties to be assessed, Plaintiff therefore believes the
2 real exposure of PAGA penalties on the rest period claim is approximately \$28,175. (\$805,000
3 x .05 [chances of success] x .7 [court discretion] = \$28,175.) (Bartz Decl., ¶ 16.c).

4 4. Failure to pay all wages on termination

5 Plaintiff further alleges that pursuant to Labor Code §203, aggrieved employees terminated
6 from Defendant's employment are entitled to a default penalty pursuant to Labor Code § 2699,
7 because Defendant did not pay them all wages due upon separation. Such a claim is derivative, and
8 for the same reasons as stated above, Defendant contends no wages are due, and thus no penalties
9 owed under PAGA. Defendant further argues that its failure to pay wages upon separation was not
10 "willful," in that the law is uncertain as to claims asserted in this case or whether the failure to pay is
11 due to a good faith dispute. *See Barnhill v. Robert Saunders & Co.*, 125 Cal.App.3d 1, 8 (1981)
12 (employer's failure to pay is not willful if its failure is due to uncertainty in the law); *Road Sprinkler*
13 *Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal.App.4th 765, 782 (2002)
14 (willfulness not met if defendant's failure to pay a result of a "good faith mistaken belief that wages
15 are not owed"). A "good faith dispute" occurs when an employer "presents a defense, based in law or
16 fact which, if successful, would preclude any recovery on the part of the employee." *Naranjo v.*
17 *Spectrum Sec. Servs., Inc.*, 88 Cal.App.5th 937, 944 (2023) (petition for review granted). The fact
18 that the defense may ultimately be unsuccessful is not determinative as only defenses that "are
19 unsupported by any evidence, are unreasonable, or are presented in bad faith" preclude a finding of a
20 good faith dispute. *See Naranjo*, 88 Cal.App.5th at 945; *see also Estrada v. Royalty Carpet Mills, Inc.*
21 76 Cal.App.5th 685, 729 (2022).

22 Plaintiff calculates PAGA penalties on this claim of \$18,900. This was calculated by
23 multiplying 189 [terminated employees] by \$100 [default penalty]. Based on the heightened
24 willfulness standard, Plaintiff estimates that the real exposure of this claim is 10% of those total
25 penalties. Moreover, Plaintiff applies the same discounts as set forth above in the above analysis
26 as to the court's discretion to reduce penalties. As such, Plaintiff believes the real exposure on
27 this claim to be \$1,323 (\$18,900 x .1 [chances of success] .70 [court discretion] = \$1,323. (Bartz
28 Decl., ¶ 16.d).

1 5. Improper pay stubs

2 Plaintiff further alleges that Defendant failed to provide proper pay statements that
3 complied with Labor Code § 226.

4 Plaintiff alleges similar theories of liability as above with respect to the paystub claim, i.e.
5 that the wage statements are defective because they do not reflect all wages owed, and fail to
6 show premium payments for missed meal and rest periods. *See Naranjo v. Spectrum Security*
7 *Servs., Inc.*, 13 Cal.5th 93 (2022). Plaintiff further alleges that to obtain PAGA penalties for pay
8 stub violations, a plaintiff need not satisfy the “injury” or “knowing and intentional” requirements
9 of Labor Code section 226(e)(1). *See Raines v. Coastal Pacific Food Distributors, Inc.*, 23
10 Cal.App.5th 667 (2018).

11 On the other hand, Defendant argues derivative violations of Labor Code § 226 do not
12 give rise to pay stub violations upon which PAGA penalties arise. *See Maldonado v. Epsilon*
13 *Plastics, Inc.*, 22 Cal.App.5th 1308 (2018); *see also Culley v. Lincare Inc.*, 236 F.Supp.3d 1184,
14 1195-1196 (E.D. Cal. 2017). Defendant further argues that any such violations were inadvertent,
15 and therefore not actionable. *See Heritage Residential Care, Inc. v. Division of Labor Standards*
16 *Enforcement*, 192 Cal.App.4th 75 (2011).

17 Plaintiff calculates pay stub penalties to be approximately \$805,000. Given that PAGA
18 allows penalties of \$100 per pay period and a subsequent penalty of \$200 per pay period, the
19 amount is calculated as follows: 189 [number of aggrieved employees] x \$100 [first penalty
20 amount] + 3929[subsequent pay periods] x \$200 [subsequent penalty amount] = \$805,000.
21 Plaintiff believes he had a 10% chance of recovering all of the potentially recoverable civil
22 penalties. Moreover, Plaintiff applies the same discounts as set forth above in the analysis as to
23 the court’s discretion to reduce penalties. As such, Plaintiff believes the real exposure on this
24 claim to be \$56,350. (\$805,000 x .1 [chances of success] x .7 [court discretion] = \$56,350).
25 (Bartz Decl., ¶ 16.e).

26 6. Total exposure to PAGA penalties

27 Based upon the alleged Labor Code violations, Plaintiff believes the total actual PAGA
28 exposure is approximately \$283,021. Based on a settlement value of \$115,000, this amounts to

1 approximately 41% of the total exposure to PAGA penalties. Plaintiff believes this to be a very
2 good result, given that Defendant has valid defenses to Plaintiff's claims. Moreover, there is a
3 substantial question as to whether a trial court will even award cumulative penalties sought by
4 Plaintiff for alleged multiple Labor Code violations because there is no established precedent for
5 such an award.² Even to the extent any violations are proven, Defendant argues that any
6 heightened penalties from subsequent violations are not warranted. *See Amaral v. Cintas Corp.*
7 *No. 2, 163 Cal.App.4th 1157, 1208-1209 (2008)* ("Until the employer has been notified that it is
8 violating a Labor Code provision. . . , the employer cannot be presumed to be aware that its
9 continuing underpayment of employees is a 'violation' subject to penalties"). (Bartz Decl., ¶
10 16.f).

11 The purpose of the PAGA is to "achieve maximum compliance with [California's] labor
12 laws." *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 379 (2014). The penalties
13 recovered here on behalf of the State and aggrieved employees achieve that purpose.

14 VI.

15 NOTICE OF THE SETTLEMENT IS NOT REQUIRED

16 "[A] PAGA action is a statutory action for penalties brought as a proxy for the State," and
17 as such, "there is no need to protect absent employees' due process rights[.]" *Williams v. Superior*
18 *Court*, 3 Cal.5th 531, 546 (2017). "Unnamed employees need not be given notice of the PAGA
19 claim, nor do they have the ability to opt-out of the representative PAGA claim." *Ochoa-*
20 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *5 (N.D. Cal. Apr. 2, 2010). A
21 representative PAGA action need not satisfy class action requirements, and no due process
22 concern arises from the fact that there are "nonparty aggrieved employees who are not given
23 notice if, and an opportunity to be heard in, a representative action that is not brought a class
24 action." *Arias v. Sup. Ct.*, 46 Cal.4th 969, 984 (2009). "PAGA does not make other potentially
25

26 ² While there are cases allowing for the "stacking" of penalties when it comes to evaluating the
27 "amount in controversy" where a case has been removed to federal court (*see Schiller v. David's*
28 *Bridal, Inc.*, 2010 WL 2793650 (E.D. Cal. July 14, 2010)), it appears to be an open question
whether such "stacked" penalties may be awarded when they potentially overlap and "double
count" remedies for similar violations.

aggrieved employees parties” to the action and no “due process concerns arise under PAGA because absent employees do not own a personal claim for PAGA civil penalties and whatever personal claims the absent employees might have for a relief are not at stake.” *Williams, supra*, 3 Cal. 5th at 546-547 (internal references omitted, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46th Cal.4th 993, 1003 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014).)

VII.

ATTORNEYS’ FEES AND COSTS

A. Fees Can Be Awarded As A Percentage of the Common Fund

When a common fund is created, attorneys who secured the fund are entitled to a percentage of the fund. (*See Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503 [“the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created]; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 26 [“percentage fees have traditionally been allowed in . . . common fund cases”]). Plaintiff’s request for one-third of the common fund is reasonable, falls within the Ninth Circuit’s historical benchmark for attorneys fees of 25% to 50% of a common fund, and is fair compensation for undertaking complex litigation on a contingent basis. (*See, e.g.,* Rubinstein, Conte and Newberg, Newberg on Class Actions at § 14:6 [surveying cases, and finding that 30-50% of fees awarded in cases in which the common fund is relatively small]; *see also In re Ampicillin Antitrust Litigation* (D.D.C. 1981) 526 F.Supp. 494 [court approved attorney fee award equal to 45% of the settlement fund].)

Under the common fund doctrine, “a litigant or 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.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 750, 62 L.Ed.2d 676 (1980). The Supreme Court explained:

The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense. Jurisdiction over the fund involved in litigation allows a court to prevent this inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.” (Citations omitted.)

(*Id.*; see also *Laffitte, supra*, 1 Cal.5th at 503 [“the percentage method is a valuable tool that should not be denied our trial courts”]; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 [“one who expends attorneys’ fees in winning a suit which creates a fund from which other derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs”].)

Thus, the common fund doctrine ensures that each member of the class contributes proportionately to the payment of attorney’s fees recovered from monetary payments that the prevailing party recovered in the lawsuit. “Put another way, in common fund cases, a variant of the usual rule applies and the winning party pays his or her own attorneys fees. . . .” *Stanton v. Boeing*, 327 F.3d 938, 967 (9th Cir. 2003), citing *Wininger v. SI Mgmt L.P.*, 301 F.3d 1115 (9th Cir. 2002).

Because Plaintiff’s attorneys secured a fund for Plaintiff and the other aggrieved employees, they are entitled to a reasonable percentage of that fund.

B. Plaintiff’s Attorneys Fees Are Also Recoverable Under The Lodestar Adjustment Approach

Fees in representative cases are also appropriate under the lodestar method, whereby the number of hours reasonably expended is multiplied by a reasonable hourly rate. See *Lealao, supra*, 82 Cal.App.4th at 26. Under PAGA, moreover, attorneys’ fees and costs are statutorily recoverable. See Cal. Labor Code § 2699, subd. (g)(1). Once a lodestar has been established, it may “be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.” *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095 (2000). In evaluating the lodestar, and whether an upward adjustment is appropriate, courts look to the qualifications of counsel, the reasonableness of the rates charged, the novelty and difficulty of the case, the contingent nature of the case, the results achieved, and related matters. See, e.g., *Serrano, supra*, 20 Cal.3d 25, 49; see also *Press v. Lucky Stores, Inc.*, 34 Cal.3d 311, 321-322 (1983). All such factors support the fee award here.

1. Plaintiff’s Counsel Are Well-Qualified To Represent The Aggrieved Employees And Their Rates Are Reasonable

Counsel for Plaintiff are experienced employment lawyers, and have extensive experience in the specific subcategory of wage and hour claims. (Bartz Decl. ¶¶ 13-15). Moreover, counsel

1 for Plaintiff have hourly rates that are reasonable in the relevant market, and below that found
2 with other class action employment lawyers with similar expertise. (Bartz Decl., ¶ 17).

3 **2. Plaintiff's Counsel's Lodestar Is Well Documented**

4 A properly supported motion for attorney's fees is prima facie evidence that the expenses
5 and services were necessarily incurred. *Hadley v. Krepel*, 167 Cal.App.3d 677, 682 (1985).
6 Here, counsel provide appropriately detailed declarations and detailed, contemporaneous billing
7 statements in support of the lodestar amounts. (Bartz Decl., ¶ 17, and Ex. 4 thereto).

8 **3. Novelty And Difficulty Of The Case**

9 Plaintiff and his counsel were able to secure a favorable settlement only after investigating
10 the claims and researching the theories of potential liability in this case. This case presented
11 several novel issues, including whether commissioned car salespersons are exempt from the
12 holding in *Peabody*, *supra*. Moreover, whether Defendant paid the regular rate of pay and the
13 timing of such pay involving overtime was a novel issue that would have required substantial
14 further motion practice to determine, and that Plaintiff may have been unsuccessful in proving.

15 **4. Plaintiff's Counsel Worked Efficiently And Skillfully**

16 Plaintiff obtained significant informal discovery, interviewed witnesses, and researched
17 all available claims in investigating the alleged wage and hour violations. Plaintiff and his counsel
18 resolved the case only after intense back and forth settlement negotiations. Plaintiff's counsel's
19 tenacity produced the highest and best settlement possible from Defendant.

20 **5. Plaintiff's Counsel Worked Entirely On A Contingency Basis**

21 Plaintiff's counsel worked on a complete contingency and advanced all expenses and
22 costs. The contingent risk included liability issues, damage issues, and evolving changes under
23 PAGA. According to the California Supreme Court:

24 A contingent fee must be higher than a fee for the same legal services paid as they are
25 performed. The contingent fee compensates the lawyer not only for the legal services he
26 renders but for the loan of those services. The implicit interest rate on such a loan is higher
27 because the risk of default (the loss of the case, which cancels the debt of the client to the
28 lawyer) is much higher than that of conventional loans.

1 (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133, quoting Posner, *Economic Analysis of*
2 *Law* (4th ed. 1992) pp. 534, 567.)

3 **6. Plaintiff's Counsel Achieved A Very Good Result**

4 Plaintiff's counsel obtained a \$115,000 settlement, which would not have been achieved
5 but for Plaintiff and his attorneys' ability to efficiently prosecute the case to a successful
6 conclusion.

7 **C. Plaintiff's Counsel's Costs Are Documented and Reasonable**

8 Plaintiff's counsel are also entitled to their reasonable out-of-pocket costs incurred in
9 prosecuting this action, in the amount of \$1,407, which includes filing and motion fees, and other
10 costs necessary to the prosecution of this case. (Bartz Decl., ¶ 17, Ex. 5 thereto). Moreover,
11 Xpand Legal has agreed to provide settlement administration services in the amount of \$4,750,
12 including preparing and mailing the notices to the aggrieved employees, distributing the
13 payments, and performing other administration duties for this PAGA settlement. (Declaration of
14 Jonathan Paul ("Paul Decl."), ¶¶ 4-10, and Ex. B thereto). All such amounts should be deducted
15 from the common fund created, and Defendant does not oppose Plaintiff's counsel's request for
16 costs and administration expenses.

17 **VIII.**
18 **CONCLUSION**

19 Based on the foregoing, Plaintiff respectfully requests that this Court grant its Motion to
20 Approve the PAGA Settlement.

21 Dated: January 14, 2024

22 BARTZ LAW GROUP, APC

23
24 By: /s/Aaron A. Bartz/s/
25 Aaron A. Bartz
26 Attorneys for Plaintiff CHRISS SORENSEN
27
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