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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 DANIEL RODRIGUEZ DURAN, an
12 individual, on behalf of himself, the State of
13 California, as a private attorney general, and on
14 behalf of all others similarly situated,

Plaintiff,

15 v.

16 ONE WEEK BATH, INC., a California
17 Corporation; and DOES 1 TO 50,
18 Defendants.
19

Case No. 22STCV39557

**NOTICE OF MOTION AND PLAINTIFF'S
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

*[Filed concurrently with Declaration of
Jonathan Melmed; Proposed Order]*

Hearing Date: September 16, 2024

Time: 2:00 pm

Dept.: 10

Judge: Hon. William F. Highberger

Complaint Filed: December 20, 2022

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 16, 2024, at 2:00 p.m., or as soon thereafter as this matter may be heard, in Department 10 of the Los Angeles County Superior Court for the State of California, located at 312 North Spring Street, Los Angeles California 90012, before the Honorable William F. Highberger, Plaintiff Daniel Rodriguez Duran (“Plaintiff”) will and hereby does move this Court for an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”).

This motion is based upon this the Memorandum of Points and Authorities; the Declaration of Jonathan Melmed in support thereof; the Stipulation and Agreement for PAGA Representative Action Settlement (the “Settlement Agreement”); the Proposed Order Granting Approval of PAGA Settlement and Entering Judgment; all other records, pleadings, and papers filed in this action; and upon such other evidence or argument as may be presented to the Court at the hearing of this motion.

Dated: August 8, 2024

MELMED LAW GROUP P.C.

By: 
Jonathan Melmed, Esq.
Attorneys for Plaintiff and the PAGA Settlement
Group Members

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.....2

III. SUMMARY OF PLAINTIFF’S CLAIMS4

A. Plaintiff’s Reimbursement Claim.....4

IV. THE PAGA AND ITS REQUIREMENTS5

V. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES.....6

A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES7

B. THE DISTRIBUTION OF THE NET SETTLEMENT AMOUNT.....7

C. PAYMENT AND THE NOTICE7

D. SETTLEMENT ALLOCATION TO THE PAGA SETTLEMENT GROUP MEMBERS8

E. THE RELEASE8

VI. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT APPROVAL9

A. Standards for Approval of a PAGA Settlement.....9

B. The Civil Penalties are Appropriate Under the Circumstances and Given Defendant’s Convincing Arguments and Evidence.....10

VII. THE REQUESTED ATTORNEYS’ FEES AND LITIGATION COSTS ARE FAIR AND REASONABLE.....12

A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEYS’ FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM ACTION.....13

B. A FEE OF ONE-THIRD OF THE GROSS SETTLEMENT AMOUNT IS FAIR AND REASONABLE BASED UPON THE FACTORS DEVELOPED BY THE COURTS AND SERVES THE PUBLIC POLICY OF ATTRACTING COMPETENT COUNSEL TO LITIGATE THESE CASES16

VIII.SUBMISSION TO THE LWDA.....20

IX. THE SETTLEMENT ADMINISTRATOR.....20

X. CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

<i>Arias v. Superior Court</i> , 46 Cal.4th 969 (2009)	3, 13, 15
<i>Bank of America v. Cory</i> (1985) 164 Cal.App.3d 66.....	24
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	25
<i>Brinker Rest. Corp. v. Sup. Ct.</i> (2012) 53 Cal.4th 1004	7
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	25
<i>Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.</i> (2005) 127 Cal.App.4th 387	26
<i>Dunk v. Ford Motor, Co.</i> (1996) 48 Cal.App.4th 1794	25
<i>Harris v. Marhoefer</i> (9th Cir. 1994) 24 F.3d 16	27
<i>Iskanian v. CLS Transp. Los Angeles, LLC</i> (2014) 59 Cal.4th 348	1, 3, 24
<i>Jutkowitz v. Bourns, Inc.</i> (1981) 118 Cal.App.3d 102	25
<i>Laffitte v. Robert Half Int'l. Inc.</i> (2016) 1 Cal.5th 480	24, 26, 27
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4th 19	25
<i>Mills v. Electric Auto-Lite Co.</i> (1970) 396 U.S. 375	25
<i>People ex rel. Stratham v. Acacia Research Corp.</i> (2012) 210 Cal.App.4th 487.....	23
<i>Sanders v. City of Los Angeles</i> (1970) 3 Cal.3d 252	25
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25	25
<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25	25
<i>Vizcaino v. Microsoft Corp.</i> (9th Cir. 2002) 290 F.3d 1043	26
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224	26

Statutes

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157, 1209 (2008)	18
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Rules

<i>Cabrera v. Advantage Sale & Marketing, LLC</i> , Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March 12, 2013).....	22
<i>Fleming v. Covidien Inc.</i> (C.D. Cal., Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at *4.....	18
<i>Penaloza v. PPG Industries Inc.</i> , Case No. BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20, 2013)	22

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This PAGA representative action stems from Defendant One Week Bath, Inc.’s
4 (“Defendant”) alleged violations of Labor Code §§ 2802, 2804, and California Industrial
5 Commission Wage Order 4, as to *all individuals who are or were employed by Defendant as non-*
6 *exempt employees in California during the Covered Period* (the “PAGA Settlement Group
7 Members”), the “Covered Period” is defined as December 20, 2022, through July 31, 2024. A
8 PAGA action is a type of qui tam action filed on behalf of the state to assist it with labor law
9 enforcement. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380-382. As
10 such, the state is the real party in interest in a PAGA action. *Id.* at 382.

11 The State of California was timely served with a copy of the agreement negotiated between
12 the parties (the “Settlement Agreement”) concurrently with this Motion to Approve the PAGA
13 Settlement.

14 Plaintiff and the PAGA Settlement Group Members contend that between December 20,
15 2022, and July 31, 2024 (the “Covered Period”), Defendant violated Labor Code §§ 2802, 2804,
16 and California Industrial Commission Wage Order 4. Defendant has denied and continues to deny
17 each and every material factual allegation and alleged claims asserted in the Action and denies that
18 Plaintiff or any other alleged aggrieved employee has been harmed based on the allegations raised
19 in the Action. The Parties dispute the merits of the claims and defenses.

20 The Parties exchanged various documents and information that allowed both sides to
21 evaluate the potential exposure and potential risk, such as a review of policies related to the claims
22 alleged in the Action, a sample of time and pay records, and the necessary data to evaluate the
23 valuation of a PAGA settlement including number of PAGA Settlement Group Members and
24 number of pay periods at issue. During this process, Plaintiff’s counsel analyzed, researched, and
25 investigated the potential issues, including matters related to the calculation of PAGA damages,
26 interviews of Plaintiff, trial management, and appellate issues and risks.

27 Now with a comprehensive Settlement Agreement that resolves the claims alleged in this
28 case, Plaintiff seeks this Court’s approval of a \$33,000.00 PAGA settlement involving

1 approximately 71 PAGA Settlement Group Members. The settlement merits full approval because
2 it fulfills the purpose of PAGA (*i.e.*, to deter violations of the Labor Code and secure obedience of
3 California’s labor laws; to end ongoing violations of the Labor Code either through injunctive
4 relief or a defendant’s voluntary changes in light of a PAGA action; and to provide relief that is
5 genuine, meaningful, and consistent with California’s goal of benefitting the public through
6 enforcement of labor laws). The following table summarizes the allocation of the Total Settlement
7 Amount:

<u>Total Settlement Amount of \$33,000.00 Is Broken Down As Follows:</u>	
•	Plaintiff’s Counsel Attorneys’ Fees not to exceed \$11,000.00 .
•	Plaintiff’s Counsel Costs totaling \$10,203.31
•	Settlement Administration Costs, not to exceed of \$2,900.00
•	Plaintiff’s Incentive payment of \$5,000.00
•	Approximately \$3,896.69 for the Net Settlement Amount: ○ 25% of the Net Settlement Amount for the PAGA Aggrieved Employee Payment (approximately \$974.17) ○ 75% of the Net Settlement Amount for the LWDA Payment (approximately \$2,922.52)

15 Because this is a PAGA-only settlement, the process for approval is fairly straight-forward:
16 “The superior court shall review and approve any settlement of any civil action filed pursuant to
17 this part.” (Labor Code § 2699(1)(2).) Based on the California Supreme Court’s holdings in *Arias*
18 *v. Superior Court*, 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*,
19 59 Cal.4th 348 (2014), there is no requirement under PAGA for Plaintiff to establish the
20 requirements of class certification (*i.e.* numerosity, typicality, commonality and adequacy) nor is
21 there the usual two-step preliminary and final approval process as found in class actions. Rather,
22 this PAGA-only settlement merely requires a one-step review and approval process.

23 For these reasons and those discussed below, the Parties now seek the Court’s approval of
24 the Settlement.

25 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

26 On December 20, 2022, Plaintiff submitted a letter to the California Labor and Workforce
27 Development Agency (“LWDA”) to notify the LWDA pursuant to the Private Attorneys General
28 Act of 2004, Labor Code section 2698, *et seq.* (“PAGA”) of Plaintiff’s intent to seek civil

1 penalties under PAGA for violations of Labor Code §§ 2802, 2804, and California Industrial
2 Commission Wage Order 4. A true and correct copy of the PAGA notice is attached to the JM
3 Decl. as **Exhibit 2**. This notice letter is required under Labor Code § 2699.3(a)(1)(A) as a
4 prerequisite to bringing a PAGA representative claim against an employer. JM Decl., ¶ 10. The
5 LWDA did not respond to this notice, thus allowing Plaintiff to file the instant lawsuit. Lab. Code
6 § 2699.3(a)(2)(A). *Id.*

7 On the same day, Plaintiff filed his class action complaint alleging causes of action for (1)
8 failure to indemnify all necessary business expenditures, and (2) violations of California’s unfair
9 competition law. JM Decl., ¶ 11.

10 On April 19, 2023, Plaintiff filed a first amended complaint alleging a single cause of action
11 for PAGA Penalties Pursuant to Labor Code § 2698 et seq. for violations of Labor Code §§ 2802,
12 2804, and California Industrial Commission Wage Order 4 (the “Action”). JM Decl. ¶ 12.

13 Although Defendant denied the allegations and vowed to vigorously defend against them,
14 the parties agreed to attempt to reach a resolution. JM Decl. ¶ 13. The Parties exchanged various
15 documents and information that allowed both sides to evaluate the potential exposure and potential
16 risk, such as a review of Defendant’s policies related to the claims alleged in the Action and a
17 sample of time and pay records. *Id.* During this process, Plaintiff’s counsel analyzed, researched,
18 and investigated the potential issues, including matters related to the calculation of PAGA
19 damages, interviews of Plaintiff, trial management, and appellate issues and risks. JM Decl. ¶ 14.

20 The Parties concluded that there were benefits associated with settling the Action and
21 concluded, after considering the sharply disputed factual and legal issues involved in this
22 litigation, the risks associated with further prosecution, the substantial benefits to be received
23 pursuant to the compromise and settlement of the Action as set forth in the Settlement Agreement,
24 as well as Plaintiff’s individual claims. JM Decl. ¶ 15. The Parties believe that settlement on the
25 terms set forth in the Settlement Agreement is in the best interest of the Plaintiff, the LWDA, the
26 PAGA Settlement Group Members covered by PAGA, and Defendant, and is fair and reasonable.
27 The Parties now present the Settlement Agreement to this Court for approval. *Id.*

1 **III. SUMMARY OF PLAINTIFF'S CLAIMS**

2 **A. Plaintiff's Reimbursement Claim**

3 Plaintiff alleged that, at the direction of Defendant and/or with Defendant's knowledge and
4 acquiescence, him and the PAGA Settlement Group Members have used their personal cell
5 phones to for work related purposes. JM Decl. ¶ 20. For example, Plaintiff alleged that
6 Defendant's supervising employees regularly contact Plaintiff and the PAGA Settlement Group
7 Members for scheduling purposes. *Id.* Further, Plaintiff alleged that he and the PAGA Settlement
8 Group Members were also required to clock in and out for their shifts by calling in on their
9 personal cell phones. *Id.* Plaintiff further alleged that Defendant required Plaintiff and the PAGA
10 Settlement Group Members to shoulder the cost associated with business use of their personal cell
11 phones and personal devices. *Id.*

12 Plaintiff alleged that Defendant did not maintain an expense reimbursement policy and/or
13 practice stating that Defendant will affirmatively reimburse Plaintiff and the PAGA Settlement
14 Group Members for a reasonable portion of their monthly personal cell phone bills and other
15 expenses necessarily incurred in their discharge of their duties, as required by *Cochran v.*
16 *Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) ("We hold that when
17 employees must use their personal cell phones for work-related calls, Labor Code section 2802
18 requires the employer to reimburse them. Whether the employees have cell phone plans with
19 unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their
20 cell phone bills.") (reversing denial of class certification in cell phone reimbursement class action
21 and setting forth the applicable law for these claims); *Aguilar v. Zep, Inc.*, 2014 WL 4245988 *17
22 (N.D. Cal. Aug. 27, 2014) (granting plaintiffs' motion for partial summary judgment on the
23 plaintiffs' cell phone reimbursement claim); *Ritchie v. Blue Shield of California*, 2014 WL
24 6982943, at *21 (N.D. Cal. Dec. 9, 2014) (Hon. Edward Chen) (certifying class of cell phone
25 reimbursement claim and adopting the logic of *Cochran*). JM Decl. ¶ 21. To the contrary, although
26 Plaintiff and the PAGA Settlement Group Members allegedly used their personal cell phones to
27 perform their job duties with the knowledge of and/or acquiescence of Defendant, Plaintiff argued
28

1 that Defendant did not reimburse Plaintiff and the PAGA Settlement Group Members in full any
2 such expenses incurred. *Id.*

3 **IV. THE PAGA AND ITS REQUIREMENTS**

4 PAGA provides an enforcement mechanism for California’s labor laws by enlisting
5 individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share
6 also going to the individual plaintiffs and other employees. Due to the lack of financing for
7 California’s agencies, and the substantial number of Labor Code violations by California
8 employers, the California Legislature found that it was in the public interest to allow aggrieved
9 employees to act as “private attorneys general” to enforce and recover civil penalties on behalf of
10 the State of California for Labor Code violations committed by employers. *Arias*, 46 Cal.4th at
11 980. As the Legislature that adopted PAGA observed, “the only meaningful deterrent to unlawful
12 conduct is the vigorous assessment and collection of civil penalties as provided in the Labor
13 Code.” Stats. 2003 ch. 906, § 1(b).

14 Moreover, the Labor Code’s primary purpose is to “ensure employees are not required or
15 permitted to work under substandard unlawful conditions ... and to protect employers who comply
16 with the law from those who attempt to gain a competitive advantage at the expense of their
17 workers by failing to comply with minimum labor standards.” Labor Code § 90.5(a). Therefore,
18 the Legislature determined that “adequate financing of labor law enforcement was necessary to
19 achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement
20 agencies had declined and were unlikely to keep pace with the future growth of the labor market,
21 and that it was therefore in the public interest to allow aggrieved employees, acting as private
22 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
23 labor law enforcement agencies were to retain primacy over private enforcement efforts.” Thus,
24 Plaintiff, acting as a private attorney general and proxy for the State of California, filed this action
25 seeking civil penalties for Defendant’s alleged violations of the Labor Code.

26 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor
27 and Workforce Development Agency for enforcement of labor laws and education of employers
28 and employees about their rights and responsibilities under this code ...; and 25 percent to the

aggrieved employees.” Lab. Code § 2699(i).

Before filing a PAGA action, an aggrieved employee must first provide written to the LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf if the LWDA fails to respond to the notice within 65 days, responds that it does not intend to investigate, or investigates and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In this case, Plaintiff provided the LWDA with a notice letter advising it of the alleged Labor Code violations, but the LWDA deferred the prosecution of these violations to Plaintiff and his attorneys. JM Decl. ¶ 10. Accordingly, the Settlement and the \$33,000 common fund created by it for the benefit of the State and PAGA Settlement Group Members, is solely the result of the work performed by Plaintiff and her attorneys on this case – all while the PAGA Settlement Group Members will preserve their own separate individual claims should they wish to pursue them.

Any settlement of a PAGA action brought by an aggrieved employee must be approved by the court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA approval process and, more specifically, whether an aggrieved employee needs to meet class certification requirements. *Arias*, 46 Cal.4th at 976. After a substantial review of the legislative history of PAGA, the Court held that an aggrieved employee's representative action brought on behalf of the state and other aggrieved employees against an employer for PAGA violations *does not* need to meet the requirements for class certification nor does there need to be notice to the other employees. *Id.* at 975, 980-88. As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986. Thus, the Court simply reviews the settlement and approves it if it is deemed to be fair and reasonable.

Accordingly, the Parties to this current PAGA action have reached such an agreement and now seek this Court’s approval of the Settlement.

V. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES

The following is a summary of the principal terms of the Settlement Agreement.

1 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA**
2 **PENALTIES**

3 The settlement provides that Defendant will pay a non-reversionary settlement amount of
4 Thirty-Three Thousand Dollars (\$33,000.00) (the “Total Settlement Amount”), inclusive of
5 payments to the LWDA and the PAGA Settlement Group Members, attorneys’ fees and litigation
6 costs, Plaintiff’s enhancement award, and Settlement Administrator fees. The Settlement
7 Agreement is attached as **Exhibit 1** to JM Decl. After payment of the attorneys’ fees and costs,
8 Plaintiff’s enhancement award, and settlement administrator fees, the remaining funds (the “Net
9 Settlement Amount”) is approximately **\$3,896.69**.

10 **B. THE DISTRIBUTION OF THE NET SETTLEMENT AMOUNT**

11 Seventy-Five Percent (75%) of the Net Settlement Amount shall be distributed to the
12 LWDA consistent with the Settlement Agreement. The Settlement Agreement provides for a fair
13 and equitable means of allocating the remaining twenty-five percent (25%) of the Net Settlement
14 Amount to the PAGA Settlement Group Members. The allocation among the PAGA Settlement
15 Group Members shall be determined by dividing the number of pay periods he or she worked
16 during the Covered Period by the total aggregate number of pay periods worked by all PAGA
17 Settlement Group Members during the Covered Period and then multiplying this amount by the
18 PAGA Aggrieved Employee Payment.

19 **C. PAYMENT AND THE NOTICE**

20 Defendant shall fully fund the Gross Settlement Amount by transmitting the funds to the
21 Administrator no later than fourteen (14) days after the Effective Date. Settlement Agreement, p.
22 6. “Effective Date” means the date by when both of the following have occurred: (a) the Court
23 enters a Judgment on its Order Approving the PAGA Settlement and (b) the Judgment is final. The
24 Judgment is final as of the latest of the following occurrences: (a) the day the Court enters
25 Judgment. Settlement Agreement, pp. 1-2.

26 Within fifteen (15) days after the Approval Order, Defendant will provide to the Settlement
27 Administrator the last known mailing addresses for each of the PAGA Settlement Group
28 Members, for the purpose of the Settlement Administrator distributing the Settlement Shares by

1 U.S. mail delivery of a check. Settlement Agreement pp. 5-6. No later than 14 days after the
2 Defendant transfers the Total Settlement Amount to the Settlement Administrator, the Settlement
3 Administrator will mail a check to each PAGA Settlement Group Member with his or her
4 Settlement Share (defined in the Settlement Agreement as the portion of the Net Settlement
5 Amount allocable to each PAGA Settlement Group Member as consideration for the settlement
6 and release of claims for penalties under PAGA as provided by this Agreement.) Settlement
7 Agreement p. 6.

8 **D. SETTLEMENT ALLOCATION TO THE PAGA SETTLEMENT GROUP**
9 **MEMBERS**

10 As noted, should the Court so elect, twenty-five percent (25%) of the PAGA Penalties will
11 be allocated to the PAGA Settlement Group Members. Settlement Agreement p. 5. Based on the
12 numbers provided by Defendant, approximately 71 current and former employees will share in this
13 fund. The Settlement Agreement provides a very fair and equitable means of allocating this fund.
14 The allocation among the PAGA Settlement Group Members shall be divided equally among all
15 PAGA Settlement Group Members. *Id.* The portion of each Aggrieved Employee's share will be
16 treated as non-wage income and reported by the Settlement Administrator on IRS Form 1099, as
17 required by law. *Id.*

18 **E. THE RELEASE**

19 The California Supreme Court has explained that a judgment in "a representative action
20 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
21 is binding not only on the named employee plaintiff but also on government agencies and any
22 aggrieved employee not a party to the proceeding." *Arias*, 46 Cal. 4th at 985-986. In accordance
23 with this rule, the release in the Settlement Agreement narrowly covers the claims for civil penalty
24 Representative Plaintiff brought under Labor Code § 2699 and not the claims for the alleged
25 underlying violations. Settlement Agreement pp. 7-8. The release in the Settlement Agreement
26 includes:

27 "All Aggrieved Employees are deemed to release, on behalf of
28 themselves and their respective former and present representatives,
agents, attorneys, heirs, administrators, successors, and assigns, the

Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice.” Settlement Agreement p. 7.

For these reasons, the Parties contend that the release narrowly applies only to the claims alleged, and only binds the PAGA Settlement Group Members as to the PAGA claims.

VI. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT APPROVAL

A. Standards for Approval of a PAGA Settlement

The legislative history of PAGA makes little mention of the approval requirements in § 2699, subdivision (l). PAGA was passed by the legislature as Senate Bill (“SB”) 796, and it was signed by the Governor and filed with the Secretary of State on October 12, 2003. *See*, Legislative Digest re Senate Bill No. 796. It took effect on January 1, 2004.

The original version of the act did not contain the court approval requirement now codified in § 2699(l). That subdivision was added as part of the amendments to the Act that were introduced as SB 1809 in February 2004 and signed by the Governor on August 11, 2004. *See*, Legislative Digest re Senate Bill No. 1809. Those amendments took effect immediately, and the Court approval requirement of § 2699(l) was one of the provisions that the legislature made retroactive to January 1, 2004. *Id.*

Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments (SB 1809). On July 29, 2004, during the consideration of the amendments in SB 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was published in the Senate Daily Journal, “to clarify the extent of subdivision (l)” of what is now section 2699. He was sending this letter “in response to an issue raised by the Judicial Council of California.” *Id.* In the letter, Senator Dunn stated,

The purpose of court review of the penalties in subdivision (l) is to ensure that settlements involving penalties arising out of Labor Code Section 2699 do not undercut the dual statutory purposes of punishment or deterrence, or result in unjust, arbitrary, and oppressive, or confiscatory settlements. *Id.*

The broad criteria appear to give the Court wide latitude in determining whether to approve the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on the effect the

1 penalties may have on the defendant-employer rather than the LWDA or the aggrieved employees
2 who will receive the penalties. *See, Iskanian, supra*, 59 Cal.4th at 313 (stating that while the State
3 clearly has an interest “in receiving the proceeds of civil penalties,” the penalties are “used to deter
4 violations.”) This is different than the analysis of a class action settlement, which typically focuses
5 on the amount received by the class and compares that to the reasonable range of potential
6 outcomes in this case. *C.f., e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
7 130. Moreover, “there is not requirement that the Court certify a PAGA claim for representative
8 treatment” as in a class action. *Villalobos v. Calandri Sunrise Farms LP* (C.D. Cal. July 2015)
9 2015 WL 12732709, at *5.

10 **B. The Civil Penalties are Appropriate Under the Circumstances and Given Defendant’s**
11 **Convincing Arguments and Evidence**

12 Here, the penalties are appropriate when considered in light of the principles discussed in
13 Senator Dunn’s letter. Plaintiff contends that a non-reversionary Total Settlement Amount of
14 \$33,000.00 represents an excellent recovery that is large enough to punish or deter Defendant.
15 The proposed Settlement provides a fair and reasonable monetary recovery for the LWDA, should
16 the Court so elect, the PAGA Settlement Group Members in the face of hotly-disputed claims.

17 **First**, although PAGA and its legislative history do not seem to require a comparison with
18 the “maximum value” of the claims to the actual settlement amount, the penalties are reasonable
19 when considered in this context as well. The number of PAGA Settlement Group Members in the
20 PAGA covered period is only 71 and the number of PAGA-eligible pay periods is 2,028. JM Decl.
21 ¶ 23.

22 Further, while Plaintiff believes the claims are meritorious and that they would have
23 recovered unreduced penalties, Defendant asserted numerous defenses to the claims. JM Decl. ¶
24 24. For example, a significant factor in evaluating the value of a PAGA-only case is that all PAGA
25 awards are discretionary and subject to potentially significant reduction by the Court. Defendant
26 maintains that given their good faith and *de minimis* defenses, this Court would exercise its
27 discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of
28 Plaintiff’s claims. *Id. See also*, Labor Code §§ 203, 2699(e)(2); *Thurman v. Bayshore Transit*

1 *Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties for wage
2 statement violations from \$2,800,000 to \$500,000, because “the aggrieved employees suffered no
3 injury” as a result of the violations, the defendants “were not aware” their wage statements
4 violated the law, and the defendants “took prompt steps to correct all violations once notified.”);
5 *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at *4
6 (reducing PAGA penalties from \$2.8 million to \$500,000). *Id.*

7 Additionally, Defendant argued Plaintiff could only seek PAGA penalties at the \$100
8 “initial” violation rate, as opposed to the \$200 “subsequent” violation rate, as before Plaintiff
9 initiated this action, Defendant had never been put on notice by a court or the Labor
10 Commissioner that its practices violated the Labor Code. *See, Amaral v. Cintas Corp. No. 2*, 163
11 Cal.App.4th 1157, 1209 (2008) (finding “initial” violation rate applies until employer has been
12 notified that it is violating a Labor Code provision). As a result, Plaintiff gave Defendant the
13 benefit of the “initial” \$100.00 per pay period violation as opposed to the \$200.00 subsequent per
14 violation rate in calculating penalties. JM Decl. ¶ 25. In light of the foregoing, Plaintiff’s Counsel
15 took into consideration the defenses raised and applied the appropriate discounts. *Id.*

16 Based upon the data provided by Defendant, the **maximum potential exposure** for the
17 PAGA claims for PAGA members is of \$405,600.00 calculated as follows. JM Decl. ¶ 26. During
18 the Covered Period, there were approximately 2,028 pay periods. *Id.* Assuming PAGA penalties
19 are assessed at the \$100 penalty, the total exposure is \$202,800.00. *Id.*

20 This settlement is a great result given that Courts can exercise their discretion to reduce the
21 amount of PAGA penalties. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D.
22 Cal. Aug. 12, 2011). Further, in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517 (Ct.
23 App. 2018), the California Court of Appeals deemed it reasonable to award just five dollars per
24 PAGA violation. **Here, with 2,028 pay periods at issue, under *Carrington* an appropriate**
25 **settlement amount could be as low as \$10,144.00.** JM Decl. ¶ 27. Instead, despite the risks of the
26 case identified through mediation and exchange of documents and information with opposing
27 counsel, the Total Settlement Amount of \$33,000.00 results in **\$16.27** for each PAGA violation if
28 assuming a 100% violation rate for all pay periods in the Covered Period. *Id.* Accordingly, the

1 proposed settlement reflects a better result than some actual PAGA trials that were litigated to
2 completion, though other cases also provided for a greater award than *Carrington*. *Id.* Thus, the
3 PAGA settlement amount is reasonable in light of significant risks and uncertainties associated
4 with the PAGA claims in this case. *Id.*

5 **Second**, the scope of the release of the PAGA Settlement is necessarily strictly confined to
6 those PAGA civil penalties that were or could have been alleged in the Action. JM Decl. ¶ 28. The
7 PAGA Released Claims do not release any Aggrieved Employee's non-PAGA claims for alleged
8 violations of the Labor Code. *Id.* Individual PAGA Settlement Group Members who believe they
9 have been denied, for example, minimum wage or overtime, can maintain those rights to pursue
10 those claims in another proceeding. *Id.*

11 **Third**, the proposed Settlement, even with deductions, provides a substantial sum of
12 \$2,922.52 to the State and \$974.17 to PAGA Settlement Group Members. JM Decl. ¶ 29.

13 **Fourth**, public policy strongly favors the settlement of litigation. *Consumer Advocacy*
14 *Group v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 63. Because the proposed
15 Settlement is neither unjust nor ignores the public interest, it should be approved. JM Decl. ¶ 30.

16 Accordingly, the gross PAGA penalty payment is extremely reasonable in light of the risks
17 and uncertainties associated with the PAGA claims in this case. JM Decl. ¶ 31. The Settlement
18 commits Defendant to pay over **\$3,896.69** in PAGA penalties (after fees/costs), which is large
19 enough to punish Defendant for alleged violations and to deter such alleged conduct in the future.
20 *Id.* At the same time, in light of the alleged violations and defenses thereto, it is not so large as to
21 be unjust, oppressive or confiscatory. *Id.* Based upon the foregoing, the proposed settlement is
22 fair, reasonable, and in the best interest of the state of California, Plaintiff, and the PAGA
23 Settlement Group Members. *Id.*

24 **VII. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**
25 **AND REASONABLE**

26 For their efforts and the risk that they undertook in obtaining a common fund settlement
27 that benefits the LWDA and PAGA Settlement Group Members, the Parties allocated one-third of
28 the Total Settlement Amount to Plaintiff's Counsel for reasonable attorneys' fees, plus actual

1 litigation costs. These fees are warranted under the law and within the range of fees commonly
2 awarded in similar cases.

3 A. **PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEYS’**
4 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
5 **ACTION**

6 When awarding attorneys’ fees, courts have discretion to choose among two different
7 methods for calculating a reasonable attorney’s fees award: 1) the common fund approach; or 2)
8 the lodestar approach *See Laffitte v. Robert Half Int’l Inc.*, 1 Cal.5th 480, 504, (2016) (“The choice
9 of a fee calculation method is generally one within the discretion of the trial court, the goal under
10 either the percentage or lodestar approach being the award of a reasonable fee to compensate
11 counsel for their efforts.”) In *Laffitte*, the California Supreme Court held that “[t]he recognized
12 advantages of the percentage method – including relative ease of calculation, alignment of
13 incentives between counsel and the class, a better approximation of market conditions in a
14 contingency case, and the encouragement it provides counsel **to seek an early settlement and**
15 **avoid unnecessarily prolonging litigation** – convince us the percentage method is a valuable tool
16 that should not be denied by our trial courts.” *Id.* (emphasis added). Similarly, the Ninth Circuit
17 has found that counsel should not “receive a lesser fee for settling a case quickly.” *Vizcaino v.*
18 *Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).

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

27 “A qui tam action is one brought under a statute that allows a private person to sue as a
28 private attorney general to recover damages or penalties, all or part of which will be paid to the

1 government.” *People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-
2 492. “A qui tam action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the qui
3 tam plaintiff stands in the shoes of the state or political subdivision [citation].” *Id.* at p. 501. As
4 the name of the PAGA statute makes clear (e.g. “Labor Code Private Attorney General Act”), a
5 PAGA action is a qui tam action because the statute allows the employee plaintiff, acting as the
6 proxy of the state’s labor law enforcement agency, to sue his or her employer for Labor Code
7 violations and recover civil penalties that otherwise would have been assessed and collected by the
8 Labor and Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC*
9 (2014) 59 Cal.4th 348, 380. “A PAGA representative action is therefore a type of *qui tam* action.”
10 *Id.* at p. 382. Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the
11 state, with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid
12 to the aggrieved employees). See Lab. C. 2699(i).

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

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

28 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a

1 common fund was created in the amount of \$33,000 for the benefit of the PAGA Settlement Group
2 Members and the State of California. Thus, these beneficiaries must bear their share of the costs
3 and attorney's fees, which fees and costs must be deducted from the settlement amount under the
4 common fund theory. *Id.*

5 The California Supreme Court recently upheld the use of the common fund theory of
6 recovery for attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506. In
7 *Laffitte*, the settlement created a common fund of \$19 million dollars. The Court approved the
8 award of attorney's fees in the amount of one-third of the gross \$19 million-dollar settlement (e.g.
9 awarded \$6.33 million in attorney's fees) under the common fund theory of recovery. *Id.* This
10 ruling is consistent with the Court's prior rulings recognizing that "when a number of persons are
11 entitled in common to a specific fund, and an action brought by ... plaintiffs for the benefit of all
12 results in the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys'
13 fees out of the fund." *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert*,
14 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund . . . is entitled to reasonable
15 attorneys' fees from the fund as a whole"); *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375,
16 393-394 (discussing the acceptance of awarding attorneys' fees and expenses from a settlement
17 where "litigation has conferred a substantial benefit on the members of an ascertainable class");
18 see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading
19 occurs when a settlement or adjudication results in the establishment of a separate or so-called
20 common fund for the benefit of the class.")

21 Accordingly, the common fund doctrine allows a court to award attorneys' fees based upon
22 a percentage of the total fund that is created for the satisfaction of beneficiaries' claims when the
23 fund consists of a "certain or easily calculable sum of money." *Dunk v. Ford Motor, Co.* (1996) 48
24 Cal.App.4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 110 [application of
25 the percentage of the fund recovery depended on "[t]he critical point" that "a fund was created
26 from which attorneys' fees could be paid"]; A. Conte & H. Newberg, *Newberg on Class Actions*, §
27 14:6 (4th ed. 2002).

28 California law has long upheld, and continues to uphold, the percentage of the recovery

1 method for awarding attorneys' fees where a fund is established. See e.g., *Serrano III v. Priest*
2 (1977) 20 Cal.3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726;
3 *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 563 ("fees based on a percentage of the benefits
4 are in fact appropriate in large class actions..."); *Sanders v. City of Los Angeles* (1970) 3 Cal.3d
5 252, 261, 263 (affirming award of attorneys' fees based on percentage of recovery); *Chavez v.*
6 *Netflix, Inc., supra*, 162 Cal.App.4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch's*
7 *Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 (the common fund doctrine is
8 "frequently applied in class actions when the efforts of the attorney for the named class
9 representatives produce monetary benefits for the entire class"); *Wershba v. Apple Computer, Inc.*
10 (2001) 91 Cal.App.4th 224, 254 ("courts recognize two methods for calculating attorney fees in
11 class actions: the lodestar/multiplier method and the percentage of recovery.")

12 In light of the foregoing, awarding attorneys' fees based on a one-third percentage of the
13 gross settlement amount is favored by California Courts when a fund established for the common
14 benefit of others is involved, such as here. Accordingly, awarding fees on this basis in the amount
15 of one-third of the \$33,000.00 Total Settlement Amount is reasonable and appropriate.

16 **B. A FEE OF ONE-THIRD OF THE GROSS SETTLEMENT AMOUNT IS**
17 **FAIR AND REASONABLE BASED UPON THE FACTORS DEVELOPED**
18 **BY THE COURTS AND SERVES THE PUBLIC POLICY OF**
ATTRACTING COMPETENT COUNSEL TO LITIGATE THESE CASES

19 An award of fees from the Total Settlement Amount under the common fund doctrine
20 prevents unjust enrichment of those who benefit from the common fund created through the
21 successful efforts of plaintiff's counsel and furthers the important goal of attracting competent
22 counsel to handle representative actions enforcing minimum labor standards. *Laffitte v. Robert*
23 *Half Int'l. Inc.* (2016) 1 Cal.5th 480, 503. In affirming the use of the common fund doctrine in
24 California, the California Supreme Court summarized the benefits of the percentage method of
25 recovery stating: "The recognized advantages of the percentage method—including relative ease
26 of calculation, alignment of incentives between counsel and the class, a better approximation of
27 market conditions in a contingency case, and the encouragement it provides counsel to seek an

1 early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the
2 percentage method is a valuable tool that should not be denied our trial courts.” *Id.*

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

9 First, Plaintiff’s Counsels’ efforts resulted in a common fund settlement amount of
10 \$33,000.00. This is a great PAGA settlement considering the contested issues.

11 Second, Plaintiff faced significant risks going forward with the litigation. As discussed
12 above, Defendant raised various defenses and, as such, Plaintiff faced risky issues going forward
13 with this litigation, as well as the fact that it would have taken significant time to realize any
14 recovery in this action along with the possibility of post-trial appeals.

15 Third, Plaintiff’s Counsel are experienced representative and class action litigators, and
16 have previously achieved significant PAGA and class action awards. This experience and
17 expertise, combined with the high quality of work performed in this case by Plaintiff’s Counsel,
18 resulted in the settlement achieved.

19 Fourth, as discussed above, the request for attorney’s fees in the amount of one-third of the
20 common fund falls well within the norms accepted by state and federal courts in California in
21 comparable wage and hour actions. Moreover, the award of a one-third fee recovery under the
22 common fund doctrine was recently approved by the California Supreme Court in *Laffitte, supra*, 1
23 Cal.5th 480, 503.

24 For all of the above reasons, a common fund fee award here in the amount of one-third of
25 the \$33,000.00 common fund created by Plaintiff and his attorneys is fair and reasonable.

26 **C. AN AWARD OF 1/3 OF ATTORNEYS’ FEES CONSISTENT WITH**
27 **PLAINTIFF’S COUNSEL’S EXPERIENCE, THE RESULTS ACHIEVED, AND OTHER**
28 **CASES**

1 Plaintiff's Counsel's request for attorneys' fees in the amount of 1/3 of the common fund
2 falls within the range of attorneys' fees regularly awarded by Courts in similar matters. *See e.g.,*
3 *McCrary v. Elations Co., LLC*, 2016 U.S. Dist. LEXIS 24050, at *2 (C.D. Cal. Feb. 25, 2016)
4 (finding that most fee awards based on either a percentage calculation or lodestar percentage are
5 33%; *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841,
6 at *4 (E.D. Cal. Nov. 14, 2007) (awarding 33% of the settlement fund in a wage-and-hour case
7 involving allegations of unpaid wages after explaining that "fee awards in class actions average
8 around one-third of the recovery."); *Stuart v. RadioShack Corp.*, 2010 WL 3155645 (N.D. Cal.
9 Aug. 9, 2010) (noting that a fee award of 1/3 of the settlement was "well within the range of
10 percentages which courts have upheld as reasonable in other class action lawsuits.".)¹

11 Plaintiff's Counsel in this action are experienced wage-and-hour litigators who have
12 prosecuted numerous Class and PAGA actions including several at the appellate level helping to
13 establish law favorable to employees. Plaintiff's Counsel have provided their qualifications and
14 experience in their concurrently filed declaration. *See*, JM Decl. ¶¶ 3-7. The excellent results
15 achieved in light of the significant risks associated with contingency litigation support Plaintiff's
16 Counsel's request for an award of 1/3 of the common fund.

17 Plaintiff's Counsel believes that the Court should also take into advisement the
18 considerable risks undertaken by the prosecution of this action, the excellent result achieved by
19 Plaintiff's Counsel as well as the non-monetary relief from which the PAGA Settlement Group
20 Members have already benefitted. It is not a foregone conclusion that every case taken on a
21 contingency fee basis will result in a recovery or that the attorneys' fees recovered will actually
22 compensate my firm for the amount of time expended in an action. Moreover, even when
23 successful, a class and representative action contingency law firm may only receive a small
24 percentage of the amount of attorneys' fees incurred during the prosecution of a case. Where
25 plaintiffs' counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the
26 firm regularly undertakes. Plaintiff's Counsel's firms are currently prosecuting actions where the

27 ¹ *See also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming an award of attorneys' fees
28 equal to approximately 33 percent of the common fund); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-
92 (E.D. Cal. 2010) (33.33% award).

1 defendant has declared bankruptcy even after the successful negotiation of a settlement and have
2 done numerous cases where they have received a negative multiplier meaning that Plaintiff's
3 Counsel prosecutes cases where they do not receive full compensation for all of their hours
4 worked. This risk is particularly acute when dealing with a defendant of this size.

5 Lastly, Plaintiff's Counsel believes that the Court should take into consideration the
6 excellent result achieved by Plaintiff's Counsel. Plaintiff's Counsel obtained a significant
7 monetary recovery in light of the discretionary nature of PAGA penalties. In a PAGA action, the
8 Court has the same authority "to assess a civil penalty" that the Labor Commissioner would have,
9 as well as complete discretion to "award a lesser amount than the maximum civil penalty amount
10 specified [by PAGA] if, based on the facts and circumstances of the particular case, to do
11 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Lab.
12 Code § 2699(e)(2). Courts often exercise at least some discretion with respect to PAGA penalties
13 and it's possible that the Court in this action would have exercised its discretion to reduce the
14 PAGA penalties. Courts have exercised their discretion to award only 5% to 18% of the potential
15 PAGA penalties. *See e.g., Kileigh Carrington v. Starbucks Corporation, et al.*, San Diego Superior
16 Court Case No. 37-2014-00018637-CU-OE-CTL (Apr. 3, 2017) (holding that the plaintiff was
17 only entitled to collect the reduced penalty amount of \$5.00 for each pay period in which a meal
18 period violation occurred or 5% of the PAGA penalties at issue); *Fleming v. Covidien, Inc.* (C.D.
19 Cal. Aug. 12, 2011) 2011 WL 7563047, at *4 (reducing PAGA penalties by 82% to \$5000 per
20 employee).

21 Further, courts can exercise their discretion to reduce the amount of PAGA penalties.
22 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517 (Ct. App. 2018) (deeming it reasonable
23 to award PAGA penalties at only \$5 per pay period). Here, with 2,028 pay periods at issue, under
24 *Carrington* an appropriate settlement amount could be as low as \$10,140.00, far lower than the
25 amount recovered via the proposed settlement. Accordingly, the proposed settlement reflects a
26 better result than some actual PAGA trials that were litigated to completion, though other cases
27 also provided for greater award than *Carrington*.

28 **E. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

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

11 The actual litigation costs in this case by Plaintiff's Counsel to date amounts to no less
12 than \$10,203.31 which includes anticipated costs in association with the serving of the present
13 motion, and in connection with shepherding this settlement through funding and disbursement. JM
14 Decl., ¶ 42.

15 **VIII. SUBMISSION TO THE LWDA**

16 The Settlement and this Motion are concurrently being submitted to the LWDA in
17 accordance with Labor Code § 2699(1)(2). The proof of electronic submission is attached as
18 **Exhibit 3** to JM Decl., ¶ 43.

19 **IX. THE SETTLEMENT ADMINISTRATOR**

20 The Parties have agreed to use Simpluris as the Settlement Administrator. The Settlement
21 Administrator will be responsible for processing the settlement payments for the PAGA
22 Settlement Group Members. Settlement Agreement p. 4. A true and correct copy of Simpluris's
23 bid to administer settlement checks is attached to the JM Decl. as **Exhibit 4**. Simpluris has
24 administered hundreds, if not thousands, of class and PAGA settlements.

25 **X. CONCLUSION**

26 For the foregoing reasons, Plaintiff requests that the Court approve the PAGA Settlement.

27
28 Dated: August 8, 2024

MELMED LAW GROUP P.C.

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By:



Jonathan Melmed, Esq.
Attorneys for Plaintiff and the PAGA
Settlement Group Members