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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

ZAREYAH THOMPSON, as an aggrieved
employee pursuant to the Private Attorneys
General Act ("PAGA"), on behalf of the State
of California and other non-party Covered
Employees,

Plaintiff,

vs.

BIG 5 CORP., a Delaware corporation; BIG 5
SPORTING GOODS CORPORATION, a
Delaware corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No. 23CV412334
Related Case: 23CV412953

Assigned to the Hon. Charles F. Adams

**NOTICE OF MOTION AND MOTION FOR
COURT APPROVAL OF THE PARTIES'
PAGA SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date: July 18, 2024
Time: 1:30 p.m.
Place: Department 7

Complaint Filed: March 13, 2023
Trial Date: None Set

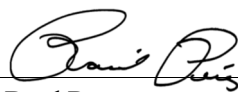
1 **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 18, 2024 at 1:30 p.m., or as soon thereafter as counsel
3 may be heard, in Department 7 of the above-captioned court, located at 191 North First Street, San Jose,
4 California 95113, the Honorable Charles F. Adams presiding, Plaintiffs Zareyah Thompson and
5 Christopher Puga will, and hereby do, move this Court for entry of an order and judgment approving the
6 Parties' PAGA settlement pursuant to Labor Code section 2699(l)(2).

7 This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of
8 Points and Authorities in Support of Motion for Court approval of the PAGA Settlement; (3) the
9 Declaration of Raul Perez, which attaches the PAGA Settlement Agreement; (4) the Declaration of Chad
10 Saunders; (5) the Declaration of Zareyah Thompson; (6) the Declaration of Christopher Puga; (7) the
11 Declaration of Julie Green on Behalf of CPT Group, Inc.; (8) [Proposed] Order and Judgment
12 Approving the PAGA Settlement Agreement; (9) the records, pleadings, and papers filed in this action;
13 and (10) upon such other documentary and oral evidence or argument as may be presented to the Court
14 at or prior to the hearing of this Motion.

15
16 Dated: June 25, 2024

Respectfully submitted,

17
18 By: 

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Orlando Villalba
Helga Hakimi
Joey Parsons
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21 Zachary M. Crosner
22 Jamie Serb
23 Chad Saunders
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24 Attorney for Plaintiffs Zareyah Thompson and
25 Christopher Puga
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Labor Code Private Attorneys General Act of 2004 (Lab. Code. §§ 2698, *et seq.*, “PAGA”), Plaintiffs Zareyah Thompson and Christopher Puga (“Plaintiffs”) seek Court approval of the settlement of their claims for PAGA civil penalties with Defendants Big 5 Corp. and Big 5 Sporting Goods Corporation (“Defendants”) (collectively with Plaintiffs, the “Parties”).

PAGA provides that “[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part.” Lab. Code § 2699(l)(2). In *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the Court of Appeal explained that similar to class action settlements, the trial court should satisfy itself that the settlement is “fair, adequate, and reasonable” in view of PAGA’s “purposes and policies.” The statute does not, however, require the two-step process utilized in class actions. *See Salazar v. Sysco Central Cal.*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (rejecting the application of class action settlement rules and procedures for PAGA settlement approval). Nothing in the PAGA changes the strong judicial preference in support of approving settlements.

The principal terms of the PAGA Settlement Agreement¹ are as follows:

- (1) A non-reversionary Gross Settlement Amount of \$1,460,000, which includes payments to the LWDA and Covered Employees for their respective shares of the PAGA Penalties Fund, Plaintiffs’ Attorneys’ Fees and Costs, and Settlement Administration Costs.
- (2) The creation of a PAGA Penalties Fund of approximately \$931,394.93, which will be paid to the LWDA and Covered Employees in full satisfaction of all Settled Claims (“PAGA Penalties Fund”).
 - (a) Seventy-five percent of the PAGA Penalties Fund, or approximately \$698,546.20, will be paid to the LWDA pursuant to Labor Code section 2699(i).
 - (b) Twenty-five percent of the PAGA Penalties Fund, or approximately \$232,848.73, will be paid to all persons who were employed by Defendants in

¹ Unless indicated otherwise, all capitalized terms used herein have the same meaning as those defined by the PAGA Settlement Agreement, which is attached as Exhibit 1 to the Declaration of Raul Perez filed in conjunction with this motion.

the State of California as non-exempt, hourly-paid retail store employees at any time from January 5, 2022 through October 31, 2023 (“Covered Employees”).

There are approximately 9,612 Covered Employees.

(3) Reasonable attorneys’ fees and costs under Labor Code section 2699(g) for Plaintiffs’ Counsel’s successful prosecution and resolution of this action. Plaintiffs request \$486,667 in attorneys’ fees and \$19,938.07 in costs for their counsel, Capstone Law APC and Crosner Legal, PC (“Plaintiffs’ Counsel”).

(4) Settlement Administration Costs of approximately \$22,000 to CPT Group, Inc. (“CPT”).

The civil penalties secured by the settlement represent a fair compromise of Plaintiffs’ PAGA claim in view of the risks of continued litigation and the hotly contested issues of law and fact relating to PAGA claims. The Settlement accomplishes PAGA’s objectives by imposing sufficient civil penalties “to punish and deter” Defendants from committing any of the Labor Code violations alleged, while also ensuring that the penalties are not “unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014).

For these reasons, Plaintiffs respectfully request that the Court approve the Settlement and enter the proposed Order Approving the PAGA Settlement Agreement and the proposed Judgment.

II. FACTS AND PROCEDURE

A. Brief Overview of the Litigation

Defendants are a leading sporting goods retailer in the United States, operating over 400 stores under the “Big 5 Sporting Goods” name, including over 200 stores in California.

Plaintiff Zareyah Thompson was employed by Defendants at their Big 5 Sporting Goods in Pinole, California as a cashier/sales representative from approximately April 2021 to October 2021, and again from February 2022 to July 2022. (Declaration of Zareyah Thompson [“Thompson Decl.”] ¶ 2.) On March 13, 2023, Plaintiff Zareyah Thompson filed this representative PAGA action against Defendants. (Declaration of Raul Perez [“Perez Decl.”] ¶ 3.) Ms. Thompson is represented by Capstone Law APC. (*Id.* at ¶ 1.)

Plaintiff Christopher Puga was employed by Defendants as a human resources assistant/clerk in the Human Resources Department located Defendants’ corporate offices in El Segundo, California from

1 April 2021 to March 2022. (Declaration of Christopher Puga ¶ 1.) He filed his representative PAGA
2 complaint on March 21, 2023 in Santa Clara County Superior Court. (Declaration of Chad Saunders
3 [“Saunders Decl.”] ¶ 2.) Mr. Puga is represented by Crosner Legal. (*Id.* at ¶ 1.)

4 **B. The Parties Settled After Mediation**

5 On September 27, 2023, the Parties participated in full-day mediation with Louis Marlin, Esq.,
6 an experienced mediator of wage and hour actions. (Perez Decl. ¶ 5.) Mr. Marlin helped to manage the
7 Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*Id.*)
8 With Mr. Marlin’s guidance, the Parties were eventually able to negotiate a complete settlement of
9 Plaintiffs’ claims. (*Id.*) The terms of the settlement are now set forth in complete and final form in the
10 PAGA Settlement Agreement. (*Id.* at ¶ 6, Ex. 1.) At all times, the Parties’ negotiations were adversarial
11 and non-collusive. (*Id.* at ¶ 5.) The Settlement therefore constitutes a fair, adequate, and reasonable
12 compromise of the claims at issue. (*Id.* at ¶ 7.)

13 **C. Plaintiffs’ Counsel Conducted a Thorough Investigation of the Factual and Legal**
14 **Issues and Were Thus Able to Objectively Assess the Settlement’s Reasonableness**

15 As set forth in greater detail in Plaintiffs’ Counsel’s declarations, based on their analysis of
16 documents and employee demographic data produced by Defendants, including Defendants’ California
17 wage and hour policies and procedures manuals and a sample of Covered Employees’ time and payroll
18 records, Plaintiffs’ Counsel were able to realistically assess the value of Plaintiffs’ claims and
19 intelligently engage defense counsel in settlement discussions that culminated in the proposed settlement
20 now before the Court. (Perez Decl. ¶¶ 7-11; Saunders Decl. ¶¶ 3-5.)

21 Plaintiffs also considered and evaluated Defendants’ defenses to Plaintiffs’ claims. (Perez Decl. ¶
22 10.) Specifically, Defendants maintained that all relevant times they had in place lawful wage and hour
23 policies, provided compliant meal and rest periods to employees, paid employees for all hours worked,
24 including any meal and rest period premiums, and reimbursed for necessary business expenses. (*Id.*)
25 Defendants further maintained that Plaintiffs’ entered into binding and enforceable arbitration
26 agreements, which required Plaintiffs to arbitrate their individual PAGA claims prior to proceeding on a
27 non-individual basis. Lastly, Defendants denied and continue to deny all of Plaintiffs’ allegations. (*Id.*)

28 By engaging in a thorough investigation and evaluation of Plaintiffs’ claims, Plaintiffs’ Counsel

1 can opine that the Settlement, for the consideration and on the terms set forth in the Settlement
2 Agreement, is fair, reasonable, and adequate, and is in the best interests of Class Members in light of all
3 known facts and circumstances, including the risk of significant delay and uncertainty associated with
4 litigation, various defenses asserted by Defendants. (Perez Decl. ¶ 12; Saunders Decl. ¶ 6.)

5 **D. The Parties Negotiated a Fair and Reasonable Settlement of Plaintiffs' Claims**

6 **1. Terms of the Settlement and Distribution of PAGA Penalties**

7 The Settlement Agreement provides that Defendants will pay a total of \$1,460,000 to settle this
8 Action. (Settlement Agreement ¶ 14.) From this amount, payments will be made: (a) to the LWDA and
9 Covered Employees; (b) to Plaintiffs as compensation for their service on behalf of the State, and for a
10 general release of claims arising out of their employment with Defendants; (c) to Plaintiffs' Counsel for
11 their attorneys' fees and litigation costs; and (d) and to the Settlement Administrator (CPT) for settlement
12 administration costs. (*Id.* at ¶¶ 14-16, 18.)

13 The resulting balance will be distributed to the LWDA and Covered Employees. The LWDA
14 will receive approximately \$698,546.20. Covered Employees will receive approximately \$232,848.73.
15 The Covered Employees encompassed by the proposed Settlement are all persons who were employed
16 by Defendants in the State of California as non-exempt, hourly-paid retail store employees at any time
17 from January 5, 2022 through October 31, 2023. (*Id.* at ¶ 2.) There are approximately 9,612 Covered
18 Employees.

19 **2. Allocations to the LWDA and Covered Employees**

20 Payments to Covered Employees will be made from the PAGA Penalties Fund. The individual
21 allocations will be calculated on a pro-rata basis using the number of pay periods worked by each
22 employee. Defendants will provide the total number of pay periods worked by each Covered Employee
23 and the total number of pay periods worked by all Covered Employees during the Settlement Period.
24 (Settlement Agreement ¶ 15.) The Settlement Administrator will calculate each Covered Employee's
25 payment using the proportional number of pay periods during which the employee worked. (*Id.*) Thus,
26 the Settlement Administrator will perform the following calculation to calculate individual payments:
27 Settlement Payment = (25% of PAGA Penalties Fund) × (pay periods worked by individual Covered
28 Employee during the Settlement Period ÷ total pay periods worked by all Covered Employees during the

Settlement Period). (*Id.*) This is a fair and equitable means of allocating the penalties. Covered Employees who worked for a longer duration during the Settlement Period will receive proportionally larger payments than those employees who worked for shorter durations.

3. The Settled PAGA Claims

Upon entry of the Order and Judgment, the LWDA and Plaintiffs, on behalf of themselves and the Covered Employees to the fullest extent allowed by law, will be deemed to have fully, finally, and forever released, relinquished, and discharged each and all of the Released Parties from all claims for remedies under PAGA, of whatever kind or nature, whether known or unknown, arising during the Settlement Period, based on the facts alleged in the Actions and/or Plaintiffs' notice letters to the LWDA including, but not limited to, Labor Code sections 201, 202, 203, 204, 206.5, 210, 216, 218.5, 221, 222, 225.5, 223, 226, 226.3, 226.6, 226.7, 227.3, 233, 234, 245, 245.5, 246, 246.5, 247, 247.5, 248, 248.5, 256, 432, 432.5, 432.7, 510, 512, 516, 558, 558.1, 1024.5, 1174, 1174.5, 1182.12, 1194, 1197, 1197.1, 1198, 1198.5, 1199, 2699, 2699.3, 2802 and 2810.5, and the corresponding provisions of the applicable IWC Wage Order, and any resulting claim for attorneys' fees and costs under PAGA. (Settlement Agreement ¶¶ 12, 23.)

Additionally, Plaintiffs have agreed to a broader general release of all claims of any kind against Defendants. (*Id.* at ¶ 17.)

III. ARGUMENT

A. The PAGA Penalties Secured by the Settlement Are Genuine and Meaningful, and Fulfill PAGA's Underlying Purpose To Benefit the Public

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. *Iskanian*, 59 Cal. 4th at 380. Seventy-five percent of any penalties recovered go to the LWDA, leaving the remaining twenty-five percent for aggrieved employees. *Id.* PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." *Id.* at 383. A judgment in a PAGA action binds all those, including non-party aggrieved employees, who would be bound by a judgment in an action brought by the government. *Id.* at 381.

A superior court must review and approve any PAGA settlement. Cal. Lab. Code § 2699(l)(2).

1 The court’s review “ensur[es] that any negotiated resolution is fair to those affected.” *Williams v.*
2 *Superior Court*, 3 Cal. 5th 531, 549 (2017). The Court’s evaluation of the settlement must “determine
3 whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law
4 violations, deter future ones, and to maximize enforcement of state labor laws.” *Moniz, Inc.*, 72 Cal. App.
5 5th at 77.

6 The Court’s evaluation of the settlement should therefore not focus on “restitution”—the average
7 recovery per aggrieved employee, as in a class action settlement, but rather take into account PAGA’s
8 statutory purpose in deterring Labor Code violations through the imposition of civil penalties, with
9 special attention on whether the relief is “genuine and meaningful.” *Salazar*, 2017 WL 1135801 at *2.

10 **B. The Settlement Is Reasonable Given the Risks of Further Litigation**

11 In assessing whether the amount of civil penalties is genuine and meaningful, the Court may
12 balance the amount in penalties against the risks of further litigation. Here, Plaintiffs obtained a
13 meaningful amount of civil penalties despite facing hurdles had the litigation continued. Based on
14 information and evidence produced by Defendants during discovery, Plaintiffs’ Counsel determined that
15 Covered Employees worked during a total of approximately 185,000 pay periods during the Settlement
16 Period. Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time of the
17 alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars
18 (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars
19 (\$200) for each aggrieved employee per pay period for each subsequent violation.

20 However, a number of courts have found that the “subsequent” penalty under PAGA applies
21 only after a court or the Labor Commissioner determines that the employer has violated the Labor Code.
22 *See Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 356 (2021) (“the increased \$200 civil penalty
23 for ‘subsequent violation[s]’ does not apply unless [Plaintiff] presents evidence that the Labor
24 Commission or a court notified [Defendant] that it was in violation of the Labor Code.”); *Bernstein v.*
25 *Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing judgment as to “heightened civil
26 penalties” because the defendant was not given notice by the Labor Commissioner when the
27
28

1 “subsequent” violations occurred).² Under this line of cases, Defendants’ exposure would be
2 approximately \$18.5 million = 185,000 alleged violative pay periods × \$100.

3 It should be noted that PAGA gives the Court wide latitude to reduce the amount of civil
4 penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result
5 in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(h). In
6 reducing PAGA penalties, courts have considered issues including whether the employees suffered
7 actual injury from the violations, whether the defendant was aware of the violations, and the employer’s
8 willingness to fix the violation. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018)
9 (awarding PAGA penalties of only 0.2% of the maximum); *see also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d
10 1030, 1037 (N.D. Cal. 2016); *Fleming v. Covidien Inc.*, No. ED CV 10-01487 RGK (OPX), 2011 WL
11 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

12 For example, during the penalty phase of trial in *Carrington*, the plaintiff requested PAGA
13 penalties in the amount of approximately \$70 million. The trial court instead awarded only \$150,000—
14 **or 0.21% of the calculated maximum**—and stated that this reduction was warranted because (a) the
15 Court did not believe it was appropriate to impose multiple penalties per pay period in which a violation
16 occurred and (b) imposing the maximum penalty would be “unjust, arbitrary, and oppressive” based on
17 Starbucks’s “good faith attempts” to comply with meal period obligations and because the court found
18 the violations were minimal. *Carrington*, 30 Cal. App. 5th at 517-18. The Court of Appeal affirmed the
19 lower court’s reduced award of a \$150,000 penalty under PAGA. *Id.* at 529. If a similar reduction had
20 been applied here, Plaintiff would have recovered only approximately \$38,850 (\$18.5 million × 0.0021
21 reduction).

22
23 ² *See also Vieyara-Flores v. Sika Corp.*, No. EDCV19606JVSKKX, 2019 WL 2436998, at *5
24 (C.D. Cal. June 10, 2019) (“employers are not subject to heightened penalties . . . until a court or
25 commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not offered
26 evidence that the Labor Commission or a court has notified them of PAGA violations [thus] PAGA’s
27 heightened penalty of \$200 for subsequent violations will not be calculated to determine the amount in
28 controversy”); *Chen v. Morgan Stanley Smith Barney, LLC*, No. 8:14-CV-01077 ODW (FFMx), 2014
WL 4961182 (C.D. Cal., October 2, 2014) (“Under the Labor Code, if an employer does not have notice
that they are committing a violation, they are not subject to the heightened penalties.”); *Trang v. Turbine
Engine Components Technologies Corp.*, No. CV 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal.
Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for subsequent
violations unless and until a court or commissioner notifies the employer that it is in violation of the
Labor Code”), citing *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008).

1 Likewise, in *Covidien*, the Court reduced the potential penalties by over 82%, awarding
2 \$500,000 instead of maximum penalties of \$2.8 million. *Covidien*, 2011 WL 7563047 at *4; *see also*
3 *Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming 30% reduction
4 under specified PAGA claim where the employer produced evidence that it took its obligations
5 seriously); *Elder v. Schwan Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May
6 12, 2011) (reversing trial court decision denying any civil penalties where violations had been proven,
7 remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A*
8 *Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal. June 15,
9 2012) (denying PAGA penalties for violation of California Labor Code section 226 as redundant with
10 recovery on a class basis pursuant to California Labor Code section 226, directly); *Aguirre v. Genesis*
11 *Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30, 2013)
12 (reducing penalty for past PAGA violations from \$1.8 million to \$500,000, after rejecting numerous
13 other PAGA claims).

14 Considering the issues, defenses, and the risks, a \$1,460,000 settlement for a limited release of
15 PAGA penalties—no individual wage and hour claims will be extinguished by the Settlement—is a fair
16 and just result and furthers PAGA’s objectives, and is not “unjust, arbitrary, and oppressive.”

17 **C. The Court Should Award the Requested Attorneys’ Fees in the Amount of**
18 **Approximately One-Third of the Gross Settlement Fund**

19 For the reasons discussed in detail below, an award of attorneys’ fees in the amount of
20 approximately one-third of the gross settlement fund is fair and reasonable, and in line with what other
21 California courts, both state and federal, have awarded in settlements of similar litigation.

22 The PAGA provides that a plaintiff is entitled to recover reasonable attorneys’ fees, expenses,
23 and costs. Section 2699(g)(1) of the California Labor Code provides that “[a]ny employee who prevails
24 in any action shall be entitled to an award of reasonable attorney’s fees and costs.” In a *qui tam* action,
25 reasonable attorneys’ fees and costs are typically awarded under the common fund doctrine where, as
26 here, the litigation creates a common fund of money in a specific amount for the benefit of others. PAGA
27 “is a type of *qui tam* action.” *See Iskanian*, 59 Cal. 4th at 382. “A *qui tam* action ‘is a type of private
28 attorney general lawsuit’ [citation], in which ‘the *qui tam* plaintiff stands in the shoes of the state or

1 political subdivision [citation].” *People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th
2 487, 501 (2012).

3 A PAGA action is a *qui tam* action because the statute allows the employee plaintiff, acting as
4 the proxy of the State’s labor law enforcement agency, to sue his or her employer for Labor Code
5 violations and recover civil penalties that otherwise would have been assessed and collected by the
6 LWDA. *See Iskanian*, 59 Cal. 4th at 382. Indeed, the majority of the civil penalties recovered in a PAGA
7 action are paid to the State, with a smaller portion paid to the aggrieved employees (e.g., 75% paid to the
8 state; 25% paid to the aggrieved employees). *See* Cal. Lab. Code § 2699(i). Where, as here, a common
9 fund is created in a *qui tam* action by the successful litigation of a plaintiff and her attorneys, the
10 plaintiff’s attorneys are entitled to recover their fees from the common fund:

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

15 *Bank of America v. Cory*, 164 Cal. App. 3d 66, 91 (1985) (authorizing common fund fees in a *qui tam*
16 taxpayer suit against certain banks).

17 Likewise, through the successful efforts of Plaintiffs and their attorneys, a common fund was
18 created in the amount of \$1,460,000 for the benefit of the employees and the State of California. Thus,
19 these beneficiaries must bear their share of the costs and attorneys’ fees, to be deducted from the gross
20 settlement fund under the common fund theory. *Id.* Such fees are deducted as a percentage of the
21 settlement amount. *See, e.g., Boeing Co. v. Van Gernert*, 444 U.S. 472, 478-482 (1980); *Six (6) Mexican*
22 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Williams v. MGM-Pathe*
23 *Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th
24 Cir. 2003).

25 The California Supreme Court recently upheld the use of the common fund theory of recovery
26 for attorneys’ fees in *Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th 480, 506 (2016). In *Laffitte*, the
27 settlement created a common fund of \$19 million. The Court approved the award of attorneys’ fees in
28 the amount of one third of the gross \$19 million settlement (e.g., an award of \$6.33 million) under the

common fund theory. *Id.* By awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the common fund method encourages attorneys to efficiently litigate to achieve the best results possible. *See Laffitte*, 1 Cal. 5th at 492-494. Indeed, “the percentage method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. *Id.* at 493 (quoting *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (internal quotations omitted)).

As a California appellate court very recently confirmed, “fee awards in class actions average around one-third of the recovery’ regardless of ‘whether the percentage method or the lodestar method is used.” *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (quoting *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008)).

Consistent with that observation, California state and federal courts routinely award attorneys’ fees equaling one-third of the common fund. *See, e.g. Laffitte v. Robert Half Internat. Inc.*, 231 Cal. App. 4th 860, 871 (2016) (“33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits”); *Chavez*, 162 Cal. App. 4th at 66 n.11 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide conclude that fees representing one-third of the total recovery is consistent with market rates). Notably, the California Supreme Court in *Laffitte v. Robert Half Internat. Inc.* affirmed a fee award representing one-third of the fund. *Laffitte*, 231 Cal. App. 4th at 506.

A one-third common fund³ attorneys’ fee award is also consistent with what courts have

³ Court have also approved fees in amounts greater than one-third of the common fund. *See Charles v. JPMorgan Chase Bank*, No. CGC-14-538933 (San Francisco County Superior Court June 18, 2019) (awarding plaintiffs \$2.88 million in attorneys’ fees on PAGA penalties totaling \$2.7 million); *Boseman v. VXi Global Solutions, LLC*, No. BC602442 (Los Angeles County Superior Court Jan. 3, 2019) (awarding plaintiff \$750,000 in attorneys’ fees and costs on general PAGA penalties totaling \$585,000); *Salas v. Hallmark Aviation Services LP*, No. BC586585 (Los Angeles County Superior Court February 17, 2017) (awarding plaintiff \$600,000 in attorneys’ fees on PAGA penalties totaling \$605,000); *Monroe v. Continental Design Co., Inc.*, No. RG16817667 (Alameda County Superior Court June 21, 2017) (awarding plaintiff \$110,000 in fees on PAGA penalties totaling \$90,000); *Ramirez v.*

awarded in other representative action cases. The following list shows PAGA actions where attorneys' fees were awarded on a common fund basis:

- *Cruz v. Wal-Mart Associates, Inc.*, Los Angeles Superior Court, No. 18STCV03128 (May 28, 2021) (approving fee award from PAGA-only settlement of \$5 million against a common fund of \$15 million);
- *Jones v. J.C. Penney Corporation*, Los Angeles Superior Court, Case No. BC451823 (April 20, 2017) (approving fee award from PAGA-only settlement of \$1.375 million against a common fund of \$3.2 million (42%));
- *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007 (Sept. 13, 2017) (33.33% fee awarded on \$12,500,000 settlement of a PAGA only case);
- *Garcia v. Pep Boys*, Orange County Superior Court, Case No. 30-2014-00720574-CU-OE-CJC (July 14, 2016) (33.33% fee awarded on a \$1,030,000 settlement of a PAGA only case);
- *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-00852123-CU-OC-CXC (June 15, 2017) (33.33% fee awarded on a PAGA only case);
- *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (May 23, 2016) (33.33% fee awarded on a \$650,000 settlement of a PAGA only case).

An award of fees from the gross settlement amount under the common fund doctrine prevents unjust enrichment of those who benefit from the common fund created through the successful efforts of plaintiff's counsel and furthers the important goal of attracting competent counsel to handle representative actions enforcing minimum labor standards. *Laffitte*, 1 Cal. 5th at 503. In affirming the use of the common fund doctrine in California, the California Supreme Court summarized the benefits of the percentage method of recovery stating: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts." *Id.*

For all of these reasons, a common fund fee award in the amount of \$486,667 is fair and reasonable.

D. A Lodestar Cross-Check Confirms that the Requested Attorneys' Fees Are Fair and Reasonable

The trial court may use an abbreviated lodestar "cross-check" for common fund awards if the

Benito Valley Farms, LLC, No. 16-CV-04708-LHK, 2017 WL 3670794, at *6 (N.D. Cal. Aug. 25, 2017) (awarding attorneys' fees under the lodestar method with no regard to the proportion of the fees to civil penalties).

1 court considers it useful. *Laffitte II*, 1 Cal. 5th at 504-05. However, under *Laffitte II*, this is not meant to
2 displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme Court expressly
3 instructed that “the lodestar calculation, when used in this manner, does not override the trial court’s
4 primary determination of the fee as a percentage of the common fund and thus does not impose an
5 absolute maximum or minimum on the fee award.” *Laffitte II*, 1 Cal. 5th at 505. Critically, the Court in
6 *Laffitte II* emphasized that only where the “multiplier calculated by means of a lodestar cross-check is
7 **extraordinarily high or low**” should the court “consider whether the percentage should be adjusted so
8 as to bring the imputed multiplier within a justifiable range.” *Id.* (emphasis added). Accordingly, when
9 the cross-check multiplier is within a normal range, the lodestar-cross check does not provide a basis for
10 a court to reduce the fee award. Furthermore, in conducting a lodestar cross-check, the court is not
11 “required to closely scrutinize each claimed attorney-hour.” *Laffitte II*, 1 Cal. 5th at 505. An evaluation
12 may be done by reviewing “counsel declarations summarizing overall time spent.” *Id.*

13 In conducting a lodestar cross-check, the Court first determines a lodestar value for the fees by
14 multiplying the time reasonably spent by plaintiffs’ counsel on the case by a reasonable hourly rate. *In re*
15 *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 (2009). To determine whether the requested
16 rate is reasonable, courts look to the prevailing rate for similar work in the pertinent geographic region.
17 *PLCM Group v. Drexler*, 22 Cal. 4th 1084, 1096-97 (2000) (using prevailing hourly rate in community
18 for comparable legal services even though party used in-house counsel). Here, Plaintiffs’ Counsel’s
19 hourly rates are comparable to, or less than, those charged by other representative action plaintiffs’
20 counsel and the firms defending PAGA actions, and have been approved by numerous federal and state
21 courts. (Perez Decl. ¶¶ 22-25, Ex. 3.)

22 Likewise, the total attorney hours expended on this action are reasonable and in line with
23 comparable cases. In determining the reasonableness of the hours expended, “the court should defer to
24 the winning lawyer’s professional judgment as to how much time he was required to spend on the case;
25 after all, he won, and might not have, had he been more of a slacker.” *Kerkeles v. City of San Jose*, 243
26 Cal. App. 4th 88, 104 (2015) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir.
27 2008)). Plaintiffs’ Counsel billed a combined total of approximately 409 hours. (Perez Decl. ¶ 22;
28 Saunders Decl. ¶ 13.)

1 Multiplying the total hours billed by Plaintiffs' Counsel to the litigation by their reasonable
2 hourly rates yields a lodestar of \$288,317.50. (Perez Decl. ¶ 22; Saunders Decl. ¶ 13.) Applying a 1.69
3 multiplier to that lodestar yields the requested fees. A 1.69 multiplier is not "extraordinarily high"—to
4 the contrary, the normal range for a multiplier on a lodestar cross-check "can range from 2 to 4 or even
5 higher." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also Vizcaino v.*
6 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (multipliers "ranging from one to four are
7 frequently awarded ... when the lodestar method is applied"; affirming fees where the cross-check
8 multiplier is 3.65).

9 Courts routinely accept multipliers ranging from 2 to 4 on a lodestar cross-check. *See, e.g., Sutter*
10 *Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a
11 lodestar cross-check); *Chavez.*, 162 Cal. App. 4th at 66 (applying a 2.5 multiplier in a consumer class
12 action); *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22,
13 2015) (approving a 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells*
14 *Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys' fees that resulted in
15 lodestar multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,
16 at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code violations).

17 Indeed, courts following *Laffitte* have reaffirmed that a multiplier between 2 and 4 to be
18 reasonable and not so "extraordinarily high" as to require greater judicial scrutiny. *See Spann v. J.C.*
19 *Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. Sept. 30, 2016) (finding that a 3.07 multiplier is
20 "well within the range for reasonable multipliers" under *Laffitte II*); *Beaver v. Tarsadia Hotels*, No. 11-
21 CV-01842-GPC-KSC, 2017 WL 4310707, at *13 (S.D. Cal. Sept. 28, 2017) ("The one-third fee Class
22 Counsel seeks reflects a multiplier of 2.89 on the lodestar which is reasonable for a complex class action
23 case.").

24 The lodestar cross-check thus confirms that Plaintiffs' fee request is fair and reasonable and
25 should be approved.

26 **E. The Requested Recovery In Litigation Expenses Is Reasonable**

27 Plaintiffs' Counsel are entitled to reimbursement of their discretionary litigation costs. Cal. Lab.
28 Code § 2699(g)(1). Out-of-pocket discretionary expenses are compensable if they would normally be

1 billed to a fee-paying client. *See Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991),
2 *overruled in part on other grounds in Olson v. Automobile Club of Southern Calif.*, 42 Cal. 4th 1142
3 (2008). Such discretionary costs may be claimed as part of an attorneys' fees motion when seeking
4 statutory fees under the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1218
5 n.27 (2008) (awarding costs that are necessarily incurred).

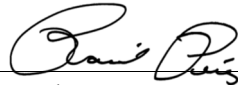
6 As detailed in Plaintiffs' Counsel's declarations, Plaintiffs' Counsel advanced \$19,938.07 in out-
7 of-pocket costs to the State for, among other things, filing fees and courier fees. (Perez Decl. ¶ 26;
8 Saunders Decl. ¶ 17.) Because these reasonable costs were necessarily incurred during the case's
9 pendency, these costs are reasonable and should be awarded. *See also* Cal. Civ. Pro. Code § 1033.5(c)(4)
10 ("[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in
11 the court's discretion."); *Hsu v. Semiconductor Sys., Inc.*, 126 Cal. App. 4th 1330, 1341 (2005) ("[W]hile
12 it is reasonable to interpret a general contractual cost provision by reference to an established statutory
13 definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely
14 choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.").

15 IV. CONCLUSION

16 The Parties have negotiated a fair and reasonable settlement of Plaintiffs' PAGA claims. Having
17 appropriately presented the materials and information necessary for approval, the Parties request that the
18 Court approve the PAGA Settlement Agreement.

19
20 Dated: June 25, 2024

Respectfully submitted,

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