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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

SERENA CARNES, as an “aggrieved
employee” and on behalf of “aggrieved
employees” under the California Labor Code
Private Attorneys General Act,

Plaintiff,

v.

THE SALVATION ARMY, THE
SALVATION ARMY ARC SAN DIEGO; and
DOES 1 through 10, inclusive,

Defendants.

Case No: 37-2021-00020557-CU-OE-CTL

REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER AWARDING
ATTORNEYS’ FEES, COSTS,
ENHANCEMENT PAYMENT, AND
SETTLEMENT ADMINISTRATION FEES**

[Assigned for all purposes to Judge Timothy
Taylor, Dept. C72]

Date: October 20, 2023
Time: 1:30 p.m.
Dept.: C72

Complaint filed: May 7, 2021
Trial date: February 16, 2024

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Serena Carnes (“Plaintiff”) respectfully moves this Court for an order awarding attorney’ fees and costs to Plaintiff’s Counsel, a service payment for Plaintiff, and settlement administration costs to Simpluris, Inc., the parties’ selected settlement administrator for this action.

Plaintiff and The Salvation Army (“Defendant”) reached a proposed settlement of Plaintiff’s representative action brought under the Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*, (“PAGA”) for a total amount of \$150,000, which is the “Settlement Amount.”¹ Plaintiff concurrently has filed a Motion for Order Approving Settlement of PAGA Action and Dismissing Action with Prejudice (“Motion for Approval of PAGA Settlement”), which addresses the details of the settlement terms, including the distribution of the Net Settlement Amount, estimated to be \$78,000, to the California Labor and Workforce Development Agency (“LWDA”) and the PAGA Group.²

Through this motion, Plaintiff requests that the Court approve the Settlement Agreement’s terms allocating \$55,000³ for the payment of Plaintiff’s Counsel’s fees and costs, \$5,000 for Plaintiff’s enhancement payment, and settlement administration costs of up to \$12,000.⁴

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Plaintiff has set forth the details of the case and procedural history in the memorandum supporting the Motion for Approval of PAGA Settlement filed concurrently with this motion.

¹ See Declaration of Robert Spencer submitted in support of this motion and Plaintiff’s Motion for Order Approving Settlement of PAGA Action and Dismissing Action with Prejudice (“Spencer Decl.”), Ex. 1 (the parties’ Labor Code Private Attorneys General Act Settlement Agreement (the “Settlement Agreement”)) at §§ I.O, VIII.B. All “Ex.” references are to Spencer Declaration exhibits unless stated otherwise.

² See Ex. 1 at § I.I, *see also*, §§ I.O, VI, X, XI.

³ The Settlement Agreement provides that Plaintiff’s Counsel may request \$50,000 in fees and up to \$5,000 in costs. Ex. 1 at § X. As discussed below, Plaintiff’s Counsel’s actual lodestar as of August 2, 2023 is \$165,975 and out-of-pocket costs incurred litigating this action total \$4,801.36. Spencer Decl. at ¶¶ 41-50 (discussion of loadstar), 57-59 (discussion of costs).

⁴ See Ex. 1 at §§ VI, X, XI.

For brevity's sake, Plaintiff does not repeat those facts here.

A. Plaintiff's Counsel's work in litigating and settling this action.

Prior to filing this action, Plaintiff's Counsel expended time and effort in investigating and researching Plaintiff's potential Labor Code claims, and preparing this case for litigation. On March 2, 2021, pursuant to Labor Code § 2699.3's exhaustion requirements, Plaintiff's Counsel, on behalf of Plaintiff, gave written notice of her PAGA claims to the LWDA and Defendant.⁵ After the LWDA declined to take action within the statutory time period, Plaintiff's Counsel drafted and then, on May 7, 2021, filed the operative Complaint, which alleges representative PAGA claims based on Defendant's alleged seating violations of Labor Code §§ 1198, 1199 and Wage Order 7 § 14.⁶

After Plaintiff brought her PAGA action, the court of appeal decided *LaFace*, a case involving a similar fact pattern and PAGA claims based on alleged seating violations.⁷ The court of appeal held, as a matter of first impression, that no right to trial existed for PAGA actions.⁸ The court further found that the employer was not obligated to provide seating for its cashiers who were expected to perform other duties around the store when no customers were in line to pay because the seating would interfere with those duties.⁹

Plaintiff's Counsel and counsel for Defendant conducted formal discovery, including interrogatories and document requests.¹⁰ Plaintiff's Counsel reviewed the discovery responses and documents that Defendant produced and analyzed the information obtained in light of the changed legal landscape that occurred due to *LaFace*. The information obtained during discovery supported that the fact pattern of this action was similar to that in *LaFace* in that Defendant expected Plaintiff and other employees who worked as cashiers to perform other duties around the store when there was a lull at the checkout line.¹¹

⁵ Spencer Decl. at ¶ 2, Ex. 2 (PAGA letter).

⁶ Spencer Decl. at ¶ 8, Ex. 3 (Complaint).

⁷ *LaFace*, *supra*, 75 Cal.App.5th at 402, 406-09.

⁸ *Id.* at 402.

⁹ *Id.* at 406-09.

¹⁰ Spencer Decl. at ¶ 11.

¹¹ Spencer Decl. at ¶¶ 10-11.

1 In August 2022, Defendant moved to compel individual arbitration of Plaintiff's claims.
2 Plaintiff's Counsel drafted and filed Plaintiff's opposition. The Court denied the motion on
3 September 30, 2022.¹²

4 After the Court denied the arbitration motion, counsel for the parties discussed potential
5 settlement and agreed to mediate. In preparation, Plaintiff's Counsel sent Defendant's counsel a
6 detailed request for additional information that would be relevant to the mediation. Plaintiff's
7 Counsel reviewed the information provided through formal discovery and the additional, relevant
8 information that Defendant provided in preparation for the mediation, which included that there
9 are 3,072 individuals who meet the Settlement Agreement's definition of the PAGA Group.¹³
10 Defendant also provided Plaintiff's Counsel with the number of pay periods at issue.¹⁴

11 On April 27, 2023, the parties participated in a formal mediation session with Brandon
12 Coen, Esq.¹⁵ At the mediation, Plaintiff's Counsel engaged in arm's-length negotiations with
13 Defense Counsel. By the end of the mediation, the parties were able to reach a tentative
14 settlement.¹⁶ Plaintiff Counsel's experience in litigating similar representative PAGA actions
15 based on wage and hour claims, the degree of investigation that Plaintiff's Counsel conducted, the
16 amount of data obtained from Defendant and the analysis of the recent *LaFace* decision made it
17 possible for Plaintiff's Counsel to determine the potential value and evaluate the strength of the
18 PAGA claims when negotiating the settlement.¹⁷

19 Following the mediation and further refinement of the agreement reached at the
20 mediation, the parties agreed to settle the entire action, subject to approval by the Court. Working
21 together, Defense Counsel and Plaintiff's Counsel drafted a detailed, formalized Settlement
22 Agreement, which set forth all of the terms of the Parties' settlement agreement, and related

23 ¹² Spencer Decl. at ¶ 12.

24 ¹³ *Id.*

25 ¹⁴ *Id.*

26 ¹⁵ It should be noted that at the beginning of this litigation, the Parties also engaged in direct
27 negotiations without the aid of the mediator and exchanged information. While these negotiations
28 were unsuccessful, they aided in the ultimate resolution of this action at the later mediation.
Spencer Decl. at ¶ 15.

¹⁶ Spencer Decl. at ¶ 13.

¹⁷ See Spencer Decl. at ¶¶ 2-5, 10-11, 15-16, and 19-20.

exhibits.¹⁸

Also, since the mediation, Plaintiff's Counsel has spent time communicating with Defense Counsel. Plaintiff's Counsel expects to spend at least 10 additional hours working with the Settlement Administrator, speaking with PAGA Group members, finalizing and filing this motion, and preparing for and attending the hearing.¹⁹

B. The Proposed Settlement

Plaintiff also refers to the Motion for Approval of PAGA Settlement and accompanying memorandum to avoid repeating the details of the proposed settlement's terms and benefits to the LWDA and the PAGA Group members. In brief summary, the Settlement Agreement provides that all PAGA Group members, defined as "all persons within the State of California who are or were employed by Defendant in the State of California as an hourly, non-exempt employee at any time within the PAGA Release Period in any of the following job positions: 1) Sales Associate/Material Handler, 2) Clerk/Cashier, 3) Clerk/Sorter, 4) Sales Associate/Clerk, and 5) Store Attendant"²⁰ during the "PAGA Release Period" which is from March 2, 2020 through April 27, 2023, inclusive.²¹ Defendant has identified approximately 3,072 PAGA Group members.²² PAGA Group members do not need to submit a claim form to receive a settlement payment.²³

If the settlement is approved, the Net Settlement Amount to be distributed to the LWDA and PAGA Group members is estimated to be \$78,000.²⁴ All PAGA Group members will divide 25% of the Net Settlement Amount, a total of approximately \$19,500, based on the formula set forth in the Settlement Agreement.²⁵ The LWDA will receive 75% of the Net Settlement Amount,

¹⁸ Spencer Decl. at ¶ 21, Ex. 1.

¹⁹ Spencer Decl. at ¶ 40.

²⁰ Ex. 1 at § I.J.

²¹ Ex. 1 at § I.K.

²² Spencer Decl. at ¶ 12.

²³ Ex.1 at §§ I.F, VIII.A.

²⁴ Spencer Decl. at ¶ 27; Ex. 1 at §§ I.I, I.O, VI, X, XI.

²⁵ Spencer Decl. at ¶ 27, 29; Ex. 1 at § VIII.A, *see also*, Ex. 1 at §§ I.F, I.I, I.O, VI, X, XI; Lab. Code § 2699(i) (requiring that the LWDA receive 75% and aggrieved employees receive 25% of PAGA penalties awarded).

which is approximately \$58,500.²⁶

1) Settlement administration.

The Settlement Agreement provides for the payment of the costs of settlement administration, which are not expected to exceed \$12,000.²⁷ The parties have selected Simpluris, Inc. (“Simpluris”) to serve as Settlement Administrator and the estimated cost of administrative functions necessary for the distribution of the Settlement Amount is \$12,000.²⁸

2) Attorneys’ fees and costs.

The Settlement Agreement permits Plaintiff’s Counsel to seek an award of attorneys’ fees and litigation costs of \$55,000.²⁹ The request is discussed in Section III.B below.

3) Enhancement award for the named Plaintiff.

The Settlement Agreement also provides that Plaintiff may seek an enhancement payment of \$5,000 for her work bringing this action on behalf of the LWDA and the PAGA Group.³⁰ The service award request is discussed in Section III.C below.

III. LEGAL ARGUMENT

A. Standards for approval of a PAGA settlement

The reasons supporting approval of the main terms of the PAGA settlement are discussed in the memorandum accompanying the Motion for Approval of PAGA Settlement. Here, Plaintiff focuses only on her request for an award of attorneys’ fees and costs, Plaintiff’s enhancement payment, and payment of the settlement administrator’s fees, all of which are requested in accordance with the Settlement Agreement.

B. Plaintiff’s Counsel is entitled to recover its reasonable fees and costs.

Pursuant to the Settlement Agreement, Plaintiff’s Counsel seeks attorneys’ fees and litigation costs in the total amount of \$55,000.³¹ Plaintiff Counsel’s entitlement to an award of

²⁶ Spencer Decl. at ¶ 27-28; Ex. 1 at §§ I.H, *see also*, I.I, I.O, VI, X, XI; Lab. Code § 2699(i).

²⁷ Ex. 1 at § VI.

²⁸ Spencer Decl. at ¶ 26-27; Ex. 1 at § VI.

²⁹ Ex. 1 at § X. The request is \$50,000 in attorneys’ fees and \$5,000 in costs. As discussed below, those amounts are substantially lower than Plaintiff’s Counsel’s actual lodestar and out-of-pocket costs incurred litigating this action. *See* Spencer Decl. at ¶¶ 38-50.

³⁰ Ex. 1 at § XI.

fees and costs is warranted on multiple independent grounds, which are discussed below. At the outset, the Court should be aware that Plaintiff's Counsel's requested fees are a loss when compared to the attorney time spent litigating this action.³²

1) Plaintiff is entitled statutorily to an award of attorneys' fees and costs.

In a PAGA action, the plaintiff's counsel is entitled to recover attorney's fees and costs as a matter of right under PAGA. Labor Code § 2699(g)(1) provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." Given that PAGA's purpose is to allow employees to enforce the Labor Code in order to further the State's law enforcement interest,³³ the statute ensures that an individual who performs this law enforcement function is able to recover his or her attorneys' fees and costs.³⁴

"The PAGA does not provide a specific standard for evaluating attorney's fees in connection with a settlement of PAGA claims."³⁵ The California Supreme Court has held the percentage of the common fund or the lodestar method may be used when determining attorneys' fees in class action settlements that produce a specific, identifiable common fund.³⁶ "The choice of a fee calculation method is generally one within the discretion of the trial court," with the goal "being the award of a reasonable fee to compensate counsel for their efforts."³⁷

To the extent the amount recovered is the basis of the fee award, the court should consider the entire amount recovered, given that the State is the real party in interest and 100% percent of the recovery is the property of the State, regardless of the subsequent distribution

³¹ Ex. 1 at § X.

³² Spencer Decl. at ¶¶ 38-50.

³³ See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.

³⁴ Lab. Code § 2699(g)(1).

³⁵ *Cresci v. Cox Auto. Corporate Servs.* (C.D. Cal. May 5, 2021) No. 2:20-cv-06832-VAP-SKx, 2021 U.S. Dist. LEXIS 134293, at *13-15, quoting *Ramirez v. Benito Valley Farms, LLC* (N.D. Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, at *18.

³⁶ *Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503, 506 (affirming that trial court did not abuse its discretion in awarding 33.33% fees based on the percentage of the fund method). Ninth Circuit case law holds the same. See e.g., *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047 (where a settlement creates a common fund, 'the district court has discretion . . . to choose either the percentage-of-the-fund or the lodestar method' to determine an award of attorneys' fees.)).

³⁷ *Laffitte, supra*, 1 Cal.5th at 504.

arrangement.³⁸ In other words, a lawyer who represents a private attorney general is working to advance law enforcement on behalf of the State and his or her performance should be judged by the total amount recovered in that function. Limiting the calculation of attorneys' fees to the amount distributed to the affected employees would ignore both the basic structure and intent of PAGA. If the fee award was limited in that manner, it would become economically unfeasible to bring representative PAGA actions, which would frustrate PAGA's purpose of encouraging private individuals to assist the State in enforcing the Labor Code. Awarding attorneys' fees based on the total recovery obtained allows private attorneys general to engage experienced counsel to advance the State's interests.

Even in the class action context, fees are calculated on the total amount recovered, *i.e.*, the gross settlement amount including the amounts that are allocated for fees and costs. "[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."³⁹ An attorney representing the named plaintiff in a class action settlement involving Labor Code claims would be entitled to a percentage of recovery on the total fund.⁴⁰ An attorney representing a private attorney general in a representative PAGA action that results in a settlement benefiting the State and aggrieved employees is entitled to fees on the same basis.

In addition, California Code of Civil Procedure § 1021.5 also entitles Plaintiff to an award of attorneys' fees and costs. That statute provides for the award of:

³⁸ See *e.g.*, *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 382 ("The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit."), *overruled on another ground* by *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906, 1925; *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 81 (same), quoting *Iskanian, supra*, 59 Cal.4th at 382. See also, *e.g.*, *Basiliali v. Allegiant Air, LLC* (C.D. Cal. July 1, 2019) No. 2:18-cv-03888-RGK-MRW, 2019 U.S. Dist. LEXIS 228250, at *11 (approving a fee request that was 33% of the total PAGA settlement, citing *Laffitte's* affirmation of a 33.33% fee award in a class action settlement. The district court also noted the requested fee award resulted in a 2.02 negative multiplier under the lodestar method).

³⁹ *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967, citing *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745.

⁴⁰ See *id.*

attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

The instant PAGA representative action was, by definition, "for the public benefit" that secured monetary awards for the LWDA and the 3,072 aggrieved employees who make up the PAGA Group and was authorized due the State's lack of enforcement resources.⁴¹

2) Plaintiff's Counsel is entitled to an award of reasonable fees and costs under the percentage of the common fund doctrine.

Counsel is entitled to recover attorneys' fees and costs under the "common fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."⁴²

Courts have long recognized the "common fund" or "common benefit" doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund.⁴³ In *Laffitte*, the California Supreme Court held that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created."⁴⁴ The California Supreme Court also noted that the percentage of the fund

⁴¹ See *e.g. Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 16-17 (finding that, because the plaintiff pursued class action not only for himself but on behalf of a class and ultimately obtained awards for 209 drivers, he satisfied "the 'significant benefit,' 'public interest,' and 'large class of persons' requirements of [C.C.P. §] 1021.5.").

⁴² See *Boeing, supra*, 444 U.S. at 478.

⁴³ *Id.*; see also, *e.g., Serrano v. Priest ("Serrano III")* (1977) 20 Cal.3d 25, 34; *Glendale City Employees' Assoc. v. City of Glendale* (1975) 15 Cal.3d 328, 341, fn.19; *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

⁴⁴ *Laffitte, supra*, 1 Cal.5th at 503 (providing an extended analysis of California law regarding fee award methodology).

method “more accurately reflects the results achieved” than the lodestar method, serves as a “better approximation of market conditions in a contingency case,” and encourages “counsel to seek an early settlement and avoid unnecessarily prolonging the litigation.”⁴⁵

Numerous appellate courts have similarly found.⁴⁶ Moreover, at least eight federal courts of appeal—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and the D.C. Circuit—have endorsed the “percentage fee” method for determining reasonable attorneys’ fees in common benefit cases.⁴⁷ The Ninth Circuit has explained that “attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants.”⁴⁸ Courts may even look at the total fund value in a reversionary settlement, although that is not necessary in this “all-in” (*i.e.*, non-reversionary) settlement.⁴⁹

California courts have recognized that “‘fee awards in class actions average around one-third of the recovery’” regardless of “‘whether the percentage method or the lodestar method is

⁴⁵ *Id.* at 503-04.

⁴⁶ See *e.g.*, *Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a “contingent percentage” award of attorneys’ fees in a representative action as the proper exercise of the court’s broad equitable powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys’ fees and expenses properly awarded from common benefit composed of illegally imposed sales and use tax); *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-68 (court upheld fee award equal to one-third of the damages to owners of residential property in an inverse condemnation action).

⁴⁷ See, *e.g.*, *In re Sumitomo Copper Litig.* (S.D.N.Y. 1999) 74 F.Supp.2d 393, 396-398 (discussing the overwhelming weight of federal authority in favor of the percentage fee method, citing cases); see also, *Laffitte, supra*, 1 Cal.5th at 503 (stating that the California Supreme Court “join[ed] the overwhelming majority of federal and state courts” that approve the percentage of the fund method).

⁴⁸ *Williams, supra*, 129 F.3d at 1027. See also, *Boeing, supra*, 444 U.S. at 478 (“a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”).

⁴⁹ *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967 (quoting *Boeing v. Van Gemert*); *Williams, supra*, 129 F.3d at 1027 (finding district court abused its discretion by awarding class counsel’s fees based on percentage of claims made rather than the total common fund); see also, *Stern v. Gambello* (9th Cir. 2012) 480 Fed. App’x 867, 870 (finding district court correctly considered the requested fees against the potential recovery, not the claims actually made).

used.”⁵⁰ When applying the percentage of the fund method, California courts routinely grant fee awards of 33.33% and higher.⁵¹ Further, courts have recognized that “[f]ee award percentages generally are higher in cases where the common fund is below \$10 million.”⁵²

- a. The requested fee amount is within the range of reasonable fee awards under the “percentage of the fund” method.

The amount of fees that Plaintiff’s Counsel requests – 33.33% of the Settlement Amount – is reasonable based on standards applicable to the “percentage of the fund” method. “When assessing whether the percentage requested is reasonable, courts look to factors such as: (a) the

⁵⁰ *Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 545, quoting *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11; see also, e.g., *Cicero v. DirecTV, Inc.* (C.D. Cal. July 27, 2010) No. EDCV 07-1182, 2010 U.S. Dist. LEXIS 86920, at *17-18 (“a review of California [wage and hour] cases in other districts reveals that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.”).

⁵¹ See e.g., *Laffitte, supra*, 1 Cal.5th at 506 (affirming that trial court did not abuse its discretion in awarding 33.33% fees based on the percentage of the fund method); *Roos v. Honeywell International, Inc.*, 2015 Cal. App. LEXIS 1004, at *26 (Nov. 10, 2015), (affirming 37.5% fee award in \$8,150,000 million class settlement), *overruled on other grounds* by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260, 269; *Borelli v. Black Diamond Aggregates, Inc.* (E.D. Cal. June 8, 2022) No. 2:14-cv-02093-KJM-KJN, 2022 U.S. Dist. LEXIS 103734, at *26-27 (granting 33% fee request, citing string of cases that did the same); *Johnson v. United States Bank Nat’l Ass’n* (S.D. Cal. Aug. 20, 2020) No. 19-CV-286 JLS (LL), 2020 U.S. Dist. LEXIS 151168, at *9 (awarding 33% fee award, finding that the percentage “is in line with other attorneys’ fees awards in California and the Ninth Circuit,”) citing *Lafitte, supra*, 1 Cal.5th at 506 and other cases; *Aguilar v. Wawona Frozen Foods* (E.D. Cal. May 18, 2017) No. 1:15-cv-00093-DAD-EPG, 2017 U.S. Dist. LEXIS 76751, at *14-15 (approving one-third fee award); *Deaver v. Compass Bank* (N.D. Cal. Dec. 11, 2015) No. 13-cv-00222-JSC, 2015 U.S. Dist. LEXIS 166484, 2015 WL 8526982, at *9-14 (approving one-third fee award); *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. July 2, 2013) 297 F.R.D. 431, 450 (approving a one-third fee award, citing cases with similar awards); *Burden v. SelectQuote Ins. Servs.* (N.D. Cal. Aug. 2, 2013) No. C 10-5966 LB, 2013 U.S. Dist. LEXIS 109110, at *13 (granting one-third fee award); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Ca. 2010) 266 F.R.D. 482, 491-92 (granting 33.33% fee award, citing cases with similar awards).

⁵² *Alvarez v. Farmers Ins. Exch.* (N.D. Cal. Jan. 17, 2017) No. 3:14-cv-00574-WHO, 2017 U.S. Dist. LEXIS 119128, at *9; see also, e.g., *Hawkins v. Kroger Co.* (S.D. Cal. Feb. 4, 2022 No. 15cv2320 JM (AHG), 2022 U.S. Dist. LEXIS 20956, at *29) (recognizing same); *Moreno v. Capital Bldg. Maint. & Cleaning Servs.* (N.D. Cal. Sep. 10, 2021) No. 19-cv-07087-DMR, 2021 U.S. Dist. LEXIS 172633, at *12 (same); *Martin v. AmeriPride Servs.* (S.D. Cal. June 9, 2011), No. 08cv440-MMA (JMA), 2011 U.S. Dist. LEXIS 61796, at *23 (same); *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18 (same).

1 results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the
2 contingent nature of the fee and the financial burden; and (f) the awards made in similar cases.”⁵³

3 First, the results achieved are significant, as approximately \$58,500 will be paid out to the
4 LWDA and \$19,500 will be paid to the PAGA Group — for a total payout of \$78,000.⁵⁴ Second,
5 such results were achieved in the face of significant risks. As explained above, Defendant
6 maintained defenses to Plaintiff’s PAGA claims that very well could have resulted in a net-zero
7 recovery at trial, especially after the court of appeal decided *LaFace*.⁵⁵ Third, notwithstanding
8 this risk of loss, Plaintiff’s Counsel undertook representation of the instant PAGA claims for the
9 benefit of the State (and the PAGA Group) on a contingency basis.⁵⁶ This not only required
10 Plaintiff’s Counsel to personally assume the risk of nonpayment in securing the financial benefit
11 that the State of California stands to receive, but constitutes a “loan” on Plaintiff’s Counsel
12 service—both of which are factors warranting fee enhancement under applicable California
13 Supreme Court authority:

14 One of the most common fee enhancers ... is for contingency risk. We
15 reaffirmed the propriety of a contingency risk enhancement in *Ketchum*:
16 “The economic rationale for fee enhancement in contingency cases has
17 been explained as follows: ‘A contingent fee must be higher than a fee for
18 the same legal services paid as they are performed. The contingent fee
19 compensates the lawyer not only for the legal services he renders but for
20 the loan of those services. The implicit interest rate on such a loan is
21 higher because the risk of default (the loss of the case, which cancels the
22 debt of the client to the lawyer) is much higher than that of conventional
23 loans.’ (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.)
24 ‘A lawyer who both bears the risk of not being paid and provides legal
25 services is not receiving the fair market value of his work if he is paid only
26 for the second of these functions. If he is paid no more, competent
27 counsel will be reluctant to accept fee award cases.’”⁵⁷

25 ⁵³ See *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 492.

26 ⁵⁴ See Spencer Decl. at ¶¶ 27-29, Ex. 1 at §§ I.I, I.O, VI, X, XI. Defendant has identified 3,072
PAGA Group members. Spencer Decl. at ¶ 12.

27 ⁵⁵ Spencer Decl. at ¶¶ 10-11.

28 ⁵⁶ Spencer Decl. at ¶ 38.

⁵⁷ *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580.

Finally, the percentage requested falls within a typical range, particularly in light of the settlement size.⁵⁸ It is recognized that “courts may award attorney’s fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.”⁵⁹ Accordingly, Plaintiff’s Counsel’s fee request is fair and reasonable and is consistent with other awards in California and the Ninth Circuit.

3) The requested fees are justified under the lodestar method.

Fee calculations under the lodestar method would result in a similar award, demonstrating the fairness of Plaintiff’s Counsel’s percentage fee request. Because this is a common fund case, the lodestar method, if used at all, serves only to cross check the reasonableness of the fee request.⁶⁰

Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. Plaintiff’s Counsel’s hourly rates are summarized in the Spencer Declaration filed in support of this motion.⁶¹ Class Counsel’s hourly rates have been approved in other cases⁶² and are well within the range of those found permissible for attorneys practicing class action litigation in California.⁶³

⁵⁸ See e.g., *Alvarez, supra*, 2017 U.S. Dist. LEXIS 119128, at *9; *Hawkins, supra*, 2022 U.S. Dist. LEXIS 20956, at *29; *Moreno, supra*, 2021 U.S. Dist. LEXIS 172633, at *12; *Martin, supra*, 2011 U.S. Dist. LEXIS 61796, at *23; *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18.

⁵⁹ See e.g., *Alvarez, supra*, 2017 U.S. Dist. LEXIS 119128, at *9, citing *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18.

⁶⁰ See e.g., *Glass v. UBS Fin. Servs.* (9th Cir. 2009) 331 F.App’x 452, 456 (approving the district court’s “informal lodestar cross-check” for confirming the reasonableness of the percentage award); *Vizcaino, supra*, 290 F.3d at 1050 (similar).

⁶¹ Spencer Decl. at ¶¶ 41-45.

⁶² See e.g., *Parker v. Cherne Contr. Corp.*, 2021 U.S. Dist. LEXIS 236229, *20-21 (N.D. Cal. Dec. 9, 2021) (finds that Keller Grover LLP’s billing rates used “to calculate the lodestar are reasonable and in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation,”) citing *Hefler v. Wells Fargo & Co.* (N.D. Cal. Dec. 18, 2018) No. 16-CV-05479, 2018 U.S. Dist. LEXIS 213045, 2018 WL 6619983, at *14 (finding rates from \$650 to \$1,250 for partners or senior counsel and \$400 to \$650 for associates were reasonable) and *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.* (N.D. Cal. Mar. 17, 2017) No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 39115, 2017 WL 1047834, at *5 (finding rates up to \$1600 for partners and up to \$790 for associates were reasonable). Courts have found that “rate determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *Cresci, supra*, 2021

Plaintiff's Counsel has spent over 238 hours litigating this case through August 2, 2023, as described in further detail in the Spencer Declaration.⁶⁴ Counsel expects to spend another 10 hours completing the work on this motion, preparing for and attending the approval hearing, and dealing with settlement administration issues.⁶⁵ The fee award should include fees incurred to establish and defend the attorneys' fee claim.⁶⁶

The lodestar for Plaintiff's Counsel through August 2, 2023 is \$165,975.⁶⁷ Plaintiff's Counsel expects to perform at least 10 more hours of work on this case finalizing this motion, attending the approval hearing, and responding to inquiries from aggrieved employees. Without counting this additional work, the requested fee award of \$50,000 thus represents a negative multiplier of .30.

4) Plaintiff's Counsel's requested costs are reasonable.

In the course of this litigation, Plaintiff's Counsel had to (and will) incur out-of-pocket costs of approximately \$5,000.⁶⁸ As described in the Spencer Declaration, the incurred costs included filing fees, legal research fees, mediation fees, printing charges, and mailing charges.⁶⁹

U.S. Dist. LEXIS 134293, at *14, quoting *United Steel Workers v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.

⁶³ See cases cited in previous footnote; see also, e.g., *Gonzalez v. S. Wine & Spirits of Am., Inc.* (9th Cir. 2014) 555 F. App'x 704, 704-05 (reversing district court's order reducing attorneys' hourly rates without considering evidence of "prevailing hourly rates for comparable legal services in the community"); *O'Bannon v. NCAA*, (N.D. Cal. 2015) 114 F. Supp. 3d 819, 827 (similar range of rates for Bay Area counsel experienced in complex class actions were reasonable); *Williams v. SuperShuttle Int'l, Inc.* (N.D. Cal. Feb. 12, 2015) No. 12-cv-06493-WHO, 2015 U.S. Dist. LEXIS 19341, at *5 (similar); *Steinfeld v. Discover Fin. Servs.* (N.D. Cal. Mar. 31, 2014) 2014 U.S. Dist. LEXIS 48540, at *4-5 (similar); *Vedachalam v. Tata Consulting Serv. Ltd.* (N.D. Cal. July 18, 2013) 2013 U.S. Dist. LEXIS 100796, at *8 (similar); *Bolton v. U.S. Nursing Corp.* (N.D. Cal. Oct. 18, 2013) 2013 U.S. Dist. LEXIS 150299, at *14-15 (similar); see also, Spencer Decl. at ¶¶ 46-48 (noting range of hourly rates approved in recent Bay Area fee orders).

⁶⁴ Spencer Decl. at ¶¶ 40-41.

⁶⁵ Spencer Decl. at ¶ 40.

⁶⁶ *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 ("Serrano IV").

⁶⁷ Spencer Decl. at ¶ 41.

⁶⁸ See Spencer Decl. at ¶¶ 57-58.

⁶⁹ Spencer Decl. at ¶ 57.

Such costs are appropriate for cost reimbursement in these types of cases.⁷⁰

The costs that Plaintiff's Counsel incurred in this litigation benefited the LWDA, Plaintiff and the PAGA Group members. In light of the costs that Plaintiff's Counsel was required to incur to prosecute this action, Plaintiff's cost request of \$5,000 is reasonable and should be granted.

C. The enhancement payment sought by the named Plaintiff is reasonable.

As the Settlement Agreement permits, Plaintiff seeks an enhancement payment in the amount of \$5,000.⁷¹ The enhancement payment is intended to recognize the time and efforts that she spent on behalf of the State and other aggrieved employees.⁷²

Although PAGA does not address service payments to private attorneys general, the reasoning of case law approving named plaintiffs' service awards in class actions supports that they also are appropriate in PAGA representative actions. Like in class actions, service payments should be awarded to named plaintiffs in representative actions to acknowledge the effort and risk they undertake to obtain a reward on behalf of others.⁷³ The California Court of Appeal has found that "incentive awards are fairly typical in class action cases" and "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."⁷⁴ The Ninth Circuit also has recognized that a named plaintiff's "willingness to act as a private attorney general" may justify the award of an incentive payment.⁷⁵

⁷⁰ See e.g., *In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); see also, *In re GNC Shareholder Litig.* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

⁷¹ Ex. 1 at § XI.

⁷² Declaration of Serena Carnes, submitted herewith.

⁷³ See e.g., *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-94, citing *Clark v. Am. Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.

⁷⁴ *Cellphone Termination*, *supra*, 186 Cal.App.4th at 1393-94 (internal citations, quotations and alterations omitted), citing *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, 4 *Newberg on Class Actions* (4th ed. 2002) § 11:38, p. 81, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303.

⁷⁵ *Rodriguez*, *supra*, 563 F.3d at 959.

Further, two separate authorities compel service payments for an employee plaintiff serving as a private attorney general. First, PAGA and its legislative history make clear that its purpose is to incentivize individuals to act on behalf of, and for the benefit of, the State to enforce the Labor Code due to shortage of the State’s law enforcement resources.⁷⁶ With that goal in mind, it is reasonable to conclude that the statute permits compensation for individuals who take on that work. Even if, for example, the statute that enables the State to employ an attorney general did not specify a salary for that position, it would be reasonable to conclude that the State has authority to pay the individual who performs that work. The same must be true for an individual who acts as a private attorney general. The Legislature’s stated purpose of encouraging private law enforcement work necessarily contemplates compensation for individuals who do that work.

It should not be assumed that the share of compensation paid to each aggrieved employee is somehow intended to be the only money available to the individual who takes on the risk and effort of filing and litigating a lawsuit. If that were the rule, each employee who is subjected to an illegal wage and hour practice would be better off waiting for someone else to file a representative claim so that he or she could reap the same reward without taking any risk.

The second authority supporting a service award is the California Supreme Court’s consistent mandate, which it just recently reiterated, that courts must “liberally construe[]” the Labor Code “in favor of affording workers protection.”⁷⁷ When addressing questions for which there is no specific statutory answer, the California Supreme Court has explained that courts interpreting the Labor Code must “adopt the construction that best gives effect to the purpose of the Legislature” which is “the protection of employees.”⁷⁸ The Court’s mandate weighs in favor of providing service awards because refusing them would dramatically impair the State’s ability

⁷⁶ *Iskanian, supra*, 59 Cal.4th at 379 (discussing the goal stated in PAGA and its legislative history to enable private attorneys general to enforce the Labor Code due to the State’s shortage of resources).

⁷⁷ *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 754, citing string of California Supreme Court cases stating the same.

⁷⁸ *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839.

1 to achieve its goal of Labor Code enforcement through private attorneys general. If an employee
2 plaintiff acting as a private attorney general can expect no compensation other than his or her
3 individual share of the recovered penalties, it would be extremely difficult to find anyone willing
4 to undertake the extensive risk and effort involved in bringing a representative PAGA action.

5 Without Plaintiff's efforts, there would be no recovery at all. An incentive award is
6 appropriate to compensate Plaintiff for the risk and expense she incurred in conferring a benefit
7 on other of Defendant's employees and the State of California. As a result of the named
8 Plaintiff's efforts, the State of California will receive more than \$58,500, to be put toward
9 education about, and enforcement of, California's labor laws.⁷⁹ The PAGA Group members will
10 receive monetary settlement payments – approximately \$6.35 each.⁸⁰

11 In this case, the named Plaintiff performed the following tasks, among others: (1) assisted
12 Plaintiff's Counsel in investigating and substantiating the claims alleged in this action, including
13 multiple telephone calls with counsel to review facts, documents, and The Salvation Army's
14 policies; (2) assisted in the preparation of the complaint in this action; (3) produced evidentiary
15 documents to Plaintiff's Counsel; and (4) assisted in the settlement of this litigation.⁸¹
16 Moreover, as with any plaintiff who files a civil action, the named Plaintiff undertook the
17 financial risk that, in the event of a judgment in favor of Defendant in this action, she could have
18 been personally responsible for any attorneys' fees and costs awarded in its favor.

19 The award of a service payment to the named Plaintiff is especially warranted in a case
20 like this one, involving claims brought to enforce the Labor Code's protections for employees.
21 Plaintiff should be commended for pursuing PAGA claims; a modest service payment like that
22 sought here is an appropriate means of doing so. In light of the work that the named Plaintiff
23 performed on behalf of the State and the PAGA Group, the requested service payment is
24 reasonable and appropriate.

25
26 ⁷⁹ Spencer Decl. at ¶ 54; Ex. 1 at §§ I.H, I.I, I.O, VI, X, XI.

27 ⁸⁰ Spencer Decl. at ¶ 29 (\$19,500/3,207 = \$6.35); Ex. 1 at § VIII.A, *see also*, §§ I.I, I.O, VI, X,
28 XI.

⁸¹ *See generally*, Carnes Declaration.

D. The Settlement Administrator's fee is reasonable and should be paid.

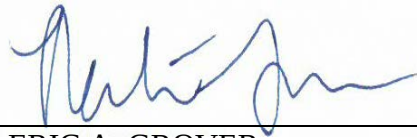
Simpluris has agreed to provide all administrative functions necessary for the distribution of the Settlement Amount for an amount not expected to exceed \$12,000, which is the amount set forth in the Settlement Agreement.⁸² Plaintiff requests that the Court approve payment to Simpluris in the amount of \$12,000. If the amounts are higher it will be deducted from the settlement amount, if the amount is lower it will revert to the Net Settlement Amount.⁸³

IV. CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order Approving Settlement submitted herewith, approve Simpluris, Inc. as the Settlement Administrator and approve payment of its administration fees up to \$12,000; approve the award of attorneys' fees and costs to Plaintiff's Counsel in the total amount of \$55,000, and approve the award of an enhancement payment to Plaintiff Serena Carnes in the amount of \$5,000.

Dated: August 14, 2023

KELLER GROVER LLP

By: 

ERIC A. GROVER
ROBERT SPENCER
Counsel for Plaintiff
SERENA CARNES

⁸² Ex. 1 at § VI; Spencer Decl. at ¶ 26.

⁸³ Ex. 1 at § VI.

PROOF OF SERVICE

I, JOEY GONZALEZ, am employed in the County of San Francisco, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1965 Market Street, San Francisco, California 94103. On August 14, 2023, in the case of *Carnes v. The Salvation Army, et al.*, San Diego Superior Court Case Number 37-2021-00020557-CU-OE-CTL, I served the foregoing document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN ORDER AWARDING ATTORNEYS' FEES, COSTS, ENHANCEMENT PAYMENT, AND SETTLEMENT ADMINISTRATION FEES

on the interested party(ies) below, using the following means:

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THE SALVATION ARMY

☒	(BY ELECTRONIC SERVICE) by electronically mailing a true and correct copy in PDF format through our electronic mail system to the email address(es) set forth above, or as stated on the attached service list per agreement between the parties.
☒	(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


JOEY GONZALEZ