

ERIC A. GROVER (SBN 136080)
eagrover@kellergrover.com
ROBERT W. SPENCER (SBN 238491)
rspencer@kellergrover.com
KELLER GROVER LLP
1965 Market Street
San Francisco, California 94103
Telephone: (415) 543-1305
Facsimile: (415) 543-7861

Attorneys for Plaintiff
SERENA CARNES

**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 APPROVING
SETTLEMENT OF PAGA ACTION AND
DISMISSING ACTION WITH
PREJUDICE**

[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”), an alleged “aggrieved employee” under the Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*, (“PAGA”), moves this Court for an order granting approval of the proposed settlement of this representative PAGA action against The Salvation Army (“Defendant”).¹ Plaintiff’s PAGA action alleges that Defendant violated certain California Labor Code provisions resulting from its failure to provide suitable seating for its employees.² The proposed settlement will dispose of the PAGA claims asserted on behalf of Plaintiff and all individuals who were employed by Defendant in California for at any time from March 2, 2020 through April 7, 2023, inclusive (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 (referred to as the “PAGA Group”).³

The proposed settlement embodies all of the features of a settlement that is fair, reasonable, and adequate. It is the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage-and-hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative strength and value of the PAGA claims, and (4) it reflects a reasoned compromise based directly on the relative strength and value of the PAGA claims, as well as the risks, expense, complexity, and likely duration of further litigation.

The settlement achieves a fair and reasonable benefit for the State of California’s Labor and Workforce Development Agency (“LWDA”) and the 3,072 members of the PAGA Group. The Settlement Agreement allocates approximately \$78,000 to the settlement of the PAGA claims

¹ See Declaration of Robert Spencer submitted in support of Plaintiff’s Motion for Approval of PAGA Settlement (“Spencer Decl.”), Ex. 1 (the parties’ Labor Code Private Attorneys General Act Settlement Agreement (the “Settlement Agreement”)). All “Ex.” references are to Spencer Declaration exhibits unless stated otherwise.

² Ex. 3 (the Complaint).

³ Ex. 1 at § I.J.

(referred to as the “Net Settlement Amount”).⁴ According to statute, from the \$78,000, 75% (\$58,500) will be distributed to the LWDA and 25% (\$19,500) will be paid to the Aggrieved Employees.⁵ The \$19,500 to be paid the Aggrieved Employees will be distributed according to the formula set forth in the Settlement Agreement.⁶

This is a reasonable recovery in light of recent California court of appeal case law as applied to the facts of this case.⁷ Defendant has raised what it considers to be substantial defenses to Plaintiff’s claims on the merits, creating a real risk of a net-zero recovery. Most significantly, Defendant asserts that the California court of appeal’s recent decision in *LaFace* defeats Plaintiff’s PAGA claims based on alleged suitable seating violations. *LaFace* was issued after Plaintiff brought this action and found that the employer that was not obligated under the California Labor Code to provide seating to grocery store employees who performed cashier duties but who also were expected to perform other tasks around the store when there was a lull at the checkout line because seating would interfere with those other duties.⁸ Information obtained in discovery in this action revealed that the facts of this case are similar to those in *LaFace*.⁹ Plaintiff’s Counsel found the net-zero recovery risk to be significant due to *LaFace* and negotiated a settlement that they view as fair, reasonable and adequate for the LWDA, PAGA Group and Plaintiff under the circumstances.¹⁰

For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this Court enter an order approving the PAGA settlement. In a separate motion being filed today, Plaintiff seeks an order awarding attorneys’ fees and costs, an enhancement award for Plaintiff,

⁴ Ex. 1 at § I.I. The remaining \$72,000 of the \$150,000 Settlement Amount is allocated to attorneys’ fees (\$50,000) and costs (\$5,000), an enhancement award to Plaintiff (\$5,000), and administration costs (up to \$12,000). Spencer Decl. at ¶ 27; Ex. 1 at §§ I.O, VI, X and XI.

⁵ Ex. 1 at § I.I. See Lab. Code § 2699(i).

⁶ Ex. 1 at § III.A.

⁷ Spencer Decl. at ¶ 10-11; see *LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App.5th 388, 406-09.

⁸ *LaFace*, *supra*, 75 Cal.App.5th at 406-09; Spencer Decl. at ¶¶ 10-11

⁹ Spencer Decl. at ¶ 11.

¹⁰ Spencer Decl. at ¶ 10-11, 13.

1 and the approval of Simpluris, Inc. as the Settlement Administrator and awarding payment of the
2 settlement administration fees.

3 **II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

4 **A. The Parties**

5 Defendant is a California corporation that operates retail thrift stores throughout
6 California.¹¹ Plaintiff worked as a non-exempt, hourly sales associate/material handler from
7 approximately January 2019 through December 1, 2020 at Defendant's retail store in San Diego,
8 California during the PAGA Release Period.¹² The PAGA Group is defined as: All persons within
9 the State of California who are or were employed by Defendant in the State of California as an
10 hourly, non-exempt employee at any time within the PAGA Release Period in any of the
11 following job positions: 1) Sales Associate/Material Handler, 2) Clerk/Cashier, 3) Clerk/Sorter, 4)
12 Sales Associate/Clerk, and 5) Store Attendant.¹³ The "PAGA Release Period" is defined as the
13 time period from and including March 2, 2020 through April 27, 2023.¹⁴

14 **B. Plaintiff's exhaustion of administrative remedies and filing of the Complaint.**

15 On March 2, 2021, pursuant to Labor Code § 2699.3's exhaustion requirements, Plaintiff
16 gave written notice of her PAGA claims to the LWDA and Defendant.¹⁵ After the LWDA
17 declined to take action within the statutory time period, Plaintiff filed the Complaint on May 7,
18 2021 alleging PAGA claims on behalf of the LWDA, herself and all other aggrieved employees.
19 The Complaint alleges that Defendant violated PAGA based on its failure to provide suitable
20 seating for its employees who perform cashiering duties at its retail stores in violation of Labor
21 Code §§ 1198 and 1199 and Wage Order 7 § 14. The Complaint seeks Labor Code § 2699(f)
22 penalties.¹⁶

23
24 _____
25 ¹¹ Spencer Decl., Ex. 3 (Complaint at ¶¶ 5, 9).

26 ¹² Ex. 3 (Complaint at ¶¶ 4, 10).

27 ¹³ Ex. 1 at § I.J.

28 ¹⁴ Ex. 1 at § I.K.

¹⁵ Spencer Decl. at ¶ 7, Ex. 2 (PAGA exhaustion letter).

¹⁶ Spencer Decl. at ¶ 8, Ex. 3 (Complaint).

Defendant has denied all of the allegations in their entirety. To date, no court has made a finding of any wrongdoing on the part of Defendant or that Defendant otherwise acted improperly or in violation of any state law, rule or regulation, with respect to the issues presented in the litigation.¹⁷

After Plaintiff filed her action, the California court of appeal decided *LaFace*, in which it held, as a matter of first impression, that no right to trial exists for PAGA actions.¹⁸ The court further found that the employer was not obligated to provide seating for its cashiers because the employer expected the cashiers to perform other duties around the store when no customers were in line to pay and the seating would interfere with those duties.¹⁹

The parties engaged in formal discovery, exchanging written discovery responses and relevant documents.²⁰ 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. The information indicated that Plaintiff's PAGA claims likely were significantly weakened by *LaFace*.²¹

In August 2022, Defendant filed a motion to compel the action into individual arbitration, which Plaintiff opposed and the Court denied.²² After the Court's denial of the arbitration motion, counsel for the parties discussed potential settlement and agreed to mediate.²³ In preparation, the Plaintiff obtained additional, relevant information from Defendant, including that there are 3,072

¹⁷ Ex. 1 at §§ II.D, IV.A-D.

¹⁸ *LaFace, supra*, 75 Cal.App.5th at 402.

¹⁹ *Id.* at 406-09.

²⁰ Spencer Decl. at ¶ 11.

²¹ Spencer Decl. at ¶¶ 10-11.

²² Spencer Decl. at ¶ 12.

²³ It should be noted that in the early stages of this litigation the Parties engaged in direct settlement negotiations without the aid of a mediator, as well as exchanged information. These negotiations were unsuccessful, yet were helpful when it came time to mediate this action. Spencer Decl. at ¶ 15.

1 individuals who meet the Settlement Agreement’s definition of the PAGA Group.²⁴ Defendant
2 also provided the number of pay periods at issue.²⁵

3 Armed with the information obtained from discovery and aware of the change in the legal
4 landscape after *LaFace*, the parties participated in a formal mediation session with Brandon Coen,
5 Esq. on April 27, 2023. By the end of the mediation, the Parties were able to reach a tentative
6 settlement.²⁶ Following the mediation and further refinement of the agreement reached at the
7 mediation, the parties agreed to settle the entire action, subject to approval by the Court. The
8 settlement is the result of arm’s-length negotiations between the parties’ counsel.²⁷ The detailed,
9 formalized Settlement Agreement sets forth all terms of the parties’ settlement.²⁸

10 **C. The Proposed Settlement**

11 **1) The benefits to the LWDA and the PAGA Group.**

12 The Settlement Agreement defines the PAGA Group as “All persons within the State of
13 California who are or were employed by Defendant in the State of California as an hourly, non-
14 exempt employee at any time within the PAGA Release Period in any of the following job
15 positions: 1) Sales Associate/Material Handler, 2) Clerk/Cashier, 3) Clerk/Sorter, 4) Sales
16 Associate/Clerk, and 5) Store Attendant.”²⁹ The “PAGA Release Period” is from March 2, 2020
17 through April 27, 2023, inclusive.³⁰ Defendant has identified approximately 3,072 PAGA Group
18 members.³¹

19 The Settlement Agreement provides that, to settle this matter, Defendant will pay
20 \$150,000 (the “Settlement Amount”).³² The Settlement Amount shall be all inclusive,
21

22 ²⁴ Spencer Decl. at ¶ 12.

23 ²⁵ *Id.*

24 ²⁶ Spencer Decl. at ¶ 13; Ex. 1 at §§ II.A, II.B.

25 ²⁷ Spencer Decl. at ¶ 13.

26 ²⁸ *Id.*

27 ²⁹ Ex. 1 at § I.J.

28 ³⁰ Ex. 1 at § I.K.

³¹ Spencer Decl. at ¶ 12.

³² Ex. 1 at §§ I.O, VIII.B.

encompassing (i) all payments to the LWDA and the PAGA Group, (ii) any and all costs of third-party administration of the settlement, (iii) Plaintiff's Counsel's attorneys' fees and costs of suit, and (iv) an enhancement payment to the named Plaintiff.³³

The total sum available for payment of PAGA penalties is calculated by deducting up to \$55,000 for the payment of Plaintiff's Counsel's fees and costs, a \$5,000 enhancement payment to Plaintiff, and administration costs of \$12,000 from the \$150,000 Settlement Amount, leaving \$78,000 (the "Net Settlement Amount") to be distributed to the LWDA and the PAGA Group members.³⁴

As required by Labor Code § 2699(i), the Net Settlement Amount will be paid 75% (approximately \$58,500) to the LWDA and 25% (approximately \$19,500) to the PAGA Group members, who are the aggrieved employees.³⁵ The \$58,500 that the LWDA will receive is substantial amount to be used for labor law enforcement and education.³⁶ The PAGA Group members will divide their portion based on the formula set forth in the Settlement Agreement, which, in summary, provides that each PAGA Group member shall be credited with a single qualified Pay Period and shall be paid an equal amount of the \$19,500 allocated to the PAGA Group.³⁷ Each PAGA Group member will receive approximately \$6.35.³⁸ PAGA Group members do not need to submit a claim to receive a settlement payment.³⁹

Simpluris will mail an Individual Settlement Payment check to each PAGA Group member no later than 60 calendar days of the Court's approval of the settlement.⁴⁰

³³ Ex. 1 at § I.O.

³⁴ Ex. 1 at §§ I.H, I.I, I.O, VIII.A; Spencer Decl. at ¶¶ 27-29

³⁵ Ex. 1 at §§ I.I, I.O, VI, X, XI; Spencer Decl. at ¶¶ 27-29; *see also*, Lab. Code § 2699(c) (PAGA defines "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.").

³⁶ Lab. Code § 2699(i).

³⁷ Ex. 1 at §§ I.F, I.J, VIII.A.

³⁸ Spencer Decl. at ¶ 29 (\$19,500/3,072 = \$6.35); *see also*, Ex. 1 at §§ I.F, I.J, VIII.A.

³⁹ Ex. 1 at § VIII.A; Spencer Decl. at ¶ 30.

⁴⁰ Ex. 1 at § VII, *see also*, §§ I.F, I.J, VIII.A.

2) The PAGA Release.

All PAGA claims alleged in the Complaint are released as part of the settlement.⁴¹ In exchange for the above-described settlement consideration, Defendant shall be entitled to the following release from Plaintiff on behalf of the LWDA.⁴²

Upon approval of this settlement by the Court, Plaintiff, individually and as a representative acting as a proxy or agent of the LWDA, a State of California Executive Branch Agency, in this Litigation, agrees to release each named Defendant and each named Defendant's partners, parents, subsidiaries, affiliates, attorneys, and all agents thereof (collectively, the "Released Parties"), of and from any and all claims under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code §§ 2698, *et seq.*, that were or could have been alleged based on the factual allegations and identified Labor Code sections in the operative pleading for the Litigation, including, but not limited to, California Labor Code sections §§ 1198 and 1199 and IWC Wage Order No. 7-2001, § 14, during the time period from and including March 2, 2020 through April 27, 2023, inclusive (the "Released Claims"). Plaintiff further agrees to release any and all claims for costs, fees, and interest related to the Released Claims. The Parties further agree that this Agreement and judgment to be entered by the Court following approval of this settlement forever bars Plaintiff and the LWDA, directly or through any other proxy or agent, from any future prosecution of any of the Released Claims against any of the Released Parties.⁴³

3) PAGA Notice.

Under the settlement, the parties have agreed to provide a Notice of Settlement ("Notice") notifying the PAGA Group members about the settlement terms.⁴⁴ The settlement

⁴¹ Ex. 1 at § V, *see also*, § I.K.

⁴² This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009) 46 Cal.4th 969, 987 ("[W]ith respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act...."). The PAGA Group members do not individually release any claims as part of the settlement.

⁴³ *See* Ex. 1 at § V.A. *See Arias, supra*, 46 Cal.4th at 987 ("[T]he nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.") This stands in contrast to the scope of release permitted in the class action context, where class members have a right to notice and the right to exclude themselves from the action. *See Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 586 ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint.").

⁴⁴ Ex. 1 at § VII, Exhibit A (the Notice).

requires Defendant to provide the Settlement Administrator with a list of the PAGA Group members' names, last known home addresses and social security numbers (the "PAGA List") no later than 30 calendar days after the Court approves the settlement.⁴⁵ After updating the PAGA List, the Settlement Administrator will mail the Notice and the Individual Settlement Payment check to each member of the PAGA Group no later than 60 calendar days after the Court approves the settlement.⁴⁶

Under the settlement terms, for any Individual Settlement Payment check that is returned as undeliverable, the Settlement Administrator shall promptly attempt to locate the PAGA Group member by performing an additional skip-trace and shall remail the Individual Settlement Payment check no later than 10 calendar days following the receipt of the undelivered Notice and check.⁴⁷

4) Residual from uncashed checks.

The Settlement Administrator shall void any settlement checks that remain uncashed more than 180 days after issuance and will remit the entire amount of the uncashed Individual Settlement Payment to the LWDA.⁴⁸

5) The Settlement Agreement selects Simpluris, Inc. as the settlement administrator.

The Settlement Agreement provides that Simpluris, Inc. will administer the settlement.⁴⁹

6) Settlement administration, attorneys' fees and costs, and the Plaintiff's enhancement payment.

The Settlement Agreement also provides for the payment of settlement administration fees, award of attorneys' fees and costs, and an enhancement payment for the Plaintiff.⁵⁰ Those terms are discussed in the memorandum accompanying the Motion for Award of Attorneys' Fees

⁴⁵ Ex. 1 at § VII.

⁴⁶ Ex. 1 at § VII.

⁴⁷ Ex. 1 at § VII.

⁴⁸ Ex. 1 at § VIII.A.

⁴⁹ Ex. 1 at § VI.

⁵⁰ Ex. 1 at §§ VI, X, XI; *see also*, §§ I.I, I.O.

1 and Costs, Plaintiff's Enhancement Award and Settlement Administration Fees that is being filed
2 concurrently with this motion.

3 **7) Notification to the LWDA of the Settlement.**

4 As detailed in the Spencer Declaration, filed concurrently with the submission of the
5 Settlement Agreement to the Court, Plaintiff is submitting the settlement to the LWDA as
6 required by Labor Code § 2699(l)(2).⁵¹

7 **III. LEGAL ARGUMENT**

8 **A. Standards for approval of a PAGA settlement.**

9 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
10 statute. Section 2699(l)(2) provides that the court must "review and approve any settlement of
11 any civil action filed pursuant to [PAGA]." The California Supreme Court has noted that the trial
12 court's review and approval of PAGA settlements ensures "that any negotiated resolution is fair
13 to those affected."⁵²

14 As with any settlement, the court conducts its inquiry staying mindful that "[s]ettlement is
15 a compromise, which balances the possible recovery against the risks inherent in litigating
16 further."⁵³ Indeed, "the very essence of a settlement is ... 'a yielding of absolutes and an
17 abandoning of highest hopes,'"⁵⁴ as "it is the very uncertainty of outcome in litigation and
18 avoidance of wasteful and expensive litigation that induce consensual settlements."⁵⁵ As such,
19 "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the
20 merits" or "judged against a hypothetical or speculative measure of what might have been
21 achieved by the negotiators."⁵⁶

22 Although Section 2699(l) does not set forth the criteria on which a PAGA settlement is to
23

24 ⁵¹ Spencer Decl. at ¶ 22.

25 ⁵² *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549, citing Lab. Code § 2699 (l)(2).

26 ⁵³ *See In re TD Ameritrade Account Holder Litig.* (N.D. Cal. Sept. 12, 2011) No. C 07-2852 SBA
and C 07-4903 SBA, 2011 U.S. Dist. LEXIS 103222, at *24.

27 ⁵⁴ *Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d 615, 624.

28 ⁵⁵ *See id.* at 625.

⁵⁶ *See id.*

1 be judged, controlling California case law has held that “a trial court should evaluate a PAGA
2 settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes
3 to remediate present labor law violations, deter future ones, and to maximize enforcement of state
4 labor laws.”⁵⁷ PAGA is intended to incentivize private parties to recover civil penalties on behalf
5 of the overburdened state enforcement agencies who otherwise would have assessed and collected
6 the civil penalties themselves.⁵⁸

7 When assessing a PAGA settlement, courts utilize some of the factors used to evaluate the
8 fairness of a class action settlement, which can include the strength of the plaintiff’s case, the risk,
9 expense, complexity and likely duration of further litigation, and the experience and views of
10 counsel.⁵⁹ It, however, is important to underscore that the California Supreme Court has found
11 that, “[a]lthough representative in nature, a PAGA claim is not simply a collection of individual
12 claims for relief, and so is different from a class action.”⁶⁰ A PAGA action “is fundamentally a
13
14

15 ⁵⁷ *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 (“*Moniz*”), citing *Williams, supra*, 3
16 Cal.5th at 546 (finding that PAGA seeks “to remediate present violations and deter future ones”) and
17 *Arias, supra*, 46 Cal.4th at 980 (recognizing that PAGA’s declared purpose is to augment
18 state enforcement efforts to achieve maximum compliance with labor laws.); *see also, e.g., Pettitt*
19 *v. Exigency Healthcare Servs.* (E.D. Cal. Mar. 2, 2023) No. 21-cv-07639-VKD, 2023 U.S. Dist.
20 LEXIS 35869, at *9 (applying that standard when evaluating the PAGA portion of a settlement,
21 citing *Moniz* and other cases); *Chamberlain v. Hughes* (July 29, 2020) No. 1:19-cv-00831-DAD-
22 JLT, 2020 U.S. Dist. LEXIS 134582, at *15 (applying same standard when approving PAGA
23 settlement), cited with approval in *Moniz*. Plaintiff cites federal authorities for guidance. *See In*
24 *re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1392 (“California courts may
25 look to federal authority for guidance on matters involving class action procedures.”).

26 ⁵⁸ *See e.g., Kim v. Reins Int’l California, Inc.* (2020) 9 Cal.5th 73, 81; *Arias, supra*, 46 Cal.4th at
27 986; *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 710-11 (also finding that
28 “[t]he civil penalties recovered in a PAGA action are ‘recovered on the state’s behalf [and] are
intended to ‘remediate present violations and deter future ones,’ not to redress employees’
injuries,”) quoting *Kim, supra*, 9 Cal.5th at 86-87.

⁵⁹ *Moniz, supra*, 72 Cal.App.5th at 77; *see also, e.g., Chamberlain, supra*, 2020 U.S. Dist. LEXIS
134582, at *12, n.5 (noting that the assessment of fairness, adequacy and reasonableness of a
PAGA settlement may involve balancing some of the factors used to assess class action
settlements), citing *Officers for Justice, supra*, 688 F.2d at 625; *Ramirez v. Benito Valley Farms,*
LLC (N.D. Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, at *8
(same), citing *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026).

⁶⁰ *Kim, supra*, 9 Cal.5th at 86, citing *Arias, supra*, 46 Cal.4th at 986.

1 law enforcement action designed to protect the public and not to benefit private parties.”⁶¹ In a
2 PAGA action, the plaintiff employee serves as a proxy for the LWDA.⁶² As a result, certain
3 factors relevant to a class action settlement do not apply when assessing the fairness of a PAGA
4 settlement.

5 In addition, other factors that are not relevant in the class action context are relevant in the
6 PAGA settlement context.⁶³ First, as noted, a court assesses a PAGA settlement’s adequacy
7 based on whether the total settlement achieves PAGA’s objective,⁶⁴ which is “to protect the
8 public” with “the potential impact on remedies other than civil penalties [being] ancillary to the
9 action’s primary objective.”⁶⁵ That said, a PAGA settlement – like any settlement – involves a
10 compromise that stops short of rendering findings of liability and damages.

11 Second, because they have no property interest in a PAGA claim,⁶⁶ “PAGA has no notice
12 requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA
13 action.”⁶⁷ The California Supreme Court has explained that “absent employees do not own a
14 personal claim for PAGA civil penalties and whatever personal claims the absent employees
15 might have for relief are not at stake.”⁶⁸ This renders the approval process of a PAGA settlement
16

17 ⁶¹ *Arias, supra*, 46 Cal.4th at 986.

18 ⁶² *Id.*; *see also, e.g., Kim, supra*, 9 Cal.5th at 86, quoting *Arias, supra*, 46 Cal.4th at 986 (“[a]n
19 employee suing under PAGA ‘does so as the proxy or agent of the state’s labor law enforcement
20 agencies.’”).

21 ⁶³ *See Ramirez, supra*, 2017 U.S. Dist. LEXIS 137272, at *8-9.

22 ⁶⁴ *See Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589 (finding that the trial court
23 properly considered the overall circumstances of the settlement when determine whether the
24 PAGA settlement was appropriate).

25 ⁶⁵ *Arias, supra*, 46 Cal.4th at 987.

26 ⁶⁶ *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th
27 993, 1003 (PAGA “does not create property rights or any other substantive rights” as “[i]t is
28 simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor
Code violations—that otherwise would be sought by state labor law enforcement agencies.”).

⁶⁷ *See e.g., Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 974 (“PAGA has no notice
requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA
action.”); *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1122 (same).

⁶⁸ *Williams, supra*, 3 Cal.5th at 547, fn. 4, citing other California Supreme Court cases; *see also, Turrieta, supra*, 69 Cal.App.5th at 973, quoting same.

1 distinct from a class action settlement, as there is no need for the Court to employ the “two-step
2 approval process” required under California Rule of Court 3.769 and FRCP Rule 23(e).⁶⁹

3 Finally, unlike in a class action settlement, the scope of release permitted in a PAGA
4 settlement is limited. While “judgment in [a PAGA] action is binding not only on the named
5 employee plaintiff but also on government agencies and any aggrieved employee not a party to
6 the proceeding,”⁷⁰ “the nonparty employees, because they were not given notice of the action or
7 afforded any opportunity to be heard, would not be bound by the judgment as to remedies other
8 than civil penalties.”⁷¹ Thus, the scope of a release in a PAGA settlement is necessarily limited to
9 PAGA claims.

10 **B. The settlement meets all of the criteria for approval.**

11 The proposed settlement embodies all of the key features of a settlement that is fair,
12 reasonable, adequate, and as such, meets all the criteria necessary for approval.

13 **1) The factors giving rise to a presumption of fairness exist.**

14 When reviewing a settlement, “a presumption of fairness exists where: (1) the settlement
15 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
16 counsel and the court to act intelligently; [and] (3) counsel is experienced in similar litigation.”⁷²
17 In this case, the proposed Settlement (1) is the product of arms-length negotiations,⁷³ (2)
18 occurred after Plaintiff’s Counsel had conducted sufficient investigation to evaluate the strength
19 and potential value of the PAGA claims, as well as evaluating the risks of litigating these claims
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21
22 ⁶⁹ The Rule 23(e) two-step process facilitates “notice” to absent class members by requiring “(1)
23 preliminary approval of the settlement; and (2) final approval of the settlement at a fairness
24 hearing following notice to the class.” *See, e.g., In re TD Ameritrade, supra*, 2011 U.S. Dist.
LEXIS 103222, at *10; *see* F.R.C.P. 23(e). Cal. Rule of Court 3.769 contains similar rules for
state court class actions.

25 ⁷⁰ *Arias, supra*, 46 Cal.4th at 986.

26 ⁷¹ *See id.* at 987.

27 ⁷² *Nordstrom Com. Cases, supra*, 186 Cal.App.4th at 581 (internal quotations and alterations
omitted), citing *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117–1118
(also listing as a factor relevant only to class actions that percentage of objectors is small).

28 ⁷³ Spencer Decl. at ¶ 13.

1 through trial,⁷⁴ and (3) was negotiated by Plaintiff's Counsel with significant experience in
2 similar wage and hour litigation.⁷⁵ As a result, the proposed PAGA settlement warrants a
3 presumption of fairness.

4 **2) The risk, expense, and complexity of further litigation balances strongly in**
5 **favor of approval of the Settlement.**

6 The proposed settlement takes into consideration the risks that this action may have
7 resulted in a net-zero recovery due to the substantial legal hurdles Plaintiff faced in establishing
8 Defendant's liability after the court of appeal's decision in *LaFace*. As noted, in *LaFace*, the
9 court of appeal not only found that there is no right to a jury trial in a PAGA action, it also found
10 that the employer was not obligated to provide suitable seating to cashiers who also were
11 expected to perform other tasks when the checkout line was quiet because seating would interfere
12 with the other duties.⁷⁶ Discovery confirmed that the facts of this case regarding the duties that
13 Defendant expected employees to perform during lulls in the checkout line were similar to the
14 facts in *LaFace*.⁷⁷ Thus, *LaFace* significantly weakened Plaintiff's claims that Defendant violated
15 its seating obligations and heightened the risk that continued litigation would result in a net-zero
16 recovery for Plaintiff, the LWDA and the aggrieved employees.⁷⁸

17 Assessing the risk of net-zero recovery to be significant, Plaintiff's Counsel agreed to
18 limit their fee request associated with the settlement to an amount well below their actual lodestar
19 and a cost request below their actual out-of-pocket costs incurred in litigating this action for two
20 years.⁷⁹ Plaintiff's Counsel's willingness to take such a loss in order to reach a settlement that
21 provides at least some recovery for the LWDA, Plaintiff and the PAGA Group reflects their
22
23

24

⁷⁴ Spencer Decl. at ¶¶ 10-11, 33-34.

25 ⁷⁵ Spencer Decl. at ¶¶ 2-5.

26 ⁷⁶ *Id.* at 402, 406-09.

27 ⁷⁷ Spencer Decl. at ¶¶ 10-11.

28 ⁷⁸ *LaFace, supra*, 75 Cal.App.5th at 402, 406-09.

⁷⁹ See Spencer Decl. at ¶¶ 38-50.

conclusion that the settlement at this juncture will garner the best results given the circumstances.⁸⁰

Also, continued litigation posed the risk of diminishing any possible recovery by increasing litigation expenses. Those combined risks, balanced with the fact that the settlement achieved a significant recovery, as demonstrated below, weigh strongly in favor of settlement approval.

3) The benefits conferred by the settlement balance in favor of approval.

The proposed settlement provides a significant monetary benefit for the LWDA and a reasonable monetary benefit for the PAGA Group. As the Ninth Circuit has held, a settlement may be fair and reasonable even where it only provides a fraction of what could have been obtained at trial:

The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. Thus, the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes. ... The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.⁸¹

Labor Code § 2699(e)(2) allows a court to reduce the amount of a PAGA penalty at the court's discretion. And, as a number of reported cases demonstrate, many courts end up awarding less than the full amount in PAGA penalties.⁸²

⁸⁰ Spencer Decl. at ¶¶ 51-52.

⁸¹ See *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1242 (internal quotations and citations omitted), citing *Officers for Justice, supra*, 688 F.2d at 625, among other cases).

⁸² See e.g., *Carrington v Starbucks Corp.* (2018) 30 Cal.App.5th 504, 517, 529 (affirming the trial court's \$150,000 PAGA penalty award out of \$75 million in penalties sought, based on 30,000 violations, which reduced the penalty rate to \$5 per violation); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1125, 1135-36 (affirming the trial court's award of \$358,588, a 30% reduction of the \$512,000 PAGA penalties requested), *disapproved on another ground* at *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196; *Magadia v Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d 1058, 1073, 1080, 1101, 1103-04, 1111 (awarding \$70,000 of requested \$821,400 PAGA penalties for Labor Code § 226.7 meal period violations, among other PAGA penalty reductions); see Spencer Decl. at ¶ 35 (listing additional examples).

Under the Settlement Agreement, after all deductions are made for settlement administration, a service payment to the Plaintiff, and attorneys' fees and costs, approximately \$58,500 of the settlement funds will be paid out to the LWDA.⁸³ PAGA requires that the LWDA use the funds for education and enforcement purposes.⁸⁴ That is a substantial benefit to the State.

The remaining \$19,500 will be distributed to the PAGA Group based on the formula set forth in the Settlement Agreement.⁸⁵ Although modest, the amount is reasonable and fair in light of *LaFace*'s impact on the PAGA claims here.

4) The scope of the release is narrowly tailored.

The release bars Plaintiff and the LWDA from prosecuting any claims covered by the Settlement Agreement through the PAGA Release Period.⁸⁶ Under *Arias*, that precludes any other member of the PAGA Group from asserting such claims on behalf of the LWDA in a future action but does not impact any other claims that any member of the PAGA Group may have.⁸⁷ The California Supreme Court has concluded that, in the context of PAGA, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties."⁸⁸ Thus, the scope of the release provided in exchange for the foregoing consideration is limited to the civil penalties asserted in this action under Labor Code §§ 2698 *et seq.*⁸⁹ As such, this factor balances strongly in favor of approval of the proposed settlement.

⁸³ Ex. 1 at §§ I.H., I.I, I.O, VIII; Spencer Decl. at ¶¶ 27-28.

⁸⁴ Lab. Code § 2699(i).

⁸⁵ Ex. 1 at § VIII.A; see Spencer Decl. at ¶ 27, 29.

⁸⁶ Ex. 1 at §§ I.K, V.A.

⁸⁷ *Arias, supra*, 46 Cal.4th at 986.

⁸⁸ *See id.* at 987.

⁸⁹ Ex. 5 at Art. 5 § 5.01.

1 **5) The experience and views of Plaintiff’s Counsel favor approval of the**
2 **settlement.**

3 Plaintiff’s Counsel has significant experience in complex wage and hour litigation.⁹⁰ In
4 the view of Plaintiff’s Counsel, the benefit conferred by the proposed settlement is fair,
5 reasonable, and adequate under the circumstances, as it reflects a reasoned compromise which
6 takes into consideration the risks inherent in this case which have the potential to completely
7 eliminate recovery.⁹¹ As such, this factor weighs in favor of approval of the proposed settlement.

8 **6) The extent of discovery completed and the stage of the proceedings favor**
9 **approval of the proposed settlement.**

10 In evaluating this element, the relevant consideration is whether “the parties have
11 sufficient information to make an informed decision about settlement.”⁹² And as the Ninth Circuit
12 has noted, ““formal discovery is not a necessary ticket to the bargaining table.””⁹³

13 Here, the extent of formal and informal discovery conducted was sufficient to enable
14 Plaintiff’s Counsel to evaluate the strength and value of the claims for purposes of settlement.⁹⁴
15 Plaintiff’s Counsel’s investigation and the discovery obtained from Defendant were sufficient to
16 tabulate the total number of pay periods at issue and identify the approximate total number of
17 individuals falling within the definition of the PAGA Group during the PAGA Release Period.⁹⁵
18 Further, the information obtained in discovery in this case, when analyzed in light of *LaFace*,
19 enabled Plaintiff’s Counsel to make a realistic assessment of the strength of the PAGA claims.⁹⁶

20 Based on Plaintiff’s Counsel’s experience litigating wage and hour claims, such
21 investigation was sufficient to determine the potential value of the PAGA claims, and to evaluate
22 the strength of these claims for purposes of settlement.⁹⁷

23 ⁹⁰ See Spencer Decl. at ¶¶ 2-5.

24 ⁹¹ Spencer Decl. at ¶¶ 51-52.

25 ⁹² *Linney, supra*, 151 F.3d at 1239.

26 ⁹³ *Id.*

27 ⁹⁴ Spencer Decl. at ¶¶ 10-12, 15.

28 ⁹⁵ Spencer Decl. at ¶ 12.

⁹⁶ Spencer Decl. at ¶¶ 10-12, 51-52.

⁹⁷ Spencer Decl. at ¶¶ 2-5.

IV. CONCLUSION

As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents a reasoned compromise obtained through arm's-length negotiations. For all the reasons set forth above, Plaintiff respectfully requests that this Court approve the settlement.

Dated: August 14, 2023

KELLER GROVER LLP

By: 

ERIC A. GROVER
ROBERT SPENCER
Counsel for Plaintiff
SERENA CARNES

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):

MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004, AND DISMISSING ACTION WITH PREJUDICE

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

Joshua Feldman, Esq.

jfeldman@littler.com

Barbara Nikitas

bnikitas@littler.com

LITTLER MENDELSON P.C

2049 Century Park East, 5th Floor

Los Angeles, California 90067-3107

Telephone: (310) 553-0308

Facsimile: (310) 553-5583

Attorneys for Defendant

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