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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SANTA CLARA

13 ADAM WRIGHT, as an individual and on
behalf of all others similarly situated,

14 Plaintiffs,
15

16 v.

17 SF MARKETS, LLC, a limited liability
company; and DOES 1 through 50,
18 inclusive,

19 Defendants.
20

CASE NO. 20CV365261

[Assigned for all purposes to the Hon. Brian C.
Walsh, Dept. 1]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: September 25, 2020

Time: 9:00 a.m.

Dept.: 1
21
22

23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

24 **PLEASE TAKE NOTICE** that on September 25, 2020, at 9:00 a.m., or as soon
25 thereafter as the matter may be heard, before the Honorable Brian C. Walsh, judge presiding, in
26 Department 1 of the above referenced Court located at 191 N. First Street, San Jose, California
27 95113, Plaintiff Adam Wright ("Plaintiff") will seek an Order approving the concurrently filed
28 PAGA Settlement Agreement, pursuant to the procedures set forth in the Private Attorneys

1 General Act (the “PAGA”), Labor Code § 2698, *et seq.*

2 This motion will be based on this notice of motion, the attached memorandum of points
3 and authorities, the accompanying declarations of William L. Marder, Dennis S. Hyun, and
4 Plaintiff, the records and file herein, and on such other evidence as may be presented at the
5 hearing of the motion.

6
7 DATED: August 28, 2020

HYUN LEGAL, APC

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9 By: 
10 Dennis S. Hyun
11 Attorneys for Plaintiff and Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
4 2698, *et seq.*, Plaintiff Adam Wright (“Plaintiff”) hereby moves the Court for an order approving
5 the non-reversionary PAGA settlement as set forth in the concurrently filed PAGA Settlement
6 Agreement (the “Settlement Agreement,” or “Agreement”). The operative Complaint in this case
7 alleges that Defendant SF Markets, LLC (“Defendant”) (Defendant and Plaintiff collectively, the
8 “Parties”) violated the PAGA arising from Defendant’s alleged failure to specify the hourly rates
9 and hours worked for “Retro Pay.” The “Retro Pay” item was simply listed as a lump sum
10 without any hourly rate or number of hours worked listed on the wage statement.

11 Pursuant to the terms of the parties’ proposed settlement agreement, Defendants will pay
12 the gross amount of \$90,000.00 (the “Maximum Settlement Amount”), which includes a payment
13 of approximately \$29,891.23 in civil penalties to the Labor Workforce Development Agency
14 (“LWDA”). The proposed release is narrowly tailored to release only those claims set forth in the
15 Complaint predicated on violations of Labor Code § 226.

16 The proposed settlement constitutes an adequate, fair and reasonable settlement on behalf
17 of the LWDA and Aggrieved Employees, and accomplishes the goals of PAGA.

18 **II. PROCEDURAL HISTORY**

19 **A. Summary of the Litigation and Settlement**

20 Plaintiff alleges Defendant failed to list the hourly rates and hours worked for the “Retro
21 Pay” line item, resulting in violation of Labor Code §§ 226(a), making Defendant liable for civil
22 penalties under PAGA. On January 15, 2020, Plaintiff provided written notice to the LWDA and
23 Defendant asserting claims for civil penalties pursuant to PAGA stemming from alleged
24 violations of the California Labor Code described above. On March 20, 2020, Plaintiff filed the
25 Lawsuit. The Operative Complaint, filed July 15, 2020, asserts a sole claim for civil penalties
26 under PAGA.

27 The Parties engaged in informal discovery before mediation, which included Defendant
28 producing the number of wage statements at issue. (Hyun Decl. ¶ 7). Defendant produced wage

1 statement data starting from November 14, 2019, through the present, due to a prior class action
2 and PAGA settlement in the case, *Hernandez v. SFM, LLC*, San Diego County Superior Court
3 Case No. 37-2016-00015169-CU-0E-CTL. (*Id.*) The *Hernandez* settlement’s PAGA release
4 went through November 13, 2019, and, therefore, the Parties agreed to limit the PAGA period and
5 data from November 14, 2019, onward. (*Id.*) On May 27, 2020, the Parties attended a full day of
6 mediation with Jeffrey Krivis, Esq., a well-respected employment mediator. (*Id.*) At the time of
7 mediation, Defendant represented that 1,188 wage statements with “Retro Pay” had been issued
8 in California, which represents a maximum penalty of \$297,000 based on the \$250 per wage
9 statement penalty set forth in Labor Code § 226.3. (*Id.*) Thus, the \$90,000 settlement represents
10 30% of the total exposure. (*Id.*)

11 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

12 The material terms of the settlement are described below and set forth in detail in the
13 concurrently filed Settlement Agreement.

14 **A. The Aggrieved Employees and Scope of Release**

15 The Settlement seeks to resolve the PAGA claims of aggrieved employees, which is
16 limited to the following employees who were actually subjected to the alleged Section 226
17 violation from November 14, 2019, through the Court’s approval date. Specifically, upon the
18 Court’s approval and entry of judgment, Plaintiff and Aggrieved Employees will release the
19 following claims during the Settlement Period of November 14, 2019, through the date of entry of
20 judgment:

21 any and all claims for PAGA civil penalties, inclusive of attorneys’ fees and/or
22 costs, under the California Labor Code, Wage Orders, regulations, and/or other
23 provisions of law during the Settlement Period, based on, arising from, or related
24 to any claim, allegation, or theory regarding Defendant’s alleged: failure to
25 provide accurate itemized wage statements in violation of Labor Code §§ 226(a),
26 226.3 and 2698 *et seq.*

27 (Agreement at §§ 10-11).

28 Accordingly, the Settlement Agreement does not release Defendant from violations of any
predicate statutes other than the PAGA predicated upon violation of Labor Code § 226, as
opposed to any other Labor Code claims.

1 **B. Settlement Sum and Allocation**

2 Again, Defendant is obligated to pay the Maximum Settlement Amount of \$90,000.
3 (Agreement § 13). The “PAGA Penalties Fund” is the amount remaining to distribute to the
4 LWDA and Aggrieved Employees after these amounts (if approved by the Court) are subtracted
5 from the Maximum Settlement Amount: (a) attorney fees up to one third (33.33%) of the
6 Maximum Settlement Amount, or \$30,000 (b) actual costs, which are \$9,595.03; (c) Plaintiff’s
7 service award of \$5,000.00; and (d) administration costs, which are \$5,550. (*Id.* §§ 14-17).

8 From the PAGA Penalties Fund, Aggrieved Employees will be allocated 25% as required
9 by the PAGA, and 75% will be allocated to the LWDA. (*Id.* § 14). The 25% set aside for
10 Aggrieved Employees shall be allocated as follows:

11 Defendant will provide the necessary information to the Settlement
12 Administrator in order to calculate: (i) the total number of pay periods in
13 which the Aggrieved Employee received a wage statement reflecting
14 “Retro Pay,” and (ii) the total number of pay periods in which all
15 Aggrieved Employees received a wage statement reflecting “Retro Pay”
16 during the Settlement Period.

17 To determine each Aggrieved Employee’s payment from the PAGA
18 Penalties Fund, the Settlement Administrator will use the following
19 formula: $\text{Settlement Payment} = 25\% \text{ of PAGA Penalties Fund } (\approx$
20 $\$7,362.50) \times [\text{Pay Periods by Individual Aggrieved Employee During the}$
21 $\text{Settlement Period} \div \text{Total Pay Periods by All Aggrieved Employees}$
22 $\text{during the Settlement Period}]$.

23 (*Id.* §§ 14(a)-(b)).

24 Based on Plaintiff’s counsel’s calculations, the estimated PAGA Penalties Fund is
25 \$39,854.97. (Hyun Decl. ¶ 8). Based on the number of Aggrieved Members, employees will be
26 entitled to recover, on raw average, up to \$5.86 each. (*Id.*) This is because of the small period of
27 liability due to the prior *Hernandez* settlement and negotiating the \$90,000 settlement based on
28 approximately only 6 months of a liability period. (*Id.*) The amount any particular Aggrieved
Employee will be entitled to recover will be greater or lower than this average depending on the
number of pay periods in which the employee received Retro Pay during the Settlement Period.
(*Id.*) This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who
have allegedly suffered greater harm. (*Id.*)

 The parties have agreed to utilize Phoenix Settlement Administrators to administer the
settlement, with the administration costs at \$5,550. (*Id.* § 17).

1 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

2 **A. PAGA Overview**

3 In 2004, California enacted PAGA, which allows Aggrieved Employees, on behalf of the
4 LWDA and other Aggrieved Employees, to bring suit against their employers for alleged
5 violations of the California labor laws and to obtain penalties that previously could only be
6 obtained by the State. The PAGA was enacted because the Legislature determined that it was “in
7 the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover
8 civil penalties for Labor Code violations,” since the State had not been able to fully or adequately
9 enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Ochoa- Hernandez v.*
10 *Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s declared
11 purpose is to supplement enforcement actions by public agencies, which lack adequate resources
12 to bring all such actions themselves. Unlike class actions, these civil penalties are not meant to
13 compensate unnamed employees because the action is fundamentally a law enforcement action.”
14 [citations omitted].)

15 Labor Code section 2699(a) states that any Labor Code provision “that provides for a civil
16 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
17 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
18 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
19 employee” means “any person who was employed by the alleged violator and against whom one
20 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
21 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
22 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
23 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
24 decides not to investigate the allegations or issue a citation to the employer, the proposed
25 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
26 2699.3(a)(2).

27 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
28 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal.4th at 986. Of the civil penalties

1 recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the “Aggrieved
2 Employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i); *Baumann v.*
3 *Chase Inv. Servs. Corp.*, 747 F. 3d 1117, 1123 (9th Cir. 2014) (a PAGA representative’s recovery
4 is “an incentive to perform a service to the state, not restitution for wrongs done to members of
5 the class”).

6 **B. Class Action Settlement Standards Do Not Govern the Settlement Approval**
7 **Process for PAGA Claims**

8 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement is
9 to determine whether it is within the “range of reasonableness,” and thus whether notice to the
10 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
11 hearing, are worthwhile. *See* 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.25 *et seq.*,
12 and § 13.64 (4th ed. 2002 and Supp. 2004) (“Newberg”). The “judge must make a preliminary
13 determination on the fairness, reasonableness, and adequacy of the settlement terms and must
14 direct the preparation of notice of the certification, proposed settlement, and date of the final
15 fairness hearing.” *Manual*, § 21.632 (4th ed. 2004). To make the preliminary fairness
16 determination, courts may consider several relevant factors, including “the strength of the
17 plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the risk of
18 maintaining class action status through trial; the amount offered in settlement; the extent of
19 discovery completed and the stage of the proceedings; [and] the experience and views of
20 counsel...” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

21 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
22 Labor Code, which provides, in relevant part: “The court shall review and approve any penalties
23 sought as part of a proposed settlement agreement pursuant to this part.” The Parties are not
24 obligated to “satisfy class action requirements,” including the standards for class action settlement
25 approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that “plaintiff need not
26 satisfy class action requirements” to assert a PAGA claim).

27 Notably, unlike the class action settlement approval process, there is also no statutory
28 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do

1 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
2 any, reached between the parties.” *Ochoa- Hernandez*, 2010 WL 1340777 at*13.

3 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

4 The Court’s focus in a PAGA case is not the amount that “Aggrieved Employees” will
5 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount
6 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
7 agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i). Here, the
8 Settlement represents an extraordinary recovery for the Aggrieved Employees and the State, and
9 thus the Settlement certainly effectuates PAGA’s purpose.

10 The Settlement is also consistent with the State’s public policy favoring resolution of
11 disputes. “California law favors the settlement of disputes as our high court clarified in *Neary*[].
12 Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The
13 parties are best positioned to understand their interests and resolve a dispute in a mutually
14 beneficial manner without court intervention into the settlement.” *Consumer Advocacy Group,*
15 *Inc. v. Kintetsu*, 141 Cal. App. 4th 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3
16 Cal. 4th 273, 277- 278 (1992)).

17 **D. The Scope of the Release is Appropriately Limited**

18 If approved, the Settlement would release Defendant and other releasees from all PAGA
19 claims predicated on the violation of Labor Code § 226, and nothing more. The Settlement would
20 not impact any other Aggrieved Employees’ ability to pursue PAGA claims predicated on other
21 Labor Code violations or any Labor Claims not predicated on PAGA. Therefore, the limited
22 scope of the release also supports approval. Because an aggrieved employee’s PAGA action is a
23 substitute for an action brought by the government, “judgment in [a PAGA] action is binding not
24 only on the named employee plaintiff but also on government agencies and any aggrieved
25 employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 986. However, “the nonparty
26 employees, because they were not given notice of the action or afforded any opportunity to be
27 heard, would not be bound by the judgment as to remedies other than civil penalties.” *Id.* at 987;
28 see also, Lab. Code § 2699(g)(l) (non-party Aggrieved Employees retain all rights “to pursue or
recover other remedies available under state or federal law, either separately or concurrently with

1 an action taken under this part”).

2 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
3 confined to the statutory penalties available under PAGA for violation of Labor Code §
4 226.**Error! Bookmark not defined.** The release is therefore appropriately tailored.

5 **E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of**
6 **Litigation**

7 Though Plaintiff is confident that he would prevail at trial, proceeding in litigation entails
8 significant risk on the underlying merits of Plaintiff’s theory, in addition to the still-developing
9 law under PAGA.

10 **1. Plaintiff’s Claims are Contested**

11 Plaintiff asserts that his representative PAGA claim is based on the allegation that
12 Defendant failed to list the hourly rates and hours worked for Retro Pay. Defendant would have
13 argued that wage adjustments need not specify the hourly rates and hours worked. While Plaintiff
14 disputes these arguments, Plaintiff and his counsel are keenly aware of the risks of litigation and
15 if Plaintiff lost, then Plaintiff, the LWDA and Aggrieved Employees would have been left
16 without any remedy. Moreover, even if the Court found that Defendant violated the Labor Code,
17 the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties or to
18 decide not to award PAGA penalties at all.

19 **2. Recovery of Penalties After Trial**

20 At the time of mediation, there were a total of approximately 1,188 pay periods for the
21 violations alleged above. Therefore, pursuant to the PAGA, Plaintiff has calculated total potential
22 exposure at \$297,000. (Hyun Decl. ¶ 7). However, even if Plaintiff were to prevail on the merits
23 of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code section
24 2699(f)(2) the Court can decline to award the full amount of PAGA penalties where “...if, based
25 on the facts and circumstances of the particular case, to do otherwise, would result in an award
26 that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of
27 Appeal’s decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the
28 plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA
penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. *Id.*

1 at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see*
2 *O'Connor*, 2016 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1
3 billion, such award “could well be reduced, as a court may reduce the penalty when to do
4 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”).

5 Courts routinely award far less than the statutory maximum amount of civil penalties,
6 even where an underlying violation of the Labor Code is found. Indeed, just very recently, in the
7 matter of *Magadia v. Wal-Mart Assocs. et al.*, 2019 U.S. Dist. Lexis 91792, while the trial court
8 imposed substantial PAGA penalties upon the defendant, such amount still represented reductions
9 of 67% and 80% of the potential PAGA penalties at issue. *Id.* at *87-*100. Moreover, this was
10 only after the plaintiff in *Magadia* had prevailed after trial.

11 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
12 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
13 contrary.

14 **3. Settlement is Reasonable When Compared to the Value of the** 15 **Underlying Labor Code Claim**

16 The Court’s assessment of the proposed Settlement must take into account that any
17 penalties awarded may be subject to substantial reduction. When this is considered, in
18 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover nothing,
19 the proposed settlement is patently reasonable. Indeed, the Maximum Settlement Amount is
20 approximately 30% of the potential exposure referenced above. Settlement for this reduced value
21 allows for the distribution of penalties in an amount which accounts for the risk of continued
22 litigation, and Defendant’s likely arguments that higher penalties would have been confiscatory.
23 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
24 of the primary goals of PAGA.

25 The proposed settlement exceeds PAGA settlements that courts have approved in other
26 cases, when considered as a percentage of the overall settlement value of the case. The proposed
27 settlement, in fact, far exceeds other PAGA settlements approved by courts—including those that
28 provide for less than the one percent allocation to PAGA penalties. *See, e.g., Hopson v.*
Hanesbrands Inc., 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA

1 allocation that was 0.49% of \$408,420.32 gross settlement; *In re Nordstrom Commission Cases*,
2 186 Cal. App. 4th 576, 579 (2010) (“the trial court did not abuse its discretion in approving a
3 settlement which does not allocate any damages to the PAGA claims”).

4 A PAGA allocation need not represent any particular percentage of the overall settlement
5 value in order to secure court approval, and courts routinely approve PAGA settlements
6 representing only a tiny fraction of the overall settlement value. Here, on the other hand, the
7 Settlement proposes a payment of approximately \$29,891.23 in penalties to the LWDA and
8 approximately \$9,963.74 in penalties to the Aggrieved Employees, which is an outstanding result
9 in a PAGA only case. The proposed settlement sum in this case vastly exceeds, both in terms of
10 the total dollar amount and as a percentage of overall settlement value, the typical PAGA
11 settlement.

12 **F. The Attorneys’ Fees are Reasonable**

13 Labor Code section 2699(g)(1) provides for the recovery of attorneys’ fees and costs in
14 any successful action brought under PAGA. Although this is not a class action, in class actions
15 California state and federal courts have recognized that an appropriate method for determining
16 award of attorneys’ fees is based on a percentage of the total value of benefits to class members
17 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v.*
18 *Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
19 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this
20 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
21 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
22 burden alone.” *Vincent*, 557 F. 2d at 769.

23 The common fund doctrine is predicated on the principle of preventing unjust enrichment.
24 When a litigant’s efforts create or preserve a fund from which others derive benefits, he may
25 require the passive beneficiaries to compensate those who created the fund. Both California state
26 and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F. 2d
27 at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the
28 California Supreme Court recognized that the common fund doctrine has been applied
“consistently in California when an action brought by one party creates a fund in which other

1 persons are entitled to share.” The reasons for applying the common fund doctrine include:
2 “...fairness to the successful litigant, who might otherwise receive no benefit because his
3 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the
4 others who are entitled to share in the fund and who should bear their share of the burden of its
5 recovery; encouragement of the attorney for the successful litigant who will be more willing to
6 undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he
7 is assured that he will be properly and directly compensated should his efforts be successful.” *Id.*

8 Indeed, most recently, the California Supreme Court has also held that the award of
9 attorneys’ fees in common fund wage and hour class action settlements should start with the
10 percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“We join the
11 overwhelming majority of federal and state courts in holding that when class action litigation
12 establishes a monetary fund for the benefit of the class members, and the trial court in its
13 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
14 of a reasonable fee by choosing an appropriate percentage of the fund created.”).

15 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent
16 of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a
17 multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily high
18 or low [should] the trial court [] consider whether the percentage method should be adjusted so as
19 to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

20 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
21 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
22 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
23 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is
24 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
25 performing a cross-check “undermines” one of the primary reasons for using the percentage
26 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
27 protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar cross-
28 check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* 108 F.R.D. 237,
258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000) (citing the

1 recommendations of the Third Circuit Task Force with approval and observing that “[t]he
2 criticisms of the lodestar approach set forth in this Report are now echoed by many authorities,
3 who have been most vocal about the manner in which it exacerbates the problem of ‘cheap
4 settlements’ and burdens already overworked trial judge”).

5 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to 4
6 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*,
7 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal App.4th 495, 512 (2009) (applying a 2.52
8 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60 (applying
9 a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d
10 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after
11 finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed a 2.13
12 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was affirmed in
13 full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

14 Here, as set forth in their declarations and their respective lodestars, Plaintiff’s attorneys
15 will have spent over 93.7 hours litigating this current action through completion of settlement
16 administration. Based thereon, and based on each of the Plaintiff’s attorneys’ hourly rates, the
17 lodestar equates to \$70,275. (Hyun Decl. ¶ 9, Exh. A; Declaration of William L. Marder (“Marder
18 Decl.”) ¶¶ 2-3, Exh. A).

19 Once the court establishes the lodestar amount, it may enhance the fee award by a
20 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at 48. The pertinent
21 factors include the difficulty of the questions involved and the skill in presenting them, the
22 contingent nature of the fee award, the extent to which the litigation precluded other employment,
23 and the percentage-of-the-fund the attorney would have received on the fair market. *Id.*, *Lealao*,
24 82 Cal. App. 4th at 49. However, this list is not exhaustive and the court can consider other
25 factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1139
(2001).

26 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
27 enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal. App. 4th at 52 (the promptness
28 of settlement “cannot be used to justify the refusal to apply a multiplier”). According to *Lealao*,

1 courts placed “an extraordinarily high value” on settlement, and counsel should be rewarded, not
2 punished, for achieving this goal in a timely fashion. *Id.*

3 Here based upon Plaintiff’s counsel’s lodestar of \$70,275, Plaintiff’s counsel does not
4 need a multiplier. As such, the requested fee award is fair and reasonable, and should be awarded
5 in its entirety. Plaintiff’s counsel risked not only a great deal of time, but also a great deal of
6 expense to ensure the successful litigation of this action on behalf of the State and Aggrieved
7 Employees. For such reasons, Plaintiff’s counsel’s request for attorneys’ fees in the amount of
8 \$30,000 is fair, reasonable, and adequate.

9 Additionally, PAGA Counsel’s cost reimbursement request in the amount of \$9,595.03 is
10 also reasonable. (Hyun Decl. ¶ 10; Marder Decl. ¶ 5, Exh. B). The costs were all directly incurred
11 in the prosecution of this Action, including filing fees, mediation fees, and Court Call fees. (*Id.*)
12 As such, the requested costs should be awarded as fair and reasonable.

13 **G. The Settlement Administrator’s Fees Should be Approved**

14 The Parties have agreed to pay actual costs of administration, or \$5,550, to the Settlement
15 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
16 settlement. (Agreement § 17). The Parties believe that the administration fee is reasonable and
17 should be approved.

18 **H. Plaintiff’s Service Award Should Be Approved**

19 Courts have held that named plaintiffs in class, or private attorney general actions can
20 request a service award. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009)
21 (explaining that service awards “are intended to compensate class representatives for work done
22 on behalf of the class, to make up for financial or reputational risk undertaken in bringing the
23 action, and, sometimes, to recognize their willingness to act as a private attorney general”)
(emphasis added).

24 Here, Plaintiff seeks \$5,000 for his service award, which is intended to compensate
25 Plaintiff for the time spent on this case, the potential for retaliation, and for executing a general
26 release, including for all known and unknown claims under Civil Code § 1542. (Declaration of
27 Adam Wright ¶¶ 4-5). This requested enhancement is consistent with awards approved in other
28 common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D.

1 Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*,
2 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive
3 awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001)
4 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*,
5 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass*
6 *v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27,
7 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v.*
8 *Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class
9 representative in ERISA case).

10 **I. Notice to the LWDA Has Been Provided**

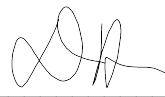
11 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the
12 LWDA's website. (Hyun Decl. ¶ 11, Exh. "B").

13 **V. CONCLUSION**

14 Based on the above, Plaintiff requests the Court approve the current PAGA settlement.

15 Dated: August 28, 2020

HYUN LEGAL, APC

17 By: 

18 Dennis S. Hyun
19 Attorneys for Plaintiff and the Aggrieved
20 Employees
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