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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN MATEO
11 UNLIMITED JURISDICTION
12

13 ADAN ORTIZ, on behalf of himself, all others
similarly situated, and the general public,

14 *Plaintiff,*

15 vs.

16 STAFFMARK HOLDINGS, INC., an Ohio
17 corporation; STAFFMARK INVESTMENT,
LLC, an Ohio Limited Liability Company;
18 WALMART, INC., an Arkansas Corporation;
and DOES 1 through 50, inclusive,

19 *Defendants.*

Case No. 20-CIV-01733

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT AND AWARD OF
ATTORNEYS' FEES, ENHANCEMENT
AWARD AND REIMBURSEMENT OF
LITIGATION COSTS; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Filed Concurrently with the Declaration of
Shaun Setareh; and [Proposed] Order]*

Date: March 13, 2023 _____
Time: 2:00 p.m.
Place: Dept. 23

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

2 PLEASE TAKE NOTICE that on March 13, 2023 at 2:00p.m. or as soon thereafter as the matter
3 may be heard in Department 23 of the above-captioned Court located at 400 County Center, Redwood
4 City, California 94063, Plaintiff ADAN ORTIZ (“Plaintiff”) will and does hereby move this Court for
5 an order approving settlement of Plaintiff’s penalty claims under the Private Attorneys General Act of
6 2004 (“PAGA”) (Lab. Code §§ 2698 *et seq.*)

7 The parties have reached and fully executed a settlement of the above-entitled case that disposes
8 of the matter entirely. However, and pursuant to statute, settlement of PAGA claims requires court
9 approval. Lab. Code § 2699(l). Thus, Plaintiff seeks court approval of the PAGA settlement so that the
10 matter may be dismissed once the parties have complied with all mutual terms and conditions of the
11 settlement. In this Motion, Plaintiff also seeks an order awarding attorneys’ fees, enhancement award
12 and reimbursement of litigation costs.

13 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points
14 and Authorities, the Declaration of Shaun Setareh in support thereof, all papers and pleadings on file
15 with the Court in this action, all matters judicially noticeable, and on such oral and documentary
16 evidence as may be presented in connection with the hearing on the Motion.

17
18 DATED: September 1, 2022

SETAREH LAW GROUP

19
20 /s/ Farrah Grant

21 SHAUN SETAREH
22 THOMAS SEGAL
23 FARRAH GRANT
Attorneys for Plaintiff
ADAN ORTIZ
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff ADAN ORTIZ (“Plaintiff”) seeks approval of a settlement which provides for a non-
4 reversionary fund of **\$2,000,000** (the “Gross Settlement Amount” or “GSA”) to settle the single claim
5 for civil penalties under the Private Attorneys General Act of 2004 (“PAGA”) (Lab. Code §§ 2698 *et*
6 *seq.*) he brought, in a representative capacity, against Defendants STAFFMARK INVESTMENT LLC
7 and WALMART INC. (“Defendants”) (Plaintiff and Defendants, collectively, the “Parties”).¹ The
8 Settlement will result in the State of California and the Aggrieved Employees² sharing approximately
9 **\$850.34** on average for each Aggrieved Employee. The Aggrieved Employees will not have to make a
10 claim in order to recover; instead, they will be mailed their share of the Settlement directly. No money
11 will revert to the Defendant; instead, any uncashed checks will be paid to the California State
12 Controller’s office to be held as “unclaimed property” in the name of the Aggrieved Employees.

13 The Settlement is an excellent one in light of the risks of litigation. After a day-long mediation
14 with Steven J. Rottman, Esq. and having reviewed data provided by Defendants, the Parties were able to
15 reach a Settlement that is now before this Court. After all Court-approved deductions from the GSA
16 common fund – i.e., (1) 33.33% of the GSA (**\$666,666.66**) allocated to attorneys’ fees, (2) **\$11,766.40** in
17 litigation expenses; (3) up to **\$5,000** as a service award to Plaintiff for prosecuting this action; and (4)
18 **\$8,400** in costs for settlement administration to be performed by Simpluris, Inc. (“Simpluris”) – it is
19 estimated that a PAGA Allocation of **\$1,308,166.94** will remain, with 75% (**\$981,125.20**) allocated to
20 the California Labor and Workforce Development Agency (“LWDA”), and 25% (**\$327,041.73**) allocated
21 to the Aggrieved Employees.

22 This Settlement guarantees a recovery for the Aggrieved Employees and avoids the expense and
23

24 _____
25 ¹ A true and correct copy of the PAGA Settlement Agreement and Release (“Settlement”) is
attached to the Declaration of Shaun Setareh (“Setareh Decl.”) as Exhibit “1.”

26 ² “Aggrieved Employees” is defined as all non-exempt employees who were placed as temporary
27 employees by Staffmark Investment at Walmart in California from February 15, 2019 to April 18,
2021 (Settlement, § 1.01(b)). “Release Period” or “PAGA Period” means February 15, 2019 to
28 April 18, 2021. (*Id.*, § 1.01(i)).

1 uncertainty of litigation. Accordingly, the Court should grant approval of the Settlement.

2 Plaintiff also seeks an award of attorneys' fees to Plaintiff's Counsel, enhancement award, and
3 reimbursement of the litigation costs. Plaintiff's Counsel and Plaintiff have dedicated their time and
4 energy to litigating this case on behalf of the aggrieved employees. Plaintiff's counsel undertook such
5 efforts on a pure contingency with no promise of payment. (Setareh Decl., ¶ 35.) Plaintiff's Counsel
6 achieved a laudable result in the face of a strong defense asserted by Defendants. For their efforts in
7 achieving the exceptional result of a **\$2,000,000** GSA, Plaintiff's Counsel seek an award of attorneys'
8 fees in the amount of **\$666,666.66** (33.33% of the gross) as a percentage-of-the-fund and
9 reimbursement of their actual out-of-pocket litigation expenses, which to date are **\$11,766.40** .

10 By any measure, the result here is outstanding, particularly considering the task of litigating a
11 complicated case in the face of contrary precedents, and the risk of non-payment involved in
12 undertaking this litigation. The work performed by Plaintiff's Counsel for the Plaintiff was extensive.
13 Among other things, Plaintiff's Counsel:

- 14 • Conducted initial investigations and developed the theories and facts to support
15 Plaintiff's claims as to Defendants' alleged violations;
- 16 • Researched and drafted the complaint;
- 17 • Sought and obtained informal discovery, including, but not limited to, time records
18 from February 15, 2019 through March 21, 2021 for 240 employees and a wage
19 statement aggregate register from February 15, 2019 to pay period end date March
20 21, 2021 for the matching 240 employees, including Adan Ortiz, and Defendants
21 have previously produced Plaintiff's personnel file and a copy of all employee
22 handbooks and policies effective from February 15, 2019 to the present during
23 formal discovery.
- 24 • Reviewed and analyzed hundreds of pages of written policy documents, handbooks,
25 and payroll records produced by Defendants;
- 26 • Prepared a detailed brief in advance of the mediation that led to the Settlement;
- 27 • Drafted settlement agreement, motion and proposed order for Court approval, form
28 notice, and claims administration guidelines; and

- Incurred **\$11,766.40** in costs. (Setareh Decl., ¶ 32.)

Despite the many risks faced by Plaintiff's Counsel, and the difficulty in prosecuting this case, they nevertheless achieved an outstanding result for the aggrieved employees and the State of California. Accordingly, Plaintiff's Counsel's request for attorneys' fees of 33.33% of the gross settlement amount is fair and reasonable. In fact, this amount is well-earned, supported by controlling case law, and is within the fee range awarded by courts.

Likewise, it is fair that Plaintiff's Counsel be reimbursed for their expenses. All of the expenses incurred were reasonable and necessary to the prosecution of this action and administration of this Settlement and are of the kind that courts routinely approve. For the reasons set forth herein, Plaintiff respectfully requests for this Court to grant this Motion in its entirety.

II. OVERVIEW OF THE LITIGATION

Staffmark is a company that provides staffing at more than 300 locations in 31 states across the country. <https://www.staffmark.com/ourStory/>. Their website states: "For more than 40 years, Staffmark has been successfully finding people work and companies people." (*Id.*) Staffmark has placed employees at Walmart locations in California.

Plaintiff Adan Ortiz worked for Defendants from approximately October 9, 2019 through August 23, 2020 at Walmart's Chino Hills warehouse distribution center as a Performance Coach. He generally worked 10-11 hour shifts 5-6 days a week. His duties included starting meetings by doing attendance and roll call, training new associates, and picking and packing orders for delivery. Plaintiff would have to wait in line approximately 1-10 minutes to pass through a security check because the line was approximately 2-30 people long on average. The line was long because there were approximately 300-400 people working in the warehouse, starting at about the same time, with only one entrance to use. Aggrieved employees had to go through the security check even if they did not have a bag on them. After passing through the security check, Plaintiff would wait in line at one of the clock-in computers, which would take anywhere from 1 to 10 minutes to clock in for his shift. (Setareh Decl., ¶ 7.)

A. PROCEDURAL HISTORY

On January 29, 2020, Plaintiff submitted a letter to the California Labor and Workforce Development Agency ("LWDA") to notify the LWDA pursuant to PAGA of Plaintiff's intent to seek

1 civil penalties under PAGA for violations of Labor Code sections 201, 202, 203, 204, 223, 226, 226.7,
2 510, 512, 558, 1194, 1197, 1197.1, 1198, 1199, and 2802. (Setareh Decl., ¶ 8.)

3 WHEREAS, on April 21, 2020, Plaintiff filed the complaint in this Action in the above-
4 titled Court with a single cause of action for recovery of civil penalties under PAGA against
5 Defendant, alleging violations of Labor Code sections 201, 202, 203, 204, 223, 226, 226. 7,
6 227.3, 510, 512, 1194, 1197, 1198, and 2802. (*Id.*, ¶ 9.)

7 On May 26, 2020, Defendants Staffmark Holdings and Staffmark Investment filed an
8 Answer to the Complaint denying the allegations and pleading affirmative defenses. On July 13,
9 2020, Defendant Walmart filed an Answer to the Complaint denying the allegations and pleading
10 affirmative defenses. (*Id.*, ¶ 10.)

11 The Court scheduled an Order to Show Cause Regarding Dismissal on October 13, 2021,
12 and continued that hearing to June 8, 2022 at 9:00 a.m.. (*Id.*, ¶ 11.)

13 On April 26, 2021, the Parties attended a full-day mediation with an experienced wage-
14 hour mediator, Steven J. Rottman, Esq., which resulted in settlement. (*Id.*, ¶ 19.)

15 Before the mediation, the Parties engaged in an extensive informal exchange of data about the
16 allegedly aggrieved employees, Defendants produced time records from February 15, 2019 through
17 March 21, 2021 for 240 employees and a wage statement aggregate register from February 15, 2019
18 to pay period end date March 21, 2021 for the matching 240 employees, including Adan Ortiz, and
19 Defendants have previously produced Plaintiff's personnel file and a copy of all employee
20 handbooks and policies effective from February 15, 2019 to the present during formal discovery.
21 (*Id.*, ¶ 17.)

22 In July 2021, the Parties executed the Settlement. (*Id.*, ¶ 30; Settlement.)

23 On June 1, 2022, Plaintiff submitted the Settlement to the LWDA. (Setareh Decl., ¶ 43.) The
24 Settlement Agreement and this motion for approval were submitted to the LWDA on September 1,
25 2022. (*Id.*, ¶ 44). To date, the LWDA has not objected to or commented upon the Settlement. (*Id.*)

26 **B. SUMMARY OF CLAIMS**

27 The Settlement addresses claims for which Plaintiff seeks civil penalties under PAGA for Labor
28 Code violations that the operative complaint alleges Defendants committed against Aggrieved Employees

1 during the PAGA Period, as follows:

2 1. Failure to Provide Proper Meal Breaks: Plaintiff alleges that Defendants required
3 Plaintiff and other aggrieved employees to pass through check points and subsequently wait in line to
4 clock in resulting in meal breaks that were shorted than 30 minutes. Plaintiff further alleges that his meal
5 breaks were sometimes interrupted because his coworkers or supervisors communicated with him
6 through the walkie talkie. Lastly Plaintiff alleges that Defendants imposed so much work on each
7 employee that it made it unlikely for them to be able to take their breaks if they wanted to finish their
8 work on time. (Setareh Decl., ¶ 12.)

9 2. Failure to Provide Proper Rest Breaks: Plaintiff alleges that it took him and other
10 aggrieved employees approximately 5 minutes to walk to the break room, which functionally afforded
11 them only a five-minute rest break, as managers would come into the break room and announce that the
12 rest break is over. Plaintiff further alleges that once or twice a month, they were too busy and would
13 have to work through their rest breaks. (Setareh Decl., ¶ 13.)

14 3. Failure to Pay Hourly Wages and Overtime: Plaintiff alleges that Defendants failed to
15 pay all wages to him and other aggrieved employees for several reasons. First, Plaintiff and other
16 aggrieved employees were not paid for the time they spent going through security checks each time they
17 entered or left the facility. Second, Plaintiff and other aggrieved employees were not paid for the time
18 they stood in line to clock in which took from 1 to 10 minutes when clocking in for the day or from a
19 meal break. Third, Plaintiff and other aggrieved employees were not paid for all of their hours because
20 their meal breaks were interrupted due to having to answer their walkie talkies or having his hours auto-
21 deducted even if a meal period was not taken. (Setareh Decl., ¶ 14.)

22 4. Failure to Calculate Regular Rate of Pay: Starting in March of 2020, Defendants paid
23 Plaintiff Covid incentive pay of \$2.50 per hour. This incentive payment was not included in calculating
24 Plaintiff and aggrieved employee's regular rate of pay. (Setareh Decl., ¶ 15.)

25 5. Inaccurate Wage Statements and Failure to Pay Final Wages: Plaintiff alleges that – as a
26 result of all hours worked, including overtime, not being included in wage statements – gross wages
27 earned, total hours worked, net wages earned, all applicable hourly rates in effect during the pay period,
28 and the corresponding number of hours worked at each hourly rate were not accurately reflected in his

1 and Aggrieved Employees' wage statements each pay period. Furthermore, the wage statements of
2 Aggrieved Employees were not accurate because they failed to include the meal and rest period
3 premiums accrued each day when meal and rest periods were not provided or were interrupted. Because
4 the various aforementioned amounts were not included in the pay of Aggrieved Employees during the
5 PAGA Period, it follows that such amounts were not paid to any Aggrieved Employees who separated
6 from employment with Defendant during the PAGA Period and that Defendant, thus, failed to pay them
7 all final wages due upon separation of employment. (Setareh Decl., ¶ 16.)

8 **III. OVERVIEW OF THE SETTLEMENT**

9 The complete terms of the Settlement are set forth in Exhibit 1 to the Declaration of Shaun
10 Setareh, filed concurrently herewith. The Settlement provides for a non-reversionary GSA of
11 **\$2,000,000** to be paid by Defendant Staffmark Investment LLC on behalf of the Aggrieved Employees.
12 (Settlement, ¶¶ 1.01(f).) The essential terms are summarized below.

13 (a) The Aggrieved Employees are: all non-exempt employees who were placed as
14 temporary employees by Staffmark Investment LLC at Walmart Inc. in California from
15 February 15, 2019 to April 18, 2021.

16 (b) Staffmark Investment LLC agrees to pay the Gross Settlement Amount ("GSA")
17 of **\$2,000,000**, which includes payment to Plaintiff as a representative of the Aggrieved
18 Employees, reasonable attorneys' fees and litigation costs, settlement administration costs, and a
19 payment to the State of California under the Private Attorney General Act ("PAGA").
20 (Settlement, § 1.01 ¶ f.)

21 (c) PAGA Allocation: Approximately **\$1,308,166.94** will be available for
22 distribution to the Aggrieved Employees and the LWDA ("Net Settlement Amount", or
23 "NSA"). (*Id.*, ¶ 22(e).) Of this amount, the LWDA will receive 75%, or approximately
24 **\$981,125.20**, and Aggrieved Employees will receive 25%, or approximately **\$327,041.73**³. (*Id.*,
25 1.01 ¶ g)

27 ³ Pursuant to Labor Code section 2699(i), awards of PAGA penalties are split with 25% going to the
28 aggrieved employees and 75% going to the LWDA.

(d) No later than thirty (30) calendar days after the Effective Date, Defendants shall deposit the Gross Settlement Amount with the Settlement Administrator. (*Id.*, § 3.04 ¶ a.)

(e) Defendants agree not to oppose a request for a service fee to be paid to Plaintiff of up to five thousand dollars (\$5,000.00). (*Id.*, § 3.01 ¶ d.) If this request is not approved and/or reduced by the Court, any amount not approved and/or reduced by the Court will be included in the Net Settlement Amount to be paid to the Aggrieved Employees. (*Id.*)

(f) Plaintiff's Counsel will not seek an amount greater than **\$666,666.66** for attorneys' fees. (*Id.*, § 3.01 ¶ a.)

(g) Plaintiff's Counsel will not seek an amount greater than what was actually expended for which there is documentation for reimbursement of litigation costs up to a maximum of \$20,000 with any amount below that maximum being added to the PAGA Allocation. (*Id.*, § 3.01 ¶ b.) The actual costs incurred to date are **\$11,766.40**.

(h) Notice to Aggrieved Employees and administration of the Settlement will be accomplished through a third-party settlement administrator, Simpluris, Inc. (*Id.*, § 3.01 ¶ c.) To the extent that Settlement Administration falls below that maximum amount, it will be included in the PAGA Allocation. (*Id.*) Plaintiff estimates that, realistically, the costs for settlement administration will be no greater than **\$8,400**.

(i) In exchange for the above settlement consideration, Defendants shall be entitled to a *limited* release from the LWDA and each and every Aggrieved Employee, including Plaintiff. (*Id.*, § 5.01.)

A. THE RELEASED CLAIMS

"Release Period" or "PAGA Period" means February 15, 2019 to April 18, 2021. "Released Claims" means all claims, rights, demands, liabilities, and causes of action of every nature and description, known and unknown, as alleged in the Complaint or that could have been asserted in the Action based on the facts alleged, arising from or related to the following claims against Defendants: for meal and rest breaks; unpaid wages, including minimum wages, regular wages, overtime and double time wages; wage statement violations; untimely wages and wages due upon termination; and derivative claims ("PAGA Released Claims."). Released Claims shall also mean

1 any other claims related to this Action by all individuals whether known or unknown, suspected or
2 unsuspected, that were or could have been alleged or asserted based on Aggrieved Employees'
3 employment for Defendants during the PAGA Period, including all claims that were or could have
4 been brought under the Private Attorneys General Act as it relates to the underlying Labor Code
5 claims referenced above, including any damages, restitution, interest, waiting time penalties,
6 statutory and civil penalties, punitive damages, attorneys' fees, costs, or any other form of relief
7 whatsoever, during the PAGA Period.. The Aggrieved Employees are only releasing their claims
8 under Labor Code 2698, *et. seq.* and are not releasing any other claims.

9 Upon the final approval by the Court of this Settlement, Plaintiff and each Aggrieved
10 Employee, shall, for the Release Period, fully release and forever discharge Defendants and each of
11 their past and present divisions, affiliates, affiliated entities, related entities, parents, subsidiaries,
12 predecessors, successors, joint ventures, assigns, and their respective shareholders, owners, officers,
13 directors, employees, agents, trustees, attorneys, managers, operators, insurers, representatives,
14 administrators, fiduciaries, beneficiaries, subrogees, executors, partners, privies, representatives,
15 consultants, and attorneys (the foregoing are collectively referred to hereafter as the "Releasees")
16 from the Released Claims. (*Id.*, ¶ 1.01 i-j, 5.01.)

17 **B. ADMINISTRATION PROCESS**

18 The Settlement provides for the Settlement Administrator to distribute the Settlement Fund. (*Id.*,
19 ¶¶ 3.04.) In distributing the settlement checks to the Aggrieved Employees, the Settlement
20 Administrator will also provide with each Individual Settlement Payment mailed a notice explaining the
21 payment and the case. (*Id.*, ¶ 3.03(a); Ex. A.)

22 **IV. ARGUMENT**

23 **A. STANDARD OF REVIEW**

24 Labor Code section 2699(1)(2) states that "the superior court shall review and approve any
25 settlement of any civil action filed pursuant to this part." Unfortunately, PAGA does not specify a
26 standard of review for PAGA settlements, and there is no published appellate authority on the subject.

27 Existing law does, however, provide some guidance as to the appropriate standard of review.
28 Plaintiff contends, and for the purposes of this motion Defendants do not contest, that the Court should

look to: (1) the standard of review used in analogous statutory schemes; (2) Federal court decisions approving PAGA settlements; and (3) the purposes and policies of PAGA.

//

1. Analogous Statutory Schemes

A PAGA case is in the nature of a *qui tam* proceeding. *Iskanian v. CLS Transp. Los Angeles LLC* (2014) 59 Cal.4th 348, 394. California has at least two other statutory schemes whereby an individual may sue on behalf of the State or in the public interest: The California False Claims Act and Proposition 65.⁴ Under both schemes, a court must approve a settlement or dismissal of the action.

Under the California False Claims Act, a *qui tam* plaintiff may only dismiss the case with a court's (and the government's) consent. (Gov't Code § 12652(c)(1).) In deciding whether to give consent, a court must take into account "the best interests of the parties involved and the public purposes behind the act." *Id.* Moreover, if a *qui tam* plaintiff objects to a settlement between the government and a defendant, the court can only approve the settlement after finding it is "fair, adequate, and reasonable under all the circumstances." (Gov't Code § 12652(e)(2)(B).)

Similarly, Proposition 65 actions, like PAGA actions, are brought by private plaintiffs to safeguard public rights. *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal. App. 4th 46, 63. In addition to complying with specified statutory criteria⁵, Prop 65 settlements may only be approved if: (1) they are "just" and (2) they "serve the public interest." (*Id.* at 61-62.) In making this determination, the *Kintetsu* court described the appropriate inquiry similar to the "fair, reasonable, and adequate" test used in class actions. (*Id.* at 61.) The *Kintetsu* court also stated that, in determining whether to approve Prop 65 settlement, a court should consider the policies underlying the

⁴ A third statute, the Insurance Frauds Prevention Act ("IFPA"), also empowers "interested persons" to bring claims on behalf of the State to combat insurance fraud. Cal. Ins. Code § 1871.7. This statute sets forth a complicated formula for distributing settlement proceeds while also stating that the relator shall receive an amount that the court decides is "reasonable" for collecting civil penalties and damages, and that the court may allocate funds pursuant to a settlement agreement when it is in "the interests of justice." Cal. Ins. Code § 1871.7(g).

⁵ The expressly specified statutory criteria in Proposition 65 settlements are: (1) the adequacy of the Prop 65 warnings; (2) the reasonableness of the attorneys' fees; and (3) the reasonableness of the penalty amount. *Id.* at 62.

1 statute. (*Id.* at 63.)

2 **2. Federal Cases**

3 In addition to analogous California law, several federal district court case have also enunciated a
4 standard for reviewing PAGA actions in the context of larger class action settlements. The federal courts
5 have concluded that a PAGA settlement should only be approved when it is “genuine and meaningful,
6 [and] consistent with the underlying purpose of the statute to benefit the public.” *O’Connor v. Uber*
7 *Technologies* (N.D. Cal. 2016) 201 F. Supp. 3d 1110; *Viceral v. Minstras Group, Inc.* (N.D. Cal. Oct.
8 11, 2016) 2016 WL 5907869 *9; *see also, Ferreri v. Bask Technology, Inc.* (S.D. Cal. Nov. 21, 2016)
9 2016 WL 6833927, *5 (evaluating PAGA settlement in light of purposes and policies of PAGA).

10 **3. The Purposes and Policies of PAGA**

11 PAGA was passed because the Legislature believed it necessary “to achieve maximum
12 compliance with state labor laws” and “to ensure an effective disincentive for employers to engage in
13 unlawful and anticompetitive business practices.” (2003 Cal. Legis. Serv. Ch. 906 § 1(a).) The
14 Legislature further found that, while self-policing efforts have had some success, “in other cases the
15 only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil
16 penalties as provided in the Labor Code.” (*Id.* at § 1(b).) Through PAGA, the Legislature thus: (1)
17 sought to “enlist[] willing citizens in the task of private enforcement,” *Iskanian*, 59 Cal.4th at 390; (2)
18 “deputized” Aggrieved Employees to sue on behalf of the State to enforce state labor laws; and (3)
19 authorized them to recover civil penalties, attorneys’ fees, and costs. (2003 Cal. Legis. Serv. Ch. 906
20 (Legislative Counsel’s Digest).) In bringing a PAGA action, “[t]he employee-plaintiff acts as the proxy
21 or agent of the state labor enforcement agencies, representing the same legal right and interest as those
22 agencies...” *Iskanian*, 59 Cal.4th at 394.

23 As for the interests of the LWDA (in whose shoes Plaintiff stands), its top enforcement priorities
24 are “to vigorously enforce minimum labor standards in order to ensure employers are not required or
25 permitted to work under substandard unlawful conditions...” and to “protect employers who comply
26 with the law from those who attempt to gain a competitive advantage at the expense of their workers by
27 failing to comply with minimum labor standards.” (Lab. Code § 90.5(a).) Moreover, in addition to the
28

1 collection of civil penalties⁶, Labor Code section 1194.5 (which is specifically referenced in Labor Code
2 section 90.5) authorizes the LWDA to seek injunctive relief.

3 In light of the above law, as well as the policies and purposes of PAGA, Plaintiff propose that
4 the Court consider the following factors in determining whether to approve the Settlement:

- 5 (1) the extent to which the Settlement achieves compliance with the state labor laws;
- 6 (2) the extent to which the Settlement deters violations of the state labor laws;
- 7 (3) whether the Settlement serves to enlist private citizens in public enforcement of PAGA; and
- 8 (4) whether the Settlement is otherwise “just” and “in the public interest.”

9 Because the proposed Settlement reasonably and fairly advances each of the above factors,
10 Plaintiff requests that this Court approve the Settlement.

11 **B. THE SETTLEMENT SHOULD BE APPROVED**

12 **1. The Settlement Falls Within the Range of Possible Approval**

13 “The PAGA is limited to the recovery of *civil* penalties.” *Villacres v. ABM Industries Inc.*
14 (2010) 189 Cal.App.4th 562, 579. Under PAGA, the default civil penalty for an employer’s initial
15 violation is one hundred dollars (\$100) per employee per pay period, and two hundred dollars (\$200) per
16 pay period for any subsequent violations. (Lab. Code § 2699(f)(2).) While courts have the discretion to
17 reduce civil penalties under certain circumstances, there is no requirement to do so.

18 There were approximately 2,352 Aggrieved Employees during the PAGA Period. (Setareh
19 Decl., ¶ 27.) Based on the data provided by Defendant, there were approximately 20,070 pay periods
20 during the PAGA Period. (*Id.*)

21 The following chart provides the estimated potential recovery that Plaintiff believes he could
22 reasonably achieve for all aggrieved employees *if he were to prevail on all his causes of action*:

23 //

24

25

26 ⁶ Note that, under PAGA, civil penalties are primarily intended as a deterrent, and not as a financing
27 mechanism for the LWDA and the State’s general fund. While the State clearly has an interest “in
28 receiving the proceeds of civil penalties,” the penalties are “used to deter violations.” *Iskanian*, 59
Cal.4th at 313.

Plaintiff's Estimated Potential Recovery		
Assumptions During PAGA Period (based on time/payroll data provided by Defendants) Number of Aggrieved Employees: 2,352; Total Pay Periods During PAGA Period: 20,070		
Number of Terminated Employees: 1,937		
Claim (Labor Codes)	Estimated Potential Civil Penalties	Calculations for Estimated Potential Recovery
Off-the-Clock Work - Overtime (510, 558) - Minimum Wage (1194)	\$1,003,500 \$2,007,000	20,070 pay periods x \$50/pay period 20,070 pay periods x \$100/pay period
Meal Period Premiums (204, 512, 226.7, 1198)	\$2,007,000	20,070 pay periods x \$100/pay period
Rest Period Premiums (204, 226.7)	\$2,007,000	20,070 pay periods x \$100/pay period
Waiting Time Penalties (201, 202, 203)	\$193,700	1,937 separated employees x \$100 per 1st (and only) violation
Wage Statement Penalties (226)	\$588,000	2,352 employees x \$250 for initial citation
TOTAL	\$7,806,200	

Accordingly, a Gross Settlement Amount of **\$2,000,000**, or 25.6% of the potential maximum penalties, is more than fair and adequate.

The Settlement should be approved because it confers a substantial benefit on Aggrieved Employees, while proceeding with litigation would impose significant risk with no guarantee of increased benefits.

2. **Although the Parties Dispute Whether Any Violations Occurred, the Settlement Achieves Compliance With, and Deters Violations of, State Labor Laws**

While the Parties dispute whether Defendants' employment practices violate the Labor Code,

1 this litigation has undisputedly achieved compliance with Labor Code sections referenced in the
2 Settlement due to the significant amount that Defendants have agreed to pay for these alleged violations.
3 Moreover, the significant amount will also serve as a deterrent to similar violations. Accordingly, the
4 proposed Settlement reasonably advances PAGA's purpose by achieving compliance with the Labor
5 Code and deterring similar violations.

6 **3. The Settlement Serves to Enlist Private Citizens in Enforcement of PAGA**

7 Plaintiff also believes the proposed Settlement acts to encourage private enforcement of PAGA.
8 Through the Settlement, Plaintiff may receive a modest incentive payment, Plaintiff's counsel will
9 receive attorneys' fees and costs as determined by the Court, and all Aggrieved Employees will receive
10 a 25% share of the PAGA Allocation, as well as notice of the claim.

11 **4. The Settlement Is "Just" and "In the Public Interest"**

12 The proposed Settlement is both just and in the public's interest.

13 First, this settlement reasonably values the PAGA claims as to Defendants. While Plaintiff
14 believes the claims are meritorious and that they would have recovered unreduced penalties, Defendants
15 deny all liability and asserted numerous defenses to the claims. Nevertheless, Defendant has agreed to
16 pay a Maximum Settlement Amount of **\$2,000,000** in exchange for a PAGA release involving
17 approximately 2,352 Aggrieved Employees who were subjected to similar working conditions during
18 the applicable time frame. Accordingly, Defendant is paying an average of **\$850.34** ($\$2,000,000 \div$
19 $2,352$) per Aggrieved Employee. If the Court grants Plaintiff's application for fees, costs and incentive
20 payments, the State and the Aggrieved Employees will still share approximately **\$556.19**
21 ($\$1,308,166.94 \div 2,352$) per Aggrieved Employee for civil penalties – still a significant and reasonable
22 recovery.⁷

23 Second, the proposed Settlement, even with deductions, provides a substantial sum to the State:
24

25
26 ⁷ It is appropriate to consider the gross award (before deductions) in comparing the litigation value
27 of a case against a settlement award. Among other things, it is appropriate to pay fees to of a
28 common fund, even in a fee-shifting case, "to avoid the unjust enrichment of those who benefit
from the fund that is created, protected, or increased by litigation and who otherwise bear none of
the litigation costs." *Sobel v. Hertz Corporation* (D. Nev. 2014) 53 F.Supp.3d 1319, 1326.

1 **\$981,125.20** (\$1,308,166.94 x 75%). It also provides a sum to each employee (around **\$139.04**) on a
2 *pro-rata* basis (1,308,166.94 x .25% = \$327,041.73/ 2,352). (The aggregate sum provided to Aggrieved
3 Employees (assuming the estimated deductions) is \$327,082.30.) However, the purpose of PAGA is not
4 to compensate employees, who retain any private right of action they may have under the applicable
5 Labor Code provisions. In that respect, the Settlement also requires that each employee receive a notice
6 that describes this litigation and the settlement sum. Plaintiff contends this notice will educate
7 Aggrieved Employees as to the requirements of the Labor Code, something that is in the public interest
8 and consistent with PAGA’s purpose. (See Lab. Code § 2699(j)) (stating that civil penalties recovered
9 under PAGA shall be distributed to the LWDA for [among other things] “education of employers and
10 employees about their right and responsibilities under this code.”)

11 Third, public policy strongly favors the settlement of litigation. *Consumer Advocacy Group v.*
12 *Kintetsu, supra*, 141 Cal.App.4th at 63. Because the proposed Settlement is neither unjust nor ignores
13 the public interest, it should be approved.

14 Finally, it should be noted that the Settlement was submitted to the LWDA on June 1, 2022.
15 Having considered the Settlement the LWDA has not raised any objection to the Settlement or made
16 any comment about it.

17 **C. THE PROPOSED AWARD OF ATTORNEYS’ FEES AND COSTS ARE FAIR,**
18 **ADEQUATE AND REASONABLE TO PLAINTIFF’S COUNSEL AND SHOULD BE**
19 **APPROVED**

20 The settlement requires that attorneys’ fees, costs, and incentive payment be paid from the
21 common fund. This is appropriate, even in the non-class action context. “California has long
22 recognized, as an exception to the general American rule that parties bear the costs of their own
23 attorneys, the propriety of awarding an attorney fee to a party who has recovered or preserved a
24 monetary fund for the benefit of himself or herself and others. In awarding a fee from the fund or from
25 the other benefitted parties, the trial court acts within its equitable power to prevent the other parties’
26 unjust enrichment.” *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 561 (approving
27 percentage of recovery method in wage and hour class action); *Sobel*, 53 F. Supp. 3d at 1330 (approving
28 plaintiff’s right to seek fees from common fund in fee shifting case); *Fox v. Hale & Norcross Silver*

1 *Min. Co.* (1895) 108 Cal. 475 (approving fee payment from common fund in early derivative case).

2 The proposed Settlement is not contingent upon any particular fee, incentive payment, or cost
3 award (other than with respect to the Settlement Administrator's costs) and should not serve as a basis
4 for rejecting the proposed Settlement.⁸

5 When attorneys' fees are awarded out of a common fund preserved or recovered by means of
6 litigation, the award is not *per se* unreasonable merely because it is calculated as a percentage of the
7 common fund. *Laffitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480 ("We join the
8 overwhelming majority of federal and state courts in holding that when class action litigation
9 establishes a monetary fund for the benefit of the class members, and the trial court in its equitable
10 powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable
11 fee by choosing an appropriate percentage of the fund created.")

12 Here, Plaintiff's Counsel request attorneys' fees of **\$666,666.66** (33.33 of the gross settlement
13 amount) and their actual costs currently at **\$11,766.40**. In view of Plaintiff's Counsel's efforts and
14 risks in pursuing this case, these amounts are well within the range of reasonableness and thus warrant
15 this Court's approval.

16 Plaintiff and the aggrieved employees, as the prevailing party plaintiffs in settlement, are
17 entitled to recover their attorneys' fees and costs for their wage claims, and the associated interest and
18 penalties. See Lab. Code §§ 218.5, 226(e), 1194, 2699(g); Code Civ. Proc. § 1021.5(a); *Earley v.*
19 *Superior Court* (2000) 79 Cal.App.4th 1420. An attorneys' fees award is justified where the legal
20 action has produced its benefits by way of a voluntary settlement. See, e.g., *Maria P. v. Riles* (1987) 43
21 Cal.3d 1281, 1290-1291; *Westside Cmty. For Indep. Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352-
22 353. California law provides that when a party is entitled to statutory fees, the party must be
23 compensated for all time reasonably spent seeking to accomplish the desired result. *Serrano v. Unruh*
24 (1982) 32 Cal.3d 621, 624.

25
26
27 ⁸ Note that, as is normally the case, Plaintiff reserves the right to appeal the Court's order
28 concerning fees, costs, or incentive payment.

1 This award is justified here because Plaintiff's Counsel achieved a strong result for the
2 aggrieved employees in an extremely risky case while bearing the substantial burdens of contingency
3 representation and the fees requested are within the market rate. *Vizcaino v. Microsoft Corp.* (9th Cir.
4 2002) 290 F.3d 1043, 1048-1049. Plaintiff's Counsel have expended time, effort, and money that they
5 could have expended on less risky cases against other defendants.

6 It is estimated that the average amount each aggrieved employee will receive based on their
7 25% share of the penalties is **\$139.04**. (The aggregate sum provided to employees and the LWDA
8 (assuming all deductions) is **\$1,308,166.94**.) However, the purpose of PAGA is not to compensate
9 employees, who retain any private right of action they may have under the applicable Labor Code
10 provisions. In that respect, the settlement also requires that each employee receive a notice that
11 describes this litigation and the settlement sum. Plaintiff contends this notice will educate aggrieved
12 employees as to the requirements of the Labor Code, something that is in the public interest and
13 consistent with PAGA's purpose. *See* Lab. Code § 2699(j) (stating that civil penalties recovered under
14 PAGA shall be distributed to the LWDA for [among other things] "education of employers and
15 employees about their right and responsibilities under this code.") This is a substantial recovery –
16 especially considering that some wage and hour class action settlements result in class members
17 receiving coupons or vouchers in much smaller amounts instead of cash payments. *See, e.g.,*
18 *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 590 (affirming final approval of wage and
19 hour class action settlement where 20% of the fund allocated to the class was merchandise vouchers).
20 Despite the extent of risk involved in this case, Plaintiff's Counsel skillfully navigated through it and
21 negotiated a favorable result for aggrieved employees and the State of California. The quality of
22 Plaintiffs' attorneys' work, and the efficacy and dedication with which it was performed, should be
23 compensated. *See, e.g., J.N. Futia Co. v. Phelps Dodge Indus., Inc.* (S.D.N.Y. 1982) 1982 U.S. Dist.
24 LEXIS 15261.

25 Plaintiff's Counsel's previous experiences in litigating wage and hour class actions also support
26 the reasonableness of the fee request, as does the caliber of opposing counsel. Plaintiff's Counsel's
27 previous experiences in similar matters was integral in evaluating the strengths and weaknesses of the
28 case against Defendants and the reasonableness of the Settlement. Practice in the narrow field of wage

1 and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law, state
2 and federal, as well as the procedural law of class action and PAGA representative litigation. (Setareh
3 Decl., ¶¶ 3-5.) Because it is reasonable to compensate Plaintiff’s Counsel commensurate with their
4 skill, reputation, and experience, a fee award of one-third of the gross settlement sum is reasonable.
5 Likewise, the caliber and experience of opposing counsel Naomi Beer of Greenberg Traurig and Susan
6 Steward of Atkinson, Andelson, Loya Rudd & Romo in labor and employment litigation supports the
7 fairness and reasonableness of the requested fee award. *See, e.g., Vizcaino v. Microsoft Corp.* (W.D.
8 Wash. 2001) 142 F. Supp. 2d 1299, 1303.

9 It is an accepted practice in wage and hour class action settlements to award attorneys’ fees to
10 class counsel based on a percentage of the total settlement value agreed upon by the parties. (Setareh
11 Decl., ¶ 33.) California courts have long recognized that an appropriate method for awarding
12 attorneys’ fees in class actions is to award a percentage of the common fund. *Serrano III*, 20 Cal.3d at
13 pp. 48-49 (“when a number of persons are entitled in common to a specific fund, and an action brought
14 by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such
15 plaintiff or plaintiffs may be awarded attorney’s fees out of the fund”); *Wershba v. Apple Computer,*
16 *Inc.* (2001) 91 Cal. App. 4th 224, 254; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19,
17 26-30.

18 Equitable considerations also dictate that Plaintiff’s Counsel should be rewarded for achieving
19 a valuable settlement without protracted litigation. Indeed, several courts have expressed frustration
20 with the lodestar approach for deciding fee awards, which usually involves wading through
21 voluminous, and often indecipherable, time records. Commenting on the lodestar approach, Judge
22 Marilyn Hall Patel wrote in *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal
23 1989),

24 This court is compelled to ask, ‘Is this process necessary?’ Under a cost-benefit analysis,
25 the answer would be a resounding, ‘No!’ Not only do the Lindy Kerr-Johnson analyses
26 consume an undue amount of court time with little resulting advantage to anyone, but in
27 fact, it may be to the detriment of the class members. They are forced to wait until the court
28 has done a thorough, conscientious analysis of the attorneys’ fee petition. Or, class
members may suffer a further diminution of their fund when a special master is retained
and paid from the fund. Most important, however, is the effect the process has on the
litigation and the timing of settlement. Where attorneys must depend on a lodestar
approach, there is little incentive to arrive at an early settlement.

1 The Ninth Circuit has similarly recognized that the lodestar method “creates incentives for
2 counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable
3 fee, since the lodestar method does not reward early settlement.” *Vizcaino v. Microsoft Corp.*, 290 F.3d
4 at 1050, n.5. The Ninth Circuit has thus cautioned that, while a lodestar may be used as a crosscheck on
5 the reasonableness of a percentage fee method if a district court in its discretion chooses to do so, a
6 lodestar calculation is not required and “class counsel should [not] necessarily receive a lesser fee for
7 settling a case quickly.” *Id.* Thus, district courts in the Ninth Circuit recognize that a crosscheck need
8 not be performed where counsel achieves a significant result through an early settlement. E.g., *Lewis v.*
9 *Starbucks Corp.*, 2008 WL 4196690 (E.D. Cal. 2008) (favoring percentage method over lodestar for
10 settlements achieved at relatively early litigation stages); *Glass v. UBS Fin. Servs., Inc.*, 2007 WL
11 221862 (N.D. Cal. 2007) (opining that lodestar crosscheck would unfairly penalize counsel for settling
12 the case without protracted litigation). Accordingly, because this case presents considerable risks,
13 coupled with the ensuing risks of lengthy appeals and risk of no recovery, the excellent result achieved
14 by Plaintiff’s Counsel shows that the amounts allocated to both attorneys’ fees and costs under the
15 Settlement warrant final approval. As such, the evidence shows that Plaintiff’s Counsel’s fee request is
16 reasonable and warrants this Court’s final approval.

17 **1. The Requested Attorneys’ Fees Are Also Justified By The Lodestar Method**

18 The lodestar crosscheck “provides a mechanism for bringing an objective measure of the work
19 performed into the calculation of a reasonable attorney fee.” *Laffitte*, 1 Cal.5th at 504. Only when the
20 lodestar multiplier is “far outside the normal range” would the trial court “have reason to reexamine its
21 choice of a percentage.” *Id.* “[T]rial courts conducting lodestar cross-checks have generally not been
22 required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney
23 time spent to focus on the general question of whether the fee award appropriately reflects the degree of
24 time and effort expended by the attorneys.” *Id.* (internal quotations omitted).

25 Under the lodestar method, the court computes the “lodestar” amount by multiplying the
26 number of hours reasonably extended by each attorney or legal staff member by their reasonable hourly
27 rates. *Serrano v. Priest* (1977) 20 Cal.3d 25, 48 (“*Serrano III*”). The court then enhances this lodestar
28

1 figure by a “multiplier” to account for a range of factors, such as the novelty and difficulty of the case,
2 its contingent nature, and the degree of success achieved. *Id.* at 49; *Ketchum v. Moses* (2001) 24
3 Cal.4th 1122, 1132-1136; *Drexler*, 22 Cal.4th at p. 1096; *Thayer v. Wells Fargo Bank* (2001) 92
4 Cal.App.4th 819, 834 (“[t]here is no ... rule limiting the factors that may justify an exercise of judicial
5 discretion to [adjust the] lodestar.”).

6 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
7 *Chavez*, 162 Cal. App. 4th at 49; *Wershba*, 91 Cal.App.4th at 255. In class and representative actions
8 such as this one, where the value of the benefit conferred to the class “can be monetized with a
9 reasonable degree of certainty,” a court may “adjust the lodestar in comparison to a percentage of the
10 common fund to ensure that the fee awarded is reasonable and within the range of fees freely
11 negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases* (2009) 175 Cal.
12 App. 4th 545, 557. In doing so, “the court determines, retrospectively, whether the litigation involved a
13 contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar
14 in order to approximate the fair market rate for such services.” *Id.* at 556.

15 A lodestar crosscheck here confirms that the requested award is reasonable. Plaintiff’s Counsel
16 have already logged a combined total of **305.15** hours in billable time at their current standard hourly
17 rates, resulting in a lodestar of **\$246,170.00**. (Setareh Decl., ¶ 36.) This results in a lodestar multiplier of
18 approximately **2.7**. The hours billed represent time spent on tasks that were essential to litigation and
19 settlement. The standard hourly rates for Plaintiff’s Counsel – ranging from \$325 to \$925 for attorneys
20 – are reasonable. Plaintiff’s Counsel’s rates are in line with those charged by experienced class action
21 lawyers who practice on a national scale and within the range of those approved by other courts in
22 similar circumstances. *See, e.g., Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123,
23 at *3 (S.D. Ill. Mar. 31, 2016) (approving hourly rates of \$460 to \$998 for attorneys, \$309 for
24 paralegals, and \$190 for legal assistants); *Laffey Matrix* <http://www.laffeymatrix.com/see.html> (last
25 visited August 18, 2022) (setting forth hourly rates from \$381 to \$919 for attorneys of similar
26 experience levels).

27 Plaintiff’s Counsel’s requested attorneys’ fees will also be justified under the lodestar method
28 since the value of the actual work performed is much higher than the requested Award of Attorneys’

fees and applying a risk multiplier. (Setareh Decl., ¶ 36.) The lodestar calculation is as follows, which are based on our firm's records:

Attorney	Bar Year	Hourly Rate	Hours	Total Fees
Shaun Setareh	1999	\$925.00	75.5	\$69,837.50
Thomas Segal	2002	\$900.00	126	\$113,400.00
William M Pao	2002	\$900.00	1.4	\$1,260.00
Jose Patino	2010	\$725.00	17.7	\$12,832.50
Farrah Grant	2013	\$650.00	50.1	\$32,565
Nolan Dilts	2019	\$400.00	9.35	\$3,740.00
Rotem Tamir	2019	\$400.00	0.8	\$320.00
Shane Farley	2021	\$350.00	0.45	\$157.50
Tyson Gibb	2021	\$325.00	2.1	\$682.50
Maxim Gorbunov	2021	\$325.00	35	\$11,375.00
Total			318.4	\$246,170.00
Fees Sought				\$666,666.66
Multiplier				2.7

Finally, the request for Plaintiff's Counsel's actual litigation costs of **\$11,766.40** is fair and reasonable. (Setareh Decl., ¶¶ 32, 37.) These costs include but are not limited to over two years' worth of filing fees, courier costs, process server costs, mediation fees, to name just a few. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. *Id.* Accordingly, they warrant approval.

B. THE PROPOSED ENHANCEMENT AWARDS TO PLAINTIFF IS ALSO FAIR, ADEQUATE, AND REASONABLE AND SHOULD BE APPROVED

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class and representative action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000 enhancement award).

1. The Enhancement Awards Are A Very Small Percentage of the Maximum Settlement Amount

Here, the Settlement provides that Plaintiff may seek an enhancement award of up to \$5,000.

1 This amount is less than one percent of the gross settlement amount. (Setareh Decl., ¶ 41.)

2 //

3 **2. The Substantial Time and Effort Plaintiff Expended on This Lawsuit**
4 **Justify the Representative Enhancement Award**

5 Awarding Plaintiff less than one percent of the gross settlement amount is entirely reasonable
6 given Plaintiff's efforts in this case undertaken on behalf of absent aggrieved employees. In this case,
7 Plaintiff has devoted several hours of his time advancing the interests of the aggrieved employees and
8 the State of California. (Setareh Decl., ¶ 41.) Plaintiff has done this by, among other things, retaining
9 experienced counsel, providing Plaintiff's Counsel with extensive information about his work history
10 with Defendants and Defendants' policies and practices with respect to the wage and hour claims at
11 issue, foregoing pursuit of his individual claims in favor of a fair resolution, participating in mediation
12 sessions, and being actively involved in the settlement process to ensure a fair result for the aggrieved
13 employees and the State of California as a whole.

14 **3. Plaintiff's Heavy Fiduciary Responsibility Justifies The Representative**
15 **Enhancement Award**

16 As a representative, Plaintiff agreed to (1) consider the interests of the aggrieved employees and
17 the State of California just as he would consider his own interests and, in some cases, to put the interests
18 of the aggrieved employees and the State of California before his own interests; (2) actively participate
19 in the lawsuit, as necessary, by among other things, answering interrogatories, producing documents to
20 Defendants and giving deposition and trial testimony if requested; (3) travel to give such testimony; (4)
21 recognize and accept that any resolution of the lawsuit by dismissal or settlement, is subject to court
22 approval, and must be designed in the best interest of the aggrieved employees and the State of
23 California as a whole; (5) follow the progress of the lawsuit and provide all relevant facts to Plaintiff's
24 Counsel; (6) champion many other people with similar claims and injuries because of the importance of
25 the case and that necessity that all aggrieved employees and the State of California benefit from the
26 lawsuit; and (7) fight for a resolution in which the individual recoveries to each aggrieved employees
27 and the State of California, including Plaintiff, may be relatively small. Plaintiff agreed to shoulder all
28 of these responsibilities in exchange for a proportionate share of funds made available for distribution to

1 the aggrieved employees and the State of California. (Setareh Decl., ¶ 41.) Plaintiff had no guarantee of
2 an enhancement award. This justifies the enhancement award sought on behalf of Plaintiff.

3 **4. The Risks That Plaintiff Undertook Justify The Enhancement Awards**

4 In taking the actions outlined above, Plaintiff exposed himself to significant risks. These
5 include the risk that he could have been ordered to pay Defendants' attorneys' fees and costs if this
6 action had been unsuccessful under Labor Code §§ 218.5 and 218.6, California's fee and cost shifting
7 statutes applicable to wage disputes. On many occasions, California courts have ordered wage and
8 hour plaintiffs and would-be aggrieved employee representatives to pay outrageous fee and/or cost
9 awards for unsuccessful claims. A few examples are:

- 10 • *Zalewa v. Tempo Research Corp.* (CA 2nd Dist. March 1, 2013) No. B238142, 2013 WL
11 766535 (court awarded the employer \$2,210,360 in attorney's fees to be paid by
12 employee for employee's unsuccessful suit for unpaid bonuses)
- 13 • *Cun v. Café Tiramisu LLC* (CA 1st Dist. Nov. 30, 2011) No. A131241, 2011 WL
14 5979937 (court ordered the employee to pay \$36,612.50 in attorneys' fees and costs to
15 employer for unsuccessful suit for unpaid wages)
- 16 • *Csaszi v. Sharp Healthcare* (CA 4th Dist. Feb. 18, 2003) No. D038558, 2003 WL
17 352422 (court ordered the employee to pay \$20,269 in attorney's fees and costs to the
18 employer for unsuccessful suit for unpaid wages and overtime)
- 19 • *Villalobos v. Guertin* (U.S.D.C. Eastern Dist. Dec. 3, 2009) No. CIV. S-07-2778
20 LKK/GGH, 2009 WL 4718721 (court ordered Plaintiff's counsel to pay \$21,180 in
21 attorney's fees and \$1,525.80 in costs to defense counsel for unpaid wages)
- 22 • *Wymore v. Minto* (CA 1st Dist. Sept. 22, 2010) No. A125476, 2010 WL 3687511 (court
23 awarded employer \$6,577.50 in attorney's fees for employee's unsuccessful suit for
24 unpaid salary and commissions)
- 25 • *Wagner v. Lim* (CA 4th Dist. March 18, 2005) No. D044086, 2005 WL 635059 (court
26 awarded employer \$4,500 in attorney's fees for unsuccessful suit for wages)

27 Such cost awards are substantially higher than the shares of the gross settlement amount that
28 Plaintiff stands to receive as an aggrieved employee. It is unfair in view of the substantial risk of an

1 adverse fee or cost award of several thousand dollars that Plaintiff receives less as a reward for taking
2 such a risk. Moreover, we cannot lose sight of the fact that Plaintiff is not a high-wage earner. Even
3 the lowest of the cost awards listed above would have devastating consequences for Plaintiff in view of
4 his modest earnings. (Setareh Decl., ¶ 41).

5 5. **Plaintiff's Shares of the Gross Settlement Amount Will Likely Be Less**
6 **Than Absent Aggrieved Employees For Greater Portions Of The**
7 **Aggrieved Employee Period**

8 Plaintiff's individual share of the recovery will likely be less than that of some absent aggrieved
9 employees. Under the Settlement, each Aggrieved employee will receive a share of the Settlement
10 proceeds based upon his or her Individual number of pay periods. Some Aggrieved Employees who
11 worked during more of the PAGA Period - will receive more, and some less. There will likely be
12 Settlement Class members who worked more pay periods than Plaintiff and, as a result, larger shares in
13 the recovery – *even though they did not actively participate in the lawsuit*. While this is a risk that
14 Plaintiff assumed when he brought the lawsuit, it seems unfair to limit Plaintiff's enhancement award to
15 an amount not much greater than an absent class member's share of the recovery. To encourage
16 employees like Plaintiff to assume the helm of class and representative champions (and thereby advance
17 the important public policies behind class actions), the Court should award something substantial to
18 Plaintiff for his readiness to receive less than absent aggrieved employees.

19 6. **The Public Policy Behind Class and Representative Actions Justifies The**
20 **Representative Enhancement Award**

21 The public policy behind class and representative actions that seek an aggregate recovery of
22 otherwise small amounts of money is equally important and has been recognized by the courts. "The
23 policy at the very core of the class action mechanism is to overcome the problem that small recoveries do
24 not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class
25 action solves this problem by aggregating the relatively paltry potential recoveries into something worth
26 someone's (usually an attorney's) labor." *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591 quoting
27 *Mace v. Van Ru Credit Corp.* (1997) 109 F.3d 338, 344. "Frequently numerous consumers are exposed
28 to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one

1 consumer would provide proof for all. Individual actions by each of the defrauded consumers are often
2 impracticable because the amount of individual recovery would be insufficient to justify bringing a
3 separate action; thus, an unscrupulous seller retains the benefits of its wrongful conduct.” *Vasquez v.*
4 *Superior Court* (1971) 4 Cal.3d 800. “A company which wrongfully exacts a dollar from each of
5 millions of customers will reap a handsome profit; the class action is often the only effective way to halt
6 and redress such exploitation.” *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381. “A current
7 employee who individually sues his or her employer is at greater risk of retaliation. We have recognized
8 that retaining one's employment while bringing formal legal action against one's employer is not a viable
9 option for many employees.” *Gentry v. Superior Court* (2007) 42 Cal.4th 443. If would-be class action
10 plaintiffs are not adequately incentivized to assume the risk of a substantial cost award, it is unlikely that
11 they will bring such lawsuits in the first place.

12 The average aggrieved employees in this case would be unlikely to pursue his or her individual
13 claims against Defendants because such a claim would be too small to justify the cost and the risk. An
14 aggrieved employee will be unlikely to find an attorney who is willing to pursue an individual's claims
15 because the claim is too small to justify the hundreds of hours of legal work necessary to prove each
16 claim. Only the class and representative action vehicle, which allows for the aggregation of hundreds of
17 risky small dollar value claims, makes such claims advantageous for an attorney to pursue on a
18 contingency basis and there can be no class action without a class member assuming the great fiduciary
19 responsibilities of class representative. *Id.* This Court should allow the enhancement awards requested
20 because to do otherwise would discourage employees (and attorneys) from bringing class and
21 representative actions in the first place.

22 If would-be class and representative action plaintiffs are not adequately incentivized to advance
23 the public policy behind class actions in court in light of the time and risk it will entail, it is unlikely
24 that they will bring class action lawsuits in the first place. Once employers realize that such lawsuits are
25 unlikely, they will have no incentive to comply with wage and hour laws. (Setareh Decl., ¶ 41.)

26 **7. The Risk of Impairment To Each Plaintiff's Job Prospects Justifies The**
27 **Enhancement Award**

28 Plaintiff faced the risk that he could face worsened career prospects for suing a former

1 employer for wage and hour violations and serving as the named plaintiff in a representative action
2 lawsuit. (Setareh Decl., ¶ 41.) Because he filed a lawsuit in California Superior Court, a public record
3 now exists that Plaintiff sued his employer for Labor Code violations – a fact that would not be lost on
4 prospective employers considering him for a job, especially in the same industry. Common sense
5 dictates that an employer will think twice about hiring someone who sued their last employer.
6 California even has laws to address this risk: Labor Code section 1102.5 prohibits retaliation against
7 employees who speak up about Labor Code violations and Labor Code section 98.6 prohibits
8 discrimination against employees who bring Labor Code violations to the attention of the Labor
9 Commissioner. Thus, the risks to Plaintiff’s future jobs and job prospects show that the enhancement
10 awards sought is fair, adequate and reasonable, and warrant approval of the Court. (Setareh Decl., ¶
11 41.)

12 **8. The Low Individual Burden On Each Aggrieved Employee Justifies The**
13 **Representative Enhancement Award**

14 The burden on each aggrieved employee to pay Plaintiff’s enhancement award is extremely
15 modest. There are approximately 2,352 aggrieved employees. (Setareh Decl., ¶ 27.) Dividing the
16 \$5,000 enhancement award to Plaintiff evenly among the aggrieved employees yields a per person
17 payment of only \$2.13, an amount approximately 1.5% of the average aggrieved employee’s share of
18 the gross settlement amount. For an average aggrieved employee, this is an extremely small price to
19 pay to have someone else prosecute the absent aggrieved employee’s claims and bear the absent
20 aggrieved employee’s risk of an adverse cost award while the absent aggrieved employee simply waits
21 to receive his or her share of the winnings. (Setareh Decl., ¶ 41.)

22 **9. Plaintiff’s Counsel’s Dependence On Plaintiff Justifies The Enhancement**
23 **Award**

24 Plaintiff’s Counsel depended heavily on each Plaintiff’s input. Plaintiff made this case possible
25 for a number of reasons. First, Plaintiff challenged his employers on unlawful practices that led to
26 Defendants paying some of the unpaid wages to the remainder of their employees. Plaintiff provided
27 Plaintiff’s Counsel with detailed descriptions of how Defendants’ business operates, the hours and
28 scheduling of employees, and the nature of the work they performed. (Setareh Decl., ¶ 41.)

1 //

2 //

3 **V. CONCLUSION**

4 For all the reasons discussed above, Plaintiff respectfully requests that this Court approve the
5 motion in its entirety and approve the proposed Settlement.

6

7 DATED: September 1, 2022

SETAREH LAW GROUP

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9

/s/ Farrah Grant

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SHAUN SETAREH

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THOMAS SEGAL

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