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

RENALDO GONZALES, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

DURHAM SCHOOL SERVICES, L.P.;
NATIONAL EXPRESS TRANSIT; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: CIVDS2009070

[Assigned for all purposes to the Hon. David Cohn,
Dept. S-26]

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

Date: April 21, 2021
Time: 10:00 a.m.
Dept: S-26

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

2 **PLEASE TAKE NOTICE** that on April 21, 2021, at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable David Cohn, judge presiding, in Department S-26
4 of the above referenced Court located at 247 W. Third Street, San Bernardino, California 92415,
5 Plaintiff Renaldo Gonzales (“Plaintiff”) will seek an Order approving the concurrently filed Joint
6 Stipulation of Settlement and Release under the Private Attorneys General Act (“Agreement” or
7 “Settlement”), pursuant to the procedures set forth in Labor Code section 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Kristen M. Agnew and Plaintiff Renaldo
10 Gonzales, the records and file herein, and on such other evidence as may be presented at the
11 hearing of the motion.

12
13 DATED: February 22, 2021

DIVERSITY LAW GROUP, P.C.

14
15 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

16
17
18 Attorneys for Plaintiffs and the 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 Renaldo Gonzales (“Plaintiff”) hereby moves the Court for an order
5 approving the non-reversionary PAGA settlement as set forth in the concurrently filed Joint
6 Stipulation of Settlement and Release under the Private Attorneys General Act (“Agreement” or
7 “Settlement”). The operative Complaint sets forth a single cause of action for violation of PAGA
8 predicated on Defendants Durham School Services, L.P. and National Express Transit
9 (collectively referred to as “Defendants”) alleged policy and practice of paying wages beyond
10 the time periods as allowed pursuant to Labor Code section 204. Plaintiff seeks to recover civil
11 penalties against Defendants on behalf of the State of California and all current and former
12 California employees of National Express Transit Corp., Inc. who were classified as exempt and
13 were paid wages by Defendants, at any time from March 11, 2019 to July 11, 2020 (“Aggrieved
14 Employees”).

15 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the
16 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
17 investigation and informal discovery, including Defendants’ production of relevant handbooks
18 during the applicable period, wage statements and pay period data. Pursuant to the terms of the
19 proposed Settlement, Defendants will pay the gross amount of \$55,000.00 (the “Maximum
20 Settlement Amount”), which includes a payment of approximately \$21,061.45 in civil penalties
21 to the Labor and Workforce Development Agency (“LWDA”). The proposed release is narrowly
22 tailored to release only claims for civil penalties under PAGA predicated on Labor Code section
23 204.

24 The proposed Settlement constitutes an adequate, fair, and reasonable settlement on
25 behalf of the LWDA and Aggrieved Employees, and accomplishes the goals of PAGA.¹

26 _____
27 ¹ Further, and without regard to the substantial monetary relief conveyed by the Settlement, the
28 efforts of Plaintiff and his counsel prompted Defendant to amend its payroll practices, such that

1 **II. PROCEDURAL HISTORY**

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

3 **1. The History of the Key Pleadings.**

4 On March 11, 2020, Plaintiff submitted his written notice under Labor Code section
5 2699.3 (the “PAGA Notice”) to the LWDA and Defendants. (Declaration of Kristen M. Agnew
6 (“Agnew Decl.”) ¶ 3.) As set forth in the PAGA Notice, Plaintiff alleged that Defendants
7 violated Labor Code section 204. (*Id.*) Pursuant to Labor Code section 204(d), all earned wages
8 must be paid by the seventh day following the close of the pay period. Plaintiff contends that
9 Defendants had a consistent policy of paying wages to Aggrieved Employees on the eighth day
10 following the close of the pay period. (*Id.*)

11 On May 29, 2020, Plaintiff initiated the instant representative PAGA Action against
12 Defendants in the Superior Court of California, County of San Bernardino. (Agnew Decl. ¶ 4.)
13 Plaintiff asserts a single cause of action for violation of the PAGA, predicated on Defendants’
14 alleged violation of Labor Code section 204. (*Id.*) As alleged in the complaint, Plaintiff seeks to
15 recover PAGA penalties on behalf of exempt employees of Defendant. (*Id.*)

16 On August 10, 2020, Plaintiff filed a First Amended Class and Representative Action
17 Complaint. (Agnew Decl. ¶ 5.) The First Amended Complaint expanded the scope of the alleged
18 aggrieved employees to include both exempt and non-exempt employees and added a class-wide
19 claim predicated on Defendants’ alleged violation of Labor Code section 226(a). (*Id.*) Plaintiff
20 subsequently discovered that previously-filed and pending class actions completely subsumed
21 the class-claim and the claims of the non-exempt aggrieved employees alleged in the First
22 Amended Complaint. (*Id.* at ¶ 6.) Consequently, the Parties entered into a stipulation to allow
23 Plaintiff to further amend his complaint to pursue a representative PAGA cause of action
24 predicated on Labor Code section 204, on behalf of exempt employees. (*Id.*)

25 On September 30, 2020, Plaintiff filed the Second Amended Representative Action
26

27
28 Aggrieved Employees are now paid within the time periods allowed by Labor Code section 204.
(Agnew Decl. ¶ 10.)

1 Complaint (“Second Amended Complaint”). (Agnew Decl. ¶ 7.) The Second Amended
2 Complaint alleges a single cause of action for violation of the PAGA, predicated on Defendants’
3 alleged violation of Labor Code section 204. Plaintiff seeks PAGA penalties on behalf of exempt
4 employees only. (*Id.*) The Second Amended Complaint is the operative complaint. (*Id.*)

5 On or about October 29, 2020, Defendants filed an Answer. (Agnew Decl. ¶ 8.)
6 Defendants deny all allegations in the Action and all claims of any wrongdoing whatsoever. (*Id.*)

7 **2. Investigation and Discovery.**

8 In light of the narrow claims at issue, Plaintiff and Defendants (collectively, the
9 “Parties”) agreed to explore the possibility of settlement and engage in direct settlement
10 negotiations. (Agnew Decl. ¶ 9.)

11 The Parties engaged in arm’s length negotiations over the course of several months.
12 (Agnew Decl. ¶ 9.) On October 14, 2020, Defendants produced a copy of the pertinent payroll
13 policies, data related to the number of Aggrieved Employees, and data related to the number of
14 pay periods in which Aggrieved Employees were paid on or after the eighth day following the
15 close of the pay period. (*Id.* at ¶ 10.) Defendants further represented that, as of July 12, 2020,
16 Defendants implemented new payroll policies and procedures that required wages to be paid in
17 compliance with Labor Code section 204. (*Id.*) Defendants provided confirmatory discovery to
18 substantiate the change in policy. (*Id.*)

19 Defendants confirmed that there were 49 Aggrieved Employees who received
20 approximately 971 wage statements from the start of the PAGA liability period on March 11,
21 2019 through July 11, 2020. (Agnew Decl. ¶ 11.) Using the data provided by Defendants,
22 Plaintiff’s Counsel performed a comprehensive damages analysis. (*Id.*)

23 On or about February 16, 2021, the Parties reached a settlement of the entire action.
24 (Agnew Decl. ¶ 12.)

25 //

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28 //

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

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

4 **A. The Aggrieved Employees**

5 The Settlement covers “all current and former California employees of National Express
6 Transit Corp., Inc. who were classified as exempt and were paid wages by Defendants any time
7 from March 11, 2019 to July 11, 2020” (the “Aggrieved Employees”). (Settlement Agreement §
8 B-2.) Based upon Defendants’ records, there are 49 Aggrieved Employees who received
9 approximately 971 wage statements reflecting the payment of wages from the start of the PAGA
10 liability period on March 11, 2019 through July 11, 2020. (*Id.*)

11 **B. Settlement Sum and Allocation**

12 The Settlement Agreement requires Defendants to pay the gross amount of Fifty-Five
13 Thousand Dollars (\$55,000.00) (the “Maximum Settlement Amount”). (Settlement Agreement
14 §§ B-9, C-1.) The balance of the Maximum Settlement Amount remaining after deduction of the
15 approved Enhancement Payment to Plaintiff, Attorneys’ Fees and Costs and the Settlement
16 Administrator’s costs (the “PAGA Penalties Fund”), will be available for distribution to the
17 LWDA and Aggrieved Employees. (*Id.* at §§ B-10, C-4.) Seventy-Five percent of the PAGA
18 Penalties Fund, or approximately \$21,061.45, will be paid to the LWDA for PAGA penalties.
19 (*Id.* at § C-4; Agnew Decl. ¶ 19.) The remaining twenty-five percent, or approximately
20 \$7,020.49, will be distributed to Aggrieved Employees. (Settlement Agreement § C-4; Agnew
21 Decl. ¶ 19.)

22 Based on the number of Aggrieved Employees, employees will be entitled to recover, on
23 average, up to \$143.27 each. (Agnew Decl. ¶ 12.) The amount that any particular Aggrieved
24 Employee will be entitled to recover will be greater or lower than this average depending on the
25 number wage statements reflecting the payment of wages that the employee received during the
26 period of March 11, 2019 to July 11, 2020, with some entitled to receive more, and others less.
27 (*Id.*) This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who
28 have allegedly suffered greater harm. (*Id.* at ¶ 20.)

1 As part of the Settlement Agreement, Defendants do not object to Plaintiff's Counsel's
2 request for attorneys' fees of approximately one-third of the Maximum Settlement Amount, *i.e.*
3 Eighteen Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$18,333.33),
4 plus up to Three Thousand Five Hundred Dollars (\$3,500.00) for reimbursement of litigation
5 costs, subject to the Court finally approving this Settlement.² (Settlement Agreement §C-9.)
6 Also, as part of the Settlement Agreement, Defendants do not object to Plaintiff's request for an
7 Enhancement Payment of Five Thousand Dollars (\$5,000). (*Id.* at § C-8.)

8 Finally, the Settlement Agreement provides for the payment of the fees and expenses
9 reasonably incurred by the Settlement Administrator. (Settlement Agreement § C-10.) The
10 Parties have agreed to utilize Phoenix Settlement Administrators to administer the settlement,
11 with the administration costs estimated to be \$1,000.00. (*Id.* at §§ B-17, C-10.)

12 **C. Scope of the Released Claims**

13 In exchange for the payments described above, Plaintiff, the State of California, and
14 Aggrieved Employees will release Defendants and Released Parties from:

15 All claims for penalties under the California Private Attorneys'
16 General Act, including costs and attorneys' fees related thereto,
17 predicated on the violation of Labor Code section 204 arising from
18 or reasonably related to the facts alleged in the Complaint that
accrued during the PAGA Period.³

19 (Settlement Agreement §§ B-15, E-1.) The Settlement, however, does not release Defendants
20 from violations of any predicate statutes other than PAGA, and will not affect a waiver of claims
21 by Aggrieved Employees against Defendants for any of the underlying Labor Code claims. The
22 release is expressly limited to claims for civil penalties under PAGA. (*Id.* at § B-15.)
23
24
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26
27 ² As set forth below, Plaintiff's Counsel seeks reimbursement for its anticipated actual litigation
costs in the amount of \$2,584.73. (Agnew Decl. ¶ 35.)

28 ³ PAGA Period is defined to mean "the period of March 11, 2019 to the date the Court approves
the Parties' Settlement." (Settlement Agreement § B-11.)

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
9 adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Ochoa-*
10 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s
11 declared purpose is to supplement enforcement actions by public agencies, which lack adequate
12 resources to bring all such actions themselves. Unlike class actions, these civil penalties are not
13 meant to compensate unnamed employees because the action is fundamentally a law
14 enforcement action.” [citations omitted].)

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

1 PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil
2 penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the
3 “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i);
4 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA
5 representative’s recovery is “an incentive to perform a service to the state, not restitution for
6 wrongs done to members of the class”).

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

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

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

28 Notably, unlike the class action settlement approval process, there is also no statutory

1 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
2 2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
3 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
4 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at*13.

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

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

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

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

20 If approved, the Settlement would release Defendants and other releasees from all PAGA
21 claims predicated on the violation of Labor Code section 204, and nothing more. The Settlement
22 would not impact any other Aggrieved Employees’ ability to pursue PAGA claims predicated on
23 other Labor Code violations or any Labor Claims not predicated on PAGA. Therefore, the
24 limited scope of the release also supports approval. Because an aggrieved employee’s PAGA
25 action is a substitute for an action brought by the government, “judgment in [a PAGA] action is
26 binding not only on the named employee plaintiff but also on government agencies and any
27 aggrieved employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 986. However, “the
28 nonparty employees, because they were not given notice of the action or afforded any

1 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
2 penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party Aggrieved Employees retain
3 all rights “to pursue or recover other remedies available under state or federal law, either
4 separately or concurrently with an action taken under this part”).

5 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
6 confined to the statutory penalties available under PAGA for violation of Labor Code section
7 204.**Error! Bookmark not defined.** The release is therefore appropriately tailored.

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

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

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

14 Plaintiff asserts that his representative PAGA claim is based on the allegation that
15 Defendants had a consistent policy of paying wages to Aggrieved Employees on or after the
16 eighth day following the close of the pay period, in violation of Labor Code section 204. (Agnew
17 Decl. ¶ 3.) The Parties dispute whether wages were timely paid. (*Id.* at ¶¶ 8, 23, 24.) Defendants,
18 moreover, have further argued that even if the Court ultimately found a violation of Labor Code
19 section 204, the alleged violation is a technical one, which did not result in the underpayment of
20 wages to Aggrieved Employees. (*Id.* at ¶ 24.) Additionally, the Court has discretion under PAGA
21 to reduce the maximum allowable PAGA penalties or to decide not to award PAGA penalties at
22 all. (*Id.* at ¶ 25.) Defendants may have sought summary judgment on this issue or proceeded to
23 trial. (*Id.* at ¶ 23.) Should Defendants have prevailed, the State of California and Aggrieved
24 Employees would have been left with zero recovery. (*Id.*)

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

26 Defendants have indicated that there were 971 pay periods in which Aggrieved
27 Employees received wage statements reflecting the payment of wages during the period of
28 March 11, 2019 through July 11, 2020. Therefore, pursuant to the PAGA, Plaintiff has calculated

1 total exposure at \$97,100. (Agnew Decl. ¶ 22.) However, even if Plaintiff were to prevail on the
2 merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code section
3 2699(f)(2) the Court can decline to award the full amount of PAGA penalties where "...if, based
4 on the facts and circumstances of the particular case, to do otherwise, would result in an award
5 that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of
6 Appeal's decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA
7 claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
8 employer's good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018).
9 Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O'Connor*,
10 2016 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such
11 award "could well be reduced, as a court may reduce the penalty when to do otherwise would
12 result in an award that is unjust, arbitrary and oppressive, or confiscatory").

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

19 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
20 penalties. However, Plaintiff is aware that Defendants could make a compelling argument to the
21 contrary. (Agnew Decl. ¶ 24.)

22 3. Settlement is Reasonable When Compared to the Value of the 23 Underlying Labor Code Claim.

24 The Court's assessment of the proposed Settlement must take into account that any
25 penalties awarded may be subject to substantial reduction. When this is considered, in
26 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
27 nothing, the proposed settlement is patently reasonable. Indeed, the Maximum Settlement
28 Amount is approximately 56.6% of the maximum amount of penalties at issue. (Agnew Decl. ¶

22.) Settlement for this reduced value allows for the distribution of penalties in an amount which accounts for the risk of continued litigation, and Defendants’ likely arguments that higher penalties would have been confiscatory. It also sufficiently deters Defendants from engaging in similar conduct in the future, which is one of the primary goals of PAGA.

The proposed settlement exceeds PAGA settlements that courts have approved in other cases, when considered as a percentage of the overall settlement value of the case. The proposed settlement, in fact, far exceeds other PAGA settlements approved by courts—including those that 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 allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as independent contractors. 2016 WL 3561742, (N.D. Cal. June 23, 2016). The parties’ settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at *5.

A PAGA allocation need not represent any particular percentage of the overall settlement value in order to secure court approval, and courts routinely approve PAGA settlements representing only a tiny fraction of the overall settlement value. Here, on the other hand, the Settlement proposes a payment of approximately \$21,061.45 in penalties to the LWDA and approximately \$7,020.49 in penalties to the Aggrieved Employees, which is an outstanding result in a PAGA only case. (*See Agnew Decl.* ¶ 19.) The proposed settlement sum in this case vastly exceeds, both in terms of the total dollar amount and as a percentage of overall settlement value,

1 the typical PAGA settlement.

2 **F. The Attorneys' Fees are Reasonable.**

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

13 The common fund doctrine is predicated on the principle of preventing unjust
14 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
15 he may require the passive beneficiaries to compensate those who created the fund. Both
16 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
17 *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
18 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
19 been applied "consistently in California when an action brought by one party creates a fund in
20 which other persons are entitled to share." The reasons for applying the common fund doctrine
21 include: "...fairness to the successful litigant, who might otherwise receive no benefit because
22 his recovery might be consumed by the expenses; correlative prevention of an unfair advantage
23 to the others who are entitled to share in the fund and who should bear their share of the burden
24 of its recovery; encouragement of the attorney for the successful litigant who will be more
25 willing to undertake and diligently prosecute proper litigation for the protection or recovery of
26 the fund if he is assured that he will be properly and directly compensated should his efforts be
27 successful." *Id.*

28 Indeed, most recently, the California Supreme Court has also held that the award of

1 attorneys' fees in common fund wage and hour class action settlements should start with the
2 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
3 overwhelming majority of federal and state courts in holding that when class action litigation
4 establishes a monetary fund for the benefit of the class members, and the trial court in its
5 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
6 of a reasonable fee by choosing an appropriate percentage of the fund created.").

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

12 Here, as set forth in the Agnew Declaration, Plaintiff's attorneys have spent over 40.30
13 hours litigating this current action. ((Agnew Decl. ¶ 36.) Counsel, moreover, anticipates
14 spending an additional two hours conferring and reviewing e-mails and other written
15 communications with counsel for Defendant, the Settlement Administrator, and Aggrieved
16 Employees regarding post final approval matters, including payments and related issues. (*Id.*)
17 Based thereon, and based on counsel's hourly rate, the lodestar equates to \$29,610, which is in
18 excess of the \$18,333.33 fee request. (*Id.*, Ex. C.) Thus, the requested fee amount of \$18,333.33
19 is fair and reasonable.

20 Additionally, Plaintiff's Counsel's cost reimbursement request in the amount of
21 \$2,584.73 is also reasonable. (Agnew Decl. ¶ 35, Ex. B.) The costs were all directly incurred in
22 the prosecution of this action, including filing fees, postage and copying. (*Id.*) As such, the
23 requested costs should be awarded as fair and reasonable.

24 **G. The Settlement Administrator's Fees Should be Approved.**

25 The Parties have agreed to pay actual costs of administration, or \$1,000, to the Settlement
26 Administrator, Phoenix Settlement Administrators, to administer this settlement. (Settlement
27 Agreement §B-17.) The Parties believe that the administration fee is reasonable and should be
28 approved. (Agnew Decl. ¶ 18.)

1 **H. Plaintiff’s Enhancement Payment Should Be Approved.**

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

8 Here, Plaintiff seeks \$5,000 for his service award, which is intended to compensate
9 Plaintiff for the time spent on this case, including reviewing and verifying written discovery
10 responses, the potential for retaliation, and for executing a general release, including for all
11 known and unknown claims under Civil Code § 1542. (Declaration of Renaldo Gonzales ¶ 3.)
12 This requested enhancement is consistent with awards approved in other common fund cases.
13 *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)
14 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D.
15 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of
16 \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a
17 \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137
18 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v.*
19 *UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27,
20 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v.*
21 *Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class
22 representative in ERISA case).

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

24 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the
25 LWDA’s website. (Agnew Decl. ¶ 38.)
26
27
28

1 **V. CONCLUSION**

2 Based on the above, Plaintiff requests the Court approve the current PAGA settlement.
3
4

5 DATED: February 22, 2021

DIVERSITY LAW GROUP P.C.

6
7 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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9 Attorneys for Plaintiffs and the Aggrieved
10 Employees
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STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

On February 22, 2021, I served the following document(s) described as:

- on the interested parties in this action as follows:

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PROOF OF SERVICE

1 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
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3 completed and that all pages were received by the party(ies) identified herein or on the attached
4 mailing list.

5 I declare under penalty of perjury under the laws of the State of California that the
6 above is true and correct. Executed on February 22, 2021, at Los Angeles, California.

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9 Erika Mejia
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