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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MICHELLE GUTIERREZ, on behalf of herself
and all others similarly situated,

Plaintiff,

vs.

NEW HORIZONS: SERVING INDIVIDUALS
WITH SPECIAL NEEDS, a California
Corporation; and DOES 1 through 100,

Defendants.

Case No. 20STCV28128

*[Assigned for all purposes to the Hon. Terry
Green; Dept. 14]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
SETTLEMENT OF CLAIMS BROUGHT
UNDER THE PRIVATE ATTORNEYS'
GENERAL ACT AND REASONABLE
ATTORNEYS' FEES, COSTS, AND
ENHANCEMENT PAYMENT**

Date: March 10, 2022
Time: 8:45 a.m.
Dept.: 14

Reservation ID: 163743327199

Complaint Filed: July 24, 2020
Trial Date: None Set

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

PLEASE TAKE NOTICE that on March 10, 2022, at 8:45 a.m., or as soon thereafter as the matter may be heard in Department 14 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Plaintiff Michelle Gutierrez (“Plaintiff”), individually and on behalf of the State of California and other Aggrieved Employees, will, and hereby does, move this Court for entry of an Order as follows:

1. Granting approval, pursuant to California Labor Code § 2699(l), of the proposed settlement of claims brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698, *et seq.*) as set forth in the Parties’ Settlement Agreement, a true and correct copy of which is attached to the Declaration of Paul K. Haines filed concurrently herewith;
2. Appointing Phoenix Settlement Administrators as the Settlement Administrator;
3. Approving the proposed Explanatory Letter (attached as Exhibit A to the Settlement Agreement), and directing that it be distributed to the Aggrieved Employees pursuant to the terms of the Settlement Agreement;
4. Directing the distribution of the Gross Settlement Amount pursuant to the terms of the Settlement Agreement;
5. Approving an award of one-third of the Gross Settlement Amount (\$111,666.67) in attorneys’ fees to Plaintiff’s Counsel;
6. Approving an award of litigation costs to Plaintiff’s Counsel of \$12,586.48;
7. Approving an award of \$5,000.00 as Plaintiff’s Enhancement Payment, and
8. Approving up to \$5,000 in administration costs to Phoenix Settlement Administrators.

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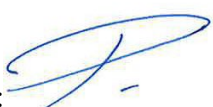
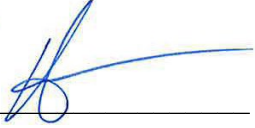
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1 This Motion is based on this Notice; the attached Memorandum of Points and Authorities;
2 the declaration of Paul K. Haines and all exhibits attached thereto; the declaration of Sean M.
3 Blakely; the declaration of Jodey Lawrence and all exhibits attached thereto; the declaration of
4 Plaintiff Michelle Gutierrez; the Settlement Agreement; Plaintiff's Request for Judicial Notice
5 and all exhibits attached thereto; all other pleadings and papers on file in this action; and on any
6 further oral or documentary evidence or argument presented at the time of hearing.

7
8 Dated: February 10, 2022

HAINES LAW GROUP, APC

9
10 By:  

Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiff and Aggrieved
Employees

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TD Ameritrade Account Holder Litig.
2011 WL 4079226 (N.D. Cal. Sept. 13, 2011)6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Michelle Gutierrez (“Plaintiff”), an “Aggrieved Employee” under the Private
4 Attorneys General Act of 2004 (“PAGA”), respectfully moves this Court for an Order granting
5 approval of the Settlement Agreement (“Settlement”) with Defendant New Horizons: Serving
6 Individuals with Special Needs (“Defendant” or “New Horizons”).¹ This PAGA action seeks civil
7 penalties predicated on New Horizons’ alleged failure to provide compliant meal and rest periods,
8 alleged failure to reimburse for necessary business expenses, and alleged failure to pay all final
9 wages and issue accurate itemized wage statements. The proposed Settlement, under which New
10 Horizons has agreed to pay a non-reversionary Gross Settlement Amount of \$335,000.00, will
11 resolve Plaintiff’s representative claim filed on behalf of the State of California and the following
12 “Aggrieved Employees:”

13 All current and former non-exempt employees of Defendant New Horizons:
14 Serving Individuals with Special Needs (“New Horizons”) who worked for
15 New Horizons in California at any time from May 19, 2019 through the date
of the Court Order granting approval of the PAGA Settlement. (“PAGA
Period”).

16 Notably, the relief provided for under the Settlement, and the claims released thereunder,
17 are *solely* for the payment of *civil penalties* under the PAGA.

18 In deciding whether to grant approval of the Settlement, the primary issue to be decided
19 is whether the Settlement is fair, reasonable, and adequate. As set forth herein, the proposed
20 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it
21 (1) is the product of arm’s-length negotiations; (2) was negotiated by attorneys experienced in
22 wage-and-hour issues and PAGA litigation with the assistance of an experienced, neutral
23 mediator; (3) was negotiated subsequent to undertaking sufficient investigation to evaluate the
24 relative strength and value of Plaintiff’s PAGA claim; and (4) reflects a reasoned compromise

25
26
27 The proposed Settlement Agreement is attached as Exhibit 1 to the Declaration of Paul K. Haines
28 filed herewith. The Explanatory Letter to accompany Aggrieved Employees’ Individual PAGA
Payments is attached as Exhibit A to the Settlement Agreement.

1 based directly on the relative strength and value of the PAGA claim, as well as the risks, expenses,
2 complexity and likely duration of further litigation.

3 As noted, the Settlement provides for a Gross Settlement Amount (“GSA”) of
4 \$335,000.00. *See* Settlement, §§ I.9; III.2. After deducting amounts for requested attorneys’ fees
5 (one-third of the GSA, \$111,666.67), litigation costs (\$12,586.48), Plaintiff’s Enhancement
6 Payment (\$5,000.00), and administration costs (\$5,000.00), the Settlement provides for
7 distribution of a Net Settlement Amount (“NSA”) of approximately \$200,746.85 to Aggrieved
8 Employees and the California Labor & Workforce Development Agency (“LWDA”). *See*
9 Settlement, §§ I.10; III.4-5.

10 The Net Settlement Amount shall be distributed 75% (approximately \$150,560.13) to the
11 LWDA, and 25% (approximately \$50,186.71) to Aggrieved Employees, pursuant to the
12 requirements of the PAGA as codified in Lab. Code § 2699(i). *See* Settlement, § III.5. There are
13 approximately 496 Aggrieved Employees. *Id.*, § I.2. Thus, the average Individual PAGA Payment
14 to Aggrieved Employees is estimated at \$101.18.

15 The GSA of \$335,000.00 represents a positive result for the State of California and
16 Aggrieved Employees. Further litigation may have resulted in a smaller recovery or even no
17 recovery at all, based on the defenses asserted by New Horizons and given the significant
18 litigation risks involved. Moreover, the GSA is greater than other PAGA penalty awards approved
19 as reasonable. *See, e.g., Penaloza v. PPG Industries Inc.*, Case No. BC471369, 2013 WL 2917624
20 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving total PAGA set-aside of \$5,000, or
21 \$7.49 per employee); *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013
22 WL 1182822 (Super. Ct. L.A. County, Mar. 12, 2013) (approving PAGA set-aside of \$10,000, or
23 \$3.33 per employee). The amounts requested for attorneys’ fees and costs, enhancement payment,
24 and administration costs are all fair, adequate, and reasonable. Thus, Plaintiff respectfully
25 requests that the Court enter the [Proposed] Judgment and Order submitted concurrently herewith.

26 **II. SUMMARY OF THE LITIGATION**

27 **A. Brief Factual Background and Summary of Claims**

28 New Horizons provides job training and placement, education services, counseling,

1 residential services, and various social programs to more than 1,200 individuals (age 16 and older)
2 and social/recreational services to nearly 3,000 individuals throughout the greater San Fernando
3 and Santa Clarita Valleys of Southern California. *See* Declaration of Paul K. Haines (“Haines
4 Decl.”), ¶ 11. Plaintiff worked for New Horizons as a non-exempt “Direct Support Professional”
5 from approximately August 2013 through December 2019. *See* Declaration of Michelle Gutierrez
6 (“Gutierrez Decl.”), ¶ 2.

7 Plaintiff’s PAGA claim is predicated on New Horizons’ unlawful meal and rest period
8 policies and practices, failure to reimburse necessary business expenses, and derivative and stand-
9 alone wage statement violations.

10 On May 19, 2020, Plaintiff sent a letter by certified mail to New Horizons, and online to
11 the LWDA, describing New Horizons’ alleged Labor Code violations, as required by Labor Code
12 § 2699.3. Haines Decl., ¶ 12 & Exh. 2; *see also* Settlement, § I.1. On July 24, 2020, after the
13 prescribed 65-day waiting period under Labor Code § 2699.3(a)(2)(A), Plaintiff filed a Complaint
14 in Los Angeles Superior Court for PAGA civil penalties against New Horizons. Haines Decl., ¶
15 12.

16 After the case was at issue, the Parties began an informal exchange of documents and
17 information, and the Parties agreed to mediate Plaintiff’s PAGA claims. Haines Decl., ¶ 13. In
18 connection with mediation, New Horizons provided Plaintiff with extensive informal discovery.
19 *Id.* New Horizons produced timekeeping and payroll records for a 10% random sampling of
20 aggrieved employees during the PAGA Period; a spreadsheet containing hire dates, termination
21 dates, and other information for all aggrieved employees; and its employee handbook and other
22 written policies in effect during the PAGA Period. *Id.*; *see also* Settlement, § II.4. This discovery
23 allowed the Parties to assess the merits and value of Plaintiff’s PAGA claim, and New Horizon’s
24 potential defenses. Haines Decl., ¶ 13.

25 On April 29, 2021, the Parties attended mediation with Jeffrey Krivis, Esq., a preeminent
26 wage and hour mediator. Haines Decl., ¶ 14; *see also* Settlement, § II.5. During mediation, the
27 Parties vigorously debated Plaintiff’s ability to proceed on a representative basis, the legal basis
28 for Plaintiff’s claims and New Horizons’ defenses, the potential amount of penalties, and the

Parties’ data analyses and conclusions based thereon. Haines Decl., ¶ 14. Ultimately, with the assistance of Mr. Krivis, the Parties agreed in principle to resolve Plaintiff’s PAGA claims. *Id.* Over the following months, the Parties negotiated and finalized the Settlement Agreement now before the Court. *Id.*

III. SUMMARY OF THE SETTLEMENT

A. “Aggrieved Employees” Defined

Aggrieved Employees are defined as “all current and former non-exempt employees of New Horizons who worked for New Horizons in California at any time during the PAGA Period.” *See* Settlement, § I.2. The PAGA Period is defined as May 19, 2019 through the date of the Court Order granting approval of the PAGA Settlement, or to the date the Cap on PAGA Pay Periods is met pursuant to Section III.3 of the Settlement Agreement, whichever is later. *Id.*, § I.12.

B. Monetary Terms

As noted, the Settlement provides for New Horizons’ payment of a non-reversionary GSA of \$335,000.00. Settlement, §§ I.9; III.2. After deducting amounts for requested attorneys’ fees, litigation costs, Plaintiff’s Enhancement Payment, and settlement administration costs, the Settlement provides for the remaining Net Settlement Amount (“NSA”) to be distributed 75% to the LWDA and 25% to Aggrieved Employees, pursuant to Lab. Code § 2699(i). *Id.* at §§ I.10; III.5. The 25% portion to Aggrieved Employees shall be distributed based on each Aggrieved Employee’s proportional number of pay periods worked for New Horizons in California during the PAGA Period. *Id.*, at § III.5.

1. *Requested Attorneys’ Fees and Costs, Administration Costs, and Plaintiff’s Enhancement Payment*

Plaintiff’s Counsel requests one-third of the GSA (i.e., \$111,666.67) in attorneys’ fees, and up to \$12,586.48 in litigation costs. Settlement, § III.4(a). As discussed in detail below, a fee award of one-third of the GSA is fair, adequate, and reasonable as a percentage of the fund and is in line with fee awards in other PAGA settlements.

The Parties have agreed to engage Phoenix Settlement Administrators (“Phoenix”) as the third-party settlement administrator. *See* Settlement, §§ I.3; IV.1. Phoenix will update Aggrieved Employees’ addresses using the National Change of Address database, calculate and distribute

1 Individual PAGA Payments, mail payments to all Aggrieved Employees together with the
2 Explanatory Letter, and perform other duties that are integral to the effectuation of the Settlement.
3 *Id.*, at §§ IV.1-6. Plaintiff requests that the Court approve \$5,000.00 in administration costs to
4 Phoenix, which will cover all costs incurred by Phoenix in connection with the Settlement. *Id.* at
5 §§ I.10; III.4(c); *see also* Declaration of Jodey Lawrence (“Lawrence Decl.”), Exh. B.

6 Finally, Plaintiff requests an enhancement payment of \$5,000, in recognition of Plaintiff’s
7 contributions to this case and her efforts in bringing this case to successful resolution. *See*
8 Gutierrez Decl., ¶¶ 7-9; *see also* Settlement, §§ I.10, III.4(b).

9 **2. Payment to LWDA and Aggrieved Employees**

10 As stated, the NSA will be distributed 75% to the LWDA and 25% to Aggrieved
11 Employees, pursuant to Labor Code § 2699(i). Settlement, § III.5. Based on the above requested
12 distributions, the NSA is estimated to be \$200,746.85, with \$150,560.13 paid to the LWDA and
13 \$50,186.71 distributed to Aggrieved Employees. *Id.*, at §§ I.10; III.4-5.

14 **3. Funding of the Settlement**

15 New Horizons will fund the settlement in two instalments. *See* Settlement, § III.2. The
16 first instalment of \$167,500 will be funded on or before March 31, 2022, and the second
17 instalment of \$167,500 will be funded on or before September 30, 2023.² *Id.* Within twenty-one
18 (21) calendar days after the GSA has been fully funded, and after receiving approval from counsel
19 of the payment calculations, Phoenix will mail the Explanatory Letter and Individual PAGA
20 Payments to Aggrieved Employees via First-Class U.S. Mail. *See* Settlement, § IV.3.

21 Funds represented by undeliverable checks, or checks remaining uncashed after 180 days,
22 shall escheat to Neighborhood Legal Services of Los Angeles County, which is a 501(c)(3)

23
24 ² Following New Horizon’s representation of its financial position, New Horizons turned over its
25 financial records to Plaintiff’s retained expert, Keith D. Messerschmidt, who is a forensic
26 accountant and has consulted or provided expert testimony in hundreds of litigation and insurance
27 matters. Mr. Messerschmidt opines that New Horizons could not reasonably afford to pay the
28 GSA on a shorter schedule, and that the requested payment schedule was necessary for New
Horizons to remain in business without dramatically impacting its operations. Should the Court
wish to review a declaration from Mr. Messerschmidt attesting to these facts and New Horizon’s
financial condition, this declaration could either be filed in *camera* or filed under seal, at the
Court’s request.

organization dedicated to providing legal services to indigent residents of Los Angeles County.
See Settlement, § IV.4.

IV. LEGAL ARGUMENT

A. Standards for Approval of a PAGA Settlement

The settlement of a PAGA claim requires court approval pursuant to the PAGA statute, which states that the “court shall review and approve any settlement of any civil action filed pursuant to this part.” Labor Code § 2699(l). Of course, “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226 at *9 (N.D. Cal. Sept. 13, 2011). “[T]he very essence of a settlement is... ‘a yielding of absolutes and an abandoning of highest hopes,’” as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624 (9th Cir. 1982). As such, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.*

Although the PAGA statute does not set forth the criteria by which a PAGA settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a class action settlement. However, “a PAGA claim asserted on a non-class representative basis... is not considered a class action but a law enforcement action, and therefore does not have to meet the requirements of [a class action].” *Casida v. Sears Holdings Corp.*, 2012 WL 253217 at *3 (E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 at *4 (E.D. Cal. Jul. 1, 2010) (“PAGA claims are law enforcement actions, not class actions”). A court’s review of a PAGA settlement implicates the following unique features that render the approval process distinct from approval of a class action settlement.

First, in evaluating the adequacy of the settlement, the court is not concerned with the amount(s) received by “aggrieved employees,” but rather, must focus on the total settlement amount in achieving PAGA’s objective. “The remedy sought in a PAGA suit consists of civil penalties, not individual or class damages.” *Mendez, supra*, 2010 WL 2650571 at *4. “Unlike

1 class actions, these civil penalties are not meant to compensate unnamed employees because the
2 action is fundamentally a law enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*,
3 2010 WL 1340777 at *4 (N.D. Cal. Apr. 2, 2010). As our Supreme Court recently confirmed,
4 “PAGA claims are ‘representative’ actions in the sense that they are brought on the state’s behalf.
5 The employee...‘represents the same legal right and interest as’ those agencies — ‘namely,
6 recovery of civil penalties that otherwise would have been assessed and collected by the
7 [LWDA].” *ZB, N.A. v. Sup. Ct.*, 8 Cal.5th 175, 185 (2019) (citing *Iskanian v. CLS Transp. Los*
8 *Angeles, LLC*, 59 Cal.4th 348, 380 (2014)).

9 Moreover, while “[a PAGA] action is ... designed to protect the public and penalize the
10 employer for past illegal conduct” (*Mendez*, 2010 WL 2650571 at *4), a PAGA claim – like any
11 settlement – involves a compromise that stops short of rendering findings of liability and
12 damages. “Unlike a class action seeking damages or injunctive relief for injured employees, the
13 purpose of PAGA is to incentivize private parties to recover civil penalties for the government
14 that otherwise may not have been assessed and collected by overburdened state enforcement
15 agencies.” *Ochoa-Hernandez*, 2010 WL 1340777 at *4.

16 Second, consistent with the fact that unnamed employees have no property interest in a
17 PAGA claim,³ “[u]nnamed employees need not be given notice of the PAGA claim, nor do they
18 have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez*, 2010 WL
19 1340777 at *5. This renders the approval process of a PAGA settlement distinct from a class
20 action settlement, as the Court need not employ the “two-step approval process” required for class
21 action settlements under Fed. R. Civ. Proc. Rule 23(e) and Cal. Rule of Court 3.769.

22 Finally, unlike a class action settlement under Rule 23(e) and Rule 3.769, the scope of
23 release in a PAGA settlement is limited to *civil penalties*. While “judgment in [a PAGA] action
24 is binding not only on the named employee plaintiff but also on government agencies and any
25 aggrieved employee not a party to the proceeding...the nonparty employees, because they were
26

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

not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.” *Arias v. Sup. Ct.*, 46 Cal. 4th 969, 986-87 (2009). Thus, the scope of release in a PAGA settlement is strictly confined to PAGA penalties.

1. *Factors in Evaluating a Representative PAGA Settlement.*

In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Sup. Ct.*, 89 Cal.App.3d 434, 438 (1979). In exercising these powers, the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited to:

[T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive, and trial courts should tailor the factors to each case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.* In the context of a PAGA settlement, the third and eighth factors (risk of maintaining class action status and reaction of class members to settlement) are inapplicable.

Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001) (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)). In addition, courts review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129-31 (2008). Information is sufficient where it allows the parties and the court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential Serv. LLC*, 175 Cal.App.4th

785, 801 (2009). This requirement exists so that the parties can provide the court with “a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar, supra*, 168 Cal.App.4th at 132.

a. The Strength of Plaintiff’s Case

Although she steadfastly maintains her claims are meritorious, Plaintiff acknowledges her position included real risks and uncertainty. For example, with respect to Plaintiff’s rest period claim, Plaintiff alleged that New Horizons failed to authorize and permit Plaintiff and Aggrieved Employees from taking all statutorily permitted off-duty rest periods during their shifts. Haines Decl., ¶ 16. New Horizons contends that it has always maintained lawful written rest period policies, including the number, duration, and frequency of rest periods, and that it has always authorized and permitted rest periods in accordance with those policies. *Id.* New Horizons further contends that Plaintiff and other Aggrieved Employees often worked on their own without direct supervision, and thus New Horizons contends that they had complete discretion regarding when and how to take their rest breaks. *Id.*

With respect to Plaintiff’s meal period claim, New Horizons contends that it has always maintained compliant written meal period policies, and contends that it utilized a lawful on-duty meal period agreement throughout the relevant time period. Haines Decl., ¶ 17. New Horizons argues, and Plaintiff does not dispute, that the nature of New Horizons’ employees’ work prevents them from being relieved of all duties during their work shift. *Id.* New Horizons also maintains that Plaintiff’s meal period claim would not be manageable on a representative basis, as individual inquiries would be required to establish which Aggrieved Employees experienced non-compliant meal periods, how many non-compliant meal periods each Aggrieve Employee experienced, and why a particular Aggrieved Employee had a non-compliant meal period during a particular shift. *Id.*

As for Plaintiff’s claims that New Horizons violated its wage statement and final payment obligations in violation of Labor Code §§ 226 and 203, respectively, New Horizons asserts it has strong, good-faith defenses to Plaintiff’s underlying claims, precluding a finding of a failure to pay all final wages that would otherwise result in waiting time penalties. Haines Decl., ¶ 18; *see*

1 also 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude
2 imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017)
3 (holding “good faith dispute” precluded imposition of waiting time penalties). New Horizons
4 further contends Plaintiff’s meal and rest period claims cannot support a claim for violations of
5 Labor Code §§ 226 or 203, as Courts of Appeal recently held in *Naranjo v. Spectrum Security*
6 *Servs., Inc.*, 40 Cal.App.5th 444, 473-75 (2019) (*review granted* Jan. 2, 2020) and *Betancourt v.*
7 *OS Rest. Svcs., LLC*, 49 Cal.App.5th 240, 248 (2020) (*review granted* Aug. 19, 2020). With
8 respect to Plaintiff’s claim that the wage statements issued by New Horizons failed to list the
9 applicable hourly rate for “Split Shifts” and the corresponding number of hours worked at the
10 “Split Shift” rate of pay, New Horizons argues that split shift premiums are not hourly rates of
11 pay which need to be included on wage statements pursuant to Labor Code § 226(a)(9). Haines
12 Decl., ¶ 18.

13 With respect to Plaintiff’s claim that New Horizons failed to reimburse Plaintiff and other
14 non-exempt employees for all necessary business expenditures, including cell phone expenses
15 and mileage, New Horizons contends that employees are not expected or required to use their cell
16 phones for work purposes. Haines Decl., ¶ 19. New Horizons further argues that it provided
17 employees with a method to seek reimbursement for cell phone expenses and mileage. *Id.* New
18 Horizons further argues that this claim is not suitable for representative treatment as
19 individualized inquiries would be required to determine the reasonableness of any expenses
20 incurred by the employee, whether each employee was properly reimbursed for his or her
21 expenses, and if they were under-reimbursed, by how much. *Id.*

22 New Horizons further maintains that even if the Court awarded PAGA penalties for any
23 of the alleged violations, the Court would substantially reduce the penalties based on the
24 discretionary factors listed in Labor Code § 2699(e)(2) (authorizing reduction in PAGA penalties
25 “if, based on the facts and circumstances of the particular case, to do otherwise would result in an
26 award that is unjust, arbitrary and oppressive, or confiscatory.”). Haines Decl., ¶ 20. Indeed, New
27 Horizons argues, many courts have reduced PAGA penalties drastically where, as here, the
28 employer presented good-faith defenses and attempted to comply with the law. *Id.*; *see, e.g.,*

1 *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming
2 reduction of PAGA penalties because “defendants took their obligations...seriously and attempted
3 to comply with the law”); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK, 2011 WL
4 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because
5 employer was “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504,
6 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith
7 attempts” to comply with the law).

8 **b. Risk, Expense, Complexity, and Duration of Further Litigation**

9 Although the Parties had engaged in significant informal discovery, the Parties still had
10 much written and deposition discovery to conduct if the case did not settle. Substantive motion
11 work and trial preparation also remained for the Parties, as well as potential appeals. As a result,
12 the Parties would likely incur considerably more attorneys’ fees and costs through trial and
13 possible appeal. The Settlement avoids those risks and the accompanying expense.

14 **c. Amount Offered in Settlement Given Realistic Value of Claims**

15 This proposed Settlement provides a fair and reasonable monetary recovery for the
16 Aggrieved Employees and the State of California in the face of hotly disputed claims. Plaintiff
17 estimated New Horizons’ realistic exposure for PAGA civil penalties as follows:

18 Based on the above-described violations, Plaintiff asserts that she would be able to seek
19 PAGA penalties for each Aggrieved Employee for each pay period in the PAGA limitations
20 period. Haines Decl., ¶ 21. Based on data provided by New Horizons, there were approximately
21 19,099 pay periods during the PAGA limitations period. *Id.*; *see also* Settlement, § III.3.
22 Assuming an initial violation rate of \$100 per pay period under Labor Code § 2699(f) (*see Amaral*
23 *v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (holding “initial” violation rate applies
24 to PAGA penalties until employer is notified it violated Labor Code)), Plaintiff estimated a
25 maximum potential PAGA exposure of \$1,909,900.00. Haines Decl., ¶ 21. However, because the
26 Court maintains discretion to reduce these penalties, and in light of New Horizons’ arguments
27 and defenses described above, Plaintiff discounted that figure by 50% for a risk of losing on the
28 merits, and by an additional 60% for risk of the Court reducing penalties, to arrive at a realistic

1 exposure of \$381,980. Haines Decl., ¶ 21; *see also, e.g., Thurman, supra*, 203 Cal.App.4th at
2 1136 (affirming reduction of PAGA penalties); *Fleming, supra*, 2011 WL 7563047 at *5
3 (reducing PAGA penalties by over 82%); *Carrington, supra*, 30 Cal.App.5th at 529 (affirming
4 PAGA civil penalty of just \$5 per pay period).

5 The proposed \$335,000.00 GSA therefore represents approximately 87.7% of Plaintiff's
6 reasonably forecasted total recovery, while avoiding the risks of proceeding through trial. Haines
7 Decl., ¶ 21. "The fact that a proposed settlement may only amount to a fraction of the potential
8 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
9 should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).
10 Plaintiff acknowledges there was substantial uncertainty and risk as to her claims. Approval of
11 the Settlement is appropriate, as the Settlement will provide tangible monetary relief to Aggrieved
12 Employees and the State of California.

13 **d. Discovery Completed and the Status of Proceedings**

14 As noted, the parties engaged in substantial informal discovery required to evaluate the
15 value of Plaintiff's PAGA claim. New Horizons provided Plaintiff with timekeeping and payroll
16 records for a 10% random sampling of aggrieved employees during the PAGA Period; a
17 spreadsheet containing hire dates, termination dates; and its employee handbook and other written
18 policies in effect during the PAGA Period. Haines Decl., ¶ 13. Only after the completion of this
19 comprehensive discovery, and significant discussions about the likelihood of prevailing on the
20 merits, did the Parties reach the proposed Settlement. Thus, this factor supports settlement
21 approval.

22 **e. The Experience and Views of Counsel**

23 "Parties represented by competent counsel are better positioned than courts to produce a
24 settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Sec.*
25 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff is represented by experienced wage and hour
26 counsel, who believe this Settlement to be fair and adequate for all involved. Haines Decl., ¶¶ 3-
27 10; Declaration of Sean M. Blakely ("Blakely Decl."), ¶¶ 2-6. This factor strongly supports
28 settlement approval. *Kullar, supra*, 168 Cal.App.4th at 130 ("The court undoubtedly should give

considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct.”).

B. The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the Settlement Fund

As the prevailing party in settlement, Plaintiff is entitled to recover attorneys' fees and costs for her claims. *See* Labor Code § 2699(g) (providing for attorney fees and costs in PAGA actions); Cal. Code Civ. Proc. § 1021.5. A fee award is justified where the legal action has produced its benefits by way of settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Comty. for Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983); *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff...for the benefit of all results in the creation or preservation of that fund, such plaintiff...may be awarded attorney's fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment); *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of the fund method for calculating attorneys' fees more accurately reflects the results achieved for the putative class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (“The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure.’”).

Fee awards of one-third of the settlement fund are routinely awarded in California courts in class and representative PAGA actions. The California Supreme Court recently confirmed its approval of the use of the “percentage of fund” method. *See Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) (“the percentage of fund method survives in California class action cases...”.) Specifically, the *Laffitte* Court held:

The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a

1 better approximation of market conditions in a contingency case, and the
2 encouragement it provides counsel to seek an early settlement and avoid
unnecessarily prolonging the litigation—convince us the percentage method
is a valuable tool that should not be denied our trial courts.

3 *Id.*, at 503 (internal citation omitted). Indeed, “[F]ee awards in class actions average around one-
4 third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008); *see also*
5 *Chavez v. Saticoy Lemon Ass’n*, 2015 WL 5561118 (Ventura Cty. Super. Ct., Aug. 29, 2015)
6 (approving attorneys’ fees of one-third of settlement fund in PAGA settlement); *Clavel v. Lupe’s*
7 *Thousand Oaks Mexican Restaurant, Inc.*, 2016 WL 1601223 (Ventura Cty. Super. Ct., Mar. 25,
8 2016) (same). This is also consistent with Plaintiff’s counsel’s experience in similar wage-and-
9 hour class and PAGA matters. Haines Decl., ¶ 22. Thus, the percentage sought by Plaintiff’s
10 counsel here (the same percentage sought by class counsel in *Laffitte*) is reasonable.

11 The requested fee award is also justified because Plaintiff’s counsel achieved a significant
12 monetary recovery in an uncertain and risky case, while bearing the substantial burden of
13 representation on a contingency basis, and the fees requested are in line with the market rate.
14 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional
15 results in a contingency case, significant risk and the absence of supporting precedents, are proper
16 considerations in awarding attorneys’ fees). Here, counsel expended significant time and
17 resources in litigating this case, which resulted in a favorable result for Plaintiff, the State of
18 California, and Aggrieved Employees in the face of significant defenses. Counsel also bore the
19 contingency risk of this litigation for the benefit of the Aggrieved Employees, as well as the State
20 of California (which elected not to take the case after receiving Plaintiff’s PAGA notice).

21 Critically, Plaintiff’s recovery in this case significantly exceeds other PAGA awards
22 approved by California courts. *See, e.g., Aguirre v. DSW, Inc.*, 2012 WL 11875296, *3 (C.D. Cal.
23 Nov. 29, 2012) (approving \$10,000 PAGA payment); *Garcia v. Gordon Trucking, Inc.*, 2012 WL
24 5364575, *7 (E.D. Cal. Oct. 31, 2012) (approving \$10,000 PAGA payment, finding it “comports
25 with settlement approval of PAGA awards in other cases. [Citations.]”); *Boyd v. Bank of Am.*
26 *Corp.*, 2014 WL 6473804, *8 (C.D. Cal. Nov. 18, 2014) (approving \$18,750 PAGA payment);
27 *Franco v. Ruiz Food Prods.*, 2012 WL 5941801, *14 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA
28 payment); *Chu v. Wells Fargo Inv., LLC*, 2011 WL 672645, *1 (N.D. Cal. Feb. 16, 2011) (\$10,000

PAGA payment). That counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges, confirms the strength of the results achieved.

Counsel conducted extensive research regarding the merits of Plaintiff's claims, her ability to recover PAGA civil penalties, and New Horizons' potential defenses. Haines Decl., ¶¶ 13, 23. Counsel also conducted significant analysis of data and information produced by New Horizons, and used this data and analysis to draft a comprehensive mediation brief and exposure analysis. *Id.* Counsel attended a full-day mediation, and expended significant effort in preparing subsequent settlement documents, this Motion and supporting documents, and will oversee the settlement administration process. *Id.* Given the considerable potential for adverse outcomes in this case, the contingent risk borne by Plaintiff's counsel was great. *Id.* The quality of Plaintiff's counsel's work, and the efficacy and dedication with which it was performed, should be compensated.

Plaintiff's counsel have over two decades of combined wage-and-hour class and representative action experience and have been certified as class counsel in numerous wage and hour class actions. Haines Decl., ¶¶ 3-9; Blakely Decl., ¶¶ 2-6. Because it is reasonable to compensate counsel commensurate with their skill, reputation, and experience, a fee award of one-third of the GSA is reasonable. Other factors show the requested fee is reasonable. This case involved nuanced legal issues, including the legality of New Horizons' obligations to "authorize and permit" rest periods, reimburse necessary business expenses, as well as the availability and amount of PAGA civil penalties for the alleged Labor Code violations. Haines Decl., ¶ 22. New Horizons was also represented by experienced wage-and-hour litigation counsel. *Id.* Thus, Plaintiff submits the requested fee award is fair, reasonable and adequate and should be approved.

C. **The Requested Litigation Costs and Settlement Administration Costs Are Fair, Reasonable, and Adequate**

Plaintiff's request for reimbursement of litigation costs of up to \$12,586.48 is also fair and reasonable. All of Plaintiff's litigation costs are documented and reasonably incurred. *See* Haines Decl., ¶ 24 & Exh. 3. Moreover, the costs Plaintiff seeks are the types of costs routinely approved by courts. *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client"); *Ashker v.*

1 *Sayre*, 2011 WL 825713 at * 3 (N.D. Cal. Mar. 7, 2011) (“costs of reproducing pleadings, motions
2 and exhibits are typically billed by attorneys to their fee-paying clients” and are reimbursable);
3 *Trustees of Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d
4 1253, 1258-59 (9th Cir. 2006) (legal research costs are reimbursable); *In re Immune Response*
5 *Securities Litig.*, 497 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant
6 and expert fees, legal research, copies, postage, filing fees, messenger and overnight delivery
7 costs are reimbursable).

8 The request for administration costs of \$5,000.00 is also fair and reasonable. Phoenix was
9 selected because it is an experienced settlement administrator, and because it returned a
10 competitive bid. *See* Settlement, § I.10, III.4(c); *see also* Declaration of Jodey Lawrence &
11 Exhibits. Moreover, Phoenix will perform several important functions that are integral to the
12 implementation of the Settlement. Its modest requested fee is therefore reasonable.

13 **D. The Court Should Approve Plaintiff’s Requested Enhancement Payment**
14 **Because It Is Fair, Adequate, and Reasonable in View of Plaintiff’s Efforts**
and the Risks She Assumed in This Litigation.

15 Courts routinely approve enhancement payments to compensate named plaintiffs for the
16 services they provide and the risks they incur during representative litigation. *See, e.g., Bell v.*
17 *Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding “service payments” to named
18 plaintiffs); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
19 \$50,000 incentive payment); *see also* Plaintiff’s Request for Judicial Notice, Exhs. 1-6 (PAGA
20 settlement approval orders awarding incentive payments to representative PAGA plaintiffs
21 ranging from \$5,000 to \$20,000). Here, Plaintiff seeks an enhancement payment of \$5,000. *See*
22 Settlement, III.4(b). This request is reasonable given Plaintiff’s efforts in this case and the risks
23 she undertook on behalf of Aggrieved Employees. Plaintiff provided substantial factual
24 information and documents to counsel, assisted in identifying potential witnesses, and attended
25 numerous meetings with Plaintiff’s counsel. *See* Gutierrez Decl., ¶¶ 8-9. Accordingly, Plaintiff’s
26 requested enhancement payment is appropriate and justified as part of the Settlement.

27 ///

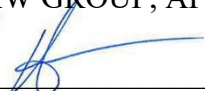
28 ///

1 **V. CONCLUSION**

2 For the reasons stated herein, Plaintiff respectfully requests that this Court grant Plaintiff's
3 Motion and adopt the [Proposed] Judgment and Order Granting Settlement Approval submitted
4 concurrently herewith.

5
6 Dated: February 10, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

7 By:  

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9 Sean M. Blakely
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