

David Mara, Esq., (SBN 230498)
Matthew Crawford, Esq. (SBN 310230)
MARA LAW FIRM, PC
2650 Camino del Rio North, Suite 302
San Diego, CA 92108
Telephone: 619.234.2833
Facsimile: 619.234.4048

Joseph Lavi, Esq. (SBN 209776)
Vincent C. Granberry, Esq. (SBN 276483)
Lavi & Ebrahimian, LLP
8889 W. Olympic Boulevard, Suite 200
Beverly Hills, California 90211
Telephone: (310) 432-0000
Facsimile: (310) 432-0001

Justin Hewgill, Esq. (SBN 259528)
HEWGILL COBB LOCKARD
1620 5TH Avenue, Suite 325
San Diego, CA 92101
Phone: (619) 432-2520
Fax: (619) 377-6026

Sarah E. Gallagher, Esq. (SBN 320487)
GOLD COAST COUNSEL
121 S Broadway, Suite 644
San Diego, California 92101
Ph: (833) 727-2442

Attorneys for Plaintiffs ALLONA FRAME, SARA
KHESRAWI, and ROXANA EDLYN GARCIA
NUNEZ, on behalf of themselves and all others
similarly situated and on behalf of the general public

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

ALLONA FRAME, SARA
KHESRAWI, and ROXANA EDLYN
GARCIA NUNEZ, on behalf of
themselves and all others similarly
situated, and on behalf of the general
public,

Plaintiffs,

v.

LUXOTTICA OF AMERICA, INC.,
LUXOTTICA RETAIL NORTH
AMERICA, INC.; and DOES 1-100,

Defendants.

Case No. 37-2020-00026895-CU-OE-CTL

**PLAINTIFFS' MOTION FOR APPROVAL
OF PAGA SETTLEMENT**

Date: September 15, 2023

Time: 10:30 a.m.

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1 **I. INTRODUCTION**

2 Plaintiffs Allona Frame, Sara Khesrawi, and Roxana Edlyn Garcia Nunez (“Plaintiffs”)
3 respectfully request that the Court approve of the Joint Stipulation and Settlement Agreement
4 (“Settlement Agreement”) entered into between Plaintiffs and Defendants, Luxottica of America,
5 Inc. and Luxottica Retail North America, Inc., (“Defendants”) (collectively Plaintiffs and
6 Defendants are referred to as the “Parties”) which resolves the claims raised against Defendants in
7 exchange for a non-reversionary \$2,700,000 Gross Settlement Amount (“GSA”).

8 This proposed settlement will settle the claims alleged in Plaintiffs’ first amended
9 complaint under the Private Attorneys General Act of 2004 (“PAGA”) on behalf of the California
10 Labor and Workforce Development Agency (“LWDA”) and all non-exempt, hourly employees
11 who worked in California for Defendants during the PAGA Period (“Aggrieved Employees”). The
12 PAGA Period is May 13, 2019 through May 8, 2023. The relief provided for under the Settlement
13 Agreement is solely for the payment of penalties under the PAGA.

14 Pursuant to California Labor Code § 2699(1)(2), a superior court shall review and approve any
15 settlement of any civil action filed pursuant to the PAGA. *See* Cal. Lab. Code § 2699(1)(2).¹ In
16 deciding whether to grant approval of the proposed settlement, the primary issue to be decided is
17 whether the settlement is fair, adequate, and reasonable. As set forth herein, the proposed settlement
18 embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is the product
19 of (1) arms-length negotiations, employing a neutral mediator, (2) negotiations by attorneys
20 experienced in these issues, (3) sufficient investigation which was necessary to evaluate the relative
21 strength and value of Plaintiffs’ claims, and (4) a reasoned compromise based on the strength and
22 value of the case, as well as, the risks, expense, complexity, and likely duration of further litigation.

23 **II. BACKGROUND**

24 **a. Procedural History**

25 Plaintiff Allona Frame sent her Notice of Labor Code Violations Pursuant to Labor Code
26 § 2699.3 on May 26, 2020. In the notice, Plaintiff Frame, a former non-exempt employee of

27 _____
28 ¹ Plaintiffs have uploaded a copy of the Settlement Agreement to the LWDA’s website at the same
time this motion is filed with the Court. *See* Declaration of David Mara, Esq., **Exhibits 7 and 8**.

Defendants, apprised the LWDA of her claims against Defendants Luxottica of America, Inc. and Luxottica Retail North America, Inc. Her notice alleged that Defendants violated the California Labor Code by failing to pay all straight time wages, failing to pay minimum wages, failing to pay all overtime wages, failing to provide lawful meal and rest periods, failing to provide accurate itemized wage statements, failing to pay all wages owed at termination, and failing to pay wages twice per month. Plaintiff Frame then filed this action against Defendants in the San Diego County Superior Court on July 31, 2020, alleging causes of action on behalf of Plaintiff and those similarly situated aggrieved employees under the PAGA for the above-mentioned wage and hour violations. Declaration of David Mara, Esq. (“Mara Dec.”) ¶ 9.

Plaintiff Sara Khesrawi sent her Notice of Labor Code Violations Pursuant to Labor Code § 2699.3 on June 19, 2020. In the notice, Plaintiff Khesrawi, a former non-exempt employee of Defendants, apprised the LWDA of her claims against Defendants Luxottica of America, Inc. and Luxottica Retail North America, Inc. Her notice alleged that Defendants violated the California Labor Code for Defendants’ failure to pay wages for all hours worked at minimum wage, failure to pay overtime wages for overtime hours worked, failure to pay overtime wages at the proper overtime rate, failure to authorize or permit meal periods and/or pay meal period premiums, failure to pay meal period premiums at the proper regular rate, failure to authorize or permit rest periods and/or pay rest period premiums, failure to pay rest period premiums at the proper regular rate, failure to provide complete and accurate wage statements, and failure to timely pay all earned and unpaid wages due upon separation of employment. Plaintiff Khesrawi then filed her action against Defendants in the Alameda Superior Court (Case No. RG20072437) on August 24, 2020, alleging a single cause of action on behalf of Plaintiff and those similarly situated aggrieved employees under the PAGA for the above-mentioned wage and hour violations. Mara Dec. ¶ 10.

Plaintiff Roxana Edlyn Garcia Nunez sent her Notice of Labor Code Violations Pursuant to Labor Code § 2699.3 on December 23, 2020. In the notice, Plaintiff Nunez, a former non-exempt employee of Defendants, apprised the LWDA of her claims against Defendants Luxottica of America, Inc. and Luxottica Retail North America, Inc. Her notice alleged that Defendants violated the California Labor Code by failing to provide lawful meal and rest periods, failing to pay wages

1 for all hours worked, failing to provide suitable seating, pressuring employees to make purchases,
2 failure to provide commission agreements, failing to provide accurate itemized wage statements,
3 and failing to pay all wages owed at termination. Plaintiff Nunez then filed her action against
4 Defendants in the San Diego Superior Court (Case No. 37-2021-00008375-CU-OE-CTL) on
5 February 26, 2021, alleging causes of action on behalf of Plaintiff and those similarly situated
6 aggrieved employees under the PAGA for the above-mentioned wage and hour violations. Mara
7 Dec. ¶ 11.

8 As part of the settlement process, the Parties agreed to the filing of the First Amended
9 Complaint in this action, adding Plaintiffs Khesrawi and Nunez and their respective PAGA claims.
10 The agreed upon First Amended Complaint is attached to the Mara Dec. as **Exhibit 2**. Plaintiffs
11 respectfully request that the Court deem filed the First Amended Complaint and deem it answered
12 with the answer currently on file in this action. Mara Dec. ¶ 12.

13 **b. Discovery and Investigation**

14 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data
15 that were needed to evaluate the case. These documents included requests for time and wage
16 records for the Class, employee handbooks in place during the class period, any policies regarding
17 meal breaks, rest breaks, the payment of wages, and employee training in place during the class
18 period. Plaintiffs also requested data surrounding the number of current and former employees, as
19 well as the number of shifts, workweeks, and pay periods worked by Class Members during the
20 relevant time period. Mara Dec. ¶ 13.

21 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
22 production of numerous documents and thousands of lines of data. Using the time and wage
23 records for Class Members produced by Defendants, and the data surrounding the number of
24 current and former Class Members, Plaintiffs' expert was able to provide numerous data points
25 used in establishing a potential exposure model in preparation for mediation. Mara Dec. ¶ 14.

26 **c. Mediation**

27 The Parties attended mediation with respected wage and hour mediator Hon. Jay C. Gandhi
28 (Ret.) on October 19, 2022. Shortly after the mediation, the mediator issued a mediator's proposal

1 that was ultimately accepted by the Parties. Since then, the Parties have met and conferred
2 regarding the terms of the settlement and finalized their agreement in the Settlement the Parties
3 now ask the Court to approve. A copy of the Settlement Agreement is attached to the Declaration
4 of David Mara, Esq. as **Exhibit 1**. Mara Dec. ¶ 15.

5 **III. THE PARTIES' CONFLICTING POSITIONS**

6 **a. Meal and Rest Periods**

7 Based upon the investigation, discovery, and litigation conducted, Plaintiffs contends that
8 Defendants fails to provide employees with lawful meal and rest periods. The California Supreme
9 Court succinctly described the mandate to provide meal periods: "Employers must afford
10 employees uninterrupted half-hour periods in which they are relieved of any duty or employer
11 control and are free to come and go as they please." *Brinker Rest. Corp. v. Superior Court* (2012)
12 53 Cal.4th 1004, 1037. In *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260, the
13 California Supreme Court ruled that these standards applicable to providing meal periods were
14 equally applicable to the rest period context.

15 The Labor Code penalizes an employer who fails to provide a rest period as mandated by
16 the Wage Orders by requiring the employer to pay the employee "one additional hour of pay at the
17 employee's regular rate of compensation for each workday that the meal or rest or recovery period
18 is not provided." *See* Labor Code section 226.7.

19 Plaintiffs contend that Defendants fail to permit employees to leave the premises for meal
20 and rest periods and use the time effectively for his or her own purposes free from employer
21 control. If they leave during a meal or a rest period, they have to submit themselves to the
22 company's controlling and invasive searches. Employees are thereby – as a matter of policy and
23 practice – prevented from using all their break time free of employer control for off-premises
24 pursuits. For this reason, Defendants do not relinquish all control over employees during their meal
25 and rest periods in violation of California law. Mara Dec. ¶ 16.

26 Defendants argue that employees were unquestionably provided with legally compliant
27 meal and rest periods in which employees can do whatever they choose. Defendants point out that
28 they have written meal and rest period policies that are facially lawful under California, which

1 explicitly state that employees must be completely relieved of all work and allowed to leave their
2 work location during meal periods and rest breaks. Defendants also point out that even if a security
3 search were to occur, as they do not occur during every shift, their policies clearly authorize meal
4 periods of at least thirty (30) minutes and fifteen (15) minute rest periods, permitting employees
5 to take full duration meal and rest periods in compliance with California law. Mara Dec. ¶ 17.

6 Defendants also argue that Plaintiffs would have to ask each employee whether they
7 thought security searches caused them to take meal periods shorter than thirty (30) minutes and
8 rest periods shorter than ten (10) minutes, despite Defendant's policies explicitly providing for a
9 minimum of thirty (30) minutes for meal periods and fifteen (15) minutes for rest periods. Because
10 each employee would have to testify as to their understanding of the policy, Plaintiffs' claims
11 would be unmanageable at trial. Mara Dec. ¶ 18.

12 **b. Unpaid Wages**

13 Employees must be paid for all "hours worked," as that phrase is defined in the Wage Order
14 and interpreted by California courts. Hours worked is defined in Wage Order 9-2001 – the Wage
15 Order that governs the employees in this case - as "the time during which an employee is subject
16 to the control of an employer, and includes all the time the employee is suffered or permitted to
17 work, whether or not required to do so." Wage Order 9-2001, Subd. 2(K); *see also Mendiola v.*
18 *CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). Under this standard, "it is only necessary that
19 the worker be subject to the control of the employer in order to be entitled to compensation."
20 *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000).

21 The *Morillion* Court reasoned that an employee is under the employer's control and entitled
22 to compensation when the employer "directs, commands or restrains' an employee." *Morillion*,
23 *supra*, 22 Cal. 4th at 583, quoting from *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968,
24 975 (1995) Whether time is considered compensable hours worked is based entirely on employer
25 control. *Id.* at 584. That is, whether during the time in question the employee is subject to an
26 employer's directive, command, or restraint. *Id.* at 583. Completely irrelevant to the analysis of
27 whether time is compensable work time is whether employees were permitted to engage in limited,
28 non-working activities, such as eating, reading, or sleeping, while they are under the employer's

1 directive, command, or restraint. *Id.* at 587. Again, it is the existence of the directive, command,
2 or restraint that the employee must oblige that determines whether the employee is engaged in
3 compensable hours worked. *Id.* at 583.

4 The recent California Supreme Court decision in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th
5 1038 is instructive. The Court was tasked with deciding whether mandatory bag checks should be
6 considered compensable time under California law. In reaffirming its holding in *Morillion*, the
7 court held:

8 “It is clear that plaintiffs are subject to Apple’s control while awaiting, and
9 during, Apple’s exit searches. Apple’s exit searches are required as a practical
10 matter, occur at the workplace, involve a significant degree of control, are imposed
primarily for Apple’s benefit, and are enforced through threat of discipline.

11 *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1056.

12 As discussed previously, Plaintiffs assert that Defendants require employees to undergo
13 security searches before leaving the premises. Similar to the situation in *Frlekin*, Defendants’
14 searches are required pursuant to policy, occur at the workplace, are subject to the same degree of
15 control for the bag searches, are imposed to prevent theft of Defendants’ property, and failure to
16 comply subjects the employee to discipline. As these searches occur when the employee is off-the-
17 clock when leaving for a meal period or at the end of their shift, this is compensable time that is
18 not being paid to the aggrieved employees each and every shift. Mara Dec. ¶ 19.

19 Defendants argues that beyond the limited accusations of Plaintiffs, there is no evidence
20 that employees performed *any* work-related tasks for which they were not compensated, and that
21 Defendant has uniform practices and policies *forbidding* employees from working off the clock.
22 Further, Defendants contend that all employees are trained that security searches, if and when they
23 occur, are to be performed while the employee is on the clock, and that Plaintiffs can point to no
24 policy that instructs otherwise. Mara Dec. ¶ 20.

25 As with the meal and rest period claims, Defendants also argue that Plaintiffs would have
26 to ask each employee whether they were subject to security searches while clocked out, despite
27 Defendant’s policies explicitly requiring employees to be clocked in for all work-related tasks.
28

1 Because each employee would have to testify as to their understanding of not only the policy, but
2 whether they were actually subject to an unpaid security search, Plaintiffs' claims would be
3 unmanageable at trial. Mara Dec. ¶ 21.

4 **c. Vacation Pay**

5 Pursuant to Section 227.3 of the Labor Code, whenever a contract of employment or
6 employer policy provides for paid vacations, and an employee is terminated without having taken
7 off his or her vested vacation time, all vested vacation shall be paid to him or her as wages at his
8 or her final rate in accordance with such contract of employment or employer policy respecting
9 eligibility or time served; provided, however, that an employment contract or employer policy
10 shall not provide for forfeiture of vested vacation time upon termination.

11 According to a May 21, 2003 California Division of Labor Standards Enforcement
12 ("DLSE") Opinion Letter responding to an employer's question concerning the application of
13 section 233 to a PTO program that provided employees with an undifferentiated block of
14 PTO days, which made no distinctions between vacation, sick time, or other types of leave, the
15 DLSE noted, "there [was] no quantitative measure for determining what percentage of the time
16 taken off would be for vacation and what would be allocated to sick time." *Torstrup-Lanham v.*
17 *Gov't Emples. Ins. Co.* (S.D.Cal. Sep. 26, 2006, No. 04-CV-1933 WQH (CAB)) 2006
18 U.S. Dist. LEXIS 112342, at *14 (citing the 5/21/03 DLSE letter). The DLSE concluded that:

19 [T]he whole of the time is subject to the strictures of Labor Code § 227.3. In
20 addition, since the time can also be used for purposes of sick leave, the time is also
21 subject to the provisions of Labor Code § 233. Since there is no quantitative limit
22 set by the employer on the amount of the time which may be used for sick leave,
we must assume that all of the time could possibly be used for sick leave. Indeed,
all of the time could be used as vacation, as well.

23 *Id.* at *14-15 (citing the 5/21/03 DLSE letter).

24 Plaintiffs allege that Defendants maintain a Paid Time Off (PTO) policy matches that of
25 the above example given by the DLSE and does not differentiate between sick and vacation time.
26 However, when an employee is terminated, none of this PTO is paid out to the employee. Mara
27 Dec. ¶ 22.

1 Defendants dispute Plaintiffs' interpretation of the policy and point out that nowhere in the
2 policy does it state that employees will not be paid out their unused PTO at the conclusion of their
3 employment. Defendants contend that California unequivocally permits these types of policies,
4 and that in accordance with the law, Defendants pays employees their unused PTO, along with all
5 other wages and compensations owed to the employee, upon separation of employment. Mara Dec.
6 ¶ 23.

7 **d. Sick Leave**

8 Section 233(c) of the California Labor Code states: "An employer shall not deny an
9 employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any
10 manner discriminate against an employee for using, or attempting to exercise the right to use, sick
11 leave to attend to an illness or the preventive care of a family member, or for any other reason
12 specified in subdivision (a) of Section 246.5."

13 Section 234 of the California Labor Code further forbids employers from adopting an
14 "absence control policy that counts sick leave taken pursuant to Section 233 as an absence that
15 may lead to or result in discipline, discharge, demotion, or suspension is a per se violation of c."

16 Plaintiffs contend that Defendants' attendance policy requires an employee to contact
17 Defendants at least one hour prior to the start of their shift to inform them of any absence, or they
18 will face disciplinary action, including potential termination. Plaintiff argues that this is a clear
19 violation of section 234, as it is clear an employee who attempts to use their legally protected sick
20 leave must provide an hour advance notice or Defendant will treat it as an unscheduled absence
21 that that may lead to or result in discipline or discharge. Mara Dec. ¶ 24.

22 Defendants argue that Plaintiffs are simply cherry-picking a provision out of their
23 attendance policy without giving it any context whatsoever. Defendants claim this does not apply
24 to an employee attempting to use their protected sick leave, and that Defendants' attendance policy
25 is separate and apart from their policy regarding sick leave, which is fully compliant with
26 California law and provides all the requisite protections under Labor Code section 233. Mara Dec.
27 ¶ 25.

28 \\\

1 **e. Wage Statements, Waiting Time Penalties, and Failure to Pay All Wages**
2 **Twice Per Month**

3 Plaintiffs also pursued claims for failure to provide accurate itemized wage statements,
4 waiting time penalty claims, and failure to pay all wages owed twice per month. These claims are
5 derivative of Plaintiffs' underlying meal and rest period claims, as well as their unpaid wages
6 claim. Should Plaintiffs' underlying wages claim fail, these claims would also fail. *Mara Dec.* ¶
7 26.

8 In addition, Defendants contend that even if Plaintiffs were successful in their underlying
9 claims, he would have to prove Defendants "willfully" failed to pay employees the appropriate
10 wages due upon separation of employment. "A willful failure to pay wages within the meaning of
11 Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee
12 when those wages are due. However, a good faith dispute that any wages are due will preclude
13 imposition of waiting time penalties under Section 203." Cal. Code Regs. Tit. 8 § 13520. "A 'good
14 faith dispute' that any wages are due occurs when an employer presents a defense, based in law or
15 fact, which would preclude any recovery on the part of the employee. The fact that a defense is
16 ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." *Id.*
17 Defendants contend that any failure to pay wages due at the separate of employment was not
18 willful. Defendants argue that it would not be liable for waiting time penalties because a "good
19 faith dispute" exists over the payment of those wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral*
20 *v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.

21 Defendants also argue that Plaintiffs' underlying claims cannot form the basis of the wage
22 statement claim or the failure to pay wages twice per month. Defendants rely on the case
23 *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, for the position that employees
24 do not suffer injury under California Labor Code § 226(a) so long as the wage statements correctly
25 reflected the hours worked and the pay received even if the pay is later determined to be inaccurate.
26 Additionally, Defendants point out that Labor Code section 204 "does not provide for the payment
27 of any wages nor create any substantive right to wages," as "[t]he only right furthered by the
28 section is the timely payment of wages." *See's Candy Shops, Inc. v. Superior Court* (2012) 210

1 Cal.App.4th 889, 905.

2 **f. Manageability**

3 Defendants also argue that should litigation continue, they will bring a motion challenging
4 the manageability of trial as Defendants do not believe that this case can be tried manageably and
5 will require the testimony of every individual aggrieved employee. Furthermore, while Defendants
6 do not concede that any of their wage and hour policies are unlawful, Defendants claim that any
7 challenges Plaintiffs have posed to these policies are easily refuted by how they are implemented
8 in practice; as a result, no aggrieved employee has suffered any damages. Mara Dec. ¶ 27.

9 **IV. THE PROPOSED SETTLEMENT**

10 The Parties have agreed (subject to and contingent upon the Court's approval) that this
11 action be settled and compromised for the non-reversionary total sum of \$2,700,000.00 ("Gross
12 Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of
13 \$900,000 (33.33% of the GSA) to compensate PAGA Counsel for work already performed and
14 work remaining to be performed in securing Court approval and overseeing administration of the
15 settlement; (b) litigation costs in the amount of \$25,679.48; and (c) administration fees and
16 expenses to Phoenix Settlement Administrators ("Phoenix") in the amount of \$30,000.²

17 After all Court-approved deductions from the GSA, it is estimated that the Net Settlement
18 Amount ("NSA") will be \$1,744,320.52. California Labor Code § 2699(i) states that "civil
19 penalties recovered by aggrieved employees shall be distributed in accordance with Labor Code §
20 2699 *et seq.* as follows: 75% to the LWDA for enforcement of labor laws, including the
21 administration of this part, and for education of employers and employees about their rights and
22 responsibilities under this code, to be continuously appropriated to supplement and not supplant
23 the funding to the agency for those purposes; and 25% to the aggrieved employees." Therefore, of
24 the NSA, \$1,308,240.39 (75% of the NSA) will go to the LWDA and \$436,080.13 (25% of the
25 NSA) will be distributed to Aggrieved Employees.³

26 ² See Declaration of Jodey Lawrence of Phoenix Settlement Administrators in Support of PAGA
27 Settlement ("Lawrence Dec."), **Exhibit B**.

28 ³ Aggrieved Employees are estimated to receive an average payment of approximately \$36.20
[\$436,080.13 divided by approximately 12,045 Aggrieved Employees during the PAGA Period

1 **a. Calculation of the Settlement Payments to the Aggrieved Employees**

2 Subject to the terms and conditions of the Settlement Agreement, the Settlement
3 Administrator will calculate and issue Individual Settlement Shares to Aggrieved Employees based
4 on the following formula:

5 Each Aggrieved Employee will receive a proportionate share of the NSA that is
6 equal to (i) the number of pay periods he or she worked for Defendants in California
7 during the PAGA Period based on the Database provided by Defendants, divided
8 by (ii) the total number of pay periods worked by all Aggrieved Employees based
9 on the same Database, which is then multiplied by the NSA. One day worked in a
given pay period will be credited as a pay period for purposes of this calculation.
Therefore, the value of each Aggrieved Employee's Individual Settlement Share
ties directly to the amount of pay periods that he or she worked.

10 **Exhibit 1** at Section III, B(1)(a). One hundred percent (100%) of each Individual Share is
11 considered to be a civil penalty. Payroll tax withholdings and deductions will not be withheld from
12 these Individual Settlement Shares. Each Individual Settlement Share will be reported on IRS 1099
13 Forms. *See Exhibit 1* at Section III, B(2).

14 **b. Funding and Disbursement**

15 Within ten (10) days after the Effective Date,⁴ Defendants will provide Phoenix an
16 electronic database, which will list for each Aggrieved Employee: (1) first and last name; (2) last
17 known mailing address; (3) social security number; and (4) the total number of pay periods during
18 which the Aggrieved Employee performed work during the PAGA Period as an Aggrieved
19 Employee ("Database"). *See Exhibit 1* at Section III, E(3)(a). Phoenix will conduct a skip trace
20 for the address of all Aggrieved Employees who are former employees of Defendants and an
21 NCOA search on all addresses. *Id.*

22 _____
23 (per the preliminary data provided by Defendants)].

24 ⁴ The Effective date is the date on which the following events have occurred: (1) this Settlement
25 Agreement has been executed by all Parties and their counsel; (2) the Court has entered an order
26 granting Approval of the Settlement; (3) the Court has entered a Judgment; (4) the period for filing
27 any appeal, writ or other appellate proceeding opposing the Settlement has elapsed without any
28 appeal, writ or other appellate proceeding having been filed; i.e., within 60 calendar days after
entry of the Judgment; or (6) when any appeal, writ or other appellate proceeding opposing the
Settlement has been dismissed finally and conclusively with no right to pursue further remedies or
relief; or (7) when any appeal, writ or other appellate proceeding has upheld the Court's Judgment
with no right to pursue further remedies or relief.

1 The Gross Settlement Amount will be wired by Defendant to Phoenix within thirty (30)
2 days of the latter of: (1) the Effective Date or (2) the date the Settlement Administrator provides
3 Defendants' counsel (a) a Form W-9 for the Settlement Administrator; and (b) a copy of a
4 cancelled check from the Settlement Administrator's account or a signed letter from the Settlement
5 Administrator's bank that includes: name of bank, account holder, account number, ACH routing
6 number, and bank address. *See Exhibit 1* at Section III, K. Phoenix will disburse the GSA within
7 ten (10) days after funding. The Settlement Administrator shall disburse: (1) the Net Settlement
8 Amount to be paid to Aggrieved Employees; (2) the Attorney Fee Award and Cost Award to
9 Plaintiffs' Counsel; (3) the Administration Costs, as approved by the Court; and (4) the LWDA
10 Payment. *See Exhibit 1* at Section III, E(3)(d). A Notice of PAGA Settlement, substantially similar
11 to the form attached to the Settlement Agreement as **Exhibit A**, subject to Court approval, shall
12 accompany each check mailed to the Aggrieved Employees.

13 **c. Undelivered Checks**

14 Any checks returned as non-deliverable on or before the check cashing deadline will be
15 sent promptly via regular First-Class U.S. Mail to the forwarding address affixed thereto. If no
16 forwarding address is provided, the Settlement Administrator will promptly attempt to determine
17 the correct address using a skip-trace, or other search using the name, address or Social Security
18 number of the Aggrieved Employee involved, and will take reasonable steps to obtain an updated
19 address. *See Exhibit 1* at Section III, E(3)(e).

20 **d. Uncashed Checks**

21 Checks will remain negotiable for 180 days. Individual Settlement Share checks remaining
22 un-cashed, shall be transmitted by Phoenix to the State of California unclaimed property fund in
23 the name of the Aggrieved Employee. *See Exhibit 1* at Section III, E(7)(b).

24 **e. Release of Claims**

25 Upon entry of the order and judgment granting approval of the Settlement Agreement,
26 Plaintiffs and the LWDA will be forever barred from pursuing against Released Parties⁵ any and

27 _____
28 ⁵ "Released Parties" means Defendants including their past, present, and future divisions,
affiliates, parents, subsidiaries, predecessors, successors, assigns, members, shareholders, owners,

1 all Released Claims during the PAGA Period. “Released Claims” means all claims alleged by
2 Plaintiffs and Aggrieved Employees in the complaints filed in the *Garcia Nunez, Khesrawi* and
3 *Frame* Actions and the First Amended Complaint for any and all debts, liabilities, demands,
4 obligations, penalties, guarantees, costs, expenses, attorneys’ fees, damages, or interest based on
5 any and all PAGA claims seeking civil penalties under California Labor Code sections 2698, et
6 seq., Wage Orders, regulations, and/or other provisions of law alleged or, based on the facts pled
7 in the complaints filed in the *Garcia Nunez, Khesrawi* and *Frame* Actions and the First Amended
8 Complaint and notices to the LWDA, and could have been alleged to have been violated in the
9 complaints filed in the *Garcia Nunez, Khesrawi* and *Frame* Actions and the First Amended
10 Complaint with respect to the Aggrieved Employees, including but not limited to all claims for
11 failure to provide meal periods or pay meal period premiums at the regular rate of pay, all claims
12 for failure to authorize and permit rest breaks or pay rest break premiums at the regular rate of pay,
13 all claims for failure to pay all wages, including overtime and premium wages, all claims for failure
14 to provide compensation for all hours worked, all claims for failure to pay minimum wages, all
15 claims for waiting time penalties, all claims for late and/or untimely payment of wages, all claims
16 for failure to maintain and provide accurate itemized wage statements, all claims for failure adopt
17 a compliant sick leave/absence control policy, all claims for failing to provide suitable seating or
18 otherwise, all claims, all claims for compelling, coercing or pressuring employees to patronize or
19 otherwise make purchases from their employer, all claims for failure to reimburse for necessary
20 business expenses, and all claims for failure to pay vacation pay owed during the PAGA Period.
21 See **Exhibit 1** at Section I, AA. This Settlement does not release any individual wage-and-hour
22 claims on behalf of the Aggrieved Employees.

23 **V. THE COURT SHOULD APPROVE OF THE SETTLEMENT**

24 The PAGA allows for the private enforcement of certain California Labor Code sections
25 relating to wage and hour violations. The settlement of a PAGA action requires court approval

26 _____
27 officers, directors, employees, agents, trustees, attorneys, representatives, administrators,
28 fiduciaries, beneficiaries, subrogees, executors, partners, and privies. See **Exhibit 1** at Section I,
BB.

1 pursuant to the operative PAGA statute, which states that a superior court shall review and approve
2 the settlement of any civil action filed pursuant to the PAGA. *See* Cal. Lab. Code § 2699(1)(2).
3 However, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, the Parties are not
4 obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain
5 approval of the PAGA settlement through a motion for preliminary or final approval. The only
6 requirement placed on settling parties under California Labor Code § 2699(1)(2) is that the
7 proposed settlement must be submitted to the LWDA at the same time it is filed with the Court.
8 Cal. Lab. Code § 2699(1)(2). As noted above, Plaintiff already provided the Parties' Settlement
9 Agreement to the LWDA. Other than this requirement, the PAGA does not set forth any standards
10 by which the Court must conduct its review of the Settlement Agreement. *See Id.*

11 In evaluating the adequacy of the settlement amount, a court is not concerned with the
12 amount the aggrieved employees are to receive, but rather, a court must focus on the total
13 settlement amount in achieving PAGA's objective. Indeed, "[t]he remedy sought in a PAGA suit
14 consists of civil penalties, not individual or class damages." *Mendez v. Tween Brands, Inc.* (E.D.
15 Cal. July 1, 2010) 2010 WL 2650571 *4. "Unlike class actions, these civil penalties are not meant
16 to compensate unnamed employees because the action is fundamentally a law enforcement action."
17 *Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D. Cal. April 2, 2010) 2010 WL 1340777 *4.
18 Moreover, a court must not lose sight of the fact that "[u]nlike a class action seeking damages or
19 injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to
20 recover civil penalties for the government that otherwise may not have been assessed and collected
21 by overburdened state enforcement agencies." *Id.*

22 As with any settlement, a court must be mindful in conducting its inquiry that "[s]ettlement
23 is a compromise, which balances the possible recovery against the risks inherent in litigating
24 further." *See In re TD Ameritrade Account Holder Litig.* (N.D. Cal. Sept. 12, 2011) 2011 U.S.
25 Dist. LEXIS 103222, *24. Indeed, "the very essence of a settlement is ... 'a yielding of absolutes
26 and an abandoning of highest hopes'" [*Officers for Justice v. Civil Service Com.* (9th Cir. 1982)
27 688 F.2d 615, 624], as "it is the very uncertainty of outcome in litigation and avoidance of wasteful
28 and expensive litigation that induce consensual settlements." *Id.* at 625.

1 In analyzing PAGA settlements, it is important that “the relief provided for under the
2 PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit
3 the public[.]” *O’Connor v. Uber Techs., Inc.* (N.D. Cal. Aug. 18, 2016) 201 F.Supp.3d 1110, 1133.
4 The court in *O’Connor* suggests that courts can look at the factors outlined in *Hanlon v. Chrysler*
5 *Corp.* (9th Cir. 1998) 150 F.3d 1011, in evaluating a PAGA settlement. *See O’Connor*, 201
6 F.Supp.3d at 1134.

7 Under *Hanlon*, a court must conclude that a settlement is “fundamentally fair, adequate,
8 and reasonable” before it approves of the settlement. *Hanlon*, 150 F.3d at 1026. The analysis in
9 *Hanlon* is typically used in federal district courts to evaluate proposed class action settlements. In
10 California state courts, settlements are more typically evaluated under the standards set forth in the
11 cases *Dunk v. Ford Motor Co.* (“*Dunk*”) (1996) 48 Cal.App.4th 1794, and *Kullar v. Foot Locker*
12 *Retail, Inc.* (“*Kullar*”) (2008) 168 Cal.App.4th 116. Similar to *Hanlon*, *Dunk* found that in deciding
13 whether to approve a proposed class action settlement under California Code of Civil Procedure §
14 382, the Court must find that a proposed settlement is “fair, adequate and reasonable.” *Dunk*, 48
15 Cal.App.4th at 1801.

16 A proposed settlement is presumed fair under the following circumstances: (1) the Parties
17 reached settlement after arms-length negotiations; (2) investigation and discovery were sufficient
18 to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
19 and (4) the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802. Here, as will be shown
20 herein, all of these elements bearing on the fairness of the proposed settlement—with the exception
21 of the percentage of objectors, which is not applicable in a PAGA action⁶—are present.

22 *Kullar* instructs that an understanding of the amount in controversy is an important factor
23 into whether the settlement “of the class members’ claims is reasonable in light of the strengths
24 and weaknesses of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker*
25 *Retail, Inc.* (2008) 168 Cal.App.4th 116, 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of*

26 ⁶ The PAGA provides no notice or claim procedures. Therefore, objections, other than the potential
27 objection of the LWDA, are not contemplated in PAGA actions. *See Baumann v. Chase Inv. Servs.*
28 *Corp.* (2014) 747 F.3d 1117, 1122 (“Unlike *Rule 23(c)(2)*, PAGA has no notice requirements for
unnamed aggrieved employees, nor may such employees opt out of a PAGA action.”).

1 *Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the
2 strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.”
3 *Id.* In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to “decide
4 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of
5 the attorneys.” *Kullar*, 168 Cal.App.4th at 133.

6 **a. The Settlement is Fair, Reasonable, and Adequate**

7 **i. The Settlement was Reached as a Result of Arm’s Length Negotiations**

8 The settlement was reached as a result of arm’s-length negotiations. Though cordial and
9 professional, the settlement negotiations have been, at all times, adversarial and non-collusive in
10 nature. At the mediation, counsel for the Parties conducted extensive arm’s length settlement
11 negotiations until the settlement was reached.

12 **ii. The Settlement is the Result of Thorough Investigation and Discovery**

13 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses
14 before reaching the proposed settlement, and engaged in sufficient investigation, research and
15 discovery to support the settlement. The significant amount of discovery, the production and
16 analysis of hundreds of documents and thousands of lines of data, and protracted settlement
17 negotiations through the mediations and in the discussions that followed were the substantial bases
18 upon which the Parties’ “clear view of the strengths and weaknesses of their cases” was made
19 possible. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

20 **iii. Counsel for Both Parties are Experienced in Similar Litigation**

21 Both Plaintiffs’ Counsel and Defendants’ Counsel are particularly experienced in wage
22 and hour employment law and class actions. Plaintiffs’ Counsel has significant experience in
23 litigating unpaid wages, unprovided meal and rest periods, and overtime claims. Indeed, Mara
24 Law Firm, PC, was class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is
25 the subject case in the landmark decision of *Brinker Restaurant Corp. v. Superior Court* (2012)
26 53 Cal.4th 1004. Mara Dec. ¶ 4. Plaintiffs’ Counsel has prosecuted numerous wage and hour
27 cases on behalf of employees for California Labor Code violations and thus are experienced and
28 qualified to evaluate the claims and to evaluate settlement versus trial on a fully informed basis,

1 and to evaluate the viability of the defenses. Mara Dec. ¶¶ 2-8; Declaration of Vincent
2 Granberry, Esq. (“Granberry Dec.”) ¶¶ 5-9; Declaration of Justin Hewgill, Esq. (“Hewgill Dec.”)
3 ¶¶ 5-8; Declaration of Sarah Gallagher, Esq. (“Gallagher Dec.”) ¶¶ 5-7. This experience
4 instructed Plaintiffs’ Counsel on the risks and uncertainties of further litigation and guided their
5 determination to endorse the proposed settlement. Defendants’ Counsel practices labor and
6 employment law and have represented numerous employers in similar types of claims.
7 Accordingly, both Parties’ Counsel are experienced in wage and hour employment law and class
8 and representative actions.

9 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

10 An understanding of the amount in controversy is an important factor into whether the
11 settlement of the Aggrieved Employees’ “claims is reasonable in light of the strengths and
12 weaknesses of the claims and the risks of the particular litigation.” *Kullar*, 168 Cal.App.4th 116,
13 129; *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399,
14 409. The most important factor in this regard is “the strength of the case for plaintiffs on the merits,
15 balanced against the amount offered in settlement.” *Id.*

16 In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to
17 “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for
18 that of the attorneys.” *Kullar*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit
19 statement of the maximum amount the Aggrieved Employees could recover if it prevailed on all
20 its claims, provided there is a record which allows “an understanding of the amount that is in
21 controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186 Cal.App.4th at 409.
22 Put differently, “as the court does when it approves a settlement as in good faith under *Code of*
23 *Civil Procedure* section 877.6, the court must at least satisfy itself that the [PAGA] settlement is
24 within the ‘ballpark’ of reasonableness.” *Kullar*, 168 Cal.App.4th at 133, citing *Tech-Bilt v.*
25 *Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.

26 As the following subsections show, the Parties’ investigation and discovery revealed a
27 healthy discount was needed in order to reach a settlement.

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**1. The Settlement is Fair and Reasonable Based on the Strengths
of Plaintiffs' Case and the Risks and Costs of Further Litigation**

At the time of mediation, Plaintiffs determined that there were approximately 11,000 Aggrieved Employees who worked approximately 336,000 pay periods based upon the data provided by Defendants.

Plaintiffs claim that there are eight (8) core violations under § 2699(f)(2) – failure to provide lawful meal breaks or pay a premium, failure to provide lawful rest breaks or pay a premium, failure to pay all wages, failure to pay accrued vacation at termination, failure to adopt a lawful sick leave policy, failure to pay for failure to provide accurate itemized wage statements, failure to pay wages at the time of termination, and failure to pay wages twice per month – of the Labor Code sections which give rise to PAGA penalties. *Mara Dec.* ¶ 28.

The PAGA allows the private enforcement of certain California Labor Code sections relating to wage and hour violations. PAGA Section 2699(f)(2) reads, in part, as follows:

[T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

California courts have interpreted this language to require notice to the employer that an initial violation occurred before penalties for subsequent violations could be assessed. *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1210. Under *Amaral*, “subsequent” has a special meaning within the California Labor Code that triggers heightened statutory penalties only after an employer has learned that its conduct violates the Labor Code—that is, pursuant to *Amaral*, courts may reject a purely chronological understanding of the term “subsequent” and interpret its use in California Labor Code to require that “the employer has been notified that it is violated a Labor Code provision” before higher penalties are triggered. *Amaral*, 163 Cal.App.4th at 1157, 1207–09. Each of Plaintiffs’ claims, with the exception of Plaintiffs’ claims for failure to pay accrued vacation owed at termination and failure to pay wages at the time of termination, occurred at least once in every pay period. Plaintiffs’ claims for failure to pay accrued vacation owed at termination and failure to pay wages at the time of termination only occurred in approximately 6,580 pay periods. Thus, Defendants’ *maximum* exposure under §2699(f)(2) is

1 \$202,916,000:

2 \$100 x 6 PAGA violations x 336,000 pay periods = \$201,600,000

3 \$100 x 2 PAGA violations x 6,580 pay periods = \$1,316,000

4 Maximum Exposure: \$202,916,000

5 Mara Dec. ¶ 29.

6 In exploring the settlement of any PAGA action, the critical fact that the Court is permitted
7 discretion to award a “lesser amount than the maximum penalty amount” must be heavily taken
8 into consideration. *Lab. Code*. 2699 § (e)(2). Unlike the underlying violations upon which the
9 Plaintiffs seek to impose PAGA civil penalties, there is no set amount the Court must levy on an
10 employer Defendant it finds to have violated the underlying claims. Under “the facts and
11 circumstances of the particular case,” the Court is permitted wide discretion to slash civil penalty
12 amounts. This discretion and how a particular court will exercise it is always an unknown variable
13 in predicting the dollar outcome of any PAGA action when evaluating settlement. Under its wide
14 discretion to award lesser amounts, a Court could side with Plaintiffs on their claims and find that
15 the underlying Labor Code rights were violated but decide to substantially moderate the imposition
16 of PAGA penalties for those violations.

17 Courts have used this discretion to massively discount PAGA penalties imposed where it
18 found the defendant employer took its Labor Code obligations seriously, even if the employer fell
19 short of complying with them. In *Thurman v. Bayshore Transit Management, Inc.* (“*Thurman*”)
20 (2012) 203 Cal. App. 4th 1112, the court determined that an award of the maximum penalty
21 allowed may be unjust in circumstances outside of when a defendant cannot afford to pay the
22 maximum amount. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th
23 1112, 1135-1136. The *Thurman* court found that penalties may be reduced when a defendant has
24 taken its obligations to comply with the law seriously. *Id.* In *Kaanaana v. Barrett Business*
25 *Services, Inc.* (2018) 29 Cal.App.5th 778, 788 & 809, the Court of Appeals took no issue with the
26 trial court exercising its discretion in slashing PAGA civil penalties for violations of Labor Code
27 section 512 to 13% of the total recoverable penalties. In *Carrington v. Starbucks* (2018) 30
28 Cal.App.5th 504, the plaintiff requested penalties in excess of \$70 million, based on a \$25 to \$75

1 penalty per violation. The court reduced the award, stating that awarding the maximum penalty
2 would be unjust, arbitrary, and oppressive based on Starbucks's good faith attempts to comply with
3 the law. The lower court's reduced award of \$150,000 was affirmed on appeal, which reflects .2%
4 of the total recoverable penalties sought.⁷

5 Thus, the projected value of PAGA claims is a variable value of two predictive indexes: 1)
6 the likelihood that Plaintiff will succeed in proving the underlying claims were violated, and 2) the
7 extent to which the Court will impose Civil Penalties permitted under PAGA. This is to be
8 distinguished from the projected values of class claims of Labor Code and Wage Order violations.
9 For instance, and relevant to the underlying claims in this action, class claims alleging California's
10 meal and rest break, minimum wage, and wage statement laws were violated, the predictive value
11 for purposes of determining whether settlement values are fair and reasonable rests only on the
12 likelihood of prevailing on the merits and the exposure related thereto, as there is no judicial
13 discretion to award lesser amounts owed for adjudged violations. It is for these reasons that, in
14 assessing and judging the reasonableness of PAGA settlements, the touchstone feature is the
15 "remedial purpose" achieved in the settlement amount, which takes into account the defendant
16 employer's "good faith" belief that it complied with the laws claimed to be violated. *Bernstein*,
17 365 F. Supp. 3d at 991.

18 Based on this blind spot of how the Court would exercise its discretion in addition to the
19 likelihood the Court would side with Plaintiffs on the underlying Labor Code violations, Plaintiffs
20 necessarily and substantially had to discount the settlement value off of the full PAGA penalty
21 amounts. As discussed earlier, Defendants argue its meal and rest policies and practices track the
22 Labor Code and Wage Order requirements and the standards articulated in *Brinker* and *Augustus*.
23 Likewise, Defendants argue that they pay employees for all time worked, properly paid accrued
24 vacation time, and maintained a lawful sick leave policy. Thus, even if Defendants were proven

26 ⁷ These instances of judicial discretion imposing massive reductions in recoverable penalties is to
27 be contrasted with *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) 365 F.Supp. 3d 980, 992, where
28 the trial court reduced the recoverable PAGA penalties by only 25%. *Bernstein*, however, only
amplifies the predictive blind spot of how a court can exercise its wide-discretion to reduce full
PAGA exposure.

wrong on these fronts and ultimately found to have violated the underlying Labor Code claims, the court could find a good faith reliance on *Brinker*, *Augustus*, and other governing authorities justifiably instructed Defendants' actions and thereby impose a massive reduction of PAGA penalties akin to the Courts in *Kaanaana* and *Carrington*.

Good faith settlement negotiations, after considerable discovery, investigation, and litigation, necessarily had to focus on amounts far less than that potential exposure. The proposed PAGA settlement here of \$2,700,000, which takes into account the realistic exposure, the very real impediments of succeeding on the merits, the risk of further litigation, and, even if Plaintiffs succeeded on the merits, persuading against a robust discount, reflects an appropriate, balanced, and reasonable settlement value of the PAGA claims. The settlement amount fits within the "remedial purpose" of PAGA of enforcing compliance with important employee protections in the Labor Code and Wage Order.

b. The Court Should Approve the Requested Attorneys' Fees and Costs

The PAGA provides that any employee who prevails is entitled to an award of reasonable attorneys' fees and costs. Cal. Lab. Code § 2699(g)(1). The PAGA statute provides for approval of the settlement but does not specifically provide that the amount or reasonableness of attorneys' fees and costs is subject to court approval. Cal. Lab. Code §§ 2699(g)(1) and (l)(2). A reasonable interpretation of the PAGA is that the amount of attorneys' fees need only be addressed by a court when the LWDA objects because there is no need to provide absent employees' due process rights in a PAGA settlement since the aggrieved employees do not have their own substantive rights. *See Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 436. And, the LWDA, as the real party in interest and the primary beneficiary of the settlement, has an opportunity to review the settlement before it is approved. Cal. Lab. Code § 2699(l)(2). Unlike a class action, where the purpose of court approval is to protect absent class members, in a PAGA settlement the real party in interest, the LWDA, has the opportunity to review and consider the reasonableness of the fees and object before the court hears the approval motion. If a court considers the reasonableness of the attorneys' fees requested, it should be guided by the common fund doctrine typically applied in class action cases.

1 **i. The Requested Attorneys' Fee and Cost Award is Within the Range of**
2 **Fees Approved in Comparable Common Fund Cases**

3 California state and federal courts have recognized that an appropriate method for
4 determining an award of attorneys' fees is based on a percentage of the total value of benefits to
5 class members by a settlement, also known as the "common fund" method. *Serrano v. Priest*
6 (1977) 20 Cal.3d 25, 34 (*Serrano III*); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent*
7 *v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. "Despite its primacy, the lodestar
8 method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*
9 (2000) 82 Cal.App.4th 19, 27 [*"Lealao"*]; *Dunk*, 48 Cal. App. 4th at 1808 (the percentage method
10 calculates attorney fees as a reasonable percentage of the common fund and may be used where
11 the amount of the settlement is a certain or easily calculable sum of money). The purpose of the
12 common fund/percentage approach is to "spread litigation costs proportionally among all the
13 beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557
14 F.2d at 769. In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the Court stated: "[O]ne
15 who expends attorneys' fees in winning a suit which creates a fund from which others derive
16 benefits may require those passive beneficiaries to bear a fair share of the litigation costs."

17 Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the
18 California Supreme Court recognized that the common fund doctrine has been applied
19 "consistently in California when an action brought by one party creates a fund in which other
20 persons are entitled to share." The reasons for applying the common fund doctrine include:
21 "...fairness to the successful litigant, who might otherwise receive no benefit because his recovery
22 might be consumed by the expenses; correlative prevention of an unfair advantage to the others
23 who are entitled to share in the fund and who should bear their share of the burden of its recovery;
24 encouragement of the attorney for the successful litigant, who will be more willing to undertake
25 and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured
26 that he will be properly and directly compensated should his efforts be successful." *Id.*

27 Assessing an appropriate fee based on a percentage of the fund involves taking into account
28 "all of the circumstances of the case." There is sparse case law addressing the evaluation of

1 reasonable attorneys' fees in employee representative or class actions as appellate cases addressing
2 fees arise almost exclusively where awards were challenged by defendants or objectors – the only
3 parties with standing to appeal. *Wershba*, 91 Cal.App.4th at 236. Several studies of class action
4 fee awards have found that the median common fund fee award is approximately one-third of the
5 total settlement fund. *See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11
6 (numerous studies have shown that “fee awards in class actions average around one-third of the
7 recovery.”); Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems:
8 Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper
9 and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to
10 the Advisory Committee on Civil Rules, 90 (1996) (finding that attorneys' fees in class litigation
11 “were generally in the traditional range of approximately one-third of the total settlement”).

12 Here, PAGA Counsel applies for an award of attorneys' fees in the sum of \$900,000 (which
13 is 33.33% of the GSA). The requested fee falls in the mid-range of percentage class fee awards,
14 which commonly range from 20% to 50% of a common fund, and constitutes fair compensation
15 for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis
16 and compensates PAGA Counsel for their efforts, as well as the result achieved for the benefit of
17 the State of California and the Aggrieved Employees. *Mara Dec.* ¶ 30.

18 Numerous state and federal courts in California routinely approve fee requests equal to or
19 greater than 33.33% of the common fund. In short, PAGA Counsel's fee request of \$900,000 is in
20 line with awards in California and nationwide and demonstrates that PAGA Counsel's fee request
21 is consistent with market rates and is reasonable.

22 **ii. A Lodestar Cross-Check with a Modest Multiplier Confirms the**
23 **Reasonableness of the Requested Fee**

24 PAGA Counsel's fee request is reasonable when calculated using the lodestar method.
25 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
26 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
27 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a
28 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree
of success achieved. *Id.* at 49; *see also Ketchum v. Moses* (2001) Cal.4th 1122, 1132-36; *PLCM*

1 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
2 Cal.App.4th 819, 834, (“[t]here is no ... rule limiting the factors that may justify an exercise of
3 judicial discretion to [adjust the] lodestar”).

4 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
5 cases.” *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v.*
6 *DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 (“One of the most common fee enhancers [...]”
7 is for contingency risk.”) Such an enhancement “mirrors the established practice in the private
8 legal market of rewarding attorneys’ fees for taking the risk of nonpayment by paying them a
9 premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 220 F.3d at
10 1051. A risk multiplier also serves to bring the financial incentives for enforcing important rights
11 “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-
12 for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or
13 reduce the lodestar, California courts take into account multiple factors, including: the time and
14 labor required; the skill requisite to perform the legal services properly; the preclusion of other
15 employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the
16 amount involved and results obtained; the experience, reputation, and ability of the attorney; and
17 awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

18 PAGA Counsel has worked 684.12 hours to date on this case and have calculated the
19 lodestar fee on those hours at \$467,381.50 at rates reflecting those currently earned in the
20 marketplace. Mara Dec. ¶¶ 31-32, 34-35, **Exhibit 3**, Summary of Time and Costs; Granberry Dec.
21 ¶¶ 10-16; Hewgill Dec. ¶¶ 9-11; Gallagher Dec. ¶¶ 8-11. All of the work and tasks performed by
22 PAGA Counsel were reasonable and necessary to the prosecution of this case and are reflected in
23 the result achieved. Mara Dec. ¶ 36.

24 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
25 cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v.*
26 *DaimlerChrysler Corp.*, 34 Cal.4th 553, 579 (2004) (“One of the most common fee enhancers [...]”
27 is for contingency risk.”) Such an enhancement “mirrors the established practice in the private
28 legal market of rewarding attorneys’ fees for taking the risk of nonpayment by paying them a

1 premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 220 F.3d at
2 1051. A risk multiplier also serves to bring the financial incentives for enforcing important rights
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5 reduce the lodestar, California courts take into account multiple factors, including: the time and
6 labor required; the skill requisite to perform the legal services properly; the preclusion of other
7 employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the
8 amount involve and results obtained; the experience, reputation, and ability of the attorney; and
9 awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

10 As discussed above, this was a highly-contested matter which required a significant amount
11 of time and labor. PAGA Counsel had to investigate and analyze hundreds of pages of documents
12 and Excel spreadsheets of data. In addition, PAGA Counsel had to marshal the evidence in a
13 manner in which it could be adjudicated manageably on behalf of all the Aggrieved Employees,
14 an endeavor which cannot be underscored. So often, lawyers unskilled in PAGA wage and hour
15 cases do not pay attention to or put the work into how the evidence must be presented for
16 adjudication on a representative basis. Strong PAGA cases perish in the hands of inexperienced
17 counsel because the case has not been worked up to succeed in demonstrating manageability.
18 PAGA Counsel here has considerable experience in PAGA litigation and, from the beginning of
19 the case, is marshalling the evidence with a sharp focus on representative proof needed for the
20 matter to make it to trial. This case was no different. This filtering of voluminous evidence into
21 representative proof while keeping an eye on the merits of the litigation resulted in a considerable
22 amount of attorney time and skill. Mara Dec. ¶ 37.

23 Most importantly, all services were performed by PAGA Counsel on a contingent basis.
24 Both California and federal courts recognize that attorneys should be compensated for taking on
25 such contingent risks and provided with financial incentives to enforce important rights and
26 protections like those at issue in this case. See, e.g., *Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24
27 Cal.4th at 1132-33. Here, PAGA Counsel bore the risk that, in spite of all of their efforts and skill
28 employed, there may be no recovery. Mara Dec. ¶ 38.

PAGA Counsel respectfully requests a fee of \$900,000, which, based on the total attorney hours expended and rates, would require a modest 1.925 multiplier to raise the generated fees of \$467,381.50 to the requested amount. Mara Dec. ¶ 39. Far greater multipliers have been awarded in similar cases, and the total amount of fees sought by PAGA Counsel is also reasonable compared to fees awarded in like cases. Courts routinely enhance lodestar amounts based on multipliers that “range from 2 to 4 or even higher.”⁸ Thus, consideration of the lodestar method as a cross-check to the percentage figure sought strongly supports the reasonableness of the requested fee award. PAGA Counsel moves for and respectfully requests that the Court grant attorneys’ fees in the amount of \$900,000.

iii. PAGA Counsel’s Hourly Rates are Reasonable

PAGA Counsel’s hourly rates are between \$150 and \$925 and are in line with rates typically approved in wage and hour class action and PAGA litigation and which rates have been approved by Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego County Superior Courts. Mara Dec. ¶ 40; **Exhibit 4**, Westlaw Court Express’s Legal Billing Report, Volume 14, Number 3, California Region for December 2012; **Exhibit 5**, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Exhibit 6**, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates).

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc* (2000) 22 Cal. 4th 1084, 1095; *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900. When determining a reasonable hourly rate, courts may consider factors such as the attorney’s skill and experience, the nature of the work performed, the relevant area of expertise and the attorney’s customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.

⁸ *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see, e.g., Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal.App.3d 465, 479-80 (1984) (approving fee award with multiplier of 12).

1 PAGA Counsel’s skill and experience support their hourly rates. Their practice is limited
2 exclusively to litigation, focusing on the representation of employees in wage and hour class action
3 and PAGA matters. As prominent attorneys in the field of wage and hour employment litigation,
4 Plaintiff’s counsel continually monitors the prevailing market rates charged by both defense and
5 plaintiff law firms and set the billing rates of their attorneys and paralegals/law clerks to be
6 consistent with the prevailing market rates in the private sector for attorneys and staff of
7 comparable skill, qualifications and experience. Other wage and hour attorneys working as class
8 counsel before California courts charge comparable if not higher rates.

9 **iv. PAGA Counsel’s Total Hours are Reasonable**

10 In determining a lodestar fee, reasonable hours include, in addition to time spent during
11 litigation, the time spent before the action was filed, including time spent interviewing clients,
12 investigating the facts and the law, and preparing the initial pleadings.⁹ Further, the fee award
13 should include fees incurred to establish and defend the attorneys’ fee claim. *Serrano v. Priest*
14 (1982) 32 Cal.3d 621, 639 (“*Serrano IV*”). PAGA Counsel has expended a total of 684.12 hours
15 on this case. The work performed by PAGA Counsel in order to achieve a settlement that will
16 provide valuable consideration to the State of California and the Aggrieved Employees is
17 summarized by PAGA Counsel in the declarations submitted herewith. Mara Dec. ¶¶ 31, 34;
18 Granberry Dec. ¶ 11; Hewgill Dec. ¶ 9; Gallagher Dec. ¶ 9.

19 Counsel’s many tasks, in summary form, included the following: pre-filing investigation
20 and legal research; communicating with Plaintiffs; interviewing aggrieved employees throughout
21 the state; drafting PAGA letters notifying the LWDA of Plaintiffs’ claims; investigation into
22 Defendants’ pay-structures and policies; draft and file pleadings; numerous conferences with
23 Defendant’s Counsel regarding a variety of issues throughout the litigation; numerous discussions
24 amongst co-counsel regarding a variety of issues throughout the litigation; draft case management
25 statements and various stipulations; attend case management conferences; draft propound
26 discovery; review discovery responses; meet and confer over discovery responses; analyze
27 documents produced by Defendants relating to their policies, pay-structures, and time keeping;

28 ⁹ See *New York Gaslight Club, Inc. v. Carey* (1980) 447 U.S. 54, 62.

1 numerous conferences with Plaintiffs' expert regarding the employee time and wage data produced
2 by Defendant in advance of mediation; prepare for and attend mediation; draft mediation brief and
3 mediation damage and exposure models; draft, negotiate, and revise the settlement agreement;
4 discussions with settlement administrator regarding their duties; draft settlement approval motion
5 and supporting papers; review settlement administrator's declaration; and appearing at the
6 settlement approval hearing. Mara Dec. ¶¶ 31, 34; Granberry Dec. ¶ 11; Hewgill Dec. ¶ 9;
7 Gallagher Dec. ¶ 9. All of the tasks and work performed were reasonable and necessary to the
8 prosecution of this case.

9 **v. Costs of Litigation**

10 PAGA Counsel seeks reimbursement of the litigation costs and expenses of \$25,679.48.
11 These costs were all reasonable and necessary to the prosecution of this case and the results
12 achieved, and are fair, reasonable, and unopposed by Defendants. Mara Dec. ¶¶ 41-42, **Exhibit 3**;
13 Granberry Dec. ¶ 17; Hewgill Dec. ¶ 12; Gallagher Dec. ¶ 12.

14 **c. The Administration Costs are Reasonable**

15 The Parties agreed to hire Phoenix as the Administrator.¹⁰ Phoenix will be responsible for
16 formatting, printing, and mailing an agreed upon Notice of Settlement of PAGA Action to be sent
17 along with the checks to be mailed to the Aggrieved Employees. It will also be responsible for
18 updating addresses and re-mailing checks returned as undeliverable, responding to Aggrieved
19 Employee inquiries, and answering questions from the Parties. Phoenix also provided a declaration
20 for filing with the settlement motion. Phoenix seeks a fee of up to \$50,000¹¹, currently estimated
21 to be \$30,000, for the services it will provide in conjunction with this settlement. *See* Lawrence
22 Dec., **Exhibit B**. Plaintiffs now request that the Court approve a fee of up to \$50,000 to Phoenix
23 for services to be rendered. Following the grant of approval, Phoenix will calculate and mail the

24 _____
25 ¹⁰ *See* Lawrence Dec., which outlines Phoenix's qualifications and experience.

26 ¹¹ Once Defendants have provided Phoenix with the data for the Aggrieved Employees upon
27 approval of the settlement, Phoenix will be able to calculate the exact administration costs. Based
28 on the preliminary data provided by Defendants, Phoenix has estimated the administration costs
will be \$30,000. The Parties do not expect this estimate to change drastically but have accounted
for any such contingency through the Settlement Agreement, which permits up to \$50,000 in
administration costs. *See* **Exhibit 1** at Section I, A.

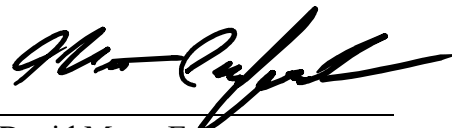
1 checks to the Aggrieved Employees, disburse other payments as ordered by the Court, and perform
2 such other duties as set forth in the Settlement Agreement. Phoenix's fee of up to \$50,000 for
3 services rendered and to be rendered is fair and reasonable and should be granted.

4 **VI. CONCLUSION**

5 For the reasons stated herein, the Court should grant Plaintiffs' motion in its entirety.

6
7 Dated: July 5, 2023

MARA LAW FIRM, PC

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10 _____
11 David Mara, Esq.
12 Matthew Crawford, Esq.
13 Attorneys for Plaintiffs
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