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

ROBERT RODRIGUEZ, as an individual and
on behalf of all others similarly situated,

Plaintiffs,

vs.

CITY NATIONAL BANK, business entity
form unknown; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 20STCV29761

[Assigned for all purposes to the Hon.
Malcolm Mackey, Department 55]

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

Date: November 10, 2022

Time: 8:30 a.m.

Dept.: 55

Reservation ID: 936780749585

Complaint Filed: August 6, 2020

Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on November 10, 2022, at 8:30 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Malcolm Mackey, judge
4 presiding, in Department 55 of the above referenced Court, located at 111 North Hill Street,
5 Los Angeles, California 90012, Plaintiff Robert Rodriguez (“Plaintiff”) will seek an Order
6 approving the concurrently filed PAGA Settlement Agreement, pursuant to the procedures set
7 forth in Labor Code section 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of
9 points and authorities, the accompanying declarations of Kristen M. Agnew, Nicholas
10 Rosenthal, Plaintiff Robert Rodriguez and Settlement Administration (Jodey Lawrence), the
11 records and file herein, and on such other evidence as may be presented at the hearing of the
12 motion.

13
14 Dated: June 3, 2022

DIVERSITY LAW GROUP, P.C.

15
16 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
4 2698, *et seq.*, Plaintiff Robert Rodriguez (“Plaintiff”) hereby moves the Court for an order
5 approving the non-reversionary PAGA settlement as set forth in the concurrently filed Joint
6 Stipulation of Settlement and Release (“Agreement” or “Settlement”). As set forth in the
7 operative Complaint, Plaintiff seeks PAGA penalties based on Defendant City National
8 Bank’s (“Defendant”) alleged policy and practice of: (a) failing to pay employees overtime
9 wages at the correct regular rate of pay that included all non-discretionary remuneration, in
10 violation of Labor Code sections 201-203, 226, 510, 558, and 1194; (b) failing to pay
11 employees meal period premiums at the correct regular rate of pay that included all non-
12 discretionary remuneration, in violation of Labor Code sections 201-203, 226.7, and 512; (c)
13 failing to pay employees sick pay at the correct regular rate of pay that included all non-
14 discretionary remuneration, in violation of Labor Code sections 201-203 and 246; (d) failing to
15 provide off-duty 10-minute rest breaks to employees who worked 3.5 hours or longer in one
16 shift, in violation of Labor Code section 226.7; and (e) failing to provide accurate, itemized
17 wage statements, in violation of Labor Code section 226(a).

18 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the
19 proposed settlement warrants the Court’s approval. This settlement was reached after
20 investigation and discovery, including Defendant’s production of relevant policy documents
21 and payroll data.

22 Pursuant to the terms of the Settlement Agreement, Defendant will pay the gross
23 amount of \$275,000.00 (the “Gross Settlement Amount”), which includes a payment of
24 approximately \$118,789.46 in civil penalties to the California Labor and Workforce
25 Development Agency (“LWDA”). The proposed release is narrowly tailored to release only
26 claims under PAGA predicated on Labor Code sections 201, 202, 203, 226, 226.7, 246, 510,
27 512, 558, and 1194 based on the facts alleged in the PAGA Notice and Complaint. The
28 proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the

LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

II. PROCEDURAL HISTORY

A. Summary of the Litigation

On June 9, 2020, Plaintiff submitted his written notice under Labor Code section 2699.3 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA Notice, Plaintiff alleged that Defendant violated Labor Code sections 201-203, 226, 226.7, 246, 510, 512, 558, and 1194. Declaration of Kristen Agnew (“Agnew Decl.”) ¶¶ 3-6.

On November 16, 2020, Plaintiff filed the operative First Amended Representative Action Complaint. Agnew Decl. ¶ 9.¹ The First Amended Complaint alleges a single cause of action for violation of violation of Labor Code section 2698, *et seq.* predicated on the following alleged violations of the Labor Code: (1) failure to pay overtime wages at the correct regular rate of pay in violation of Labor Code sections 510, 558, and 1194; (b) failure to pay meal period premiums at the correct regular rate of pay in violation of Labor Code sections 226.7 and 512; (c) failure to pay sick pay at the correct regular rate of pay in violation of Labor Code sections 201-203 and 246; (d) failure to provide proper rest breaks in violation of Labor Code section 226.7; (e) failure to provide accurate wage statements in violation of Labor Code section 226(a); and (f) engaging in unfair business practices in violation of the UCL. *Id.* The First Amended Complaint is the operative Complaint (“Complaint”)

On December 8, 2020, Defendant filed a Demurrer and Motion to Strike Allegations from Plaintiff’s First Amended Complaint. Agnew Decl. ¶ 10. Defendant argued that Plaintiff cannot recover PAGA penalties based on Defendant’s alleged violation of the Healthy Workplace Healthy Family Act (“HWHFA”), Labor Code section 245 *et seq.* More specifically, Defendant advanced the legal argument that sick pay is not a wage, subject to the requirements of Sections 201 and 202. Defendant further maintained that there is no private right of action to pursue PAGA penalties for alleged violations of the HWHFA. Plaintiff

¹ On August 6, 2020, Plaintiff filed a class action complaint predicated on the Labor Code violations set forth in the PAGA Notice. However, because Plaintiff was party to an arbitration agreement with a class action waiver, Plaintiff agreed to dismiss the class claims and proceed on a PAGA-only basis. Agnew Decl. ¶ 8.

1 opposed the Demurrer and Motion to Strike. On February 18, 2021, the Court denied the
2 motion. *Id.*

3 **B. Summary of the Discovery.**

4 The Parties engaged in an extensive exchange of documents and information, through
5 both formal and informal discovery. Agnew Decl. ¶¶ 11-18. Shortly after the Court denied
6 Defendant's Demurrer and Motion to Strike, Plaintiff propounded written discovery. *Id.* at ¶
7 12. Amongst other relevant topics, the discovery required Defendants to provide documents
8 and information relevant to its payroll policies, the number of Aggrieved Employees and the
9 number of pay periods at issue. *Id.* On May 12, 2021, Defendant served responses and
10 produced responsive documents. *Id.*

11 Defendant also served Requests for Production of Documents (Set One). Agnew Decl. ¶
12 13. The requests sought documents relevant to Plaintiff's claims, including communications
13 pertaining to Defendant's meal/rest period policy and communications with employees and
14 management regarding the claims alleged in the Complaint. *Id.* On May 24, 2021, Plaintiff
15 served responses to Defendant's Requests for Production of Documents. *Id.*

16 In or around November 2021, the Parties agreed to participate in a private mediation
17 with the Honorable Brian C. Walsh (Ret.), a respected and experienced mediator
18 knowledgeable of both the wage and hour laws and representative claims at issue in this
19 action. Agnew Decl. ¶ 14. Prior to the mediation, Defendant produced the payroll records of
20 Aggrieved Employees, data relating to the number of pay periods worked by Aggrieved
21 Employees, the number of pay periods in which Aggrieved Employees were assigned a radio,
22 the number of pay periods in which Aggrieved employees earned a shift pay and meal period
23 premium, the number of pay periods in which Aggrieved employees earned a shift pay and
24 overtime wages, the number of pay periods in which Aggrieved employees earned an incentive
25 and sick pay, and the number of Aggrieved Employees that separated from Defendant's
26 employ during the PAGA Period. *Id.* Using the data provided by Defendant, Plaintiff's
27 Counsel performed a comprehensive damages analysis. *Id.*

1 The Parties also extensively met and conferred regarding the underlying merits of the
2 Action. Agnew Decl. ¶ 15.

3 **C. The Parties Participate in Private Mediation.**

4 On January 10, 2022, the Parties engaged in an all-day mediation session before Judge
5 Walsh. Agnew Decl. ¶ 16. After a full day of negotiation, the Parties were able to reach an
6 agreement for settlement and the key terms, which they memorialized in a memorandum of
7 understanding. *Id.* at ¶ 17.

8 The Parties thereafter worked to memorialize the terms of the settlement in a long-form
9 settlement agreement. Agnew Decl. ¶ 17. On or about May 9, 2022, the Parties executed a
10 Joint Stipulation of Settlement and Release under PAGA. *Id.* at ¶ 18, Exhibit A.

11 Based on their own independent investigation and evaluation, Plaintiff’s Counsel is of
12 the opinion that the settlement with Defendant for the consideration and on the terms set forth
13 in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of
14 Plaintiff and the Aggrieved Employees, in light of all known facts and circumstances,
15 including the risk of significant delay, the uncertainty associated with litigation, the various
16 defenses asserted by Defendant, and the numerous potential appellate issues. Agnew Decl. ¶
17 40; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 2, 3; Declaration of Nicholas Rosenthal
18 (“Rosenthal Decl.”) ¶ 3.

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

20 The material terms of the settlement are described below and set forth in detail in the
21 concurrently filed Settlement Agreement. Agnew Decl. ¶ 18, Ex. A.

22 **A. The Aggrieved Employees**

23 The Settlement covers the following groups of employees: (i) California non-exempt
24 employees who earned both shift pay and overtime in the same workweek during the PAGA
25 Period (“Overtime Aggrieved Employees”); (ii) California non-exempt employees who earned
26 both shift pay and meal period premiums in the same workweek during the PAGA Period
27 (“Meal Period Aggrieved Employees”); (iii) California non-exempt employees who earned
28 both non-discretionary incentive wages and sick pay in the same workweek during the PAGA

Period (“Sick Pay Aggrieved Employees”); (iv) California non-exempt employees who received a wage statement reflecting the payment of shift pay wages during the PAGA Period (“Shift Pay Aggrieved Employees”); and (v) California non-exempt employees, who were assigned a company-issued radio, and worked at least one shift lasting 3.5 hours or more during the PAGA Period (“Radio Aggrieved Employees”).² See Settlement Agreement (“SA”) § B-2. Together, the Overtime Aggrieved Employees, Meal Period Aggrieved Employees, Sick Pay Aggrieved Employees, Shift Pay Aggrieved Employees and Radio Aggrieved Employees constitute the “Aggrieved Employees.” See *id.* Defendant has determined that there are approximately 1,304 Aggrieved Employees. See *id.* Defendant has further determined that Aggrieved Employees worked approximately 14,957 pay periods from April 9, 2019, through September 1, 2021. See *id.*

B. Settlement Sum and Allocation

The Settlement Agreement requires Defendant to pay the gross amount of Two Hundred Seventy-Five Thousand Dollars (\$275,000.00) (the “Gross Settlement Amount”). See SA §§ B-9, C-1. Based on the Gross Settlement Amount, Defendant will pay approximately \$18.38 per pay period ($\$275,000 \div 14,957$ pay periods) to resolve the claims in this case. Agnew Decl. ¶ 26.

The balance of the Gross Settlement Amount remaining after deduction of the approved Enhancement Payment to Plaintiff, Attorneys’ Fees and Costs, and Settlement Administration Costs (the “PAGA Penalties Fund”), will be available for distribution to the LWDA and Aggrieved Employees. See SA § B-11, C-3. The Parties estimate that the PAGA Penalties Fund will total at least \$158,385.95. Agnew Decl. ¶ 22.

Seventy-five percent (75%) of the PAGA Penalties Fund, or approximately \$118,789.46, will be paid to the LWDA for PAGA penalties. See SA § C-3; Agnew Decl. ¶ 22. The remaining twenty-five percent (25%), or approximately \$39,596.49, will be distributed to Aggrieved Employees. See SA § C-3; Agnew Decl. ¶ 22. The amount any particular

² The PAGA Period is defined as April 9, 2019 through the date the approval motion for the instant settlement is filed with the Court. See SA § B-11.

1 Aggrieved Employee will be entitled to recover will depend on the number of pay periods
2 worked by the employee in a non-exempt position in California during the PAGA Period in
3 which they were paid overtime wages and shift pay, and/or meal period premiums and shift
4 pay, and/or were assigned a radio, and/or were paid sick pay and incentive pay. *See* SA § C-4.
5 This is fair, as it directly allocates greater penalties to individuals who have allegedly suffered
6 greater harm. Agnew Decl. ¶ 27. Any uncashed checks will escheat to the Unclaimed Property
7 Fund administered by the California State Controller’s Office in the name of the Aggrieved
8 Employee, where it will be held in trust. *See* SA § D-6.

9 As part of the Settlement Agreement, Defendant does not object to Plaintiff’s
10 Counsel’s request for attorneys’ fees of approximately thirty-three and one-third percent
11 (33.33%) of the Gross Settlement Amount, *i.e.*, Ninety-One Thousand Six Hundred Sixty-Six
12 Dollars (\$91,666.00), plus up to Fifteen Thousand Dollars (\$15,000.00) for reimbursement of
13 litigation costs, subject to the Court approving this Settlement.³ *See* SA § C-7. Also, as part of
14 the Settlement Agreement, Defendant does not object to Plaintiff’s request for an
15 Enhancement Payment of Ten Thousand Dollars (\$10,000.00). *Id.* at § C-6.

16 Finally, the Settlement Agreement provides for the payment of the fees and expenses
17 reasonably incurred by the Settlement Administrator. *See* SA §§B-17, B-18, C-8. The Parties
18 have agreed to utilize Phoenix Settlement Administration to administer the settlement, with the
19 administration costs estimated to be Seven Thousand Seven Hundred Fifty Dollars
20 (\$7,750.00). *Id.* at §§ B-18, C-8; Declaration of Jodey Lawrence (“Lawrence Decl.”) ¶ 8, Ex.
21 B.

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

23 In exchange for the payments described above, Plaintiff and each of the Aggrieved
24 Employees will release Defendant and Released Parties from:

25 [A]ll claims for penalties under the California Private Attorneys
26 General Act, including costs and attorneys’ fees related thereto,
27 predicated on the violation of Labor Code sections 201, 202, 203,

28 ³ As set forth below, Plaintiff’s Counsel seeks reimbursement for its anticipated actual
litigation costs in the amount of \$7,198.05. Agnew Decl. ¶ 23, Ex. B.

226, 226.7, 246, 510, 512, 558, and 1194, based on claims that are or could have been alleged against the Released Parties in the Complaint and PAGA notice that occurred during the PAGA Period.

See SA §§ B-16, E-1. The release only extends to PAGA claims predicated on the above-referenced Labor Code sections. *See id.* at §§ B-16, E-1. The Agreement further provides that the release does not extend to any individual wage and hour claims. *See id.* at § B-16.

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

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

Labor Code section 2699(a) states that any Labor Code provision “that provides for a civil penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved employee” means “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an action, the allegedly aggrieved employee must provide notice to the LWDA and the employer setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.” Lab.

1 Code § 2699.3(a)(1). If the LWDA decides not to investigate the allegations or issue a citation
2 to the employer, the proposed representative plaintiff is entitled to commence a PAGA action
3 after 65 days. Lab. Code § 2699.3(a)(2).

4 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
5 “represents the same legal right and interest as state labor law enforcement agencies,” and
6 brings PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil
7 penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the
8 “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i);
9 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA
10 representative’s recovery is “an incentive to perform a service to the state, not restitution for
11 wrongs done to members of the class”).

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

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

28 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the

1 Labor Code, which provides, in relevant part: “The court shall review and approve any
2 penalties sought as part of a proposed settlement agreement pursuant to this part.” The parties
3 are not obligated to “satisfy class action requirements,” including the standards for class action
4 settlement approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that
5 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).

6 Notably, unlike the class action settlement approval process, there is also no statutory
7 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
8 2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor
9 do they have the ability to opt-out of the representative PAGA claim” or “contest a settlement,
10 if any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at*13.

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

12 The Court’s focus in approving a PAGA settlement is not the amount that aggrieved
13 employees will ultimately receive as a result of the settlement, but instead, on whether the
14 gross settlement amount achieves PAGA’s objectives. Under PAGA, the penalties recovered
15 are meant to supplement agency funding for education and enforcement purposes. *See* Lab.
16 Code § 2699(i). Here, the settlement represents an extraordinary recovery for the Aggrieved
17 Employees and the State, and thus the settlement certainly effectuates PAGA’s purpose.

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

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

26 If approved, the settlement would release Defendant and other releasees from all
27 claims under PAGA based on claims that are or could have been alleged against the Defendant
28 in the Complaint and PAGA notice that occurred during the PAGA Period—specifically Labor

Code sections 201, 202, 203, 226, 226.7, 246, 510, 512, 558, and 1194. *See* SA § B-16. The settlement would not impact any Aggrieved Employee’s ability to pursue PAGA claims predicated on other Labor Code violations. *See id.* Nor does the release extend to individual wage and hour claims. *See id.* Therefore, the limited scope of the release also supports approval. Because an aggrieved employee’s PAGA action is a substitute for an action brought by the government, “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 986. However, “the nonparty employees, because they were 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.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights “to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part”).

Accordingly, the Aggrieved Employees will be subject to only a limited release strictly confined to the penalties and other relief available under PAGA for violation of Labor Code sections 201, 202, 203, 226, 226.7, 246, 510, 512, 558, and 1194. The release is therefore appropriately tailored.

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

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

1. Plaintiff’s Claims are Contested

a. Unpaid Overtime

Pursuant to California law, employers must include all non-discretionary items of pay, including incentive pay and/or bonuses, into the regular rate of compensation or pay. Cal. Division of Labor Standards Enforcement (“DLSE”) Enforcement Policies and Interpretation Manual at §§ 49.1, 49.2.4 (June 2002); *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App.

1 4th 804, 807, as modified on denial of reh’g (Jan. 21, 2009).

2 Here, Defendant pays non-discretionary shift differentials to Overtime Aggrieved
3 Employees for working a swing shift or graveyard shift. Agnew Decl. ¶¶ 15, 33. The Parties
4 sharply disagree as to whether the shift differentials wages should be included in the regular rate
5 of pay for purposes of calculating overtime wages. Defendant contends that it relied on the
6 percentage pay method set forth in the FLSA regulations and paid the incentive as a total
7 percentage of qualifying earnings during the pay period. As argued by Defendant, an employer
8 need not recalculate an employer’s regular rate of pay where a bonus is paid as a percentage of
9 earnings, including straight time and overtime. Agnew Decl. ¶¶ 15, 33.

10 However, Plaintiff contends that California law is far more protective than the FLSA
11 and requires that “bonuses based on incentive [] be calculated into the employee’s wages to
12 determine the regular rate of pay.” *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th
13 1239, 1261 (2019). Plaintiff’s Counsel is unaware of the existence of any published California
14 Court of Appeal decision that grapples with this precise dispute regarding the calculation of the
15 regular rate. Agnew Decl. ¶ 33. However, at least two federal courts interpreting California law
16 have upheld the use of a percentage payment. *Harris v. Best Buy Stores, L.P.*, No. 15-cv-00657-
17 HSG, 2016 U.S. Dist. LEXIS 100538, at *7-*8 (N.D. Cal. Aug. 1, 2016); *Russell v. Gov’t*
18 *Emples. Ins. Co.*, 2018 U.S. Dist. LEXIS 38425 (S.D. Cal. Mar. 8, 2018). While *Harris* and
19 *Russell* are by no means controlling authority, the Court may look to them as a persuasive
20 authority.

21 **b. Unpaid Sick Pay Wages**

22 Plaintiff seeks PAGA penalties based on Defendant’s alleged failure to pay sick pay
23 earnings using the regular rate of pay. Agnew Decl. ¶ 34. Under the HWHFA, “[p]aid sick
24 time for nonexempt employees shall be calculated in the **same manner as the regular rate of**
25 **pay** for the workweek in which the employee uses paid sick time, whether or not the employee
26 actually works overtime in that workweek.” Cal. Lab. Code § 226(l)(1) (emphasis added).
27 Here, Plaintiff alleges that Defendant consistently paid sick pay at an employee’s base hourly
28

1 rate of pay, even in workweeks where the employee earned non-discretionary incentive wages.
2 Agnew Decl. ¶ 34.

3 In response, Defendant argues that there is no private right of action to pursue PAGA
4 penalties for alleged violations of the HWHFA. *See* Agnew Decl. ¶ 34. Although the Court
5 previously ruled against Defendant on this issue, there are more recent unreported district
6 court opinions, including, *Rudolph v. Herc Rentals*, 2021 WL 5994514 (C.D. Cal. Aug. 27,
7 2021), that have held that only the Labor Commissioner may recover penalties for a violation
8 of HWHFA. Defendant also cited state court trial orders reaching the same conclusion. *See*
9 Agnew Decl. ¶ 34. While these are by no means controlling authority, the Court may look to
10 these decisions as a persuasive authority, despite Plaintiff's contention that they were wrongly
11 decided. Furthermore, even had Plaintiff prevailed at summary judgment and/or trial, given the
12 novelty of the legal questions raised by the claim, Defendant may have sought immediate
13 appellate review through a writ. *See id.*

14 **c. Unpaid Meal Period Premium Pay**

15 Plaintiff alleges that Meal Period Aggrieved Employees' meal period premium
16 payments were not correctly calculated at the "regular rate of pay that included all non-
17 discretionary remuneration." *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021).
18 Defendant asserts numerous defenses to this claim. Defendant contends that it adjusted its
19 calculation of meal period premiums in March 2019, which is prior to the start of the alleged
20 liability period. Agnew Decl. ¶ 35. Defendant further argues that shift differentials—which are
21 paid as a percentage of total earnings—are excluded from the regular rate calculation under
22 *Ferra*. *See* Cal. 5th at 866. As argued by Defendant, the *Ferra* Court adopted the FLSA's
23 approach to the regular rate of calculation, and under the FLSA payments that are a percentage
24 of total earnings are not included within the regular rate calculations. *See* Section IV-E-1-a,
25 *supra*. Although Plaintiff believes in the merits of the claim, Plaintiff's Counsel is not aware
26 of any court that has applied Labor Code section 226.7's requirements that meal period
27 premiums be paid at the "regular rate of compensation" to bonus payments that are paid on
28 total earnings. Agnew Decl. ¶ 35.

1 **d. Rest Period Violations**

2 Plaintiff alleges that Defendant required Radio Aggrieved Employees carry a two-way
3 radio and respond to calls whenever they came in. Agnew Decl. ¶ 36. As a result, Radio
4 Aggrieved Employees remained subject to Defendant’s control, received interrupted and
5 shortened rest breaks, and were subject to an immediate return to work. *See id.* However,
6 Defendant has argued that it complied with the law, had legal policies, and provided its
7 employees duty-free rest periods. *See id.* In support of this argument, Defendant provided
8 evidence that it implemented a facially compliant written rest period policy, which included a
9 channel for reporting any violations. *See id.* Defendant further argued that, even if Plaintiff
10 were able to establish that he experienced a rest period violation, such a claim would not be
11 manageable. *See id.*

12 **e. Wage Statement Violations**

13 Plaintiff seeks to recover PAGA penalties for Defendant’s alleged failure to list “all
14 applicable hourly rates in effect during the pay period and the corresponding number of hours
15 worked at each hourly rate by the employee” on the wage statements issued to Shift Pay
16 Aggrieved Employees. Labor Code § 226(a)(9). More specifically, Plaintiff alleges that when
17 shift differential wages were paid, the corresponding wage statements issued to Plaintiff and
18 Shift Pay Aggrieved Employees did not identify the applicable rate of pay and number of hours
19 worked used to calculate such wages. *See Agnew Decl. ¶ 37.*

20 The Parties do not dispute that Defendant’s wage statements fail to identify the rate or
21 hours used to calculate shift differential wages. *See Agnew Decl. ¶ 37.* Defendant, however,
22 points out that the shift differential plan calls for the incentive to be calculated as a percentage
23 of an employee’s earnings. *See id.* Thus, as framed by Defendant, shift differential wages are
24 not an hourly wage subject to the requirements of Labor Code section 226(a)(9). *See id.* While
25 Plaintiff believes that Defendant’s defense lacks merit, the defense involves a purely legal
26 question that can be easily adjudicated through a motion for summary adjudication. An adverse
27 ruling on this issue would have resulted in the elimination of any potential civil penalties
28 available to Shift Pay Aggrieved Employees. *See id.*

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

2 Defendant has indicated that Aggrieved Employees worked approximately 14,957 pay
3 periods from April 9, 2019, through September 1, 2021. *See* SA § B-2. Therefore, pursuant to
4 the PAGA, Plaintiff has calculated total exposure, if the Court were to award penalties for
5 each violation alleged, could total as high as \$1,865,650. Agnew Decl. ¶¶ 30, 31. However, if
6 the Court only awarded one penalty per pay period (regardless of the number of violations),
7 the total penalties would only be approximately \$1,495,700. *See id.* at ¶ 29. Even then,
8 pursuant to Labor Code section 2699(f)(2) the Court can decline to award the full amount of
9 PAGA penalties “if, based on the facts and circumstances of the particular case, to do
10 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
11 *See also* Agnew Decl. ¶¶ 38, 39. Indeed, as shown in the Court of Appeal’s decision in
12 *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the
13 trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good
14 faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the
15 Court of Appeal found such reduction to be proper. *Id.* at 539; *see O’Connor*, 2016 WL
16 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award
17 “could well be reduced, as a court may reduce the penalty when to do otherwise would result
18 in an award that is unjust, arbitrary and oppressive, or confiscatory”). Assuming that the Court
19 uses *Carrington* as a benchmark and assesses PAGA penalties of approximately 10% of the
20 total maximum, a more realistic estimate of the maximum PAGA penalties at issue—even
21 with “stacking”—is \$186,565. *See* Agnew Decl. ¶ 39.

22 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
23 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to
24 the contrary. Agnew Decl. ¶ 38.

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

27 The Court’s assessment of the proposed Settlement must take into account that any
28 penalties awarded may be subject to substantial reduction. When this is considered, in

1 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
2 nothing, the proposed settlement is patently reasonable. Indeed, the Gross Settlement Amount
3 is approximately 14.74% of the maximum amount of penalties at issue, if the Court permitted
4 an award of multiple violations per pay period. Agnew Decl. ¶ 30. If the Court were to only
5 permit a single violation penalty per pay period, the Gross Settlement Amount is
6 approximately 18.38% of the available penalties. *Id.* Settlement for this reduced value allows
7 for the distribution of penalties in an amount which accounts for the risk of continued
8 litigation and Defendant’s likely arguments that higher penalties would have been
9 confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the
10 future, which is one of the primary goals of PAGA.

11 The proposed settlement exceeds PAGA settlements that courts have approved in other
12 cases, when considered as a percentage of the overall settlement value of the case. The
13 proposed settlement, in fact, far exceeds other PAGA settlements approved by courts —
14 including those that provide for less than the one percent allocation to PAGA penalties. *See,*
15 *e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving
16 total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart,*
17 *Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that
18 was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D.
19 Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement).
20 For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were
21 misclassified as independent contractors. 2016 WL 3561742 (N.D. Cal. June 23, 2016). The
22 parties settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of
23 \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the
24 proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low
25 when compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite
26 high compared to the typical amount apportioned to claims for PAGA penalties in wage and
27 hour settlements.” *Id.* at *5.

28 A PAGA allocation need not represent any particular percentage of the overall

1 settlement value in order to secure court approval, and courts routinely approve PAGA
2 settlements representing only a tiny fraction of the overall settlement value. Here, on the other
3 hand, the Settlement proposes a payment of approximately \$118,789.46 in penalties to the
4 LWDA and approximately \$39,596.49 in penalties to the Aggrieved Employees, which is an
5 outstanding result in a PAGA-only case. *See* Agnew Decl. ¶ 22. The proposed settlement sum
6 in this case vastly exceeds, both in terms of the total dollar amount and as a percentage of
7 overall settlement value, the typical PAGA settlement.

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

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

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

1 advantage to the others who are entitled to share in the fund and who should bear their share of
2 the burden of its recovery; encouragement of the attorney for the successful litigant who will
3 be more willing to undertake and diligently prosecute proper litigation for the protection or
4 recovery of the fund if he is assured that he will be properly and directly compensated should
5 his efforts be successful.” *Id.*

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

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

18 Here, as set forth in their declarations and their respective lodestars, Plaintiff’s
19 attorneys will have spent at least 100.20 hours litigating this current action. Agnew Decl. ¶ 49,
20 Ex. C; Rosenthal Decl. ¶ 6, Ex. A. Based thereon and based on each of the Plaintiff’s
21 attorneys’ hourly rates, the lodestar equates to \$70,140, which requires a modest multiplier of
22 1.3069. Agnew Decl. ¶ 50, Ex. C; Rosenthal Decl. ¶ 6, Ex. A. Thus, the requested fee amount
23 of \$91,666.00 is fair and reasonable.

24 Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of
25 \$7,198.05 is also reasonable. Agnew Decl. ¶ 23, Ex. B. The costs were all directly incurred in
26 the prosecution of this action, including filing fees, mediation fee, postage, copying, and
27 service of process fees. *Id.* As such, the requested costs should be awarded as fair and
28 reasonable.

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

2 The Parties have agreed to pay actual costs of administration, or \$7,750.00, to the
3 Settlement Administrator, Phoenix Settlement Administration, to administer this settlement.
4 See SA §§ B-16, B-17. The Parties believe that the administration fee is reasonable and should
5 be approved. Agnew Decl. ¶ 25.

6 **H. Enhancement Payment Should be Approved**

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

13 Here, Plaintiff seeks \$10,000 for his service award, which is intended to compensate
14 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
15 hesitation from later prospective employers that might find out he brought this claim, and for
16 executing a general release, including for all known and unknown claims under Civil Code
17 section 1542. Declaration of Robert Rodriguez ¶¶ 9, 10. This requested enhancement is
18 consistent with awards approved in other common fund cases. See *Van Vranken v. Atlantic*
19 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
20 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
21 incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v.*
22 *Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive
23 award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52
24 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*,
25 No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding
26 \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d
27 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
28 ERISA case).

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

2 Concurrent with the filing of this motion, Plaintiff uploaded the instant motion to the
3 LWDA's website. Agnew Decl. ¶ 41.

4 **V. CONCLUSION**

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

6
7 Dated: June 3, 2022

DIVERSITY LAW GROUP, P.C.

8
9 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and Aggrieved Employees

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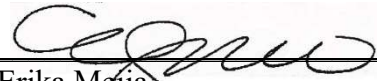
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 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the ACE Attorney Service E-Filing System at the website www.efile.acelegal.com, addressed to all parties appearing on this proof of service for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 3, 2022, at Los Angeles, California.


Erika Mejia



Make a Reservation

ROBERT RODRIGUEZ vs CITY NATIONAL BANK

Case Number: 20STCV29761 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2020-08-05 Location: Stanley Mosk Courthouse - Department 55

Reservation

Case Name: ROBERT RODRIGUEZ vs CITY NATIONAL BANK	Case Number: 20STCV29761
Type: Motion re: (Motion for Approval of PAGA Settlement)	Status: RESERVED
Filing Party: Robert Rodriguez (Plaintiff)	Location: Stanley Mosk Courthouse - Department 55
Date/Time: 11/10/2022 8:30 AM	Number of Motions: 1
Reservation ID: 936780749585	Confirmation Code: CR-CXQQDBOQFUXHCIFJU

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount: \$61.65	Type: Visa
Account Number: XXXX7685	Authorization: 02365G

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