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on behalf of himself and in his representative capacity as
private attorney general;

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

JONATHAN FLORES, an individual, on behalf
of himself and in his representative capacity as
private attorney general;

Plaintiff,

vs.

WEST COAST DINER MANAGEMENT,
INC., a California corporation, DOING
BUSINESS AS DENNY'S and DOES 1-50,
inclusive,

Defendants.

Case No. RG20073419

Assigned For All Purposes to: Hon. Julia
Spain
Department: 520

Reservation ID: A-20073419-001

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF PAGA
SETTLEMENT AND RELEASE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*(Filed concurrently with Declarations of
James R. Hawkins, Plaintiff, and Proposed
Order)*

Date: May 31, 2024
Time: 2:30 PM

Complaint Filed: September 4, 2020
FAC Filed: November 23, 2020
Trial: Not Set

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

2 **PLEASE TAKE NOTICE** that on May 31, 2024, at 2:30 p.m. in Department 520 of the
3 Superior Court of the State of California, County of Alameda, located at the Hayward Hall of Justice,
4 24405 Amador Street, Hayward, California, 94544, Plaintiff Jonathan Flores (“Plaintiff”) will, and
5 hereby does, move this Court for an Order (1) approving the Parties’ settlement of the claims asserted
6 in this action under Labor Code Section 2698 et seq. (“PAGA”) and ordering the Parties to carry out
7 the terms of the PAGA Settlement Agreement and Release (“PAGA Settlement”), attached as **Exhibit**
8 **1** to the Declaration of James R. Hawkins submitted herewith; and (2) and entering a Final Judgment
9 thereon.

10 This Motion will be based on this notice, the attached memorandum of points and authorities
11 filed contemporaneously herewith, the Parties’ PAGA Settlement and Release of Claims (Exhibit 1 to
12 the Hawkins Decl.), the Declarations of James R. Hawkins and Plaintiff Jonathan Flores, as well as
13 upon the pleadings, documents, memoranda, and other records on file with the Court in this matter,
14 and upon such other and further oral and/or documentary evidence as may be properly presented at
15 the hearing on this matter.

16 Pursuant to California Labor Code § 2699(1)(2), a copy of the PAGA Settlement and Release
17 of PAGA Claims was filed with the LWDA on May 8, 2024. (Declaration of James R. Hawkins at ¶
18 ____)

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Given the multiplicity of issues addressed herein, Plaintiffs' memorandum of points and authorities necessitates exceeding the 15-page limit set forth in California Rule of Court 3.113(d). As this Motion is unopposed, Plaintiff respectfully requests that the Court consider the entire Motion, which is _____pages in length.

DATED: May 8, 2024

JAMES HAWKINS APLC

By: /s/ Christina M. Lucio
James R. Hawkins
Christina M. Lucio
Mitchell J. Murray

Attorneys for Plaintiff
JONATHAN FLORES on behalf of herself and
all others similarly situated

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I.

Plaintiff Jonathan Flores brings this Motion pursuant to Cal. Lab. Code § 2699(1)(2) for approval of the Parties' settlement. Plaintiff filed this case solely as an enforcement action pursuant to the Private Attorneys General Act of 2004 ("PAGA"). "Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal. App. 4th 489, 499.). Plaintiff and Defendant West Coast Diner Management Inc. ("Defendant") have reached a settlement that effectuates the purposes of PAGA and, by this motion, Plaintiff, pursuant to California Labor Code § 2699(1), seeks Court approval of such settlement.

The terms of the settlement are more fully set forth in the PAGA Settlement and Release (“PAGA Settlement”) attached as **Exhibit 1** to the Declaration of James R. Hawkins (“Hawkins Decl.”) filed in support of this Motion. Under the PAGA Settlement, Defendant will pay a Gross Settlement Amount (“Gross Settlement Amount”) of \$125,000.00 to settle the PAGA claim only. The non-reversionary Gross Settlement Amount will be allocated as follows:

1. PAGA Counsel Fees: not to exceed thirty-five percent (35%) of the Gross Settlement Amount, or \$43,750.00.
2. PAGA Counsel Expenses: not to exceed \$21,471.33;
3. PAGA Representative Payment: not to exceed \$5,000;
4. Settlement Administration Costs: not to exceed \$10,995.00; and
5. PAGA Payment: 75%, or approximately \$32,837.75, of the Net Settlement Amount that will be paid to the LWDA;
6. Settlement Shares: 25%, or approximately \$10,945.92 of the Net Settlement Amount will be paid to the Aggrieved Employees.

As detailed below, the settlement is fair, reasonable, and adequate. Plaintiff requests that the Court: (1) enter an Order approving the settlement pursuant to the Private Attorneys General Act of

2004, California Labor Code § 2698, *et seq.* and ordering the Parties to carry out the terms of the PAGA Settlement; and (2) and enter a Final Judgement thereon.

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Procedural History

On June 30, 2020, and later amended on November 20, 2020, Plaintiff filed a putative class action complaint against Defendant in the Superior Court of the State of California, Alameda County, Case No. RG20066341, alleging causes of action for (i) failure to reimburse necessary expenses, and (ii) violation of the Unfair Competition Law.¹ (Hawkins Decl. at ¶ 4.)

Plaintiff also filed a PAGA complaint on September 4, 2020, which was later amended on November 23, 2020, (the present PAGA action) in the Superior Court of the State of California, Alameda County, seeking PAGA penalties. Defendant denies all of Plaintiff's allegations, any failure to comply with the laws, and all liability for the claims and causes alleged in the complaint. (Hawkins Decl. at ¶ 5.)

Pursuant to California Labor Code § 2699.3, subd.(a), Plaintiff gave timely written notice to Defendant and to the LWDA on June 29, 2020. (Hawkins Decl. at ¶ 6.)

B. Related Claims

The scope of Plaintiff's claims has been significantly limited by two intervening settlements in *Krake et al. v. Central Valley Diner, et al.*, County of Placer, Case No. SCV0041654, and *Baez et al., v. Bay Area Diner, Inc., et al.*, County of Alameda, Case No. RG15797841² (collectively, the "Related Actions"). The Related Actions were filed on August 17, 2018, and December 24, 2015, respectively, and have since resulted in approved class and PAGA settlements. (Hawkins Decl. at ¶ 7.)

¹ The class action will be dismissed without prejudice in connection with the PAGA settlement.

² The resolution in *Baez* encompassed the claims in *Baez*, as well as *Alfaro, et al. v. Bay Area Diner, Inc., et al.*, Alameda County Superior Court Case No. RG15797839; *Benlamlih v. Bay Area Diner, Inc., et al.*, Alameda County Superior Court Case No. RG15797841; *Guy v. Bay Area Diner, Inc., et al.*, Alameda County Superior Court Case No. RG16843879. (Hawkins Decl. at ¶ 7.)

1 The *Krake* Settlement released all class and PAGA claims for (1) unfair competition in
2 violation of Business and Professions Code §§ 17200 et seq.; (2) failure to provide required meal
3 periods in violation of Labor Code §§ 226.7 and 512 and applicable IWC Wage Order No. 5; (3)
4 failure to provide required rest periods in violation of Labor Code §§ 226.7 and 512 and IWC
5 Wage Order No. 5; (4) failure to pay minimum wages in violation of Labor Code §§ 1193.6, 1194,
6 1194.2, 1197 and 1197.1; (5) failure to pay overtime wages in violation of Labor Code §§ 510,
7 1194 and 1198; (6) failure to provide accurate itemized statements in violation of Labor Code §§
8 226 and 226.3; (7) failure to timely pay wages when due in violation of Labor Code §§ 201, 202
9 and 203; (8) all claims under Labor Code § 558; and (9) all claims arising from the facts in the
10 complaint. The Class Period was August 18, 2014 to January 21, 2020. (Hawkins Decl. at ¶ 8.)

11 The *Baez* Settlement included a broad PAGA release for all PAGA penalties which could
12 have been pled based on the facts alleged in the complaint for the period of January 21, 2020 to
13 August 5, 2022. (Hawkins Decl. at ¶ 9.)

14 As a direct consequence of the releases obtained in the *Krake* and *Baez* settlements, effectively
15 the sole remaining claim for the vast majority of the release period related to the alleged violations of
16 Labor Code § 2802 for expenses Plaintiff and the aggrieved group incurred in purchasing writing
17 utensils, notepads, and uniform pieces, as well as cleaning uniforms. (Hawkins Decl. at ¶ 10.)

18 C. Discovery and Investigation

19 Plaintiff and PAGA Counsel conducted extensive investigation and engaged in substantial
20 litigation efforts in both the Class and PAGA actions. In the context of the related *Flores* Class Action,
21 Plaintiff vigorously opposed Defendant's motion to compel arbitration, filed a motion to compel
22 discovery, and engaged in extensive discovery and information gathering in order to prepare a motion
23 for class certification. These efforts were critical to the result achieved in this PAGA Action.
24 (Hawkins Decl. at ¶ 14.)

25 In the PAGA Action, Plaintiff faced a significant challenge when Defendant filed a Demurrer
26 seeking to dismiss Plaintiff's First Amended PAGA Complaint based on the prior Settlement. This
27 Court initially sustained Defendant's Demurrer and Plaintiff was forced to appeal the Order.

1 (Hawkins Decl. at ¶ 15.) The appellate court reversed the decision and allowed the PAGA Action to
2 proceed.

3 Throughout the course of the actions, the Parties engaged in substantial discovery to uncover
4 relevant facts and strengthen their respective positions. Plaintiff propounded comprehensive
5 discovery requests, including Interrogatories, Requests for Admissions, and Requests for
6 Production, to obtain essential information from Defendant. (Hawkins Decl. at ¶ 17.) Following the
7 receipt of the class list in the Class case, Plaintiff's counsel conducted thorough interviews with
8 numerous employees to gather firsthand accounts of the alleged Labor Code violations. (*Id.*)
9 Furthermore, Plaintiff's counsel took the deposition of Defendant's designated Person Most
10 Knowledgeable to obtain critical testimony and gain a deeper understanding of Defendant's policies
11 and practices. (*Id.*)

12 In preparation for mediation, Plaintiff and counsel analyzed, researched, and investigated the
13 potential legal and factual issues, including matters related to the calculation of damages, trial, and
14 appellate issues and risks. Defendants' discovery responses, informal productions, and document
15 production enabled Plaintiff to conduct an analysis of the alleged violations. (Hawkins Decl. at ¶¶
16 18, 24-25.) To that end, Plaintiff's counsel obtained documents and information pertaining to
17 employee files, payroll records, check history details, employee contracts, reimbursement forms, store
18 materials reports and supply lists, arbitration agreements, and Defendant's policies and procedures.
19 (*Id.*) These documents aided in the preparation of Plaintiff's evaluation of the claims and formulation
20 of a damages model. (*Id.*) This shared data facilitated a precise evaluation of the Defendant's liability
21 and potential damages based on the presented claims. (*Id.*).

22 The Parties' counsel engaged in thorough discussions regarding this data, evaluating the
23 strengths of their respective claims and defenses, and other pivotal factors for settlement
24 considerations. (Hawkins Decl. at ¶ 20.) Throughout the discovery phase, both Parties remained
25 committed and worked to ensure comprehensive information sharing, thus ensuring well-informed
26 discussions leading up to the mediation. (*Id.*).

27 The extensive discovery and investigation undertaken by Plaintiff and PAGA Counsel has
28

1 been instrumental in assessing the merits of the claims and negotiating a fair and reasonable settlement
2 that serves the best interests of the State and PAGA members.

3 **D. Mediation and Negotiations**

4 Following extensive discussions, as well as negotiations and the exchange of informal
5 discovery, the Parties engaged in a full day of mediation on March 23, 2023, with experienced
6 mediator, Michael Loeb. (Hawkins Decl. at ¶ 21.). The case did not settle at mediation. However,
7 through continued mediation efforts and concerted arms-length negotiations, the Parties resolved this
8 matter. Thereafter, the Parties memorialized the terms of the settlement in a PAGA Settlement, fully
9 executed in April 2024, which is now presented to this Court for approval. (Ex 1; Hawkins Decl. at ¶
10 22.) Pursuant to the PAGA Settlement, Plaintiff will dismiss his Class complaint without prejudice.
11 (*Id.*)

12 The PAGA Settlement achieved constitutes a fair, adequate, and reasonable compromise of
13 the claims at issue given the risks of continued litigation and the strength of the defenses advanced by
14 Defendant.

15 **III. SUMMARY OF THE SETTLEMENT**

16 Plaintiff and his counsel— after mediation with a distinguished mediator specializing in wage
17 and hour class and representative actions—believe that the settlement is balanced and just for all
18 parties involved. It is fair, reasonable, and adequate. The settlement’s terms are detailed in the PAGA
19 Settlement attached as **Exhibit 1** to the Declaration of James Hawkins, hereby incorporated by
20 reference, encompassing the primary conditions:

21 **A. Aggrieved Employees**

22 Aggrieved Employees are all current and former hourly-paid, non-exempt employees who
23 worked for Defendant in California from September 4, 2020, through granting of approval of PAGA
24 Settlement. (Ex. 1, I.B.)

25 **B. Gross Settlement Amount**

26 In consideration for this settlement and a release by Plaintiff, Aggrieved Employees, and the
27 LWDA, as provided herein, Defendant has agreed to pay \$125,000 subject to the escalator provision
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in the Agreement. (Ex.1, III.B.)

1. Settlement Allocation

The Gross Settlement Amount is allocated as follows:

Settlement Administration Expenses	\$10,995.00
PAGA Counsel's Costs	\$21,471.33
PAGA Representative Payment	\$5,000.00
Plaintiff's Counsel's Attorneys' Fees	\$43,750.00
PAGA Payment	\$32,837.75
Settlement Shares	\$10,945.92

2. Formula for Division of Settlement Shares for Aggrieved Employees

Each Aggrieved Employee will be entitled, provisionally, to a share or shares of the Net Settlement Amount. (Ex. 1, III.D.3.) The Settlement Share for each Aggrieved Employee will be calculated by (a) dividing the Net Settlement Amount by the total number of pay periods worked by all Aggrieved Employees that occurred during the PAGA Period and (b) multiplying the result by each individual Aggrieved Employee's pay periods that occurred during the PAGA Period. Defendant's payroll records shall control. (*Id.*)

The Settlement Shares will be reported on IRS 1099 Forms. (Ex. 1, III.2.) Defendant has represented in good faith that there is an estimated total of 25,000 pay periods collectively worked during the PAGA Period. (*Id.* at III.E.) If the number of actual pay periods worked by the Aggrieved Employees during the PAGA Period is more than 5% of the estimate stated herein (greater than 26,250), the Gross Settlement Amount will increase proportionally by the number of pay periods exceeding 105% of the stated estimate, except that, in the alternative, at Defendant's sole option and in lieu of increasing the Gross Settlement Amount, the PAGA Period may be modified to end on such date that the total pay periods within the PAGA Period do not exceed 26,250. (Ex. 1, III.E.)

3. Release by Aggrieved Employees

Upon the Effective Date and contingent on full funding of the Gross Settlement Amount by

1 Defendant, Defendant shall receive a release from the Aggrieved Employees of all claims for civil
2 penalties under PAGA that were or could have been raised based upon the facts and theories alleged
3 in Plaintiff’s PAGA Notice dated June 29, 2020, and the operative complaints in the Actions which
4 occurred during the PAGA Period, including but not limited to claims based on an alleged violation
5 of Labor Code section 2802, and a release of all PAGA claims that were or could have been alleged
6 in the Actions based upon the facts and theories set forth in Plaintiff’s PAGA notice, and which
7 occurred during the PAGA Period (“Released PAGA Claims”). This release expressly excludes any
8 claims seeking relief for unpaid wages, premiums, reimbursements, or other damages, even if based
9 upon the same facts and theories as alleged in the Released PAGA Claims; as well as claims for vested
10 benefits, wrongful termination, unemployment insurance, disability, social security, workers’
11 compensation, and PAGA claims outside the PAGA Period. (“Released PAGA Claims”). (Ex.1,
12 III.G.1.) Plaintiff also entered into an Individual Release which is much broader and includes all
13 claims, whether known or unknown, including a waiver of the rights and benefits of section 1542 of
14 the California Civil Code. (*Id.* at III.G.2.)

15 **IV. PAGA ACTIONS AND THE REQUIREMENTS**

16 **A. Relevant Statutory History**

17 In 2003, the California Legislature enacted PAGA after declaring: (i) that adequate financing
18 of labor law enforcement was necessary to achieve maximum compliance; (ii) that staffing levels for
19 state labor law enforcement agencies had declined and were unable to keep up with a growing labor
20 market; (iii) that vigorous assessment and collection of civil penalties provides a meaningful deterrent
21 to unlawful conduct; and (iv) that it was therefore in the public interest to allow Aggrieved Employees,
22 acting as private attorneys general, to seek and recover civil penalties for Labor Code violations. 2003
23 Cal. Stat. § 6629. Under PAGA, an “aggrieved employee” may bring an action for civil penalties for
24 labor code violations on behalf of herself and other current or former employees. (Cal. Lab. Code
25 § 2699(a).)

26 A plaintiff suing under PAGA “does so as the proxy or agent of the state’s labor law
27 enforcement agencies.” (*Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986.). Accordingly, a
28

1 judgment in a PAGA action “binds all those, including nonparty Aggrieved Employees, who would
2 be bound by a judgment in an action brought by the government.” (*Id.* (emphasis added); *see also*
3 *Iskanian v. CLS Transp. Los Angeles LLC* (2014) 59 Cal. 4th 348, 381 (“When a government agency
4 is authorized to bring an action on behalf of an individual or in the public interest, and a private person
5 lacks an independent legal right to bring the action, a person who is not a party but who is represented
6 by the agency is bound by the judgment as though the person were a party.”).)

7 **B. Penalties for Violations of PAGA**

8 Where the underlying Labor Code section does not already provide a civil penalty, the PAGA
9 penalty is equal to \$100.00 for each employee per pay period for the initial violation, and \$200.00 for
10 each employee per pay period for each subsequent violation. Cal. Lab. Code §2699(f)(1)-(2). The
11 penalties themselves are not intended to compensate unnamed employees because the action “is
12 fundamentally a law enforcement action”; the PAGA statute permits a trial court to “exercise its
13 discretion to award lesser penalties based on the enumerated considerations.” (*Thurman v. Bayshore*
14 *Transit Mgmt., Inc.* (2012) 203 Cal. App .4th 1112, 1135; *see also* Cal. Lab. Code § 2699(e)(2) (“a
15 court may award a lesser amount than the maximum civil penalty amount specified by this part if,
16 based on the facts and circumstances of the particular case, to do otherwise would result in an award
17 that is unjust, arbitrary and oppressive, or confiscatory.”).)

18 The PAGA statute requires that any civil penalties recovered must be distributed as follows:
19 75 percent to the LWDA, and the remaining 25 percent to the Aggrieved Employees. Cal. Lab. Code
20 § 2699(i).

21 **C. Standards for Court Approval of PAGA Enforcement Settlement**

22 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
23 Court. (Cal. Lab. Code § 2699(1)(2)). The Labor Code does not require the two-step settlement
24 approval process utilized in class actions—instead, PAGA settlements are approved on a single
25 motion. (*See Salazar v. Sysco Central Cal*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal.
26 Feb. 2, 2017) (rejecting the application of class action settlement rules and procedures for PAGA
27 settlement approval).) When trial courts review PAGA settlements, they should consider whether

1 “the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying
2 purpose of the statute to benefit the public.” (*O’Connor v. Uber Techs., Inc.*, No. 13-03826-EMC
3 (N.D. Cal. Jul. 29, 2016), ECF No. 736 at 2-3; *see also Salazar*, 2017 WL 1135801, *2 (quoting the
4 above passage).) Nothing in PAGA changes the strong judicial preference in support of approving
5 settlements. (*See, e.g., Osumi v. Sutton* (2007) 151 Cal. App. 4th 1355, 1357 (confirming the “[s]trong
6 public policy in favor of the settlement of civil cases”).)

7 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS**
8 **COURT APPROVAL**

9 In 2016, PAGA was amended to require the Court to “review and approve any settlement of
10 any civil action filed pursuant to this part.” (Cal. Lab. Code § 2699(l)(2).) The amendment also
11 required that the “proposed settlement shall be submitted to the agency at the same time that it is
12 submitted to the court.” As such, the PAGA settlement and this Motion have been concurrently
13 submitted to the LWDA in accordance with this section. (Hawkins Decl. at ¶ 39.)

14 **A. The PAGA Settlement is Fair and Reasonable and Accomplishes the Objectives of**
15 **PAGA**

16 Although PAGA and its legislative history do not seem to require a Court to analyze a PAGA
17 settlement in comparison to the “value” of the claims, the penalties herein are reasonable when
18 considered in this context as well.

19 To assess civil penalties, the PAGA provides that the civil penalty is \$100.00 for each
20 aggrieved employee per pay period for the initial violation and (generally) \$200.00 for each aggrieved
21 employee per pay period for each subsequent violation. (Cal. Lab. Code § 2699(f)(2).) In *Amaral v.*
22 *Cintas Corp.* (2008) 163 Cal. App. 4th 1157, the plaintiff argued that the trial court should assess a
23 \$200 civil penalty for each violation that occurred after the plaintiff submitted their PAGA letter(s) to
24 the LWDA, thereby informing defendant of their claims. However, the defendant objected to this
25 argument, relying on a later district court case construing *Amaral*, holding that the trial court can only
26 assess a \$200 civil penalty for “subsequent” violations after the date that “a court or commission”
27 notifies the employer of a violation. (*Amalgamated Transit Union Local 1309 v. Laidlaw Transit*
28 *Servs.* (C.D. Cal 2009) U.S. Dist. LEXIS 69842, *26; *see also Bernstein v. Virgin Am., Inc.* (9th Cir.

2021) 990 F.3d 1157, 1173 (reversing judgment as to “heightened civil penalties” because the defendant was not given notice by the Labor Commissioner when the “subsequent” violations occurred); *Vieyara-Flores v. Sika Corp.* (C.D. Cal. June 10, 2019) No. EDCV19606JVSKKX, 2019 WL 2436998, at *5 (“employers are not subject to heightened penalties . . . until a court or commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them of PAGA violations [thus] PAGA’s heightened penalty of \$200 for subsequent violations will not be calculated to determine the amount in controversy”); *Chen v. Morgan Stanley Smith Barney, LLC* (C.D. Cal., October 2, 2014) No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (“Under the Labor Code, if an employer does not have notice that they are committing a violation, they are not subject to the heightened penalties.”); *Trang v. Turbine Engine Components Technologies Corp.* (C.D. Cal. Dec. 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”).)

While Plaintiff argued that stacking was allowed, and that it was appropriate to award \$100 for each initial violation and \$200 for each subsequent violation, and that each violation of the Labor Code gave rise to a separate penalty such Defendant could ultimately face liability in excess of \$5,000,000 for initial and subsequent violations, Defendant argued that under no circumstances should Plaintiff be awarded more than \$100 per pay period for alleged PAGA violations. (Hawkins Decl. at ¶ 41.) Thus, while PAGA Counsel argued that Defendant faced liability of approximately \$5,000,000 in aggregate penalties for (initial and subsequent) violations of the Labor Code, PAGA Counsel is cognizant that there is at least an argument that Defendant’s realistic exposure would be approximately \$2,500,000 (25,000 violative pay periods multiplied by \$100³). (*Id.* at ¶¶ 42-44.)

However, this maximum amount does not take into account the various risks and defenses to the claims herein. For example, Defendant denies that a violation for each pay period can be

³ Moreover, PAGA Counsel is aware that certain statutes provide for different penalties under PAGA (e.g., LC 226.3 provides for \$250 for an initial violation and \$1,000 for a subsequent violation); however, for the sake of discussion PAGA Counsel evaluated the claims using a \$100/\$200 framework.

1 established as to each allegedly Aggrieved Employee due to its legally compliant policies and
2 practices. As such, Defendant contends the claims would fail on the merits and the exposure numbers
3 are overstated. (Hawkins Decl. at ¶¶ 45-47.) Defendant also argues that as to the reimbursement
4 claims it provided its employees with writing utensils and notepads for use during their employment.
5 It also contends that it provided employees with uniform pieces that required normal laundering and
6 that separate laundering was not required. (*Id.*) Nonetheless, to the extent a uniform piece was severely
7 damaged or tarnished, Defendant stated that it would provide its employees with a new one. (*Id.*) In
8 sum, Defendant asserts unwavering compliance with legal requirements, and denies all liability.

9 Additionally, Defendant asserts that, even if the claims were proven, Plaintiff's alleged
10 maximum exposure figure fails to acknowledge that courts have wide latitude to reduce the amount
11 of civil penalties "based on the facts and circumstances of a particular case" and if "to do otherwise
12 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Cal. Lab. Code
13 § 2699(h).) Moreover, Defendant argues against the merits of the underlying claims and particularly
14 to the extent that the "wilfulness" standard and/or "good faith" defenses mitigate the civil penalty
15 claims and rendered any such penalties as untenable. (Hawkins Decl. at ¶¶ 45-47.). For these reasons,
16 the Parties submit that the agreed-upon PAGA settlement is fair and reasonable.

17 In the face of these defenses, Plaintiff determined that the initial realistic exposure estimate of
18 \$2,500,000 should be reduced by approximately 65%, bringing the potential realistic liability to
19 approximately \$875,000. Plaintiff successfully secured a settlement wherein Defendant agreed to pay
20 \$125,000 to resolve the action. The settlement amount is approximately 14% of the potential realistic
21 liability. (Hawkins Decl. at ¶ 48.)

22 The settlement amount is reasonable result in light of the risks and uncertainties associated
23 with the PAGA claims in this case. This is sufficient to accomplish the objectives of PAGA while not
24 being unjust, arbitrary and oppressive, or confiscatory. (Hawkins Decl. at ¶ 48.)

25 **B. Plaintiff's Request for a PAGA Representative Payment is Proper**

26 Plaintiff is a former employee of Defendant who took the extraordinary step to challenge his
27 former employer's actions by bringing this action. (See Declaration of Jonathan Flores ("Flores Decl.")
28 at ¶¶ 15-22, attached as Exhibit 2 to Hawkins Decl.) He did so in the belief that Defendant should be

1 held accountable for its alleged Labor Code violations. (*Id.* at ¶¶ 2-4.) Plaintiff's actions have resulted
2 in a substantial recovery under PAGA. Plaintiff fully participated in the case's preparation, initiation,
3 litigation, and mediation. He provided valuable information and documents pertaining to the claims,
4 and kept well informed of the nature and extent of settlement discussions, and approved the same. (*Id.*
5 at ¶ 15-22.)

6 Plaintiff has also agreed to enter into a broad, general release of any individual claims against
7 Defendant in exchange for receiving a \$5,000 PAGA Representative Payment. (Ex. 1, C.1.) Notably,
8 the California Labor Code specifically permits a plaintiff to separately resolve claims for individual
9 damages from PAGA claims on behalf of aggrieved employees. California Labor Code section
10 2699(g)(1) provides that "[n]othing in this part shall operate to limit an employee's right to pursue or
11 recover ***other remedies available under state or federal law, either separately or concurrently with***
12 ***an action taken under this part***") (emphasis added). The rule permitting employees to pursue separate
13 individual claims while maintaining a PAGA claim aligns perfectly with the general principle that
14 PAGA claims (which seek civil penalties on behalf of aggrieved employees) are separate and distinct
15 from individual claims for unpaid wages and statutory penalties. (See also, *Iskanian v. CLS*
16 *Transportation, LLC* (2014) 59 Cal. 4th 348, 381-387.)

17 The PAGA Representative Payment is reasonable and represents a small percentage of the
18 Gross Settlement Amount. Absent the actions taken by Plaintiff, neither the LWDA nor the Aggrieved
19 Employees would have reaped the rewards of this action. Plaintiff respectfully requests that this Court
20 approve the PAGA Settlement and the PAGA Representative Payment.

21 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE**
22 **FAIR AND REASONABLE**

23 For their efforts and the risk undertaken in obtaining a common fund settlement that benefits
24 the LWDA and Aggrieved Employees, the Parties allocated \$43,750 to PAGA Counsel for reasonable
25 attorneys' fees, or 35% of the Gross Settlement Amount. Additionally, the Parties agreed to reimburse
26 PAGA Counsel for their actual litigation costs up to \$21,471.33. These fees and costs are warranted
27 under the law and within the range of fees commonly awarded in similar cases.

A. Plaintiff's Counsel are Entitled to Recover Attorney's Fees Under The Common Fund Doctrine in This *Qui Tam* Action

PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees and costs under section 2699(g)(1) of the California Labor Code, which provides that, "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. As discussed below, in a *qui tam* action, reasonable attorney's fees and costs are typically awarded under the common fund doctrine where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

“A qui tam action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government.” (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal. App. 4th 487, 491-492.) “A qui tam action ‘is a type of private attorney general lawsuit’ [citation], in which ‘the qui tam plaintiff stands in the shoes of the state or political subdivision [citation].’” (*Id.* at p. 501.) As the name of the PAGA statute makes clear (*e.g.* “Labor Code Private Attorney General Act”), a PAGA action is a qui tam action because the statute allows the employee plaintiff, acting as the proxy of the state’s labor law enforcement agency, to sue his or his employer for Labor Code violations and recover civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency (LWDA). (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380.) “A PAGA representative action is therefore a type of *qui tam* action.” (*Id.* at p. 382.) Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (*e.g.*, 75% paid to the state; 25% paid to the aggrieved employees). (*See* Cal. Lab. Code § 2699(i).)

As here, where a common fund is created in a *qui tam* action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the common fund. (*Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 89-91.) In *Bank of America*, California taxpayers compelled the State Controller to enforce the Unclaimed Property Law against banks who were retaining accounts that should have been turned over to the State. Because of the success of the

1 taxpayers' lawsuit, a common fund was created in favor of some depositors and the State of California.
2 (*Id.*) When the taxpayers' attorneys sought recovery of their attorney's fees from the judgment under
3 the common fund doctrine, the Controller opposed the request. The Court of Appeal affirmed the trial
4 court's fee award to the taxpayers' counsel under the common fund doctrine stating:

5 "Those benefiting from the recovery of the fund, in this case some depositors and
6 eventually the People of the State of California, must bear their share of the cost of
7 litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each
8 claimant's share reduced proportionately. To the extent the judgment relies upon
section 1021.5 for recovery of attorney fees, it must be modified to confine the award
of fees to the common fund theory." (*Id.* at 91.)

9 In this case, the settlement creates a common fund for the benefit of the employees and the
10 State of California. Thus, these beneficiaries must bear their share of the costs and attorney's fees,
11 which must be deducted from the Gross Settlement Amount under the common fund theory. (*Id.*)
12 Moreover, such fees are deducted as a percentage of the settlement amount. (*Boeing Co. v. Van Gemert*
13 (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990)
14 904 F.2d 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026,
15 1027; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.).)

16 The California Supreme Court also upheld the use of the common fund theory of recovery for
17 attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, 506. In *Laffitte*, the settlement
18 created a common fund of \$19 million. This ruling was consistent with the Court's prior rulings
19 recognizing that "when a number of persons are entitled in common to a specific fund, and an action
20 brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such
21 ... plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano III v. Priest* (1977) 20 Cal. 3d
22 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who recovers a common
23 fund . . . is entitled to reasonable attorneys' fees from the fund as a whole;" *Mills v. Electric Auto-Lite*
24 *Co.* (1970) 396 U.S. 375, 393-394 (discussing the acceptance of awarding attorneys' fees and expenses
25 from a settlement where "litigation has conferred a substantial benefit on the members of an
26 ascertainable class"); see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 26
27 "[f]ee spreading occurs when a settlement or adjudication results in the establishment of a separate or
28 so-called common fund for the benefit of the class.".)

1 Accordingly, the common fund doctrine allows a court to award attorneys' fees based upon a
2 percentage of the total fund that is created for the satisfaction of beneficiaries' claims when the fund
3 consists of a "certain or easily calculable sum of money." (*Dunk v. Ford Motor, Co.* (1996) 48 Cal.
4 App. 4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal. App. 3d 102, 1,282.91 (application of
5 the percentage of the fund recovery depended on "[t]he critical point" that "a fund was created from
6 which attorneys' fees could be paid"); A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6
7 (4th ed. 2002).)

8 California law has long upheld, and continues to uphold, the percentage of the recovery method
9 for awarding attorneys' fees where a fund is established. (See e.g., *Serrano v. Priest* (1977) 20 Cal. 3d
10 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 726; *Chavez v. Netflix,*
11 *Inc.* (2008) 162 Cal. App. 4th 43, 563 ("fees based on a percentage of the benefits are in fact
12 appropriate in large class actions..."); *Sanders v. City of Los Angeles* (1970) 3 Cal. 3d 252, 261, 263
13 (affirming award of attorneys' fee based on percentage of recovery); *Chavez v. Netflix, Inc., supra,*
14 162 Cal. App. 4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets,*
15 *Inc.* (2005) 127 Cal. App. 4th 387, 397 (the common fund doctrine is "frequently applied in class
16 actions when the efforts of the attorney for the named class representatives produce monetary benefits
17 for the entire class"); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254 ("courts
18 recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method
and the percentage of recovery").)

19 Based on the foregoing, awarding attorneys' fees of 35% of the Gross Settlement Amount is
20 fair and warranted in light of the PAGA settlement that was reached on behalf of the State of California
21 and Aggrieved Employees. Accordingly, the requested fees are reasonable and appropriate.

22 **B. The Percentage Fee of the Gross Settlement Amount Is Fair and Reasonable**

23 An award of fees from the Gross Settlement Amount under the common fund doctrine prevents
24 unjust enrichment of those who benefit from the common fund created through Plaintiff's Counsel's
25 successful efforts and furthers the important goal of attracting competent counsel to handle
26 representative actions enforcing minimum labor standards. (*Laffitte v. Robert Half Int'l. Inc.* (2016) 1
27 Cal. 5th 480, 503.) In affirming the use of the common fund doctrine in California, the California
28

1 Supreme Court summarized the benefits of the percentage method of recovery stating: “The
2 recognized advantages of the percentage method—including relative ease of calculation, alignment of
3 incentives between counsel and the class, a better approximation of market conditions in a contingency
4 case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily
5 prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should
6 not be denied our trial courts.” (*Id.*)

7 Among the factors considered in determining whether the requested fee percentage is
8 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
9 plaintiff’s counsel and the quality of work performed by plaintiff’s counsel; (4) the contingent nature
10 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.
11 (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.) All these factors support an
12 award here of 35% of the Gross Settlement Amount.

13 First, Plaintiff’s counsel achieved a reasonable PAGA-only settlement in a case that involved
14 highly contested legal and factual issues.

15 Second, Plaintiff faced significant risks going forward with the litigation. As discussed above,
16 Defendant raised various defenses which threatened recovery and, as such, Plaintiff faced significant
17 risk going forward with this litigation.

18 Third, PAGA Counsel are experienced class and representative PAGA action litigators, and
19 have achieved some of the largest representative awards in the State of California. (Hawkins Decl. at
20 ¶ 52-61.) This experience and expertise, combined with the high quality of work performed in this
21 case by Plaintiff’s Counsel, resulted in the settlement achieved in this case. (*Id.* at ¶¶ 61-70.)

22 Fourth, as discussed above and as set forth in the Hawkins Declaration, the request for
23 attorney’s fees falls well within the norms accepted by state and federal courts in California in
24 comparable wage and hour actions actually handled by Plaintiff’s Counsel. (*Id.* at ¶¶ 61-70.)

25 For all of the above reasons, a fee award here in the amount of 35% of the Gross Settlement
26 Amount is fair and reasonable.

27 **C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award**

28 Despite recognized limitations of the so-called lodestar method, some California and federal

courts acknowledge the utility of a lodestar “cross-check.”⁴ (*Lealao, supra*, 82 Cal. App. 4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal. App. 4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”).)

As set forth in the Hawkins Declaration submitted herewith, the actual aggregated lodestar between the attorneys that worked on this case is approximately \$217,187.50. No positive multiplier is necessary to reach the requested award. To the contrary, the award requested constitutes a significant negative multiplier. Counsel has invested significant costs and time in the litigation of this matter. The total lodestar is summarized in the following table and in the Hawkins Declaration (See Hawkins Decl. at ¶ 62.):

James Hawkins APLC Lodestar Summary				
Timekeeper	Years	Hours	Rate	Total
James Hawkins, Esq.	26	87.3	\$1050	\$91,665
Christina Lucio	16	108.7	\$775	\$84,242.50
Mitchell Murray	12	3.8	\$750	\$2,850.00
Associate Attorneys	1-2	51.4	\$450	\$23,130.00
Paralegal Staff		76.5	\$200	\$15,300.00
TOTALS		327.7		\$217,187.50

The hourly rates above are comparable to those of other attorneys with equal or similar experience. The starting point in determining the appropriate hourly fee is to discern the prevailing rate for similar work in the pertinent geographic region. (*See Herr, Manual for Complex Litigation*, § 14.122 (1984) (“reasonable fees ... are to be calculated according to the prevailing market rates in

⁴ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended. *Herr, David F., Manual for Complex Litigation*, § 14.121 (1988); *see also In re Activision* (N.D. Cal 1989) 723 F. Supp 1373.

the relevant community.”.) Thus, not only are PAGA Counsel’s rates reasonable and typical, but the attorneys’ fees requested are in line with the lodestar, which further confirms that the fee request is fair and reasonable. (Hawkins Decl. at ¶ 68.)

D. The Requested Litigation Costs are Fair and Reasonable

Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. (See *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Plaintiff’s Counsel are permitted to recover their litigation costs and expenses under the common fund doctrine. (See *Serrano v. Priest* (1977) 20 Cal. 3d 25, 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal. App .4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by . . . [Plaintiffs’] attorneys”).) Furthermore, PAGA Counsel are entitled to recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” (*Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.)

The PAGA Settlement authorizes PAGA Counsel to recover litigation costs up to \$21,471.33 which are the actual costs projected through the hearing. Any remaining balance will be added to the Net Settlement Amount as set forth in paragraph III.C(2) of the PAGA Settlement. These costs are reasonable, uncontested, and should be approved.

VII. SUBMISSION TO THE LWDA

The PAGA Settlement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code section 2699(l)(2). The proof of electronic submission is attached as **Exhibit 2** to the Hawkins Declaration.

VIII. THE SETTLEMENT ADMINISTRATOR

Phoenix Class Action Solutions will serve as the Settlement Administrator and will be responsible for processing the settlement payments and providing notice to the Aggrieved Employees. They have estimated that the costs of administration will not exceed \$10,995.00.

IX. CONCLUSION

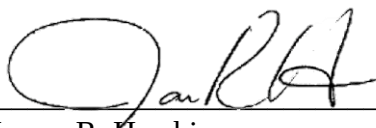
In the present case, a thorough evaluation of Plaintiff’s claims supports a finding that the

1 settlement is fair, adequate and reasonable. The statutory purposes of PAGA may be fulfilled even
2 with a relatively small award on the PAGA claim itself, because such “a settlement not only vindicates
3 the rights of the class members as employees, but may have a deterrent effect upon the defendant
4 employer and other employers, an objective of PAGA.” (*Viceral v. Mistras Group, Inc.* (N.D. Cal.,
5 Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *9 (citing *O'Connor v. Uber*
6 *Technologies, Inc.* (N.D. Cal. Aug. 18, 2016) No. 13-CV-03826-EMC, 2016 WL 4398271, at *18.)
7 Here, the settlement sum obtained is reasonable and should be approved.

8 Based on the above, Plaintiff respectfully requests that this Court: 1) approve the Parties’
9 settlement and order the Parties to carry out the terms of the PAGA Settlement, and 2) enter a Final
10 Judgment thereon.

11
12
13 DATED: May 8, 2024

JAMES HAWKINS APLC

14
15 By: 

16 James R. Hawkins
17 Christina M. Lucio
18 Mitchell J. Murray

19 Attorneys for Plaintiff
20 JONATHAN FLORES on behalf of himself and
21 all others similarly situated
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