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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO**

DON SARUBBI, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

TECH MAHINDRA (AMERICAS) INC.,
a New Jersey corporation; TECH
MAHINDRA NETWORK SERVICES
INTERNATIONAL, INC., a Delaware
corporation; TECH MAHINDRA
TECHNOLOGIES INC., a Delaware
corporation; TECH MAHINDRA
NETWORK SERVICES, a business
organization, form unknown; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 20-CIV-03616

(Assigned to the Hon. Robert D. Foiles, Dept. 21)

**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 2, 2021

Time: 2:00 p.m.

Dept.: 21

Complaint Filed: August 26, 2020

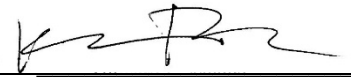
1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on November 2, 2021, at 2:00 p.m., before the Honorable
3 Robert D. Foiles, judge presiding, in Department 21 of the above referenced Court, located at
4 400 County Center, Redwood City, CA 94063, Plaintiff Don Sarubbi ("Plaintiff") will seek an
5 Order approving the concurrently filed PAGA Settlement Agreement, pursuant to the procedures
6 set forth in Labor Code § 2698, *et seq.*

7 This motion will be based on this notice of motion, the attached memorandum of points
8 and authorities, the accompanying declarations of Larry W. Lee, Mai Tulyathan, and Plaintiff
9 Don Sarubbi, the records and file herein, and on such other evidence as may be presented at the
10 hearing of the motion.

11
12 DATED: September 22, 2021

DIVERSITY LAW GROUP, P.C.

13
14 By: 

15 Larry W. Lee
16 Mai Tulyathan
17 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 § 2698, *et*
4 *seq.*, Plaintiff Don Sarubbi (“Plaintiff”) hereby moves the Court for an order approving the non-
5 reversionary PAGA settlement as set forth in the concurrently filed Stipulation of Settlement (the
6 “Settlement Agreement” or “Settlement”).¹

7 This lawsuit is premised upon Defendant Tech Mahindra (Americas) Inc.’s (“TMA”),
8 Defendant Tech Mahindra Technologies Inc.’s (“TMT”), and Defendant Tech Mahindra
9 Network Services International, Inc.’s (“TMNSI”) (erroneously sued as Tech Mahindra Network
10 Services) (collectively, “Defendants”) alleged violation of California Labor Code § 2698 *et seq.*,
11 the Private Attorneys General Act of 2004 (“PAGA”). Specifically, Plaintiff alleged that
12 Defendants failed to comply with Labor Code § 201.3 by failing to pay temporary services
13 employees on a weekly basis and, in the alternative, failed to comply with Labor Code § 204 by
14 paying wages to employees beyond the time limits set forth therein. Based thereon, Plaintiff
15 sought civil penalties under PAGA on behalf of the State of California and other aggrieved
16 employees.

17 As demonstrated below and in the accompanying declaration of Mai Tulyathan, the
18 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
19 investigation and discovery, including formal discovery and informal discovery conducted in
20 connection with the Parties’ settlement negotiations.

21 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendants will
22 pay the gross amount of \$44,100.00 (the “Total Settlement Amount”) for the release of PAGA
23 claims in this lawsuit by the PAGA aggrieved employees. This amount includes the following:

- 24 • An enhancement payment of \$5,000.00 to Plaintiff, in recognition for his efforts
25 in obtaining the benefits of the settlement on behalf of other aggrieved employees
26

27
28 ¹ The Settlement Agreement is attached to the Declaration of Mai Tulyathan (“Tulyathan Decl.”)
as Exhibit A.

and for Plaintiff's general release of his claims against Defendants (Settlement Agreement ¶ 5);

- The settlement administration costs of \$450.00 to Atticus, the third-party Settlement Administrator to be retained by the Parties for issuing settlement payments to PAGA aggrieved employees along with an accompanying Notice, (Settlement Agreement ¶ 6); and
- Plaintiff's Counsel's fees of up to \$16,150.00, and actual litigation costs of \$2,138.10 (Settlement Agreement ¶ 4; Tulyathan Decl. at ¶ 24, Ex. C).

After subtraction of the settlement administration costs, Plaintiff's attorneys' fees and costs, Plaintiff's enhancement award, the remaining amount of \$20,361.90 will be distributed in accordance with PAGA's requirements. (Tulyathan Decl. at ¶ 7.) Pursuant to the PAGA, 75 percent of the Net Settlement Amount, or approximately \$15,271.42, will be paid to the Labor and Workforce Development Agency ("LWDA"). (*Id.*)

The proposed release for aggrieved employees is narrowly tailored to release only claims for civil penalties under PAGA arising out of the facts alleged or could have been alleged in this lawsuit, and does not release any other claims.

Accordingly, the 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

On or about July 1, 2020, Plaintiff submitted his written notice under Labor Code § 2699.3 (the "PAGA Notice") to the California Labor & Workforce Development Agency ("LWDA") and Defendants. (Tulyathan Decl. at ¶ 2.) As set forth in the PAGA Notice, Plaintiff alleged that Defendants failed to pay earned wages in a timely manner in violation of Labor Code § 204, and, in the alternative, failed to pay wages to purported temporary services employees on a weekly basis in violation of Labor Code § 201.3. (*Id.*)

On August 26, 2020, Plaintiff filed a representative PAGA action Complaint against Defendants in the Superior Court of California, County of San Mateo, alleging a single cause of

1 action for violation of Labor Code § 2698, *et seq.*, predicated on the violations of Labor Code §§
2 201.3 and 204 (the “Action”). (*Id.* at ¶ 3.) On October 5, 2020, TMA, TMT and TMNSI filed
3 their respective Answers to the Complaint, wherein Defendants denied all material allegations of
4 the Complaint and set forth their respective affirmative defenses. (*Id.*)

5 Thereafter, the Parties engaged in formal discovery. On January 11, 2021, Plaintiff
6 propounded a series of written discovery requests to Defendants. (Tulyathan Decl. at ¶ 4.) On
7 March 19, 2021, Defendants served its discovery responses and documents, including Plaintiff’s
8 personnel file and Defendants’ policies. (*Id.*) The Parties subsequently met and conferred
9 regarding the possibility of informal dispute resolution. (*Id.*)

10 In connection with the Parties’ dispute resolution discussions, Defendants provided
11 Plaintiff with information to allow Plaintiff to conduct liability and exposure analysis. (*Id.* at ¶
12 5.) As part of the dispute resolution discussions, Defendants have also indicated that Plaintiff
13 and the purported aggrieved employees were employed by TMNSI, and not by TMA and TMT.
14 Furthermore, Defendants have indicated TMA and TMT do not utilize the same payroll schedule
15 and/or operate under the same payroll policies as TMNSI. (*Id.*) In light of those defenses,
16 Defendants provided the number of purported aggrieved employees of TMNSI and the number
17 of pay periods worked by purported aggrieved employees of TMNSI during the PAGA period as
18 alleged in the lawsuit. (*Id.*) The data allowed Plaintiff’s counsel to perform a comprehensive
19 damages analysis. (*Id.*)

20 Following arm’s-length negotiations and discussions between the Parties, during which
21 the Parties spoke at length about the strengths and weaknesses of each side’s claims and
22 defenses, and the scope of Defendants’ purported liability, the Parties were able to reach an
23 agreement in principle. (*Id.* at ¶ 6.) The Parties then finalized the settlement terms in the
24 concurrently filed Settlement Agreement. (*Id.*, Ex. A.) The settlement is the result of informed
25 and non-collusive arm’s length negotiations.

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

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

1 **A. The Aggrieved Employees (or PAGA Settlement Group Members)**

2 The purported aggrieved employees affected by this Settlement, or PAGA Settlement
3 Group Members, are defined as “all current and former employees of TMNSI in California at
4 any time during the period from April 6, 2019, to August 15, 2020.” (Settlement Agreement ¶
5 9.) The Covered Period in this matter runs from April 6, 2019, to August 15, 2020. (*Id.*) Based
6 upon Defendants’ records, there are seven (7) PAGA Settlement Group Members during the
7 Covered Period. (*Id.*)

8 **B. Settlement Sum and Allocation**

9 The Settlement Agreement requires Defendants to pay a total of Forty-Four Thousand
10 One Hundred Dollars (\$44,100.00) (the “Total Settlement Amount”). (*Id.* ¶ 3.) This is an
11 allocation of the Total Settlement Amount for the release of PAGA claims by PAGA Settlement
12 Group Members and the Service Award to Plaintiff for the general release of his individual
13 claims. (*Id.* ¶¶ 5, 9.) The balance of the Total Settlement Amount remaining after deduction of
14 the approved Plaintiff’s attorneys’ fees and costs, Plaintiff’s Service Award, and settlement
15 administration costs, or the Net Settlement Amount, in the amount of \$20,361.90, will be
16 available for distribution to the LWDA and PAGA Settlement Group Members. (*Id.* ¶ 7;
17 Tulyathan Decl. at ¶ 7.) Seventy-five percent of the Net Settlement Amount, or approximately
18 \$15,271.42, will be paid to the LWDA for PAGA penalties. (*Id.* ¶ 7.a.; Tulyathan Decl. at ¶ 7.)
19 The remaining twenty-five percent, or approximately \$5,090.48, will be distributed to the PAGA
20 Settlement Group Members. (Settlement Agreement ¶ 7.b., Tulyathan Decl. at ¶ 7.)

21 The portion of the Net Settlement Amount distributed to PAGA Settlement Group
22 Members will be distributed on a *pro rata* basis, based on the number of pay periods each
23 individual PAGA Settlement Group Member was paid wages during the Covered Period.
24 (Settlement Agreement ¶ 10.) The number of pay periods in which PAGA Settlement Group
25 Members were paid wages by TMNSI during the Covered Period is 128 pay periods. (*Id.*)
26 Based on the number of PAGA Settlement Group Members, employees will be entitled to
27 recover, on average, approximately **\$727.21** each. (Tulyathan Decl. at ¶ 9.) The amount any
28 particular PAGA Settlement Group Member will be entitled to recover will be greater or lower

1 than this average depending on the number of pay periods during which he or she was paid
2 wages. (*Id.*) This is fair, as it directly allocates greater penalties to individual PAGA Settlement
3 Group Members who have allegedly suffered greater harm. (*Id.*)

4 As part of the Settlement Agreement, Defendants also do not object to Plaintiff's
5 Counsel's request for attorneys' fees of \$16,150.00, which is approximately 36.6 percent of
6 Total Settlement Amount. (Settlement Agreement ¶ 4.) While the Settlement Agreement
7 provides of reimbursement of documented litigation costs of up to \$5,000.00, Plaintiff's
8 Counsel is only requesting for reimbursement of \$2,138.10 in actual litigation costs. (*Id.*;
9 Tulyathan Decl. at ¶ 24, Ex. C.) Also, as part of the Settlement Agreement, Defendants do not
10 object to Plaintiff's request for a Service Award of \$5,000.00, in recognition for Plaintiff's
11 efforts in obtaining the benefits of the settlement on behalf of other purported aggrieved
12 employees and for Plaintiff's general release of his claims against Defendants. (Settlement
13 Agreement ¶ 5.)

14 Finally, the Settlement Agreement provides for the payment of the fees and expenses
15 reasonably incurred by the Settlement Administrator. (*Id.* ¶ 6.) The Parties have agreed to
16 utilize Atticus to administer the Settlement, with the administration costs estimated to be
17 \$450.00. (*Id.*)

18 **C. Scope of the Released Claims by PAGA Settlement Group Members**

19 In exchange for such payments, Plaintiff, the PAGA Settlement Group Members, and the
20 State of California will release Defendants from the following release:

21 [A]ny and all claims for penalties under PAGA, arising during the
22 Covered Period, based on the facts alleged or that could have been alleged
23 in the Action and Plaintiff's notice letter to the LWDA including, but not
24 limited to, Labor Code sections 201.3 and 204, and the applicable IWC
Wage Orders, and any resulting claim for attorneys' fees and costs under
PAGA (the "Released Claims").

25 (*Id.* ¶ 14.) This release is appropriately tailored as it only releases claims for civil penalties
26 under PAGA arising out of the facts alleged or could have been alleged in this lawsuit, and does
27 not release any other claims. (Tulyathan Decl. at ¶ 10.) Further, none of the PAGA Settlement
28 Group Members are bound by any general release under Code of Civil Procedure § 1542 as part

1 of this settlement. (*Id.*)

2 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

3 **A. PAGA Overview**

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

16 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
17 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
18 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
19 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
20 employee” means “any person who was employed by the alleged violator and against whom one
21 or more of the alleged violations was committed.” (Cal. Lab. Code § 2699, subd. (c).) Prior to
22 commencing an action, the allegedly aggrieved employee must provide notice to the LWDA and
23 the employer setting forth the “specific provisions of [the Labor Code] alleged to have been
24 violated, including the facts and theories to support the alleged violation.” (Cal. Lab. Code §
25 2699.3, subd. (a)(1).) If the LWDA decides not to investigate the allegations or issue a citation to
26 the employer, the proposed representative plaintiff is entitled to commence a PAGA action after
27 65 days. (Cal. Lab. Code § 2699.3, subd. (a)(2).)

28 The California Supreme Court has explained that a plaintiff who brings a PAGA claim

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

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

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

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

1 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).)

2 Notably, unlike the class action settlement approval process, there is also no statutory
3 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
4 2699, subd. (1).) In addition, “[u]nnamed employees need not be given notice of the PAGA
5 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
6 settlement, if any, reached between the parties.” (*Ochoa-Hernandez*, 2010 WL 1340777 at p.
7 *13.)

8 **C. The Scope of the Release is Appropriately Limited**

9 As explained above, the release for PAGA Settlement Group Members are narrowly
10 tailored to release only claims for civil penalties under PAGA pursuant to Labor Code §§ 201.3
11 and 204 arising out of the facts alleged or could have been alleged in this lawsuit during the
12 Covered Period. The release does not impact any PAGA Settlement Group Members’ ability to
13 pursue any other claims outside of this scope as it does not release their individual substantive
14 claims. Therefore, this limited scope of the release also supports approval of the settlement.

15 Because an aggrieved employee’s PAGA action is a substitute for an action brought by
16 the government, “judgment in [a PAGA] action is binding not only on the named employee
17 plaintiff but also on government agencies and any aggrieved employee not a party to the
18 proceeding.” (*Arias*, 46 Cal. 4th at p. 986.) However, “the nonparty employees, because they
19 were not given notice of the action or afforded any opportunity to be heard, would not be bound
20 by the judgment as to remedies other than civil penalties.” (*Id.* at p. 987; *see also*, Cal. Lab.
21 Code § 2699, subd. (g)(l) (non-party aggrieved employees retain all rights “to pursue or recover
22 other remedies available under state or federal law, either separately or concurrently with an
23 action taken under this part”).)

24 Accordingly, the PAGA Settlement Group Members will be subject to only a limited
25 release strictly confined to the violations of PAGA under Labor Code §§ 201.3 and 204, and any
26 resulting claim for attorneys’ fees and costs. (Settlement Agreement ¶ 14.b.) The release is
27 therefore appropriately tailored.

28 **D. Plaintiff’s Rationale for Agreeing to the Settlement**

1 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
2 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to the
3 still-developing law under PAGA. (Tulyathan Decl. at ¶ 13.) Here, Plaintiff asserts that his
4 representative PAGA claim is based on the allegation that Defendants failed to pay wages to
5 temporary services employees on a weekly basis in violation of Labor Code § 201.3. In the
6 alternative, Plaintiff also asserts that Defendants failed to pay wages to employees pursuant to
7 the time limits of Labor Code § 204. (Tulyathan Decl. at ¶ 2.)

8 Defendants have denied violation of any applicable laws and liability for any claims
9 asserted in the Action. (Tulyathan Decl. at ¶ 14.) In this regard, Defendants have asserted that
10 Plaintiff and the purported aggrieved employees were employed by TMNSI, and not by TMA
11 and TMT, and that the entities do not utilize the same payroll schedule and/or operate under the
12 same payroll policies as TMNSI. Thus, Defendants have argued that Plaintiff cannot prevail on
13 a joint employer theory and that Plaintiff would not have standing to represent purported
14 aggrieved employees of the other entities as he was not employed by them. (*Id.*) As another
15 defense, Defendants have also indicated that TMNSI has corrected its pay schedule for its
16 employees prior to the filing of the Action, and thus Plaintiff cannot establish liability under the
17 PAGA for the alleged claims. (*Id.*) Defendants also maintain that TMNSI is not a temporary
18 services employer and the purported aggrieved employees (including Plaintiff) were not
19 temporary services employees under the Labor Code and, therefore, TMNSI cannot be held
20 liable for alleged violations of Labor Code § 201.3. Furthermore, Defendants also argued that
21 the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its
22 discretion. (*Id.*) Should Defendants have prevailed on its defenses whether at summary
23 judgment or at trial, the State of California and purported aggrieved employees would have been
24 left with zero or minimal recovery. (*Id.*)

25 With respect to recovery of potential penalties after trial, Defendants have indicated that
26 there were 7 PAGA Settlement Group Members who were paid wages and 128 pay periods at
27 issue during the Covered Period. (Tulyathan Decl. at ¶¶ 8-9.) Therefore, pursuant to the PAGA,
28 Plaintiff has calculated total exposure to be \$12,800.00, calculated based on PAGA's \$100 initial

1 violation per pay period penalty. (Tulyathan Decl. at ¶ 11.) The overall settlement value of
2 \$44,100.00 here provides PAGA Settlement Group Members with 100 percent recovery of
3 potential PAGA penalties recoverable at trial without any discount or reduction. In addition, the
4 settlement also provides for payment of attorneys’ fees and costs, and costs pertaining to
5 settlement administration. (Tulyathan Decl. at ¶ 12.)

6 The Court’s assessment of the proposed settlement must also take into account that even
7 if Plaintiff prevailed at trial on his PAGA claims, any penalties to be awarded by the Court may
8 be subject to substantial reduction. Pursuant to Labor Code § 2699(f)(2), the Court can decline
9 to award the full amount of PAGA penalties where “if, based on the facts and circumstances of
10 the particular case, to do otherwise, would result in an award that is unjust, arbitrary and
11 oppressive, or confiscatory.” When this is considered, in conjunction with the history of PAGA
12 case law and settlements, and the fact that Plaintiff may recover nothing, the proposed settlement
13 is more than reasonable as it provides the State of California and PAGA Settlement Group
14 Members with a full recovery of the civil penalties. The settlement here accounts for the risk of
15 continued litigation, and the risk that Defendants would prevail on their defenses.

16 Given that the proposed settlement sum in this case significantly exceeds the amount of
17 PAGA penalties potentially recoverable in this action, the Court should approve the settlement.

18 **E. The Attorneys’ Fees are Reasonable**

19 PAGA allows a prevailing plaintiff to obtain attorneys’ fees and costs. (Cal. Lab. Code §
20 2699, subd. (g).) Similar to awarding fees in a class action, California state and federal courts
21 have recognized that an appropriate method for determining award of attorneys’ fees for
22 representative actions is to use a percentage of the total value of benefits to class members by the
23 settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v.*
24 *Priest* (1977) 20 Cal. 3d 25, 34 (“*Serrano III*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472,
25 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose of this
26 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
27 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
28 burden alone.” (*Vincent*, 557 F. 2d at p. 769.)

1 The Common Fund doctrine is predicated on the principle of preventing unjust
2 enrichment. When a litigant’s efforts create or preserve a fund from which others derive
3 benefits, he may require the passive beneficiaries to compensate those who created the fund.
4 Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at
5 p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet*
6 (1995) 12 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund
7 doctrine has been applied “consistently in California when an action brought by one party creates
8 a fund in which other persons are entitled to share.” The reasons for applying the common fund
9 doctrine include: “fairness to the successful litigant, who might otherwise receive no benefit
10 because his recovery might be consumed by the expenses; correlative prevention of an unfair
11 advantage to the others who are entitled to share in the fund and who should bear their share of
12 the burden of its recovery; encouragement of the attorney for the successful litigant who will be
13 more willing to undertake and diligently prosecute proper litigation for the protection or recovery
14 of the fund if he is assured that he will be properly and directly compensated should his efforts
15 be successful.” (*Id.*)

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

23 As a secondary support for the percentage of the fund method, when fees are allocated
24 by percentage method, courts have discretion to “cross-check” the fees awarded through the
25 lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation,
26 when used in this manner, does not override the trial court’s primary determination of the fee as
27 a percentage of the common fund and thus does not impose an absolute maximum or minimum
28 on the potential fee award.” (*Laffitte*, 1 Cal.5th at p. 505 (emphasis added); *In re Rite Aid*

1 *Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check does not
2 trump the primary reliance on the percentage of common fund method”).)

3 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
4 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
5 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
6 range, but the court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a
7 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
8 required; in many cases, performing a cross-check “undermines” one of the primary reasons for
9 using the percentage method: aligning counsel’s incentives with the benefits delivered to the
10 class and discouraging protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the
11 discretion to forgo a lodestar cross-check”)); *Report of the Third Circuit Task Force, Court*
12 *Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao*, 82 Cal.App.4th 19, pp. 29-30
13 (citing the recommendations of the Third Circuit Task Force with approval and observing that
14 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
15 authorities, who have been most vocal about the manner in which it exacerbates the problem of
16 ‘cheap settlements’ and burdens already overworked trial judge”).)

17 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
18 to 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see*
19 *also, e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying a
20 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60
21 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*
22 (1988) 203 Cal.App.3d 78 (affirming a 2.34 multiplier without remand).)

23 With respect to Plaintiff’s Counsel’s lodestar, to date, approximately 67.7 hours have
24 been expended by Plaintiff’s Counsel this matter. (Tulyathan Decl. at ¶ 21, Ex. B.) Plaintiff’s
25 Counsel expects to incur approximately 5 additional hours to handle any post-approval matters
26 and any settlement issues. (Tulyathan Decl. at ¶ 22.) Ms. Tulyathan requests an hourly rate of
27 \$500.00 per hour. (Tulyathan Decl. at ¶ 23.) The courts are quite liberal in the evidence
28 required to prove an attorney’s hours. Detailed time records are not required. An attorney’s

1 testimony alone may suffice: “Testimony of an attorney as to the number of hours worked on a
2 particular case is sufficient evidence to support an award of attorney fees, even in the absence
3 of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.)

4 Reasonable hours include, in addition to time spent during litigation, the time spent
5 before the action is filed, including time spent interviewing the clients, investigating the facts
6 and the law, and preparing the initial pleadings. (*New York Gaslight Club, Inc. v. Carey* (1980)
7 447 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and defend
8 the attorneys’ fee claim. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 [*Serrano IV*].)

9 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
10 experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084,
11 1095.) The court may consider other factors when determining a reasonable hourly rate, e.g.,
12 the attorney’s skill and experience, the nature of the work performed, the relevant area of
13 expertise and the attorney’s customary billing rates. (*Flannery v. California Highway Patrol*
14 (1998) 61 Cal.App.4th 629, 632-33.)

15 Plaintiff’s Counsel’s skill and experience justify the requested rate. As shown in the
16 supporting declarations, Plaintiff’s Counsel have significant experience in the area of
17 employment and wage and hour class actions. Specifically, Plaintiff’s Counsel’s practice
18 focuses on representing employees in employment matters, particularly wage and hour cases.
19 (Tulyathan Decl. at ¶¶ 18-20.) As such, based on the hours and applicable rate, the total
20 lodestar to be expended by Plaintiff’s Counsel through finalizing this Settlement will be
21 approximately \$36,350.00, based on 72.7 total hours. (Tulyathan Decl. at ¶ 23.)

22 Once the court establishes the lodestar amount, it may enhance the fee award by a
23 multiplier in order to make an appropriate fee award. (*Serrano III*, 20 Cal.3d at p. 48.) The
24 pertinent factors include the difficulty of the questions involved and the skill in presenting
25 them, the contingent nature of the fee award, the extent to which the litigation precluded other
26 employment, and the percentage-of-the-fund the attorney would have received on the fair
27 market. (*Id.*; *Lealao*, 82 Cal.App.4th at p. 49.) However, this list is not exhaustive and the
28 court can consider other factors it deems important in setting the multiplier. (*Ketchum v. Moses*

1 (2001) 24 Cal.4th 1122, 1139.)

2 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
3 enhancement based on a percentage-of-the-fund. (*Lealao*, 82 Cal.App.4th at p. 52 (the
4 promptness of settlement “cannot be used to justify the refusal to apply a multiplier”).)
5 According to *Lealao*, courts placed “an extraordinarily high value” on settlement, and counsel
6 should be rewarded, not punished, for achieving this goal in a timely fashion. (*Id.*)

7 Here, based upon Plaintiff’s Counsel’s lodestar of \$36,350.00, Plaintiff’s request for a
8 fee award of \$16,150.00 is more than reasonable and fair. As the Court can see, the lodestar
9 well exceeds the requested fee amount, such that it would result in a negative multiplier. Based
10 thereon, Plaintiff’s Counsel’s request for attorneys’ fees in the amount of \$16,150.00 is fair and
11 reasonable, and the Court should approve this amount.

12 **F. The Costs are Reasonable**

13 Additionally, Plaintiff’s Counsel’s reimbursement of actual litigation costs in the amount
14 of \$2,138.10 is also reasonable, especially in light of the fact that the Parties agreed that
15 Plaintiff’s counsel may seek up to \$5,000.00 as reimbursement for litigation costs under the
16 Settlement Agreement. (*See* Settlement Agreement at ¶ 4; Tulyathan Decl. at ¶ 24, Ex. C.) As
17 set forth in Plaintiff’s Counsel’s declaration, the costs were all directly incurred in the
18 prosecution of this action, including, but not limited to, filing and service fees, postage fees, and
19 court fees. (Tulyathan Decl. at ¶ 24.) As such, the requested costs are fair and reasonable and
20 should be approved.

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

22 The Parties have agreed to pay actual costs of administration, which is estimated not to
23 exceed \$450.00, to the Settlement Administrator, Atticus, to administer this Settlement.
24 (Settlement Agreement ¶ 6.) The Parties believe that the administration fee is reasonable and
25 should be approved.

26 **H. Plaintiff’s Service Award Should Be Approved**

27 Courts have held that named Plaintiff in class, or private attorney general actions can
28 request a service award. (*Rodriguez v. W. Publ’g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59

(explaining that service awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general”) (emphasis added).)

Here, Plaintiff seeks \$5,000.00 for the service award, which is intended to compensate Plaintiff for the time spent on this case, including reviewing pleadings, including his PAGA letters to the LWDA, the complaint, the settlement agreement, and his declaration, providing information and documents for this lawsuit and the resulting settlement, any potential for retaliation by prospective employers by filing a public lawsuit, and for executing a general release, including for all known and unknown claims under Civil Code § 1542. (Declaration of Don Sarubbi (“Sarubbi Decl.”) at ¶¶ 5-6.) This requested enhancement is consistent with awards approved in other common fund cases. (*See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299-300 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907, 913-14 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.* (N.D. Cal. Jan. 27, 2007) No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award to class representative in ERISA case).)

I. Notice to the LWDA Has Been Provided

Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the LWDA’s website. (Tulyathan Decl. at ¶ 25, Ex. D.)

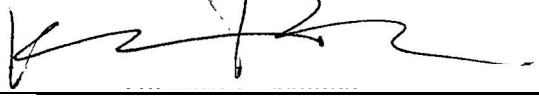
V. CONCLUSION

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

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2 DATED: September 22, 2021

DIVERSITY LAW GROUP, P.C.

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4 By: 

5 Larry W. Lee
6 Mai Tulyathan
7 Attorneys for Plaintiff and Aggrieved Employees
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