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

KADAY ALLEN, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

KUMQUAT HOLDINGS, LLC, a
Delaware limited liability company doing
business as PRIMROSE POST-ACUTE;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: 20STCV33311

[Assigned for all purposes to the Hon. Lawrence P.
Riff, Department 7]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE THE PARTIES'
SETTLEMENT AGREEMENT PURSUANT
TO THE LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: November 9, 2022
Time: 11:00 a.m.
Dept.: 7

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

2 PLEASE TAKE NOTICE that on November 9, 2022, at 11:00 a.m., or as soon thereafter
3 as the matter be heard in Department 7 of the Superior Court of the State of California for the
4 County of Los Angeles located at 312 North Spring Street, Los Angeles, CA 90012, Plaintiff
5 Kaday Allen (“Plaintiff”) will, and hereby does, move the Court for entry of an order approving
6 the proposed Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and Release
7 Agreement (“Settlement Agreement”) entered into in the above-captioned civil action between
8 Plaintiff and Defendant Kumquat Holdings, LLC (“Defendant”) (Plaintiff and Defendant shall
9 collectively be referred to as the “Parties”) under the Labor Code Private Attorneys General Act
10 of 2004 (the “PAGA”).

11 This motion is made pursuant to California Labor Code section 2699(l)(2), which requires
12 trial courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],”
13 *see* Cal. Lab. Code § 2699(l)(2), and on the grounds that the parties’ settlement is fundamentally
14 fair, adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
15 concurrently filed declaration of Max Gavron, a copy of the Parties’ proposed Settlement
16 Agreement and this Motion was electronically submitted to the Labor and Workforce
17 Development Agency in accordance with California Labor Code sections 2699(l)(2) and
18 2699(l)(4) concurrent with the filing of this motion.

19 This motion is based on this notice of motion and motion for approval of the Parties’
20 Settlement Agreement attached to the Declaration of Max Gavron and the Settlement Agreement
21 attached thereto as **Exhibit A**, concurrently filed herewith; the attached memorandum of points
22 and authorities in support of this motion; the concurrently filed declarations of Max Gavron (and
23 any exhibits attached thereto), Larry Lee, and Plaintiff in support of this motion; all pleadings,
24 records, and files in this action; and upon such other matters as may be properly presented to, or
25 received by, the Court at or before the hearing on this motion.

1 DATED: August 16, 2022

DIVERSITY LAW GROUP, P.C.



3 By: _____

4 Larry W. Lee

5 Max W. Gavron

6 Attorneys for Plaintiff and the Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Kaday Allen (“Plaintiff”) respectfully requests the Court’s
4 approval of the Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and
5 Release Agreement (the “Settlement Agreement”). After this lawsuit was commenced, the
6 Parties engaged in written discovery, multiple meet and confer efforts, and motion practice.
7 Ultimately, the Parties participated in a mediation. As part of their privileged settlement
8 negotiations, Defendant produced data regarding the aggrieved employees and a sampling of time
9 and pay records, from which Plaintiff’s counsel calculated the maximum PAGA penalty
10 exposure. (Declaration of Max Gavron (“Gavron Decl.”) ¶ 8). Based on this information and
11 evidence of Defendant’s limited ability to pay discussed at mediation, the Parties have settled this
12 case on a representative PAGA basis for \$145,000.00, or approximately 19.31% of the originally
13 calculated maximum exposure. (*Id.*)

14 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
15 attorneys’ fees, or \$48,333.33, up to \$15,000.00 in litigation costs incurred by Plaintiffs’ counsel,
16 \$10,000.00 to Plaintiff for a service award, and up to \$5,500.00 for settlement administration
17 costs. (*Id.* at §§ III.2(a)-(d)). The remainder, or the “PAGA Penalty Fund,” is allocated to the
18 payment of civil penalties under PAGA, 75 percent of the civil penalties for distribution to the
19 Labor and Workforce Development Agency (the “LWDA”) and 25 percent of the civil penalties
20 for distribution to the “aggrieved employees” on whose behalf Plaintiff filed this action as
21 required by PAGA. (*Id.* at § III.2(e)).

22 Under PAGA, the Court must review and approve the proposed settlement. *See* Cal. Lab.
23 Code § 2699 (1)(2). Accordingly, Plaintiff brings this motion to request approval of the Settlement
24 Agreement on the grounds it is fundamentally fair, adequate, and reasonable in light of PAGA’s
25 policies and purposes and the facts and circumstances discussed in detail below.

26 **II. FACTUAL AND PROCEDURAL BACKGROUND**

27 On August 26, 2020, Plaintiff sent notice to the Labor and Workforce Development
28

1 Agency (“LWDA”) giving notice of her intent to pursue a representative PAGA action, on behalf
2 of herself and the State of California as well as on behalf of other aggrieved employees (the
3 “PAGA Notice”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 3.

4 On August 31, 2020, Plaintiff filed the Action against Defendant asserting class action
5 claims under Labor Code §§ 201-203, 212-213, 226, 226.7, 510, 512, 1194, as well as a
6 representative action claim under PAGA, and a claim under Business and Professions Code §
7 17200, *et seq.* Gavron Decl. ¶ 4.

8 On March 5, 2021, Defendant filed an Answer to the Complaint. Gavron Decl. ¶ 5.

9 Thereafter, the Parties engaged in formal and informal discovery, distributed *Belaire-West*
10 notice to the putative class, and engaged in several meet and confer efforts. Plaintiff propounded
11 written discovery requests, including requests for production of documents and interrogatories,
12 upon Defendant. Gavron Decl. ¶ 6.

13 On August 4, 2021, the Court ultimately granted Defendant’s Motion to Compel
14 Arbitration and Dismissed Plaintiff’s class claims. Gavron Decl. ¶ 7.

15 Thereafter, the Parties agreed to engage in mediation before neutral Todd Smith, Esq. In
16 connection with the mediation, Defendant provided Plaintiff and PAGA Counsel with
17 information about the number of potentially aggrieved employees, the number of pay periods at
18 issue, written policies and procedures, a sampling of time and pay data for analysis, and position
19 regarding potential liability. Based on this information, the Parties conducted settlement
20 negotiations. Gavron Decl. ¶ 8.

21 Following a full day of mediation with Mr. Smith on April 28, 2022, the Parties agreed to
22 terms for complete settlement of the Action, which was negotiated at arm’s-length with each
23 Party having had the opportunity to consider all known facts and circumstances. (Gavron Decl. ¶
24 9). At the time the Parties arrived at the proposed settlement, the Court had not yet issued its
25 model settlement agreement. Gavron Decl. ¶ 9. While the proposed settlement agreement does
26 not have the same format as the model agreement provided by Los Angeles Superior Court, the
27 Parties’ proposed agreement addresses all the same pertinent terms.

28 Given Defendant’s financial condition, the Parties have agreed that Defendant will fund
8

1 the first payment of the Gross Settlement Amount in the amount of \$72,500.00 within thirty
2 calendar days of the Effective Date, and the second payment in the amount of \$72,500.00 on or
3 before January 31, 2023. (Settlement Agreement at § V.2). The Settlement Agreement allocates
4 one-third of the Gross Settlement Amount for attorneys' fees, or \$48,333.33, up to \$15,000.00 in
5 litigation costs incurred by Plaintiffs' counsel, \$10,000.00 to Plaintiff for a service award, and up
6 to \$5,500.00 for settlement administration costs. (*Id.* at §§ III.2(a)-(d), V.3(a)-(d)). The
7 remainder, or the "PAGA Penalty Fund," is allocated to the payment of civil penalties under
8 PAGA, 75 percent of the civil penalties for distribution to the Labor and Workforce Development
9 Agency (the "LWDA") and 25 percent of the civil penalties for distribution to the "aggrieved
10 employees" on whose behalf Plaintiffs filed this action as required by PAGA. (*Id.* at § III.2(e),
11 V.3(e)).

12 The Settlement Agreement provides the following release:

13 Upon the approval by the Court of this Agreement and funding of
14 the GSA by Defendant, each of the PAGA Members, including
15 Plaintiff, shall, for the Covered Period, fully release and forever
16 discharge the Released Parties, subject to the terms and conditions
17 hereof and the approval of the Court, from the Covered Claims and
any other form of relief or remedy in law, equity, or whatever kind
or nature that were asserted or could have been asserted based on
the facts alleged in the Action.

18 (*Id.* at § IV.1). The Settlement Agreement defines "Covered Claims" as

19 [A]ny and all claims, demands, rights, liabilities, and/or causes of
20 action under the PAGA for civil penalties, which are premised on
21 alleged violation of Labor Code §§ 201, 202, 203, 212-213, 226,
22 226.7, 510, 512, 1194, as well as any other claims which could have
been brought based on the facts alleged in the Action within the
Covered Period.

23 (*Id.* at § II.9). Plaintiff also executed a general release as part of the Settlement Agreement,
24 including a waiver of Civil Code § 1542. (*Id.* at § IV.2).

25 Each PAGA Member will receive an individual payment proportionate to the number of
26 Eligible Pay Periods worked. (*See id.* § III.3). Each Individual Settlement Payments will be
27 considered the payment of a civil penalty and treated as IRS Form 1099 income. (*See id.*)
28

III. STANDARD OF REVIEW

Although PAGA requires courts to “review and approve” the settlement of any civil action filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark” and stated only that the relief provided under PAGA must be “genuine and meaningful,” “consistent with the underlying purpose of the statute to benefit the public” and, in the context of a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce Development Agency’s Comments on Proposed PAGA Settlement at 2–3, *O’Connor v. Uber Techs.*, No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

Left to develop their own standards, federal district courts have typically followed the LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and reasonable in light of PAGA’s policies and purposes.” *See Haralson*, 383 F. Supp. 3d at 972 (collecting cases). When applying this test, federal district courts often consider factors such as strength of a Plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the amount offered in settlement; the extent of discovery completed; and the expertise and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab. Code § 2699 (e)(2).

1 **IV. ARGUMENT**

2 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant**
3 **to Labor Code section 2699(1)(2)**

4 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
5 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
6 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the proposed
7 settlement to the LWDA online “at the same time that it is submitted to the court,” to give LWDA
8 an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§ 2699 (1)(2),
9 2699(1)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement
10 Agreement and this Motion to the LWDA through the LWDA’s online filing system in
11 conjunction with filing this Motion. (See Gavron Decl. ¶ 28, Exh. C).

12 **B. The Court Should Approve the Settlement Agreement**

13 **1. The Settlement Agreement Is Entitled to a Presumption of Fairness**

14 In class actions, judicial review of a settlement’s fairness is designed to protect class
15 members who had no say in the negotiation of the settlement by ensuring that the settlement is not
16 the product of “fraud,” “overreaching,” or “collusion” by the negotiating parties and that “due
17 regard” was given to the rights and interests of absent class members subject to the settlement.
18 *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800–01 (1996). Although PAGA actions
19 and class action have certain “fundamental” differences, *see Sakkab v. Luxottica Retail North*
20 *America, Inc.*, 803 F.3d 425, 435 (9th Cir. 2015), PAGA settlements are also subject to Court
21 approval. *See Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing the scope of a
22 judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D.
23 Cal. 2016).

24 Against this backdrop, California courts have identified a set of circumstances entitling
25 class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In
26 particular, a presumption of fairness arise where “(1) the settlement is reached through arm’s-
27 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
28 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of

1 objectors is small.” *See id.*

2 All of the factors that would give rise to a presumption of fairness in the context of a class
3 action settlement are present in this PAGA action. After this lawsuit was commenced, the Parties
4 agreed to engage in arms’ length negotiations between highly experienced counsel. As part of
5 their privileged settlement negotiations, Defendant produced data regarding the aggrieved
6 employees, from which Plaintiff’s counsel calculated the maximum PAGA penalties and
7 analyzed Defendant’s potential liability. (Gavron Decl. ¶ 11). Both Plaintiff’s and Defendant’s
8 counsel has significant experience in litigating wage and hour class and PAGA actions, which
9 further supports the reasonableness of the settlement. (Gavron Decl. ¶¶ 18-24; Declaration of
10 Larry W. Lee (“Lee Decl.”) ¶¶ 6-7). Therefore, the Settlement Agreement is entitled to a
11 presumption of fairness.

12 **2. The Scope of the Settlement Agreement is Fair, Adequate, and**
13 **Reasonable**

14 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
15 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to
16 sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted
17 PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement
18 capability of the LWDA with private enforcement actions by “aggrieved employees” acting as
19 private attorneys general. See 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS*
20 *Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of
21 in the nature of an enforcement action, where the named plaintiff acts as a proxy of the LWDA to
22 collect penalties otherwise recoverable only by the LWDA. *See Arias*, 46 Cal. 4th at 986; *see also*
23 *Iskanian*, 59 Cal. 4th at 381–82. In that role, the named plaintiff “take[s] on a special
24 responsibility to their fellow aggrieved workers who are effectively bound by any judgment.” *See*
25 *O'Connor*, 201 F. Supp. 3d at 1134.

26 Plaintiff’s claims in this action are based on alleged violations of Labor Code sections
27 201-203, 212-213, 226, 226.7, 510, 512, 1194, and 2698, *et seq.* *See generally* Pl.’s Cmpl’t.
28 When reviewing a settlement agreement, “the test is not the maximum amount plaintiffs might

1 have obtained at trial on the complaint,” *see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
2 224, 250 (2001), nor is it “whether the settlement agreement is perfect in the estimation the
3 reviewing court.” *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is
4 “whether the settlement is reasonable under all of the circumstances.” *See Wershba*, 91 Cal.
5 App. 4th at 250. Relevant considerations include the strength of a Plaintiffs’ case and the risk,
6 expense, complexity, and likely duration of further litigation. *See Kullar v. Foot Locker Retail,*
7 *Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see also Smith*, 2018 WL 1899912 at *2. In PAGA
8 settlements, courts also consider their authority to award less than the maximum penalty
9 authorized by PAGA. *See Cal. Lab. Code § 2699(e)(2)*; *see also Smith*, 2018 WL 1899912 at *3.

10 Here, Defendant produced a sampling of time and pay records for the aggrieved
11 employees, which permitted Plaintiff to analyze Defendant’s potential exposure and liability.
12 (Gavron Decl. ¶ 11). As detailed in the Settlement Agreement, § II.12, there were approximately
13 7,508 pay periods at issue during the time encompassed by this settlement. PAGA’s penalty
14 structure is based on the number of violations of the Labor Code committed during a given pay
15 period. *See Cal. Lab. Code § 2699(f)*. Defendant’s potential exposure could be as high as
16 \$750,800.00 if the Court were to award a \$100 penalty for each pay period encompassed by the
17 proposed settlement. (Gavron Decl. ¶ 11). However, Defendant argued that its exposure was
18 significantly less because it maintained legally compliant policies, complied with the law at all
19 times, the sampling of time and pay records produced for evaluation demonstrated an extremely
20 low facial violation rate regarding Plaintiff’s claims, and that it maintained arbitration agreements
21 applicable to its employees, which it contended precluded Plaintiff’s PAGA claims. (Gavron
22 Decl. ¶ 11). On June 15, 2022, the United States Supreme Court issued its decision in *Viking*
23 *River Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL 2135491, at *10 (U.S. June 15, 2022),
24 which Defendant would have argued precludes Plaintiff’s PAGA claim. *Id.* (holding that Federal
25 Arbitration Act (“FAA”) preempted portion of California Supreme Court’s holding in *Iskanian v.*
26 *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) and that PAGA claims may be arbitrable
27 under the FAA).

28 While the PAGA does provide for a potentially heightened penalty of \$200 for
13

1 “subsequent” violations, many courts do not award that penalty unless there has been a prior
2 citation by the LWDA or court ruling demonstrating that the employer previously violated the
3 Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209; *accord*
4 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* (S.D. Cal. Aug. 10,
5 2009) 2009 WL 2448430, at *9 (“[u]nder California law, courts have held that employers are
6 not subject to heightened penalties for subsequent violations unless and until a court or
7 commissioner notifies the employer that it is in violation of the Labor Code”); *see also*
8 *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
9 penalty unless prior citation or court ruling). Thus, Defendant argued that even if Plaintiff was
10 able to establish any violation of the Labor Code, the PAGA penalties assessed for these
11 violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at
12 maximum, and there is a likelihood that a further reduction of the penalty would be appropriate
13 given its good faith efforts to comply with the Labor Code and its contentions that it complied
14 with the Labor Code at all times. (Gavron Dec. ¶ 12.)

15 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
16 PAGA are minimal. Indeed, courts to consider the issue have refused to “stack” PAGA
17 penalties and often significantly reduce the penalties awarded. *See Carrington v. Starbucks*
18 *Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving
19 PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani* (2018) 27
20 Cal.App.5th 809. If the Court in this case were to reduce penalties to \$5 a pay period, as was
21 approved in *Carrington*, the potential exposure amounts to approximately \$37,540.00 (7,508
22 pay periods x \$5.00).

23 Under the circumstances of this case, the payment of \$145,000.00 in civil penalties is fair,
24 adequate, and reasonable. The payment of \$145,000.00 in exchange for a release of only those
25 claims for civil penalties that are pleaded in the action or that could have been pleaded based on
26 the facts alleged in the PAGA Notice or the Complaint will have a substantial deterrent effect on
27 Defendant and other California employers and will confer benefits on the PAGA Members, who
28 will each receive a portion of the settlement.

1 Finally, Defendant's financial condition was a significant factor in evaluating the
2 reasonableness of this settlement. The \$145,000.00 Gross Settlement Amount is the highest
3 Defendant could pay while remaining in business. For this reason, Defendant needs to make
4 installment payments. Settlement Agreement ¶ V.1-2. This heavily favors approval of the
5 settlement. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (holding that
6 lower court properly approved class action settlement because of the defendant's financial
7 condition; "Here one factor predominates to make clear that the district court acted within its
8 discretion. That factor is Tucson's financial condition.").

9 In sum, this settlement is fair, reasonable, and consistent with PAGA's policies and
10 purposes under these circumstances.

11 **3. The Settlement Agreement Apportions Civil Penalties between the**
12 **LWDA and the Settlement Group as Required by PAGA**

13 Except when civil penalties are recovered from a defendant who did not have any
14 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
15 distributed so that 75 percent of the civil penalties are paid to the to LWDA and 25 percent are
16 paid to the "aggrieved employees" on whose behalf the PAGA action was brought. *See* Cal. Lab.
17 Code § 2699(i). In full compliance with that rule, the Settlement Agreement requires the PAGA
18 Penalty Fund to be paid to the LWDA and 25 percent of the PAGA Penalty Fund to be paid
19 Settlement Group. (Settlement Agreement at § III.3). The Settlement Group will receive
20 penalties based on the number of pay periods they worked during the applicable period using a
21 pro rata distribution formula. (*Id.*)

22 **4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
23 **Amount to the Payment of Attorneys' Fees**

24 **a. Percentage of the Fund**

25 PAGA allows a prevailing Plaintiff to recover reasonable attorneys' fees. *See* Cal. Lab.
26 Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff's counsel to
27 request up to \$48,333.33, in attorneys' fees. (*See* Settlement Agreement at §§ III.2(a), III.4). For
28 two reasons, this amount is fair, adequate, and reasonable in light of policies and purposes.

1 First, in class actions, state and federal courts have held that when a class action
2 establishes a monetary fund for the benefit of the class members out of which attorneys' fees may
3 be paid, courts may determine the amount of a reasonable fee by "choosing an appropriate
4 percentage of the fund created." *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016)
5 (affirming a fee award representing 33 1/3 percent of the fund and joining "the overwhelming
6 majority of federal and state courts" in approving the "percentage method" as a reasonable means
7 for determining attorney fee awards in class actions). While different from class action
8 settlements in important ways, PAGA settlements also involve the establishment of a common
9 fund for the benefit of persons other than the named Plaintiff, so the reasons for utilizing the
10 percentage method are the same. *See id.* (noting that the percentage method provides "ease of
11 calculation," "alignment of incentives between counsel and the class," "a better approximation of
12 market conditions in a contingency case," and the "encouragement . . . to seek an early
13 settlement"). The \$48,333.33 requested by Plaintiff's counsel represents one-third of the Gross
14 Settlement Amount, which is consistent with awards usually approved in class actions. *See*
15 *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008) ("[F]ee awards in class actions
16 average around one-third of the recovery"); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the
17 approval of a fee award equal to one-third of the total settlement amount).

18 **b. Lodestar Cross-Check**

19 When the primary method employed to determine fees is the percentage method, courts
20 have discretion to use the lodestar method to "cross-check" the amount of fees calculated by way
21 of percentage. The *Laffitte* Court emphasized, however, that "the lodestar calculation, when used
22 in this manner, does not override the trial court's primary determination of the fee as a percentage
23 of the common fund and thus does not impose an absolute maximum or minimum on the potential
24 fee award." *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396
25 F.3d 294, 306-307 (3d Cir. 2005) ("[The lodestar cross-check does not trump the primary reliance
26 on the percentage of common fund method]").

27 Nonetheless, the Supreme Court in *Laffitte* stated: "If the multiplier calculated by means
28 of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the

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

13 Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or even
14 higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*, e.g., *Sutter*
15 *Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier
16 on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60 (applying a 2.5
17 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78
18 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after
19 finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed a 2.13
20 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was affirmed in
21 full by the California Supreme Court in its decision guiding lower courts on assessing fees.

22 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
23 awarded by the percentage method showing that the majority of multipliers awarded are “in the
24 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming a
25 multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
26 over 30 cases). Federal district courts applying California law have likewise routinely approved
27 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
28 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a

1 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank*,
2 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys' fees that resulted in lodestar
3 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at
4 *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code
5 violations). Other courts have found even higher multipliers to be reasonable by comparison to
6 other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal.
7 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases affirming
8 a higher multiplier).

9 With respect to PAGA Counsel's lodestar, PAGA Counsel will have expended
10 approximately 93.6 hours litigating this case, which includes approximately 5 hours of anticipated
11 time spent after approval responding to correspondence and phone calls from aggrieved
12 employees, the class administrator, and defense counsel. (Gavron Decl. ¶ 26; Ex. B.) Class
13 Counsel request an hourly rate of \$600.00. (Gavron Decl. ¶ 27.) The courts are quite liberal in the
14 evidence required to prove an attorney's hours. Detailed time records are not required. An
15 attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours
16 worked on a particular case is sufficient evidence to support an award of attorney fees, even in the
17 absence of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

18 Reasonable hours include, in addition to time spent during litigation, the time spent before
19 the action is filed, including time spent interviewing the clients, investigating the facts and the
20 law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62
21 (1980). The fee award should also include fees incurred to establish and defend the attorneys' fee
22 claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which PAGA Counsel seeks
23 compensation involve only these types of tasks. Thus, the number of hours for which fees are
24 sought is reasonable.

25 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
26 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
27 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
28 attorney's skill and experience, the nature of the work performed, the relevant area of expertise

1 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
2 4th 629, 632-33 (1998).

3 PAGA Counsel's skill and experience justify the requested rates. As shown in the
4 supporting declarations, PAGA Counsel has significant experience in the area of employment and
5 wage and hour class and representative actions. PAGA Counsel's practice focuses on
6 representing employees in employment matters, particularly wage and hour cases on a
7 contingency basis. (Gavron Decl. ¶ 22.) As such, based on the hours and applicable rate, PAGA
8 Counsel's lodestar amount through the finalization of this settlement – without a multiplier – will
9 be approximately \$59,160.00, which **exceeds the fee requested** by Plaintiff here. (Gavron Decl. ¶
10 27.) Accordingly, the cross-check supports the fee requested.

11 **5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable** 12 **Amount to the Payment of Litigation Costs**

13 PAGA also allows a prevailing Plaintiff to recover litigation costs. *See* Cal. Lab. Code §
14 2699(g). Accordingly, the Settlement Agreement allows Plaintiff's counsel to request up to
15 \$15,000.00 in litigation costs. (Settlement Agreement at §§ III.2(b), III.4).

16 Plaintiff's counsel requests \$10,969.90 for the reimbursement of litigation costs. As set
17 forth in accompanying declarations of Plaintiff's counsel, these costs were all directly incurred in
18 the prosecution of this action, including, but not limited to, filing fees, service fees, and mediation
19 fees. (Lee Decl. ¶ 8, Exh. A). As such, Plaintiff's counsel's request for costs in the amount of
20 \$10,969.70 is fair, adequate, reasonable, and consistent with PAGA's policies. Because this
21 amount is less than what was provided in the Settlement Agreement, the difference will be
22 distributed to the LWDA and Aggrieved Employees.

23 **6. Plaintiff's Service Award Should Be Approved**

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

1 (emphasis added).

2 Here, Plaintiff respectfully requests \$10,000.00 for her service award, which is intended to
3 compensate Plaintiff for the time spent on this case and for executing a general release, including
4 of Civil Code § 1542, which was not required by aggrieved employees. (Declaration of Kaday
5 Allen ¶¶ 3-5). This requested enhancement is consistent with awards approved in other common
6 fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal.
7 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130
8 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards
9 of \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a matter of public
10 record. Future employers may be less likely to hire an employee who has previously filed an
11 action against an employer. This in conjunction with Plaintiff's agreement to provide a general
12 release supports the requested award.

13 **7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
14 **Amount to the Payment of Settlement Administration Costs**

15 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
16 Counsel, and the LWDA, but also to Defendant's current and former employees, significant time
17 and effort will be required to administer the Settlement Agreement if it is approved by this Court.
18 Among other things, the administrator will calculate each PAGA Member's shares; appropriate
19 tax forms must be issued to all parties who receive payments under the Settlement Agreement;
20 payments must be mailed to Plaintiff, Plaintiff's Counsel, the LWDA, and each Settlement Group
21 Member; and any checks not cashed by Settlement Group Members must be voided so that the
22 unclaimed amount can be forwarded to the State of California Controller's Office Unclaimed
23 Property Fund in the name of the PAGA Members who did not cash their respective PAGA
24 Member Shares. (*See* Settlement Agreement § V.6.)

25 In contemplation of these expenses, the parties will engage Phoenix Settlement
26 Administrators to act as a third-party settlement administrator and have allocated up to \$5,500.00
27 to cover the cost of settlement administration. (Settlement Agreement §§ II.8, III.2(d), V.3(d)).
28

1 **V. CONCLUSION**

2 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
3 Agreement pursuant to Labor Code section 2699(l)(2).

4
5 DATED: August 16, 2022

DIVERSITY LAW GROUP, P.C.



6
7 By: _____

Larry W. Lee

8 Max W. Gavron

9 Attorneys for Plaintiff and the Class
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1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On August 16, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE THE**
12 **PARTIES' SETTLEMENT AGREEMENT PURSUANT TO THE LABOR CODE**
13 **PRIVATE ATTORNEYS GENERAL ACT OF 2004; AND MEMORANDUM OF**
14 **POINTS AND AUTHORITIES IN SUPPORT**
- 15 **2. DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFF'S**
16 **MOTION TO APPROVE THE PARTIES' SETTLEMENT AGREEMENT**
17 **PURSUANT TO THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT**
18 **OF 2004**
- 19 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S NOTICE**
20 **OF MOTION AND MOTION TO APPROVE THE PARTIES' SETTLEMENT**
21 **AGREEMENT PURSUANT TO THE LABOR CODE PRIVATE ATTORNEYS**
22 **GENERAL ACT OF 2004**
- 23 **4. DECLARATION OF PLAINTIFF IN SUPPORT OF PLAINTIFF'S MOTION TO**
24 **APPROVE THE PARTIES' SETTLEMENT AGREEMENT PURSUANT TO THE**
25 **LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004**
- 26 **5. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION TO APPROVE**
27 **SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEY**
28 **GENERAL ACT AND JUDGMENT**

on the interested parties in this action as follows:

Grace Y. Horoupian
Fisher & Phillips LLP
2050 Main Street, Suite 1000
Irvine, California 92614

Attorneys for Defendant Kumquat Holdings,
LLC

ghoroupian@fisherphillips.com

X BY ELECTRONIC SERVICE VIA CASE ANYWHERE: Based on a
court order I caused the above-entitled document(s) to be served through Case Anywhere at the
website www.caseanywhere.com, addressed to all parties appearing on the electronic service list

1 for the above-entitled case. The service transmission was reported as complete and a copy of the
2 Case Anywhere Filing Receipt/Confirmation will be filed, deposited, or maintained with the
3 original document(s) in this office.

4 I declare under penalty of perjury under the laws of the State of California that the
5 above is true and correct. Executed on August 16, 2022, at Los Angeles, California.

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7 Erika Mejia
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