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

PIERRE FISTANIC, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

HILLTOP SECURITIES INC., a Delaware
corporation; and DOES 1 through 100,

Defendants.

Case No. 20STCV47743

*[Assigned for all purposes to the Hon. Kevin
C. Brazile, Dept. 20]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
SETTLEMENT OF CLAIMS
BROUGHT UNDER THE PRIVATE
ATTORNEYS' GENERAL ACT AND
REASONABLE ATTORNEYS' FEES,
COSTS, AND ENHANCEMENT
AWARD**

Date: November 4, 2022
Time: 8:30 a.m.
Dept.: 20

Reservation ID: 742939880446

Complaint Filed: December 14, 2020
Trial Date: None set

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

3 PLEASE TAKE NOTICE that on November 4, 2022, at 8:30 a.m., or as soon thereafter
4 as the matter may be heard in Department 20 of the above-entitled Court, located at 111 North
5 Hill Street, Los Angeles, CA 90012, Plaintiff Pierre Fistanic (“Plaintiff”), individually and on
6 behalf of the State of California and other Aggrieved Employees, will, and hereby does, move
7 this Court for entry of an Order as follows:

- 8 1. Granting approval, pursuant to California Labor Code § 2699(l), of the proposed
9 settlement of claims brought pursuant to the Private Attorneys General Act of 2004
10 (Cal. Labor Code § 2698, *et seq.*) and as set forth in the Parties’ Settlement
11 Agreement, a true and correct copy of which is attached to the Declaration of Paul K.
12 Haines filed concurrently herewith;
- 13 2. Appointing Phoenix Settlement Administrators as the Settlement Administrator;
- 14 3. Approving the proposed Explanatory Letter (attached as Exhibit A to the Settlement
15 Agreement), and directing that it be distributed to Aggrieved Employees pursuant to
16 the terms of the Settlement Agreement;
- 17 4. Directing the funding and distribution of the Gross Settlement Amount pursuant to
18 the terms of the Settlement Agreement;
- 19 5. Approving an award of attorneys’ fees to Plaintiff’s counsel of \$31,208.33 and an
20 award of litigation costs to Plaintiff’s counsel of \$11,538.68;
- 21 6. Approving an enhancement award to Plaintiff in the amount of \$5,000.00;
- 22 7. Approving \$2,250.00 in administration costs to Phoenix Settlement Administrators;
23 and
- 24 8. Approving the payment of \$32,720.99 to the California Labor & Workforce
25 Development Agency for its share of PAGA civil penalties.

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1 This Motion is based on this Notice; the attached Memorandum of Points and Authorities;
2 the declaration of Paul K. Haines and all exhibits attached thereto; the declaration of Jodey
3 Lawrence of Phoenix Class Action Administration Solutions and all exhibits attached thereto;
4 the declaration of Plaintiff Pierre Fistanic; the Settlement Agreement; all other pleadings and
5 papers on file in this action; and on any further oral or documentary evidence or argument
6 presented at the time of hearing.

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8
9 Dated: October 13, 2022

Respectfully submitted,

HAINES LAW GROUP, APC

10
11 By:  _____

Paul K. Haines

Sean M. Blakely

Attorneys for Plaintiff
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I. INTRODUCTION

This PAGA representative action seeks civil penalties predicated on Defendant’s alleged failure to pay all minimum wages, alleged failure to provide paid rest periods, and alleged failure to pay all final wages and issue accurate itemized wage statements from April 12, 2019 through December 31, 2021 (the “PAGA Period”). The proposed Settlement, under which Defendant has agreed to pay a non-reversionary Gross Settlement Amount (“GSA”) of \$93,625.00, will resolve Plaintiff’s representative claims for civil penalties filed on behalf of the State of California and all “Aggrieved Employees,” which consists of all current and former employees of Defendant who worked pursuant to a commission pay plan at any time during the PAGA Period.

In deciding whether to grant approval of the Settlement, the primary issue is whether the Settlement is fair, reasonable, and adequate. As set forth herein, the proposed Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it: (1) is the product of arm's-length negotiations; (2) was negotiated by attorneys experienced in wage-and-hour issues and PAGA litigation with the assistance of an experienced, neutral mediator; (3) was negotiated after undertaking sufficient discovery and investigation to evaluate the relative

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1 strength and value of Plaintiff’s PAGA claim and Defendant’s defenses thereto; and (4) reflects
2 a reasoned compromise based on the relative strength and value of the PAGA claim, as well as
3 the risks, expenses, complexity and likely duration of further litigation.

4 As noted above, the Settlement provides for a GSA of \$93,625.00. After deducting
5 amounts for requested attorneys’ fees (\$31,208.33), attorney costs (\$11,538.68), Plaintiff’s
6 enhancement award (\$5,000.00), and administration costs (\$2,250.00), the Settlement provides
7 for distribution of a Net Settlement Amount (“NSA”) of approximately \$43,627.99 to be paid to
8 Aggrieved Employees and the California Labor & Workforce Development Agency (“LWDA”).
9 Settlement, §§ III.4-5; *see also* Declaration of Paul K. Haines (“Haines Decl.”), ¶ 18 & Exh. 3;
10 Declaration of Jodey Lawrence, ¶ 17 & Exh. B.

11 The NSA shall be distributed 75% (approximately \$32,720.99) to the LWDA, and 25%
12 (approximately \$10,907.00) to Aggrieved Employees, pursuant to the requirements of the PAGA
13 as codified in Lab. Code § 2699(i). *See* Settlement, § III.5; *see also* Haines Decl., ¶ 18. There are
14 approximately 60 Aggrieved Employees, resulting in average payments of approximately
15 \$181.78 to each Aggrieved Employee. *See* Settlement, § I.2; Haines Decl., ¶ 18.

16 This Settlement represents a reasonable recovery for the State of California and Aggrieved
17 Employees. Of particular relevance here is the fact that on June 15, 2022, only a few months after
18 this Settlement was reached, the United States Supreme Court issued its opinion in *Viking River*
19 *Cruises, Inc. v. Moriana* (“*Viking River*”) where it overruled the California Supreme Court’s
20 holding in *Iskanian v. CLS Transportation Los Angeles, LLC* which held that a representative
21 PAGA claim could not be compelled to arbitration. *See Viking River Cruises, Inc. v. Moriana*
22 (June 15, 2022, No. 20-1573) 596 U.S. ____ [____ S.Ct. ____, 2022 WL 2135491; *Iskanian v. CLS*
23 *Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. In effect, the U.S. Supreme Court’s
24 ruling in *Viking River* means that if this matter had not settled, Defendant would likely have been
25 able to compel this case to individual arbitration based on the arbitration agreement signed by
26 Plaintiff, thereby barring Plaintiff from recovering PAGA civil penalties for violations suffered
27 by other Aggrieved Employees. Therefore, this is a unique case where further litigation would
28 almost certainly have resulted in a smaller recovery, or even no recovery at all. Moreover,

1 notwithstanding these risks, the GSA exceeds other PAGA penalty awards approved as
2 reasonable throughout California. *See, e.g., Penaloza v. PPG Industries Inc.*, Case No.
3 BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving total
4 PAGA set-aside of \$5,000, or \$7.49 per employee); *Cabrera v. Advantage Sale & Marketing,*
5 *LLC*, Case No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, Mar. 12, 2013)
6 (approving PAGA set-aside of \$10,000, or \$3.33 per employee). Further, the amounts requested
7 for attorneys’ fees and costs, Plaintiff’s enhancement award, and settlement administration costs
8 are fair, adequate, and reasonable. In light of the foregoing, this Court should enter the [Proposed]
9 Judgment and Order submitted herewith.

10 **II. SUMMARY OF THE LITIGATION**

11 **A. Brief Factual Background and Summary of Claims**

12 Defendant offers wealth management and other financial services to clients throughout
13 the country, including from seven offices in California spanning from San Diego to the Bay Area.
14 Haines Decl., ¶ 11. Plaintiff worked for Defendant until approximately September 2020. *See*
15 Declaration of Pierre Fistanic (“Fistanic Decl.”), ¶ 2.

16 Plaintiff’s PAGA claim is predicated on Defendant’s commission-based compensation
17 system, which Plaintiff alleges failed to separately compensate employees for rest periods and
18 “non-productive time.” Plaintiff further contends that Defendant failed to timely pay all final
19 wages and provide complete and accurate itemized wage statements. As explained below,
20 Defendant denies Plaintiff’s allegations and asserts several affirmative defenses to his claims.

21 **B. Relevant Procedural History**

22 On October 7, 2020, Plaintiff provided written notice to the LWDA and Defendant,
23 thereby giving notice of his intent to pursue civil penalties under PAGA for alleged Labor Code
24 violations, as required by Labor Code § 2699.3. *See* Haines Decl., ¶ 12 & Exh. 2; *see also*
25 Settlement Agreement, § II.2.

26 On December 14, 2020, after the prescribed 65-day waiting period under Labor Code §
27 2699.3(a)(2)(A), Plaintiff filed the operative Representative Action Complaint titled *Pierre*
28 *Fistanic v. Hilltop Securities, Inc.*, Los Angeles County Superior Court Case No. 20STCV47743,

alleging a single cause of action for civil penalties under the PAGA. *See* Haines Decl., ¶ 13; *see also* Settlement Agreement, § II.3.

On January 22, 2021, Defendant removed this action to the United States District Court, Central District of California, on the sole basis of diversity jurisdiction under 28 U.S.C. § 1332(a). Haines Decl., ¶ 14.

On February 22, 2021, Plaintiff filed a Motion to Remand this Action back to the Superior Court of California, County of Los Angeles. Haines Decl., ¶ 15. On March 15, 2021, this action was remanded to Department 20 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, CA 90012. *Id.*.

C. Pre-Mediation Discovery and Mediation

The Parties engaged in significant discovery during this litigation, with Plaintiff propounding and Defendant responding to formal discovery, the Parties meeting and conferring over Defendant’s discovery responses, the Parties participating in an Informal Discovery Conference (“IDC”) to address Defendant’s discovery responses, Plaintiff filing Motions to Compel Further Responses to Plaintiff’s Requests for Production of Documents and Special Interrogatories, Set One, and the Parties completing a *Belaire-West* opt-out process. Haines Decl., ¶ 16. In connection with mediation, Defendant informally and formally produced information and documents pertaining to Plaintiff and other Aggrieved Employees, including, but not limited to, its commission pay plans, a sample of payroll records for Aggrieved Employees, and a list of Aggrieved Employees with hire dates and termination dates, in order for Plaintiff’s counsel to investigate Plaintiff’s allegations and value the claims prior to mediation. *Id.*

On April 4, 2022, the Parties attended a full-day mediation with mediator Jeffrey A. Ross, Esq., a well-respected wage and hour mediator. Haines Decl., ¶ 17; Settlement, § I.5. During mediation, the Parties vigorously debated Plaintiff’s ability to proceed on a representative basis, the legal basis for Plaintiff’s claims and Defendant’s defenses, the impact of *Viking River* on this case, the potential amount of civil penalties, and the Parties’ data analyses and conclusions based thereon. Haines Decl., ¶ 17. With the assistance of Mr. Ross, the Parties agreed to fully and finally resolve Plaintiff’s PAGA claim, and subsequently negotiated and finalized the Settlement now

before the Court. *Id.*

III. SUMMARY OF THE SETTLEMENT

A. “Aggrieved Employees” Defined

Aggrieved Employees are defined as, “all current and former employees of Defendant who worked pursuant to a commission pay plan at any time during the PAGA Period.” *See* Settlement, § I.2. The PAGA Period is defined as the time period from April 12, 2019 through December 31, 2021. *Id.*, § I.11.

B. Monetary Terms

The Settlement provides for Defendant’s payment of a non-reversionary GSA of \$93,625.00. *See* Settlement, §§ I.8, III.2. After deducting requested attorneys’ fees, litigation costs, Plaintiff’s Enhancement Award, and settlement administration costs, the Settlement provides for a Net Settlement Amount (“NSA”) of \$43,627.99 to be distributed 75% to the LWDA and 25% to Aggrieved Employees, per Labor Code § 2699(i). Settlement, §§ III.4-5; Haines Decl., ¶ 18. The Aggrieved Employees’ portion of the NSA is estimated to be \$10,907.00 and will be paid to all Aggrieved Employees *pro rata* based on the proportional number of Affected Pay Periods worked by each Aggrieved Employee for Defendant in California during the PAGA Period. *See* Settlement, § III.5; Haines Decl., ¶ 18.

1. *Requested Attorneys’ Fees and Costs, Administration Costs, and Plaintiff’s Enhancement Award*

Plaintiff’s Counsel requests one-third of the GSA (i.e., \$31,208.33) in attorneys’ fees, and \$11,538.68 in litigation costs. *See* Settlement, §§ I.9, III.4(a); Haines Decl., ¶¶ 18, 24, 26 & Exh. 3. As discussed in detail below, a fee award of one-third of the GSA is fair, adequate, and reasonable as a percentage of the settlement fund and as confirmed by a lodestar cross-check, is in line with fee awards in other PAGA settlements.

The Parties have agreed to engage Phoenix Settlement Administrators (“Phoenix”) as the third-party settlement administrator. *See* Settlement, § IV.1. Phoenix will update Aggrieved Employees’ addresses using the National Change of Address database, calculate and distribute Individual PAGA Payments, mail payments to all Aggrieved Employees together with the

Explanatory Letter, and perform other duties that are integral to the effectuation of the Settlement. *Id.*, §§ IV.2-6. Plaintiff requests that the Court approve up to \$2,250.00 in administration costs to Phoenix, which will cover all costs incurred by Phoenix in connection with the Settlement. *Id.*, at §§ I.9, III.4(c); *see also* Declaration of Jodey Lawrence (“Lawrence Decl.”) and attached exhibits.

Finally, Plaintiff requests an Enhancement Award of \$5,000.00, in recognition of Plaintiff’s contributions to this case and his efforts in bringing this case to successful resolution. *See* Settlement, §§ I.9, III.4(b); Fistanic Decl., ¶¶ 6-8.

2. Payment to LWDA and Aggrieved Employees

The NSA will be distributed 75% to the LWDA and 25% to Aggrieved Employees, pursuant to Labor Code § 2699(i). *See* Settlement, § III.5. Based on the above requested distributions, the NSA is estimated to be \$43,627.99, with \$32,720.99 paid to the LWDA and \$10,907.00 distributed to Aggrieved Employees. Haines Decl., ¶ 18. As noted, there are approximately 60 total Aggrieved Employees. *Id.* Thus, it is anticipated that overall, Aggrieved Employees will receive average Settlement payments of approximately \$181.78. *Id.*

3. Funding of the Settlement

Defendant shall pay the Gross Settlement Amount to the Settlement Administrator within thirty (30) calendar days of the Effective Date. *See* Settlement, § III.2. Within twenty-one (21) calendar days after the Settlement has been fully funded, the Settlement Administrator shall mail copies of the explanatory letter along with Individual PAGA Payments to all Aggrieved Employees via regular First-Class U.S. Mail. *See* Settlement, § IV.3. Funds from any settlement checks remaining uncashed after 180 days shall escheat to the California State Controller’s Office for deposit in the Unclaimed Property Fund, in the name of the Aggrieved Employee. *See* Settlement, § IV.4.

IV. LEGAL ARGUMENT

A. Standards for Approval of a PAGA Settlement

The settlement of a PAGA claim requires court approval pursuant to the PAGA statute, which states that the “court shall review and approve any settlement of any civil action filed pursuant to this part.” Labor Code § 2699(l). Of course, “[s]ettlement is a compromise, which

1 balances the possible recovery against the risks inherent in litigating further.” *See In re TD*
2 *Ameritrade Account Holder Litig.*, 2011 WL 4079226 at *9 (N.D. Cal. Sept. 13, 2011). “[T]he
3 very essence of a settlement is...‘a yielding of absolutes and an abandoning of highest hopes,’”
4 as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive
5 litigation that induce consensual settlements.” *Officers for Justice v. Civil Service Com.*, 688 F.2d
6 615, 624 (9th Cir. 1982). As such, “the settlement or fairness hearing is not to be turned into a
7 trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure
8 of what might have been achieved by the negotiators.” *Id.*

9 Although the PAGA statute does not set forth the criteria by which a PAGA settlement is
10 to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a
11 class action settlement. However, “a PAGA claim asserted on a non-class representative basis...is
12 not considered a class action but a law enforcement action, and therefore does not have to meet
13 the requirements of [a class action].” *Casida v. Sears Holdings Corp.*, 2012 WL 253217 at *3
14 (E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 at *4 (E.D. Cal. Jul.
15 1, 2010) (“PAGA claims are law enforcement actions, not class actions”). A court’s review of a
16 PAGA settlement implicates the following unique features that render the approval process
17 distinct from approval of a class action settlement.

18 First, in evaluating a PAGA settlement, the court is not concerned with amount(s) received
19 by “aggrieved employees,” but rather, must focus on the total settlement amount in achieving
20 PAGA’s objective. “The remedy sought in a PAGA suit consists of civil penalties, not individual
21 or class damages.” *Mendez*, 2010 WL 2650571 at *4. “Unlike class actions, these civil penalties
22 are not meant to compensate unnamed employees because the action is fundamentally a law
23 enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C-08-2073-MHP, 2010 WL
24 1340777 at *4 (N.D. Cal. Apr. 2, 2010). As our Supreme Court confirmed, “PAGA claims are
25 ‘representative’ actions in the sense that they are brought on the state’s behalf. The
26 employee...‘represents the same legal right and interest as’ those agencies — ‘namely, recovery
27 of civil penalties that otherwise would have been assessed and collected by the [LWDA].” *ZB,*
28 *N.A. v. Sup. Ct.*, 8 Cal.5th 175, 185 (2019) (citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59

1 Cal.4th 348, 380 (2014)).

2 Moreover, while “[a PAGA] action is ... designed to protect the public and penalize the
3 employer for past illegal conduct” (*Mendez*, 2010 WL 2650571 at *4), a PAGA settlement – like
4 any settlement – involves a compromise that stops short of rendering findings of liability and
5 damages. “Unlike a class action seeking damages or injunctive relief for injured employees, the
6 purpose of PAGA is to incentivize private parties to recover civil penalties for the government
7 that otherwise may not have been assessed and collected by overburdened state enforcement
8 agencies.” *Ochoa-Hernandez*, 2010 WL 1340777 at *4.

9 Second, consistent with the fact that unnamed employees have no property interest in a
10 PAGA claim,² “[u]nnamed employees need not be given notice of the PAGA claim, nor do they
11 have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez*, 2010 WL
12 1340777 at *5; *see also Robinson v. Southern Counties Oil Co.*, 53 Cal.App.5th 476, 482 (2020)
13 (recognizing that “there is no mechanism for opting out of the judgment entered on the PAGA
14 claim.”). This renders the approval process of a PAGA settlement distinct from a class action
15 settlement, as the Court need not employ the “two-step approval process” required for class action
16 settlements under Fed. R. Civ. Proc. Rule 23(e) and Cal. Rule of Court 3.769.

17 Finally, unlike a class action settlement under Fed. R. Civ. Proc. Rule 23(e) or Cal. Rule
18 of Court 3.769, the scope of release in a PAGA settlement is limited to *civil penalties*. While
19 “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on
20 government agencies and any aggrieved employee not a party to the proceeding...the non-party
21 employees, because they were not given notice of the action or afforded any opportunity to be
22 heard, would not be bound by the judgment as to remedies other than civil penalties.” *Arias v.*
23 *Sup. Ct.*, 46 Cal. 4th 969, 986-87 (2009).

24 **1. Factors in Evaluating a Representative PAGA Settlement**

25 In deciding whether to approve a proposed settlement, a trial court has broad powers to
26

27 ² “The [PAGA] does not create property rights or any other substantive rights” as “[i]t is simply
28 a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code
violations—that otherwise would be sought by state labor law enforcement agencies.” *See*
Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct., 46 Cal.4th 993, 1003 (2009).

determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Sup. Ct.*, 89 Cal.App.3d 434, 438 (1979). In exercising these powers, the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited to:

[T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive, and trial courts should tailor the factors to each case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.* In the context of a PAGA settlement, the third and eighth factors (risk of maintaining class action status and reaction of class members to settlement) are inapplicable.

Because settlements inherently involve compromise, even a settlement providing for substantially narrower relief than might be obtained if the suit were successfully litigated can be reasonable because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001) (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)). Courts also review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. *Kullar*, 168 Cal.App.4th at 129-31. Information is sufficient where it allows the parties and the court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential Serv. LLC*, 175 Cal.App.4th 785, 801 (2009). This requirement exists so that the parties can provide the court with “a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar*, 168 Cal.App.4th at 132.

a. The Strength of Plaintiff’s Case

Plaintiff acknowledges that there are substantial risks and uncertainty in proceeding to

1 trial. Haines Decl., ¶ 19. First and foremost was the risk that the United States Supreme Court
2 would issue its opinion in *Viking River* which could result in the outright dismissal of Plaintiff’s
3 representative PAGA claim. *Id.* At the time that this settlement was reached, the U.S. Supreme
4 Court had granted certiorari in *Viking River*. *Id.* Shortly after Plaintiff entered into this Settlement,
5 this risk became a reality and the Supreme Court issued its opinion in *Viking River*, which
6 overturns the California Supreme Court’s holding in *Iskanian v. CLS Transportation Los Angeles,*
7 *LLC* which held that a representative PAGA claim could not be compelled to arbitration. *See*
8 *Viking River Cruises, Inc. v. Moriana* (June 15, 2022, No. 20-1573) 596 U.S. ____ [____ S.Ct. ____,
9 2022 WL 2135491; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. As
10 a result, absent this settlement, it is likely that **no** representative PAGA recovery (i.e., a recovery
11 of PAGA civil penalties for violations suffered by other Aggrieved Employees) would be possible
12 at all. Haines Decl., ¶ 19.

13 Defendant also presented multiple defenses with respect to the merits of Plaintiff’s claims.
14 For example, Defendant argues that its commission pay plans comply with California law and
15 that it has always compensated its commissioned-based employees for all required paid rest
16 periods. Haines Decl., ¶ 20. Defendant further argues that at all times throughout the PAGA
17 Period, it calculated separate rest period compensation for its commissioned based employees in
18 compliance with California law. *Id.* Defendant also contends that employees experienced minimal
19 (if any) uncompensated “non-productive” time. *Id.* Additionally, Defendant maintains that any
20 questions of non-productive time would be highly individualized, as there are no records or other
21 common evidence of time spent on potentially non-productive tasks, making Plaintiff’s
22 commission claim unmanageable on a representative basis. *Id.*

23 As a result of Defendant’s failures to pay all rest period premiums, and all wages owed,
24 Plaintiff alleges PAGA claims for failure to issue accurate and itemized wage statements and
25 failure to pay all wages owed at separation of employment. *See* Labor Code §§ 226(a), 201-203;
26 *see also* Haines Decl., ¶ 21. In response, Defendants argue that Plaintiff’s underlying claims will
27 fail and, as a result, these claims will also fail. *See Price v. Starbucks Corp.*, 192 Cal.App.4th
28 1136, 1147 (2011) (“Because the underlying causes of action fail, the derivative UCL and PAGA

claims also fail.”). Defendant also maintains that any “derivative” PAGA claims for violations of Labor Code Sections 226 or 203 would be entirely duplicative and would be unlikely to be awarded in any significant manner by a Court. Haines Decl., ¶ 21.

Defendant further maintains that even if the Court awarded PAGA penalties for any of the alleged violations, it would substantially reduce the penalties based on the discretionary factors in Labor Code § 2699(e)(2) (authorizing reduction in penalties “if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”). Haines Decl., ¶ 22. Indeed, Defendant argues that many courts have reduced PAGA penalties drastically where, as here, the employer presented good-faith defenses and attempted to comply with the law. *See Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because “defendants took their obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK, 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because employer “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

While Plaintiff was prepared to litigate his claims through trial, he faced substantial challenges in prevailing in this matter and obtaining a better result than will be provided through the Settlement. Thus, this factor supports approval.

b. Risk, Expense, Complexity, and Duration of Further Litigation

As discussed above, *Viking River* posed an existential threat to this case, and has since become controlling precedent that would likely result in the dismissal of Plaintiff’s representative PAGA claim if it had not already been settled. Therefore, at the time the settlement was reached, Plaintiff faced tremendous risk that continued litigation would have resulted in the dismissal of his representative PAGA claim. This factor therefore supports approval of the Settlement.

c. Amount Offered in Settlement Given Realistic Value of Claims

The proposed Settlement provides a fair and reasonable monetary recovery for the State of California and Aggrieved Employees in the face of hotly disputed claims, when compared with

1 the potential realistic exposure. Based on data provided by Defendant, there were approximately
2 3,745 pay periods worked by the Aggrieved Employees during the PAGA Period. Haines Decl.,
3 ¶ 23; Settlement, § III.3.

4 Labor Code § 2699(f)(2) provides for PAGA civil penalties in the amount of \$100 for
5 each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved
6 employee per pay period for each subsequent violation. *See* Labor Code § 2699(f)(2). However,
7 courts have interpreted section 2699(f)(2) to only impose the \$200 subsequent penalty after an
8 employer has been notified that its conduct violates the Labor Code. *See, e.g., Amaral v. Cintas*
9 *Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until
10 employer is notified that it is violating a Labor Code provision); *Trang v. Turbine Engine*
11 *Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854, at *5 (C.D.
12 Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for
13 subsequent violations unless and until a court or commissioner notifies the employer that it is in
14 violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw*
15 *Transit Services, Inc.*, No. 05cv1199–IEG–CAB, 2009 WL 2448430, at *9 (S.D. Cal. 2009)
16 (finding that California law imposes the “subsequent violation penalty” only after an employer
17 has been notified its conduct violates the Labor Code). Therefore, assuming that Plaintiff could
18 prove at least one Labor Code violation in each pay period, Plaintiff calculated Defendant’s
19 maximum PAGA exposure at \$374,500 (3,745 pay periods * \$100 per violation). Haines Decl., ¶
20 23.

21 However, as discussed above, Defendant raised numerous defenses to the merits of
22 Plaintiff’s claims, and argued that even if found liable, the Court would exercise its discretion to
23 reduce any potential PAGA penalties given Defendant’s good-faith defenses. *See Thurman,*
24 *supra*, 203 Cal.App.4th at 1136 (affirming reduction of PAGA penalties); *Carrington, supra*, 30
25 Cal.App.5th 504 (affirming reduction of PAGA penalties to 10% of maximum exposure).
26 Additionally, at the time of mediation, there was a looming threat that a forthcoming decision in
27 *Viking River* could preclude any representative PAGA recovery at all. Haines Decl., ¶¶ 19-23. In
28 the face of Defendant’s defenses on the merits, the Court’s discretion to reduce PAGA penalties,

1 and the threat (which has since become reality) of an adverse *Viking River* ruling, Plaintiff felt
2 that the negotiated settlement of \$93,625.00, was clearly in the best interests of the LWDA and
3 the Aggrieved Employees and was well within the range of reasonableness. *See Linney v. Cellular*
4 *Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (“The fact that a proposed settlement
5 may only amount to a fraction of the potential recovery does not, in and of itself, mean that the
6 proposed settlement is grossly inadequate and should be disapproved.”) (internal quotations
7 omitted); Haines Decl., ¶¶ 19-23.

8 Approval of the Settlement is appropriate, as the Settlement will provide tangible
9 monetary relief to Aggrieved Employees and the State of California while avoiding the risks and
10 costs of continued litigation and trial.

11 **d. Discovery Completed and the Status of Proceedings**

12 As discussed above, the Parties engaged in substantial formal and informal discovery to
13 evaluate the PAGA claim. Haines Decl., ¶ 16. Defendant provided Plaintiff with, *inter alia*,
14 Defendant’s commission pay plans, a sample of payroll records for Aggrieved Employees, a list
15 of Aggrieved Employees’ hire dates and termination dates, additional relevant data points and
16 information, and its relevant written policies. *Id.* Only after the completion of this comprehensive
17 discovery process, and significant discussions about the likelihood of prevailing on the merits,
18 did the Parties reach the proposed Settlement. Thus, this factor supports settlement approval.

19 **e. The Experience and Views of Counsel**

20 “Parties represented by competent counsel are better positioned than courts to produce a
21 settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enter. Sec.*
22 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff is represented by experienced counsel with
23 decades of combined experience, who believe this Settlement to be fair and adequate for all
24 involved. Haines Decl., ¶¶ 3-9. This factor strongly supports settlement approval. *Kullar*, 168
25 Cal.App.4th at 130 (“The court undoubtedly should give considerable weight to the competency
26 and integrity of counsel and the involvement of a neutral mediator in assuring itself that a
27 settlement agreement represents an arm’s length transaction entered without self-dealing or other
28 potential misconduct.”).

1 **B. The Requested Award of Attorneys’ Fees is Reasonable as a Percentage of**
2 **the Settlement Fund as Confirmed by a Lodestar Cross-Check**

3 Plaintiff is entitled to attorneys’ fees in this PAGA action under Labor Code § 2699(g)(1),
4 which provides that “[a]ny employee who prevails in any [PAGA] action shall be entitled to an
5 award of reasonable attorneys’ fees and costs.” *See also Gouskos v. Aptos Village Garage, Inc.*,
6 94 Cal.App.4th 754, 765 (2001) (holding that attorneys’ fees to prevailing party are mandatory
7 when the statute uses the word “shall”). It is undisputed that by obtaining PAGA penalties for the
8 LWDA and Aggrieved Employees, Plaintiff has prevailed. *See Graciano v. Robinson Ford Sales*,
9 144 Cal.App.4th 140, 153 (2006) (“[P]laintiffs may be considered ‘prevailing parties’ for
10 attorney’s fee purposes if they succeed on any significant issue in the litigation that achieves some
11 of the benefit the parties sought in bringing suit.” (internal citation omitted)).

12 A fee award is justified where the legal action has produced its benefits by way of
13 settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Comty. for*
14 *Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983); *Serrano v. Priest* (1977) 20
15 Cal.3d 25, 34 (“when a number of persons are entitled in common to a specific fund, and an action
16 brought by a plaintiff...for the benefit of all results in the creation or preservation of that fund,
17 such plaintiff...may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32
18 Cal.3d 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties,
19 the trial court acts within its equitable power to prevent the other parties’ unjust enrichment);
20 *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of
21 the fund method for calculating attorneys’ fees more accurately reflects the results achieved for
22 the putative class than the lodestar method and “establishes reasonable expectations on the part
23 of plaintiffs’ attorneys as to their expected recovery; and it encourages early settlement, which
24 avoids protracted litigation.”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)
25 (“The percentage-of-recovery method is generally favored in common fund cases because it
26 allows courts to award fees from the fund ‘in a manner that rewards counsel for success and
27 penalizes it for failure.”).

28 Fee awards of one-third of the settlement fund are routinely awarded in California courts

1 in class and representative PAGA actions. The California Supreme Court recently confirmed its
2 approval of the use of the “percentage of fund” method. See *Laffitte v. Robert Half Int’l, Inc.*, 1
3 Cal.5th 480, 506 (2016) (“the percentage of fund method survives in California class action
4 cases...”.) Specifically, the *Laffitte* Court held:

5 The recognized advantages of the percentage method—including relative ease
6 of calculation, alignment of incentives between counsel and the class, a better
7 approximation of market conditions in a contingency case, and the
encouragement it provides counsel to seek an early settlement and avoid
unnecessarily prolonging the litigation—convince us the percentage method is a
valuable tool that should not be denied our trial courts.

8 *Id.*, at 503 (internal citation omitted). Indeed, “[F]ee awards in class actions average around one-
9 third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008); see also
10 *Chavez v. Saticoy Lemon Ass’n*, 2015 WL 5561118 (Ventura Cty. Super. Ct., Aug. 29, 2015)
11 (approving attorneys’ fees of one-third of settlement fund in PAGA settlement); *Clavel v. Lupe’s*
12 *Thousand Oaks Mexican Restaurant, Inc.*, 2016 WL 1601223 (Ventura Cty. Super. Ct., Mar. 25,
13 2016) (same). This is also consistent with Plaintiff’s counsel’s experience in similar wage-and-
14 hour class and PAGA matters. Haines Decl., ¶ 24.

15 Here, Plaintiff’s fee request of one-third of the GSA (estimated to be \$31,208.33), which
16 is the same percentage approved by the California Supreme Court in *Laffitte*, is fair and reasonable
17 based on the percentage of the recovery method, as confirmed by a lodestar cross-check.

18 In *Laffitte*, the California Supreme Court held that trial courts have discretion to assess the
19 reasonableness of fee awards with tools such as the “lodestar cross-check,” whereby the trial court
20 calculates counsel’s lodestar and determines whether the “lodestar multiplier” needed to bring the
21 lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-06. Under
22 the lodestar method, the court multiplies the number of hours reasonably expended by each
23 attorney or legal staff member by their reasonable hourly rates, then enhances this lodestar figure
24 by a “multiplier” to account for a range of factors, such as the contingent nature of the case and
25 the degree of success achieved. See *Serrano v. Priest*, 20 Cal.3d 25, 48-49 (1977); *Ketchum v.*
26 *Moses*, 24 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834
27 (2001) (“There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial
28 discretion to increase or decrease a lodestar calculation”).

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *Coalition for L.A. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of approximately 12.8). In representative actions such as this one, where Plaintiff’s counsel efficiently protected the rights of the aggrieved employees and where the value of the benefit conferred to the group “can be monetized with a reasonable degree of certainty,” the Court may “adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 (2009).

In this case, Plaintiff’s counsel has a lodestar of approximately \$88,972.50 without the use of any multiplier, resulting in a *negative* multiplier compared to the \$31,208.33 fee request. Haines Decl., ¶¶ 27-28. The billing rates used are reasonable in view of the evidence submitted herewith. *Id.*, Exh. 4 (2021-2022 Laffey Matrix).

Name	Rate	Hours	Pre-Multiplier Lodestar
Paul K. Haines (17th Year Attorney)	\$675	25.2	\$17,010.00
Tuvia Korobkin (14th Year Attorney)	\$650	55.9	\$36,335.00
Neil M. Larsen (11th Year Attorney)	\$550	60.8	\$33,440.00
Firm Paralegals	\$175	12.5	\$2,187.50
Total Lodestar			\$88,972.50

The requested fee award is also justified because Plaintiff’s counsel achieved a significant monetary recovery in an uncertain and risky case, while bearing the substantial burden of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys’ fees). Here, Plaintiff’s counsel expended significant time and resources in litigating this case, which resulted in an excellent result for Plaintiff, the State of California, and Aggrieved Employees in the face of significant defenses. Counsel also bore the contingency risk of this litigation for the benefit of the Aggrieved Employees, as well as the State

of California (which elected not to take the case after receiving Plaintiff's PAGA notice).

Critically, Plaintiff's recovery for the State of California and Aggrieved Employees of approximately \$43,627.99 (NSA) significantly exceeds other PAGA awards approved by California courts. *See, e.g., Aguirre v. DSW, Inc.*, 2012 WL 11875296, *3 (C.D. Cal. Nov. 29, 2012) (approving \$10,000 PAGA payment); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, *7 (E.D. Cal. Oct. 31, 2012) (approving \$10,000 PAGA payment, finding it "comports with settlement approval of PAGA awards in other cases. [Citations.]"); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, *8 (C.D. Cal. Nov. 18, 2014) (approving \$18,750 PAGA payment); *Franco v. Ruiz Food Prods.*, 2012 WL 5941801, *14 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA payment); *Chu v. Wells Fargo Inv., LLC*, 2011 WL 672645, *1 (N.D. Cal. Feb. 16, 2011) (\$10,000 PAGA payment).

As discussed above, this case presented significant risks to Plaintiff, including the risk that an adverse *Viking River* decision could have effectively concluded the case. It is fair and reasonable to account for these risks in compensating Plaintiff's counsel, as well as the risks involved in undertaking this litigation and expending considerable effort while working on a pure contingency basis. Since undertaking representation of Plaintiff, Plaintiff's counsel dedicated substantial resources to this litigation, including expending \$11,538.68 in litigation costs, without receiving any compensation to date. Haines Decl., ¶¶ 24-26. Plaintiff's counsel conducted extensive research regarding the merits of Plaintiff's claims, his ability to recover PAGA civil penalties, and Defendant's potential defenses. Plaintiff's counsel conducted formal and informal discovery, performed law and motion work, and also performed extensive analysis of data and information produced by Defendant, used this analysis to evaluate Plaintiff's claims, and drafted a comprehensive mediation brief. Plaintiff's counsel also attended a private mediation, and expended significant effort in preparing settlement documents, this Motion and supporting documents, and will oversee the settlement administration process. Given the considerable potential for adverse outcomes in this case, the contingent risk borne by Plaintiff's counsel was great. Haines Decl., ¶ 25. The quality of Plaintiff's counsel's work, and the efficacy and dedication with which it was performed, should be compensated. Thus, Plaintiff submits that the

1 requested fee award is fair, reasonable and adequate and should be approved.

2 Plaintiff's counsel's previous experience in litigating wage and hour class and
3 representative actions also supports the reasonableness of the fee request. Plaintiff's counsel is
4 well-versed in plaintiff and defense-side wage and hour class and representative action litigation.
5 See Haines Decl., ¶¶ 3-9. Plaintiff's counsel has also been certified as class counsel in numerous
6 class action cases alleging wage and hour claims. *Id.* Plaintiff's counsel's experience in similar
7 matters was integral in evaluating the strengths and weaknesses of this case and the
8 reasonableness of the Settlement. Because it is reasonable to compensate Plaintiff's counsel
9 commensurate with their skill, reputation, and experience, the requested fee award is fair,
10 reasonable and adequate, and should therefore be approved.

11 **C. The Requested Litigation Costs and Settlement Administration Costs Are**
12 **Fair, Reasonable, and Adequate**

13 Plaintiff's request for reimbursement of litigation costs of \$11,538.68 is also fair and
14 reasonable. All of Plaintiff's litigation costs are reasonably incurred. See Haines Decl., ¶ 26 &
15 Exh. 3. Moreover, the costs Plaintiff seeks are the types of costs routinely approved by courts.
16 See, e.g., *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-
17 of-pocket expenses that would normally be charged to a fee paying client"); *Ashker v. Sayre*, 2011
18 WL 825713 at * 3 (N.D. Cal. Mar. 7, 2011) ("costs of reproducing pleadings, motions and exhibits
19 are typically billed by attorneys to their fee-paying clients" and are reimbursable); *Trustees of*
20 *Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-
21 59 (9th Cir. 2006) (legal research costs reimbursable); *In re Immune Response Sec. Litig.*, 497
22 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, legal
23 research, copies, postage, filing fees, messenger and overnight delivery costs are reimbursable).

24 Likewise, the request for administration costs of up to \$2,250.00 is also fair and
25 reasonable. Phoenix was selected because it is an experienced settlement administrator and
26 returned a reasonable bid. See Declaration of Jodey Lawrence & Exhibits. Moreover, Phoenix
27 will perform several important functions that are integral to the implementation of the Settlement.
28 *Id.* Its modest requested fee is therefore reasonable.

1 **D. The Court Should Approve Plaintiff’s Requested Enhancement Award**
2 **Because It Is Fair, Adequate, and Reasonable in View of Plaintiff’s Efforts**
3 **and the Risks He Assumed in This Litigation**

4 Courts routinely approve enhancement payments to compensate named plaintiffs for the
5 services they provide and the risks they incur during representative litigation. *See, e.g., Bell v.*
6 *Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding “service payments” to named
7 plaintiffs); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
8 \$50,000 incentive payment). Here, Plaintiff seeks an Enhancement Award of \$5,000.00. *See*
9 Settlement, § III.4.b. This request is reasonable given Plaintiff’s efforts in this case and the risks
10 he undertook on behalf of Aggrieved Employees. Fistanic Decl., ¶ 6. Plaintiff provided
11 substantial factual information and documents to counsel, assisted in identifying potential
12 witnesses, and participated in numerous discussions with Plaintiff’s counsel regarding the case.
13 *Id.*, ¶ 7; *see also* Haines Decl., ¶ 29. Accordingly, Plaintiff’s requested Enhancement Award is
14 appropriate and justified as part of the Settlement.

15 **V. CONCLUSION**

16 For the reasons stated herein, Plaintiff respectfully requests that this Court grant Plaintiff’s
17 Motion and adopt the [Proposed] Judgment and Order Granting Settlement Approval submitted
18 concurrently herewith.

19
20 Dated: October 13, 2022

Respectfully submitted,
HAINES LAW GROUP, APC

21 By: 
22 Paul K. Haines
23 Sean M. Blakely
24 Attorneys for Plaintiff
25
26
27
28



Make a Reservation

PIERRE FISTANIC vs HILLTOP SECURITIES INC.

Case Number: 20STCV47743 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2020-12-14 Location: Stanley Mosk Courthouse - Department 20

Reservation

Case Name: PIERRE FISTANIC vs HILLTOP SECURITIES INC.	Case Number: 20STCV47743
Type: Motion to Confirm Settlement	Status: RESERVED
Filing Party: Pierre Fistanic (Plaintiff)	Location: Stanley Mosk Courthouse - Department 20
Date/Time: 11/04/2022 8:30 AM	Number of Motions: 1
Reservation ID: 742939880446	Confirmation Code: CR-JEQVXURDLKBW6GTKY

Fees

Description	Fee	Qty	Amount
Motion to Confirm Settlement	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount: \$61.65	Type: Visa
Account Number: XXXX6940	Authorization: 01127G

[Print Receipt](#)[+ Reserve Another Hearing](#)[View My Reservations](#)