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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

TANIS CLARK, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

NOW OPTICS, LLC, a Florida limited
liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 37-2020-00044817-CU-OE-CTL

(Assigned to the Hon. Richard S. Whitney, Dept. C-68)

**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: October 28, 2022
Time: 10:30 a.m.
Dept.: C-68

Reservation Number: 2830404

Complaint Filed: December 7, 2020
FAC Filed: August 26, 2021
SAC Filed: March 21, 2022
Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on October 28, 2022, at 10:00 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Richard S. Whitney, judge presiding, in
4 Department C-68 of the above referenced Court, located at 330 West Broadway, San Diego,
5 California 92101, Plaintiff Tanis Clark ("Plaintiff") will seek an Order approving the
6 concurrently filed Joint Stipulation of Settlement and Release Under the Private Attorneys
7 General Act, California Labor Code § 2698, *et seq.*, pursuant to the procedures set forth in Labor
8 Code § 2698, *et seq.*

9 This motion will be based on this notice of motion, the attached memorandum of points
10 and authorities, the accompanying declarations of Kristen M. Agnew, Plaintiff Tanis Clark and
11 Phoenix Class Action Administrators (Jodey Lawrence), the records and file herein, and on such
12 other evidence as may be presented at the hearing of the motion.

13
14 DATED: May 24, 2022

DIVERSITY LAW GROUP, P.C.

15
16 By: _____

17 Larry W. Lee
18 Kristen M. Agnew
19 Nicholas Rosenthal
20 Attorneys for Plaintiff and the Aggrieved
21 Employees
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	8
II. SUMMARY OF THE LITIGATION.....	9
A. The Original PAGA Notice and Complaint.....	9
B. The Dismissal of the Class Claims.....	9
C. Plaintiff Files a Supplemental PAGA Notice.....	9
D. Plaintiff Agrees to Proceed on a PAGA-Only Basis.	10
E. The Parties Engage in Informed Settlement Negotiations.	10
F. Plaintiff Filed the Operative Second Amended Complaint.....	11
III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	11
A. The Aggrieved Employees.....	11
B. Settlement Sum and Allocation.....	12
C. Scope of the Released Claims.....	13
IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED..	14
A. PAGA Overview.....	14
B. Class Action Settlement Standards Do Not Govern the Settlement Approval Process for PAGA Claims	15
C. The Settlement is Reasonable and Effectuates PAGA’s Objectives.....	16
D. The Scope of the Release is Appropriately Limited.....	16
E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation.....	17
1. Plaintiff’s Claims are Contested	17
2. Recovery of Penalties After Trial	18
3. Settlement is Reasonable When Compared to the Value of the Underlying Labor Code Claim	19
F. The Attorneys’ Fees are Reasonable	21

1	G. The Settlement Administrator’s Fees Should be Approved	22
2	H. Representative Plaintiff’s Payment Should be Approved.....	23
3	I. Notice to the LWDA Has Been Provided.....	23
4	V. CONCLUSION	23

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009)	14, 15, 16, 17
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	19
<i>City and County of San Francisco v. Sweet</i> , 12 Cal. 4th 105 (1995).....	21
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46 (2006).....	16
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480 (2016).....	22
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal. App. 5th 1308 (2018)	18
<i>Mayreli Martinez v. Vision Precision Holdings, LLC</i> , Superior Court of California, County of Kern case number BCV-18-103076.....	10, 11, 18
<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal. 4th 273 (1992)	16
<i>Serrano v. Priest</i> , 20 Cal. 3d 25 (1977)	21
<i>Titus v. McLane Foodservice, Inc.</i> , 2016 WL 4797497	18

Federal Cases

<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F. 3d 1117 (9th Cir. 2014)	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	21
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907 (S.D. Ohio 2001).....	23
<i>Cook v. Niedert</i> , 142 F.3d 1004 (7th Cir. 1998)	23
<i>Cotter v. Lyft, Inc.</i> , 2016 WL 3561742 (N.D. Cal. June 23, 2016).....	20
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> , 137 F.R.D. 240 (S.D. Ohio 1991)..	23
<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 27, 2007)	23
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	15
<i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133 (N.D. Cal. Apr. 3, 2009)	20
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366 (S.D. Ohio 1990)	23
<i>Lusby v. Gamestop Inc.</i> , 97 F.R.D. 400, 407 (N.D. Cal. 2013)	20
<i>Magadia v. Wal-Mart Assocs. et al.</i> , 2019 U.S. Dist. Lexis 91792 (N.D. Cal. May 31, 2019)....	19

1	<i>Moore v. PetSmart, Inc.</i> , 2015 WL 5439000 (N.D. Cal. Aug. 4, 2015).....	20
2	<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777 (N.D. Cal. April 2, 2010)....	14, 16
3	<i>O'Connor v. Uber Technologies, Inc.</i> , 201 F.Supp.3d 1110, 1133 (N.D. Cal., 2016).....	16
4	<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	23
5	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995).....	23
6	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759 (9th Cir. 1997)	21
7	Statutes	
8	Business and Professions Code § 17200, et seq.	9
9	Civil Code § 1542	23
10	Labor Code § 2699(c)	14
11	Labor Code § 2699(g)(l)	17, 21
12	Labor Code § 2699(i).....	15, 16
13	Labor Code § 2699(1).....	15, 16
14	Labor Code § 2699.3(a)(2)	14
15	Labor Code § 2699.3(a)(l)	14
16	Labor Code § 1174.....	8, 11, 13, 17
17	Labor Code § 1174.5.....	11
18	Labor Code § 1194.....	8, 11, 13, 17
19	Labor Code § 1197.....	8, 13, 17
20	Labor Code § 1197.1.....	8, 13, 17
21	Labor Code § 1198.....	11
22	Labor Code § 201.....	passim
23	Labor Code § 202.....	passim
24	Labor Code § 203.....	passim
25	Labor Code § 204.....	11
26	Labor Code § 210.....	11
27	Labor Code § 226.....	passim
28	Labor Code § 226.3.....	11

1	Labor Code § 226.7.....	passim
2	Labor Code § 246.....	8, 10, 13, 17
3	Labor Code § 2698, <i>et seq.</i>	passim
4	Labor Code § 2699(a)	14
5	Labor Code § 2699(f)(2).....	19
6	Labor Code § 2699.3.....	9, 14
7	Labor Code § 510.....	8, 11, 13, 17
8	Labor Code § 512.....	passim
9	Labor Code § 558.....	8, 11, 13, 17
10	Labor Code § 245, <i>et. seq</i>	17
11	Other Authorities	
12	4 Herbert B. Newberg, Newberg on Class Actions §§ 11.25, et seq. and 13.64 (4th ed. 2002 and	
13	Supp. 2004)	15
14	IWC Wage Orders.....	13
15	<i>Manual for Complex Litigation, Fourth</i> § 21.632 (Fed. Jud. Ctr., 4th ed. 2004)	15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
4 2698, *et seq.*, Plaintiff Tanis Clark (“Plaintiff”) hereby moves the Court for an order approving
5 the non-reversionary PAGA settlement as set forth in the concurrently filed Joint Stipulation of
6 Settlement and Release Under the Private Attorneys General Act, California Labor Code § 2698,
7 *et seq.* (“Agreement” or “Settlement Agreement”).¹ As set forth in the operative Complaint,
8 Plaintiff seeks PAGA penalties based on Defendant Now Optics, LLC’s (“Defendant”) alleged
9 failure to pay meal period premiums and sick pay at the correct regular rate of pay, pay minimum
10 and overtime wages for all hours worked, provide paid, duty-free rest periods, pay all wages
11 owed upon separation of employment, provide accurate itemized wage statements, pay all earned
12 wages at least twice a month, and maintain accurate time records.

13 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the
14 proposed settlement warrants the Court’s approval. This settlement was reached after
15 investigation and discovery, including Defendant’s production of relevant documents and payroll
16 data.

17 Pursuant to the terms of the Settlement Agreement, Defendant will pay the gross amount
18 of \$174,000.00 (the “Maximum Settlement Amount”), which includes a payment of
19 approximately \$76,607.82 in civil penalties to the California Labor and Workforce Development
20 Agency (“LWDA”). The proposed release is narrowly tailored to release only claims under
21 PAGA that were or could have been pled based on the operative Complaint—specifically, Labor
22 Code sections 201, 202, 203, 226, 226.7, 246, 510, 512, 558, 1174, 1194, 1197 and 1197.1. The
23 proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the
24 LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

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26
27 ¹ A true and correct copy of the Settlement Agreement is attached as Exhibit A to the Declaration
28 of Kristen M. Agnew in Support of Plaintiff’s Motion to Approve PAGA Settlement (“Agnew
Decl.”).

1 **II. SUMMARY OF THE LITIGATION**

2 **A. The Original PAGA Notice and Complaint.**

3 On November 18, 2020, Plaintiff submitted his written notice under Labor Code section
4 2699.3 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA Notice,
5 Plaintiff alleged that Defendant failed to pay meal period premiums at the regular rate of pay,
6 pay all wages owed upon separation of employment, and provide accurate itemized wage
7 statements to its employees in violation of California Labor Code sections 201, 202, 203, 226,
8 226.7, and 512. Agnew Decl. ¶ 3.

9 On December 7, 2020, Plaintiff filed a class and representative PAGA action against
10 Defendant in the Superior Court of California, County of San Diego. Agnew Decl. ¶ 4. The
11 complaint alleged causes of action for: (1) violation of Labor Code sections 226.7 and 512; (2)
12 violation of Labor Code section 226; (3) violation of Business and Professions Code section
13 17200, et seq.; and (4) violation of Labor Code section 2698, *et seq.*, based on the facts described
14 in Plaintiff’s PAGA Notice. *Id.*

15 **B. The Dismissal of the Class Claims.**

16 On or about February 4, 2021, Defendant filed a motion to compel arbitration of
17 Plaintiff’s individual claims, based on an arbitration agreement containing a class waiver. Agnew
18 Decl. ¶ 5. Plaintiff opposed the motion. *Id.* On August 6, 2021, the Court granted Defendant’s
19 motion to compel arbitration, dismissed Plaintiff’s class claims, and stayed Plaintiff’s PAGA
20 claims pending arbitration of the individual claims. *Id.*

21 **C. Plaintiff Files a Supplemental PAGA Notice.**

22 On August 10, 2021, Plaintiff submitted a supplemental notice (“Supplemental PAGA
23 Notice”) to the LWDA and Defendant. Agnew Decl. ¶ 6. In addition to the claims set forth in the
24 PAGA Notice, Plaintiff further alleged that Defendant failed to pay sick pay at the regular rate of
25 pay. *Id.* The failure to properly pay sick pay wages resulted in derivative violations of California
26 Labor Code sections 201, 202, and 203, because Defendant did not pay employees all owing and
27 unpaid wages for work performed by them during their employment and at the end of their
28 employment. *Id.*

1 **D. Plaintiff Agrees to Proceed on a PAGA-Only Basis.**

2 In light of the dismissal of the class claims, Plaintiff agreed to amend the complaint to
3 pursue his representative PAGA cause of action. Agnew Decl. ¶ 7. After approval by the Court,
4 on August 26, 2021, Plaintiff filed the First Amended Representative Action Complaint (“First
5 Amended Complaint”). *Id.* The First Amended Complaint alleged a single cause of action for
6 violation of PAGA arising from claims that Defendant: (a) failed to pay meal period premiums at
7 the correct regular rate of pay that included all non-discretionary remuneration, in violation of
8 Labor Code sections 226.7 and 512; (b) failed to pay employee sick pay wages at the correct
9 regular rate of pay that included all non-discretionary incentive wages, in violation of Labor
10 Code sections 201, 202, 203 and 246; (c) failed to pay all wages owed upon separation of
11 employment due to the unpaid meal period premiums, in violation of Labor Code sections 201,
12 202 and 203; and (d) failed to provide accurate itemized wage statements, in violation of Labor
13 Code section 226. *Id.* at ¶ 8.

14 **E. The Parties Engage in Informed Settlement Negotiations.**

15 Following the filing of the First Amended Complaint, Plaintiff and Defendant (the
16 “Parties”) met and conferred regarding the proper liability period and the underlying merits of
17 the case. Agnew Decl. ¶¶ 9-11. The Parties extensively discussed the settlement of a related
18 lawsuit entitled *Mayreli Martinez v. Vision Precision Holdings, LLC*, Superior Court of
19 California, County of Kern case number BCV-18-103076, alleging similar wage and hour PAGA
20 claims against an affiliated entity of Defendant (“*Martinez*”). *Id.* at ¶ 9. Further, Defendant
21 represented that it did not employ any individuals in California prior to January 1, 2020, and that
22 to the extent any aggrieved employees worked for Defendant’s related entities, such claims
23 would be compensated in the *Martinez* settlement. *Id.* at ¶ 11. In light of the narrow liability
24 period in this Action, the Parties agreed to engage in early settlement discussions. *Id.* at ¶ 12.

25 Over the course of several months, the Parties engaged in arm’s length negotiations.
26 Agnew Decl. ¶ 12. In connection therewith, Defendant produced data relating to the number of
27 pay periods worked by aggrieved employees and the number of pay periods in which aggrieved
28 employees earned non-discretionary remuneration and meal period premiums and/or sick pay. *Id.*

1 This information allowed Plaintiff to conduct a full damage analysis. *Id.* at ¶¶ 12, 24-26.

2 On or about December 15, 2021, the Parties reach a settlement of the entire action.
3 Agnew Decl. ¶ 13.

4 **F. Plaintiff Filed the Operative Second Amended Complaint.**

5 As a condition of the settlement, on January 19, 2022, Plaintiff submitted a second
6 supplemental notice (“Second Supplemental PAGA Notice”) with the LWDA and Defendant.
7 Agnew Decl. ¶ 14. In the Second Supplemental PAGA Notice, Plaintiff alleges that Defendant
8 failed to pay minimum and overtime wages to employees for time spent performing work-related
9 tasks, failed to provide paid, duty-free rest periods and/or pay rest period premium pay, failed to
10 pay all earned wages twice a month and upon separation of employment, and failed to maintain
11 accurate time records.² *Id.*

12 On March 21, 2022, Plaintiff filed the Second Amended Representative Action
13 Complaint (“Second Amended Complaint”). Agnew Decl. ¶ 15. The Second Amended
14 Complaint is the operative complaint and alleges claims based on the facts described in
15 Plaintiff’s Second Supplemental PAGA Notice.

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

17 The material terms of the settlement are described below and set forth in detail in the
18 concurrently filed Joint Stipulation of Settlement and Release Under the Private Attorneys
19 General Act, California Labor Code § 2698, *et seq.* Agnew Decl. ¶ 13, Ex. A.

20 **A. The Aggrieved Employees**

21 The settlement covers “all current and former California non-exempt employees of
22 Defendant who were paid wages by Defendant at any time during the PAGA Period” (the
23

24
25 ² Given the overlap between the aggrieved employees represented in this Action and *Martinez*,
26 the Second Supplemental PAGA Notice encompasses the PAGA allegations at issue in *Martinez*.
27 Agnew Decl. ¶ 14. On April 6, 2022, the Kern County Superior Court entered an order granting
28 approval of the PAGA settlement in *Martinez*. The court approved releases encompasses claims
for PAGA civil penalties predicated on alleged violations of the following California Labor Code
sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, and
1198. *Id.* at fn. 1.

1 “Aggrieved Employees”). Settlement Agreement § B-2. The PAGA Period is defined as “the
2 period of January 1, 2020 to March 31, 2022.” *Id.* at § B-15. Based upon Defendant’s records,
3 there are an estimated 293 Aggrieved Employees who worked approximately 9,300 workweeks
4 during the PAGA Period. *Id.* at § C-2. The 9,300 workweeks translates to approximately 4,650
5 pay periods during the PAGA Period. Agnew Decl. ¶ 16.

6 **B. Settlement Sum and Allocation**

7 The Settlement Agreement requires Defendant to pay the gross amount of One Hundred
8 Seventy-Four Thousand Dollars (\$174,000.00) (the “Maximum Settlement Amount”).
9 Settlement Agreement § B-13. Based on the Maximum Settlement Amount, Defendant will pay
10 approximately \$37.42 per pay period to resolve the claims in this case. Agnew Decl. ¶ 22.

11 The balance of the Maximum Settlement Amount remaining after deduction of the
12 approved enhancement payment to Plaintiff, attorneys’ fees and costs, and settlement
13 administration costs (the “PAGA Penalties Fund”), will be available for distribution to the
14 LWDA and Aggrieved Employees. Settlement Agreement §§ B-14, C-4. The PAGA Penalties
15 Fund is estimated to be at least \$102,143.76. Agnew Decl. ¶ 18. Seventy-five percent (75%) of
16 the PAGA Penalties Fund, or approximately \$76,607.82, will be paid to the LWDA for PAGA
17 penalties. Settlement Agreement § C-4; Agnew Decl. ¶ 18. The remaining twenty-five percent
18 (25%), or approximately \$25,535.94, will be distributed to Aggrieved Employees. Settlement
19 Agreement § C-4; Agnew Decl. ¶ 18. The amount any particular Aggrieved Employee will be
20 entitled to recover will depend on the number of pay periods he or she worked during the PAGA
21 Period, with some entitled to receive more and others less. Settlement Agreement § C-5; Agnew
22 Decl. ¶ 23. This is fair, as it directly allocates greater penalties to individuals who have allegedly
23 suffered greater harm. Agnew Decl. ¶ 23. Any uncashed checks will escheat to the Unclaimed
24 Property Fund administered by the California State Controller’s Office in the name of the
25 Aggrieved Employee, where it will be held in trust. Settlement Agreement § D-6.

26 As part of the Settlement Agreement, Defendant does not object to Plaintiff’s Counsel’s
27 request for attorneys’ fees of approximately thirty-three and one-half percent (33.5%) of the
28 Maximum Settlement Amount, *i.e.*, Fifty-Eight Thousand Three Hundred Thirty-Three Dollars

1 and Thirty-Three Cents (\$58,333.33), plus up to Five Thousand Dollars (\$5,000.00) for
2 reimbursement of litigation costs, subject to the Court approving this Settlement.³ Settlement
3 Agreement § C-8. Also, as part of the Settlement Agreement, Defendant does not object to
4 Plaintiff's request for an enhancement payment of Seven Thousand Five Hundred Dollars
5 (\$7,500.00). *Id.* at § C-7.

6 Finally, the Settlement Agreement provides for the payment of the fees and expenses
7 reasonably incurred by the Settlement Administrator. Settlement Agreement § C-9. The Parties
8 have agreed to utilize Phoenix Settlement Administrators to administer the settlement, with the
9 administration costs estimated to be \$4,000.00. Declaration of Jodey Lawrence, ¶ 8, Ex. B.

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

11 In exchange for the payments described above, Plaintiff and Aggrieved Employees will
12 release Defendant and Released Parties from:

13 [A]ll claims for penalties under the California Private Attorneys'
14 General Act, including costs and attorneys' fees that: (1) arose or
15 may be alleged to have arisen or occurred at any time during the
16 PAGA Period, and (2) are based on or arise from alleged violations
17 of the following California Labor Code sections: 201, 202, 203, 226,
18 226.7, 246, 510 512, 558, 1174, 1194, 1197, and 1197.1 and all
19 applicable IWC Wage Orders, which arise from the facts alleged in
the Complaint or Plaintiff's letters to the LWDA, or otherwise
asserted by Plaintiff in the Action; or any other claims that are
reasonably related to Plaintiff's allegations in the Complaint or the
letters to the LWDA (the "Released Claims").

20 Settlement Agreement §§ B-18, B-19, E-1. The Settlement expressly states that the release does
21 not extend to violations of any predicate statutes other than PAGA. *Id.* at § B-19. The release
22 also does not constitute a waiver of claims by Aggrieved Employees for any individual wage and
23 hour claims. *Id.*

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28 ³ As set forth below, Plaintiff's Counsel seeks reimbursement for its anticipated actual litigation
costs in the amount of \$2,022.91. Agnew Decl. ¶ 19, Ex. B.

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

2 **A. PAGA Overview**

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

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

27 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
28 “represents the same legal right and interest as state labor law enforcement agencies,” and brings

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

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

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

23 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
24 Labor Code, which provides, in relevant part: “The court shall review and approve any penalties
25 sought as part of a proposed settlement agreement pursuant to this part.” The parties are not
26 obligated to “satisfy class action requirements,” including the standards for class action
27
28

1 settlement approval. ⁴ *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that
2 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).

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

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

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

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

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

23 Because an aggrieved employee’s PAGA action is a substitute for an action brought by
24 the government, “judgment in [a PAGA] action is binding not only on the named employee
25

26 ⁴ PAGA also does not require class action procedures, such as notice and opt-out rights.
27 *O’Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal., 2016) (explaining
28 that “in a lawsuit which asserts a PAGA claims and seeks class certification for labor/wage
claims, even class members who opt out of the class would be bound by an
adverse PAGA judgment or settlement”).

1 plaintiff but also on government agencies and any aggrieved employee not a party to the
2 proceeding.” *Arias*, 46 Cal. 4th at 986. However, “the nonparty employees, because they were
3 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
4 judgment as to remedies other than civil penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(l)
5 (non-party aggrieved employees retain all rights “to pursue or recover other remedies available
6 under state or federal law, either separately or concurrently with an action taken under this
7 part”).

8 Here, if approved, the Settlement would release Defendant and other releasees from civil
9 penalties under PAGA predicated on alleged violations of Labor Code sections 201, 202, 203,
10 226, 226.7, 246, 510, 512, 558, 1174, 1194, 1197, and 1197.1. Settlement Agreement § B-19.
11 The Settlement would not impact Aggrieved Employees’ ability to pursue PAGA claims
12 predicated on other Labor Code violations. *Id.* Nor does the Settlement release individual wage
13 and hour claims that Aggrieved Employees may have against Defendant. *Id.* Therefore, the
14 limited scope of the release also supports approval.

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

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

20 **1. Plaintiff’s Claims are Contested**

21 Defendant contends that it maintains compliant written meal/rest period and overtime
22 policies, which strictly prohibit employees from working off-the-clock. Agnew Decl. ¶ 27. With
23 respect to the alleged unpaid sick time, Defendant maintains that there is no private right of
24 action to bring a paid sick pay claim. This argument presents novel legal issues and there is
25 substantial ground for difference of opinion as to the remedies, if any, available to employees
26 who have experienced a violation of the Healthy Workplaces, Healthy Families Act
27 (“HWHFA”), codified at Labor Code section 245, *et. seq.* Plaintiff’s counsel is unaware of the
28 existence of any published California Court of Appeal decision that grapples with this issue. *Id.*

1 There are a handful of unreported district court opinions, including *Titus v. McLane Foodservice,*
2 *Inc.*, which have held that only the Labor Commissioner may recover penalties for a violation of
3 HWHFA. 2016 WL 4797497. While *Titus* is by no means controlling authority, the Court may
4 look to it as a persuasive authority, despite Plaintiff’s contention that it was wrongly decided.
5 Even had Plaintiff ultimately prevailed on the merits, given the novelty of the legal questions it
6 raised, Defendant may have sought immediate appellate review through a writ or appeal.
7 Furthermore, the alleged wage statement violation is in part derivative in nature, and therefore
8 vulnerable to a motion for summary judgment. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.
9 App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a) where
10 their wage statement cause of action was derived from an underlying wage and hour violation for
11 overtime).

12 Defendant, moreover, provided evidence that it did not employ any individuals in
13 California prior to January 1, 2020. Agnew Decl. ¶ 11. Prior to 2020, many of the Aggrieved
14 Employees were employed by Vision Precision Holdings (“Vision Precision”). *Id.* at ¶¶ 9-11.
15 Defendant could have moved to dismiss and/or stay the claims of the Aggrieved Employees who
16 previously worked for Vision Precision, pending the outcome of the *Martinez* litigation. Should
17 Defendant have prevailed, the State of California and Aggrieved Employees would have been
18 left with no or a substantially delayed recovery. *Id.* at ¶ 11.

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

20 Defendant has indicated that there were approximately 9,300 workweeks (or 4,650 pay
21 periods) that Aggrieved Employees worked during the PAGA Period. Agnew Decl. ¶ 24.
22 Therefore, pursuant to the PAGA, Plaintiff has calculated total exposure, if the Court were to
23 award penalties for each violation alleged, could total as high as \$2,338,900. *Id.* at ¶ 25. This,
24 however, assumes that the Court would “stack” penalties —*ie* award multiple PAGA penalties
25 for the same pay period based on different violations of the Labor Code—which is highly
26 unlikely. *Id.* at ¶¶ 25, 26.

27 If the Court only awarded a maximum penalty for a single violation per pay period, the
28 total penalties would only be approximately \$465,000. Agnew Decl. ¶ 24. Even then, pursuant to

1 Labor Code § 2699(f)(2) the Court can decline to award the full amount of PAGA penalties “if,
2 based on the facts and circumstances of the particular case, to do otherwise, would result in an
3 award that is unjust, arbitrary and oppressive, or confiscatory.” Courts routinely award far less
4 than the statutory maximum amount of civil penalties, even where an underlying violation of the
5 Labor Code is found. Indeed, as shown in the Court of Appeal’s decision in *Carrington v.*
6 *Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim at trial, the trial court reduced
7 the maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at
8 complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal
9 found such reduction to be proper. *Id.* at 539; *see O’Connor*, 201 F.Supp.3d 1110 at 1133 (noting
10 that even if PAGA penalties amounted to \$1 billion, such award “could well be reduced, as a
11 court may reduce the penalty when to do otherwise would result in an award that is unjust,
12 arbitrary and oppressive, or confiscatory”); *Magadia v. Wal-Mart Assocs. et al.*, 2019 U.S. Dist.
13 Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019) (while the trial court imposed substantial
14 PAGA penalties upon the defendant, such amount still represented reductions of 67% and 80%
15 of the potential PAGA penalties at issue).

16 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
17 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
18 contrary. Agnew Decl. ¶ 28.

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

21 The Court’s assessment of the proposed settlement must take into account that any
22 penalties awarded may be subject to substantial reduction. When this is considered, in
23 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
24 nothing, the proposed settlement is patently reasonable. Indeed, the Maximum Settlement
25 Amount is approximately 7.43% of the maximum amount of penalties at issue, if the Court
26 permitted an award of multiple violations per pay period. Agnew Decl. ¶ 25. If the Court were to
27 only permit a single violation penalty per pay period, the Maximum Settlement Amount is
28 approximately 37.41% of the available penalties. *Id.* at ¶ 24. Settlement for this reduced value

1 allows for the distribution of penalties in an amount which accounts for the risk of continued
2 litigation and Defendant’s likely arguments that higher penalties would have been confiscatory.
3 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
4 of the primary goals of PAGA.

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

22 A PAGA allocation need not represent any particular percentage of the overall settlement
23 value in order to secure court approval, and courts routinely approve PAGA settlements
24 representing only a tiny fraction of the overall settlement value. Here, on the other hand, the
25 settlement proposes a payment of approximately \$76,607.82 in penalties to the LWDA and
26 approximately \$25,535.94 in penalties to the Aggrieved Employees, which is an outstanding
27 result in a PAGA-only case. *See Agnew Decl.* ¶ 18. The proposed settlement sum in this case
28 vastly exceeds, both in terms of the total dollar amount and as a percentage of overall settlement

1 value, the typical PAGA settlement.

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

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

13 The common fund doctrine is predicated on the principle of preventing unjust
14 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
15 he may require the passive beneficiaries to compensate those who created the fund. Both
16 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
17 *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
18 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
19 been applied "consistently in California when an action brought by one party creates a fund in
20 which other persons are entitled to share." The reasons for applying the common fund doctrine
21 include: "fairness to the successful litigant, who might otherwise receive no benefit because his
22 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
23 the others who are entitled to share in the fund and who should bear their share of the burden of
24 its recovery; encouragement of the attorney for the successful litigant who will be more willing
25 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
26 if he is assured that he will be properly and directly compensated should his efforts be
27 successful." *Id.*

28 Indeed, most recently, the California Supreme Court has also held that the award of

1 attorneys' fees in common fund wage and hour class action settlements should start with the
2 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
3 overwhelming majority of federal and state courts in holding that when class action litigation
4 establishes a monetary fund for the benefit of the class members, and the trial court in its
5 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
6 of a reasonable fee by choosing an appropriate percentage of the fund created.").

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

12 Here, as set forth in their declarations and their respective lodestars, Plaintiff's attorneys
13 have spent at least 54.10 hours litigating this current action, which includes an anticipated
14 additional five hours preparing for the hearing on this motion, corresponding with the Settlement
15 Administrator and Defendant's Counsel regarding administration of the settlement. Agnew Decl.
16 ¶¶ 39, Ex. C. Based thereon and based on each of the Plaintiff's attorneys' hourly rates, the
17 lodestar equates to \$41,370, which only requires a modest multiplier of 1.41. Agnew Decl. ¶ 39,
18 Ex. C. Thus, the requested fee amount of \$58,333.33 is fair and reasonable.

19 Additionally, Plaintiff's Counsel's cost reimbursement request in the amount of
20 \$2,022.91 is also reasonable. Agnew Decl. ¶ 19, Ex. B. The costs were all directly incurred in the
21 prosecution of this action, including filing fees, postage, copying, and service of process fees. *Id.*
22 As such, the requested costs should be awarded as fair and reasonable.

23 **G. The Settlement Administrator's Fees Should be Approved**

24 The Parties have agreed to pay actual costs of administration, or \$4,000.00, to the
25 Settlement Administrator, Phoenix Settlement Administrators, to administer this settlement.
26 Settlement Agreement §§ B-22, C-9; Lawrence Decl. ¶ 8, Ex. B. The Parties believe that the
27 administration fee is reasonable and should be approved. Agnew Decl. ¶ 21.

1 **H. Representative Plaintiff’s Payment Should be Approved**

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

8 Here, Plaintiff seeks \$7,500 for his service award, which is intended to compensate
9 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
10 hesitation from later prospective employers that might find out he brought this claim, and for
11 executing a general release, including for all known and unknown claims under Civil Code §
12 1542. Declaration of Tanis Clark ¶¶ 9, 10. This requested enhancement is consistent with awards
13 approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.
14 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit*
15 *Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000,
16 and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14
17 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
18 *Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class
19 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-
20 52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class
21 action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive
22 award to class representative in ERISA case).

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

24 Concurrent with the filing of this motion, Plaintiff uploaded the instant motion to the
25 LWDA’s website. Agnew Decl. ¶ 31.

26 **V. CONCLUSION**

27 Based on the above, Plaintiff requests the Court approve the current PAGA settlement.
28

1 DATED: May 24, 2022

DIVERSITY LAW GROUP, P.C.

2
3 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

4 Attorneys for Plaintiff and the Aggrieved
5 Employees
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1 **PROOF OF SERVICE**

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

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

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

9 On May 24, 2022, I served the following document(s) described as:

- 10 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE**
11 **SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS**
12 **GENERAL ACT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
13 **SUPPORT**
- 14 **2. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
15 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
16 **PRIVATE ATTORNEYS GENERAL ACT**
- 17 **3. DECLARATION OF TANIS CLARK IN SUPPORT OF PLAINTIFF'S MOTION**
18 **TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
19 **ATTORNEYS GENERAL ACT**
- 20 **4. DECLARATION OF JODEY LAWRENCE REGARDING NOTICE AND**
21 **ADMINISTRATION OF SETTLEMENT**
- 22 **5. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION TO APPROVE**
23 **PLAINTIFF'S PAGA SETTLEMENT AND JUDGMENT**

24 on the interested parties in this action as follows:

25 Noel S. Cohen
26 ncohen@posinelli.com
27 September Rea
28 Srea@polsinelli.com
Armida Derzakarian
aderzakarian@polsinelli.com
Polsinelli
2049 Century Park East, Suite 2900
Los Angeles, California 90067
Attorneys for Defendant Now Optics, LLC

1 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
2 entitled document(s) to be served through the One Legal E-Filing System at the website
3 www.onelegal.com, addressed to all parties appearing on the electronic service list for the above-
4 entitled case. The service transmission was reported as complete and a copy of the filing
5 receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this
6 office.

7 I declare under penalty of perjury under the laws of the State of California that the
8 above is true and correct. Executed on May 24, 2022, at Los Angeles, California.

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Erika Mejia