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

MICHAEL GIBSON, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

SOUTHWEST TRADERS
INCORPORATED, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: STK-CV-UOE-2020-10620

(Assigned to the Honorable Erin Guy Castillo,
Dept. 10B)

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

Date: September 27, 2022;
September 28, 2022;
September 29, 2022;
September 30, 2022; or
October 3, 2022

Time: 9:00 a.m.
Dept.: 10B

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

2 PLEASE TAKE NOTICE that on September 27, 2022, September 28, 2022, September
3 29, 2022, September 30, 2022, or October 3, 2022, at 9:00 a.m., or as soon thereafter as the
4 matter be heard in Department 10B of the Superior Court of the State of California for the
5 County of San Joaquin located at 180 E. Weber Avenue, Stockton, CA 95202, Plaintiff Michael
6 Gibson (“Plaintiff”) will, and hereby does, move the Court for entry of an order approving the
7 proposed Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and Release
8 Agreement (“Settlement Agreement”) entered into in the above-captioned civil action between
9 Plaintiff and Defendant Southwest Traders Incorporated (“Defendant”) (Plaintiff and Defendant
10 shall collectively be referred to as the “Parties”) under the Labor Code Private Attorneys General
11 Act of 2004 (the “PAGA”).

12 This motion is made pursuant to California Labor Code section 2699(l)(2), which requires
13 trial courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],”
14 *see* Cal. Lab. Code § 2699(l)(2), and on the grounds that the parties’ settlement is fundamentally
15 fair, adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
16 concurrently filed declaration of Max Gavron, a copy of the Parties’ proposed Settlement
17 Agreement and this Motion was electronically submitted to the Labor and Workforce
18 Development Agency in accordance with California Labor Code sections 2699(l)(2) and
19 2699(l)(4) concurrent with the filing of this motion.

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

1 DATED: August 29, 2022

DIVERSITY LAW GROUP, P.C.



2
3 By: _____

4 Larry W. Lee

5 Max W. Gavron

6 Attorneys for Plaintiff and Aggrieved Employees
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through this Motion, Plaintiff Michael Gibson (“Plaintiff”) respectfully requests the Court’s approval of the Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and Release Agreement (the “Settlement Agreement”). After this lawsuit was commenced, the Parties engaged in written discovery, multiple meet and confer conferences regarding the theories of liability and potential damages, and litigated the case. Ultimately, the Parties participated in a mediation effort. As part of their privileged settlement negotiations, Defendant produced a data regarding the aggrieved employees and a sampling of time and pay records, from which Plaintiff’s counsel calculated the maximum PAGA penalty exposure. (Declaration of Max Gavron (“Gavron Decl.”) ¶ 8). Based on this information and evidence of Defendant’s deteriorating financial condition discussed at mediation, the Parties have settled this case on a representative PAGA basis for \$480,000.00, or approximately 15% of the originally calculated maximum exposure. (*Id.*)

The Settlement Agreement allocates 35% of the Gross Settlement Amount for attorneys’ fees, or \$168,000.00, up to \$20,000.00 in litigation costs incurred by Plaintiffs’ counsel, \$10,000.00 to Plaintiff for a service award, and up to \$7,500.00 for settlement administration costs. (*Id.* at §§ III.2(a)-(d)). The remainder, or the “PAGA Penalty Fund,” is allocated to the payment of civil penalties under PAGA, 75 percent of the civil penalties for distribution to the Labor and Workforce Development Agency (the “LWDA”) and 25 percent of the civil penalties for distribution to the “aggrieved employees” on whose behalf Plaintiff filed this action as required by PAGA. (*Id.* at §§ III.2(e), III.3.).

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

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 On December 14, 2020, Plaintiff sent notice to the Labor and Workforce Development
3 Agency (“LWDA”) giving notice of his intent to pursue a representative PAGA action, on behalf
4 of herself and the State of California as well as on behalf of other aggrieved employees (the
5 “PAGA Notice”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 3.

6 On December 17, 2020, Plaintiff filed the Action against Defendant asserting class action
7 claims under Labor Code §§ 201-203, 204, 226, 226.7, 246, 510, 512, 558, 1174, 1194, 1198,
8 1199, 2802, as well as a representative action claim under PAGA, and a claim under Business and
9 Professions Code § 17200, *et seq.* *Id.* ¶ 4.

10 On February 25, 2021, Plaintiff filed a First Amended Complaint, alleging a single claim
11 for violation of the PAGA, after having dismissed without prejudice his putative class claims. *Id.*
12 ¶ 5. On or about April 1, 2021, Defendant filed an Answer to the First Amended Complaint.

13 Thereafter, the Parties agreed to engage in mediation before neutral Hon. Brian C. Walsh
14 (Ret.). In connection with the mediation, Defendant provided information regarding the number
15 of potentially aggrieved employees, the number of pay periods at issue, written policies and
16 procedures, a sampling of time and pay data for analysis, and its position regarding potential
17 liability. Defendant also produced confidential information regarding its financial condition,
18 which it contended impacted its ability to pay any judgment resulting from this action. Based on
19 this information, the Parties conducted settlement negotiations. *Id.* ¶ 6.

20 Following a full day of mediation with Judge Walsh on March 30, 2022, and subsequent
21 negotiations occurring thereafter, the Parties agreed to terms for complete settlement of the
22 Action, which was negotiated at arm’s-length with each Party having had the opportunity to
23 consider all known facts and circumstances. *Id.* ¶ 6.

24 Given Defendant’s financial condition, the Parties have agreed that Defendant will fund
25 equal monthly payments of \$26,666.67 over an 18-month period with the first payment funded
26 within seven (7) days after the Court grants Plaintiff’s Motion for Approval, and every month
27 thereafter until the Gross Settlement Amount is fully funded. (Settlement Agreement at § V.2).
28 The Settlement Agreement allocates 35% of the Gross Settlement Amount for attorneys’ fees, or

1 \$168,000.00, up to \$20,000.00 in litigation costs incurred by Plaintiff's counsel, \$10,000.00 to
2 Plaintiff for a service award, and up to \$7,500.00 for settlement administration costs. (*Id.* at §§
3 III.2(a)-(d)). The remainder, or the "PAGA Penalty Fund," is allocated to the payment of civil
4 penalties under PAGA, 75 percent of the civil penalties for distribution to the Labor and
5 Workforce Development Agency (the "LWDA") and 25 percent of the civil penalties for
6 distribution to the "aggrieved employees" on whose behalf Plaintiff filed this action as required
7 by PAGA. (*Id.* at § III.2(e)).

8 The Settlement Agreement provides the following release:

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

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

18 [A]ny and all claims for civil penalties under the PAGA that were
19 asserted or could have been asserted based on the facts alleged and
20 with respect to the claims asserted in Plaintiff's LWDA Notice and
21 the Action for the entire Covered Period, which are premised on the
22 alleged violation of sections 7 & 11 of the applicable IWC Wage
23 Order and/or Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7,
24 510, 512, 558, 1174, 1194, 1198, 1199, and 2802.

25 (*Id.* at § II.9). Plaintiff also executed a general release as part of the Settlement Agreement. (*Id.*
26 at § III.2(c)).

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

29 **III. STANDARD OF REVIEW**

30 Although PAGA requires courts to "review and approve" the settlement of any civil action
31 filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California
32 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
33 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959,
34

1 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA
2 settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2
3 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA
4 settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark” and stated
5 only that the relief provided under PAGA must be “genuine and meaningful,” “consistent with the
6 underlying purpose of the statute to benefit the public” and, in the context of a class action,
7 “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to
8 the public policies underlying the PAGA.” *See* California Labor and Workforce Development
9 Agency’s Comments on Proposed PAGA Settlement at 2–3, *O’Connor v. Uber Techs.*, No. 3:13-
10 CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

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

21 **IV. ARGUMENT**

22 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 23 **to Labor Code section 2699(l)(2)**

24 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
25 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
26 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the proposed
27 settlement to the LWDA online “at the same time that it is submitted to the court,” to give LWDA
28 an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§ 2699 (l)(2),

1 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement
2 Agreement and this Motion to the LWDA through the LWDA's online filing system in
3 conjunction with the filing of this Motion. (See Gavron Decl. ¶ 23, Exh. B).

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

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

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

16 Against this backdrop, California courts have identified a set of circumstances entitling
17 class action settlements to a "presumption of fairness." *See Dunk*, 48 Cal. App. 4th at 1802. In
18 particular, a presumption of fairness arise where "(1) the settlement is reached through arm's-
19 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
20 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
21 objectors is small." *See id.*

22 All of the factors that would give rise to a presumption of fairness in the context of a class
23 action settlement are present in this PAGA action. After this lawsuit was commenced, the Parties
24 agreed to engage in arms' length negotiations between highly experienced counsel. As part of
25 their privileged settlement negotiations, Defendant produced data regarding the aggrieved
26 employees, from which Plaintiff's counsel calculated the maximum PAGA penalties and
27 analyzed Defendant's potential liability. (Gavron Decl. ¶ 8). Both Plaintiff's and Defendant's
28 counsel has significant experience in litigating wage and hour class and PAGA actions, which

1 further supports the reasonableness of the settlement. (Gavron Decl. ¶¶ 15-21; Declaration of
2 Larry W. Lee (“Lee Decl.”) ¶¶ 6-7); Declaration of Kelsey A. Webber (“Webber Decl.”) ¶¶ 4-8).
3 Therefore, the Settlement Agreement is entitled to a presumption of fairness.

4 **2. The Scope of the Settlement Agreement is Fair, Adequate, and** 5 **Reasonable**

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

18 Plaintiff’s claims in this action are based on alleged violations of Labor Code sections
19 201-203, 204, 226, 226.7, 246, 510, 512, 558, 1174, 1194, 1198, 1199, 2802, and 2698, *et seq.*
20 *See generally* Pl.’s Am. Cmplt. When reviewing a settlement agreement, “the test is not the
21 maximum amount plaintiffs might have obtained at trial on the complaint,” *see Wershba v.*
22 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the settlement
23 agreement is perfect in the estimation the reviewing court.” *See Lane v. Facebook, Inc.*, 696
24 F.3d 811, 819 (9th Cir. 2012). The test is “whether the settlement is reasonable under all of the
25 circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant considerations include the
26 strength of a Plaintiffs’ case and the risk, expense, complexity, and likely duration of further
27 litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see also*
28 *Smith*, 2018 WL 1899912 at *2. In PAGA settlements, courts also consider their authority to

1 award less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2); *see*
2 *also Smith*, 2018 WL 1899912 at *3.

3 Here, Defendant produced a sampling of time and pay records for the aggrieved
4 employees, which permitted Plaintiff to analyze Defendant's potential exposure and liability.
5 (Gavron Decl. ¶ 8). As detailed in the Settlement Agreement, § II.12, there were approximately
6 31,855 pay periods at issue during the time encompassed by this settlement. PAGA's penalty
7 structure is based on the number of violations of the Labor Code committed during a given pay
8 period. *See* Cal. Lab. Code § 2699(f). Defendant's potential exposure could be as high as
9 approximately \$3.1 million if the Court were to award a \$100 penalty for each pay period
10 encompassed by the proposed settlement. (Gavron Decl. ¶ 8). However, Defendant argued that
11 its exposure was significantly less because it maintained legally compliant policies, complied
12 with the law at all times, the sampling of time and pay records produced for evaluation
13 demonstrated an extremely low facial violation rate regarding Plaintiff's claims, and that it
14 maintained arbitration agreements applicable to its employees, which it contended precluded
15 Plaintiff's PAGA claims. (Gavron Decl. ¶ 8). On June 15, 2022, the United States Supreme
16 Court issued its decision in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL
17 2135491, at *10 (U.S. June 15, 2022), which Defendant would have argued precludes Plaintiff's
18 PAGA claim. *Id.* (holding that Federal Arbitration Act ("FAA") preempted portion of California
19 Supreme Court's holding in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014)
20 and that PAGA claims may be arbitrable under the FAA).

21 While the PAGA does provide for a potentially heightened penalty of \$200 for
22 "subsequent" violations, many courts do not award that penalty unless there has been a prior
23 citation by the LWDA or court ruling demonstrating that the employer previously violated the
24 Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209; *accord*
25 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* (S.D. Cal. Aug. 10,
26 2009) 2009 WL 2448430, at *9 ("[u]nder California law, courts have held that employers are
27 not subject to heightened penalties for subsequent violations unless and until a court or
28 commissioner notifies the employer that it is in violation of the Labor Code"); *see also*

1 *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
2 penalty unless prior citation or court ruling). Thus, Defendant would have argued that even if
3 Plaintiff was able to establish any violation of the Labor Code, the PAGA penalties assessed for
4 these violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at
5 maximum, and there is a likelihood that a further reduction of the penalty would be appropriate
6 given its good faith efforts to comply with the Labor Code and its contentions that it complied
7 with the Labor Code at all times. (Gavron Dec. ¶ 9.)

8 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
9 PAGA are minimal. Indeed, courts to consider the issue have refused to “stack” PAGA
10 penalties and often significantly reduce the penalties awarded. *See Carrington v. Starbucks*
11 *Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving
12 PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani* (2018) 27
13 Cal.App.5th 809. If the Court in this case were to reduce penalties to \$5 a pay period, as was
14 approved in *Carrington*, the potential exposure amounts to approximately \$159,275.00 (31,855
15 pay periods x \$5.00).

16 Under the circumstances of this case, the payment of \$480,000.00 in civil penalties is fair,
17 adequate, and reasonable. The payment of \$480,000.00 in exchange for a release of only those
18 claims for civil penalties that are pleaded in the action or that could have been pleaded based on
19 the facts alleged in the PAGA Notice or the Complaint will have a substantial deterrent effect on
20 Defendant and other California employers and will confer benefits on the approximately 1,151
21 PAGA Members, whom will each receive a portion of the settlement.

22 Finally, Defendant’s financial condition was a significant factor in evaluating the
23 reasonableness of this settlement. The \$480,000.00 Gross Settlement Amount is the highest
24 Defendant could pay while remaining in business. For this reason, Defendant needs to make
25 installment payments. Settlement Agreement ¶ V.2. This heavily favors approval of the
26 settlement. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (holding that
27 lower court properly approved class action settlement because of the defendant’s financial
28 condition; “Here one factor predominates to make clear that the district court acted within its

1 discretion. That factor is Tucson's financial condition.”).

2 In sum, this settlement is fair, reasonable, and consistent with PAGA’s policies and
3 purposes under these circumstances.

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

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

15 **4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
16 **Amount to the Payment of Attorneys’ Fees**

17 PAGA allows a prevailing Plaintiff to recover reasonable attorneys’ fees. *See* Cal. Lab.
18 Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff’s counsel to
19 request up to \$168,000.00, in attorneys’ fees. (*See* Settlement Agreement at §§ III.2(a), III.4).

20 In class actions, state and federal courts have held that when a class action establishes a
21 monetary fund for the benefit of the class members out of which attorneys’ fees may be paid,
22 courts may determine the amount of a reasonable fee by “choosing an appropriate percentage of
23 the fund created.” *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee
24 award representing 33 1/3 percent of the fund and joining “the overwhelming majority of federal
25 and state courts” in approving the “percentage method” as a reasonable means for determining
26 attorney fee awards in class actions). While different from class action settlements in important
27 ways, PAGA settlements also involve the establishment of a common fund for the benefit of
28 persons other the named Plaintiff, so the reasons for utilizing the percentage method are the same.

1 *See id.* (noting that the percentage method provides “ease of calculation,” “alignment of
2 incentives between counsel and the class,” “a better approximation of market conditions in a
3 contingency case,” and the “encouragement . . . to seek an early settlement”). The \$168,000.00
4 requested by Plaintiff’s counsel represents 35% of the Gross Settlement Amount, which is
5 consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162
6 Cal.App.4th 43, 66, fn. 11 (2008) (“[F]ee awards in class actions average around one-third of the
7 recovery”); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to
8 one-third of the total settlement amount); *see Fitzpatrick, An Empirical Study of Class Action*
9 *Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases
10 between 2006-2007 and concluding that “[m]ost fee awards were between 25 percent and 35
11 percent”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study:*
12 *1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class
13 action litigation nationwide conclude that fees representing one-third of the total recovery is
14 consistent with market rates).

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

17 PAGA also allows a prevailing Plaintiff to recover litigation costs. *See* Cal. Lab. Code §
18 2699(g). Accordingly, the Settlement Agreement allows Plaintiff’s counsel to request up to
19 \$20,000.00 in litigation costs. (Settlement Agreement at §§ III.2(b), III.4).

20 Plaintiff’s counsel requests \$8,671.24 for the reimbursement of litigation costs. As set
21 forth in accompanying declarations of Plaintiff’s counsel, these costs were all directly incurred in
22 the prosecution of this action, including, but not limited to, filing fees, service fees, and mediation
23 fees. (Lee Decl. ¶ 8, Exh. A). As such, Plaintiff’s counsel’s request for costs in the amount of
24 \$8,671.24 is fair, adequate, reasonable, and consistent with PAGA’s policies. Because this
25 amount is less than what was provided in the Settlement Agreement, the difference will be
26 distributed to the LWDA and Aggrieved Employees, which further supports approval.

27 **6. Plaintiff’s Service Award Should Be Approved**

28 Courts have held that named plaintiffs in class, or private attorney general actions can

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

6 Here, Plaintiff respectfully requests \$10,000.00 for his service award, which is intended to
7 compensate Plaintiff for the time spent assisting in the prosecution of this case. (Declaration of
8 Michael Gibson ¶¶ 3-5). Plaintiff also executed a general release as part of the Agreement,
9 which is something that aggrieved employees will not do. This requested enhancement is
10 consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic*
11 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
12 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
13 incentive awards of \$55,000, and three incentive awards of \$35,000). Plaintiff also took the risk
14 of bringing the lawsuit, which was a matter of public record. Future employers may be less likely
15 to hire an employee who has previously filed an action against an employer. This supports the
16 requested award.

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

19 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff’s
20 Counsel, and the LWDA, but also to as many as 1,151 of Defendant’s current and former
21 employees, significant time and effort will be required to administer the Settlement Agreement if
22 it is approved by this Court. Among other things, calculate each PAGA Member’s shares;
23 appropriate tax forms must be issued to all parties who receive payments under the Settlement
24 Agreement; payments must be mailed to Plaintiff, Plaintiff’s Counsel, the LWDA, and each
25 Settlement Group Member; and any checks not cashed by Settlement Group Members must be
26 voided so that the unclaimed amount can be forwarded to the *cy pres* recipient, the Legal Aid at
27 Work (“LAAW”). (See Settlement Agreement § V.6.) Plaintiff’s Counsel do not have any
28 relationship of any kind with LAAW. Gavron Decl. ¶ 14; Lee Decl. ¶ 5.

1 In contemplation of these expenses, the parties will engage Phoenix Settlement
2 Administrators to act as a third-party settlement administrator and have allocated up to \$7,500.00
3 to cover the cost of settlement administration. (Settlement Agreement §§ II.8, III.2(d), V.3(d)).
4 This is especially reasonable given the payment plan, which will require additional time and
5 effort by the Parties and administrator to monitor the settlement payments.

6 **V. CONCLUSION**

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

9
10 DATED: August 29, 2022

DIVERSITY LAW GROUP, P.C.



11
12 By: _____

Larry W. Lee

13 Max W. Gavron

14 Attorneys for Plaintiff and Aggrieved Employees
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