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pursuant to Labor Code § 2698 *et seq.*

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 GUILLAUME DIAZ, on behalf of himself
12 and all “aggrieved employees” pursuant to
Labor Code § 2698 *et seq.*,

13 Plaintiffs,

14 v.

15 SAN FERNANDO VALLEY PRODUCE &
16 DELI, INC., a California corporation, and
DOES 1 through 10, inclusive,

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18 Defendants.
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CASE NO: 21VECV00704

*Assigned to the Honorable Shirley K. Watkins,
Department T*

**NOTICE OF UNOPPOSED MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004,
AWARDING ATTORNEYS’ FEES, COSTS,
GENERAL RELEASE PAYMENT, AND
REIMBURSEMENT OF SETTLEMENT
ADMINISTRATION EXPENSES, AND
DISMISSING ACTION WITH PREJUDICE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: October 10, 2022

Time: 8:30 AM

Dept.: T

RESERVATION ID: 516248169961

Complaint Filed: May 27, 2021

Trial Date: None

1 **PLEASE TAKE NOTICE THAT** on October 10, 2022 at 8:30 a.m., or as soon thereafter
2 as the matter may be heard, in Department T of the above-entitled Court, located at 6230 Sylmar
3 Avenue, Van Nuys, CA 91401, Plaintiff Guillaume Diaz will and hereby does move unopposed for
4 an Order: (1) granting approval of the proposed settlement of claims brought pursuant to the Private
5 Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”) set forth in the parties’
6 PAGA Settlement Agreement (the “Settlement Agreement”); (2) appointing Phoenix Class Action
7 Administration Solutions (“Phoenix”) as the Settlement Administrator and approving payment of
8 its fees not to exceed \$2,995 from the PAGA Settlement Sum; (3) directing disbursement of the
9 PAGA Settlement Sum pursuant to the terms of the Settlement Agreement; (4) directing payment
10 of attorneys’ fees and litigation costs from the PAGA Settlement Sum not to exceed \$47,896.42 to
11 Plaintiff’s counsel; (5) directing a general release payment from the PAGA Settlement Sum in the
12 amount of \$6,000 to Plaintiff Guillaume Diaz; and (6) dismissing this action with prejudice.

13 This motion will be based on this Notice, the supporting memorandum of points and
14 authorities, the parties’ PAGA Settlement Agreement, the Declarations of Daniel F. Gaines,
15 Plaintiff Guillaume Diaz, and Phoenix Administrator Jodey Lawrence, the documents and records
16 on file in this matter, and such additional arguments, authorities, and evidence and other matters as
17 may be presented by the parties hereafter.

18 Date: August 18, 2022

Respectfully submitted,

GAINES & GAINES, APLC

21 By: Daniel F. Gaines
22 DANIEL F. GAINES
23 ALEX P. KATOFISKY
24 Attorneys for Plaintiff
25 GUILLAUME DIAZ

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Guillaume Diaz (“Plaintiff”) and aggrieved employees under the Labor Code’s
4 Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order
5 granting approval of the proposed Settlement of the above-captioned lawsuit against Defendant San
6 Fernando Valley Produce & Deli, Inc. (“Defendant”), a supermarket with three locations in
7 California. The proposed Settlement will dispose of the Released Claims asserted on behalf of
8 Plaintiff and approximately 110 non-exempt employees who worked for Defendant in Southern
9 California at any time between March 22, 2020 and March 3, 2022 (the “Aggrieved Employees”¹).

10 This case addresses claimed violations of employee protections embodied in the California
11 Labor Code and penalties stemming therefrom for the violation of PAGA. Plaintiff alleged that
12 Defendant failed to provide legally compliant rest breaks to Plaintiff and Aggrieved Employees, in
13 violation of Labor Code §§ 226.7 and 558, failed to provide legally compliant meal breaks to
14 Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7, 512, and 558, failed to
15 issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in violation of
16 Labor Code §§ 226(a) and 226.3 and failed to pay Plaintiff and Aggrieved Employees all wages
17 due at the separation of their employment, in violation of Labor Code §§ 201-202. As a result of
18 Defendant’s alleged violations of the Labor Code, approximately 110 employees are claimed to
19 have suffered Labor Code violations for up to 3,869 aggregate pay periods at the rate of \$100 each
20 based on PAGA’s penalty provisions.

21 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
22 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
23 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is
24 the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage and
25

26 ¹ The individuals identified as “Aggrieved Employees” are “Aggrieved” solely for the purposes of
27 this settlement only.

1 hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative
2 strength and value of the PAGA claim, and (4) it reflects a reasoned compromise based directly on
3 the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and
4 likely duration of further litigation.

5 The value achieved by the Settlement may be gleaned from the fact that the LWDA and the
6 approximately 110 Aggrieved Employees encompassed by the Settlement will receive no less than
7 \$59,178.58 under the terms of the Settlement, which, pursuant to the operative statute, shall be
8 allocated “75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the
9 aggrieved employees.” *See Cal. Lab. Code* § 2699(i). This is a reasonable recovery, not only
10 because further litigation may have resulted in a net-zero recovery based on the defenses available
11 to Defendant, but because the amount secured by Plaintiff is sizable and in line with similar
12 settlements of these types of claims under PAGA. It is also important to underscore that all penalty
13 amounts paid to Aggrieved Employees will be an unexpected windfall, as employees typically do
14 not bring individual lawsuits asserting only PAGA penalties.

15 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
16 Court enter the Order submitted herewith.

17 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

18 **A. The Parties**

19 Defendant San Fernando Valley Produce & Deli, Inc. operates three supermarkets in
20 Southern California. Gaines Decl. at ¶ 8.

21 Defendant employed Plaintiff Guillaume Diaz as a non-exempt employee from August
22 2020 through November 2020. The Aggrieved Employees are all persons who worked for
23 Defendant in California as an hourly and/or non-exempt employee at any time from March 22,
24 2020 through March 3, 2022. Gaines Decl. at ¶ 9.

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1 1-5. The major issue in this case was whether Defendant failed to issue complete and accurate wage
2 statements by not setting forth an employee identification number or Social Security Number.²
3 Defendant proffered data and documents evidencing that only 805 out of 3,869 wage statements
4 issued may have been subject to such a practice. Gaines Decl. at ¶ 13; Exhibit C to Gaines Decl.

5 Based on the information received, as well as through discussions with Defendant's
6 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
7 within the definition of "Aggrieved Employee" for the relevant statutory period, and (ii) construct
8 a damage model that calculated the maximum realistic amount of PAGA penalties that could be
9 levied against Defendant within the PAGA Period based on employee timekeeping and payroll data
10 produced by Defendant. Defendant, however, disputed Plaintiff's claims and disputed both the
11 existence of and extent of liability as alleged by Plaintiff. Based on the information received, as
12 well as through discussions with Defendant's counsel, Plaintiff's Counsel was able to ascertain (i)
13 the size of the aggrieved employee group, (ii) the number of affected pay periods at issue among
14 them, and (iii) the strength of Plaintiff's claims. Gaines Decl. at ¶ 14; Notice of Lodgment at ¶¶ 1-
15 5. Plaintiff's Counsel's experience in litigating similar "representative" wage and hour claims, the
16 degree of investigation that was conducted here, the amount of data that was obtained, and the
17 discussions guided by mediation, was sufficient to determine the potential value of the PAGA
18 claim, and to evaluate the strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5,
19 12-15.

20 **E. Settlement Negotiations**

21 On March 3, 2022, the Parties participated in a mediation session with a respected mediator,
22 attorney Marc J. Feder. During the mediation, the parties engaged in arm's-length negotiations and
23 reached a resolution of the PAGA claims asserted in this action. Gaines Decl. at ¶ 15.

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26 ² While Plaintiff asserted multiple claims against Defendant, this claim was by far the strongest and
27 most likely to succeed on a groupwide basis.

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1. Defendant agrees to settle this matter for the payment of One Hundred Sixteen Thousand Seventy Dollars (\$116,070.00) (hereinafter the “PAGA Settlement Sum”), which shall be all inclusive, encompassing (i) all payments to the Labor and Workforce Development Agency and Aggrieved Employees, (ii) any and all costs of third party administration of the settlement, (iii) Plaintiff’s Counsel’s attorneys’ fees and costs of suit, and (iv) a modest general release payment to Plaintiff. *See Settlement Agreement*, at § 3.02(a)(1).

3. All non-exempt employees that performed work for Defendant during the PAGA Period will receive a pro rata share of the \$14,794.65 allocated to Aggrieved Employees, which shall be distributed based on the number of pay periods each Aggrieved Employee worked for Defendant in California during the PAGA Period. *See* Settlement Agreement, at § 3.02(a)(3). Although these calculations will not be made until after approval, a rough estimation of the value to the 110 individuals falling within the definition of “Aggrieved Employee” may be gleaned from the fact that an equal division would provide about \$134.50 to each Aggrieved Employee, net of payments to the LWDA, the Settlement Administrator, attorney’s fees, and costs. The LWDA will

1 be paid a substantial \$44,383.93. *See* Settlement Agreement, at § 3.02(a)(2).

2 4. In exchange for the above settlement consideration, Defendant and the Released
3 Parties shall be entitled to the following limited release from each and every Aggrieved Employee,
4 including Plaintiff³:

5 Upon the Effective Date, in exchange for the consideration provided herein and
6 subject to Defendant's full payment of all sums required by this Settlement, Plaintiff,
7 on behalf of himself, his heirs, executors, and assigns, the Aggrieved Employees,
8 and the State of California, fully releases and discharges Defendant, and each of its
9 present and former affiliates, related entities, parent companies, subsidiaries,
10 divisions, joint employers, staffing companies, successors, predecessors, and
11 assigns, and each of its respective past and present shareholders, officers, partners,
12 directors, current and former employees, independent contractors, agents, attorneys,
13 insurers, successors, assigns, representatives, accountants, and all persons acting
under, by, through, or in concert with any of them (collectively, "Released Parties")
from any and all claims, rights, demands, liabilities, and causes of action of every
nature and description, under PAGA, which were alleged or which could have been
alleged based on the facts asserted in the operative Complaint in the Action and/or
the operative administrative exhaustion letter filed with the Labor and Workforce
Development Agency ("Released Claims") that accrued during the Release Period
(from March 22, 2020 through March 3, 2022).

14 *See* Notice of Settlement.

15 5. In addition to the limited release above, in exchange for the above settlement
16 consideration, Defendant and the Released Parties shall be entitled to the following general release
17 from Plaintiff only:

18 In addition, Plaintiff acknowledges that he has been made aware of and
understands Section 1542 of the California Civil Code, which states:

19 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
20 **THAT THE CREDITOR OR RELEASING PARTY DOES**
21 **NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
22 **FAVOR AT THE TIME OF EXECUTING THE RELEASE**
23 **AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE**
24 **MATERIALLY AFFECTED HIS OR HER SETTLEMENT**
WITH THE DEBTOR OR RELEASED PARTY."

25 ³ This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009)
26 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties, nonparty
employees as well as the government are bound by the judgment in an action brought under the act
....").

1 Notwithstanding Section 1542, Plaintiff understands and agrees that this
2 Agreement shall act as a release of all future claims that may arise from Plaintiff's
3 employment or separation from employment with Defendant, or any other matters
4 that existed between the Parties up to the date of this Agreement, whether such
5 claims are currently known or unknown, and that Plaintiff intentionally waives any
6 rights he may have under the provisions of Section 1542, as well as under any other
7 statutes or common law principles of similar effect in the State of California or in
8 any other state.

9 *See* Settlement Agreement, at § 5.02.

10 6. Settlement administration, which is to be paid from the PAGA Settlement Sum, will
11 not exceed \$2,995. *See* Lawrence Decl., ¶ 17. Phoenix Settlement Administrators, a reputable
12 settlement administration company, has agreed to administer the settlement for this amount,
13 submitting a competitive bid. *See* Gaines Decl., ¶ 18. Phoenix Settlement Administrators is a
14 qualified settlement administrator who has efficiently and economically provided administration
15 services on many settlements for counsel for Plaintiff. *See, generally*, Lawrence Decl.

16 7. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
17 litigation costs totaling \$47,896.42, and Plaintiff Guillaume Diaz seeks a general release payment
18 of \$6,000. *See* Settlement Agreement, at § 3.02(a)(2).

19 8. Finally, under the terms of Settlement, the value of checks uncashed more than
20 180 days after issuance shall be remitted to the Unclaimed Property Fund of the California State
21 Controller's Office to be held in the name of the Settlement Aggrieved Employee. *See* Settlement
22 Agreement, at § 3.02(a)(7).

23 **III. LEGAL ARGUMENT**

24 **A. Standards for Approval of A PAGA Settlement**

25 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
26 statute, which states that the "[t]he superior court shall review and approve any settlement of any
27 civil action filed pursuant to this part." *See Labor Code* § 2699(1)(2).

28 As with any settlement, the Court must be mindful in conducting its inquiry that
29 "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in

litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222, 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of absolutes and an abandoning of highest hopes’” [*Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *See id.*

Although the operative PAGA statute does not set forth the criteria on which a PAGA settlement is to be judged, California law does state that some of the factors for review of a class action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. § 382 and Cal. Rules of Court, Rule 3.769, may be “useful in evaluating the fairness of a PAGA settlement” to the reviewing court. *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56, 77 (“Thus, while PAGA does not require the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement.”) Courts within California have continued to approve settlements of PAGA claims using Rule 23 criteria⁴. However, it is important to underscore that not all Rule 23 factors

⁴ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a balancing of several factors which may include, among others, some or all of the following: [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement.” *See Linney v. Cellular Alaska P'ship*,

1 can be applied, as “a PAGA claim asserted on a non-class representative basis . . . is not considered
2 a class action but a law enforcement action, and therefore does not have to meet the requirements
3 of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan.
4 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2,
5 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010).
6 Based thereon, a court’s review of a PAGA settlement necessarily implicates the following unique
7 features that render the approval process completely distinct from approval of a class action
8 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

9 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not
10 concerned with the amount which “aggrieved employees” are to receive, but rather, must focus on
11 the total settlement amount in achieving PAGA’s objective.

12 While “[a PAGA] action is . . . designed to protect the public and penalize the employer for
13 past illegal conduct” [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
14 into account the fact that settlement of a PAGA claim – like any settlement – involves a
15 “compromise” that stops short of rendering findings of liability and damages. Moreover, the Court
16 must not lose sight of the fact that “[u]nlike a class action seeking damages or injunctive relief for
17 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
18 for the government that otherwise may not have been assessed and collected by overburdened state
19 enforcement agencies.” *See Ochoa-Hernandez v. CJADER Foods, Inc.*, 2010 U.S. Dist. LEXIS
20 32774, 12 (N.D. Cal. Apr. 2, 2010).

21 **B. The Settlement Meets All the Criteria For Approval**

22 Applying the Rule 23 fairness factors – limited to those compatible with the unique PAGA
23 considerations detailed above – the proposed Settlement embodies all of the key features of a
24

25 151 F.3d 1234, 1242 (9th Cir., 1998). “Not all of these factors will apply to every class action
26 settlement” and “[u]nder certain circumstances, one factor alone may prove determinative in
27 finding sufficient grounds for court approval.” *See Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*,
221 F.R.D. 523, 525-526 (C.D. Cal., 2004).

1 settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for
2 approval.

3 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

4 In conducting a review of a settlement, it is generally recognized that an “agreement . . .
5 reached through arms-length negotiation between experienced parties . . . is entitled to a
6 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
7 44 (C.D. Cal. Apr. 12, 2010).

8 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
9 length negotiations brokered through a respected third party neutral [Gaines Decl. at ¶ 15], (2) that
10 was negotiated by Counsel with significant experience in similar wage and hour litigation [*see id.*,
11 at ¶¶ 2-5, 25-28 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient
12 investigation to evaluate the strength and potential value of the PAGA claims, as well as evaluating
13 the risks of litigating this claim through trial. *See id.*, at ¶¶ 12-14, 20-23. Based thereon, the Court
14 should give considerable weight to the competency and integrity of counsel in assuring itself that
15 the Settlement Agreement represents an arm’s-length transaction entered without self-dealing or
16 other potential misconduct.

17 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of**
18 **Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

19 The relative strength of the PAGA claim brought by Plaintiff weighs in favor of the Court
20 finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous
21 defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the
22 potential to completely eliminate any recovery.

23 This case addresses violations of important employee protections embodied in the
24 California Labor Code – namely, that Defendant failed to provide legally compliant rest breaks to
25 Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7 and 558, failed to provide
26 legally compliant meal breaks to Plaintiff and Aggrieved Employees, in violation of Labor Code

1 §§ 226.7, 512, and 558, failed to issue accurately itemized wage statements to Plaintiff and
2 Aggrieved Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay all
3 wages due to Plaintiff and Aggrieved Employees at the separation of their employment, in violation
4 of Labor Code §§ 201-202. Defendant’s maximum theoretical exposure in this action for the 110
5 total Aggrieved Employees is approximately \$364,700, which is ascertained by multiplying the
6 total violations by \$100 each. *See* Gaines Decl., ¶ 19; **Exhibit E** to Gaines Decl. While the PAGA
7 does provide the potential for a heightened penalty for subsequent violations, courts are often
8 hesitant to award a heightened penalty where there is no prior citation by the Labor Commissioner.
9 *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no heightened penalty
10 where defendant was not notified by Labor Commissioner or any court that it was subject to the
11 California Labor Code). The Ninth Circuit’s holding in *Bernstein* also supports that a settlement
12 valuation that does not “stack” penalties. *Id.*

13 Plaintiff’s strongest claim was his allegation that Defendant failed to issue complete and
14 accurate wage statements as they failed to include an employee identification number or Social
15 Security Number. This claim, however, only affected approximately 21% of the applicable pay
16 periods (805 out of a total 3,869 pay periods at issue exhibited this violation). A compromise was
17 required to resolve this claim at this juncture of the litigation. *See* Gaines Decl., ¶ 20.

18 As to Plaintiff’s other primary claims for failing to provide legally compliant meal and rest
19 periods, discovery demonstrated that these claims lacked the strength of Plaintiff’s wage statements
20 claim, apparently due to Defendant’s compliant policies. Defendant evidenced through the
21 production of time and wage records and policy documents that it enforced meal and rest period
22 policies and practices which complied with California law. As a result, Plaintiff’s other claims
23 were not strong; the settlement amount is a fair compromise considering the risks of continued
24 litigation in light of the strengths and weaknesses of Plaintiff’s claims on behalf of himself and
25 other aggrieved employees. Because Plaintiff’s waiting time penalty claims were wholly derivative
26 of his unpaid wage claims, and subject to independent defenses of their own, he was required to

1 compromise them as set forth in the Settlement Agreement. *See* Gaines Decl., ¶ 21.

2 Defendant, however, contends it acted within the requirements of California law at all times
3 as to all Aggrieved Employees. It further contends that not every pay period at issue – and no pay
4 periods at issue – involved an alleged Labor Code violation subject to civil penalties. Moreover,
5 it maintained that even if the Court did award penalties, the Court could and would *substantially*
6 reduce the penalties awarded based on the discretionary factors contained in Labor Code §
7 2699(e)(2) (“In action by an aggrieved employee . . . , a court may award a lesser amount than the
8 maximum civil penalty amount specified by this part if, based on the facts and circumstances of the
9 particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
10 confiscatory.”). *See* Gaines Decl., ¶ 22.

11 Based on these disputes, which had the potential to completely eliminate Plaintiff’s
12 recovery, the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined
13 by a “maximum possible liability” amount of approximately \$364,700 [Gaines Decl., ¶ 22], and a
14 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
15 such issues, the Settlement achieves a significant benefit – approximately 30% recovery of the
16 maximum possible liability. As such, this factor weighs very heavily in favor of resolution by way
17 of the compromise set forth in the Settlement. Gaines Decl., ¶ 23.

18 **3. The Risk, Expense, and Complexity of Further Litigation Balances**
19 **Strongly in Favor of Approval of the Settlement**

20 Approval of the Settlement Agreement is also appropriate in light of the risk, expense, and
21 complexity of further litigation. As discussed above, the Settlement Agreement takes into
22 consideration the specific factual and legal hurdles faced by the Plaintiff in establishing
23 Defendant’s penalty-liability in this case, which again, may have resulted in a net-zero recovery.
24 Any recovery on these claims is not certain. And even when liability is found, PAGA claims are
25 discretionary, such that the Court could decline to award their full value. Some of Plaintiff’s claims
26 are also derivative, and as such, Plaintiff must prevail on his underlying Labor Code claims in order

1 to prevail on the derivative claims. These risks – when balanced with the fact that the settlement
2 achieved a very significant recovery (as demonstrated below), and that further litigation posed a
3 risk of diminishing such recovery by increasing litigation expenses – weigh strongly in favor of
4 settlement approval.

5 **4. The Benefits Conferred by the Settlement Balance in Favor of Approval**

6 The Settlement Agreement provides a significant monetary benefit that falls well within
7 “the range of an acceptable settlement” under the circumstances, which is the standard on which
8 the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and
9 reasonable even where it only provides a fraction of what could have been obtained at trial:

10 The proposed settlement is not to be judged against a hypothetical or
11 speculative measure of what might have been achieved by the
12 negotiators.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d at
13 625 (emphasis in original). Thus, “the very essence of a settlement is
14 compromise, ‘a yielding of absolutes and an abandoning of highest
15 hopes.’” *Id.* at 624 (citations omitted). As the Second Circuit has
16 pointed out: “The fact that a proposed settlement may only amount
to a fraction of the potential recovery does not, in and of itself, mean
that the proposed settlement is grossly inadequate and should be
disapproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
n.2 (2nd Cir. 1974).

17 *See Linney*, 151 F.3d at 1242.

18 Here, after all deductions are made for administration, a general release payment, attorneys’
19 fees and costs, \$59,178.58 will be paid out, of which \$44,383.93 (i.e. 75%) will go to the LWDA,
20 and \$14,794.65 (i.e. 25%) will go to the Aggrieved Employees, as required by Labor Code § 2699(i)
21 (“civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to
22 the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees.”).
23 *See Settlement Agreement*, at § 3.02(a)(2).

24 This result is exceptional, as settlements of PAGA claims impacting thousands of
25 individuals have been approved as reasonable for amounts far less than the payment in this case.
26 *See Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27, 2012)

1 (“Defendant has agreed to pay \$10,000 as civil penalties pursuant to the PAGA Of the \$10,000,
2 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will benefit
3 the class The Court finds that the PAGA payment is set at a reasonable amount, and it shall be
4 approved.”); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D. Cal.
5 Oct. 29, 2012) (“GTI agrees to allocate \$10,000 to Plaintiff’s PAGA claims, and will pay \$7,500
6 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports with
7 settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the
8 allocation of the Settlement to Plaintiff’s PAGA claim.”); *Schiller v. David’s Bridal, Inc.*, 2012
9 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) (“Pursuant to the Settlement Agreement, the
10 parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency . .
11 . . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it
12 be approved.”); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11,
13 2012) (“Pursuant to the Settlement Agreement, Defendant has agreed to pay \$15,000 to the
14 California Labor and Workforce Development Agency The Court finds that the PAGA
15 payment is set at a reasonable amount, and it shall be approved.”).⁵

16 Thus, notwithstanding the existence of issues having the potential to completely eliminate
17 recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds
18 typical PAGA awards routinely approved by the courts, but it also recovers significant monies for
19 Aggrieved Employees which they otherwise would not receive. As such, this factor balances
20 strongly in favor of approval of the Settlement.

21 **5. The Scope of the Release is Narrowly Tailored**

22 As discussed above, the California Supreme Court has concluded that in the context of

23 ⁵ Significantly, each of the above-cited actions involved substantially more “aggrieved employees”
24 than the approximately 110 aggrieved employees in the instant Lawsuit. *See Franco*, 2012 U.S.
25 Dist. LEXIS 169057, 14 (“2,055 Class Members were ultimately identified”); *Garcia*, 2012 U.S.
26 Dist. LEXIS 160052, at 12 (class comprised of “approximately 1,869 individuals”); *Schiller*, 2012
27 U.S. Dist. LEXIS 80776, 16 (“3,327 California Class members were ultimately identified”); *Gong-
Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051 California Class Members were ultimately
identified”).

1 PAGA “the nonparty employees, because they were not given notice of the action or afforded any
2 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
3 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the limited release provided in
4 exchange for the foregoing consideration is limited to the civil penalties asserted in the Action
5 under Labor Code §§ 2698 *et seq.* *See Settlement Agreement*, at § 5.01.

6 As such, this factor balances strongly in favor of approval of the Settlement.

7 **6. The Experience and Views of Plaintiff’s Counsel Favor Approval of the Settlement**

8 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
9 litigation. *See* Gaines Decl., ¶¶ 2-5, Gaines Decl. at **Exhibit A**. In the view of Plaintiff’s Counsel,
10 the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under the
11 circumstances, as it reflects a reasoned compromise which takes into consideration the risks
12 inherent in this case which had the potential to completely eliminate recovery. Gaines Decl., ¶¶
13 20-23. As such, this factor balances in favor of approval of the Settlement.

14 **7. The Extent of Discovery Completed And The Stage Of The Proceedings Favor Approval of the Settlement**

15 In evaluating this element, the Court should be mindful that “‘formal discovery is not a
16 necessary ticket to the bargaining table’” [*Linney*, 151 F.3d at 1239], as the relevant consideration
17 is “whether ‘the parties have sufficient information to make an informed decision about
18 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
19 26 (C.D. Cal. Nov. 9, 2011).

20 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
21 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
22 ¶¶ 12-14. As discussed above, Plaintiff’s Counsel’s investigation was sufficient to, among other
23 things, tabulate with precision the total number of alleged Labor Code violations at issue during
24 the PAGA Period and identify the total number of individuals falling within the definition of
25 “Aggrieved Employee” for the PAGA Period.
26

1 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such
2 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
3 the strength of this claim for purposes of settlement. *See* Gaines Decl., ¶¶ 2-5; 12-14.

4 **8. Additional Factors Weigh In Favor Of Finding The Terms Of The Proposed**
5 **Settlement To Be Fair, Adequate, And Reasonable**

6 In addition to the factors presented above, the proposed Settlement does not possess any
7 obvious deficiencies. The Settlement contemplates entry of an order (submitted concurrently
8 herewith) which approves the Settlement and dismisses the Action with prejudice. Section 2.01(c)
9 of the Settlement Agreement and paragraph 7 of the proposed order authorize the Court to retain
10 jurisdiction over the Action pursuant to Code of Civil Procedure section 664.6. This procedure
11 effectively disposes of the Action in its entirety, documents the Court's approval of the Settlement
12 as required by PAGA, allows for Court intervention if necessary to enforce the terms of the
13 Settlement Agreement, and avoids any stigmas associated with the entry of a judgment against
14 Defendant. In sum, under the applicable standards for approval of PAGA settlements in California,
15 the settlement in this case meets the standards for approval.

16 **IV. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR**
17 **REASONABLE FEES AND COSTS**

18 Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of one-
19 third of the PAGA Settlement Sum (projected to be \$38,690) and reimbursement of litigation costs
20 of \$9,206.42, falling within the bounds authorized by the Settlement Agreement. *See* Settlement
21 Agreement, at § 3.02(a)(2). Plaintiff's Counsel's entitlement to an award of attorneys' fees and
22 costs is warranted on multiple independent grounds. Further, the amount of fees requested falls well
23 within the range of reasonableness under applicable standards, as the amount requested constitutes
24 a "percentage of the fund" deemed reasonable in similar wage and hour settlements of this size and
25 approved by California courts, which is not only warranted based on the contingency risk Plaintiff's
26 Counsel has agreed to incur for the benefit of the State of California and Aggrieved Employees,
27 but also based on the significant results achieved, as the Settlement obtains a recovery substantially

1 above the range approved as reasonable by California state and federal courts. Based thereon,
2 Plaintiff's Counsel respectfully requests that the Court enter an order approving the fee and cost
3 amounts requested.

4 **A. Plaintiff's Counsel Are Entitled To Recover Their Reasonable Fees And**
5 **Costs As A Matter Of Right**

6 Plaintiff's Counsel are entitled to recover attorneys' fees and costs under the "common
7 fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a
8 common fund for the benefit of persons other than himself or his client is entitled to a reasonable
9 attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

10 Courts have long recognized the "common fund" or "common benefit" doctrine, under
11 which attorneys who create a common fund or benefit for a group of persons may be awarded their
12 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
13 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
14 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
15 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
16 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

17 The California Supreme Court has held that, "when a number of persons are entitled in
18 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
19 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
20 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d
21 1; *see also Boeing, supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit
22 of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as
23 a whole."); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
24 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
25 Group) at § 17:172.3 explains the common fund doctrine as follows:

26 Where the lawsuit results in the recovery of a fund or property
27 benefiting others as well as Plaintiffs (e.g., a class action), the court

1 has inherent equitable power to order Plaintiffs' attorney fees paid
2 out of the common fund or property [citations]. Such fee spreading
3 assures that all of those benefited by the litigation pay their fair share
4 of obtaining the recovery.

5 The percentage-of-the-fund approach appears to be the preferred method of awarding fees
6 in traditional common fund cases, such as this case. Where the settlement amount is a "certain or
7 easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. *Serrano*
8 *III*, 20 Cal. 3d at 35.

9 In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341
10 fn.19, the California Supreme Court upheld an attorney's fee award based on a percentage of the
11 common benefit obtained in a lawsuit by a city employee's association for retroactive wages:

12 It is not necessary to find this suit a proper class action in order to
13 uphold the portion of the judgment awarding counsel for Plaintiffs
14 25 percent of all retroactive salaries and wages received. That award
15 may be sustained under the rule that a litigant who creates a fund in
16 which others enjoy beneficial rights may require those beneficiaries
17 to pay their fair share of the expense of litigation. (*See Sprague v.*
18 *Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer*
19 (1959) 53 Cal.2d 124, 132).

20 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court
21 stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which
22 others derive benefits may require those passive beneficiaries to bear a fair share of the litigation
23 costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,
24 the California Supreme Court recognized that the common benefit doctrine has been applied
25 "consistently in California when an action brought by one party creates a fund in which other
26 persons are entitled to share."

27 Numerous appellate courts have similarly found. *See e.g., Knoff v. City and County of San*
28 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of
attorneys' fees in a representative action as the proper exercise of the court's broad equitable
powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
expenses properly awarded from common benefit composed of illegally imposed sales and use tax);

1 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
2 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
3 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
4 of residential property in an inverse condemnation action).

5 Moreover, at least eight federal courts of appeal-the First, Third, Sixth, Seventh, Ninth,
6 Tenth, Eleventh and the D.C. Circuit-have endorsed the “percentage fee” method for determining
7 reasonable attorneys’ fees in common benefit cases. *See e.g., In re Sumitomo Copper Litig.*
8 (S.D.N.Y. 1999) 74 F. Supp. 2d 393, 396-398 (describing the overwhelming weight of federal
9 authority in favor of the percentage fee method); *see also, Lealao v. Beneficial California, Inc.*
10 (2000) 82 Cal.App.4th 19, 30-31 (describing same).

11 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
12 a \$116,070 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
13 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
14 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
15 sum or ‘fund’ the fees are to be paid.”)], and in doing so, has exclusively bore the risk of loss for
16 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
17 the PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
18 applicable precedent.⁶

19 **B. The Fee Amount Requested Is Reasonable**

20 In addition to the forgoing, Plaintiff’s Counsel’s request for attorneys’ fees in the amount

21 ⁶ Plaintiff’s Counsel is also entitled to recover attorney’s fees and costs as a matter of right under
22 the PAGA statute [*Labor Code* § 2699(g)(1) (“Any employee who prevails in any action shall be
23 entitled to an award of reasonable attorney's fees and costs.”)], and under *C.C.P.* § 1021.5, as the
24 instant PAGA action was by definition “for the public benefit” and secured monetary awards for
25 approximately 110 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
26 (2007) 154 Cal. App. 4th 1, 16-17 (2007) (“Estrada’s personal motivation does not diminish the
27 fact that he pursued this public interest class action not only for himself but on behalf of a class
28 comprised of FedEx’s past and present drivers and ultimately obtained awards for 209 drivers. []
No more is required to satisfy the ‘significant benefit,’ ‘public interest,’ and ‘large class of persons’
requirements of Code of Civil Procedure section 1021.5.”).

1 of one-third of the \$116,070 PAGA Settlement Sum, falls well within the “zone of reasonableness.”

2 It is important to highlight at the outset that the fee amount presently sought is not
3 extraordinary, but actually falls at the “average” fee deemed reasonable under California State court
4 authority, as it is recognized that “courts may award attorney’s fees in the 30-40% range in wage
5 and hour class actions that result in recovery of a common fund under \$10 million.” *See e.g. Martin*
6 *v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). This fee falls
7 directly within that range.

8 Moreover, Plaintiff’s Counsel agreed to incur the contingency risk for the benefit of the
9 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
10 Decl., ¶¶ 29-30. The significant results achieved, and the underlying facts therefrom, justify
11 Plaintiff’s Counsel’s requested fee as reasonable under all applicable standards.

12 C. **The Fee Amount Allocated by The Settlement Agreement Is Within the**
13 **Zone of Reasonableness Under the “Percentage of the Fund” Method**

14 The amount of fees requested by Plaintiff’s Counsel is reasonable based on standards
15 applicable to the “percentage of the fund” method. “When assessing whether the percentage
16 requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of
17 litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the
18 financial burden; and (f) the awards made in similar cases.” *See Vasquez v. Coast Valley Roofing,*
19 *Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

20 First, the results achieved by Plaintiff’s Counsel are significant, as Defendant has agreed to
21 pay \$116,070 under the Settlement. This is a significant recovery given the risk of success in
22 obtaining any recoverable penalties [Gaines Decl., ¶¶ 20-23], and further, as the settlement of
23 PAGA claims impacting much higher numbers of individuals have been approved as reasonable
24 for between \$7,500 and \$15,000. *See* Section III.B.4., *supra*.

25 Second, such results were achieved in the face of significant risks. As explained above,
26 Defendant maintained defenses to Plaintiff’s PAGA claims that very well could have resulted in a

1 net-zero recovery at trial.

2 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
3 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
4 Decl. at ¶¶ 29-30. This required Plaintiff's Counsel to personally assume the risk of nonpayment in
5 securing the very substantial financial benefit the State of California stands to receive, and also
6 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors that warrant fee
7 enhancement under applicable California Supreme Court authority:

8 One of the most common fee enhancers . . . is for contingency risk.
9 We reaffirmed the propriety of a contingency risk enhancement in
10 Ketchum: "The economic rationale for fee enhancement in
11 contingency cases has been explained as follows: 'A contingent fee
12 must be higher than a fee for the same legal services paid as they are
13 performed. The contingent fee compensates the lawyer not only for
14 the legal services he renders but for the loan of those services. The
15 implicit interest rate on such a loan is higher because the risk of
16 default (the loss of the case, which cancels the debt of the client to
17 the lawyer) is much higher than that of conventional loans.' (Posner,
18 *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) 'A lawyer
19 who both bears the risk of not being paid and provides legal services
20 is not receiving the fair market value of his work if he is paid only
21 for the second of these functions. If he is paid no more, competent
22 counsel will be reluctant to accept fee award cases.'"

23 *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 579-580.

24 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,
25 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
26 23 ("[C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that
27 result in recovery of a common fund under \$10 million." *See also Crandall v. U-Haul*
28 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys' fees of 40% of a common
fund).

Attorneys' fee awards in the amount sought here are well-established by California law and
practice. Accordingly, Plaintiff's Counsel's fee request is fair and reasonable and is consistent with
the awards in California and the Ninth Circuit. It is also reasonable given the history of this action

1 and the results obtained.

2 **D. While the Requested Award of Attorneys' Fees is Reasonable as a**
3 **Percentage of the Common Fund, It is Further Confirmed by a**
4 **Lodestar Cross-Check**

5 The California Supreme Court confirmed in *Laffitte v. Robert Half Int'l, Inc.* (2016) 1
6 Cal.5th 480, 506, that “[t]he percentage of fund method survives in California class action cases.”
Specifically, the *Laffitte* Court held:

7 The recognized advantages of the percentage method—including relative
8 ease of calculation, alignment of incentives between counsel and the class, a
9 better 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.

10 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
11 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
12 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
13 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d
14 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial
15 court acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v.*
16 *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund
17 method for calculating attorneys’ fees more accurately reflects the results achieved for the putative
18 class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’
19 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
20 litigation.”); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The
21 percentage-of-recovery method is generally favored in common fund cases because it allows courts
22 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
23 failure.’”).

24 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
25 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
26 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed

1 to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-
2 06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold
3 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the
4 court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
5 evaluate the reasonableness of a requested percentage fee.”)

6 Here, Plaintiff’s Counsel’s fee request of one-third of the PAGA Settlement Sum is fair and
7 reasonable based on a percentage of the recovery, and as well as when confirmed with a lodestar
8 cross-check. First, “regardless whether the percentage method or the lodestar method is used, fee
9 awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.* (2008)
10 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff’s Counsel’s experience in
11 similar wage and hour class action matters. *Gaines Decl.*, ¶ 2-5; 24-28. Thus, the percentage sought
12 by Plaintiff’s Counsel here is reasonable.

13 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
14 multiplying the number of hours reasonably expended by each attorney or legal staff member by
15 their reasonable hourly rates. *See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 48. The court then
16 enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty
17 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49;
18 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *Thayer v. Wells Fargo Bank* (2001) 92
19 Cal.App.4th 819, 834 (“There is no hard-and-fast rule limiting the factors that may justify an
20 exercise of judicial discretion to increase or decrease a lodestar calculation”).

21 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
22 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
23 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition*
24 *for L. County Planning etc. Interest v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251 (approving
25 multiplier of ~2.04). In representative actions such as this one, where the value of the benefit
26 conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust

1 the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is
2 reasonable and within the range of fees freely negotiated in the legal marketplace in comparable
3 litigation.” *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. In doing so, “the court
4 determines, retrospectively, whether the litigation involved a contingent risk or required
5 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate
6 the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

7 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$38,690.
8 Based on a projected final lodestar of \$44,982.50, this yields a “negative multiplier” of 1.16 under
9 the projected \$38,690 fee request. Gaines Decl., ¶ 24; **Exhibit F** to Gaines Decl. The billing rates
10 used to compute the lodestar are reasonable in view of the evidence submitted herewith. Gaines
11 Decl., ¶ 24-28; **Exhibit F**.

12 Based thereon, and for the reasons discussed above (the significant risk in continuing to
13 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
14 burden involved in representation on a contingency basis; the knowledge and experience of
15 Plaintiff’s Counsel; and the value obtained by Plaintiff’s Counsel for the Aggrieved Employees), it
16 is fair and reasonable to account for these risks and compensate Plaintiff’s Counsel with a fee award
17 of 33 1/3% of the PAGA Settlement Sum.

18 **E. Plaintiff’s Counsel’s Request for Costs is Reasonable**

19 In the course of this litigation, Plaintiff’s Counsel incurred out-of-pocket costs of \$9,206.42.
20 *See* Gaines Decl. at ¶ 35, **Exhibit G**. As demonstrated in the Gaines Declaration submitted
21 herewith, the incurred costs included filing fees, expert analysis fees, mediation fees, service of
22 process fees, mailing charges, and other charges typical of litigation of this nature. *Id.* Such costs
23 are appropriate for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp.*
24 *Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19
25 (1987)); *see also, In re GNC Shareholder Litigation* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

26 The costs incurred by Plaintiff’s Counsel in this litigation benefited Plaintiff, Aggrieved

1 Employees, and the State. Plaintiff's cost request is reasonable and represents the costs that
2 Plaintiff's Counsel was required to incur to prosecute this action and should therefore be granted.

3 **V. THE GENERAL RELEASE PAYMENT SOUGHT BY PLAINTIFF IS**
4 **REASONABLE AND SHOULD BE APPROVED**

5 The Parties have agreed that Plaintiff Guillaume Diaz will be paid a general release payment
6 in the amount of \$6,000. This payment is intended to recognize the time and effort that Mr. Diaz
7 spent on behalf of other Aggrieved Employees and the State and compensate him for his general
8 release of all claims against Defendant. *See* Settlement Agreement at § 5.02. *See* Declaration of
9 Guillaume Diaz, submitted herewith. *See* Gaines Decl., ¶ 36.

10 As to an incentive award, case law supports the award of incentive payments in private
11 attorney general actions. The Ninth Circuit has recognized that a named Plaintiff's "willingness to
12 act as a private attorney general" may justify the award of an incentive payment. *Rodriguez v. West*
13 *Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub*
14 *LLC*, 2013 WL 12415482 (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern
15 District of California approved a similar PAGA-only settlement and awarded a service payment to
16 the representative Plaintiff in recognition of his efforts.

17 The traditional bases for awarding incentive awards in class settlements support the award
18 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
19 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
20 awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs
21 is that he or she should be compensated for the expense or risk he has incurred in conferring a
22 benefit" on others. *Id.* at 806. That rationale applies synonymously in this Action.

23 Without Plaintiff's efforts, there would be no recovery at all. The requested award is
24 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
25 other of Defendant's employees and the State of California. As a result of the named Plaintiff's
26 efforts, Aggrieved Employees will receive monetary settlement payments, and the State of

1 California will receive \$44,383.93 to be put toward education about and enforcement of
2 California's labor laws. *See* Gaines Decl., ¶ 37.

3 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
4 investigating and substantiating the claims alleged in this action, including multiple interviews with
5 counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the
6 complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
7 settlement of this litigation. *See generally*, Diaz Declaration. Moreover, as with any Plaintiff who
8 files a civil action, the named Plaintiff undertook the financial risk that, in the event of a judgment
9 for Defendant in this action, he could have been personally responsible for any attorneys' fees and
10 costs awarded in Defendant's favor.

11 The award of such payment to Plaintiff is especially warranted in a case like this one. It is
12 necessary to ensure that employees continue to bring forth claims that enforce their rights.
13 Individuals like the named Plaintiff (and most Aggrieved Employees) would have little, if any,
14 recourse without the representative action device. Most Aggrieved Employees – like the named
15 Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much less a
16 representative action suit. Plaintiff must be commended for pursuing his claims; the modest
17 payment sought here is an appropriate means of doing so.

18 Plaintiff is also entering into a full general release against Defendant and its Released
19 Parties, which is far broader than the release by other Aggrieved Employees. Specifically,
20 Aggrieved Employees are releasing only limited PAGA civil penalty claims, while Plaintiff is
21 releasing all claims which he asserts or could assert against Defendant. *See* Settlement Agreement
22 at §§ 5.01 and 5.02. No other Aggrieved Employee is subject to this broad form of release. Gaines
23 Decl. at ¶ 38.

24 This broad release by Plaintiff was negotiated (and necessary) to resolve the Action.
25 Plaintiff threatened to assert his individual claims and Defendant required that they be resolved in
26 connection with the resolution of the Action. Without the resolution and release of Plaintiff's

1 individual claims, litigation would continue in a piecemeal fashion. Defendant is buying peace with
2 this settlement, such that its objectives would not be achieved absent the general release. Gaines
3 Decl. at ¶ 39.

4 **VI. NOTICE OF SETTLEMENT TO AGGRIEVED EMPLOYEES**

5 The Notice of Settlement, attached as Exhibit A to the Settlement Agreement to be sent to
6 each Aggrieved Employee (submitted herewith), identifies the administrator for the settlement as
7 Phoenix Class Action Administration Solutions (“Settlement Administrator”). The qualifications
8 of the Settlement Administrator, its procedures for receiving and updating the list of Aggrieved
9 Employees, processing of payments, and handling of notices are all addressed in the Declaration of
10 Jodey Lawrence of Phoenix Class Action Administration Solutions. *See generally*, Lawrence
11 Declaration. The Settlement Agreement further indicates that Defendant will provide the Settlement
12 Administrator with a confidential list containing the names, addresses, and total number of pay
13 periods worked during the PAGA Period for each of the Aggrieved Employees within ten (10)
14 calendar days after the Effective Date. *See* Settlement Agreement at § 3.02(a)(4).

15 This case is a PAGA action – not a class action. As such, there is no “class list” to be
16 provided to the Settlement Administrator as part of the settlement process, nor any class notice to
17 be sent to advise class members of their rights and deadline to opt-out or object to the Settlement.
18 Rather, the notice that is sent in conjunction with a PAGA settlement is one that accompanies each
19 Aggrieved Employee’s individual payment. It informs the Aggrieved Employees about the nature
20 of the case, the settlement, the amount of their individual payment and how it was calculated, and
21 what claims they are releasing. The proposed Notice of Settlement in this matter provides that
22 information.

23 The Settlement Agreement provides that any notices returned to the administrator as
24 undeliverable will be reviewed by the Settlement Administrator to attempt to locate the Aggrieved
25 Employee by using an address refresher database and, if applicable, re-mailed by the Settlement
26 Administrator. *See* Settlement Agreement at § 3.02(a)(7); *See generally*, Lawrence Declaration.

1 Because this PAGA settlement does not require either a preliminary or final approval hearing, there
2 is no hearing location or other information to provide in the Notice of Settlement, nor a settlement
3 website or publication notice. The hearing on this motion to approve the PAGA settlement is the
4 only hearing on the matter, pursuant to the settlement procedures set forth in Labor Code §§ 2698,
5 2699 *et seq.*

6 **VII. CONCLUSION**

7 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents
8 a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth
9 above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order Approving
10 Settlement, do the following:

11 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
12 2699, subpart 1;

13 2. Appoint Phoenix Class Action Administration Solutions as the Settlement
14 Administrator and approve its administration fees up to \$2,995 for payment out of the PAGA
15 Settlement Sum;

16 3. Approve the award of attorneys' fees of one-third of the PAGA Settlement Sum,
17 and costs of \$9,206.42, to Plaintiff's Counsel, payment of which shall come from the PAGA
18 Settlement Sum;

19 4. Approve the award of a general release payment to Plaintiff Guillaume Diaz in the
20 amount of \$6,000 from the PAGA Settlement Sum;

21 \\\

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1 5. Direct disbursement of the remaining Net Settlement Fund to the LWDA and all
2 Aggrieved Employees as provided for in the Settlement Agreement; and

3 6. Dismiss the Action with prejudice.

4
5 Date: August 18, 2022

Respectfully submitted,

6 GAINES & GAINES, APLC

7
8 By: Daniel F. Gaines

9 DANIEL F. GAINES
10 ALEX P. KATOFISKY
11 Attorneys for Plaintiff
12 GUILLAUME DIAZ
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Court Reservation Receipt

Reservation

Reservation ID: 516248169961	Status: RESERVED
Reservation Type: Motion re: (Motion for PAGA Approval)	Number of Motions: 1
Case Number: 21VECV00704	Case Title: GUILLAUME DIAZ, ON BEHALF OF HIMSELF AND ALL AGGRIEVED EMPLOYEES PURSUANT TO LABOR CODE 2698 ET SEQ vs SAN FERNANDO VALLEY PRODUCE & DELI, INC., A CALIFORNIA CORPORATION, AND DOES 1 THROUGH 10, INCLUSIVE
Filing Party: GUILLAUME DIAZ, on behalf of himself and all aggrieved employees pursuant to Labor Code 2698 et seq (Plaintiff)	Location: Van Nuys Courthouse East - Department T
Date/Time: October 10th 2022, 8:30AM	Confirmation Code: CR-WLH6MSZ4NWUXDWTJ6

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	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: XXXX6645	Authorization: 00619G

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