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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE**

JAMES FLOURNOY, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

PARTNERS PERSONNEL –
MANAGEMENT SERVICES, LLC, a
Delaware limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

Case No. CVRI2102372

[Assigned for all purposes to the Hon. Daniel
Ottolia, Department 4]

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION TO APPROVE
SETTLEMENT AGREEMENT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: May 9, 2022

Time: 8:30 a.m.

Dept.: 4

Reservation ID: 938404797838

Action Filed: May 7, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on May 9, 2022, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Daniel Ottolia, judge presiding, in Department
4 4 of the above referenced Court, located at 4050 Main Street, Riverside, California 92501,
5 Plaintiff James Flourney (“Plaintiff”) will seek an Order approving the concurrently filed
6 PAGA Settlement Agreement, pursuant to the procedures set forth in Labor Code section
7 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of
9 points and authorities, the accompanying declarations of Larry W. Lee, Kristen M. Agnew,
10 Nicholas Rosenthal, and Plaintiff James Flourney, the records and file herein, and on such
11 other evidence as may be presented at the hearing of the motion.

12
13 Dated: April 13, 2022

DIVERSITY LAW GROUP, P.C.

14
15 By: 
16 Larry W. Lee
17 Kristen M. Agnew
18 Nicholas Rosenthal
19 Attorneys for Plaintiff and Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
4 2698, *et seq.*, Plaintiff James Flourney (“Plaintiff”) hereby moves the Court for an order
5 approving the non-reversionary PAGA settlement as set forth in the concurrently filed PAGA
6 Settlement Agreement (“Agreement” or “Settlement Agreement”). As set forth in the operative
7 Complaint, Plaintiff seeks PAGA penalties based on Defendant Partners Personnel –
8 Management Services, LLC’s (“Defendant”) alleged failure to provide off-duty rest breaks,
9 timely pay all wages upon separation of employment, and provide accurate itemized wage
10 statements. Specifically, Plaintiff alleges that Defendant had a policy wherein employees were
11 required to remain on work premises during their rest breaks, and as a result, remained on-duty
12 and under Defendant’s control. As a result of Defendant’s failure to pay the rest period
13 premium, Defendant did not pay all wages owed upon separation of employment. Moreover,
14 the wage statements provided to employees did not accurately reflect the correct gross and net
15 wages earned. In addition, Plaintiff alleges that Defendant had a policy of issuing final
16 payment of wages more than 72 hours after termination of employment.

17 As demonstrated below and in the accompanying declaration of Nicholas Rosenthal,
18 the proposed settlement warrants the Court’s approval. This settlement was reached after
19 investigation and discovery, including Defendant’s production of relevant policy documents
20 and payroll data.

21 Pursuant to the terms of the Settlement Agreement, Defendant will pay the gross
22 amount of \$125,000.00 (the “Total Settlement Amount”), which includes a payment of
23 approximately \$44,158.71 in civil penalties to the California Labor and Workforce
24 Development Agency (“LWDA”). The proposed release is narrowly tailored to release only
25 claims under PAGA that were or could have been pled based on the operative Complaint—
26 specifically, Labor Code sections 201, 202, 203, 226, 226.7, 2698, 2699.3, and 2699.5.

27 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
28 behalf of the LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

1 **II. PROCEDURAL HISTORY**

2 **A. Summary of the Litigation and Settlement**

3 On or around March 3, 2021, Plaintiff submitted his written notice under Labor Code
4 section 2699.3 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA
5 Notice, Plaintiff alleged that Defendant failed to provide off-duty rest periods, failed to pay all
6 wages owed upon separation of employment, and failed to provide accurate itemized wage
7 statements to its employees, in violation of California Labor Code sections 201, 202, 203,
8 226(a), and 226.7. Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶¶ 3-5.

9 On May 7, 2021, Plaintiff filed a representative PAGA action against Defendant in the
10 Superior Court of California, County of Riverside. Rosenthal Decl. ¶ 6. The Complaint alleged
11 a single cause of action for civil penalties pursuant to Labor Code section 2698, *et seq.*, based
12 on the facts and the alleged Labor Code violations described in Plaintiff’s PAGA Notice. *Id.*

13 After the filing of the Complaint, Defendant and Plaintiff (collectively, the “Parties”)
14 discussed possible informal resolution of this matter. The Parties engaged in a robust meet and
15 confer effort regarding the underlying merits of the case and subsequently agreed to participate
16 in mediation. Rosenthal Decl. ¶¶ 7-9.

17 In advance of the mediation, Defendant produced payroll data, including the number of
18 California employees Defendant placed at StarCrest (the client that Plaintiff was assigned to),
19 the number of pay periods where these employees worked at least one shift in excess of 3.5
20 hours, the number of separated employees who worked at StarCrest, and the number of wage
21 statements issued to employees placed at StarCrest during the applicable time period.¹
22 Rosenthal Decl. ¶ 10. Defendant also produced relevant rest period policies. *Id.* at ¶ 8. This
23 information allowed Plaintiff to conduct a full analysis of the potential penalties available to
24 Plaintiff based on his allegations of Labor Code violations. *Id.* ¶ 10.

25 On February 17, 2022, the Parties participated in private mediation with the Honorable
26

27
28 ¹ The Parties agreed that, for the purpose of mediation, they would limit negotiations to
employees placed at the job site where Plaintiff worked (StarCrest) during the PAGA period.
Rosenthal Decl. ¶ 9.

Brian Walsh (Ret.). Rosenthal Decl. ¶ 11. During the mediation, the Parties spoke at length about the strengths and weaknesses of each side’s claims and defenses, and the scope of Defendant’s liability. *Id.* After a full day of negotiation, the Parties were able to reach an agreement and accepted a mediator’s proposal for settlement and the key terms, as detailed fully in the Settlement Agreement. *Id.*

III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

The material terms of the settlement are described below and set forth in detail in the concurrently filed Settlement Agreement. Rosenthal Decl. ¶ 11, Ex. A.

A. The Aggrieved Employees

The settlement covers “all current and former non-exempt employees of Defendant in the State of California who were placed at StarCrest at any time during the Covered Period” (the “PAGA Settlement Group Members”). Settlement Agreement ¶ I.P.² Based upon Defendant’s records through January 23, 2022, there are an estimated 1,240 PAGA Settlement Group Members who worked approximately 5,305 pay periods during the Covered Period. *Id.* ¶ III.H.

B. Settlement Sum and Allocation

The Settlement Agreement requires Defendant to pay the gross amount of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) (the “Total Settlement Amount”). Settlement Agreement ¶ I.X. Based on the Total Settlement Amount, Defendant will pay approximately \$23.56 per pay period ($\$125,000 \div 5,305$ pay periods) to resolve the claims in this case. Rosenthal Decl. ¶ 18.

The balance of the PAGA Settlement Amount remaining after deduction of the approved enhancement payment to Plaintiff, attorneys’ fees and costs, and settlement administration costs (the “Net Settlement Amount”), will be available for distribution to the LWDA and PAGA Settlement Group Members. Settlement Agreement ¶ III.C. Seventy-five

² The Covered Period is defined as March 3, 2020 to the date a signed order approving this Settlement is filed, or May 14, 2022, whichever date is earlier. Settlement Agreement ¶ I.E.

percent (75%) of the Net Settlement Amount, or approximately \$44,158.71, will be paid to the LWDA for PAGA penalties. Settlement Agreement ¶ III.E; Rosenthal Decl. ¶ 14. The remaining twenty-five percent (25%), or approximately \$14,719.57, will be distributed to PAGA Settlement Group Members. Settlement Agreement ¶ III.H; Rosenthal Decl. ¶ 14. The amount any particular PAGA Settlement Group Member will be entitled to recover will depend on the number of pay periods during which he or she worked while placed at StarCrest during the Covered Period, with some entitled to receive more and others less. Settlement Agreement ¶ III.H; Rosenthal Decl. ¶ 19. This is fair, as it directly allocates greater penalties to individuals who have allegedly suffered greater harm. Rosenthal Decl. ¶ 19. Any uncashed checks will escheat to the Unclaimed Property Fund administered by the California State Controller's Office in the name of the PAGA Settlement Group Member, where it will be held in trust. Settlement Agreement ¶ III.J.9.

As part of the Settlement Agreement, Defendant does not object to Plaintiff's Counsel's request for attorneys' fees of approximately thirty-three and one-third percent (33 1/3%) of the Total Settlement Amount, *i.e.*, Forty-One Thousand Six Hundred Sixty-Six Dollars (\$41,666.00), plus up to Fifteen Thousand Dollars (\$15,000.00) for reimbursement of litigation costs, subject to the Court approving this Settlement.³ Settlement Agreement ¶ III.F. Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's request for a Representative Plaintiff's Payment of Ten Thousand Dollars (\$10,000.00). *Id.* ¶ III.G.

Finally, the Settlement Agreement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. Settlement Agreement ¶ III.D. The Parties have agreed to utilize ILYM Group, Inc. to administer the settlement, with the administration costs estimated to be \$8,000.00. *Id.* ¶¶ III.D, III.I.

C. Scope of the Released Claims

In exchange for the payments described above, Plaintiff, the State of California, and PAGA Settlement Group Members will release Defendant and Released Parties from:

³ As set forth below, Plaintiff's Counsel seeks reimbursement for its anticipated actual litigation costs in the amount of \$6,455.72. Rosenthal Decl. ¶ 15, Ex. B.

1 any and all claims based on the Private Attorneys General Act
2 (2004), as pleaded in Plaintiff's Complaint or that could have been
3 pleaded on the facts as alleged in the Complaint and Plaintiff's
4 notice letters to LWDA, arising during the Covered Period,
5 including but not limited to claims under Labor Code sections 201,
6 202, 203, 226, 226.7, 2698, 2699.3, and 2699.5, the Industrial
7 Welfare Commission Wage Orders, and any resulting claim for
8 attorneys' fees and costs (the "Released Claims").

9 Settlement Agreement ¶ III.K.1. Further, the release only extends to pay periods during which
10 the PAGA Settlement Group Members worked at StarCrest. *Id.*

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

12 **A. PAGA Overview**

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

25 Labor Code section 2699(a) states that any Labor Code provision "that provides for a
26 civil penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered
27 through a civil action brought by an aggrieved employee on behalf of himself or herself and
28 other current or former employees pursuant to the procedures specified in Section 2699.3." An
"aggrieved employee" means "any person who was employed by the alleged violator and
against whom one or more of the alleged violations was committed." Lab. Code § 2699(c).
Prior to commencing an action, the allegedly aggrieved employee must provide notice to the
LWDA and the employer setting forth the "specific provisions of [the Labor Code] alleged to

1 have been violated, including the facts and theories to support the alleged violation.” Lab.
2 Code § 2699.3(a)(1). If the LWDA decides not to investigate the allegations or issue a citation
3 to the employer, the proposed representative plaintiff is entitled to commence a PAGA action
4 after 65 days. Lab. Code § 2699.3(a)(2).

5 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
6 “represents the same legal right and interest as state labor law enforcement agencies,” and
7 brings PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil
8 penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the
9 “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i);
10 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA
11 representative’s recovery is “an incentive to perform a service to the state, not restitution for
12 wrongs done to members of the class”).

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

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

1 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
2 Labor Code, which provides, in relevant part: “The court shall review and approve any
3 penalties sought as part of a proposed settlement agreement pursuant to this part.” The parties
4 are not obligated to “satisfy class action requirements,” including the standards for class action
5 settlement approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that
6 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).

7 Notably, unlike the class action settlement approval process, there is also no statutory
8 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
9 2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor
10 do they have the ability to opt-out of the representative PAGA claim” or “contest a settlement,
11 if any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at*13.

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

13 The Court’s focus in approving a PAGA settlement is not the amount that aggrieved
14 employees will ultimately receive as a result of the settlement, but instead, on whether the total
15 settlement amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are
16 meant to supplement agency funding for education and enforcement purposes. *See* Lab. Code
17 § 2699(i). Here, the settlement represents an extraordinary recovery for the PAGA Settlement
18 Group Members and the State, and thus the settlement certainly effectuates PAGA’s purpose.

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

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

27 If approved, the settlement would release Defendant and other releasees from all
28 claims under PAGA that were or could have been pled based on the operative Complaint—

specifically, Labor Code sections 201, 202, 203, 226, 226.7, 2698, 2699.3, and 2699.5. The settlement would not impact any other PAGA Settlement Group Members' ability to pursue PAGA claims predicated on other Labor Code violations. Therefore, the limited scope of the release also supports approval. Because an aggrieved employee's PAGA action is a substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias*, 46 Cal. 4th at 986. However, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part").

Accordingly, the PAGA Settlement Group Members will be subject to only a limited release strictly confined to the penalties and other relief available under PAGA for violation of Labor Code sections 201, 202, 203, 226, and 226.7. The release is therefore appropriately tailored.

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

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

1. Plaintiff's Claims are Contested

Plaintiff asserts that his representative PAGA claim is based on the allegation that Defendant failed to provide off-duty rest periods, pay all wages owed upon separation of employment, and provide accurate itemized wage statements. Defendant has argued that it complied with the law, had legal policies, and provided its employees duty-free rest periods. Rosenthal Decl. ¶¶ 8, 23. Defendant, moreover, provided evidence that it implemented a facially compliant written rest period policy in June 2020. *Id.* Defendant may have sought

summary judgment on these issues or proceeded to trial. *Id.* Should Defendant have prevailed, the State of California and PAGA Settlement Group Members would have been left with no recovery. *Id.*

2. Recovery of Penalties After Trial

Defendant has indicated that there were approximately 5,305 pay periods through January 23, 2022, during which PAGA Settlement Group Members worked at StarCrest. Therefore, pursuant to the PAGA, Plaintiff has calculated total exposure, if the Court were to award penalties for each violation alleged, could total as high as \$1,061,000. Rosenthal Decl. ¶ 22. However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential recovery is uncertain. If the Court only awarded a maximum penalty for a single violation per pay period, the total penalties would only be approximately \$530,500. *Id.* Even then, pursuant to Labor Code § 2699(f)(2) the Court can decline to award the full amount of PAGA penalties “if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” *See also* Rosenthal Decl. ¶¶ 24, 25. Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O’Connor*, 2016 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award “could well be reduced, as a court may reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”).

Courts routinely award far less than the statutory maximum amount of civil penalties, even where an underlying violation of the Labor Code is found. Indeed, just very recently, in the matter of *Magadia v. Wal-Mart Assocs. et al.*, while the trial court imposed substantial PAGA penalties upon the defendant, such amount still represented reductions of 67% and 80% of the potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019). Moreover, this was only after the plaintiff in *Magadia* had prevailed after trial.

1 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
2 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to
3 the contrary. Rosenthal Decl. ¶ 25.

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

6 The Court's assessment of the proposed Settlement must take into account that any
7 penalties awarded may be subject to substantial reduction. When this is considered, in
8 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
9 nothing, the proposed settlement is patently reasonable. Indeed, the Total Settlement Amount
10 is approximately 11.78% of the maximum amount of penalties at issue, if the Court permitted
11 an award of multiple violations per pay period. Rosenthal Decl. ¶ 22. If the Court were to only
12 permit a single violation penalty per pay period, the Total Settlement Amount is approximately
13 23.56% of the available penalties. *Id.* Settlement for this reduced value allows for the
14 distribution of penalties in an amount which accounts for the risk of continued litigation and
15 Defendant's likely arguments that higher penalties would have been confiscatory. It also
16 sufficiently deters Defendant from engaging in similar conduct in the future, which is one of
17 the primary goals of PAGA.

18 The proposed settlement exceeds PAGA settlements that courts have approved in other
19 cases, when considered as a percentage of the overall settlement value of the case. The
20 proposed settlement, in fact, far exceeds other PAGA settlements approved by courts —
21 including those that provide for less than the one percent allocation to PAGA penalties. *See,*
22 *e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving
23 total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart,*
24 *Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that
25 was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D.
26 Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement).
27 For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were
28 misclassified as independent contractors. 2016 WL 3561742 (N.D. Cal. June 23, 2016). The

1 parties settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of
2 \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the
3 proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low
4 when compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite
5 high compared to the typical amount apportioned to claims for PAGA penalties in wage and
6 hour settlements.” *Id.* at *5.

7 A PAGA allocation need not represent any particular percentage of the overall
8 settlement value in order to secure court approval, and courts routinely approve PAGA
9 settlements representing only a tiny fraction of the overall settlement value. Here, on the other
10 hand, the settlement proposes a payment of approximately \$44,158.71 in penalties to the
11 LWDA and approximately \$14,719.57 in penalties to the PAGA Settlement Group Members,
12 which is an outstanding result in a PAGA-only case. *See* Rosenthal Decl. ¶ 14. The proposed
13 settlement sum in this case vastly exceeds, both in terms of the total dollar amount and as a
14 percentage of overall settlement value, the typical PAGA settlement.

15 **F. The Attorneys’ Fees are Reasonable**

16 Labor Code section 2699(g)(1) provides for the recovery of attorneys’ fees and costs in
17 any successful action brought under PAGA. Although this is not a class action, in class actions
18 California state and federal courts have recognized that an appropriate method for determining
19 an award of attorneys’ fees is based on a percentage of the total value of benefits to class
20 members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
21 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*,
22 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir.
23 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to
24 “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary
25 does not bear the entire burden alone.” *Vincent*, 557 F. 2d at 769.

26 The common fund doctrine is predicated on the principle of preventing unjust
27 enrichment. When a litigant’s efforts create or preserve a fund from which others derive
28 benefits, he may require the passive beneficiaries to compensate those who created the fund.

1 Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at
2 35; *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.
3 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine
4 has been applied “consistently in California when an action brought by one party creates a
5 fund in which other persons are entitled to share.” The reasons for applying the common fund
6 doctrine include: “fairness to the successful litigant, who might otherwise receive no benefit
7 because his recovery might be consumed by the expenses; correlative prevention of an unfair
8 advantage to the others who are entitled to share in the fund and who should bear their share of
9 the burden of its recovery; encouragement of the attorney for the successful litigant who will
10 be more willing to undertake and diligently prosecute proper litigation for the protection or
11 recovery of the fund if he is assured that he will be properly and directly compensated should
12 his efforts be successful.” *Id.*

13 Indeed, most recently, the California Supreme Court has also held that the award of
14 attorneys’ fees in common fund wage and hour class action settlements should start with the
15 percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (“We join the
16 overwhelming majority of federal and state courts in holding that when class action litigation
17 establishes a monetary fund for the benefit of the class members, and the trial court in its
18 equitable powers awards class counsel a fee out of that fund, the court may determine the
19 amount of a reasonable fee by choosing an appropriate percentage of the fund created.”).

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

25 Here, as set forth in their declarations and their respective lodestars, Plaintiff’s
26 attorneys have spent at least 68.2 hours litigating this current action,. Rosenthal Decl. ¶¶ 29,
27 30, Ex. C; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 10, Ex. A. Based thereon and
28 based on each of the Plaintiff’s attorneys’ hourly rates, the lodestar equates to \$47,740, which

requires a **negative** multiplier of .87. Rosenthal Decl. ¶ 30, Ex. C; Agnew Decl. ¶ 10, Ex. A. Thus, the requested fee amount of \$41,666.00 is fair and reasonable.

Additionally, Plaintiff's Counsel's cost reimbursement request in the amount of \$6,455.72 is also reasonable. Rosenthal Decl. ¶ 15, Ex. B. The costs were all directly incurred in the prosecution of this action, including filing fees, mediation fee, postage, copying, and service of process fees. *Id.* As such, the requested costs should be awarded as fair and reasonable.

G. The Settlement Administrator's Fees Should be Approved

The Parties have agreed to pay actual costs of administration, or \$8,000.00, to the Settlement Administrator, ILYM Group, Inc., to administer this settlement. Settlement Agreement ¶¶ III.D, III.I. The Parties believe that the administration fee is reasonable and should be approved. Rosenthal Decl. ¶ 17.

H. Representative Plaintiff's Payment Should be Approved

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

Here, Plaintiff seeks \$10,000 for his service award, which is intended to compensate Plaintiff for the time spent on this case, including reviewing pleadings, the potential for hesitation from later prospective employers that might find out he brought this claim, and for executing a general release, including for all known and unknown claims under Civil Code section 1542. Declaration of James Flournoy ¶ 6. This requested enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v.*

1 *Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive
2 award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52
3 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*,
4 No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding
5 \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d
6 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
7 ERISA case).

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

9 Concurrent with the filing of this motion, Plaintiff uploaded the instant motion to the
10 LWDA's website. Rosenthal Decl. ¶ 32.

11 **V. CONCLUSION**

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

14 Dated: April 13, 2022

DIVERSITY LAW GROUP, P.C.

16 By: 
17 Larry W. Lee
18 Kristen M. Agnew
19 Nicholas Rosenthal
20 Attorneys for Plaintiff and Aggrieved Employees