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16 Attorneys for Plaintiffs

17 **IN THE SUPERIOR COURT OF CALIFORNIA**

18 **IN AND FOR THE COUNTY OF ALAMEDA**

19 THE CALIFORNIA LABOR AND)
20 WORKFORCE DEVELOPMENT)

21 AGENCY, a California governmental)
22 agency, *ex rel.* CARLOS LARA; and)
23 CARLOS LARA, individually,)

24 Plaintiffs,)

25 v.)

26 VISUAL EDGE, INC., a Delaware)
27 corporation; CHRIS WALLACE, an)
28 individual; and DOES 1-15, inclusive,)

Defendants.)
)
)
)
)

Case No.: RG21105541

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT (PAGA)
SETTLEMENT**

DATE: NOVEMBER 15, 2023

TIME: 2:30 PM

DEPT. 16

HON. TARA DESAUTELS

RESERVATION ID: 391126737874

1 Plaintiff Carlos Lara (“Plaintiff”) respectfully submits the following Memorandum of
2 Points and Authorities in Support of Plaintiff’s Motion for Approval of Settlement of PAGA
3 Claim.

4 I. INTRODUCTION

5 This action arises from the employment policies and practices of Defendant Visual
6 Edge, Inc. (“Defendant”). The present motion seeks approval of the settlement of Plaintiff’s
7 claim for Defendant’s alleged violations of the Labor Code Private Attorneys General Act of
8 2004, Labor Code § 2698, *et seq.* (“PAGA”). The parties’ settlement agreement is contained
9 in their Private Attorneys General Act Settlement Agreement and Release of Claims
10 (“Settlement Agreement”), a copy of which is attached as Exhibit A to the accompanying
11 Declaration of Hallie Von Rock (“HVR Dec.”).¹

12 As more specifically described below, Plaintiff’s PAGA claim, which Plaintiff seeks to
13 settle on behalf of approximately 151 Aggrieved Employees, alleges that Defendant failed to
14 provide all meal and rest breaks owed; failed to pay for missed meal and rest breaks; falsified
15 timekeeping records; failed to pay minimum, overtime, and contractual wages; failed to
16 provide accurate wage statements; failed to pay all wages due at termination; failed to provide
17 and reimburse for the reasonable cost of purchasing necessary business equipment and
18 materials; failed to provide places of employment that are safe and healthful; and failed to
19 comply with Cal OSHA’s emergency COVID-19 regulations.

20 Plaintiff alleges that Defendant’s conduct violates several provisions of the California
21 Labor Code and Wage Order No. 7, and subjects Defendant to penalties under the PAGA, as
22 well to liability for costs and attorneys’ fees. The parties now seek to resolve all violations of
23 the PAGA alleged in this case.

24 Pursuant to the parties’ Settlement Agreement, Defendant will pay a non-reversionary
25

26
27 ¹ A copy of the Settlement Agreement and this Motion were served on the Labor Workforce
28 and Development Agency (“LWDA”) the same date as this filing, in compliance with Labor
Code § 2699(1)(2). HVR Dec., ¶ 4.

1 total of Five Hundred Thousand Dollars (\$500,000) (the “Gross Settlement Amount”).
2 Settlement Agreement at ¶ 2. From the Total Settlement Amount, Plaintiff’s counsel requests
3 approval of attorneys’ fees equal to one-third of the Total Settlement Amount, or \$165,000,
4 and reimbursement of costs incurred to prosecute this case, currently estimated at \$14,553. *Id.*
5 at ¶¶ 3.2, 5. Plaintiff also requests the Court to approve an incentive fee for Plaintiff, for the
6 risks he assumed in pursuing this litigation and his valuable participation in this case on behalf
7 of the LWDA, in the amount of \$500. *Id.* at ¶¶ 3.3, 6. Plaintiff further requests the Court to
8 approve Atticus Administration as the Settlement Administrator. Atticus Administration
9 submitted a quote for its administration costs capping those costs at \$3,756 based upon the
10 current number of Aggrieved Employees. HVR Dec., ¶ 25. After deducting these amounts
11 from the Total Settlement Amount, \$316,191 (the “Net Settlement Amount”) will be
12 distributed pursuant to the PAGA.

13 Per the PAGA, 75% of the \$316,191 Net Settlement Amount, or \$237,143, shall be paid
14 to the LWDA. Lab. Code § 2699(i); Settlement Agreement at ¶¶ 3.5, 7.3. The remaining 25%,
15 or \$79,048, shall be distributed among the Aggrieved Employees. *Id.* At the mediation,
16 Defendant identified 151 Aggrieved Employees who worked during the PAGA Period. HVR
17 Dec., ¶ 21. Defendant’s records indicate these Aggrieved Employees worked a total of 6,565
18 pay periods through June 2023. *Id.*

19 The Aggrieved Employees will be mailed their checks directly by the settlement
20 administrator. Settlement Agreement at ¶¶ 4.2, 7.1. The Aggrieved Employees will have 180
21 days to cash their checks. *Id.* at ¶ 4.5. Thereafter, if any Settlement Award check remains
22 uncashed, the funds will be distributed by the Settlement Administrator to the State
23 Controller’s Office for allocation to the Unclaimed Property Fund administered by the State of
24 California in the name of the individual to whom the funds belong. *Id.*

25 The Settlement Agreement was the product of extensive arm’s-length negotiations, by
26 experienced counsel on both sides, which took into consideration the claims at issue in this
27 case, Defendant’s asserted defenses, and is a fair and reasonable resolution for the LWDA and
28 the Aggrieved Employees.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Allegations, PAGA Notices, and Complaints

A PAGA action is commenced by “The aggrieved employee or representative [giving] written notice by certified mail to the LWDA and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.” (Labor Code § 2699.3 (c)(1)).

After service of the aggrieved employee’s notice, the LWDA has 60 days to notify an aggrieved employee it intends to investigate the alleged PAGA violation. If no notice of cure by the employer or investigation is provided, the aggrieved employee may commence a civil action 65 days after providing notice of the violations. (Labor Code § 2699.3(c)(2)).

On April 2, 2021, Plaintiff sent notice to Defendant and the LWDA giving notice of Plaintiff’s intent to pursue a PAGA action on behalf of the State of California and a proposed group of Aggrieved Employees (“PAGA Notice”). HVR Dec, ¶ 5. Plaintiff’s PAGA Notice alleged that Defendant conducted business in California with a principal place of business in San Bernardino, California, and primarily participates in the mercantile industry by selling, renting, and distributing office products and supplies. *Id.* Plaintiff’s PAGA Notice defined the proposed group of Aggrieved Employees as “all non-exempt employees of Defendant working in California at any time during the Claim Period,” i.e. at any time from April 2, 2020. *Id.* Plaintiff alleged that Defendant’s conduct with respect to the Aggrieved Employees violated Wage Order No. 5 and Labor Code §§ 201, 202, 204, 204b, 226, 226.7, 510, 512, 515, 551, 552, 1102.5, 1174, and 1197. *Id.* The LWDA did not respond to Plaintiff’s PAGA Notice or otherwise indicate that it intended to investigate Plaintiff’s allegations. *Id.*

On July 15, 2021, Plaintiff submitted an amended notice to Defendant and the LWDA (“Amended PAGA Notice”). *Id.*, ¶ 6. Plaintiff’s Amended PAGA notice alleged that, in addition to the violations alleged in Plaintiff’s PAGA Notice, Defendant’s conduct violated Labor Code §§ 558, 1174(d), 1198, and 1199, for falsification of timekeeping records. *Id.* The

1 LWDA did not respond to Plaintiff's Amended PAGA Notice or otherwise indicate that it
2 intended to investigate Plaintiff's allegations. *Id.*

3 On July 19, 2021, Plaintiff commenced the present action against Defendant in the
4 Superior Court of the State of California for the County of Alameda. *Id.*, ¶ 7. Plaintiff's
5 complaint ("Complaint") brought the following claims: (1) Failure to Pay Minimum, Overtime,
6 and Contractual Wages; (2) Failure to Pay Premium Meal Period Wages; (3) Failure to Provide
7 Accurate Wage Statements; (4) Failure to Reimburse Necessary Business Expenses; (5) Failure
8 to Pay All Wages Due at Separation; (6) Whistleblower Retaliation; (7) Harassment in
9 Violation of the California Fair Employment and Housing Act; (8) Discrimination in Violation
10 of the California Fair Employment and Housing Act; (9) Violations of the California Attorneys
11 General Act; and (1) Public Injunctive Relief. *Id.*

12 On September 30, 2021, Defendant Answered with a general denial and twenty-two
13 affirmative defenses.

14 **B. Individual Claims and Settlement Agreement**

15 All causes of action contained in Plaintiff's Complaint other than Plaintiff's cause of
16 action for violations of the PAGA were brought by Plaintiff in his individual capacity. *Id.*, ¶ 8.
17 Those causes of action are not part of this PAGA settlement and have been settled through an
18 individual settlement agreement between Plaintiff and Defendant. If the Court requests,
19 Plaintiff will submit a copy of the individual settlement for *in camera* review.

20 In *Moniz*, the First District reviewed a contested PAGA settlement approval, and raised
21 no concerns that the settling representative plaintiff had separately agreed to a settlement of
22 their individual claims that was not placed on the record before trial court. *Moniz v. Adecco*
23 *USA, Inc.* (2021) 72 Cal.App.5th 56, 84, fn. 18. Accordingly, submission of the individual
24 settlement agreement for *in camera* review at the Court's request comports with controlling
25 law.

26 However, if this Court believes the individual settlement agreement should nonetheless
27 be submitted on the record, the Parties request leave to file the individual settlement under
28

1 seal, with only the amount of consideration paid in the settlement agreement redacted and
2 subject to sealing.

3 California law permits parties to individual settlements to agree to maintain
4 confidentiality regarding the settlement amount. *See, e.g.*, Gov. Code, § 12964.5 (permitting
5 “entry or enforcement of a provision in any agreement that precludes the disclosure of the
6 amount paid in a severance agreement”). California law also permits the sealing of court
7 records where “there is a binding contractual obligation not to disclose certain information”
8 that gives rise to an interest that overrides the interest in public access to court proceedings,
9 and where there is a “substantial probability that [that interest] will be prejudiced absent
10 closure or sealing.” *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th
11 1273, 1279-1283 (applying Rule 2.550(d)).

12 Notably, in *Universal City*, the Court considered whether to seal a settlement agreement
13 in which “All references to financial data have been deleted,” and in declining to seal the
14 agreement, the Court repeatedly emphasized the lack of potential prejudice given that all
15 financial data had already been “heavily redacted” in the agreement sought to be sealed. *Id.* at
16 1283-1284. The opinion in *Universal City* indicates that sealing is appropriate where limited to
17 the financial terms in a confidential settlement agreement.

18 Here, only the financial terms of the Parties’ individual settlement are sought to be
19 sealed. Defendant has bargained for a contractual obligation to hold confidential the amount
20 of consideration paid to Plaintiff to settle his individual harassment, discrimination, retaliation,
21 and wage claims. Disclosure of the amount of consideration would deprive Defendant of part
22 of its bargained for consideration. In addition, in the view of defense counsel, disclosure in the
23 public record of the settlement amount would threaten serious injury to Defendant by putting a
24 metaphorical target on Defendant’s back, and thereby risk incentivizing suspect lawsuits
25 brought by employees whose grievances are not actionable but who see only the dollar value
26 of Plaintiff’s settlement and think they can obtain the same, but who are not privy to litigation
27 history, the evidence, and the merits arguments regarding Plaintiff’s individual claims that
28 motivated the parties’ compromise of those claims. *See*, HVR Dec., ¶ 8. Defense counsel avers

1 that due to the ever-increasing costs of litigating even suspect claims, disclosure threatens to
2 substantially increase Defendants' potential liability without regard to Defendant's actual
3 conduct. *Id.* at ¶ 8.

4 For those reasons, should the Court require more than *in camera* review, the Parties
5 respectfully submit that substantial evidence supports this Court making each of the findings
6 required by Rule 2.550(d), and granting leave to file under seal the Parties' individual
7 settlement agreement with only the financial terms of the individual settlement subject to
8 sealing.

9 **C. Defendant's Asserted Defenses and the Risks of Continued Litigation**

10 From the beginning of this litigation, Defendant challenged the merits of Plaintiff's
11 PAGA claim on several bases, including the assertions that Defendant required all workers to
12 record all hours worked and, therefore, off-the-clock work was the result of individual
13 employees not following Defendant's policies, that Defendant reimbursed employees for all
14 business expenses submitted, that Defendant maintains and enforces facially-lawful meal break
15 policies, that Defendant pays employees for any missed meal periods, that Defendant provided
16 appropriate PPE, and that Defendant complied with CalOSHA laws. HVR Dec., ¶ 9.

17 In addition to challenging the merits of Plaintiff's PAGA claim, Defendant contended
18 that numerous individualized inquiries would be required to determine liability in this case and
19 would render any trial unmanageable, which would deny Defendant its rights to due process
20 and a fair trial and subject the action to dismissal. HVR Dec., ¶ 10; *see, e.g., Raphael v.*
21 *Tesoro Refining and Marketing Co. LLC*, 2015 WL 5680310, at *3 (C.D. Cal. Sep. 25, 2015)
22 (granting motion for judgment on the pleadings with prejudice as to PAGA claim because
23 proof of the claim would be unmanageable). Moreover, Defendant claimed that Plaintiff's
24 complaints, such as for off-the-clock duties and unsafe work conditions of using the stair
25 crawler, related only to delivery drivers and that of the 151 Aggrieved Employees, there were
26 only 7 delivery drivers in the PAGA period. HVR Dec., ¶ 11. Defendant also claimed that even
27 if Plaintiff could present a manageable trial plan, and carry their burden of proving the merits
28 of his claims, the Court could exercise the discretion granted to it under the PAGA to "award a

1 lesser amount than the maximum civil penalty amount specified . . . if, based on the facts and
2 circumstances of a particular case, to do otherwise would result in an award that is unjust,
3 arbitrary and oppressive, or confiscatory.” *Id.*; Cal. Lab. Code § 2699(e)(2).

4 In conducting the settlement negotiations described below, the legal arguments detailed
5 above, and the associated risks of continued litigation, were considered extensively by all
6 parties.

7 **D. Discovery**

8
9 In December 2021, Defendant served written discovery on Plaintiff, including special
10 interrogatories, form general and employment interrogatories, request for admissions, and
11 requests for production of documents. HVR Dec., ¶ 12. Plaintiff provided substantive
12 responses and documents in response in March 2022. *Id.*

13 In December 2022, Plaintiff served written discovery on Defendant, including special
14 interrogatories, form general and employment interrogatories, and requests for production of
15 documents. HVR Dec., ¶ 13. Defendant responded to these discovery responses in January
16 2023. *Id.*

17 The parties also engaged in the *Belaire-West* notice process for Defendant to provide
18 the contact information of Aggrieved Employees to Plaintiff. *Id.*, ¶ 14.

19 Subsequently, the parties met and conferred over the scope of discovery and data
20 necessary for mediation and Defendant informally provided additional documents, as well as
21 time and payroll data. *Id.*, ¶ 15.

22 **E. Settlement Negotiations**

23 The Settlement was reached through extensive, arms-length negotiations with the
24 assistance of well-respected mediator Louis Marlin, Esq. The parties engaged in a full-day
25 mediation that was facilitated by informal exchanges of documents, information, data,
26 discussions with plaintiff, interviews with Aggrieved Employees, an analysis of meal break
27 records by an expert consultant, and the expertise of an experienced mediator who set forth the
28 risks for each side in further litigating the matter. HVR Dec., ¶ 16.

1 The case did not settle the day of the mediation, but the mediator made a settlement
2 proposal. Thereafter, both parties agreed to the mediator's proposal. *Id.*, ¶ 17.

3 During the settlement negotiations, each side, represented by its respective counsel,
4 recognized the substantial risk of an adverse result in the case given the claims and defenses
5 asserted. *Id.*, ¶ 18. It was by balancing these considerations that the parties came to the
6 agreement set forth in the Settlement Agreement, which represents a compromise and
7 settlement of highly disputed claims. *Id.*

8 Plaintiff contends that the result is fair, adequate, reasonable, and satisfies the PAGA's
9 intention of enforcing California's laws protecting employees and collecting civil penalties for
10 the State. *Id.*, ¶ 19. The settlement amount is consistent with Court-approved amounts in other
11 PAGA cases, and the requests for PAGA Counsel's attorneys' fees and costs and Plaintiff's
12 service payment are also fair and reasonable. *Id.*

13 The superior court "shall review and approve any settlement of any civil action filed
14 pursuant to" Labor Code § 2699(1)(2). Plaintiff requests the Court approve this PAGA
15 Settlement, order it be implemented according to the terms of the Agreement, and enter Final
16 Judgment.

17 Defendant has reviewed the instant Motion and will not be opposing it. HVR Dec., ¶ 20.

19 III. THE PROPOSED SETTLEMENT

21 A. Overview of the Settlement

22 The proposed settlement provides for a non-reversionary Total Settlement Amount of
23 \$500,000. Settlement Agreement at ¶ 2. Per the PAGA, 75% of the Net Settlement Amount
24 shall be paid to the LWDA. Lab. Code § 2699(i); Settlement Agreement at ¶ 3.5. The
25 remaining 25% of the Net Settlement Amount will be distributed by a direct mailing of checks
26 by the Settlement Administrator to the Aggrieved Employees. *Id.* at ¶¶ 2, 4.2, 7.1.

27 1. Settlement Payout

28 Subject to the terms and conditions of the Settlement Agreement, the Total Settlement

1 Amount that Defendant is obligated to pay in connection with the settlement is \$500,000. *Id.*
2 at ¶ 2. This amount will cover (as approved by the Court): (1) all PAGA settlement shares
3 (“Individual Settlement Awards”) paid to the Aggrieved Employees; (2) the PAGA
4 Representative Service Award (\$500); (3) Plaintiff’s counsel’s attorneys’ fees (\$165,000); (4)
5 litigation costs (\$14,553); (5) payment to the LWDA; and (6) the Settlement Administrator’s
6 fees and expenses (\$3,756). *Id.* at ¶¶ 3.2, 3.3, 3.4, 3.5, 4.2, 5, 6. The Total Settlement Amount
7 is non-reversionary. *Id.* at ¶¶ 2, 4.5. The Net Settlement Amount, if the Court awards the
8 requested fees and costs, is \$316,191.

9 2. Calculation and Distribution of Settlement Payments

10 Per the PAGA, from the Net Settlement Amount, 75%, or \$273,143, shall be paid to the
11 LWDA. Lab. Code § 2699(i); Settlement Agreement at ¶ 3.5. The remaining 25%, or
12 \$79,048, shall be distributed among the Aggrieved Employees. *Id.* at ¶¶ 2, 4.2, 7.1. Defendant
13 identified 151 Aggrieved Employees who worked during the PAGA Period, from April 2,
14 2020, through June 2023. HVR Dec., ¶ 21. Per Defendant’s records, these Aggrieved
15 Employees worked a total of 6,565 pay periods through June 2023. *Id.* The Aggrieved
16 Employees’ share of \$79,048 will be divided by the total number of pay periods for a per-pay
17 period amount of approximately \$12, which will be multiplied by the number of pay periods
18 each Aggrieved Employee worked during the PAGA Period to determine the amount he or she
19 will receive. *Id.*, ¶ 22; Settlement Agreement at ¶ 7.3. For example, an Aggrieved Employee
20 who worked 40 pay periods during the PAGA Period would receive \$480 (40 x \$12). *Id.*, ¶ 22.

21 Each PAGA Individual Settlement Award shall be allocated as one hundred percent
22 (100%) penalties, from which there will be no tax withholdings and for which an IRS Form
23 1099 will be issued, as needed. *Id.* at ¶ 4.4.

24 The timing of settlement payments to the Aggrieved Employees is as follows: Within
25 ten (10) business days of the Effective Date, Defendant will compile and provide in electronic
26 form to the Settlement Administrator, who shall be mutually-selected by the Parties, the
27 following information concerning the Aggrieved Employees: (1) full name; (2) last known
28

1 home address and telephone number; (3) number of pay periods employed during the PAGA
2 Period; and (4) Social Security Number. *Id.* at ¶ 7.1. The Settlement Administrator shall run
3 all the addresses of PAGA Members through the United States Postal Service National Change
4 of Address Database (which provides updated addresses for any individuals who have moved
5 in the previous four years and have notified the U.S. Postal Service of a forwarding address) to
6 obtain current address information. *Id.* The Settlement Administrator will agree to treat the
7 list of PAGA Members as Confidential Information. Within twenty (20) business days of
8 Defendant's funding of the Total Settlement Amount, the Settlement Administrator will mail
9 the Individual Settlement Awards to the PAGA Members by first class mail. *Id.* The
10 Settlement Administrator will perform an address search follow-up on returned mail and will
11 re-mail the Individual Settlement Awards to an updated address (if any) within three (3)
12 business days of receipt of the returned mail. *Id.* The Parties intend that reasonable, but not
13 extraordinary, means are to be used to locate PAGA Members. *Id.* If no other address is
14 found, no further action is required. *Id.*

15 **3. Release of Claims**

16 The Settlement Agreement sets forth the Release of Claims as follows:

17 In consideration for Defendant entering into this Agreement, Plaintiff, in his
18 capacity as a private attorney general acting on behalf of himself and as a proxy or
19 agent of the LWDA, agrees to fully release and discharge Defendant and any present
20 and former parent companies, subsidiaries, divisions, related or affiliated
21 companies, shareholders, officers, directors, managers, members, principals,
22 employees, partners, agents, attorneys, insurers, successors and assigns, legal
23 representatives, and any individual or entity which could be jointly liable with
24 Defendant (the "Released Parties"), from any and all claims, causes of action, debts,
25 liabilities, demands, damages, penalties, costs, and attorneys' fees, whether known
26 or unknown, contingent or vested, arising from or based on a claim for civil penalties
27 under the Labor Code Private Attorneys General Act of 2004 ("PAGA") for any
28 violations of the Labor Code or Wage Orders that were alleged by Plaintiff in the
 Action, or that could have been alleged based on the facts asserted in the Action or
 Plaintiff's notices to the LWDA referenced in Paragraph A of the Recitals, including
 but not limited to claims for alleged violations of the Labor Code sections 201-204,
 204b, 221, 225.5, 223. 226, 226.3, 226.7, 510, 512, 558, 1197, 1197.1, 1198, 1199,
 2698 *et seq.*, 2699, 2802, 6310, 6311, 6400, 6402, 6403, 6407, 6427, 6428, 6429,
 or 6432 (the "Release Claims"), during the PAGA Period.

1 *Id.* at ¶ 12.1.

2 Additionally, Plaintiff agreed to a general release, as set forth in the Settlement
3 Agreement. *Id.* at ¶ 12.4.

4 **4. Incentive Award to PAGA Representative**

5 Plaintiff requests, and Defendant does not oppose, that the Court award a PAGA
6 Representative Service Award in the amount of \$500 to Plaintiff, in consideration of his
7 initiating and pursuing this lawsuit, including by participating in discovery, undertaking the
8 risk of liability for attorney's fees and expenses in the event he was unsuccessful in the
9 prosecution of this lawsuit, and agreeing to the general release as part of the Settlement
10 Agreement. *See, id.* at ¶ 6. The Settlement Administrator will pay the PAGA Representative
11 Service Award approved by the Court of up to a total of \$500 out of the Total Settlement
12 Amount. *Id.* at ¶ 6.

13 Awarding an incentive to a PAGA representative follows the same principle that applies
14 in the class action context. "[T]he rationale for making enhancement or incentive awards to
15 named plaintiffs is that they should be compensated for the expense or risk they have incurred
16 in conferring a benefit on other members of the class. An incentive award is appropriate if it is
17 necessary to induce an individual to participate in the suit." *Cellphone Termination Fee Cases*
18 (2010) 186 Cal.App.4th 1380, 1395 (quoting *Clark v. Am. Residential Servs. LLC* (2009) 175
19 Cal.App.4th 785, 804-806). An award of \$500 falls well below the average enhancement
20 award according to one study. *See, Theodore Eisenberg & Geoffrey P. Miller, Incentive*
21 *Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303, 1308
22 (concluding the average award per class representative was \$15,992).

23 An incentive award in a PAGA case is especially important where the plaintiff has filed
24 suit on behalf of the LWDA, and is thus providing a vital service for the State. As a result of
25 Plaintiff's efforts here, the LWDA will receive \$237,143.

26 Plaintiff spent a significant amount of time helping counsel with the prosecution of this
27 action and performed the following tasks: (1) communicating extensively with counsel on
28 numerous occasions; (2) detailing his experiences and producing copies of documents; (3)

1 assisting in preparing complaint; (4) engaging in discovery; (5) preparing for and attending the
2 mediation; and (6) reviewing the terms of and signing the Settlement Agreement. HVR Dec., ¶
3 23. Plaintiff also undertook personal and financial risks as a PAGA representative that should
4 be rewarded. *Id.*

5 In light of the work that Plaintiff performed on behalf of the LWDA and the Aggrieved
6 Employees, the requested PAGA Representative Service Award of \$500 for Plaintiff is
7 reasonable and appropriate.

8 **5. Administration Costs**

9 The Settlement Administrator will pay out of the Total Settlement Amount to itself its
10 reasonable fees and expenses after such payment has been approved by the Court. Settlement
11 Agreement ¶ 3.4. Plaintiff sought multiple bids and Atticus Administration submitted the
12 lowest quote for its administration costs, capping those costs at \$3,756 based upon the current
13 number of Aggrieved Employees. HVR Dec., ¶ 25. Atticus is a well-known and respected
14 settlement administrator and should be approved by the Court. *See, id.*, Ex. B (Resume of
15 Atticus Administration).

16 **6. Attorneys' Fees and Litigation Costs**

17 In considering the overall fairness of the settlement, the Court may consider the
18 reasonableness of the amounts allocated for attorneys' fees and costs in the Settlement
19 Agreement. Plaintiff's counsel's litigation costs were all reasonable and necessary expenses in
20 litigating and resolving this action. An itemized list of Plaintiff's counsel's out-of-pocket
21 costs, in the amount of \$14,553, is attached as Exhibit C to the accompanying Declaration of
22 Hallie Von Rock. Defendant does not object to Plaintiff's counsel's request for these costs.
23 Settlement Agreement ¶ 3.2. Plaintiff also seeks 33.33% of the Total Settlement Amount, or
24 \$165,000, in attorneys' fees.

25 The attorneys' fees sought by Plaintiff will compensate Plaintiff's counsel for work
26 performed in recovering a significant benefit for the LWDA and the Aggrieved Employees.
27 As one court explained in approving the payment of attorneys' fees in the class action context:
28 "The fee was negotiated at arm's-length with sophisticated defendants by the attorneys who

1 were intimately familiar with the case, the risks, the amount and value of their time, and the
2 nature of the result obtained for the class.” *In Re First Capital Holdings Corp. Fin. Prods.*
3 *Securities Litig.* (C.D. Cal. June 10, 1992) 1992 WL 226321, at *4 (awarding attorney’s fees of
4 \$8 million). The same is true here.

5 Courts have long recognized the “common fund” or “common benefit” doctrine, under
6 which attorneys who create a common fund or benefit for a group of persons may be awarded
7 their fees and costs to be paid out of the fund. *See, Laffitte v. Robert Half Internat. Inc.* (2016)
8 1 Cal. 5th 480, 504; *see also, Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal.3d 25, 34;
9 *Glendale City Employees’ Assoc. v. City of Glendale* (1975) 15 Cal.3d 328, 341, fn. 19; *In re*
10 *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557; *In re Sumitomo Copper Litig.*
11 (S.D.N.Y. 1999) 74 F.Supp.2d 393, 396-398 (describing the overwhelming weight of federal
12 authority in favor of the percentage fee method); *Mills v. Electric Auto-Lite Co.* (1970) 396
13 U.S. 375, 391-392 (United States Supreme Court endorsing the common fund approach to
14 class actions.)

15 The California Practice Guide: Civil Trials and Evidence (The Rutter Group) at
16 § 7.172.3 explains the common fund doctrine as follows:

17 Where the lawsuit results in the recovery of a fund or property benefiting others as
18 well as plaintiff (e.g., a class action), the court has inherent equitable power to
19 order plaintiff’s attorney fees paid out of the common fund or property [citations].
20 Such fee spreading assures that all of those benefited by the litigation pay their fair
21 share of obtaining the recovery.

22 Numerous appellate courts have similarly endorsed the “percentage fee” method for
23 determining reasonable attorneys’ fees in common benefit cases.²

24
25 ² *See, e.g., Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court
26 upheld a “contingent percentage” award of attorneys’ fees in a representative action as the
27 proper exercise of the court’s equitable powers); *Rider v. County of San Diego* (1992) 11
28 Cal.App.4th 1410, 1423 (attorneys’ fees and expenses properly awarded from common benefit
composed of illegally imposed sales and use tax); *Bank of America v. Cory* (1985) 164
Cal.App.3d 66, 89-92 (fees awarded from common benefit created by action compelling state
to claim dormant bank accounts); *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-568

1 In the *Laffitte* decision, the California Supreme Court held that, “when class action
2 litigation establishes a monetary recovery fund for the benefit of the class members, and the
3 trial court in its equitable powers awards class counsel a fee out of that fund, the court may
4 determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
5 created.” *Laffitte*, 1 Cal.5th at 503. The California Supreme Court also noted that the
6 percentage of the fund method “more accurately reflects the results achieved” than the lodestar
7 method, serves as a “better approximation of market conditions in a contingency case,” and
8 encourages “counsel to seek an early settlement and avoid unnecessarily prolonging the
9 litigation.” *Id.* at 503-504.

10 The attorneys’ fees requested here are in line with other fee awards in California wage
11 and hour cases. For example, in *Smiles v. Walgreens Co.*, Alameda Superior Court Case
12 Number RG17862495, the court awarded attorneys’ fees of 35% of the settlement amount in a
13 PAGA case, plus costs; in *Pearce v. Linens ‘N Things, Inc.*, Orange County Superior Court
14 Case No. 00CC04830, the court awarded attorneys’ fees equal to 33.33 % of the settlement
15 fund, plus costs; in *Albrecht v. Rite Aid Corp.*, San Diego Superior Court Case No. 729129,
16 Judge Haden awarded attorneys’ fees equal to 35% of the settlement fund, plus costs; in
17 *Crandall v. U-Haul International*, L.A. Superior Court Case No. BC 178775, the court
18 awarded plaintiff’s counsel attorneys’ fees equal to 40% of the settlement fund; and in
19 *Graubard v. Goodyear Tire Rubber Company*, LA Superior Court Case No. BC 230520, the
20 court awarded attorneys’ fees equal to 32.1% of the settlement fund, plus costs. These cases
21 illustrate that California courts recognize that the 33.33% fee requested here is appropriate in a
22 wage and hour common fund case.

23 Given the results achieved under the circumstances of this litigation, the requested fee
24

25 _____
26
27 (court upheld fee award equal to one-third of the damages to owners of residential property in
28 an inverse condemnation action).

award is reasonable. As discussed in *Sumitomo Copper Litigation*, *supra*, 74 F.Supp.2d at 396:

No one expects a lawyer whose compensation is contingent on the success of his services to charge, when successful, as little as he would charge a client who in advance of the litigation has agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

In that vein, this Court should consider the contingent nature of this case, the uncertainty of the outcome, the quality of the counsel, and counsel's preclusion from other employment.

a. The Contingent Nature of this Case

Plaintiff's counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. HVR Dec., ¶ 30. With no guarantee of success, Plaintiff's counsel placed their own resources at risk, including over 304 hours of their time, to prosecute this action. *Id.* If Plaintiff's counsel were unsuccessful in the prosecution of this case, they would receive nothing in return for this time, or for their out-of-pocket costs. Despite these risks, Plaintiff's counsel took their duty to represent the LWDA and the Aggrieved Employees seriously, and expended all of the time and resources necessary to vigorously prosecute this case. As a result, Plaintiff's counsel were able to demonstrate to Defendant that it faced potential exposure sufficient to engage in serious settlement negotiations and to settle Plaintiff's claim on behalf of the LWDA.

b. The Experience, Reputation, and Ability of Counsel, and the Skill Displayed in Litigation

Plaintiff's counsel has substantial experience in complex and representative action litigation, including many wage and hour cases. *See*, HVR Dec., Ex. D (Firm Resume). The quality of opposing counsel is also important in evaluating the quality of the work done by Plaintiff's counsel. The complexity and potential duration of this case, in the face of experienced and resourceful opposition, weigh in favor of awarding the requested attorneys' fees.

1 **c. The Results Achieved**

2 The results achieved by the settlement also support Plaintiff’s counsel’s request for
3 attorneys’ fees. As noted, the settlement will result in payments of \$237,143 to the LWDA and
4 \$79,048 to Aggrieved Employees. This is a significant sum of money in light of Defendant’s
5 affirmative defenses and the risks of continued litigation.

6 Further, the efficiency with which this litigation was conducted and resolved should be
7 rewarded. The LWDA and the Aggrieved Employees will directly benefit from the prompt
8 and fair resolution of their claims. They will receive a significant award in a reasonable period
9 of time, as opposed to waiting years to recover an undetermined amount.

10 **d. Preclusion of Other Employment**

11 As California law recognizes, Plaintiff’s counsel’s commitment to this litigation should
12 not be assessed in a vacuum. *See, Serrano*, 20 Cal.3d at 49. A relevant factor in determining
13 attorneys’ fees is whether the litigation required Plaintiff’s counsel to forego other
14 employment. *Id.* Additional work was available that Plaintiff’s counsel had to forgo to devote
15 the time necessary to pursue this litigation. HVR Dec., ¶ 31.

16 **e. Lodestar Comparison**

17 Plaintiff’s counsel seeks approval of attorneys’ fees based on a percentage of the
18 recovery, not a lodestar. While a percentage fee may be compared against a lodestar increased
19 by a risk multiplier, courts are not required to engage in this exercise, and many California
20 courts decline to do so. *See, e.g., Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC,
21 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) (finding “no need to conduct a lodestar cross-check
22 [as] [c]lass counsel’s prompt action in negotiating a settlement while the state of the law
23 remained uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011
24 WL 10483569 (E.D. Cal. Sept. 2, 2011) (“A lodestar cross-check is not required in this circuit,
25 and in a case such as this, is not a useful reference.”)

26 Where the cross-check is used, the “calculation need entail neither mathematical
27 precision nor bean-counting” and is not intended to be a “full-blown lodestar inquiry.” “Where
28 the use of the lodestar method is used as a cross-check, it can be performed with a less

1 exhaustive cataloguing and review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions*
2 *Corp.*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

3 A comparison of the lodestar of Plaintiff’s counsel with the amount of attorneys’ fees
4 sought here also supports the propriety of the fees requested. Plaintiff’s counsel spent a total
5 of 304.6 hours to date prosecuting this action and calculated the resulting lodestar fee on those
6 hours at \$241,660, which is substantially more than the amount of fees being sought here.
7 HVR Dec., ¶¶ 32-37.

8 Accordingly, attorneys’ fees in the amount of \$165,000 (33.33% of the Total Settlement
9 Amount) are fair and reasonable under the circumstances, and in line with California
10 precedent, along with \$14,553 in litigation costs. *Id.*, ¶¶ 32-37, Ex. C (Costs Index).

11 **IV. THE STANDARD FOR APPROVAL OF PAGA SETTLEMENTS**

12 Labor Code § 2699(l)(2) requires court approval of PAGA actions. However, because
13 PAGA claims are not class actions, the rules and findings required by Rule 23 and CCP § 382
14 do not apply. *See, Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 519 (“statutory
15 class action requirements are not applicable to PAGA claims”); *see also, Williams v. Superior*
16 *Court* (2017) 3 Cal.5th 531, 546-547 and n. 4; *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir.
17 2015) 803 F.3d 425, 436. “An employee bringing a PAGA action does so ‘as the proxy or
18 agent of the state’s labor law enforcement agencies,’ who are the real parties in interest.”
19 *Sakkab*, 803 F.3d at 435 (quoting *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59
20 Cal.4th 348, 380).³ Accordingly, the “bulk of any recovery goes to the LWDA, not to the
21 aggrieved employees ... A PAGA action is at heart a civil enforcement action filed on behalf
22 of and for the benefit of the state, not a claim for class relief.” *Baumann v. Chase Inv. Servs.*
23 *Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123-1124.

24 In a PAGA action, there is no requirement to provide notice to the aggrieved
25 employees; aggrieved employees do not have the right to object to or opt out of the settlement;
26

1 and there is no need for separate preliminary and final hearings. *See, Sakkab*, 803 F.3d 425 at
2 435-36; *Baumann*, 747 F.3d at 1122; *Harvey v. Morgan Stanley Smith Barney LLC* (N.D.Cal.
3 Sep. 5, 2019) 2019 U.S.Dist.LEXIS 159258, at *20-2; *Ochoa-Hernandez v. CJADERS Foods,*
4 *Inc.* (N.D.Cal. Apr. 2, 2010) 2010 U.S.Dist.LEXIS 32774, at *13.⁴

5 Although the PAGA itself does not provide instruction on how courts are to evaluate a
6 settlement under the Act, California law provides some general guidance concerning judicial
7 approval of any settlement. First, California courts recognize a strong public policy in favor of
8 settlements. *See, Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 735 (“there is well-
9 established policy in the law to discourage litigation and favor settlement. Pretrial settlements
10 are highly favored because they diminish the expense of litigation”). Here, the settlement
11 proposed by the parties not only avoids the complexities and legal uncertainties of continued
12 litigation, but also the delay, expense, and drain on judicial resources that would result from a
13 lengthy trial. Second, in all circumstances, the decision to approve or reject a settlement is
14 committed to the trial court’s sound discretion. *Wershba v. Apple Computer, Inc.* (2001) 91
15 Cal.App.4th 224, 234-235. This basic principle coincides with the discretion the Legislature
16 specifically afforded courts under sections 2699(e)(1) and (2) of the PAGA, granting to the
17 courts the same discretion as that held by the LWDA in assessing civil penalties and
18 specifically authorizing courts the ability to award lesser amounts than the maximum civil
19 penalties set forth in section 2699. Third, although the court possesses discretion in approving
20 a PAGA settlement, it seems logical that the court’s role “must be limited to the extent
21 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
22 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as
23

24
25
26 ⁴ The only potential objector to a PAGA action is the LWDA itself, whose comments, if any,
27 will be submitted to the court in advance of the approval hearing. The PAGA requires the
28 parties to a PAGA suit to submit any proposed settlement to the LWDA at the same time it is
filed with the court, and then, if the settlement is approved, to submit the judgment to the
LWDA within 10 days after entry. Lab. Code § 2699(1)(3).

1 a whole, is fair, reasonable and adequate to all concerned.” *In re Microsoft I-V Cases* (2006)
2 135 Cal.App.4th 706, 723 (quoting *Officers for Justice v. Civil Service Com.* (9th Cir. 1982)
3 688 F.2d 615, 625). Here, the parties agree that settlement, on the terms set forth in the
4 Settlement Agreement, is fair, reasonable, and adequate to the LWDA and Aggrieved
5 Employees.

6 **V. THE PAGA SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

7 The settlement proposed by the parties here was reached only after extensive, arm’s-
8 length negotiations. HVR Dec., ¶ 38. The parties engaged in discovery and exchanged
9 documents supporting their claims and defenses, exchanged letters and conducted meet-and-
10 confer conferences in which the parties’ claims and defenses and supporting legal authorities
11 and documentary evidence were discussed at length, and conducted informal discovery
12 discussions. *Id.* As a result of these activities, the parties had sufficient information to
13 evaluate the strengths and weaknesses of their claims and defenses, the risks involved in
14 continued litigation for both sides, and the appropriate settlement value of Plaintiff’s PAGA
15 claim. Despite zealous advocacy on both sides, the parties determined that the risks of
16 continued litigation favored the compromise contained in the Settlement Agreement.

17 Given these factors, the parties agreed that the Total Settlement Amount set forth in the
18 Settlement Agreement, i.e., \$500,000, was a fair and reasonable sum for the resolution of
19 Plaintiff’s PAGA claim. With respect to penalties potentially available should Plaintiff
20 succeed with all his claims at trial, Plaintiff calculated that the following penalties could apply:

- 21 • Off-the-clock violations arise under Labor Code sections 1197, 510, 204/204b, 226,
22 and 558;
- 23 • Meal period violations arise under Labor Code sections 512, 226.7, 204/204b, 226,
24 and 558;
- 25 • Reimbursement violations arise under Labor Code sections 2802, 558, 221, and 223;
- 26 • Separation violations arise under Labor Code sections 201 and 202; and
- 27 • CalOSHA violations arise under Labor Code sections 6400, 6402, 6403, and 6407.

28 At mediation, Plaintiff assumed that if the Court awarded a flat \$100 for each wage and
hour violation, and \$10,000 per CalOSHA violation, this would result in \$3.05 million in civil
penalties. If the Court found that Defendant did not violate the Covid regulations in effect at

1 the time, and thus did not violate CalOSHA, and awarded only \$100 per pay period total for all
2 wage and hour violations combined, this results in penalties for the current number of pay
3 periods of \$656,500. In agreeing to resolve Plaintiff's PAGA claim for \$500,000, which is an
4 amount less than this potential trial award, Plaintiff considered Defendant's defenses and the
5 risks of future litigation and believed the compromised amount was a favorable and fair
6 outcome.

7 Moreover, the PAGA grants trial courts discretion to reduce the amount of civil
8 penalties imposed, thus injecting further uncertainty into the outcome of any trial of Plaintiff's
9 PAGA claim. *See*, Labor Code § 2699(e)(2). All of these factors were considered and/or
10 discussed extensively during the parties' settlement negotiations.

11 The reasonableness of the Total Settlement Amount set forth in the Settlement
12 Agreement is also demonstrated by other cases in which plaintiffs have resolved PAGA claims
13 for amounts less than the maximum penalty amount available. In *Carrington v. Starbucks*
14 *Corp.* (2018) 30 Cal.App.5th 504, 517, 529, for example, the trial Court reduced the PAGA
15 penalty amount to only \$150,000 (\$5 per violation) from a maximum penalty amount of
16 \$50,000,000 to \$70,000,000. The trial court stated that this reduction was warranted because
17 imposing the maximum penalty would be unjust, arbitrary, and oppressive based on
18 Starbucks's "good faith attempts" to comply with meal period obligations and because the
19 court found the violations were minimal. *Id.*

20 Similarly, here, Defendant argued that it implemented lawful policies that foreclosed the
21 violations alleged by Plaintiff, and made every effort to comply with minimum wage,
22 overtime, and meal period requirements by implementing time keeping policies that assured
23 payment for all hours worked and for any missed meal periods. HVR Dec., ¶¶ 39-40. Plaintiff
24 has strong arguments against these defenses, but even if Plaintiff proved Defendant's liability,
25 the possibility of a penalty reduction due to Defendant's asserted good faith attempt to comply
26 with the law would remain. *Id.*

27 Other courts have also reduced PAGA penalties, often substantially. *See, Singh v.*
28 *Roadrunner Intermodal Servs., LLC* (E.D.Cal. Jan. 24, 2019) 2019 U.S.Dist.LEXIS 11724, at

*16-19 (approving settlement of PAGA claim for \$100,000 where penalties were estimated at \$14,224,000); *Fleming v. Covidien, Inc.* (C.D.Cal. Aug. 12, 2011) 2011 U.S.Dist.LEXIS 154590, at *8-9 (reducing PAGA penalties for wage statement violations from \$2,800,000 to \$500,000); *Viceral v. Mistras Grp., Inc.* (N.D.Cal. Oct. 11, 2016) 2016 U.S.Dist.LEXIS 140759, at *25-30) (approving settlement of PAGA claim for \$20,000 where penalties were estimated at \$12,952,000); *see also, Shames v. Hertz Corp.* (S.D.Cal. Nov. 5, 2012) 2012 U.S.Dist.LEXIS 158577, at *20 (noting, in the class action context, that “settlements for substantially less than the plaintiff’s claimed damages may be fair and reasonable, especially when taking into account the uncertainties involved with litigation”).

Here, the Total Settlement Amount reflects a fair and reasonable compromise of Plaintiff’s PAGA claim, especially given Defendant’s defenses, the uncertainty of continued litigation, and the Court’s discretion to discount any penalties awarded at trial.

VI. CONCLUSION

Because the proposed settlement is fair, reasonable, and adequate, Plaintiff respectfully requests that the Court grant approval of all terms of the settlement, as set forth in the Settlement Agreement attached to as Exhibit A to the accompanying declaration of Hallie Von Rock.

Respectfully submitted,

August 15, 2023

AIMAN-SMITH & MARCY
A PROFESSIONAL CORPORATION

/s/ Hallie Von Rock

Hallie Von Rock
Attorneys for Plaintiff