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

12 GABRIEL DELGADO, on behalf of the  
general public as private attorney general,

13 Plaintiffs,

14 v.

15 BAKER COMMODITIES INC., a California  
16 Corporation, and DOES 1-50, inclusive,

17 Defendants.

Case No. 37-2021-00018865-CU-OE-CTL

[Assigned for All Purposes to:  
The Hon. Carolyn Caietti]

**NOTICE OF MOTION AND MOTION TO  
APPROVE PAGA SETTLEMENT AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION**

HEARING DATE: APRIL 22, 2022  
TIME: 10:30 A.M.  
DEPT.: C-70

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

**YOU ARE HEREBY NOTIFIED THAT** on April 22, 2022 at 10:30 a.m., or as soon thereafter as the matter can be heard, in Department C-70 of the above entitled Court before the Honorable Carolyn Caietti, Plaintiff Gabriel Delgado, ("Plaintiff") will and hereby does move for an order approving the settlement of the PAGA claim alleged against Defendant Baker Commodities Inc., ("Defendant") in accordance with Labor Code §2699(l). The proposed settlement is set forth in the accompanying Joint Stipulation of PAGA Action Settlement and Release ("Settlement", "Agreement" or "Settlement Agreement"). This PAGA Settlement resolves this action in its entirety.

This Motion will be based on this notice, the accompanying points and authorities, the Declaration of James Hawkins, Declaration of Plaintiff Gabriel Delgado, and the complete files and records in this action. The Labor Workforce Development Agency has been served with this motion and the Settlement Agreement as set forth in the accompanying proof of service.

Dated: March 30, 2022

Respectfully submitted,

JAMES HAWKINS APLC

By:

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1           **I.       INTRODUCTION**

2           Plaintiff Gabriel Delgado ("Plaintiff") reached a settlement of the California Private  
3 Attorneys General Act, Cal. Labor Code §2699, et seq. ("PAGA") claim asserted in this action  
4 against Defendant Baker Commodities Inc., ("Defendant"). The only claim in this action is the  
5 representative PAGA claim. In accordance with California Labor Code §2699(l), Plaintiff now  
6 asks this Court to review and approve the settlement of Plaintiff's PAGA claim for approximately  
7 317 aggrieved employees. This is only a settlement of the PAGA claims for civil penalties, and is  
8 not a class settlement and does not release the individual claims, if any, of the affected employees  
9 other than the Plaintiff himself. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*,  
10 59 Cal. 4th 348, 381 (2014).

11           The PAGA settlement is set forth in the accompanying Joint Stipulation of PAGA Action  
12 Settlement and Release ("Settlement", "Agreement" or "Settlement Agreement"). A true and  
13 correct copy of the Settlement Agreement which sets forth the terms for the settlement of the  
14 PAGA claims is attached as **Exhibit #1** to the Declaration of James Hawkins, filed herewith.  
15 Capitalized terms shall have the same meaning as defined in the Settlement Agreement. The  
16 LWDA was served notice of this Settlement and this motion as set forth in the accompanying  
17 proof of service. The Notice of Settlement to Aggrieved Employees is attached hereto as **Exhibit**  
18 **A** to the Settlement Agreement.

19           A proposed order confirming review and approval of the PAGA settlement is submitted  
20 herewith.

21           **II.       RELEVANT FACTS**

22           On April 28, 2021 Plaintiff filed a class action complaint in the Superior Court of  
23 California, County of San Diego, Case No. 21STCV09903, entitled *Gabriel Delgado vs. Baker*  
24 *Commodities, Inc.*, San Diego County Superior Court Case No. 37-2021-00018865-CU-OE-CTL  
25 alleging violations of the Labor Code and Unfair Competition Law for: (1) failure to pay wages  
26 including overtime; (2) failure to provide meal periods; (3) failure to provide rest periods; (4)  
27 failure to timely pay wages; (5) failure to provide accurate itemized wage statements; (6) failure  
28 to accurately record and pay sick leave; (7) payment of wages in a non-labor code compliant

1 instrument; (8) failure to indemnify necessary business expenses, and (9) for unfair competition.  
2 On July 14, 2021, Plaintiff filed a First Amended Complaint to add a cause of action for civil  
3 penalties under PAGA. Plaintiff then dismissed the class and individual claims, and filed a  
4 Second Amended Complaint on July 27, 2021 with a single cause of action for PAGA penalties.  
5 ( Hawkins Decl., at ¶ 3).

6 On October 18, the Parties participated in a day-long mediation with mediator Steven  
7 Mehta, Esq. In preparation for the mediation, Plaintiff's counsel requested and Defendant's  
8 counsel provided sample time and payroll data for the purported Aggrieved Employees, personnel  
9 and employment documents. With Mr. Mehta's assistance, the Parties agreed to fully and finally  
10 resolve the Action and the PAGA Released Claims as to Plaintiff, the State of California, the  
11 LWDA and the Aggrieved Employees. ( Hawkins Decl., at 4).

12 Prior to participating in mediation, Plaintiff's counsel requested and Defendant's counsel  
13 provided data to Plaintiff's Counsel so that they could evaluate the potential value of the claims.  
14 The Parties engaged in extensive, arms-length negotiations and, with Mr. Mehta's assistance,  
15 reached a settlement to fully and finally resolve the Action and the PAGA Released Claims as to  
16 Plaintiff, the State of California, the LWDA and the Aggrieved Employees, in accordance with  
17 the terms set forth in the Agreement that is now presented to this Court. The Parties engaged in  
18 significant efforts to obtain the facts regarding the claims asserted, including a 25% sampling of  
19 time and payroll records, an exchange of detailed statistical data regarding shifts worked by  
20 individuals Plaintiff intends to represent, the production of documents including policies, arb  
21 agreements, and the exchange of detailed briefing and analysis in connection with that mediation.  
22 The long form settlement agreement was later negotiated and is presented here for approval. . (   
23 Hawkins Decl., at ¶¶ 4, 10-12.).

24 The claim before this court is the representative claim under PAGA on behalf of the State  
25 of California for civil penalties pursuant to the PAGA and on behalf of 317 aggrieved employees.  
26 The parties have agreed to settle this PAGA claim in its entirety after discovery and arm's length  
27 mediation. Defendant filed and served its answer generally denying the claims therein and  
28 asserting affirmative defenses. Defendant denies any wrongdoing and denies liability with

1 respect to the matters alleged in the Complaint and believes that it has valid defenses to all of  
2 Plaintiff's claims. Defendant further contends that it has complied with all wage and hour laws  
3 applicable to the employment of Plaintiffs and other Class Members. To date, no court has made  
4 any findings that Defendant engaged in any wrongdoing or in any wrongful conduct, or otherwise  
5 acted improperly or in violation of any law, rule or regulation with respect to any of the issues  
6 presented in this action. ( Hawkins Decl., at ¶ 5.).

### 7 **III. TERMS OF THE AGREEMENT**

8 The settlement is intended to fully and finally resolve the PAGA claims asserted by  
9 Plaintiff on behalf of the State of California and aggrieved employees. This is only a settlement  
10 of the PAGA claims for civil penalties, and is not a class settlement and does not release the  
11 individual claims, if any, of the Aggrieved Employees. After deducting the Attorneys' Fees  
12 (\$66,666.67) and Costs (\$12,220.51), Settlement Administration Expenses (\$7,370.00) ILYM  
13 Group (the Settlement Administrator), and Plaintiff's separate Individual Settlement Payment  
14 (\$10,000), the remaining Net Settlement Amount is estimated to be \$103,747.82 and will be  
15 distributed to the LWDA and Aggrieved Employees. An estimated \$25,936.95 (25% of the NSA)  
16 will be distributed to the Aggrieved Employees on a pro rata basis, amounting to an average of  
17 \$81 per Aggrieved Employee. The remaining \$77,807.11 (75% of the NSA) is to be distributed to  
18 the LWDA. This recovery provided for under the Settlement Agreement is a reasonable result for  
19 the State and Aggrieved Employees. Any difference from these amounts will be added to the Net  
20 Settlement Amount. (Agreement at ¶ III (2) through (6); Hawkins Decl., at ¶ 6.).

21 The "Aggrieved Employees" are defined as "all current and former non-exempt  
22 employees who worked at least one pay period for Baker Commodities, Inc. at any time during  
23 the PAGA Period, i.e., from July 2, 2020, through December 31, 2021. (Agreement at ¶ 2).

24 Defendants provided Plaintiff's Counsel with information concerning the Aggrieved  
25 Employees, including statistical data concerning the shifts worked. Defendants represented that  
26 PAGA Group Members consisted of approximately 317 employees who worked approximately  
27 16,763 pay periods from July 2, 2020 to October 8, 2021. Thus, the 16,743 pay periods divided  
28 by the settlement of \$200,000.00 yields an \$11.94 per pay period value prior to deductions. The

1 Settlement Amount shall increase by the value of additional pay periods proportionally if the  
2 actual number of pay periods from July 2, 2020 to October 8, 2021 are more than 10% greater  
3 than the estimate of pay periods stated above. (Agreement, at ¶ III (2)). ( Hawkins Decl., at ¶¶ 6,  
4 8.).

5 Within thirty (30) calendar days after approval of the Settlement by the Court, Defendants  
6 will deposit with the Settlement Administrator the GSA and provide the Settlement Administrator  
7 with the names, last known address and telephone number, social security number, and number of  
8 PAGA Pay Periods of the Aggrieved Employees pursuant to Defendant's business records  
9 (collectively, the "Aggrieved Employees' records"). (Agreement, at ¶ 4(2)(a)).

10 Within twenty (20) calendar days after Defendants provided the Settlement Administrator  
11 with the Aggrieved Employees' records, the Settlement Administrator shall run all the addresses  
12 of Aggrieved Employees through the United States Postal Service NCOA database to obtain  
13 current address information, and shall remit (1) Settlement Administration Fees to itself, (2)  
14 PAGA Counsel's fees and costs to PAGA Counsel, and (3) the remaining Net Settlement  
15 Amount, as awarded by the Court, in the amount of 25% of the Net Settlement Amount to the  
16 Aggrieved Employees and 75% of the Net Settlement Amount to the LWDA. (Agreement, at ¶ III  
17 (3)).

18 Aggrieved Employees shall not be required to make claims, but shall simply be delivered  
19 a check for their share of the PAGA settlement. The Settlement Administrator shall send  
20 Individual Settlement Payments to each Aggrieved Employee by U.S. First Class mail to the  
21 Aggrieved Employee's address with directions to the Postmaster to forward the payment checks  
22 and return all undeliverable payment checks to the Settlement Administrator. The Settlement  
23 Administrator shall send the Aggrieved Employees an explanatory letter attached as Ex. A to the  
24 Settlement Agreement, which has been mutually approved by the Parties, with the Individual  
25 Settlement Payment checks.

26 Settlement Checks issued to Aggrieved Employees pursuant to this Settlement will expire  
27 one hundred and twenty (180) days from the date they are mailed by the Settlement  
28 Administrator. Funds represented by settlement checks returned as undeliverable and those

1 settlement checks remaining un-cashed for more than 180 days after issuance will be tendered to  
2 the State Controller's Office, Unclaimed Property Division in the name of each Aggrieved  
3 Employee. (Agreement at ¶ IV (2)).

4 Each Aggrieved Employee will grant in favor of each Released Party, and be subject to,  
5 the Settlement Release. (Agreement at ¶ I (16)).

6 The California Labor Workforce Development Agency ("LWDA") is being served with a  
7 copy of this motion with the Settlement Agreement through the online process as required by  
8 Labor Code § 2699(l), and therefore has notice of this PAGA settlement and this motion. This  
9 service on the LWDA is verified in the accompanying proof of service.

#### 10 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

11 The claim before this court is the representative claim under PAGA on behalf of the State  
12 of California for civil penalties pursuant to the PAGA. The parties have agreed to settle this  
13 PAGA claim in its entirety after discovery and arm's length mediation. ( Hawkins Decl., at ¶ 4-  
14 12.) The settlement is intended to fully and finally resolve the PAGA claims asserted by Plaintiff  
15 on behalf of the State of California. This is only a settlement of the PAGA claims for civil  
16 penalties, and is not a class settlement and does not release the individual claims, if any, of the  
17 Aggrieved Employees. Attorneys' fees equal to one-third of the Settlement Amount and litigation  
18 expenses in the amount of \$66,666.67 will also be paid to Plaintiff's Counsel as part of the  
19 settlement in accordance with California Labor Code § 2699(g)(1) as set forth in the Agreement.  
20 There is also payment of \$7,370.00 to ILYM Group, Inc., (the Settlement Administrator) to  
21 perform the administrative duties to distribute the settlement money. ( Hawkins Decl., at ¶ 6.).

#### 22 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE** 23 **SETTLEMENT OF THE PAGA CLAIM**

24 Labor Code § 2699(l) requires that the Court "shall review and approve any settlement of  
25 any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to  
26 the agency at the same time that it is submitted to the court." Consequently, the Parties  
27 respectfully ask the Court to review and approve the settlement of the PAGA claims and the  
28 Maximum and Net Settlement Amounts to be paid as part of the proposed settlement.

1           **A. The PAGA Group Recovery to Be Paid Is Fair and Reasonable**

2           The Parties believe that the PAGA Group Recovery is fair and reasonable and therefore  
3 “shall” be reviewed and approved. The Labor and Workforce Development Agency has released  
4 data on PAGA settlement amounts. Here, there are a total of 16,743 pay periods at issue through  
5 the close of the PAGA Period and the PAGA Settlement Amount constitutes approximately  
6 \$11.94 per pay period. ( Hawkins Decl., at ¶¶ 6, 8.).

7           Since the filing of the complaint, the Parties have exchanged extensive discovery and  
8 engaged in numerous discussions regarding the factual and legal issues surrounding this case.  
9 Throughout the litigation, Defendant produced thousands of pages of information and data,  
10 including written policies, employee handbooks, a 25% sampling of time and payroll records for  
11 the Aggrieved Employees reflecting time punches at the start of employees’ shifts, and at the end  
12 of the shift, and meal period punches, applicable pay rates, job titles, policies on clocking in and  
13 out using the mobile apps, time card approval agreements re MP RB accuracy of time card  
14 stamps, policies regarding attesting to time entered, first and second meal break waivers, timecard  
15 signoff policies, request and approval audit trails and timekeeping operations. Defendant also  
16 provided Plaintiff’s personnel file, records regarding documents identifying the non-exempt  
17 positions and information regarding the number of employees holding these positions during the  
18 relevant time period. Defendant also provided substantial information concerning the total  
19 number of potential size of the PAGA group, the total number of pay periods at issue, and other  
20 summary data related to the alleged class. The Parties have conducted themselves in informed,  
21 good faith arms-length negotiations after conducting discovery and exchanging extensive  
22 evidence and information about the claims and defenses of this lawsuit and engaging in pre-  
23 mediation discussions, telephone conferences, and correspondence all aimed at settling their  
24 dispute. ( Hawkins Decl., ¶¶ 10-12.).

25           In preparation for the mediation, Plaintiff reviewed the entire discovery produced. The  
26 information had to be extrapolated and processed to figure out the amount of compensation  
27 Plaintiff contends are due to the Aggrieved Employees. Defendant also provided substantial  
28 information concerning the total number of potential Aggrieved Employees, the total number of

1 pay periods at issue, and other summary data related to the alleged class. The evidence and  
2 information gathered and reviewed by Plaintiff's counsel provided a factual framework for a  
3 comprehensible and reliable damage model pertaining to all Aggrieved Employees. The  
4 mediation and subsequent settlement discussions included discussion and examination of the  
5 Aggrieved Employees claims and the Parties' respective positions on the legal and factual issues  
6 raised in the Complaints. (Id.).

7 The settlement is presumptively fair because: (1) it is the product of non-collusive, arm's-  
8 length negotiations that were overseen by an independent mediator knowledgeable in complex  
9 labor and employment matters; (2) it was negotiated by counsel with significant experience in  
10 similar complex labor and employment matters; and (3) it occurred after counsel for the Parties  
11 engaged in significant investigation to evaluate the strength and potential value of the PAGA  
12 claim, and the risks of litigating these claims through trial. ( Hawkins Decl., at ¶ 13.).

13 During mediation, the Parties discussed all aspects of the case, including the risks and  
14 delays of further litigation, the risks to the Parties of proceeding with trial, the law relating to  
15 representative PAGA actions, the functions performed by the purported Aggrieved Employees in  
16 the various roles, the various alleged labor code violations, meal and rest period violations,  
17 regular rate calculations, unreimbursed expenses, wage statement violations, the evidence  
18 produced and analyzed, and the possibility of bifurcation of discovery and/or trial and appeals,  
19 among other things. ( Hawkins Decl., at ¶¶ 4, 9-13.).

20 During all settlement discussions, the Parties conducted their negotiations with the  
21 mediator and subsequent negotiations at arm's length in an adversarial position. Based on all of  
22 the information available to the Parties and with the assistance of the experienced mediator, and  
23 experienced counsel, the Parties agree that this matter is well-suited for settlement given the  
24 strengths and weaknesses of the PAGA claim. ( Hawkins Decl., at ¶ 15.). This Aggrieved  
25 Employees recovery compares favorably to the estimated amount of PAGA penalties given the  
26 evidence provided and the risks of liability and then penalty awards at trial.

27 With the assistance of an expert, Plaintiff calculated that the maximum amount of  
28 statutory PAGA civil penalties was potentially \$3,348,000 based on 16,743 pay periods,

1 consisting of the maximum \$200 per pay period for one of the alleged violations per pay period.  
2 Importantly, these calculations were performed at the \$200 statutory rate for the penalties, as it is  
3 likely that any penalties awarded would be at a much lower rate given the apparent compliant  
4 policies in place. As discussed further herein, California Labor Code Section 2699(e) (1) permits  
5 a Court to award a lesser amount than the maximum civil penalty if based on the facts and  
6 circumstances to do otherwise would result in an award that is "unjust, arbitrary and oppressive or  
7 confiscatory." ( Hawkins Decl., ¶ 14).

8 Defendants dispute that the penalties assessed by Plaintiff and his expert would have been  
9 awarded. Further, it is Defendants' contention that PAGA penalties cannot be stacked, and that at  
10 most just one PAGA penalty can be awarded to an aggrieved employee in any one pay period.  
11 See Labor Code section 2699 (f)(2) (authorizing awardable PAGA penalties to be measure by  
12 "each "each aggrieved employee per pay period"); *Smith v. Lux Retail North America, Inc.*, 2013  
13 WL 2932243, at \*1, \*4 (N.D. Cal. 2013) (rejecting a pleading that sought the "stacking of  
14 penalties"; "[f]or the single mistake of failing to include commissions in the overtime base,  
15 plaintiff has asserted five (count them, five) separate labor code violations that could lead to  
16 statutory penalties;" "is it plausible that we would really pile one penalty on another for a single  
17 substantive wrong?"; noting that "no actual holding in any judicial decision has ever blessed such  
18 stacking"). As such, and for this initial reason, Defendants contend that the maximum potential  
19 recovery in this action is significantly lower than as stated by Plaintiff. (Hawkins Decl., ¶¶ 16-  
20 26).

21 Further, Defendants argue that Plaintiff's calculation of penalties as applicable to any  
22 employee and for any pay period, is inflated for an additional reason. Defendants argue that  
23 even were liability established, one does not reach the second-tier penalty for that violation  
24 unless and until the employer is first cited for the violation, and that Defendants have never been  
25 cited. See *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*,  
26 2009 WL 2448430 \*1, \*9 (S.D. Cal. 2009) ("For the purposes of subsequent violation penalties,  
27 the issue is not whether [defendant] willfully violated the Labor Code, but rather whether a  
28 court or commissioner had notified it of any violation."); *Amaral v. Cintas Corp. No. 2*, 163

1 Cal. App. 4th 1157, 1209 (2008) (“[u]ntil the employer has been notified that it is violating a  
2 Labor Code provision (whether or not the Commissioner or court chooses to impose penalties),  
3 the employer cannot be presumed to be aware that its continuing underpayment of employees is  
4 a ‘violation’ subject to penalties” at a second tier); *Robinson v. Open Top Sightseeing San*  
5 *Francisco, LLC*, No. 14-CV-00852-PJH, 2018 WL 895572, at \*20 (N.D. Cal. Feb. 14, 2018)  
6 (applying “initial” penalty to each violation of § 226 and § 2699(f)(2) because there was no  
7 evidence showing defendant was previously notified its practice violated § 226); *Willis v. Xerox*  
8 *Bus. Servs., LLC*, 2013 WL 605383, at \*1, \*6 (E.D. Cal. 2013) (“for a plaintiff to recover for a  
9 ‘subsequent violation,’ an employer must have notice that it has violated the Labor Code”). As  
10 such, Defendants contend that Plaintiff’s calculation are inflated not only because the “stack”  
11 penalties for a single person during a single pay period, but because the penalties Plaintiff would  
12 award in each instances are at an inapplicable (doubled) rate. (Id.)

13 Defendants further argue that Plaintiff would still face significant practical problems in  
14 aggregating any material exposure, as each violation would need to be proven as to each person  
15 and for each period for which recovery is sought.<sup>1</sup> Defendants argue that it is unlikely that any

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16 <sup>1</sup> Defendants argue that claims of this sort tend to require individualized proof sets, and  
17 are not the subject of “common proof.” *See e.g., Mateo v. V.F. Corp.* 2009 WL 3561539, at \*6  
18 (N.D. Cal. Oct. 27, 2009) (denying collective treatment of off-the-clock (OTC) and overtime  
19 claims as involving individualized proof); *Lawrence v. City of Philadelphia* (E.D. Pa. 2004) WL  
20 945139 at \*1-3 (rejecting OTC claims for collective treatment; “each of the plaintiffs potentially  
21 may claim that on any given day he or she arrived early or departed outside their regularly  
22 scheduled hours and were not compensated for such. The circumstances of those individual  
23 claims potentially vary too widely to conclude that in regard to their OTC claim, the plaintiffs  
24 are similarly situated. The questions of fact will likely differ for each Plaintiff and will be unduly  
25 burdensome to both Defendants and to the Court in managing as a collective action.”); *Basco v.*  
26 *Wal-Mart Stores, Inc.* (E.D. La. 2002) 216 F.Supp.2d 592, 603 (individual issues arise from  
27 “myriad of possibilities that could be offered to explain why any one of the plaintiffs worked  
28 OTC” and predominate; rejecting collective treatment of such claims); *Chavez v. Zaldivar*, 2012  
U.S. Dist. LEXIS 40984 \*1, at \*23-24 (N.D. Cal. 2012) (“To determine whether staffing levels  
resulted in missed meal periods, the Court would need to engage in individualized questions  
concerning the staffing requirements at each of [defendants’] locations. Additionally, these  
staffing requirements would vary from day to day.”); *Washington v. Joe’s Crab Shack*, 271  
F.R.D. 629, 641 (N.D. Cal. 2010) (“an individualized inquiry will be required to determine  
whether any single employee failed to take a meal break because he/she was too busy and also to  
determine whether a particular employee signed a waiver based on a decision not to take meal  
breaks. For this reason alone, common issues do not predominate with regard to the meal break  
claim”); *Ruiz v. Affinity Logistics Corp.*, 2009 WL 648973, \*7-8 (S.D. Cal. 2009) (holding that  
inquiry into the reasonableness and necessity of the expenses required a “case-by-case analysis  
in which common questions did not predominate over individual questions.”). *See also*

1 significant number of current and former employees would travel to the venue of a trial, stay at a  
2 hotel, prepare for and deliver testimony, all in exchange for – at most – 25% of \$50 or \$100 (i.e.  
3 \$12.50 or \$25) for each pay period in which there was a violation in wage statement penalties”).  
4 For purposes of section 226, “a good faith dispute presents when there is (1) uncertainty in the  
5 law; (2) representations by an authority that compliance was not required; or (3) an employer’s  
6 good faith mistaken belief grounded in a good faith dispute.” *Magadia v. Wal-Mart Assocs., Inc.*,  
7 384 F. Supp. 3d 1058 (N.D. Cal. 2019). “Mere recklessness” is not a basis for liability. *Pedroza*,  
8 2012 WL 9506073, \*5. (Id.).

9 Defendants also note that PAGA grants the Court discretion to lower any PAGA penalty  
10 otherwise due. See Labor Code section 2699 (e)(2). Defendants also argue that the Court could  
11 reduce any penalty potentially due where, as Defendants contend, any technical violation of law  
12 would have been inadvertent and in good faith, particularly where the law is undefined and  
13 capable of differing interpretations. Section 226, for example, is not violated where the employer  
14 acted in “good faith.” See *Pedroza v. PetSmart, Inc.*, 2012 WL 9506073 (C.D. Cal. June 14,  
15 2012) (“The good faith defense to the willfulness element of these sections [226, 203] is clearly  
16 established under California law); *Woods v. Vector Mktg. Corp.*, 2015 WL 2453202, at \*3 (N.D.  
17 Cal. May 22, 2015) (“The ‘good faith dispute’ rule has been extended by courts to apply to  
18 California Labor Code Section 226. (Id.)

19 A crucial factor in evaluating the value of a PAGA-only case is that all PAGA awards are  
20 discretionary and can be reduced by the Court.<sup>2</sup> California Labor Code Section 2699(e)(1)

21  
22 *Nikmanesh v. Wal-Mart Stores, Inc.*, No. 8:15-cv-00202-AG-JCG, ECF Dkt. 200, slip op. at 4-5  
23 (C.D. Cal. Mar. 22, 2017) (dismissing uncertified PAGA claim “as unmanageable,” where court  
24 previously “pointed to other examples of individualized variables when it denied class  
25 certification for failure of common questions to ‘predominate over questions affecting only  
individual class members”); *Salazar v. McDonald’s Corp.*, No. 14-CV-02096-RS, 2017 WL  
88999, at \*7-9 (N.D. Cal. Jan. 5, 2017) (striking representative PAGA claims as unmanageable  
where underlying claims would require individualized determinations).

26 <sup>2</sup> Under PAGA, courts have considerable discretion to reduce the penalty award. In *Thurman v.*  
27 *Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1135-1136 (2012), the court found  
28 no abuse of discretion when the trial court reduced the penalty by 30 percent based on the facts of  
the case, ruling that “[t]o do otherwise under the particular facts and circumstances of this case  
would be unjust, arbitrary, oppressive, and confiscatory.” Some trial courts have actually awarded

1 permits a Court to award a lesser amount than the maximum civil penalty if, based on the facts  
2 and circumstances, to do otherwise would result in an award that is “unjust, arbitrary and  
3 oppressive or confiscatory.” For example, in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504  
4 (2018), the Court of Appeal affirmed a judgment after trial that only provided for a PAGA  
5 penalty of \$5 per pay period. Given this precedent, there is a risk at trial that any PAGA penalties  
6 awarded could be significantly less than Plaintiff’s calculation even where Plaintiff prevailed on  
7 the PAGA claim. If the amount of \$5 per pay period from *Carrington v. Starbucks* is used, the  
8 potential recovery of civil penalties would be only \$229,000, which is significantly less than this  
9 settlement provides. (Id.)

10 Under PAGA, Courts have considerable discretion to reduce the penalty award. In  
11 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced  
12 PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found  
13 maximum penalties “unjust” because the employees had suffered no injuries. Some trial courts  
14 have actually awarded no civil penalties, even when Labor Code violations are established. See  
15 *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, \*5-7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no  
16 PAGA penalties were awarded by the Los Angeles County Superior Court) (unpublished  
17 decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, \*40-43 (E.D.  
18 Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

19 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each  
20 of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S.  
21 Dist. LEXIS 13126, \*10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff  
22 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of  
23 the Labor Code by the defendant.”). Here, Plaintiff would need to prove that each PAGA Group  
24 Member suffered all violations for each pay period the employee worked.

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25 no civil penalties, even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016  
26 Cal. App. Unpub. 1489, \*5-7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA penalties were  
27 awarded by the Los Angeles County Superior Court) (unpublished decision); *In re Taco Bell*  
28 *Wage & Hour Actions*, No. 1:07-cv-01314-SAB, 2016 U.S. Dist. LEXIS 48557, \*40-43 (E.D.  
Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

1 The claim in this PAGA action is based upon the wage and hour practices of Defendants.  
2 The claims in this action are regarding meal periods and rest periods and regular rate issues as to o  
3 overtime. Plaintiff alleges that Defendants' practices do not provide proper payment for missed  
4 meal periods, rest periods and overtime for off the clock work. Defendants contend that it had  
5 compliant meal and rest period policies in place and such policies also prohibited employees  
6 from working off the clock and further provided evidence that over 900 meal period premiums  
7 had been paid to the non-exempt employees. (Id.)

8 Defendants contend that Plaintiff and the Aggrieved Employees were properly  
9 compensated, and that they did not violate the Labor Code as to any of them. Defendants asserted  
10 additional defenses to the PAGA claim as discussed above. These defenses present a risk to the  
11 PAGA claim and the potential that some or all of the PAGA penalties sought may not be  
12 awarded.

13 Given Defendants' potential defenses to the violations at issue, the risks and costs of  
14 continued litigation, Plaintiff and his attorneys believe that the PAGA Settlement is fair and  
15 reasonable. (Hawkins Decl., ¶ 9.) Plaintiff's Counsel have significant experience litigating wage  
16 and hour claims including claims for PAGA penalties, and the PAGA Group Recovery here is  
17 similar to or greater than similar settlements that courts have approved. (Hawkins Decl., at ¶ 29.)  
18 The PAGA Member recovery, along with the other terms of the proposed settlement, were  
19 negotiated by experienced counsel at arm's length with the assistance of a private mediator, Steve  
20 Mehta. (Hawkins Decl., at ¶ 4).

21 As set forth in the accompanying proof of service, the LWDA has been provided notice of  
22 this motion and the PAGA settlement. The decision of LWDA to accept the PAGA settlement  
23 and not oppose the motion should be given considerable weight. This is not a situation where the  
24 Court needs to be concerned about the rights of absent employees as in a class settlement, as this  
25 PAGA-only settlement does not release the individual claims of absent employees, and the  
26 LWDA is a sophisticated government entity that is more than able to look out for its own rights.

27 **B. The Remaining Settlement Terms Are Fair and Reasonable**

28 Although PAGA requires that a court approve the proposed PAGA settlement, Labor

1 Code § 2699(1) does not require that a court approve any other elements of the proposed  
2 settlement. Because there are no class allegations, the approval provisions applicable to class  
3 settlements under Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs to  
4 approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as  
5 explained herein, the settlement terms for attorneys' fees and costs are reasonable.

6 **VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

7 PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's  
8 position is that the payment of attorneys' fees and costs in this settlement is a matter of contract  
9 for a contingent representation. Nevertheless, should this Court review the requested attorneys'  
10 fees, it is clear that the requested fees and costs are reasonable.

11 First, the requested fees are justified by the result achieved. Plaintiff's Counsel  
12 negotiated a recovery of \$200,000.00 and this result justifies the requested fees equal to one-  
13 third of this recovery (\$66,666.67). This percentage is within the standard contingent recovery  
14 percentage of one-third, and this percentage is what was expressly approved by the Supreme  
15 Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). Second, the requested fees  
16 are justified by the work performed. ( Hawkins Decl., ¶ 30).

17 A review of our firm's detailed billing system reveals that to date, our firm as Counsel,  
18 on behalf of Plaintiff and the Settlement Aggrieved Employees, invested hundreds of hours  
19 litigating this matter through the date of this declaration and have incurred fees in excess of the  
20 requested fees. All of the work and tasks performed by Counsel were reasonable and necessary  
21 to the prosecution of this case. The rates charged by my firm are in line with the prevailing rates  
22 of attorneys in the local legal community for similar work and, if this were a commercial matter,  
23 these are the charges that would be made and presented to the client. These hourly rates have  
24 been approved by Court's throughout California, including the Courts in the Superior Court of  
25 California. ( Hawkins Decl., ¶ 30 ).

26 Generally, the Ninth Circuit and California Courts award multipliers between 2 to 4  
27 times the lodestar to reward counsel for accepting the contingent risks of the litigation or  
28 obtaining good results. *See, e.g., Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award with

multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at \*11 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at \*6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a multiplier of 2.76 as falling within the "majority" range for risk multipliers).

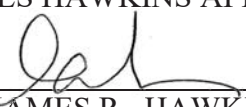
Finally the award of litigation expenses is based upon the actual expenses incurred by Plaintiff and Plaintiff's Counsel, and were all reasonably necessary to the litigation, and are detailed in **Exhibit #2** attached hereto. Under the Agreement, Plaintiff's Counsel will be recovering litigation expenses in the total amount of \$12,220.51. (Hawkins Decl. ¶ 31).

## VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA settlement and the PAGA Member recovery as set forth in the Agreement and enter the proposed order submitted herewith.

Dated: March 30, 2022

JAMES HAWKINS APLC

By: 

JAMES R. HAWKINS, ESQ.

JAMES HAWKINS, ESQ.

MICHAEL CALVO, ESQ.

LAUREN FALK, ESQ.

AVA ISSARY, ESQ.

Attorneys for Plaintiff GABRIEL

DELGADO, individually and on behalf of the  
general public as Private Attorney General

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On March 30, 2022, I served on the interested parties in this action the following document(s) entitled:

- [XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from the email address Nicole@jameshawkinsaplc.com to the persons at the e-mail addresses listed in the Service List below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

See Attached Service List

Executed on March 30, 2022, at Irvine, California

## PROOF OF SERVICE

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13 Attn: PAGA Administrator  
14 1515 Clay Street, Suite. 801  
15 Oakland, CA 94612  
16 <http://www.dir.ca.gov/Private-Attorneys-General-Act>  
17 (Via LWDA Website)