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on behalf of all other similarly aggrieved employees

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

Steven Yetter, on behalf of himself and all  
other similarly aggrieved employees,

Plaintiff,

vs.

Select Comfort Retail Corp., a Minnesota  
corporation; and Does 1-25, inclusive,

Defendants.

Case No.: SCRDCVCV21-0197881-000

(Assigned to the Hon. Stephen H. Baker, Dept. 3)

**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: April 11, 2022

Time: 8:30 a.m.

Dept.: 3

Complaint Filed: July 29, 2021

Trial Date: June 28, 2022

**FILED**

**MAR - 1 2022**

CLERK OF THE SUPERIOR COURT  
BY: S. MURILLO, DEPUTY CLERK

**BY FAX**

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

2 **PLEASE TAKE NOTICE** that on April 11, 2022, at 8:30 a.m., or as soon thereafter as  
3 the matter may be heard, before the Honorable Stephen H. Baker, judge presiding, in Department  
4 3 of the above referenced Court located at 1500 Court Street, Redding, California 96001,  
5 Plaintiff Steven Yetter ("Plaintiff") will seek an Order approving the concurrently filed Private  
6 Attorneys General Act Settlement Agreement ("Settlement Agreement" or "Settlement"),  
7 pursuant to the procedures set forth in Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points  
9 and authorities, the accompanying declarations of Max W. Gavron and Plaintiff Steven Yetter,  
10 upon the oral arguments of counsel (should there be any), and on the complete records and file  
11 herein.

12  
13 DATED: February 28, 2022

DIVERSITY LAW GROUP, P.C.

14  
15 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff Steven Yetter

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1     **I.     INTRODUCTION**

2             Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et*  
3 *seq.*, Plaintiff Steven Yetter (“Plaintiff”) hereby moves the Court for an order approving the non-  
4 reversionary PAGA settlement as set forth in the concurrently filed Private Attorneys General  
5 Act Settlement Agreement (the “Settlement Agreement” or “Settlement”).<sup>1</sup> The operative  
6 Complaint in this case alleges that Defendant Select Comfort Retail Corp. (“Defendant”)  
7 (Defendant and Plaintiff together, the “Parties”) violated the PAGA arising from Defendant’s  
8 alleged failure to pay premium compensation at the regular rate of pay in lieu of off-duty meal  
9 and rest periods. These claims derive from Plaintiff’s allegation that he earned non-discretionary  
10 remuneration such as incentive pay and commissions, and that such wages were not calculated  
11 into the regular rate of pay for the purposes of paying meal and rest period premium pay.

12             As demonstrated below and in the accompanying declaration of Max W. Gavron, the  
13 proposed settlement warrants the Court’s approval. This settlement was reached after extensive  
14 investigation and informal discovery, including Defendant’s production of relevant policies, and  
15 a full-day mediation with respected mediator Michael J. Loeb, Esq.

16             Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will pay  
17 the amount of \$112,500.00 (the “Gross Settlement Fund”). This amount encompasses a  
18 settlement of PAGA claims, Service Award to Plaintiff in the amount of \$10,000.00, attorneys’  
19 fees to Plaintiff’s Counsel in the amount of \$37,500.00, Plaintiff’s Counsel’s costs in the amount  
20 of \$10,024.95 and settlement administration costs in the amount of \$4,000.00. The remaining  
21 amount, or PAGA Payment, totals \$50,975.05 and includes \$38,231.29 in civil penalties to the  
22 Labor and Workforce Development Agency (“LWDA”). The proposed release for Aggrieved  
23 Employees is narrowly tailored to release only claims for civil penalties under the PAGA  
24 predicated on Labor Code §§ 201-203, 226.7, 512, and 2698, *et seq.*

25             The proposed settlement constitutes an adequate, fair, and reasonable settlement on  
26  
27

---

28     <sup>1</sup> Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in  
the Settlement Agreement.

1 behalf of the LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

## 2 **II. PROCEDURAL HISTORY**

### 3 **A. Summary of the Litigation and Settlement**

#### 4 **1. The History of the Key Pleadings**

5 On or about May 25, 2021, Plaintiff submitted written notice under Labor Code § 2699.3  
6 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA Notice, Plaintiff  
7 alleged that Defendant failed to pay meal and rest period premium compensation at the regular  
8 rate of pay and pay all wages owed upon separation of employment, in violation of California  
9 Labor Code §§ 201-203, 226.7, and 512. (Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2.)

10 On July 29, 2021, Plaintiff filed a representative action complaint against Defendant in  
11 the Superior Court of California, County of Shasta, alleging a cause of action for violation of  
12 Labor Code § 2698, *et seq.* (the “Action”). (Gavron Decl. ¶ 3.) The Complaint asserted claims  
13 for penalties under PAGA for Defendant’s failure to pay meal and rest period premium  
14 compensation at the regular rate of pay and pay all wages owed upon separation of employment.  
15 (*Id.* ¶ 3); *see also* Declaration of Steven Yetter.

#### 16 **2. The Parties Agree to Mediation and This Settlement**

17 After Defendant appeared, the Parties met and conferred regarding the possibility of  
18 conducting an early mediation that would include the exchange of information to allow the  
19 Parties to evaluate Plaintiff’s theory of liability and Defendant’s potential exposure. (*Id.* ¶ 4.)  
20 After further discussion regarding mediator selection, the Parties agreed to engage the services of  
21 experienced wage and hour neutral Michael J. Loeb, Esq., for a private mediation on November  
22 5, 2021. (*Id.* ¶ 5.)

23 In connection with the Parties’ mediation efforts, Defendant provided Plaintiff with  
24 employee time records, wage statements (in excess of 1,500 exemplars) issued during the  
25 applicable period, and payroll data, including the number of Aggrieved Employees and the  
26 number of pay periods worked by the Aggrieved Employees. (*Id.* ¶ 6.) The data allowed  
27 Plaintiff’s counsel to perform a comprehensive damage analysis in preparation for the mediation.  
28 (*Id.*)

1 During the mediation, the Parties spoke at length about the strengths and weaknesses of  
2 each side's claims and defenses, and the scope of Defendant's potential liability. After a full day  
3 of arm's-length negotiations, the Parties agreed to a settlement of the Action and executed a  
4 memorandum of understanding. (*Id.*) The Parties thereafter worked to memorialize and finalize  
5 the terms of the settlement in a long-form settlement agreement. (*Id.* ¶ 7.)

### 6 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

7 The material terms of the settlement are described below and set forth in detail in the  
8 concurrently filed Settlement Agreement.

#### 9 **A. The Aggrieved Employees**

10 The aggrieved employees affected by this Settlement are defined as "all individuals who  
11 are or were employed as non-exempt employees by Select Comfort within the State of California  
12 who were paid a meal or rest period premium at any time from July 19, 2020 through the date the  
13 Court approves the Settlement ("PAGA Representative Group"). (Settlement Agreement ¶ 1.1.)  
14 The PAGA Period in this matter runs from July 19, 2020, through the date the Court approves  
15 the Settlement, unless Select Comfort exercises its option to limit the PAGA Period so that the  
16 total Pay Periods does not exceed 4,000. (*Id.*) Based upon Defendant's records, there were  
17 approximately 330 individuals in the PAGA Representative Group as of the time of mediation  
18 and 4,000 pay periods during the PAGA Period. (*Id.* ¶ 6.1.)

#### 19 **B. Gross Settlement Fund and Allocation**

20 The Settlement Agreement requires Defendant to pay the gross amount of One Hundred  
21 Twelve Thousand Five Hundred Dollars (\$112,500.00) (the "Gross Settlement Fund"). (*Id.* ¶  
22 6.1.) This is an allocation of the civil penalties for the release of PAGA claims by the PAGA  
23 Representative Group. (*Id.*) The balance of the Gross Settlement Fund remaining after deduction  
24 of the approved Service Award to the Plaintiff for the general release of his individual claims,  
25 attorneys' fees and costs, and settlement administration fees (the "PAGA Payment"), will be  
26 available for distribution to the LWDA and PAGA Representative Group. (*Id.* ¶¶ 1.7, 1.8, 6.3.)  
27 Seventy-five percent of the PAGA Payment, or approximately \$38,231.29 will be paid to the  
28 LWDA for PAGA penalties. (*Id.* ¶ 6.3; Gavron Decl. ¶ 11.) The remaining twenty-five percent,

1 or approximately \$12,743.76, will be distributed to the PAGA Representative Group (“Net  
2 Settlement Proceeds”). (Settlement Agreement ¶ 1.7.)

3 The Net Settlement Proceeds distributed to the PAGA Representative Group will be  
4 distributed on a pro rata basis, based on the number of pay periods each individual worked  
5 during the PAGA Period. (*Id.* ¶ 6.3.)

6 Based on the number of pay periods encompassed by the Settlement (4,000) and the gross  
7 settlement amount (\$112,500.00), the average value per pay period is approximately \$28.13  
8 (\$112,500 / 4,000 pay periods). After deduction of the amounts described above, the  
9 \$12,743.76, will be distributed to the PAGA Representative Group. The amount any particular  
10 PAGA Representative Group member will be entitled to recover will vary depending on the  
11 number of pay periods he or she worked. (*Id.*) This is fair, as it directly allocates greater penalties  
12 to the individuals who have allegedly suffered greater harm. (*Id.*)

13 As part of the Settlement Agreement, Defendant does not object to Plaintiff’s Counsel’s  
14 request for attorneys’ fees of approximately thirty-three and one-third percent of the Gross  
15 Settlement Fund, *i.e.*, Thirty-Seven Thousand Five Hundred Dollars (\$37,500.00), plus  
16 reimbursement of documented litigation costs, subject to the Court approving this Settlement.  
17 (Settlement Agreement ¶ 6.6.) Defendant also does not object to Plaintiff’s request for a  
18 Service Award of \$10,000.00, in recognition of Plaintiff’s efforts in obtaining the benefits of  
19 the Settlement on behalf of other purported aggrieved employees and for Plaintiff’s general  
20 release of his claims against Defendant. (*Id.* ¶ 5.2.)

21 Finally, the Settlement Agreement provides for the payment of the fees and expenses  
22 reasonably incurred by the Settlement Administrator. (*Id.* ¶ 1.14.) The Parties have agreed to  
23 allocate the amount of \$4,000 for the settlement administration costs based on the estimate  
24 provided by Phoenix Settlement Administrators. (Gavron Decl. ¶ 16.) Further, the Parties have  
25 agreed to utilize Phoenix Settlement Administrators to administer the Settlement. (*Id.* ¶ 1.15.)

### 26 **C. Scope of the Released Claims**

27 In exchange for the payments described above, the PAGA Representative Group will  
28 release the Released Parties from:

claims [,] debts, liabilities, demands, actions, or causes of action for civil penalties that were alleged or which could have been alleged based on the factual allegations in the operative complaint and/or PAGA letter in the Action, including all claims for civil penalties based upon or arising out of Select Comfort’s alleged failure to pay meal and rest period premium pay at the regular rate of pay; failure to pay all wages owed upon separation of employment; waiting time penalties; and claims arising under or based upon the alleged violations of California Labor Code Sections 201-203, 226.7, 512 and 2698 *et seq.* and applicable California Industrial Welfare Commission (“IWC”) Wage Orders, including but not limited to IWC Wage Order No. 7 during the PAGA Period.

(Settlement Agreement ¶ 5.1.) This release is appropriately tailored as it only releases claims arising out of the facts alleged or could have been alleged in this lawsuit and PAGA Notice and does not release any other claims. (Gavron Decl. ¶ 17.) Further, none of the PAGA Representative Group members are bound by any general release under Code of Civil Procedure § 1542 as part of the Settlement. (*Id.*)

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

##### **A. PAGA Overview**

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

Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through

1 a civil action brought by an aggrieved employee on behalf of himself or herself and other current  
2 or former employees pursuant to the procedures specified in Section 2699.3. “ An “aggrieved  
3 employee” means “any person who was employed by the alleged violator and against whom one  
4 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an  
5 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer  
6 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including  
7 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA  
8 decides not to investigate the allegations or issue a citation to the employer, the proposed  
9 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §  
10 2699.3(a)(2).

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

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

21 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement  
22 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the  
23 class of the terms and conditions of the settlement, and the scheduling of a formal fairness  
24 hearing, are worthwhile. See 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §  
25 11.25 *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a  
26 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms  
27 and must direct the preparation of notice of the certification, proposed settlement, and date of the  
28 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.

2004). To make the preliminary fairness determination, courts may consider several relevant factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel...” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

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

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

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

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

Here, the Settlement accomplishes PAGA’s primary objective to enforce the Labor Code. *See O’Connor v. Uber Techs, Inc.*, 2016 WL 4398271, at \*18 (N.D. Cal. August 18, 2016) (noting that deterring noncompliance with the Labor Code is one of PAGA’s objectives).

The Settlement is also consistent with the State’s public policy favoring resolution of

1 disputes. “California law favors the settlement of disputes as our high court clarified in *Neary*[].  
2 Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The  
3 parties are best positioned to understand their interests and resolve a dispute in a mutually  
4 beneficial manner without court intervention into the settlement.” *Consumer Advocacy Group,*  
5 *Inc. v. Kintetsu*, 141 Cal.App.4th 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3  
6 Cal.4th 273, 277- 278 (1992)).

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

8 If approved, the Settlement would release the Released Parties from claims predicated on  
9 the violation of Labor Code §§ 201-203, 226.7, 512, and 2698, *et seq.*, during the PAGA Period,  
10 and nothing more. The Settlement would not impact any other aggrieved employees’ ability to  
11 pursue PAGA claims predicated on other Labor Code violations. Therefore, the limited scope of  
12 the release also supports approval. Because an aggrieved employee’s PAGA action is a substitute  
13 for an action brought by the government, “judgment in [a PAGA] action is binding not only on  
14 the named employee plaintiff but also on government agencies and any aggrieved employee not  
15 a party to the proceeding.” *Arias*, 46 Cal.4th at 986. However, “the nonparty employees, because  
16 they were not given notice of the action or afforded any opportunity to be heard, would not be  
17 bound by the judgment as to remedies other than civil penalties.” *Id.* at 987; *see also*, Lab. Code  
18 § 2699(g)(l) (non-party aggrieved employees retain all rights “to pursue or recover other  
19 remedies available under state or federal law, either separately or concurrently with an action  
20 taken under this part”).

21 Accordingly, the aggrieved employees will be subject to only a limited release strictly  
22 confined to the civil penalties under the PAGA, which are premised on the violation of Labor  
23 Code §§ 201-203, 226.7, 512, and 2698, *et seq.* (Settlement Agreement ¶ 5.1.) The release is  
24 also appropriately limited to the claims alleged or which could have been alleged based on the  
25 factual allegations in the operative complaint and/to PAGA letter. (*Id.*) The release is therefore  
26 appropriately tailored.

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

1 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in  
2 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to the  
3 still-developing law under PAGA. (Gavron Decl. ¶ 24.)

4 **1. Plaintiff's Claims are Contested**

5 Plaintiff asserts that his representative PAGA claim is based on the allegation that  
6 Defendant failed to pay meal and rest period premium compensation at the correct, regular rate  
7 of pay and pay all wages owed upon separation of employment. (Gavron Decl. ¶ 2.) Defendant  
8 has denied violation of any applicable laws and liability for any claims asserted in the Action.  
9 (*Id.*) Defendant also argued that even assuming *arguendo* that the Court found its employment  
10 practices violative of the Labor Code, the Court has discretion under PAGA to reduce the  
11 maximum allowable PAGA penalties at its discretion. (*Id.* ¶ 19.) Here, because the California  
12 Supreme Court's ruling in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021) came  
13 down very recently, Defendant would have argued that the amount of PAGA penalties to be  
14 imposed should be extremely limited. (*Id.*)

15 Even if Plaintiff prevailed at trial, Defendant could have appealed, which would have  
16 continued litigation in this Action for several years thus depriving the State and aggrieved  
17 employees of any recovery for the foreseeable future.

18 **2. Recovery of Penalties After Trial**

19 Defendant has represented that there are approximately 405 individuals who comprise the  
20 PAGA Representative Group and 4,000 pay periods at issue during the PAGA Period. Therefore,  
21 pursuant to the PAGA, Plaintiff has calculated total approximate exposure at \$400,000.00 (\$100  
22 x 4,000 pay periods), pursuant to Labor Code § 2699(f)(2). (Gavron Decl. ¶ 18.) While the  
23 PAGA does provide the potential for a heightened penalty for subsequent violations, courts are  
24 often hesitant to award a heightened penalty where there is no prior citation by the Labor  
25 Commissioner. *See Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no  
26 heightened penalty where defendant was not notified by Labor Commissioner or any court that it  
27 was subject to the California Labor Code).

28 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential

1 recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the  
2 full amount of PAGA penalties where “if, based on the facts and circumstances of the particular  
3 case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or  
4 confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*  
5 *Corp.*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the  
6 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying  
7 with the law. 30 Cal.App.5th 504, 517 (2018). Upon review, the Court of Appeal found such  
8 reduction to be proper. *Id.* at 539; *see O’Connor*, 2016 WL 4398271, at \*17 (noting that even if  
9 PAGA penalties amounted to \$1 billion, such award “could well be reduced, as a court may  
10 reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and  
11 oppressive, or confiscatory”).

12 Courts routinely award far less than the statutory maximum amount of civil penalties,  
13 even where an underlying violation of the Labor Code is found. Indeed, just very recently, in the  
14 matter of *Magadia v. Wal-Mart Assocs. et al.*, while the trial court imposed substantial PAGA  
15 penalties upon the defendant, such amount still represented reductions of 67% and 80% of the  
16 potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at \*87-\*100. Moreover, this was  
17 only after the plaintiff in *Magadia* had prevailed after trial. Thereafter, the Ninth Circuit reversed  
18 the district court and vacated its award, which resulted in no PAGA recovery at all. *Magadia v.*  
19 *Wal-Mart Associates, Inc.*, 999 F.3d 668, 678 (9th Cir. 2021).

20 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA  
21 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the  
22 contrary, especially considering how recently the California Supreme Court’s ruling in *Ferra*  
23 was issued. Even if there were a finding of liability, Defendant has argued that these violations  
24 were not intentional violations of the law and that the court should reduce any penalties awarded.  
25 (*Id.* ¶ 22.) As such, the Court may be disinclined to award full PAGA penalties. On this basis, the  
26 Court again may find there is reason to significantly reduce the PAGA penalties awarded.

27 The Court’s assessment of the proposed Settlement must take into account that any  
28 penalties awarded may be subject to substantial reduction. When this is considered, in

1 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may  
2 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced value  
3 allows for the distribution of penalties in an amount which accounts for the risk of continued  
4 litigation, and Defendant’s likely arguments that higher penalties would have been confiscatory.  
5 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one  
6 of the primary goals of PAGA.

7         The proposed settlement significantly exceeds PAGA settlements that courts have  
8 approved in other cases, when considered as a percentage of the overall settlement value of the  
9 case. The proposed settlement amounts to 28% (\$112,500 / \$400,000) of the total possible  
10 liability in this matter, which far exceeds other PAGA settlements approved by courts –  
11 including those that provide for less than the one percent allocation to PAGA penalties. *See, e.g.,*  
12 *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, \*9 (N.D. Cal. Apr. 3, 2009) (approving total  
13 PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015  
14 WL 5439000, \*8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of  
15 \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013)  
16 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in  
17 *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as  
18 independent contractors. 2016 WL 3561742, (N.D. Cal. June 23, 2016). The parties’ settled all  
19 Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7%  
20 of the total settlement. *Id.* at \*2. In granting preliminary approval to the proposed settlement in  
21 *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the  
22 maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the  
23 typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at  
24 \*5

25         A PAGA allocation need not represent any particular percentage of the overall settlement  
26 value in order to secure court approval, and courts routinely approve PAGA settlements  
27 representing only a tiny fraction of the overall settlement value. The proposed Gross Settlement  
28 Fund in this case vastly exceeds, both in terms of the total dollar amount and as a percentage of

1 overall settlement value, the typical PAGA settlement.

2 **F. The Attorneys' Fees and Costs are Reasonable**

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

13 The common fund doctrine is predicated on the principle of preventing unjust  
14 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,  
15 he may require the passive beneficiaries to compensate those who created the fund. Both  
16 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal.3d at 35;  
17 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.4th  
18 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has  
19 been applied "consistently in California when an action brought by one party creates a fund in  
20 which other persons are entitled to share." The reasons for applying the common fund doctrine  
21 include: "fairness to the successful litigant, who might otherwise receive no benefit because his  
22 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to  
23 the others who are entitled to share in the fund and who should bear their share of the burden of  
24 its recovery; encouragement of the attorney for the successful litigant who will be more willing  
25 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund  
26 if he is assured that he will be properly and directly compensated should his efforts be  
27 successful." *Id.*

28 Indeed, most recently, the California Supreme Court has also held that the award of

1 attorneys' fees in common fund wage and hour class action settlements should start with the  
2 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal.5th 480, 503 (2016) ("We join the  
3 overwhelming majority of federal and state courts in holding that when class action litigation  
4 establishes a monetary fund for the benefit of the class members, and the trial court in its  
5 equitable powers awards class counsel a fee out of that fund, the court may determine the amount  
6 of a reasonable fee by choosing an appropriate percentage of the fund created.").

7 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3  
8 percent of the fund. *Laffitte*, 1 Cal.5th at 506. And this was based on a lodestar amount that  
9 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is  
10 "extraordinarily high or low [should] the trial court [] consider whether the percentage method  
11 should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at 505.  
12 Here, an award based on the common fund approach of one third, or \$37,500.00, is reasonable  
13 and appropriate. *See id.* Plaintiff's counsel accepted this case on a contingency basis, and  
14 recovery was uncertain. (Gavron Decl. ¶ 23.) Had Plaintiff not prevailed, then counsel would  
15 not have been compensated for their efforts and would be left with significant costs expended.  
16 (*Id.*).

17 Additionally, the Settlement allows Plaintiff's Counsel to seek reimbursement of  
18 litigation costs in an amount not to exceed \$15,000.00. To date, Plaintiff's Counsel have incurred  
19 \$10,024.95 in litigation-related costs. (Gavron Decl. ¶ 33; Ex. B.) The costs were all directly  
20 incurred in the prosecution of this action, including, but not limited to, filing/service fees and  
21 mediation costs. (*Id.*) As such, the requested costs are appropriate. The difference between the  
22 maximum of \$15,000.00 allocated to costs in the Settlement Agreement and the amount of the  
23 costs actually incurred will be distributed to the LWDA and the PAGA Representative Group as  
24 set forth in the Settlement Agreement.

#### 25 **G. The Settlement Administrator's Fees Should be Approved**

26 The Parties have agreed to pay actual costs of administration, which will not exceed  
27 \$4,000.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer  
28 this Settlement. (Settlement Agreement ¶ 1.14.) The Parties believe that the administration fee is

1 reasonable and should be approved.

2 **H. Plaintiff's Service Award Should be Approved**

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

9 Here, Plaintiff seeks \$10,000.00 for the service award, which is intended to compensate  
10 Plaintiff for the time spent on this case, including reviewing pleadings, including his PAGA  
11 letter to the LWDA, the complaint, the settlement agreement, and his declaration, providing  
12 information and documents for this lawsuit and the resulting settlement, any potential for  
13 retaliation by prospective employers by filing a public lawsuit, and for executing a general  
14 release, including for all known and unknown claims under Civil Code § 1542. (Declaration of  
15 Steven Yetter (“Yetter Decl.”) ¶¶ 7-10.) This requested enhancement is consistent with awards  
16 approved in other common fund cases. (*See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.  
17 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit*  
18 *Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000,  
19 and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14  
20 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*  
21 *Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class  
22 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at \*51-  
23 52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class  
24 action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive  
25 award to class representative in ERISA case).)

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

27 Pursuant to California Labor Code § 2699(1), in conjunction with filing this Motion,  
28 Plaintiff uploaded the instant motion, Settlement Agreement, and proposed order to the LWDA's

1 website. (Gavron Decl. ¶ 34.) In addition, Plaintiff will submit to the LWDA a copy of the  
2 Court's judgment and order approving the Settlement Agreement within ten (10) days after entry  
3 of judgment or order. (*Id.*)

4 **V. CONCLUSION**

5 Based on the above, Plaintiff requests that the Court approve the current PAGA  
6 settlement.

7  
8 DATED: February 28, 2022

DIVERSITY LAW GROUP, P.C.

9  
10 By: 

Larry W. Lee

11 Max W. Gavron

12 Attorneys for Plaintiff Steven Yetter  
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