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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER

JAMIN WATSON, individually and on behalf of
all others similarly situated,

Plaintiff,

vs.

GMRI, INC., a Florida corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No. S-CV-0047042

**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: January 12, 2023

Time: 8:30 a.m.

Department: 3

Complaint Filed: July 23, 2021

FAC Filed: August 3, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on January 12, 2023, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Michael Jones, judge presiding, in Department 3 of the
4 above referenced Court located at 10820 Justice Center Dr., Roseville, California 95678, Plaintiff Jamin
5 Watson ("Plaintiff") will seek an Order approving the Stipulation of Private Attorneys General Act
6 Settlement and Release (attached as **Exhibit C** to the concurrently filed Dennis Hyun Declaration),
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 and
9 authorities, the accompanying declarations of Majed Dakak, Dennis S. Hyun, William L. Marder, and
10 Plaintiff Jamin Watson, the records and file herein, and on such other evidence as may be presented at
11 the hearing of the motion.

12
13 DATED: November 9, 2022

POLARIS LAW GROUP
HYUN LEGAL, APC
KESSELMAN BRANTLY STOCKINGER LLP

14
15
16 By: _____


Majed Dakak

17
18 *Attorneys for Plaintiff*
JAMIN WATSON

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“**PAGA**”), Labor Code Section 2698, *et*
4 *seq.*, Plaintiff Jamin Watson (“**Watson**” or “**Plaintiff**”) hereby moves the Court for an order approving
5 the non-reversionary PAGA settlement as set forth in the Stipulation of Private Attorneys General Act
6 Settlement and Release (the “**Settlement Agreement**” or “**Settlement**”) attached as **Exhibit C** to the
7 Dennis Hyun Declaration (“**Hyun Decl.**”).

8 The proposed Second Amended Complaint in this case alleges that Defendant GMRI, Inc.
9 (“**Defendant**” or “**GMRI**”) (Defendant and Plaintiff collectively referred to as the “**Parties**”) violated
10 the Labor Code as a result of Defendant’s alleged failure to provide accurate itemized wage statements
11 pursuant to Labor Code Section 226(a), failure to pay all minimum and overtime wages owed pursuant
12 to Labor Code Sections 201-204, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, and 1197.1 and Industrial
13 & Welfare Commission (“**IWC**”) Wage Order 5-2001(5)(A), and failure to provide meal and rest
14 periods pursuant to Labor Code Sections 226.7 and IWC Wage Order 5-2001(11) and (12).¹
15 Specifically, Plaintiff alleges that he was not provided with off-duty meal and rest periods, paid all
16 applicable minimum and overtime wages and reporting time pay, and provided with accurate itemized
17 wage statements.

18 As demonstrated below and in the accompanying Hyun Decl., the proposed Settlement warrants
19 the Court’s approval. This Settlement was reached after extensive investigation, discovery and
20 litigation, including receiving Defendant’s discovery responses, production of documents, including
21 policy documents, the Parties’ arbitration agreement containing a representative action waiver, and
22 Defendant’s production of the number of allegedly aggrieved employees and pay periods at issue.

23 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will pay the
24 gross amount of \$350,000.00 (the “**Total Settlement Amount**”), which includes a payment of
25 approximately \$148,595.49 in civil penalties to the Labor and Workforce Development Agency
26

27 ¹ The Parties stipulated to the filing of the proposed Second Amended Complaint on November 3,
28 2022. Plaintiff also filed a proposed order permitting Plaintiff to file his proposed Second Amended
Complaint.

1 (“LWDA”) and approximately \$49,531.83 to the allegedly aggrieved employees. The proposed release
2 is narrowly tailored to release *only* claims for civil penalties under PAGA predicated on Labor Code
3 Sections 201-204, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, and 1197.1 and/or the allegations
4 contained in Plaintiff’s PAGA notices and initial and amended complaints.

5 The proposed Settlement constitutes an adequate, fair, and reasonable settlement on behalf of the
6 LWDA and allegedly aggrieved employees, and accomplishes the goals of PAGA.

7 **II. PROCEDURAL HISTORY**

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

9 **1. *Litigation and Action Commencement***

10 On May 25, 2021, Watson provided written notice to the LWDA and Defendant alleging
11 violations of Labor Code §§ 201-204, 226, 226.7, 510, 512, 558, 1174, 1194, 1197, and 1197.1. Hyun
12 Decl. ¶ 10. Watson’s May 25, 2021 Notice advised the LWDA and Defendant that allegedly aggrieved
13 employees were not paid all minimum and overtime wages, and were not provided off-duty meal and
14 rest periods and accurate itemized wage statements. *Id.*

15 On July 23, 2021, Watson filed a putative class and representative action pursuant to the PAGA
16 alleging violations of Labor Code §§ 201-203, 226, 226.7, 510, 512, 1194, 1197, and 1197.1 (the
17 “**Action**”). Hyun Decl. ¶ 11.

18 Upon receipt of Plaintiff’s original complaint, Defendant informed Plaintiff that the parties had
19 entered into an arbitration agreement with a class and representative action waiver. Therefore, on August
20 3, 2021, Watson filed his First Amended Complaint (“FAC”) removing all class claims and allegations
21 and alleging a single cause of action for violation of the PAGA predicated upon violations of Labor
22 Code §§ 201-203, 226, 226.7, 510, 512, 1194, 1197, and 1197.1. Hyun Decl. ¶ 12. Plaintiff declined
23 to dismiss his PAGA representative action because, as of August 2021, PAGA representative action
24 waivers were not enforceable under California law.

25 On September 1, 2021, Watson also served Requests for Production of Documents, Set One, and
26 Special Interrogatories, Set One. Hyun Decl. ¶ 13. Among other things, the discovery called for
27 Defendant to identify its California non-exempt aggrieved employees and the pay periods at issue, as
28 well as Defendant’s policy documents. *Id.* Defendant responded to Watson’s discovery requests. *Id.*

On September 22, 2021, Defendant filed a motion to strike portions of the FAC. Hyun Decl. ¶ 14. On November 18, 2021, this Court issued its Minute Order denying Defendant’s Motion to Strike. *Id.* On December 17, 2021, Defendant filed its Answer to the FAC. *Id.* On February 28, 2022, Defendant filed its Amended Answer to the FAC. *Id.*

2. Settlement

The Parties continued to vigorously litigate this matter. However, the Parties then agreed to engage in arms’ length settlement negotiations in light of the U.S. Supreme Court granting a writ of *certiorari* in *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508 (Cal. Ct. App. Sept. 18, 2020), *cert. granted*, 2021 WL 5911481 (U.S. Dec. 15, 2021) (No. 20-1573). Hyun Decl. ¶ 15. The Supreme Court was set to decide whether California’s prohibition on arbitration of PAGA claims was still valid. *Id.* Given that the Parties’ arbitration agreement contained a waiver of the right to bring a claim for civil penalties under the PAGA and the extreme uncertainty of the outcome of the *Viking River* case, the Parties agreed to engage in settlement negotiations. *Id.* In connection with the negotiations, Defendant provided the number of allegedly aggrieved employees and pay periods at issue. *Id.*

After weeks of negotiations, the Parties reached an agreement to settle the Action including the amount of the Total Settlement Amount, on June 14, 2022, the day before the U.S. Supreme Court issued its decision in the *Viking River* case. The Parties drafted a Memorandum of Understanding, which was executed on July 7, 2022. Hyun Decl. ¶ 16. The Parties then drafted and ultimately executed the long-form Settlement Agreement on October 31, 2022. *Id.* The Stipulation of Private Attorneys General Act Settlement and Release resolving all claims alleged in the Action is attached to the Hyun Decl. as **Exhibit C**.

On August 24, 2022, Watson submitted a supplemental written notice to the LWDA and Defendant alleging violation of Labor Code §§ 201-203, 226, 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2699, for failure to provide compliant meal periods by requiring on-duty/on-call meal periods, failure to pay overtime and minimum wages by requiring aggrieved employees to take their meal periods at the start of their shifts, and failure to pay reporting time pay. Hyun Decl. ¶ 17.

As a condition of settlement, Plaintiff agreed to file an amended complaint in the Action, which adds PAGA claims for the violations asserted in Plaintiff’s August 24, 2022 PAGA notice. Hyun Decl. ¶

1 18. Plaintiff filed his Stipulation for Leave to File Second Amended Complaint on November 3, 2022.
2 *Id.* Upon the Court’s approval of the Stipulation and the filing of the Second Amended Complaint, the
3 proposed Second Amended Complaint will be the operative complaint. *Id.*

4 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

5 The material terms of the Settlement are described below and set forth in detail in the Settlement
6 Agreement.

7 **A. The Allegedly Aggrieved Employees**

8 The Settlement covers “Plaintiff and all other individuals who worked for GMRI in the State of
9 California in a non-exempt position at a Yard House restaurant during the Settlement Period [May 25,
10 2020 through June 14, 2022], based on GMRI’s records” (“**PAGA Employees**”). Settlement Agreement
11 § A.11 (PAGA Employees defined); § A.20 (Settlement Period defined as May 25, 2020 through June
12 14, 2022). Based upon Defendant’s records, there are an estimated 7,398 PAGA Employees who
13 worked an estimated 241,924 pay periods during the Settlement Period. Hyun Decl. ¶ 19.

14 **B. Settlement Sum and Allocation**

15 The Settlement Agreement requires Defendant to pay the gross amount of Three Hundred Fifty
16 Thousand Dollars and Zero Cents (\$350,000.00) (the “**Total Settlement Amount**”). Settlement
17 Agreement § A.22. The balance of the Total Settlement Amount remaining after deduction of the Court-
18 approved Service Award to Plaintiff, Attorneys’ Fees, Litigation Costs, and Settlement Administration
19 Costs (the “**PAGA Fund**”), will be available for distribution to the LWDA and PAGA Employees.
20 Settlement Agreement §§ A.12, B.25. Seventy-five percent (75%) of the PAGA Fund, which is now
21 calculated to be \$148,595.49, will be paid to the LWDA. *Id.* § B.25.e. The remaining twenty-five
22 percent (25%), which is now calculated to be \$49,531.83, will be distributed to PAGA Employees.²
23 Settlement Agreement § B.25.e.

24 PAGA Employees will receive, on average approximately \$6.70. Hyun Decl. ¶ 19. The amount
25

26 ² The Parties’ Settlement Agreement initially estimated the Litigation Costs up to \$20,000, payment to
27 the LWDA in the amount of \$135,059.50, and payment to the PAGA Employees in the amount of
28 \$45,019.83. Settlement Agreement §§ B.25.b and B.25.e. However, Plaintiff seeks only \$1,952.01 in
Litigation Costs. As a result, the projected payments to the LWDA and PAGA Employees is higher than
originally anticipated.

1 any particular PAGA Employee will receive may be greater or lower than this average depending on the
2 number of pay periods he or she worked during the Settlement Period, with some entitled to receive
3 more, and others less. *Id.* Settlement Agreement § C.41. This is fair, as it directly allocates greater
4 payments to individual PAGA Employees who worked for GMRI for a longer period of time and
5 therefore who have allegedly suffered greater harm. *Id.*

6 As part of the Settlement Agreement, Defendant does not object to Plaintiff's Counsel's request
7 for attorneys' fees of approximately 33.33% of the Total Settlement Amount, *i.e.*, One Hundred
8 Sixteen Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$116,666.67), plus up to
9 Twenty Thousand Dollars and Zero Cents (\$20,000.00) for reimbursement of Litigation Costs, subject
10 to the Court finally approving this Settlement.³ Settlement Agreement §§ B.25.a, B.25.b. Also, as part
11 of the Settlement Agreement, Defendant does not object to Plaintiff's request for a Service Award of
12 Seven Thousand Five Hundred Dollars (\$7,500.00) to Plaintiff. Settlement Agreement § B.25.c.

13 Finally, the Settlement Agreement provides for the payment of the costs reasonably incurred by
14 the Settlement Administrator. Settlement Agreement § B.25.d. The Parties have agreed to utilize Rust
15 Consulting, Inc. to administer the Settlement, with the administration costs estimated to be \$25,754.00.
16 *Id.* §§ A.16, A.17, B.25.d, C.32.

17 **C. Scope of the Released Claims**

18 In exchange for the payments described above, Plaintiff, as proxy for the State of California and
19 on behalf of all PAGA Employees, will provide a release to Defendant and the Released Parties as
20 follows:

21 In consideration of GMRI's promises and agreements as set forth herein,
22 Plaintiff, as proxy for the State of California and on behalf of all PAGA
23 Employees, hereby releases the Released Parties from any and all claims,
24 rights, demands, liabilities, and causes of action for civil penalties under
25 PAGA arising during the Settlement Period that were asserted in the
26 Action or that are reasonably related to the facts alleged in the Action,
including in the initial and amended complaints in the Action and/or in
Plaintiff's May 25, 2021 and/or August 24, 2022 notice letters to the
LWDA, for alleged violations of California Labor Code sections 201-204,
226, 226.7, 510, 512, 558, 1174, 1194, 1197, and 1197.1. This PAGA

27 ³ As set forth below, Plaintiff's Counsel seeks reimbursement for its anticipated actual litigation costs
28 in the amount of \$1,952.01.

1 Release also includes all claims that Plaintiff and/or the PAGA Employees
2 may have against GMRI or the Released Parties relating to: the payment,
3 taxation, and allocation of Attorneys' Fees and Litigation Costs pursuant
4 to this Settlement Agreement; and the payment, taxation, and allocation of
Plaintiff's Service Award pursuant to this Settlement Agreement ("**PAGA
Release**").

5 Settlement Agreement § B.27.

6 In addition to the above PAGA Release, Plaintiff individually will release Defendant and the
7 Release Parties from any and all claims, including a waiver of Civil Code § 1542. Settlement Agreement
8 § B.26.

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

10 **A. PAGA Overview**

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

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

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

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

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

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

26 By contrast, court approval of PAGA settlements is governed by Section 2699(l) of the Labor
27 Code, which provides, in relevant part: “The court shall review and approve any penalties sought as part
28 of a proposed settlement agreement pursuant to this part.” The parties are not obligated to “satisfy class

1 action requirements,” including the standards for class action settlement approval. *Arias*, 46 Cal. 4th at
2 980-988 (affirming lower court’s holding that “plaintiff need not satisfy class action requirements” to
3 assert a PAGA claim). In *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 76-77 (2021), the Court of
4 Appeal noted that in approving PAGA settlements, “the trial court conducts an ‘independent assessment
5 of the adequacy of the settlement terms,’ which requires that the court have before it a record from
6 which it can discern sufficient information about the amount in controversy and the realistic range of
7 outcomes.” *Id.* (citations omitted).

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

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

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

20 The Settlement is also consistent with the State’s public policy favoring resolution of disputes.
21 “California law favors the settlement of disputes as our high court clarified in *Neary*[]. Settlement is
22 efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best
23 positioned to understand their interests and resolve a dispute in a mutually beneficial manner without
24 court intervention into the settlement.” *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of Am.*,
25 141 Cal. App. 4th 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277- 278
26 (1992)).

27 As this Court also knows, the U.S. Supreme Court has reiterated that arbitration agreements with
28 class waivers are enforceable. *Epic Systems Corp. v. Lewis*, 584 U.S. __ [138 S.Ct. 1612] (2018). As

1 such, the only method for enforcement of the Labor Code against Defendant is the PAGA, which again,
2 does not permit recovery of damages and/or unpaid wages.

3 Defendant would further have argued that under the U.S. Supreme Court's recent opinion in *Viking*
4 *River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) ("*Viking River*"), Plaintiff lacks standing to bring a
5 PAGA claim. While Plaintiff disagrees with Defendant's argument, this would lead to further litigation
6 and uncertainty. Indeed, the question of PAGA standing in light of *Viking River* is before the California
7 Supreme Court in *Adolph v. Uber Technologies*, Cal. Case No. S274671. Therefore, the fact that Plaintiff
8 secured a recovery for the State and allegedly-aggrieved employees is significant in and of itself.

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

10 If approved, the Settlement would release Defendant and other releasees from only PAGA claims
11 predicated on the alleged violation of Labor Code Sections 201-204, 226, 226.7, 510, 512, 558, 1174,
12 1194, 1197, and 1197.1, and the allegations contained in Plaintiff's PAGA notices and initial and amended
13 Complaints. Settlement Agreement § B.27. The Settlement would not impact any other PAGA
14 Employees' ability (aside from Plaintiff's ability) to pursue PAGA claims predicated on other Labor Code
15 violations or any Labor Code claims other than for civil penalties predicated on PAGA. Therefore, the
16 limited scope of the release also supports approval. Because an aggrieved employee's PAGA action is a
17 substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on
18 the named employee plaintiff but also on government agencies and any aggrieved employee not a party to
19 the proceeding." *Arias*, 46 Cal. 4th at 986. However, "the nonparty employees, because they were not
20 given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as
21 to remedies other than civil penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved
22 employees retain all rights "to pursue or recover other remedies available under state or federal law, either
23 separately or concurrently with an action taken under this part").

24 Accordingly, the PAGA Employees will be subject to only a limited release strictly confined to
25 the civil penalties available under PAGA for alleged violation of Labor Code Sections 201-204, 226,
26 226.7, 510, 512, 558, 1174, 1194, 1197, and 1197.1. The release is therefore appropriately tailored.

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

3 Though Plaintiff had brought this action in good faith and was reasonably confident that he
4 would prevail at trial, proceeding in litigation and the changes in the law, including the risk that the U.S.
5 Supreme Court would (and after this settlement was reached actually did) conclude that PAGA waivers
6 are enforceable, entail significant risk on the underlying merits of Plaintiff's theory, in addition to the
7 still-developing law under PAGA.

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

9 As set forth above, Plaintiff alleges that Defendant did not provide proper and accurate itemized
10 wage statements identifying all hours worked and payment for all minimum and overtime wages,
11 reporting time pay, as well as premium pay for missed meal and rest breaks. Plaintiff alleges he was
12 required to spend time off-the-clock, including without limitation, having to wait for the manager to
13 close up the restaurant. Plaintiff also alleges he worked more than 5 hours in a shift for Defendant but
14 was not provided with off-duty meal breaks. Additionally, Plaintiff alleges he was required to work
15 through his rest breaks. Additionally, Plaintiff alleges that Defendant failed to provide meal periods to
16 Plaintiff and other similarly aggrieved non-exempt employees. Plaintiff alleges that he and other
17 similarly aggrieved non-exempt employees were required to take on-duty meal periods and remain on
18 call during their meal periods, including because they were expected to work during meal periods if
19 there was a rush of customers. Plaintiff further alleges that Defendant failed to pay minimum and
20 overtime wages to Plaintiff and other similarly aggrieved employees for the time spent on call during
21 meal periods. Additionally, Plaintiff alleges that aggrieved employees were required to arrive 30
22 minutes before the start of their scheduled shifts, required to clock in and then immediately clock out
23 before performing any work, and required to take their meal period before their scheduled shift and
24 before commencing any work. As a result, aggrieved employees were not provided a compliant meal
25 "break." Plaintiff alleges that Defendant required Plaintiff and similarly aggrieved non-exempt
26 employees to report to work, but they were not always put to work and/or put to work for at least ½ of
27 their scheduled shifts. This included being required to arrive 30 minutes before the start of their
28 scheduled shifts, required to clock in and then immediately clock out before performing any work, and

1 required to take their meal period before their scheduled shift and before commencing any work.
2 Plaintiff further alleges that Defendant did not pay the requisite reporting time wages of at least ½ the
3 usual or scheduled day’s work, or in no event less than two hours up to four hours of wages at the
4 employees’ regular rate of pay. Defendant also allegedly violated Labor Code § 226 as to Plaintiff and
5 all similarly aggrieved employees as a result of these violations, including by not accurately listing the
6 hourly rates of pay, gross wages, and net wages in violation of Labor Code § 226(a)(1), (5), and (9). As
7 for all non-exempt employees whose employment has ended, the Company allegedly violated Labor
8 Code §§ 201-203, by failing to pay these owed wages within the deadlines required by these statutes.

9 Defendant argued that Plaintiff’s PAGA action was barred by the PAGA waiver contained in the
10 Parties’ arbitration agreement. If litigation proceeded, Defendant would have argued that it has lawful
11 policies, such that proving any violations on a representative basis would be unmanageable. Hyun Decl.
12 ¶ 15. Defendant further argued that even if the Court ultimately found Defendant liable, the Court has
13 discretion under PAGA to reduce the maximum allowable PAGA penalties or to decide not to award
14 PAGA penalties at all. *Id.* Defendant would have sought summary judgment on this issue or proceeded
15 to trial. *Id.* Should Defendant have prevailed, the State of California and PAGA Employees would have
16 been left with zero recovery. *Id.*

17 **2. Potential PAGA Penalties**

18 Defendant’s verified discovery responses to Plaintiff’s Special Interrogatories indicated that
19 there were 137,025 pay periods at issue as of October 3, 2021. Therefore, at the time of the Parties’
20 settlement negotiations, Plaintiff had calculated total, maximum potential exposure of PAGA penalties
21 at \$68.5 million. Hyun Decl. ¶ 7. However, even if Plaintiff was to prevail on the merits of the PAGA
22 claim, the potential recovery was uncertain. Again, whether a plaintiff can assert a representative PAGA
23 action was unclear at the time the settlement was negotiated in light of *Viking River*, 142 S. Ct. 1906.
24 This Court may have ruled against Plaintiff, resulting in zero recovery.

25 Moreover, pursuant to Labor Code § 2699(e)(2) the Court can decline to award the full amount
26 of PAGA penalties “if, based on the facts and circumstances of the particular case, to do otherwise
27 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in
28 the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his

PAGA claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see also O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (noting that even if PAGA penalties amounted to \$1 billion, such award "could well be reduced, as a court may reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory").

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

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

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

The Court's assessment of the proposed Settlement must take into account that any penalties awarded may be subject to substantial reduction. When this is considered, in conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover nothing, the proposed Settlement is reasonable. While the Total Settlement Amount is approximately 1% of the maximum amount of penalties at issue, the settlement for this reduced value allows for the distribution of penalties in an amount which accounts for the risk of continued litigation, Defendant's arguments on the merits, and Defendant's arguments that Plaintiff has no right to bring a PAGA action in light of *Viking River* and even if viable, that higher penalties would have been confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one of the primary goals of PAGA.

The proposed Settlement exceeds PAGA settlements that courts have approved in other cases, when considered as a percentage of the overall settlement value of the case. The proposed Settlement, in fact, far exceeds other PAGA settlements approved by courts – including those that provide for less than one percent allocation to PAGA penalties. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL

928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as independent contractors. 2016 WL 3561742, (N.D. Cal. June 23, 2016). The parties’ settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at *5.

A PAGA allocation need not represent any particular percentage of the overall settlement value in order to secure court approval, and courts routinely approve PAGA settlements representing only a tiny fraction of the overall maximum potential exposure. Here, on the other hand, the Settlement proposes a payment of approximately \$148,595.49 to the LWDA and approximately \$49,531.83 in payments to the PAGA Employees, which provides concrete relief in light of the risks. *See* Hyun Decl. ¶ 20.

F. The Attorneys’ Fees are Reasonable

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

The common fund doctrine is predicated on the principle of preventing unjust enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits, he may require the

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

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

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

24 Here, as set forth in their declarations and their respective lodestars, Plaintiff’s attorneys have
25 spent over 190.2 hours litigating the Action. Plaintiff’s attorneys also anticipate incurring 30 additional
26 hours to administer the settlement, including communicating with the administrator and aggrieved
27 employees. Based thereon, and based on each of the Plaintiff’s attorneys’ hourly rates, the lodestar
28 equates to \$136,005.00, which is in excess of the \$116,666.67 fee request. Declaration of Majed Dakak

1 (“Dakak Decl.”) ¶ 7, **Ex. A**; Hyun Decl. ¶¶ 20-22, **Ex. A**; Declaration of William L. Marder (“Marder
2 Decl.”) ¶ 10, **Ex. A**. Thus, the requested fee amount of \$116,666,67 is fair and reasonable.

3 Additionally, Plaintiff’s Counsel’s Litigation Cost reimbursement request in the amount of
4 \$1,952.01 is also reasonable. Hyun Decl. ¶ 23; Dakak Decl. ¶ 8, **Ex. B**; Marder Decl. ¶ 11, **Ex. B**. The
5 Litigation Costs were all directly incurred in the prosecution of this Action, including filing and service
6 of process fees, postage, copying, and remote appearance fees. *Id.* As such, the requested Litigation
7 Costs should be awarded as fair and reasonable.

8 **G. The Settlement Administrator’s Fees Should be Approved**

9 The Parties have agreed to pay actual costs of administration, or \$25,754.00, to the Settlement
10 Administrator, Rust Consulting, Inc., to administer this Settlement. Settlement Agreement §§ A.16,
11 A.17, B.25.d, C.32. The Parties believe that the administration fee is reasonable and should be approved.

12 **H. Plaintiff’s Service Award Should be Approved**

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

18 Here, Plaintiff seeks the total amount of \$7,500.00 for the Service Award, which is intended to
19 compensate Plaintiff for the time spent on this case, including reviewing and verifying written discovery
20 responses, the potential for retaliation, and for executing a general release including for all known and
21 unknown claims under Civil Code § 1542. Declaration of Jamin Watson ¶ 5. This requested
22 enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v.*
23 *Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
24 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive
25 awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d
26 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia*
27 *Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class
28 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D.

1 Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v.*
2 *Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award to class representative
3 in ERISA case).

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

5 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion and Settlement
6 Agreement to the LWDA's website. Hyun Decl. ¶ 24, **Ex. B.**

7 **V. CONCLUSION**

8 Based on the above, Plaintiff requests the Court approve the Parties' PAGA settlement.
9

10 DATED: November 9, 2022

POLARIS LAW GROUP
HYUN LEGAL, APC
KESSELMAN BRANTLY STOCKINGER LLP

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13 By: 
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Majed Dakak

15 *Attorneys for Plaintiff Jamin Watson*
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