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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

RACHEL QUIJADA, as an individual and
on behalf of aggrieved employees,

Plaintiffs,

vs.

EXTRA SPACE MANAGEMENT, INC.,
a Utah corporation; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 21CV385899

**PLAINTIFFS' 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 25, 2024
Time: 1:30 p.m.
Dept: 7

Complaint Filed: August 17, 2021
Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on April 25, 2024, at 1:30 p.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Charles F. Adams, Judge presiding in Department
4 7 of the above-referenced Court located at 191 North First Street, San Jose, California 95113,
5 Plaintiffs Rachel Quijada and Sasan Azar (collectively, “Plaintiffs”) will seek an Order
6 approving the concurrently filed Private Attorneys General Act Settlement Agreement
7 (“Agreement” or “Settlement”), pursuant to the procedures set forth in Labor Code § 2698, *et*
8 *seq.*

9 This motion will be based on this notice of motion, the attached memorandum of points
10 and authorities, the accompanying declarations of Kristen M. Agnew, Nicholas Rosenthal, Sean
11 S. Vahdat, Plaintiff Rachel Quijada, Plaintiff Sasan Azar and Jodey Lawrence of Phoenix
12 Settlement Administrator the records and file herein, and on such other evidence as may be
13 presented at the hearing of the motion.

14
15 DATED: March 6, 2024

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ASSOCIATES, APLC

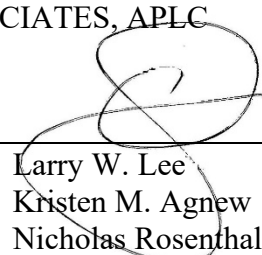
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18 By: 
19 Larry W. Lee
20 Kristen M. Agnew
21 Nicholas Rosenthal
22 Attorneys for Plaintiffs and Aggrieved Employees
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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
3 2698, *et seq.*, Plaintiffs Rachel Quijada and Sasan Azar (collectively, “Plaintiffs”) hereby move
4 the Court for an order approving the non-reversionary settlement with Defendant Extra Space
5 Management, Inc. (“Defendant” or “Extra Space”). The settlement was reached after extensive
6 investigation and informal discovery, including Defendant’s production of payroll data and
7 relevant payroll policies and procedures. Furthermore, pursuant to the terms of the Private
8 Attorneys General Act Settlement Agreement (“Settlement Agreement”), Defendant will pay the
9 gross amount of \$350,000.00, which includes an estimated payment of approximately \$142,590.10
10 in civil penalties to the California Labor and Workforce Development Agency (“LWDA”). The
11 proposed release is also narrowly tailored to release only claims for civil penalties under PAGA
12 predicated on the specific Labor Code violations alleged in the operative Complaint.

13 As further demonstrated below and in the accompanying declarations of counsel, the
14 proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the
15 LWDA and aggrieved employees, and accomplishes the goals of the PAGA.

16 **II. PROCEDURAL HISTORY**

17 **A. The *Quijada* Action**

18 **1. The *Quijada* PAGA Notice**

19 On June 21, 2021, Plaintiff Rachel Quijada (“Plaintiff Quijada”) submitted written notice
20 under Labor Code section 2699.3 to the California Labor and Workforce Development Agency
21 (“LWDA”) and Defendant, alleging that Defendant violated Labor Code sections 201, 202, 203,
22 226(a), 226.7, 510, 512, 558, 1194 (the “*Quijada* PAGA Notice”). *See* Declaration of Kristen M.
23 Agnew (“Agnew Decl.”) ¶ 3. On August 13, 2021, Plaintiff Quijada submitted an amended written
24 notice to the LWDA and Defendant further identifying the basis of her claims. *See id.* The June
25 21, 2021 and August 13, 2021 notices are jointly referred to herein as the “*Quijada* PAGA Notice.”
26 *See id.*, Exhibit A.

27 As set forth in the *Quijada* PAGA Notice, Plaintiff Quijada alleges that, due to lack of
28 staffing, Defendant failed in its affirmative obligation to ensure that Aggrieved Employees had the

1 opportunity to take and were provided with off-duty 10-minute rest periods and a thirty (30) minute
2 uninterrupted duty-free meal period within five (5) hours of the beginning of their shift. *See* Agnew
3 Decl. ¶ 4, Ex. A.

4 Plaintiff Quijada further alleges that Defendant underpaid overtime and meal/rest period
5 premium compensation to Aggrieved Employees. *See* Agnew Decl. ¶ 5, Ex. A. For the purpose of
6 calculating overtime and premium compensation, Defendant failed to include non-discretionary
7 incentive pay, such as “Gift/Awards” and “Monthly Field Incentives,” in the calculation of the
8 regular rate. *See id.* The base rate did not take into account additional items of nondiscretionary
9 remuneration, thus resulting in the underpayment of overtime and meal/rest period premium
10 compensation. *See id.*

11 As a result of the alleged above-mentioned Labor Code violations, Plaintiff Quijada further
12 contends that Defendant failed to provide accurate wage statements and timely pay earned wages
13 upon termination of employment. *See* Agnew Decl. ¶ 6, Ex. A.

14 **2. The Court Compels the Arbitration of Quijada**

15 On August 17, 2021, Plaintiff Quijada filed a Representative Action Complaint (the
16 “*Quijada* Action”). *See* Agnew Decl. at ¶ 7. Plaintiff Quijada alleges a single cause of action for
17 violation of PAGA predicated on the Labor Code violations set forth in the *Quijada* PAGA Notice.
18 *See id.* Defendant disputes and denies the claim and allegations asserted in the *Quijada* Action.
19 *See id.*

20 On October 17, 2022, pursuant to a Mutual Agreement to Arbitrate, the Court compelled
21 the arbitration of the individual component of Plaintiff Quijada’s PAGA claim. *See* Agnew Decl.
22 at ¶ 10. The Court stayed the remaining representative PAGA claim. *See id.* Shortly thereafter,
23 Plaintiff Quijada submitted a demand for arbitration to JAMS. *See id.* at ¶ 11.

24 **B. The Azar Action**

25 **1. The Azar PAGA Notice and Azar Action**

26 On July 7, 2021, Plaintiff Sasan Azar (“Plaintiff Azar”) submitted written notice under
27 Labor Code section 2699.3 to the California Labor and Workforce Development Agency
28 (“LWDA”) and Defendant, alleging that Defendant violated Labor Code sections 201, 202, 203,
204, 226(a), 226.7, 510, 512, 558, 2802, 1194, 1194.2 (the “*Azar* PAGA Notice”). *See* Declaration

of Sean S. Vahdat (“Vahdat Decl.”) ¶ 3, Exhibit 1.

On September 28, 2021, Plaintiff Azar filed a Representative Action Complaint against Defendant in Superior Court of the State of California County of Orange, case No. 30-2021-01223381 CU OE CXC (the “*Azar* Action”). Attached to the Declaration of Sean Vahdat as Exhibit 2 is a true and correct copy of the Complaint. Plaintiff Azar alleged a single cause of action for violation of PAGA predicated on the Labor Code violations set forth in the *Azar* PAGA Notice. *See id.* Defendant disputes and denies the claim and allegations asserted in the *Azar* Action. *See id.*

On January 6, 2022, Plaintiff Azar filed an amended notice to the LWDA and subsequently amended his complaint because the complaint originally erroneously named Extra Space Storage as the defendant, when the correct entity was Extra Space Management, Inc. Vahdat Decl. ¶ 4.

2. The Court Compels the Arbitration of Azar

As a result of the *Viking River* Action, Defendant filed a motion to compel arbitration of Plaintiff Azar’s individual PAGA claim in the *Azar* Action. On December 2, 2022, the court granted and denied in part Defendant’s motion to compel arbitration. Specifically, the court granted arbitration of the individual PAGA claim of Plaintiff Azar, and stayed the representative PAGA claims pending the completion of arbitration of Plaintiff Azar’s individual PAGA claims. On February 21, 2023, the *Azar* Arbitration action commenced. Vahdat Decl at ¶ 5.

C. The Parties Participate in a Global Private Mediation

In or around April 2023, Plaintiffs and Defendant agreed to participate in a global mediation of the *Quijada* Action and *Azar* Action. *See* Agnew Decl. at ¶ 14. In lieu of formal discovery, Defendant produced: (1) a ten percent sampling of time and payroll records for the employees that covered the period of June 13, 2020 and March 26, 2023; (2) data points regarding the total number of pay periods worked by non-exempt employees between June 13, 2020 and March 26, 2023 in which a shift of 3.5 hours or more was worked; (3) data points regarding the total number of pay periods worked by non-exempt employees between June 13, 2020 and March 26, 2023 in which a shift of 5 hours or more was worked; (4) the total number of non-exempt employees employed by Defendant at any time between June 13, 2020 and March

26, 2023; (5) the relevant policies, including those pertaining to meal and rest periods, the payment of meal/rest period premium compensation, the calculation of overtime wages, and mileage and travel time reimbursement; and (6) the arbitration agreements signed by employees. *See id.* at ¶ 15.

Plaintiffs’ Counsel retained Berger Consulting Group to analyze the time and payroll records produced by Defendant. *See* Agnew Decl. at ¶ 16. Based on the information provided by Defendant, Plaintiffs’ Counsel conducted a full penalties analysis as to the value of the PAGA claims. *See id.* Plaintiffs’ Counsel also investigated the applicable law as applied to the facts discovered regarding Plaintiffs’ alleged claims and potential defenses thereto. *See id.* Thus, Plaintiffs’ Counsel entered mediation with a clear understanding of Defendant’s maximum exposure. *See id.*

On August 3, 2023, the Parties engaged in a full-day mediation with Steven R. Denton. *See* Agnew Decl. at ¶ 17. As a result of the mediation and subsequent mediator’s proposal, Plaintiffs and Defendant reached a global settlement in principle of the *Quijada* Action and *Azar* Action. *See id.* The Parties thereafter negotiated the terms of the Private Attorneys General Act Settlement Agreement. *See id.* at ¶ 18. The settlement discussions were conducted at arm’s length. *See id.*

D. The *Quijada* Operative Second Amended Complaint

As a condition of settlement, the Parties agreed to the amendment of the Representative Action Complaint in the *Quijada* Action. *See* Agnew Decl. at ¶ 19. On November 6, 2023, Plaintiffs filed the First Amended Representative Action Complaint (“FAC”). *See id.* The FAC includes Plaintiff Azar as a named plaintiff and includes the claims alleged in the *Azar* Action and *Azar* PAGA Notice. *See id.* Accordingly, Azar filed a request for dismissal of his Orange County Superior Court action.

III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

The material terms of the Settlement are described below and set forth in detail in the concurrently filed PAGA Settlement Agreement, a true and correct copy of which is attached as **Exhibit B** to the Declaration of Kristen M. Agnew.

//

1 **A. The Aggrieved Employees**

2 The current Action is being settled on behalf of the following employees: all current and
3 former hourly, non-exempt employees who work or who have worked for Extra Space in the State
4 of California at any time during the Settlement Period (“Aggrieved Employees”). *See* Settlement
5 Agreement (“SA”) § 1.1. The Settlement Period is defined to mean the period of June 13, 2020
6 through July 19, 2023. *See* SA § 1.18. Based on Defendant’s records, there are approximately
7 1,180 Aggrieved Employees. *See* Agnew Decl. ¶14. These individuals worked, as of March 26,
8 2023, in approximately 38,285 pay periods during the Settlement Period. *See* SA § 6.1.

9 **B. The Gross Settlement Amount**

10 The Settlement Agreement requires Defendant to pay the gross amount of Three Hundred
11 Fifty Thousand Dollars (\$350,000.00) (the “Gross Settlement Amount”). *See* SA § 1.7. Based on
12 the Gross Settlement Amount, Defendant will pay approximately \$9.14 per pay period to resolve
13 the claims alleged in the operative FAC. *See* Agnew Decl. ¶ 21.

14 **C. The PAGA Payment**

15 The balance of the Gross Settlement Amount remaining after deduction of Settlement
16 Administration Costs, Service Awards to the Plaintiffs, and the Attorneys’ Fees and Costs Award,
17 will be available for distribution to the LWDA and Aggrieved Employees (the “PAGA Payment”).
18 *See* SA § 1.1. The PAGA Payment will total approximately \$190,120.14. *See* Agnew Decl. ¶ 22.
19 Seventy-five percent (75%) of the PAGA Payment, or approximately \$142,590.10, will be paid to
20 the LWDA for PAGA penalties. *See* SA § 6.4; Agnew Decl. ¶ 22. The remaining twenty-five
21 percent (25%), or approximately \$47,530.04, will be distributed to Aggrieved Employees. *See* SA
22 § 6.4. *See* SA § 6.4; Agnew Decl. ¶ 22.

23 The amount any particular Aggrieved Employee will be entitled to recover will depend on
24 the number of pay periods in which he or she worked during the Settlement Period, with some
25 entitled to receive more and others less. *See* SA §§ 1.1, 6.4. This is fair, as it directly allocates
26 greater penalties to individuals who have allegedly suffered greater harm. *See* Agnew Decl. ¶ 27.
27 Any uncashed checks shall escheat to the State of California Unclaimed Property Fund in the name
28 of the Aggrieved Employee whose check went uncashed. *See* SA § 6.5.

1 **D. Attorneys' Fees and Litigation Costs**

2 As part of the Settlement, Defendant does not object to Plaintiffs' Counsel's request for
3 attorneys' fees of approximately 33.33% of the Gross Settlement Amount, *i.e.*, One Hundred
4 Sixteen Thousand, Six Hundred Fifty-Five Dollars and Zero Cents (\$116,655.00), and
5 reimbursement for litigation costs, subject to the Court finally approving this Settlement. *See* SA
6 § 6.7. ¹ Plaintiffs' Counsel requests reimbursement of \$13,624.86 for litigation related expenses.
7 *See* Agnew Decl. ¶ 23; Vahdat Decl. ¶ 11. Any portion of the requested attorneys' fees and/or
8 costs not approved by the Court shall be added to the PAGA Payment. *See* SA § 6.7.

9 **E. The Service Awards**

10 As part of the Settlement, Defendant also does not object to Plaintiffs' request for
11 individual Service Awards in the amount of Ten Thousand Dollars (\$10,000.00). *See* SA § 6.6.
12 Any portion of the Service Awards that is not approved by the Court shall become part of the
13 PAGA Payment. *See* SA § 6.6.

14 **F. Settlement Administration Costs**

15 Finally, the Settlement provides for the payment of the fees and expenses reasonably
16 incurred by the Settlement Administrator. *See* SA §§ 1.14, 6.8. The Parties have agreed to utilize
17 Phoenix Settlement Administrators to administer the settlement, with the administration costs
18 estimated to be Nine Thousand Six Hundred Dollars (\$9,600.00). *See* SA § 6.8; Admin.
19 Declaration ¶ 16, Ex. B.

20 **G. The Scope of the Released Claims Is Appropriately Limited**

21 Upon funding of the Gross Settlement Amount, Plaintiffs, all Aggrieved Employees, and
22 the LWDA will release Defendant and Released Parties from all Released Claims. *See* SA § 5.1.
23 As defined in the Agreement, the term "Released Claims" means:

24 ...claims for penalties under the California Private Attorneys
25 General Act, including interest, costs and attorneys' fees related
26 thereto, predicated upon Labor Code sections 201, 202, 203, 204,
27 226, 226.7, 510, 512, 558, 1194 and 2802 and any other Labor
28 Code sections and/or duplicative or similar provisions arising

¹ At the time the Parties negotiated the Settlement Agreement, Plaintiffs' Counsel did not have a final tally of the litigation costs incurred to date.

1 under the Wage Orders of the California Industrial Welfare
2 Commission that were alleged or that could have been alleged
3 based on the factual allegations in the Quijada Complaint and/or
4 PAGA Letters. The Released Claims include all claims for
5 penalties recoverable under PAGA concerning: failure to pay
6 minimum wages, straight time compensation and overtime
7 compensation; failure to pay for all hours worked; the calculation
8 of the regular rate of pay; failure to pay overtime compensation at
9 the regular rate of pay; failure to provide meal and/or rest periods;
10 failure to pay proper meal or rest period penalties; failure to
11 provide accurate itemized wage statements; failure to timely pay
12 wages during employment; failure to timely pay wages at
13 separation of employment; payment for all hours worked; waiting
14 time penalties; and off-the-clock work, and any other PAGA
15 penalty claims whatsoever alleged in the Quijada Complaint and/or
16 PAGA Letters, whether known or unknown, during the Settlement
17 Period.

18 *See* SA § 5.1. The Settlement is not intended to release does not extend to violations of any
19 predicate statutes other than PAGA. *See* SA § 5.1. The Settlement also does not affect a waiver of
20 claims by Aggrieved Employees (excluding the Plaintiffs) against the Released Parties for any
21 individual wage and hour claims. *See* SA § 5.1.²

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

23 **E. PAGA Overview**

24 In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the
25 LWDA and other aggrieved employees, to bring suit against their employers for alleged
26 violations of the California labor laws and to obtain penalties that previously could only be
27 obtained by the State. The PAGA was enacted because the Legislature determined that it was “in
28 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

² Because an aggrieved employee’s PAGA action is a substitute for an action brought by the government, “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 986. However, “the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all rights “to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part”).

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

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

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1 **F. Class Action Settlement Standards Do Not Govern the Settlement Approval**
2 **Process for PAGA Claims**

3 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
4 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
5 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
6 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* §
7 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a
8 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
9 and must direct the preparation of notice of the certification, proposed settlement, and date of the
10 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
11 2004). To make the preliminary fairness determination, courts may consider several relevant
12 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
13 duration of further litigation; the risk of maintaining class action status through trial; the amount
14 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
15 the experience and views of counsel....” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
16 Cir. 1998).

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

23 Notably, unlike the class action settlement approval process, there is also no statutory
24 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
25 2699(i). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
26 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
27 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

28 //

1 **G. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

2 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
3 ultimately receive as a result of a settlement, but instead, on whether the Gross Settlement
4 Amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
5 supplement agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i).
6 Here, the Settlement represents an extraordinary recovery for the Aggrieved Employees and the
7 State, and thus the Settlement certainly effectuates PAGA’s purpose. The Settlement is also
8 consistent with the State’s public policy favoring resolution of disputes. “California law favors
9 the settlement of disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces
10 costs, saves resources, and minimizes court congestion. [] The parties are best positioned to
11 understand their interests and resolve a dispute in a mutually beneficial manner without court
12 intervention into the settlement.” *Consumer Advocacy Group, Inc. v. Kintetsu*, 141 Cal. App. 4th
13 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277- 278 (1992)).

14 **H. The Settlement Recognizes the Inherent Risk of Litigation**

15 Though Plaintiffs’ Counsel is reasonably confident that they would prevail at trial,
16 proceeding in litigation entails significant risk on the underlying merits of Plaintiffs’ theories, in
17 addition to the still-developing law under PAGA.

18 **1. The Meal/Rest Period Claim Is Contested.**

19 Plaintiffs allege that, as result of understaffing, Defendant systematically denied requisite
20 meal and rest periods to Aggrieved Employees. *See* Agnew Decl. ¶ 32. In Plaintiffs’ experience,
21 the breaks of Aggrieved Employees were frequently interrupted by customers requesting access
22 to their storage units. In response, Defendant maintains that it complied with the law, had lawful
23 and compliant practices, and provided Aggrieved Employees with duty-free meal and rest
24 periods. *See* Agnew Decl. ¶ 33. According to Defendant, an adjudication of the alleged meal and
25 rest period violation would require individualized assessments as to the circumstances of each
26 missed, delayed or interrupted break. *See id.* Defendant argues that, even if Plaintiffs were able
27 to establish that some Aggrieved Employees experienced a meal and/or rest period violation,
28 such a claim would not be manageable. *See id.*

1 **2. The Overtime and Meal/Rest Period Regular Rate Claim Is Contested.**

2 Plaintiffs allege that Defendant’s method of calculation for payment of overtime and
3 meal/rest period premium compensation fails to accurately apply a regular rate that includes
4 Monthly Field Incentives and Gifts/Awards. *See* Agnew Decl. ¶ 34. Plaintiffs contend that the
5 Monthly Field Incentives and Gifts/Awards constitute non-discretionary compensation and are
6 required for the correct regular rate of pay. *See* Lab. Code § 226.7; *Alvarado v. Dart Container*
7 *Corp. of California*, 4 Cal.5th 542, 554 (2018) (The regular rate of pay “includes adjustments to
8 the straight time rate, reflecting, among other things, shift differentials and the per-hour value of
9 any nonhourly compensation the employee has earned”).

10 Defendant denies Plaintiffs’ allegations. *See* Agnew Decl. ¶ 35. As an initial matter,
11 Defendant claims that the Gifts/Awards compensation was entirely discretionary. *See id.*
12 Defendant maintains that individual area and location managers determined the criteria for the
13 Gifts/Awards and the amount of the payment. *See id.* If true, there would be no violations from
14 this category of payment. Defendant further maintains that the question of whether Gifts/Awards
15 compensation is discretionary raises manageability issues. *See id.*

16 Defendant further maintains that it incorporated the Monthly Field Incentives in the
17 regular rate of pay. *See* Agnew Decl. ¶ 36. The consultant retained by Plaintiffs’ Counsel
18 identified instances where Defendant appeared to underpay overtime and meal/rest period
19 premium compensation. *See id.* Defendant, however, maintains that Plaintiffs fail to take into
20 account true-up payment made in subsequent pay periods. *See id.* Plaintiffs recognize that
21 adjustments to the regular rate made in subsequent pay periods can be highly technical and
22 difficult to track. *See id.* If Defendant properly adjusted overtime and meal/rest period premium
23 payments, there would be no regular rate violation based on the Monthly Field Incentives
24 payment. *See id.*

25 **3. The Off-the-Clock Claim Is Contested.**

26 Plaintiffs allege that Defendant failed to pay Aggrieved Employees for all hours worked.
27 *See* Agnew Decl. ¶ 37. Due to staffing shortages, Aggrieved Employees were required to work
28 off-the-clock for regular, but short periods of time in functions such as obtaining the store keys

1 from a storage unit, and placing the store keys back into the storage unit after having already
2 clocked out. Plaintiffs contend that such time is compensable. *See Frlekin v. Apple Inc.*, 8
3 Cal.5th 1038, 1056 (2020) (mandatory exit searches constitute hours worked and must be paid).

4 Defendant argues that the minimum wage and overtime claims are not suitable to be
5 adjudicated on a representative basis because its policies and training materials required accurate
6 recording of time and prohibited off-the-clock work. *See Agnew Decl.* ¶ 38. Defendant's written
7 policy strictly prohibits non-exempt employees from working off the clock for any reason. *See*
8 *id.* Furthermore, Defendant's timekeeping system allowed individual employees to "edit" their
9 clock entries to reflect any time that was for any reason not captured by the time clock entries.
10 *See id.* Citing to *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) and its
11 progeny, Defendant argues that its liability is contingent on proof that Defendant knew or should
12 have known that off-the-clock work was occurring. *See id.* at ¶ 39. In the absence of a uniform
13 policy that requires off-the-clock work, Defendant argues that Plaintiffs will not be able to
14 establish the requisite knowledge through common proof. *See id.*

15 **4. The Reimbursement Claim Is Contested**

16 Plaintiffs allege that Aggrieved Employees incurred expenses while performing
17 reasonable and necessary work-related duties. *See Agnew Decl.* ¶ 40. Plaintiffs maintain that
18 Aggrieved Employees were regularly required to drive their private vehicles to make bank
19 deposits and use their personal cell phones when out of the office but on the property and were
20 not reimbursed for those costs. Defendant, however, responds that its mandatory written policy
21 instructed Aggrieved Employees to submit any expenses made necessary by work duties. *See*
22 *Agnew Decl.* ¶ 41. Defendant further contends that the law does not require an employer to be
23 responsible for expenses it does not know about. Defendant also argues that the reimbursement
24 claims is unmanageable because not all employees were required to make bank deposits and/or
25 use a personal cell phone for work-related purposes. *See id.*

26 **5. The Derivative Wage Statement Violation Is Contested**

27 Plaintiffs allege a derivative wage statement violation. *See Agnew Decl.* ¶ 42. As a result
28 of the alleged underpayment and/or non-payment of wages to Aggrieved Employees, Plaintiffs

1 contend that the wage statements omit information required by Labor Code 226, including all
2 applicable hourly rates and the total hours worked. *See id.* As argued by Defendant, the
3 derivative wage statement violation is vulnerable to a motion for summary judgment based on
4 the weaknesses of the underlying primary claims. *See Maldonado v. Epsilon Plastics, Inc.*, 22
5 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a)
6 where their wage statement cause of action was derived from an underlying wage and hour
7 violation for overtime).

8 **6. Recovery of Civil PAGA Penalties Is Uncertain**

9 If Plaintiffs were to prevail on the merits of the PAGA claim, the potential recovery
10 remains uncertain. As argued by Defendant, in deciding whether to award the maximum penalty
11 amount, courts may focus on whether the employer made a good faith effort to follow the law.
12 For example, in *Thurman v. Bayshore Transit Management, Inc.*, the Court of Appeal upheld the
13 trial court’s significant reduction of PAGA penalties by 30% because the employer was not
14 initially on notice that it was in violation of the law and because it would have been unfair to
15 award penalties where the employer was unaware of the violations. 203 Cal. App. 4th 1112,
16 1136 (2012). When the employer made aware of the violations, it timely took steps to come into
17 compliance. *Id.* By contrast, the imposition of full penalties was justified when an employer took
18 a “cavalier approach to fulfilling its contractual and statutory obligations” and demonstrated
19 “reckless disregard.” *Id.* Furthermore, as the California Court of Appeal has affirmed, trial courts
20 are well within their discretion to reduce PAGA penalties “for technical violations that cause no
21 injury,” especially where the “violation was inadvertent.” *Raines v. Coastal Pac. Food*
22 *Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018).

23 In this case, Defendant asserted that a substantial reduction in potential PAGA penalties
24 was warranted because: (1) even assuming that Plaintiffs could establish the predicate violations,
25 the alleged violations were inadvertent; and (2) Aggrieved Employees did not suffer substantial
26 economic harm as a result of the alleged violations of Labor Code. *See Agnew Decl.* ¶ 44. Thus,
27 Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its
28 inadvertent behavior, much less to deter it from committing any future violations that were

1 completely foreclosed by its new payroll practices. *See id.*

2 **I. The Settlement is Reasonable When Compared to the Realistic Amount of**
3 **PAGA Civil Penalties At Issue**

4 Defendant has indicated that Aggrieved Employees worked approximately 38,285 pay
5 periods, as of March 26, 2023, during the Settlement Period. *See* SA § 6.1. Assuming that
6 Plaintiffs were to prevail on the merits of the PAGA claim, applying the standard penalty of
7 \$100 per pay period yields \$3,828,500 in potential liability. *See* Agnew Decl. ¶ 29.³

8 However, the Court’s assessment of the proposed settlement must take into account that
9 any penalties awarded may be subject to substantial reduction. Pursuant to Labor Code section
10 2699(f)(2) the Court can decline to award the full amount of PAGA penalties “if, based on the
11 facts and circumstances of the particular case, to do otherwise, would result in an award that is
12 unjust, arbitrary and oppressive, or confiscatory.” Courts routinely award far less than the
13 statutory maximum amount of civil penalties, even where an underlying violation of the Labor
14 Code is found. Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*
15 *Corp.*, while the plaintiff prevailed on his PAGA claim at trial, the trial court reduced the
16 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying
17 with the law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such
18 reduction to be proper. *Id.* at 539; *see O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110,
19 1133 (N.D. Cal., 2016). Thus, assuming that the Court uses *Carrington* as a benchmark and
20 assesses PAGA penalties of approximately 10% of the total maximum, a more realistic estimate
21 of the maximum PAGA penalties at issue is \$382,850. *See* Agnew Decl. ¶ 45.

22 When the discretionary reduction in penalties is considered, in conjunction with the
23 history of PAGA settlements, and the fact that Plaintiffs may recover nothing, the proposed
24 settlement is patently reasonable. Indeed, assuming that the Court applies the standard penalty of
25 \$100 per pay period, the Gross Settlement Amount is approximately 9.14% of the amount of
26

27
28 ³ In the alternative, if the Court were to “stack” penalties, (*i.e.*, award multiple PAGA penalties
for different Labor Code violations in the same pay period), the potential PAGA penalties could
total as high as \$8,756,550. *See* Agnew Decl. ¶ 30.

1 penalties at issue. *See* Agnew Decl. ¶ 46. Settlement for this reduced value allows for the
2 distribution of penalties in an amount which accounts for the risk of continued litigation and
3 Defendant’s likely arguments that higher penalties would have been confiscatory. *See id.*

4 Given Defendant’s potential defenses to the alleged violations at issue, the risks and costs
5 of continued litigation, Plaintiffs’ Counsel believes that the Settlement is fair and reasonable. *See*
6 Agnew Decl. ¶ 47; Vahdat Decl. ¶ 6. The Settlement proposes a payment of approximately
7 \$142,590.10 in penalties to the LWDA and approximately \$47,530.04 penalties to the Aggrieved
8 Employees. *See* Agnew Decl. ¶ 22. Furthermore, the LWDA has been provided notice of this
9 motion and the PAGA settlement. *See* Agnew Decl. ¶ 58, Exhibit E; Vahdat Decl. ¶ 7, Exhibit 3.
10 The decision of the LWDA to accept the Settlement and not oppose the motion should be given
11 considerable weight.

12 **J. The Request for Attorneys’ Fees Is Reasonable and Should Be Approved**

13 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
14 successful action brought under PAGA. Although this is not a class action, in class actions
15 California state and federal courts have recognized that an appropriate method for determining
16 award of attorneys’ fees is based on a percentage of the total value of benefits to class members
17 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano*
18 *v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
19 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this
20 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
21 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
22 burden alone.” *Vincent*, 557 F. 2d at 769. Under the percentage of the fund method, the Court’s
23 objective remains to “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160
24 F.3d 361, 363 (7th Cir. 1998) (J. Posner) (“When a fee is set by a court rather than by contract,
25 the object is to set it at a level that will approximate what the market will set.... The judge, in
26 other words, is trying to mimic the market in legal services.”).

27 An award of 33.33% of the Gross Settlement Amount in attorneys’ fees mimics the
28 marketplace as it “is supported by the fact that typical contingency fee agreements provide that

1 class counsel will recover 33.33% if the case is resolved before trial and 40% if the case is tried.”
2 *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21,
3 2008); *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011)
4 (recognizing that “courts may award attorney’s fees in the 30-40% range in wage and hour class
5 actions that result in recovery of a common fund under \$10 million”). Indeed, “empirical studies
6 [that] show that...fee awards in class actions average around one-third of the recovery.” *Chavez*
7 *v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

8 In addition, it is recognized that one of the primary factors justifying an enhanced
9 attorney’s fees reward is the attendant risks inherent in the litigation. As observed in *City of*
10 *Detroit v. Grinnell Corp.* 495 F.2d 448, 470 (2d Cir. 1974) (“No one expects a lawyer whose
11 compensation is contingent upon his success to charge, when successful, as little as he would
12 charge a client who had agreed to pay for his services, regardless of success. Nor, particularly in
13 complicated cases producing large recoveries, is it just to make a fee depend solely on the
14 reasonable amount of time expended”). For Plaintiffs’ Counsel, the fees here were wholly
15 contingent in nature and the case presented far more risk than the usual contingent fee case.
16 Among the risks was the cost inherent in PAGA litigation, as well as a long battle with a
17 Defendant who had retained a premier and highly experienced defense firm. As such, the
18 requested fee should be awarded.

19 As a secondary support for the percentage of the fund method, when fees are allocated by
20 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
21 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in
22 this manner, does not override the trial court’s primary determination of the fee as a percentage
23 of the common fund and thus does not impose an absolute maximum or minimum on the
24 potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs.*
25 *Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the
26 primary reliance on the percentage of common fund method”). The Supreme Court in *Laffitte*
27 stated: “If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or
28 low, the trial court should consider whether the percentage used should be adjusted so as to bring

1 the imputed multiplier within a justifiable range, but the court is not necessarily required to make
2 such an adjustment.” *Id.* Thus, a lodestar cross-check is aimed at astronomical multipliers.
3 Indeed, cross-checks are not required; in many cases, performing a cross-check “undermines”
4 one of the primary reasons for using the percentage method: aligning counsel’s incentives with
5 the benefits delivered to the class and discouraging protracted litigation. *Id.* at 506 (finding trial
6 courts “retain the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task*
7 *Force, Court Awarded Attorney Fees* 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial*
8 *California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000) (citing the recommendations of the Third
9 Circuit Task Force with approval and observing that “[t]he criticisms of the lodestar approach set
10 forth in this Report are now echoed by many authorities, who have been most vocal about the
11 manner in which it exacerbates the problem of ‘cheap settlements’ and burdens already
12 overworked trial judge”).

13 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
14 4 or even higher.” *Wershba*, 91 Cal. App. 4th at 255; *see also, e.g., Sutter Health Uninsured*
15 *Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in
16 an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60 (applying a 2.5 multiplier on a lodestar
17 cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34
18 multiplier without remand).

19 With respect to Plaintiffs’ Counsel’s lodestar, approximately 238.50 hours have been
20 expended by counsel this matter. *See* Agnew Decl. ¶ 55, Exhibit C; Declaration of Nicholas
21 Rosenthal (“Rosenthal Decl.”) ¶ 6, Exhibit A; Vahdat Decl. ¶ 9, Exhibit 4. The courts are quite
22 liberal in the evidence required to prove an attorney’s hours. Detailed time records are not
23 required. An attorney’s testimony alone may suffice: “Testimony of an attorney as to the number
24 of hours worked on a particular case is sufficient evidence to support an award of attorney fees,
25 even in the absence of detailed time records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559
26 (1986). Reasonable hours include, in addition to time spent during litigation, the time spent
27 before the action is filed, including time spent interviewing the clients, investigating the facts and
28 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,

62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*].

For the purpose of the lodestar calculation, Plaintiffs' Counsel apply a reasonable hourly rate. Ms. Agnew and Mr. Rosenthal request an hourly rate of \$800 per hour. *See* Agnew Decl. ¶ 56; Rosenthal Decl. ¶ 7. Mr. Vahdat requests an hourly rate of \$750.00 per hour. *See* Vahdat Decl. ¶ 10. The hourly rate is consistent with the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632-33 (1998).

Here Plaintiffs' Counsel's skill and experience justify the requested rate. As shown in the supporting declarations, counsel has significant experience in the area of employment and wage and hour class actions. Specifically, Plaintiffs' Counsel's practice focuses on representing employees in employment matters, particularly wage and hour cases. *See* Agnew Decl. ¶¶ 48-54; Rosenthal Decl. ¶¶ 4, 5; Vahdat Decl. ¶ 8. As such, based on the hours and applicable rate, the total lodestar to be expended by Plaintiffs' Counsel through finalizing this settlement will be approximately \$184,900, which is more than the requested attorneys' fee award. *See* Agnew Decl. ¶ 56; Rosenthal Decl. ¶ 7; Vahdat Decl. ¶ 9. As such, the requested fee award is fair and reasonable, and should be awarded in its entirety. Plaintiffs' Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Aggrieved Employees.

K. The Court Should Approve the Request for Reimbursement of Costs

The request for reimbursement of costs, in the amount of \$13,624.86 is fair and reasonable. The costs are all litigation related costs, which have been detailed in the supporting declarations of Class Counsel. *See* Agnew Decl. ¶ 57, Exhibit D; Vahdat Decl. ¶ 11. The authority for the court to award this is the Parties' Settlement Agreement and the California Labor Code. As such, this request should be approved.

1 **L. Plaintiffs’ Request for a Service Award Should be Approved**

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

7
8 Here, Plaintiffs seek \$10,000 each for their service award, which is intended to
9 compensate Plaintiffs for the time spent on this case, including reviewing pleadings, the potential
10 for hesitation from later prospective employers that might find out they brought this claim, and
11 for executing a general release, including for all known and unknown claims under Civil Code §
12 1542. *See* SA § 5.2; Quijada Decl. ¶¶ 4-7; Azar Decl. ¶¶ 3-16. This requested Service Award is
13 consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic*
14 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
15 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
16 incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*,
17 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter.*
18 *Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)
19 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
20 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award
21 in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
22 (affirming \$25,000 Incentive award to class representative in ERISA case).

23 **M. The Settlement Administrator’s Costs Should be Approved**

24 The Parties have agreed to pay actual costs of administration, or Nine Thousand Six
25 Hundred Dollars (\$9,600.00), to the Settlement Administrator, Phoenix Settlement
26 Administrators, to administer this Settlement. *See* SA § 6.8. The Parties believe that the
27 administration fee is reasonable and should be approved.

28 //

1 **N. Notice to the LWDA Has Been Provided**

2 As discussed above, and concurrent with the filing of this Motion, Plaintiffs uploaded the
3 instant motion to the LWDA's website. *See* Agnew Decl. ¶ 58, Exhibit E; Vahdat Decl. ¶ 7,
4 Exhibit 3.

5 **V. CONCLUSION**

6 Based on the above, Plaintiffs request the Court approve the current PAGA settlement.
7
8

9 DATED: March 6, 2024

DIVERSITY LAW GROUP, P.C.
LAW OFFICES OF SEAN S. VAHDAT &
ASSOCIATES, APLC

11
12 By: _____

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