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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

BENJAMIN BROWN-BAXTER, as an
individual and on behalf of aggrieved
employees,

Plaintiff,

vs.

TUTOR PERINI CORPORATION, a
Massachusetts corporation; DESERT
MECHANICAL, INC., a Nevada
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 21STCV30039

(Assigned to the Honorable Colin P. Leis, Dept.
74)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE THE PARTIES'
SETTLEMENT AGREEMENT PURSUANT
TO THE LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Reservation No.: 326040727832

Date: August 23, 2023

Time: 8:30 A.M.

Dept.: 74

Action Filed: August 13, 2021

Trial Date: April 22, 2024

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 23, 2023, at 8:30 A.M., or as soon thereafter
as the matter be heard in Department 74 of the Superior Court of the State of California for the
County of Los Angeles, located at 111 N. Hill Street, Los Angeles, California 90012, Plaintiff
Benjamin Brown-Baxter ("Plaintiff") will and hereby does move the Court for entry of an order

1 approving the proposed PAGA Settlement Agreement (“Agreement” or “Settlement
2 Agreement”) entered into in the above-captioned civil action between Plaintiff and Defendants
3 Desert Mechanical, Inc. and Tutor Perini Corporation (together, “Defendants”) (Plaintiff and
4 Defendants shall collectively be referred to as the “Parties”) under the Labor Code Private
5 Attorneys General Act of 2004 (the “PAGA”).

6 This motion is made pursuant to California Labor Code § 2699(1)(2), which requires trial
7 courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],” *see*
8 Cal. Lab. Code § 2699(1)(2), and on the grounds that the parties’ settlement is fundamentally fair,
9 adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
10 concurrently filed declaration of Max W. Gavron, a copy of the Parties’ proposed Settlement
11 Agreement and this motion were electronically submitted to the Labor and Workforce
12 Development Agency in accordance with California Labor Code §§ 2699(1)(2) and 2699(1)(4)
13 concurrent with the filing of this motion.

14 This motion is based on this notice of motion and motion for approval of the Parties’
15 Settlement Agreement attached to the Declaration of Max Gavron and the Settlement Agreement
16 attached thereto as **Exhibit A**, concurrently filed herewith; the attached memorandum of points
17 and authorities in support of this motion; the concurrently filed declarations of Max W. Gavron
18 (and any exhibits attached thereto), Larry W. Lee, and Plaintiff Benjamin Brown-Baxter in
19 support of this motion; all pleadings, records, and files in this action; and upon such other
20 matters as may be properly presented to, or received by, the Court at or before the hearing on this
21 motion.

22
23 DATED: August 1, 2023

DIVERSITY LAW GROUP, P.C.

24
25 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Aggrieved
Employees

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	7
II. FACTUAL AND PROCEDURAL BACKGROUND.....	8
III. STANDARD OF REVIEW	10
IV. ARGUMENT.....	11
A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant to Labor Code § 2699(1)(2).....	11
B. The Court Should Approve the Settlement Agreement	11
1. The Settlement Agreement is Entitled to a Presumption of Fairness	11
2. The Scope of the Settlement Agreement is Fair, Adequate, and Reasonable.....	12
3. The Settlement Agreement Apportions Civil Penalties Between the LWDA and the Aggrieved Employees as Required by PAGA	15
4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys' Fees	15
a. Percentage of the Fund.....	15
b. Lodestar Cross-Check.....	16
5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Litigation Costs.....	19
6. Plaintiff's Service Award Should be Approved.....	19
7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Settlement Administration Costs	20
V. CONCLUSION.....	21

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal. App. 4th 1157 (2008)	14
<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009)	11, 12
<i>Atempa v. Pedrazzani</i> , 27 Cal. App. 5th 809 (2018).....	14
<i>Carrington v. Starbucks Corporation</i> , 30 Cal. App. 5th 504 (2018).....	14
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43 (2008)	16, 17
<i>City of Oakland v. Oakland Raiders</i> , 203 Cal. App. 3d 78 (1988).....	17
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	11
<i>Flannery v. California Highway Patrol</i> , 61 Cal. App. 4th 629 (1998).....	18
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> , 59 Cal. 4th 348 (2014).....	12
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116 (2008).....	13
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480 (2016).....	15, 16, 19
<i>Lealao v. Beneficial California, Inc.</i> , 82 Cal. App. 4th 19 (2000)	17
<i>Martino v. Denevi</i> , 182 Cal. App. 3d 553 (1986)	18
<i>PLCM Group, Inc. v. Drexler</i> , 22 Cal. 4th 1084 (2000).....	18
<i>Serrano v. Unruh</i> , 32 Cal. 3d 621 (1982)	18
<i>Sutter Health Uninsured Pricing Cases</i> , 171 Cal. App. 4th 495 (2009)	17
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224 (2001).....	13, 17

Statutes

2003 Cal. Stat. ch. 906 § 1(d)	11
Civil Code § 1542	20
Labor Code § 212.....	8, 12
Labor Code § 225.5.....	8, 12, 13
Labor Code § 2698, <i>et seq.</i>	8, 12
Labor Code § 2699 (e)(2)	10
Labor Code § 2699 (f).....	13

1	Labor Code § 2699 (g).....	15, 19
2	Labor Code § 2699 (i).....	15
3	Labor Code § 2699 (l)(2)	7, 10, 11
4	Labor Code § 2699(l)(4)	11
5	Other Authorities	
6	2003 Cal. Stat. ch. 906 § 1	12
7	<i>Report of the Third Circuit Task Force, Court Awarded Attorney Fees</i> 108 F.R.D. 237 (1985). 17	
8	Federal Cases	
9	<i>Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.</i> , 2009 WL 2448430	
10	(S.D. Cal. Aug. 10, 2009)	14
11	<i>Bernstein v. Virgin Am., Inc.</i> , 3 F.4th 1127 (9th Cir. 2021).....	14
12	<i>Craft v. County of San Bernardino</i> , 624 F. Supp. 2d 1113 (C.D. Cal. 2008).....	18
13	<i>Dyer v. Wells Fargo Bank, N.A.</i> , 303 F.R.D. 326 (N.D. Cal. 2014).....	17
14	<i>Haralson v. U.S. Aviation Servs. Corp.</i> , 383 F. Supp. 3d 959 (N.D. Cal. 2019).....	10
15	<i>Hopkins v. Stryker Sales Corp.</i> , No. 11-CV-02786-LHK, 2013 WL 496358 (N.D. Cal. Feb. 6,	
16	2013)	17
17	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366 (S.D. Ohio 1990)	20
18	<i>In re Rite Aid Corp. Secs. Litig.</i> , 396 F.3d 294 (3d Cir. 2005)	16
19	<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811 (9th Cir. 2012)	13
20	<i>New York Gaslight Club, Inc. v. Carey</i> , 447 U.S. 54 (1980).....	18
21	<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110 (N.D. Cal. 2016)	11, 12
22	<i>O'Connor v. Uber Techs.</i> , No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).....	10
23	<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	19
24	<i>Sakkab v. Luxottica Retail North America, Inc.</i> , 803 F.3d 425 (9th Cir. 2015)	11
25	<i>Smith v. H.F.D. No. 55, Inc.</i> , No. 2:15-cv-01293, 2018 WL 1899912 (E.D. Cal. Apr. 20, 2018)	
26		10, 13
27	<i>Solis v. Regis Corp.</i> , 612 F. Supp. 2d at 1087 (N.D. Cal. 2007).....	13
28	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995).....	20

1	<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043 (9th Cir. 2002).....	17
2	<i>Willner v. Manpower Inc.</i> , No. 11-CV-02846-JST, 2015 WL 3863625 (N.D. Cal. June 22, 2015)	
3		17

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Benjamin Brown-Baxter (“Plaintiff”) respectfully requests
4 the Court’s approval of the PAGA Settlement Agreement (“Agreement” or “Settlement
5 Agreement”). After this lawsuit was commenced, the Parties engaged in written discovery,
6 multiple meet and confer efforts, and substantial motion practice. Ultimately, the Parties
7 participated in a mediation. As part of their privileged settlement negotiations, Defendants Desert
8 Mechanical, Inc. and Tutor Perini Corporation (together, “Defendants”) produced data regarding
9 the aggrieved employees, from which Plaintiff’s counsel calculated the maximum PAGA penalty
10 exposure. Declaration of Max W. Gavron (“Gavron Decl.”) ¶¶ 10-15. Based on this information
11 and evidence, the Parties have settled this case on a representative PAGA basis for \$625,000.00,
12 or approximately 34% of the originally calculated maximum exposure. *Id.*

13 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
14 attorneys’ fees, or \$208,333.33, up to \$30,000.00 in litigation costs incurred by Plaintiff’s
15 counsel,¹ \$10,000.00 to Plaintiff for a service award, and up to \$5,250.00 for settlement
16 administration costs. Agreement ¶¶ 3.2.1, 3.2.2, 3.2.4. The remainder, or the “PAGA
17 Penalties,” is allocated to the payment of civil penalties under the Private Attorneys General Act
18 (“PAGA”), 75% of which is for distribution to the Labor and Workforce Development Agency
19 and 25% of which is for distribution to the “Aggrieved Employees” on whose behalf Plaintiff
20 filed this action, as required by PAGA. *Id.* ¶ 3.2.3.

21 Under PAGA, the Court must review and approve the proposed settlement. *See* Cal. Lab.
22 Code § 2699(1)(2). Accordingly, Plaintiff brings this motion to request approval of the
23 Settlement Agreement on the grounds it is fundamentally fair, adequate, and reasonable in light
24 of PAGA’s policy and purpose and the facts and circumstances discussed in detail below.

25
26
27 ¹ Plaintiff’s counsel actually incurred \$5,000.99 in costs. Declaration of Larry W. Lee (“Lee
28 Decl.”) ¶ 8; Ex. A (Cost Report). Accordingly, the difference between what the agreement
allocates and those actually incurred will be distributed to the LWDA and aggrieved employees.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 On June 10, 2021, Plaintiff sent notice to the Labor and Workforce Development Agency
3 (“LWDA”) giving notice of his intent to pursue a representative PAGA action, on behalf of
4 himself and the State of California, as well as on behalf of other aggrieved employees (the
5 “PAGA Notice”). Gavron Decl. ¶ 2.

6 On August 13, 2021, Plaintiff filed a representative action complaint against Defendants
7 asserting a claim under Labor Code § 2698, *et seq.*, predicated on underlying violations of Labor
8 Code §§ 212 and 225.5 (the “Action”). Gavron Decl. ¶ 3. Plaintiff subsequently amended the
9 complaint on October 18, 2021, and again on December 6, 2021, adding further details regarding
10 the exhaustion of administrative remedies, joint employer relationship between Defendants, and
11 other information. *Id.* ¶4. The Second Amended Complaint is the operative Complaint
12 (“Complaint”).

13 After the filing of the initial complaint, the Parties engaged in formal and informal
14 discovery and engaged in several meet and confer efforts and an informal discovery conference.
15 Gavron Decl. ¶ 5. Plaintiff propounded multiples sets of written discovery requests upon
16 Defendants, including requests for production of documents, requests for admissions, and
17 interrogatories. Gavron Decl. ¶ 5. Defendant also filed and Plaintiff opposed a Motion to Strike,
18 a Demurrer, and Motion to Compel Arbitration. Gavron Decl. ¶ 5. Plaintiff defeated all of these
19 motions. Gavron Decl. ¶ 5. Plaintiff thereafter filed four motions to compel. Gavron Decl. ¶ 5.

20 Thereafter, the Parties agreed to engage in mediation before neutral Christopher E.
21 Panetta, Esq. In connection with the mediation, Defendants provided Plaintiff and his counsel
22 with information about the number of potentially aggrieved employees, the number of pay
23 periods at issue, sample checks, and other data to analyze Defendant’s potential liability. Based
24 on this information, the Parties conducted settlement negotiations. Gavron Decl. ¶ 6.

25 Following a full day of mediation with Mr. Panetta on April 10, 2023, the Parties agreed
26 to terms for complete settlement of the Action, which was negotiated at arm’s-length with each
27 Party having had the opportunity to consider all known facts and circumstances. Gavron Decl. ¶
28 7. The proposed settlement is based on the Los Angeles Superior Court’s model settlement

1 agreement. *Id.* ¶ 8.

2 The Parties have agreed that Defendants will fund the Gross Settlement Amount of
3 \$625,000.00. Agreement ¶ 3.1. The Settlement Agreement allocates one-third of the Gross
4 Settlement Amount for attorneys' fees, or \$208,333.33, up to \$30,000.00 in litigation costs
5 incurred by Plaintiff's counsel ("PAGA Counsel"), \$10,000.00 to Plaintiff for a service award,
6 and up to \$5,250.00 for settlement administration costs. *Id.* ¶¶ 3.1, 3.2.1, 3.2.2, 3.2.4. The
7 remainder (or PAGA Penalties) is allocated to the payment of civil penalties under PAGA, 75%
8 of which is for distribution to the LWDA and 25% of which is for distribution to the Aggrieved
9 Employees on whose behalf Plaintiff filed this action, as required by PAGA. *Id.* ¶ 3.2.3.

10 The Settlement Agreement provides the following release:

11 All Aggrieved Employees are deemed to release, on behalf of
12 themselves and their respective former and present representatives,
13 agents, attorneys, heirs, administrators, successors, and assigns, the
14 Released Parties from all claims, causes of action, demands,
15 damages, or liabilities arising at any time during the PAGA Period
16 that were pled or which could have been pled based on the factual
17 allegations contained in the operative Complaint or any amendments
thereto, including but not limited to claims brought under the Private
Attorneys General Act ("PAGA") for violation of Labor Code
Sections 212 and 225.5.

18 *Id.* ¶ 5.2. These claims are defined as the Released PAGA Claims. *Id.* ¶ 1.25. Plaintiff also
19 executed a general release as part of the Settlement Agreement, including a waiver of Civil Code
20 § 1542, in exchange for his Service Award. *Id.* ¶¶ 5.1, 5.1.1.

21 Each Aggrieved Employee will receive an individual payment proportionate to the
22 number of PAGA Pay Periods worked. *See id.* ¶¶ 1.18, 3.2.3.1. Each Individual Settlement
23 Payment will be considered the payment of a civil penalty and treated as IRS Form 1099 income.
24 *See id.* ¶ 3.2.3.2. Finally, any checks not cashed by Aggrieved Employees will be voided and the
25 unclaimed amount will be forwarded to the State of California Controller's Office Unclaimed
26 Property Fund in the name of the respective Aggrieved Employees. *See Settlement Agreement* ¶
27 4.4.3.

28 //

1 **III. STANDARD OF REVIEW**

2 Although PAGA requires courts to “review and approve” the settlement of any civil
3 action filed under PAGA, *see* Cal. Lab. Code § 2699(l)(2), neither the Legislature, the California
4 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
5 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d
6 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a
7 PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL
8 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating
9 PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark”
10 and stated only that the relief provided under PAGA must be “genuine and meaningful,”
11 “consistent with the underlying purpose of the statute to benefit the public” and, in the context of
12 a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’
13 with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce
14 Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber*
15 *Techs.*, No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

16 Left to develop their own standards, federal district courts have typically followed the
17 LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and
18 reasonable in light of PAGA’s policies and purposes.” *See Haralson*, 383 F. Supp. 3d at 972
19 (collecting cases). When applying this test, federal district courts often consider factors such as
20 strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further
21 litigation; the amount offered in settlement; the extent of discovery completed; and the expertise
22 and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been
23 mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that
24 are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab.
25 Code § 2699(e)(2).

26 //

27 //

28 //

1 **IV. ARGUMENT**

2 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant**
3 **to Labor Code § 2699(l)(2)**

4 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
5 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
6 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the
7 proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to
8 give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§
9 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the
10 Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system
11 in conjunction with filing this motion. *See* Gavron Decl. ¶ 36, Ex. C.

12 **B. The Court Should Approve the Settlement Agreement**

13 **1. The Settlement Agreement is Entitled to a Presumption of Fairness**

14 In class actions, judicial review of a settlement’s fairness is designed to protect class
15 members who had no say in the negotiation of the settlement by ensuring that the settlement is
16 not the product of “fraud,” “overreaching,” or “collusion” by the negotiating parties and that
17 “due regard” was given to the rights and interests of absent class members subject to the
18 settlement. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Although
19 PAGA actions and class actions have certain “fundamental” differences, *see Sakkab v. Luxottica*
20 *Retail North America, Inc.*, 803 F.3d 425, 435 (9th Cir. 2015), PAGA settlements are also
21 subject to Court approval. *See Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing
22 the scope of a judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d
23 1110, 1134 (N.D. Cal. 2016).

24 Against this backdrop, California courts have identified a set of circumstances entitling
25 class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In
26 particular, a presumption of fairness arises where “(1) the settlement is reached through arm’s-
27 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
28 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of

objectors is small.” *See id.*

All of the factors that would give rise to a presumption of fairness in the context of a class action settlement are present in this PAGA action. After this lawsuit was commenced, the Parties agreed to engage in arm’s-length negotiations between highly experienced counsel. As part of their privileged settlement negotiations, Defendants produced data regarding the aggrieved employees, from which Plaintiff’s counsel calculated the maximum PAGA penalties and analyzed Defendants’ potential liability. Gavron Decl. ¶ 10. Plaintiff’s counsel has significant experience in litigating wage and hour class and PAGA actions, which further supports the reasonableness of the settlement. Gavron Decl. ¶¶ 26-32; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 6, 7. Therefore, the Settlement Agreement is entitled to a presumption of fairness.

2. The Scope of the Settlement Agreement is Fair, Adequate, and Reasonable

Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the “vigorous assessment and collection of civil penalties as provided in the Labor Code” to sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement capability of the LWDA with private enforcement actions by “aggrieved employees” acting as private attorneys general. *See* 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of in the nature of an enforcement action, where the named plaintiff acts as a proxy of the LWDA to collect penalties otherwise recoverable only by the LWDA. *See Arias*, 46 Cal. 4th at 986; *see also Iskanian*, 59 Cal. 4th at 381-82. In that role, the named plaintiff “take[s] on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment.” *See O'Connor*, 201 F. Supp. 3d at 1134.

Plaintiff’s claims in this action are based on alleged violations of Labor Code §§ 212, 225.5, and 2698, *et seq.* *See generally*, Complaint. When reviewing a settlement agreement, “the test is not the maximum amount plaintiffs might have obtained at trial on the complaint,”

1 *see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the
2 settlement agreement is perfect in the estimation of the reviewing court.” *See Lane v.*
3 *Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is “whether the settlement is
4 reasonable under all of the circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant
5 considerations include the strength of a plaintiff’s case and the risk, expense, complexity, and
6 likely duration of further litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116,
7 130 (2008); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912 at *2
8 (E.D. Cal. Apr. 20, 2018). In PAGA settlements, courts also consider their authority to award
9 less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2); *see also*
10 *Smith*, 2018 WL 1899912 at *3.

11 Here, Defendants produced data for the aggrieved employees, which permitted Plaintiff
12 to analyze Defendants’ potential exposure and liability. Gavron Decl. ¶ 10. As detailed in the
13 Settlement Agreement, there are approximately 432 Aggrieved Employees and approximately
14 9,175 pay periods at issue during the time encompassed by this settlement. Agreement ¶ 4.1.

15 Labor Code section 225.5 provides the penalty structure for violations of Labor Code
16 Section 212 where an employee’s wages are unlawfully withheld, and provides \$100 for initial
17 violations, and \$200 for subsequent ones, plus 25 percent of the amount unlawfully withheld.
18 Lab. Code § 225.5; *Solis*, 612 F. Supp. 2d at 1087. The PAGA’s default penalty structure also
19 provides \$100 for the initial violation and \$200 for subsequent violations. Cal. Labor Code
20 § 2699(f).

21 Defendants’ potential exposure could be as high as \$1.8 million if the Court were to
22 award a \$100 penalty for an initial violation and a \$200 penalty for each subsequent violation
23 during each pay period encompassed by the proposed settlement ((9,175 x \$200) – (432
24 Aggrieved Employees x \$100) = \$1,791,800). Gavron Decl. ¶ 12. However, Defendants argued
25 that their exposure was significantly less because they always complied with the law. Gavron
26 Decl. ¶ 12. As detailed in the motions the Parties litigated prior to settlement, Defendants also
27 argued that they were not joint employers, were not subject to the PAGA because they were
28 entitled to an exemption applicable to the construction industry, and that Plaintiff and the

aggrieved employees' claims were subject to binding arbitration by operation of the various collective bargaining agreements governing their employment. Gavron Decl. ¶ 12.

While the PAGA does provide for a potentially heightened penalty of \$200 for "subsequent" violations, many courts do not award that penalty unless there has been a prior citation by the LWDA or court ruling demonstrating that the employer previously violated the Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); accord *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.*, 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); see also *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling). Thus, Defendants argued that even if Plaintiff was able to establish any violation of the Labor Code, the PAGA penalties assessed for these violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at maximum, and there is a likelihood that a further reduction of the penalty would be appropriate given Defendants' good faith efforts to comply with the Labor Code and their contentions that they complied with the Labor Code at all times. Gavron Decl. ¶ 13.

Defendants also argued that even if Plaintiff prevailed, the recoverable penalties under PAGA are minimal. Indeed, courts often significantly reduce the penalties awarded. See *Carrington v. Starbucks Corporation*, 30 Cal. App. 5th 504, 517 (2018) (approving PAGA penalty reduction to \$5 per pay period); accord *Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018). If the Court in this case were to reduce penalties as was approved in *Carrington*, the potential exposure would be significantly less.

Under the circumstances of this case, the payment of \$625,000.00 in civil penalties is fair, adequate, and reasonable. The payment of \$625,000.00 in exchange for a release of only those claims for civil penalties that are pleaded in the action or that could have been pleaded based on the facts alleged in the operative Complaint will have a substantial deterrent effect on Defendants and other California employers and will confer benefits on the Aggrieved

1 Employees, who will each receive a portion of the settlement, and the LWDA. This is
2 approximately 34% of the calculated maximum exposure (\$625,000 / \$1,800,000). Gavron Decl.
3 ¶¶ 15; 17.

4 In sum, this settlement is fair, reasonable, and consistent with PAGA’s policies and
5 purposes under these circumstances.

6 **3. The Settlement Agreement Apportions Civil Penalties Between the**
7 **LWDA and the Aggrieved Employees as Required by PAGA**

8 Except when civil penalties are recovered from a defendant who did not have any
9 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
10 distributed so that 75% of the civil penalties are paid to the to LWDA and 25% are paid to the
11 “aggrieved employees” on whose behalf the PAGA action was brought. *See* Cal. Lab. Code §
12 2699(i). In full compliance with that rule, the Settlement Agreement requires 75% of the PAGA
13 Penalties to be paid to the LWDA and 25% to be paid to the Aggrieved Employees. Agreement ¶
14 3.2.3. The Aggrieved Employees will receive penalties based on the number of pay periods they
15 worked during the applicable period using a pro rata distribution formula. *Id.* ¶ 3.2.3.1.

16 **4. The Settlement Agreement Allocates a Fair, Adequate, and**
17 **Reasonable Amount to the Payment of Attorneys’ Fees**

18 **a. Percentage of the Fund**

19 PAGA allows a prevailing plaintiff to recover reasonable attorneys’ fees. *See* Cal. Lab.
20 Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff’s counsel to
21 request up to \$208,333.33, in attorneys’ fees. *See* Agreement ¶ 3.2.1. For two reasons, this
22 amount is fair, adequate, and reasonable in light of PAGA’s policy and purpose.

23 First, in class actions, state and federal courts have held that when a class action
24 establishes a monetary fund for the benefit of the class members out of which attorneys’ fees
25 may be paid, courts may determine the amount of a reasonable fee by “choosing an appropriate
26 percentage of the fund created.” *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016)
27 (affirming a fee award representing 33 1/3 percent of the fund and joining “the overwhelming
28 majority of federal and state courts” in approving the “percentage method” as a reasonable

means for determining attorney fee awards in class actions). While different from class action settlements in important ways, PAGA settlements also involve the establishment of a common fund for the benefit of persons other than the named plaintiff, so the reasons for utilizing the percentage method are the same. *See id.* (noting that the percentage method provides “ease of calculation,” “alignment of incentives between counsel and the class,” “a better approximation of market conditions in a contingency case,” and the “encouragement...to seek an early settlement”). The \$208,333.33 requested by Plaintiff’s counsel represents one-third of the Gross Settlement Amount, which is consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) (“[F]ee awards in class actions average around one-third of the recovery”); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to one-third of the total settlement amount).

b. Lodestar Cross-Check

When the primary method employed to determine fees is the percentage method, courts have discretion to use the lodestar method to “cross-check” the amount of fees calculated by way of percentage. The *Laffitte* Court emphasized, however, that “the lodestar calculation, when used in this manner, does not override the trial court’s primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the primary reliance on the percentage of common fund method”).

Nonetheless, the Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment.” *Id.* (emphasis added). Thus, a lodestar cross-check seeks to uncover astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check “undermines” one of the primary reasons for using the percentage method: aligning counsel’s incentives with the benefits delivered to the class and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain

1 the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
2 *Awarded Attorney Fees* 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82
3 Cal. App. 4th 19, 29-30 (2000) (citing the recommendations of the Third Circuit Task Force with
4 approval and observing that “[t]he criticisms of the lodestar approach set forth in this Report are
5 now echoed by many authorities, who have been most vocal about the manner in which it
6 exacerbates the problem of ‘cheap settlements’ and burdens already overworked trial judge.”).

7 Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or
8 even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also, e.g.*,
9 *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
10 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
11 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
12 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
13 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
14 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was
15 affirmed in full by the California Supreme Court in its decision guiding lower courts on
16 assessing fees.

17 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
18 awarded by the percentage method showing that the majority of multipliers awarded are “in the
19 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
20 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
21 over 30 cases). Federal district courts applying California law have likewise routinely approved
22 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
23 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a
24 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
25 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in lodestar
26 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,
27 at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code
28 violations). Other courts have found even higher multipliers to be reasonable by comparison to

1 other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal.
2 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases
3 affirming a higher multiplier).

4 With respect to PAGA Counsel's lodestar, PAGA Counsel will have expended
5 approximately 270.5 hours litigating this case, which includes approximately 5 hours of
6 anticipated time spent after approval responding to correspondence and phone calls from
7 Aggrieved Employees, the settlement administrator, and defense counsel. Gavron Decl. ¶ 33; Ex.
8 B. PAGA Counsel request an hourly rate of \$600.00 and \$800.00, both of which have been
9 approved by numerous courts. Gavron Decl. ¶ 34; Lee Decl. ¶ 10. The courts are quite liberal in
10 the evidence required to prove an attorney's hours. Detailed time records are not required. An
11 attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours
12 worked on a particular case is sufficient evidence to support an award of attorney fees, even in
13 the absence of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

14 Reasonable hours include, in addition to time spent during litigation, the time spent
15 before the action is filed, including time spent interviewing the clients, investigating the facts and
16 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
17 62 (1980). The fee award should also include fees incurred to establish and defend the attorneys'
18 fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which PAGA Counsel
19 seeks compensation involve only these types of tasks. Thus, the number of hours for which fees
20 are sought is reasonable.

21 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
22 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
23 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
24 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
25 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
26 4th 629, 632-33 (1998).

27 PAGA Counsel's skill and experience justify the requested rates. As shown in the
28 supporting declarations, PAGA Counsel have significant experience in the area of employment

1 and wage and hour class and representative actions. PAGA Counsel’s practice focuses on
2 representing employees in employment matters, particularly wage and hour cases on a
3 contingency basis. Gavron Decl. ¶ 30-32. As such, based on the hours and applicable rates,
4 PAGA Counsel’s lodestar amount through the finalization of this settlement – without a
5 multiplier – will be approximately \$177,960.00, which results in a modest multiplier of 1.17.
6 Gavron Decl. ¶ 33, Ex B; Lee Decl. ¶ 9, Ex B. This is well within the range approved by the
7 California Supreme Court in *Laffitte*. Accordingly, the cross-check supports the fee requested.

8 **5. The Settlement Agreement Allocates a Fair, Adequate, and**
9 **Reasonable Amount to the Payment of Litigation Costs**

10 PAGA also allows a prevailing plaintiff to recover litigation costs. *See* Cal. Lab. Code §
11 2699(g). Accordingly, the Settlement Agreement allows PAGA Counsel to request up to
12 \$30,000.00 in litigation costs. Agreement ¶ 3.2.1.

13 PAGA Counsel requests \$5,000.99 for the reimbursement of litigation costs. As set forth
14 in accompanying declarations of PAGA Counsel, these costs were all directly incurred in the
15 prosecution of this action, including, but not limited to, filing fees, service fees, and mediation
16 fees. Lee Decl. ¶ 8, Ex. A. As such, PAGA Counsel’s request for costs in the amount of \$5,000.9
17 is fair, adequate, reasonable, and consistent with PAGA’s policies. Lee Decl. ¶ 8; Ex. A (Cost
18 Report). Because this amount is less than what was provided in the Settlement Agreement, the
19 difference will be distributed to the LWDA and Aggrieved Employees.

20 **6. Plaintiff’s Service Award Should be Approved**

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

27 Here, Plaintiff respectfully requests \$10,000.00 for his service award, which is intended
28 to compensate Plaintiff for the time spent on this case and for executing a general release,

including of Civil Code § 1542, which was not required by Aggrieved Employees. Declaration of Benjamin Brown-Baxter ¶ 7. Plaintiff estimates he spent approximately 20-25 hours assisting in the litigation of this case, including conferring with his attorneys, providing documents, and reviewing filings. Brown-Baxter Decl. ¶ 5. This requested enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a matter of public record. Future employers may be less likely to hire an employee who has previously filed an action against an employer. This in conjunction with Plaintiff's agreement to provide a general release supports the requested award.

7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Settlement Administration Costs

Because the Settlement Agreement requires payments not only to Plaintiff, PAGA Counsel, and the LWDA, but also to Defendant's current and former employees, significant time and effort will be required to administer the settlement if it is approved by this Court. Among other things, the administrator will calculate each Aggrieved Employee's settlement shares; appropriate tax forms must be issued to all parties who receive payments under the Settlement Agreement; payments must be mailed to Plaintiff, PAGA Counsel, the LWDA, and each Aggrieved Employee; and any checks not cashed by Aggrieved Employees must be voided so that the unclaimed amount can be forwarded to the State of California Controller Office's Unclaimed Property Fund in the name of the Aggrieved Employees who did not cash their respective Individual PAGA Payments. *See* Agreement ¶¶ 4.2, 4.4, 7.1-7.4. The Administrator will also distribute a short letter to aggrieved employees explaining the release of claims and settlement. Gavron Decl. ¶ 37; Ex. D (PAGA Settlement Notice Letter).

In contemplation of these expenses, the parties will engage Phoenix Settlement Administrators to act as a third-party settlement administrator and have allocated up to \$5,250.00

1 to cover the cost of settlement administration. Agreement ¶¶ 1.2, 3.2.2; Gavron Decl. ¶ 37; Ex. E
2 (Phoenix Bid).

3 **V. CONCLUSION**

4 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
5 Agreement pursuant to Labor Code § 2699(1)(2).

6
7 DATED: August 1, 2023

DIVERSITY LAW GROUP, P.C.

8
9 By: 

Larry W. Lee

Max W. Gavron

10 Attorneys for Plaintiff and the Aggrieved
11 Employees
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