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

ALLEN JOHNSON, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

FS PALO ALTO EMPLOYMENT, INC., a
Delaware corporation; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 21CV389927

(Assigned for all purposes to the Hon. Sunil R.
Kulkarni, Dept. 1)

**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: March 2, 2023

Time: 1:30 P.M.

Dept.: 1

Complaint Filed: November 4, 2021

Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on March 2, 2023, at 1:30 P.M., or as soon thereafter as
3 the matter may be heard, before the Honorable Sunil R. Kulkarni, judge presiding, in Department
4 1 of the above referenced Court, located at 191 N. First Street, San Jose, California 95113,
5 Plaintiff Allen Johnson ("Plaintiff") will seek an Order approving the concurrently filed Joint
6 PAGA Settlement Agreement and Release of Claims ("Settlement Agreement"), pursuant to the
7 procedures set forth in Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Larry W. Lee, Kristen M. Agnew, Nicholas
10 Rosenthal, and Plaintiff Allen Johnson, the records and file herein, and on such other evidence as
11 may be presented at the hearing of the motion.

12
13 DATED: February 6, 2023

DIVERSITY LAW GROUP, P.C.

14
15 By: 
16 Larry W. Lee
17 Kristen M. Agnew
18 Nicholas Rosenthal
19 Attorneys for Plaintiff and Aggrieved Employees
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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 § 2698, *et*
4 *seq.*, Plaintiff Allen Johnson (“Plaintiff”) hereby moves the Court for an order approving the
5 non-reversionary PAGA settlement as set forth in the concurrently filed Joint PAGA Settlement
6 Agreement and Release of Claims (the “Settlement Agreement” or “Settlement”).¹

7 The operative Complaint in this case alleges that Defendant FS Palo Alto Employment,
8 Inc. (“Defendant”) (Defendant and Plaintiff together, the “Parties”) violated the PAGA by: (i)
9 failing to pay employees minimum and/or overtime wages for time spent undergoing check
10 in/out procedures, including COVID temperature checks and screenings, in violation of Labor
11 Code §§ 510, 558, 1194, 1197, and 1197.1; (ii) failing to provide off-duty 10-minute rest breaks
12 to employees who worked 3.5 hours or more in one shift, in violation of Labor Code § 226.7;
13 (iii) failing to provide off-duty 30-minute meal periods to employees who worked more than five
14 hours in one shift, in violation of Labor Code §§ 226.7 and 512; (iv) failing to provide accurate
15 wage statements to employees, in violation of Labor Code § 226(a); and (v) failing to pay all
16 earned wages upon termination to separating employees, in violation of Labor Code §§ 201, 202,
17 and 203. With respect to the afore-mentioned PAGA claims, Plaintiff seeks to recover civil
18 penalties against Defendant on behalf of the State of California and other similarly aggrieved
19 employees.

20 As will be explained in further detail below, based on the California Supreme Court’s
21 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
22 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as called
23 for under PAGA on behalf of the State of California and other similarly situated aggrieved
24 employees, without seeking class certification or meeting the requirements of class certification
25 (*i.e.*, numerosity, typicality, commonality, and adequacy). As such, while the PAGA settlement
26

27 ¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of Nicholas
28 Rosenthal (“Rosenthal Decl.”) as **Exhibit B**. Unless otherwise indicated, capitalized terms used
herein have the same meaning as defined in the Settlement Agreement.

1 reached herein is on behalf of the State of California and other aggrieved employees, the usual
2 two-step preliminary and final approval process is not required. Rather, as called for under Labor
3 Code § 2699(l), all that is required is an approval by this Court of any settlement of the PAGA
4 claims by the Parties.

5 The Parties have reached such a PAGA settlement, and now seek this Court's approval of
6 the settlement which provides for the payment of civil penalties under the PAGA. As
7 demonstrated below, the proposed settlement warrants the Court's approval. Significantly, this
8 settlement was reached after the exchange of informal discovery, including the size of the PAGA
9 group, the number of pay periods at issue, and documents pertaining to Defendant's policies,
10 practices, and procedures regarding meal and rest breaks and wage statements. The Parties also
11 participated in a full-day mediation with mediator, Christopher M. Barnes, Esq., and continued
12 negotiations thereafter facilitated by Mr. Barnes, after which the Parties were ultimately able to
13 reach this settlement.

14 Pursuant to the terms of the Parties' proposed Settlement Agreement, Defendant will pay
15 the total amount of \$95,000.00 (the "Gross Settlement Amount"). This amount encompasses a
16 payment of attorneys' fees to Plaintiff's counsel in the amount of \$31,666.00, Plaintiff's
17 counsel's actual litigation costs of \$10,216.65, a service award to Plaintiff in the amount of
18 \$7,500.00, and settlement administration costs in the amount of \$7,500.00. Assuming the Court
19 grants the foregoing amounts in full, the Net Settlement Amount totals approximately
20 \$42,900.70. Pursuant to the PAGA, 75% of the Net Settlement Amount, or \$32,175.53 will be
21 paid to the Labor & Workforce Development Agency ("LWDA") as civil penalties ("LWDA
22 PAGA Payment"), and 25% of the Net Settlement Amount, or \$10,735.17, will be paid to the
23 Aggrieved Employees ("Individual PAGA Payments").

24 The proposed settlement also has a limited and tailored release for PAGA Settlement
25 Members that does not release any of their substantive claims. Specifically, the Aggrieved
26 Employees are releasing "all claims for PAGA penalties that were alleged, or reasonably could
27 have been alleged, based on the PAGA Period facts stated in the operative Complaint and the
28 PAGA Notice." Settlement Agreement ¶ 5.2.

1 In light of the above, the proposed settlement constitutes an adequate, fair, and reasonable
2 settlement on behalf of the State of California and Aggrieved Employees, and accomplishes the
3 goals of PAGA. Thus, the Court should grant approval of the settlement.

4 **II. FACTUAL AND PROCEDURAL BACKGROUND**

5 **A. Summary of the Litigation**

6 Plaintiff asserts claims against Defendant under the PAGA based on Defendant's failure
7 to pay all minimum and/or overtime wages owed for time spent undergoing check in and out
8 procedures in violation of Labor Code §§ 201-203, 510, 558, 1194, 1197, and 1197.1, failure to
9 provide off-duty meal and rest breaks in violation of Labor Code §§ 201-203, 226.7 and 512, and
10 failure to provide accurate itemized wage statements in violation of Labor Code § 226(a). Based
11 on these allegations, Plaintiff asserts violations of the PAGA based on violations of California
12 Labor Code §§ 201-203, 204, 226, 226.7, 510, 512, 558, 1194, 1197, and 1197.1 against
13 Defendant. Declaration of Nicholas Rosenthal ("Rosenthal Decl.") ¶ 2.

14 On or about August 31, 2021, Plaintiff submitted written notice under Labor Code §
15 2699.3 (the "PAGA Notice") to the LWDA and Defendant, predicated on the alleged violations
16 of the Labor Code described above. *Id.* ¶ 2. Thereafter, on September 23, 2021, Plaintiff filed a
17 class action lawsuit in Santa Clara County Superior Court (the "Class Action"). *Id.* The Class
18 Action complaint alleges causes of action for (1) violation of Labor Code §§ 1194, 1197, and
19 1197.1; (2) violation of Labor Code §§ 510 and 558; (3) violation of Labor Code §§ 226.7 and
20 512; (4) violation of Labor Code § 226.7; (5) violation of Labor Code § 226(a); and (6) violation
21 of Business and Professions Code § 17200, *et seq.* *Id.* ¶ 3.

22 On November 4, 2021, Plaintiff filed a separate, related action against Defendant. *Id.* ¶ 4.
23 Plaintiff filed a representative action complaint, alleging a single cause of action for violation of
24 the PAGA, Labor Code § 2698, *et seq.*, predicated on underlying violations of Labor Code §§
25 201-203, 204, 226, 226.7, 510, 512, 558, 1194, 1197, and 1197.1 (the "PAGA Action"). *Id.* ¶ 4.

26 On or about December 1, 2021, Defendant filed a motion to compel Plaintiff's class
27 action claims to arbitration and motion to stay the PAGA Action. *Id.* ¶ 5.

28 On March 14, 2022, the Court ordered Plaintiff's class action claims to proceed in

1 arbitration and denied Defendant’s motion to stay the PAGA Action. *Id.* ¶ 6. The representative
2 action complaint is the operative Complaint. *Id.* ¶ 6.

3 **B. The Parties Agree to Mediation and This Settlement**

4 In about March 2022, the Parties agreed to participate in mediation with Christopher M.
5 Barnes, Esq. Rosenthal Decl. ¶ 7. The Parties also agreed to conduct informal discovery to
6 facilitate an effective mediation. *Id.* As part of informal discovery, Defendant provided Plaintiff
7 with the number of aggrieved employees, the number of pay periods at issue, sample of time and
8 payroll records, employee handbook, and relevant payroll policies. *Id.* The data provided by
9 Defendant allowed Plaintiff to analyze liability and calculate Defendant’s potential exposure. *Id.*

10 The Parties participated in mediation with Mr. Barnes on June 17, 2022. *Id.* ¶ 8. During
11 the mediation, the Parties spoke at length about the strengths and weaknesses of each side’s
12 claims and defenses and the scope of Defendant’s liability.

13 Based on the foregoing and on their own independent investigation and evaluation,
14 Plaintiff’s counsel is of the opinion that the PAGA settlement with Defendant for the
15 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and
16 adequate, and is in the best interests of Plaintiff, the State of California, and the Aggrieved
17 Employees. Rosenthal Decl. ¶ 23. Accordingly, the Parties desire to settle, compromise, and
18 discharge Plaintiff’s PAGA claims as set forth in the Settlement Agreement.

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

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

22 **A. The Aggrieved Employees**

23 The Aggrieved Employees affected by this Settlement are defined as “all non-exempt
24 employees employed by FS Palo Alto Employment, Inc. who worked for FS Palo Alto
25 Employment, Inc. during the PAGA Period.” Settlement Agreement ¶ 1.4. The PAGA Period is
26 defined as “the period from August 30, 2020, to September 30, 2022.” *Id.* ¶ 1.19.

27 Based upon Defendant’s records, Defendant represents that there are approximately 104
28 Aggrieved Employees and approximately 1,074 pay periods at issue during the PAGA Period.

Settlement Agreement ¶ 4.1.

B. Settlement Sum and Allocation

The Settlement Agreement requires Defendant to pay the Gross Settlement Amount of Ninety-Five Thousand Dollars (\$95,000.00). Settlement Agreement ¶ 3.1. The terms of the Settlement Agreement provide for an award of attorneys' fees and reimbursement of litigation costs to Plaintiff's counsel, service award to Plaintiff for serving as the PAGA representative, settlement administration costs, and payment of penalties pursuant to the PAGA.

The balance of the Gross Settlement Amount remaining after deduction of the approved PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, Plaintiff's Service Award, and Administration Expenses Payment will be available for distribution to the LWDA and Aggrieved Employees pursuant to the PAGA (the balance of the Gross Settlement Amount remaining after the above deductions shall be referred to as the "Net Settlement Amount" or "PAGA Penalties"). *Id.* ¶ 1.15. Seventy-five percent (75%) of the Net Settlement Amount, or approximately \$32,175.53, will be paid to the LWDA. *Id.* ¶ 3.2.3; Rosenthal Decl. ¶ 15. The remaining twenty-five percent (25%) of the Net Settlement Amount, or approximately \$10,735.17, will be distributed to Aggrieved Employees on a pro rata basis. Settlement Agreement ¶¶ 1.11, 3.2.3; Rosenthal Decl. ¶ 15. The amount of each Individual PAGA Payment will be based on the number of PAGA Period Pay periods each Aggrieved Employee worked during the PAGA Period. Settlement Agreement ¶ 3.2.3(i).

Based on the number of Aggrieved Employees, employees will be entitled to recover, *on average*, approximately **\$103.22** each, after accounting for three quarters of the Net Settlement Amount going to the State. Rosenthal Decl. ¶ 16. The amount any particular Aggrieved Employee will be entitled to recover may be greater or lower than this average depending on the number of PAGA Period Pay periods he or she worked during the PAGA Period. *Id.* This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who were employed longer and thus allegedly suffered greater harm. *Id.*

As part of the Settlement Agreement, Defendant does not object to Plaintiff's counsel's request for attorneys' fees of approximately one-third (1/3) of the Gross Settlement Amount,

1 *i.e.*, Thirty-One Thousand Six Hundred Sixty-Six Dollars (\$31,666.00), plus reimbursement of
2 litigation costs in an amount of Ten Thousand Two Hundred Sixteen Dollars and Sixty Five
3 Cents (\$10,216.65), subject to the Court approving this Settlement. Settlement Agreement ¶
4 3.2.1. Any portion of the attorneys' fees and costs not approved by the Court will be added to
5 the Net Settlement Amount. *Id.*

6 Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's
7 request for a Service Award of Seven Thousand Five Hundred Dollars (\$7,500.00) in
8 recognition of Plaintiff's his efforts in prosecuting this Action as the PAGA representative on
9 behalf of the State of California and other Aggrieved Employees. Settlement Agreement ¶ 1.24.

10 Finally, the Settlement Agreement provides for the payment of the fees and expenses
11 reasonably incurred by the Settlement Administrator. *Id.* ¶ 3.2.2. The Parties have agreed to
12 utilize Phoenix Settlement Administrators, a well-known third-party settlement administrator, to
13 administer the Settlement, with the administration costs estimated not to exceed \$7,500.00. *Id.* ¶¶
14 1.2, 3.2.2; Rosenthal Decl. ¶ 18.

15 C. Scope of the Released Claims

16 In exchange for the payments described above, Plaintiff and Aggrieved Employees will
17 release the Released Parties from the following limited release:

18 all claims for PAGA penalties that were alleged, or reasonably
19 could have been alleged, based on the PAGA Period facts stated in
20 the Operative Complaint and the PAGA Notice ("Released PAGA
Claims").

21 Settlement Agreement ¶¶ 1.26, 5.2. The Settlement does not release Defendant from violations of
22 any predicate statutes other than PAGA and will not affect a waiver of individual claims by
23 Aggrieved Employees against Defendant for any of the underlying Labor Code claims. The
24 release is expressly limited to claims for civil penalties under the PAGA pertaining to the PAGA
25 allegations raised in the lawsuit that accrued during the PAGA Period. *Id.*

26 IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

27 A. PAGA Overview

28 Prior to the enactment of PAGA, many of the penalties provided against employers for

1 violations of certain Labor Code provisions were solely within the province of the California
2 Department of Labor to seek, enforce, and assess. *Arias v. Superior Court* (2009) 46 Cal. 4th
3 969, 980. However, due to the lack of financing to California's agencies and the potential
4 number of Labor Code violations by California employers, the California Legislature found that
5 it was in the public interest to allow aggrieved employees to act as private attorneys general and
6 to enforce and recover penalties on behalf of other similarly situated aggrieved employees for
7 Labor Code violations committed by their employers. *Id.* As such, PAGA was enacted to allow
8 such enforcement and recovery by private individuals who have been aggrieved by their
9 employers. Under the PAGA, 75% of any penalties recovered under PAGA by an aggrieved
10 employee is to be paid to the state agency, the LWDA, and the remaining 25% is to be shared
11 amongst the aggrieved employees. Cal. Lab. Code § 2699, subd. (i).

12 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
13 employee must first provide written notice to the LWDA and the employer of the particular
14 Labor Code violation(s) alleged to have been violated by the employer. *See* Cal. Labor Code §
15 2699.3, subd. (a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to
16 investigate the alleged violations or the time for the LWDA to investigate the violations passes,
17 the aggrieved employee is allowed to proceed in a civil action against the employer on behalf of
18 all other similarly aggrieved employees. *See* Cal. Labor Code § 2699.3, subd. (a)(2)(A).

19 In 2009, the California Supreme Court considered the issue of whether an aggrieved
20 employee who brings a PAGA claim needs to meet class certification requirements. *Arias*, 46
21 Cal. 4th at p. 976. After a substantial review of the legislative history of PAGA, the California
22 Supreme Court held that an aggrieved employee's representative action brought on behalf of
23 other similarly aggrieved employees against an employer for PAGA violations do not need to
24 meet the requirements for class certification. *Id.* at pp. 975, 980-88. As held by the California
25 Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or agent of
26 California's labor law enforcement agencies. *Id.* at p. 986. Because an employee's PAGA action
27 functions as a substitute for an action brought by the government itself, a judgment in the PAGA
28 action binds all those who would be bound by a judgment in an action brought by the

1 government. *Id.*

2 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
3 Superior Court must “review and approve any settlement of any civil action filed pursuant to”
4 PAGA. Cal. Lab. Code § 2699, subd. (l)(2). As the Parties to this current PAGA action have
5 reached such an agreement, the Parties now seek this Court’s approval as to the settlement of the
6 penalties amount.

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

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

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

1 Notably, unlike the class action settlement approval process, there is also no statutory
2 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
3 2699, subd. (1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim,
4 nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
5 settlement, if any, reached between the parties.” *Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D.
6 Cal. 2010) 2010 WL 1340777, p. *13.

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

8 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
9 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount
10 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
11 agency funding for purposes of education of employers and employees and enforcement of labor
12 laws and rights. *See* Cal. Lab. Code § 2699, subd. (i). Here, the settlement provides monetary
13 recovery for the Aggrieved Employees and the State of California and accomplishes PAGA’s
14 primary objective to enforce the Labor Code, and thus the Settlement certainly effectuates
15 PAGA’s purpose. *See O’Connor v. Uber Techs, Inc.* (N.D. Cal. August 18, 2016) 2016 WL
16 4398271, at p. *18 (noting that deterring noncompliance with the Labor Code is one of PAGA’s
17 objectives).

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

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

26 The limited scope of the release supports approval of this PAGA settlement. If approved,
27 the Settlement would release the Released Parties from PAGA claims based on the facts stated in
28 the operative Complaint and the PAGA Notice, that accrued during the PAGA Period, and

1 nothing more. Settlement Agreement ¶¶ 1.26, 5.2. The Settlement would *not* impact any other
2 Aggrieved Employees’ ability to pursue PAGA claims predicated on other allegations aside from
3 those raised in this lawsuit or any Labor Code claims not predicated on the PAGA.

4 Because an aggrieved employee’s PAGA action is a substitute for an action brought by
5 the government, “judgment in [a PAGA] action is binding not only on the named employee
6 plaintiff but also on government agencies and any aggrieved employee not a party to the
7 proceeding.” *Arias*, 46 Cal. 4th at p. 986. However, “the nonparty employees, because they were
8 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
9 judgment as to remedies other than civil penalties.” *Id.* at p. 987; *see also*, Cal. Lab. Code §
10 2699(g)(l) (non-party aggrieved employees retain all rights “to pursue or recover other remedies
11 available under state or federal law, either separately or concurrently with an action taken under
12 this part”).

13 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
14 confined to the civil penalties available under PAGA based on the facts stated in the operative
15 Complaint and the PAGA Notice. Settlement Agreement ¶¶ 1.26, 5.2. The release is therefore
16 appropriately tailored.

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

19 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
20 litigation entails significant risk on the underlying merits of Plaintiff’s theory, in addition to the
21 still-developing law under PAGA. Rosenthal Decl. ¶ 23.

22 **1. Plaintiff’s Claims are Contested**

23 Plaintiff asserts that his representative PAGA claims are based on the allegations that
24 Defendant failed to pay all minimum and/or overtime wages owed, failed to provide off-duty
25 meal and rest breaks, failed to provide accurate itemized wage statements, and failed to pay all
26 wages owed upon separation of employment. Rosenthal Decl. ¶ 20.

27 Defendant has denied violations of any applicable laws and denied liability for any
28 claims asserted in the Action. *Id.* ¶ 21. In this regard, Defendant argued that the policy was for

COVID checks to be performed on the clock and any instances where this occurred were the exception and that all employees were completely relieved of duty during meal and rest breaks . *Id.* ¶ 21. Moreover, Defendant argued that even if the Court ultimately found its employment practices violative of the Labor Code, the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its discretion. *Id.* Defendant may have sought summary judgment on this issue or proceeded to trial. Should Defendant have prevailed, the State of California and Aggrieved Employees would have been left with zero recovery. Even if Plaintiff prevailed at trial, Defendant could have appealed, which would have continued litigation in this action for several years thus depriving the State and Aggrieved Employees of any recovery for the foreseeable future. *Id.* ¶ 21.

2. Recovery of Penalties After Trial

Defendant has represented that there are approximately 104 employees who comprise the Aggrieved Employees and approximately 1,074 total pay periods at issue during the PAGA Period. Based on the data provided by Defendant, Plaintiff has calculated the maximum exposure for all PAGA claims to be \$537,000.00. Rosenthal Decl. ¶ 19. The breakdown for the calculation of PAGA penalties per claim is as follows:

- Estimated \$107,400 for PAGA penalties with respect to minimum wage and violations (based on approximately 1,074 pay periods during the PAGA period x \$100 initial violation per pay period);
- Estimated \$107,400 for PAGA penalties with respect to overtime violations (based on approximately 1,074 pay periods during the PAGA period x \$100 initial violation per pay period);
- Estimated \$107,400 for PAGA penalties with respect to rest period violations (based on approximately 1,074 pay periods during the PAGA period x \$100 initial violation per pay period);
- Estimated \$107,400 for PAGA penalties with respect to meal period violations (based on approximately 1,074 pay periods during the PAGA period x \$100 initial violation per pay period);and

- Estimated \$1,074 for PAGA penalties with respect to wage statement violations (calculated based on approximately 1,074 pay periods during the PAGA period x \$250 violation penalty under Labor Code § 226.3 pursuant to *Raines v. Coastal Pac. Food Dist.* (2018) 23 Cal. App. 5th 667).

Id.

However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the full amount of PAGA penalties where “if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. Upon review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539; *see O’Connor*, 2016 WL 4398271, at p. *17 (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”).) It should also be noted that the damages analysis above assumes the Court would permit “stacking” of PAGA penalties, meaning allowing for multiple PAGA violations based upon the same underlying violation. For instance, it is possible a Court would not permit both a PAGA penalty for a minimum wage violation and an overtime violation based on

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. Even if there were a finding of liability, Defendant has argued that these violations were not intentional violations of the law and did not occur every pay period or apply to all employees. Rosenthal Decl. ¶ 21. As such, the Court may be disinclined to award full PAGA penalties. On this basis, the Court again may find there is reason to significantly reduce the PAGA penalties awarded.

1 The Court's assessment of the proposed Settlement must take into account that any
2 penalties awarded may be subject to substantial reduction. When this is considered, in
3 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
4 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced value
5 allows for the distribution of penalties in an amount which accounts for the risk of continued
6 litigation, and Defendant's likely arguments that higher penalties would have been confiscatory.
7 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
8 of the primary goals of PAGA.

9 The proposed settlement exceeds PAGA settlements that courts have approved in other
10 cases, when considered as a percentage of the overall settlement value of the case. The proposed
11 settlement amounts to **17.7%** of the total possible liability in this matter, which significantly
12 exceeds other PAGA settlements approved by courts. Rosenthal Decl. ¶ 22; *see, e.g., Hopson v.*
13 *Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133, *9 (approving total PAGA
14 allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.* (N.D. Cal.
15 Aug. 4, 2015) 2015 WL 5439000, *8 (approving total PAGA allocation that was 0.5% of
16 \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407
17 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement).

18 A PAGA allocation need not represent any particular percentage of the overall settlement
19 value in order to secure court approval, and courts routinely approve PAGA settlements
20 representing only a tiny fraction of the overall settlement value. The proposed settlement sum in
21 this case significantly exceeds the percentage of overall settlement value of other PAGA
22 settlements and should be approved by the Court.

23 **F. The Attorneys' Fees are Reasonable**

24 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
25 2699, subd. (g). Similar to awarding fees in a class action, California state and federal courts
26 have recognized that an appropriate method for determining award of attorneys' fees for
27 representative actions is to use a percentage of the total value of benefits to class members by the
28 settlement. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v. Priest*

1 (1977) 20 Cal. 3d 25, 34 (“*Serrano III*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478;
2 *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769. The purpose of this
3 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
4 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
5 burden alone.” *Vincent*, 557 F. 2d at p. 769.

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

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

28 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3

1 percent of the fund. *Laffitte*, 1 Cal.5th at p. 506. And this was based on a lodestar amount that
2 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
3 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
4 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at p.
5 505.

6 As a secondary support for the percentage of the fund method, when fees are allocated by
7 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
8 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in
9 this manner, does not override the trial court’s primary determination of the fee as a percentage
10 of the common fund and thus does not impose an absolute maximum or minimum on the
11 potential fee award.” *Laffitte*, 1 Cal. 5th at p. 505 (emphasis added); *In re Rite Aid Corp. Secs.*
12 *Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check does not trump the
13 primary reliance on the percentage of common fund method”).

14 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
15 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
16 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
17 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is
18 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
19 performing a cross-check “undermines” one of the primary reasons for using the percentage
20 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
21 protracted litigation. *Id.* at p. 506 (finding trial courts “retain the discretion to forgo a lodestar
22 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (1985) 108
23 F.R.D. 237, 258; *Lealao*, 82 Cal. App. 4th 19, pp. 29-30 (citing the recommendations of the
24 Third Circuit Task Force with approval and observing that “[t]he criticisms of the lodestar
25 approach set forth in this Report are now echoed by many authorities, who have been most vocal
26 about the manner in which it exacerbates the problem of ‘cheap settlements’ and burdens already
27 overworked trial judge”).

28 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to

4 or even higher.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also*,
e.g., *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying a 2.52
multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
(applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders* (1988)
203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).

With respect to Plaintiff’s counsel’s lodestar, to date, approximately 70 hours have been
expended to date by Plaintiff’s counsel this matter. Rosenthal Decl. ¶ 26, Ex. B; Declaration of
Larry W. Lee (“Lee Decl.”) ¶ 8, Ex. A; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 11,
Ex. A. Mr. Lee requests an hourly rate of \$750.00 per hour. Lee Decl. ¶ 9. Ms. Agnew requests
an hourly rate of \$700.00 per hour. Agnew Decl. ¶ 12. Mr. Rosenthal requests an hourly rate of
\$700.00 per hour. Rosenthal Decl. ¶ 27. The courts are quite liberal in the evidence required to
prove an attorney’s hours. Detailed time records are not required. An attorney’s testimony alone
may suffice: “Testimony of an attorney as to the number of hours worked on a particular case is
sufficient evidence to support an award of attorney fees, even in the absence of detailed time
records.” *Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.

Reasonable hours include, in addition to time spent during litigation, the time spent
before the action is filed, including time spent interviewing the clients, investigating the facts and
the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey* (1980) 447
U.S. 54, 62. Further, the fee award should include fees incurred to establish and defend the
attorneys’ fee claim. *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 [*Serrano IV*].

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084,
1095. 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* (1998) 61 Cal.
App. 4th 629, 632-33.

Plaintiff’s counsel’s skill and experience justify the requested rate. As shown in the
supporting declarations, Plaintiff’s counsel have significant experience in the area of

1 employment and wage and hour class actions. Specifically, Plaintiff's counsel's practice focuses
2 on representing employees in employment matters, particularly wage and hour cases. Lee Decl.
3 ¶¶ 5-7; Agnew Decl. ¶¶ 5-10; Rosenthal Decl. ¶¶ 24, 25. As such, based on the hours and
4 applicable rate, the total lodestar to be expended by Plaintiff's counsel through finalizing this
5 Settlement will be approximately \$49,330.00, based on 70 total hours. Lee Decl. ¶ 8, Ex. A;
6 Agnew Decl. ¶ 11, Ex. A; Rosenthal Decl. ¶¶ 26, Ex. D.

7 Once the court establishes the lodestar amount, it may enhance the fee award by a
8 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at p. 48. The
9 pertinent factors include the difficulty of the questions involved and the skill in presenting them,
10 the contingent nature of the fee award, the extent to which the litigation precluded other
11 employment, and the percentage-of-the-fund the attorney would have received on the fair
12 market. *Id.*; *Lealao*, 82 Cal. App. 4th at p. 49. However, this list is not exhaustive and the court
13 can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses* (2001)
14 24 Cal. 4th 1122, 1139.

15 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
16 the-benefit, namely, no objections by class members, commendable conduct by counsel, and
17 significant recoveries by class members, all of which were previously detailed above. *Lealao*, 82
18 Cal. App. 4th at 51-53. The extreme effort undertaken by counsel, as shown by their hours and
19 the significantly high amount of each claim being paid out, shows commendable conduct.

20 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
21 enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal.App.4th at p. 52 (the
22 promptness of settlement "cannot be used to justify the refusal to apply a multiplier"). According
23 to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel should be
24 rewarded, not punished, for achieving this goal in a timely fashion. *Id.*

25 Here, based upon Plaintiff's counsel's lodestar of \$49,330.00, Plaintiff's request for a fee
26 award of \$31,666.00 is more than reasonable and fair. As the Court can see, the lodestar well
27 exceeds the requested fee amount, such that it would result in a negative multiplier.

28 As such, the requested fee award in the amount of \$31,666.00 is fair and reasonable, and

1 should be awarded in its entirety.

2 **G. The Costs are Reasonable**

3 Additionally, Plaintiff's counsel's request for reimbursement of litigation costs in the
4 amount of \$10,216.65 is also reasonable, especially in light of the fact that the Parties agreed that
5 Plaintiff's counsel may seek up to \$15,000.00 as reimbursement for litigation costs under the
6 Settlement Agreement. Rosenthal Decl. ¶ 29, Ex. D; Settlement Agreement ¶ 3.2.1. As set forth
7 in Plaintiff's counsel's declaration, Plaintiff's counsel incurred actual litigation costs in the
8 amount of \$10,216.65, which are costs that were directly incurred in the prosecution of this
9 action, including filing fees, service of process fees, CourtCall fees, mediation fees, and postage.
10 Rosenthal Decl. ¶ 28. As such, the requested costs should be awarded as fair and reasonable.

11 **H. The Settlement Administrator's Fees Should be Approved**

12 The Parties have agreed to pay actual costs of administration, which are estimated to be
13 \$7,500.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
14 this Settlement. Settlement Agreement ¶¶ 1.2, 3.2.2. The Parties believe that the administration
15 fee is reasonable and should be approved.

16 **I. Plaintiff's Service Award Should be Approved**

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

23 Here, Plaintiff seeks \$7,500.00 as Plaintiff's Service Award, which is intended to
24 compensate Plaintiff for the efforts in prosecuting the case and his time spent on this case,
25 including reviewing the various pleadings and documents in connection with this lawsuit.
26 Declaration of Allen Johnson ("Johnson Decl.") ¶¶ 7, 8. Additionally, by serving as the PAGA
27 representative and filing this lawsuit, which is a public record, Plaintiff also faced significant risk
28 in not being able to find prospective employment and/or face retaliation from prospective

1 employers. *Id.* ¶ 10. In this regard, future employers are less likely to hire and/or continue
2 employment with individuals who have filed employment-related lawsuits, particularly cases of
3 this nature. *Id.* In light of Plaintiff's efforts, the service award should be awarded to Plaintiff for
4 his commitment, dedication, and risks taken for this litigation.

5 Furthermore, the requested service award is consistent with awards approved in other
6 common fund cases. *See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp.
7 294, 299-300 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer*
8 *Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three
9 incentive awards of \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907,
10 913-14 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
11 *Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class
12 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068 (N.D. Cal. Jan. 27, 2007) 2007 U.S.
13 Dist. LEXIS 8476, *51-52 (awarding \$25,000 incentive award in FLSA overtime wages class
14 action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award
15 to class representative in ERISA case).

16 As Plaintiff's requested service award is a modest amount, the Court should approve this
17 service award as requested.

18 **J. Notice to the LWDA Has Been Provided**

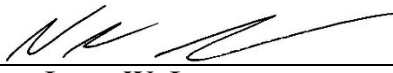
19 Pursuant to California Labor Code § 2699(1), on February 6, 2023, Plaintiff uploaded the
20 instant motion, Settlement Agreement, and proposed order to the LWDA's website. Rosenthal
21 Decl. ¶ 29. In addition, Plaintiff shall submit to the LWDA a copy of the Court's judgment and
22 order approving the Settlement Agreement within ten (10) days after entry of judgment or order.
23 *Id.*

24 **V. CONCLUSION**

25 Based on the above, Plaintiff requests that the Court approve the current PAGA
26 settlement.
27
28

1 DATED: February 6, 2023

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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