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SUPERIOR COURT OF THE STATE OF CALIFORNIA

**FOR THE COUNTY OF SANTA CLARA
(UNLIMITED JURISDICTION)**

DAVID XIQUI VASQUEZ,

Plaintiff,

v.

THE PROVINCE LLC, PAUL REDDICK;
and DOES 1 to 25, inclusive,

Defendant(s)

Case no.: 22CV397541

**NOTICE OF PLAINTIFF'S MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT AND RELEASE**

Action filed: May 2, 2022
Hearing Date: October 19, 2022
Hearing Time: 1:30 p.m.
Hearing Dept: 3, Hon. Patricia M. Lucas

Submitted Herewith Under Separate Cover:

1. Memorandum of Point and Authorities;
2. Declaration of Harout Messrelian;
3. Declaration of David Xiqui Vasquez;
4. Declaration of Michael E. Moore; and
5. [Proposed] Order and Judgment Approving PAGA Settlement.

1 TO ALL PARTIES, THE CALIFORNIA LABOR AND WORKFORCE DEVELOPMENT
2 AGENCY, AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on October 19, 2022 at 1:30 p.m., or as soon thereafter as
4 the matter may be heard, in Department 3 of the Santa Clara County Superior Court, located at
5 191 N. First Street, San Jose, California, 95113, Plaintiff David Xiqui Vasquez ("Plaintiff" or
6 "Vasquez") will and hereby does move this Court for an order approving the PAGA Settlement
7 Agreement and Release (the "Agreement" or "PAGA Settlement") and entering the [Proposed]
8 Order and Judgment Approving PAGA Settlement.

9 The PAGA Settlement is on behalf of Vasquez and all current and former hourly or non-
10 exempt employees who worked for Defendants in California at any time from October 14, 2020
11 through April 19, 2022 (the "Aggrieved Employees"). Plaintiff alleges that Defendants are liable
12 to him and other Aggrieved Employees for (1) failure to pay for all hours worked, including but
13 not limited to, minimum wages; (2) failure to provide all required timely and duty-free meal and
14 rest periods; (3) failure to pay wages owed every pay period; (4) failure to provide accurate,
15 itemized wage statements; (5) failure to pay all wages owed at the end of employment; (6) failure
16 to maintain accurate records; (7) failure to reimburse business expenses; (8) failure to provide sick
17 pay; and (9) failure to provide Worker's Compensation coverage.

18 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of
19 Points and Authorities, the declarations of Harout Messrelian, David Xiqui Vasquez, and Michael
20 E. Moore, the PAGA Settlement, all papers and pleadings on file with the Court in this action, all
21 matters judicially noticeable, and on such oral and documentary evidence as may be presented in
22 connection with the hearing on the Motion.

23 Respectfully submitted,

24 MESSRELIAN LAW INC.

25 Dated: September 27, 2022

26 By: 
27 Harout Messrelian
28 Marjole Messrelian (Of Counsel)
Attorneys for Plaintiff, David Xiqui Vasquez

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OF PAGA SETTLEMENT**

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TABLE OF CONTENTS

1		
2	TABLE OF AUTHORITIES	iv
3	I. INTRODUCTION	1
4	II. FACTUAL AND PROCEDURAL BACKGROUND.....	1
5	A. Plaintiff’s PAGA Claim.....	1
6	B. Mediation With The Honorable Jamie Jacobs-May	2
7	C. Plaintiff’s Lawsuit.....	2
8	III. OVERVIEW OF SETTLEMENT	3
9	A. “Aggrieved Employees” Definition.....	3
10	B. Monetary Terms Of The Settlement	3
11	C. Funding and Distribution of the Settlement.....	4
12	D. Individual PAGA Payments and Uncashed Checks	5
13	E. Release of Claims For Aggrieved Employees Limited To Those That Could Reasonably	
14	Arise From the Facts Alleged In The Action.....	5
15	IV. ARGUMENT.....	6
16	A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT	6
17	B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA	7
18	C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE IT IS	
19	FAIR, REASONABLE AND ADEQUATE.....	7
20	1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm’s Length	
21	Negotiations Between The Parties.	8
22	2. The Parties Conducted Sufficient Investigation And Discovery To Allow Counsel	
23	And The Court To Act Intelligently.....	9
24	3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further	
25	Litigation.....	10
26	4. Each Aggrieved Employee Will Be Paid Based on the Potential Extent of His or Her	
27	Injury Compared to Other Aggrieved Employees	15
28	5. Counsel For Parties Are Experienced in Similar Litigation	16

1
2
3
4
5
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8
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10
11
12
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14
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17
18
19
20
21
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23
24
25
26
27
28

6. The Proposed Attorneys’ Fees and Costs Are Fair, Adequate, and Reasonable and
Should Be Approved..... 16

7. The Proposed Settlement Administration Costs Are Fair and Reasonable and Should
Be Approved. 18

V. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Amey v. Cinemark USA Inc.</i> (N.D.Cal. May 13, 2015) 2015 WL 2251504	14
<i>Austin v. Foodliner, Inc.</i> (N.D.Cal. May 10, 2019) 2019 U.S. Dist. LEXIS 79638	17
<i>Bowers v. First Student, Inc.</i> (C.D.Cal. Apr. 23, 2015) 2015 WL 1862914	14
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	11
<i>Carrington v. Starbucks</i> (2018) 30 Cal.App.5th 504	13
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	17
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	8
<i>Farm Raised Salmon Cases</i> (2008) 42 Cal.4th 1077	17
<i>Gutilla v. Aerotek, Inc.</i> (E.D.Cal. Mar. 21, 2017) 2017 U.S. Dist. LEXIS 41655	6, 8
<i>Hanlon v. Chrysler Corp.</i> (9th Cir. 1998) 150 F.3d 1011	6, 7
<i>In re Executive Life Ins. Co.</i> (1995) 32 Cal.App.4th 344	7
<i>In re Synacor ERISA Litigation,</i> (9th Cir. 2008) 516 F.3d 1095	7
<i>Juarez v. Villafan</i> (E.D.Cal. Aug. 24, 2017) 2017 U.S. Dist. LEXIS 137205	6, 8
<i>Laffitte v. Robert Half Internat. Inc.</i> (2016) 1 Cal.5th 480	16, 17

1	<i>Lealao v. Beneficial California, Inc.</i>	
2	(2000) 82 Cal.App.4th 19	16
3	<i>Litty v. Merrill Lynch & Co.</i>	
4	(C.D.Cal. Nov. 10, 2014) 2014 WL 5904904	14
5	<i>Lopez v. Mgmt. & Training Corp.</i>	
6	(S.D.Cal. Apr. 20, 2020) 2020 U.S. Dist. LEXIS 70029	16
7	<i>Moorer v. Noble L.A. Events, Inc.</i>	
8	(2019) 32 Cal.App.5th 736	7
9	<i>Neary v. Regents of University of California</i>	
10	(1992) 3 Cal.4th 273	7
11	<i>Officers for Justice v. Civil Service Com.</i>	
12	(9th Cir. 1982) 688 F.2d 615	6
13	<i>Ortiz v. CVS Caremark Corp.</i>	
14	(N.D.Cal. Mar. 18, 2014) 2014 WL 1117614	13, 14
15	<i>Principe v. Ukropina (In re Pacific Enter. Sec. Litig.)</i>	
16	(9th Cir. 1995) 47 F.3d 373	17
17	<i>Ramirez v. Benito Valley Farms, LLC</i>	
18	(N.D.Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272	6, 8
19	<i>Rincon v. West Coast Tomato Growers, LLC</i>	
20	(S.D.Cal. Feb. 12, 2018) 2018 U.S. Dist. LEXIS 22886	6, 8
21	<i>Salazar v. Sysco Cent. Cal., Inc.</i>	
22	(E.D.Cal. Feb. 2, 2017) 2017 U.S. Dist. LEXIS 14971	6
23	<i>Serrano v. Priest</i>	
24	(1977) 20 Cal.3d 25	16
25	<i>Smith v. H.F.D. No. 55, Inc.</i>	
26	(E.D.Cal. Apr. 19, 2018) 2018 U.S. Dist. LEXIS 67192	6, 8
27	<i>Stafford v. Dollar Tree Stores, Inc.</i>	
28	(E.D.Cal. Nov. 20, 2014) 2014 WL 6633396	14
	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
	(2012) 203 Cal.App.4th 1112	13
	///	

1	<i>Washington v. Joe's Crab Shack</i>	
2	(N.D.Cal. 2010) 271 F.R.D. 629	12
3	<i>Wershba v. Apple Computer, Inc.</i>	
4	(2001) 91 Cal.App.4th 224	16
5	<i>Wesson v. Staples the Office Superstore, LLC</i>	
6	(Cal.Ct. App. Sept. 9, 2021) 2021 Cal. App. LEXIS 743	14
7	<i>Western Heritage Ins. Co. v. Frances Todd, Inc.</i>	
8	(2019) 33 Cal.App.5th 976	17
9	<i>Williams v. MGM-Pathe Communs. Co.</i>	
10	(9th Cir. 1997) 129 F.3d 1026	17
11	Statutes	
12	Lab. Code, section 201.....	6
13	Lab. Code, section 202.....	6
14	Lab. Code, section 203	6
15	Lab. Code, section 204.....	6
16	Lab. Code, section 210	6
17	Lab. Code, section 226	6, 10
18	Lab. Code, section 226.3	6,10
19	Lab. Code, section 226.7	2, 6
20	Lab. Code, section 232	2, 6
21	Lab. Code, section 246	2, 6
22	Lab. Code, section 510.....	1, 6, 10
23	Lab. Code, section 512.....	2, 6, 10
24	Lab. Code, section 558	6,10
25	Lab. Code, section 1174	2, 6, 10
26	Lab. Code, section 1194	1,6

1	Lab. Code, section 1194.2.....	6
2	Lab. Code, section 1197.....	1, 6, 10
3		
4	Lab. Code, section 1197.1.....	1, 6, 10
5	Lab. Code, section 1198.....	6, 10
6	Lab. Code, section 2698 et seq.	1, 2, 6
7	Lab. Code, section 2699	<i>passim</i>
8	Lab. Code, section 2699.3	1
9		
10	Lab. Code, section 2802.....	2, 6, 10
11	Lab. Code, section 3700.5.....	2, 6

Rules

14	California Rules of Court, rule 8.1115	16
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Other

16	IWC Wage Order No. 5-2001	6, 9
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff David Xiqui Vasquez (“Plaintiff” or “Vasquez”) submits this memorandum of
4 points and authorities in support of his motion for approval of the Private Attorneys General Act
5 (Labor Code § 2698 *et seq.*) Settlement And Release Agreement (the “Agreement” or “PAGA
6 Settlement”)¹ for the civil penalties claim he brought against Defendants The Province LLC and
7 Paul Reddick (collectively “Province” or “Defendants”) under the Labor Code Private Attorneys
8 General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because
9 Labor Code section 2699(l) of the PAGA requires Court-approval of any civil penalties sought as
10 part of a proposed settlement agreement. Through this motion, Plaintiff respectfully requests for
11 this Court to approve the PAGA Settlement.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 The Province is a restaurant located in San Jose, California. Plaintiff first started working
14 for Defendants on or around May 15, 2021 as a kitchen cook. His employment ended on or around
15 August 6, 2021. At all times during his employment with Defendants, Plaintiff was considered an
16 hourly, non-exempt employee. HM, ¶ 5.

17 **A. Plaintiff’s PAGA Claim**

18 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the
19 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On
20 October 14, 2021, Plaintiff, on behalf of himself and Defendants’ other California non-exempt
21 hourly employees (hereafter collectively the “Aggrieved Employees”) gave written notice by
22 electronic service to the California Labor and Workforce Development Agency (“LWDA”) and
23 via certified mail to Defendants of his claims against Province. In his notice to the LWDA,
24 Plaintiff asserted on behalf of himself and the Aggrieved Employees that Defendants (1) failed to
25 pay for all hours worked, including but not limited to, minimum wages (California Labor Code
26 sections 510, 1194, 1197, 1197.1); (2) failed to provide all required timely and duty-free meal
27

28 ¹ The PAGA Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of Harout Messrelian
 (“HM”), which is submitted herewith under a separate cover.

1 and rest periods (California Labor Code sections 226.7 and 512); (3) failed to pay wages owed
2 every pay period (California Labor Code section 204); (4) failed to provide accurate, itemized
3 wage statements (California Labor Code section 226a); (5) failed to pay all wages owed at the
4 end of employment (California Labor section 203); (6) failed to maintain accurate records
5 (California Labor Code section 1174d); (7) failed to reimburse business expenses (California
6 Labor Code sections 2800 and 2802); (8) failed to provide sick pay (California Labor Code
7 sections 232 and 246); and (9) failed to provide Worker's Compensation coverage (California
8 Labor Code section 3700.5). HM, ¶ 6, Ex. 3.

9 **B. Mediation With The Honorable Jamie Jacobs-May (Ret.).**

10 Prior to Plaintiff commencing a civil action against Defendants, the parties met and
11 conferred and agreed that it may be in their mutual interests to discuss Plaintiff's allegations
12 informally, rather than through litigation, and scheduled private mediation. HM, ¶ 7.

13 On April 19, 2022, the parties attended a full day mediation session with the Honorable
14 Jamie Jacobs-May (Ret.) At the mediation, the parties agreed to settle Plaintiff's PAGA Claim
15 for violation of Labor Code § 2698, *et seq.* Before agreeing to the terms of the Settlement, the
16 Parties engaged in informal discovery regarding Defendants' policies, practices, operations, time
17 and payroll information and other topics. In advance of mediation, Defendants produced
18 Plaintiff's personnel file, including time and payroll data through data sampling. Moreover, prior
19 to the mediation, Defense counsel provided Plaintiff's counsel with information and documents
20 relating to other Aggrieved Employees, including time and payroll data. Through extensive arm's
21 length negotiations at the mediation and only after discovery and investigation were performed,
22 the Parties agreed to settlement terms. Now that the parties have finalized the PAGA Settlement,
23 Plaintiff submits it to this Court for approval. Now that the parties have finalized the PAGA
24 Settlement, Plaintiff submits it to this Court for approval. HM, ¶ 8.

25 **C. Plaintiff's Lawsuit**

26 Upon reaching a settlement, Plaintiff filed his lawsuit in this Court on May 2, 2022 with
27 a single representative claim for civil penalties under the PAGA (California Labor Code § 2698,
28 *et seq.*) against Defendants so that Plaintiff may pursue the present motion for approval of the

Parties' Agreement. HM, ¶ 12.

Defendants deny any liability or wrongdoing of any kind whatsoever associated with the lawsuit. It is the desire of the parties to fully, finally, and forever compromise, and discharge all claims known or unknown related to those alleged in Plaintiff's lawsuit. HM, ¶ 13.

III. OVERVIEW OF SETTLEMENT

A. "Aggrieved Employees" Definition

The Aggrieved Employees are all current and former hourly or non-exempt employees who worked for Defendants in California at any time during the Release Period. Agreement, ¶ 1.01(b). The Release Period means the period of time from October 14, 2020, through April 19, 2022. Agreement, ¶ 1.01(i).

B. Monetary Terms Of The Settlement

Defendants have agreed to pay a total of \$82,500.00 ("Gross Settlement Amount" or "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and the Aggrieved Employees against Defendants (described more fully below), Defendants agreed to pay \$82,500.00 toward the GSA from which all settlement payments for the Net Settlement Amount, Court approved attorneys' fees and costs, and Settlement Administration Costs shall be paid. Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis calculated based on the total number of pay periods each Aggrieved Employee worked as a non-exempt hourly employee in California during the Release Period. Agreement, ¶ 3.04 (b). The GSA will be divided as follows:

1. Attorneys' fees amounting to \$27,500.00 (one third of the GSA), and Litigation Costs of \$8,340.64 (the Agreement provides up to \$10,000);
 2. "Settlement Administration Costs" of \$5,500.00 to Phoenix Class Action Administration Solutions ("Phoenix" or "Settlement Administrator") to administer the Settlement;
 3. Approximately \$41,159.36 ("Net Settlement Fund"), divided as follows:
 - a. \$30,869.52 to the LWDA (75%); and
 - b. \$10,289.84 to the Aggrieved Employees (25%)
- Agreement, ¶ 3.01 (a)-(d).

1 **C. Funding and Distribution of the Settlement**

2 No later than thirty (30) calendar days after the Effective Date², Defendants shall deposit
3 the Gross Settlement Amount with the Settlement Administrator. Agreement, ¶ 3.04 (a).

4 No later than ten (10) calendar days after the Effective Date, Defendants shall provide the
5 Settlement Administrator with a list of all Aggrieved Employees (the “Aggrieved Employees
6 List”), which states each Aggrieved Employee’s first and last name, last known home address,
7 social security number, and respective number of pay periods worked for Defendants during the
8 Release Period. Agreement, ¶ 3.03 (a)(1).

9 No later than ten (10) calendar days after Defendants provide the Aggrieved Employees
10 List and deposit the Gross Settlement Amount with the Settlement Administrator, the Settlement
11 Administrator shall mail the Notice of PAGA Settlement (Exhibit 2 to HM Declaration) together
12 with a settlement payment to all Aggrieved Employees by first-class United States mail, postage
13 prepaid, with directions to the Postmaster to forward the Notice of PAGA Settlement and return
14 all undeliverable Notices to the Settlement Administrator. For each Notice of PAGA Settlement
15 that is returned as undeliverable, the Settlement Administrator shall promptly attempt to locate
16 the Aggrieved Employee by performing an additional skip trace and shall re-mail the Notice and
17 settlement check no later than ten (10) days following receipt of the undeliverable Notice.
18 Agreement, ¶ 3.03 (a)(3).

19 No later than Forty-Five (45) days after the Effective Date, the Settlement Administrator
20 shall pay the court approved Plaintiff’s Attorneys’ Fees and Litigation Costs to Plaintiff’s
21 Counsel. Agreement, ¶ 3.04 (a).

22 Upon completion of the Settlement Administrator’s duties under the Agreement, the
23 Settlement Administrator shall pay itself its actual costs in administering the settlement, up to the
24 amount allocated to it for Settlement Administration Costs. Agreement, ¶ 3.04 (b).

25 ///

26 ///

27 _____
28 ² “Effective Date” means the date the Court has signed an order approving the motion or joint stipulation
of settlement for approval of this PAGA Settlement, and enters an order thereon.

1 **D. Individual PAGA Payments and Uncashed Checks**

2 The settlement checks issued to Aggrieved Employees will remain valid for one hundred
3 eighty (180) days. Any settlement checks remaining uncashed after one hundred eighty (180)
4 days will be distributed to Controller of the State of California to be held pursuant to the
5 Unclaimed Property Law, California Civil Code section 1500 et seq., for the benefit of that
6 Aggrieved Employee. Agreement, ¶ 3.04 (b). With regard to the individual PAGA payments to
7 the Aggrieved Employees, IRS Form 1099s will be issued as legally appropriate Agreement, ¶
8 3.04 (b).

9 **E. Release of Claims For Aggrieved Employees Limited To Those That Could**
10 **Reasonably Arise From the Facts Alleged In The Action.**

11 The PAGA Settlement will release Defendants and their parents, subsidiaries and related
12 entities (namely, Smoking Pig BBQ Company, LLC), owners, officers, directors, shareholders,
13 persons, employees, including but not limited to agents, servants, representatives, members,
14 attorneys, insurers, re-insurers, assigns, and affiliates and any and all other entities with whom
15 they have been, are now, or may hereafter be affiliated, and any of their affiliated companies,
16 predecessors, successors and assigns, as well as their past or present owners, officers, directors,
17 agents, representatives, attorneys, insurers, re-insurers, assigns, or employees, as well as any
18 individual or entity that could be jointly liable with Defendants for any of the Released Claims.

19 The Released Claims include:

20 any and all claims, rights, demands, liabilities and causes of action for civil
21 penalties under the PAGA that arose during the Release Period, that were alleged
22 or pled in the Action or that could have been alleged or pled based on the facts
23 alleged in the Action, including but not limited to the following claims: (a) failure
24 to pay all minimum wages owed; (b) failure to pay all overtime and/or double
25 time wages owed; (c) failure to pay all overtime and/or double time wages owed
26 at the correct rate(s) of pay due to bonus payments, incentive compensation, or
27 otherwise; (d) failure to provide compliant meal periods, and premium pay for
28 non-compliant meal periods; (e) failure to authorize and permit complaint rest
periods, and provide premium pay for non-complaint rest periods; (f) failure to
provide accurate, itemized wage statements and/or otherwise maintain accurate
records; (g) failure to timely pay wages during employment and/or upon
separation of employment; (h) failure to indemnify and/or reimburse for all
reasonable and necessary business expenses; (i) all claims for PAGA penalties for
unfair business practices that could have been premised on the facts, claims,
causes of action or legal theories described above, including failure to pay sick
pay and provide Worker's Compensation coverage; and (j) all other claims under
the Private Attorneys General Act that were or could have been premised on the

1 facts, claims, causes of action or legal theories described above pursuant to the
2 IWC Wage Order(s) and/or California Labor Code, including but not limited to
3 California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 232,
246, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2698,
2699, 2800, 2802, and 3700.5 against the Released Parties.

4 Agreement, ¶ 1.01(j)-(k).

5 **IV. ARGUMENT**

6 **A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT**

7 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
8 Court necessarily has broad discretion in making the decision to approve or reject a settlement
9 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
10 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
11 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
12 Although the PAGA does not set forth the particular standards against which a PAGA settlement
13 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
14 for evaluating class action settlements. HM, ¶ 10; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*,
15 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's
16 guidance, that approval of PAGA settlements may be had where the statutory requirements of
17 the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and
18 adequate). The established standards for evaluating whether class action settlements are fair,
19 reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA
20 settlements and have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist.
21 LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm'n of City*
22 *& Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms,*
23 *LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*,
24 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7,
25 n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal.
26 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal.
27 2018).

28 ///

1 In making the determination whether a settlement taken as a whole is fair, reasonable,
2 and adequate, the Court should be careful to still give “proper deference to the private consensual
3 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
4 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
5 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
6 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
7 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
8 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents*
9 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
10 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

11 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
12 **PAGA**

13 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
14 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
15 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*
16 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
17 The parties’ Settlement so provides. HM, ¶ 11, Ex. 1. Second, the LWDA must be given notice
18 of the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
19 Lab. Code § 2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of
20 this motion. HM, ¶¶ 11, 44, Ex. 12. As a result, Plaintiff has met all procedural statutory
21 requirements for settling a PAGA action.

22 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE**
23 **IT IS FAIR, REASONABLE AND ADEQUATE**

24 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the
25 Court may consider several factors, including:
26 the strength of the Plaintiff’s case, the risk, expense, complexity and
27 likely duration of further litigation, the risk of maintaining class
28 action status through trial, the amount offered in settlement, the
extent of discovery completed and the stage of the proceedings, and
the experience and views of counsel.

1 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
2 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
3 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
4 *6. However, this Court should begin its analysis with a presumption that the proposed
5 settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through
6 arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
7 court to act intelligently; (3) counsel is experienced in similar litigation” *Dunk*, 48 Cal.
8 App. 4th at 1802.

9 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
10 parties reached the Settlement through arm’s-length bargaining with the aid of a respected
11 mediator; (2) The parties conducted sufficient investigation and discovery to allow Counsel and
12 the Court to act intelligently. Plaintiff requested and Defendants provided the number Aggrieved
13 Employees, the number of total paychecks issued during the Release Period, all policies in effect
14 during the Release Period, and a significant sampling of time records; and (3) Counsel for the
15 Parties are experienced with PAGA cases. HM, ¶ 14. Moreover, neither Plaintiff nor Plaintiff’s
16 Counsel have any conflicts of interest with the absent Aggrieved Employees and there are no
17 issues of ascertainability. HM, ¶ 14. For the reasons discussed below, this Court should approve
18 the PAGA Settlement.

19 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm’s Length**
20 **Negotiations Between The Parties.**

21 The PAGA Settlement was reached only after litigation and arms’ length negotiations
22 between experienced attorneys, which included a full day mediation with the Honorable Jamie
23 Jacobs-May (Ret.). At all times, the negotiations were adversarial and contentious, although still
24 professional in nature. HM, ¶ 8.

25 Counsel for the Parties have further investigated the applicable law as applied to the facts
26 discovered regarding Plaintiff’s claims, the defenses thereto, and the Labor Code violations
27 claimed by Plaintiff. I am experienced in prosecuting PAGA lawsuits. Counsel for the Defendants
28 are experienced in defending PAGA cases. Based on the parties’ own independent investigations
and evaluations, the parties and their respective counsel are of the opinion that the Settlement for

1 the consideration and on the terms set forth in the Agreement are fair, reasonable and adequate
2 and are in the best interests of Plaintiff, the Aggrieved Employees, the State, and Defendants in
3 light of all known facts and circumstances and the risks inherent in litigation, especially in this
4 post pandemic era, where businesses are struggling to remain afloat, much less prosper and make
5 a large profit. HM, ¶ 9.

6 **2. The Extent of Investigation and Discovery Completed Provided Ample**
7 **Information to Enter into an Informed and Reasonable Settlement**

8 Plaintiff considered various sources of information in the lead-up to and during the
9 mediation of April 19, 2022 that enabled him to achieve the PAGA Settlement at issue. HM, ¶

10 15. Among other things, Plaintiff considered the following:

- 11 • Defendants produced and Plaintiff's counsel reviewed Plaintiff's personnel file.
- 12 • Plaintiff's counsel requested that Defendants provide any and all policies regarding
13 overtime and double-time wages, off the clock work, expense reimbursement, meal
14 periods, rest breaks, meal period waivers and agreements, compensation plans, and
15 complaints about working conditions in effect during the relevant time period beginning
16 in October of 2020. Defendants produced those policies as part of their employee
17 handbook. They are largely consistent with the Wage Order (No. 5) and the Labor Code.
- 18 • Plaintiff's counsel requested that Defendants provide the total number of employees,
19 paychecks, and the pay cycles during the relevant period. Defendants provided the
20 answers to each of these questions.
- 21 • Plaintiff's counsel requested a 20% sample of time and payroll records for the relevant
22 time period. Defendants provided a sampling of time and pay records for 95 of their
23 employees. This represents 76% of the total employees that Defendants employed during
24 the PAGA Period based on data available at the time of mediation.
- 25 • Plaintiff's counsel then retained a professional data analyst, James Toney, to examine
26 the records and determine the meal period violation rates, if there was any pay
27 discrepancy in timesheet hours versus paid hours, and if there was any rounding/time
28 shaving issues. Plaintiff is prepared to provide the Court with the data analysis for *in camera* inspection upon its request.
- Plaintiff's counsel analyzed the state of caselaw on PAGA claims, meal and rest break
violations, claims for "off the clock" work and business expense reimbursement,
especially as it relates to "manageability" arguments brought up by the defense.

HM, ¶ 15.

1 **3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further**
2 **Litigation**

3 Before mediation, Defendants disclosed that for the period of October 14, 2020 to
4 December 1, 2021, there were approximately 125 potentially aggrieved employees and 1,632 pay
5 periods. Based on this information, Plaintiff's counsel prepared an estimate of the maximum
6 possible civil penalties under the PAGA. The maximum possible civil penalties under the PAGA
7 is the total number of pay periods with one or more violations multiplied by the maximum
8 possible civil penalty amount per pay period. Under the civil penalty formulas applicable under
9 PAGA, Plaintiff's counsel estimated a maximum possible exposure of approximately \$2,040,000
10 for civil penalties as follows:

TYPE OF VIOLATION	LABOR CODE SECTION VIOLATED/ CIVIL PENALTY STATUTE	INITIAL PENALTY AMOUNT/PAY PERIOD	PAY PERIODS	CIVIL PENALTIES
Unpaid Minimum Wages	1197/1197.1	\$100	1632	\$163,200.00
Unpaid Overtime	510/558	\$50	1632	\$81,600.00
Inaccurate Wage Statements	226/226.3	\$250	1632	\$408,000.00
Inaccurate Pay Records	1174/1174.5	\$500	1632	\$816,000.00
Untimely Wages	201-204/210, 2699(f)(2)	\$100	1632	\$163,200.00
Unreimbursed Expenses	2802/2699(f)(2)	\$100	1632	\$163,200.00
Unprovided Meal Breaks	512/558	\$50	1632	\$81,600.00
Unprovided Rest Breaks	1198/2699(f)(2)	100	1632	\$163,200.00
MAXIMUM CIVIL PENALTIES				\$2,040,000.00

11 The potential for recovery of this maximum possible civil penalties depends on circumstances
12 that are highly unlikely and not in line with reality. It would depend on the Court stacking the
13 maximum recoverable civil penalties for unpaid wages violations, inaccurate wage statements
14 violations, inaccurate pay records violations, untimely wages violations, unreimbursed expenses
15 violations, unprovided meal breaks violations, and unprovided rest breaks violations, per pay
16 period for all 1,632 pay periods for all 125 potentially aggrieved employees during the PAGA
17 Period. I am unaware of any California State court decision awarding a plaintiff and the other
18

1 aggrieved employees he represents multiple civil penalties for the same pay period under
2 different Labor Code provisions. As such, one of the risks Plaintiff faces is that the Court would
3 refuse to “stack” civil penalties arising under the various Labor Code statutes. I had to
4 substantially discount the value of these claims in the settlement negotiations for this and a
5 variety of other reasons. At best, Plaintiff could hope to recover one penalty for each pay period
6 (regardless of the different Labor Code violations that potentially occurred for the same
7 employee, during the same pay periods). Assuming that Plaintiff could prove that there was at
8 least one violation of a Labor Code section per pay period, Plaintiff could expect to recover
9 approximately \$81,600.00 (1,632 pay periods x \$50 = \$81,600.00). HM, ¶ 16.

10 The PAGA action brought forth in this case by Plaintiff had two main substantive
11 arguments: 1) unprovided meal and rest periods, 2) failure to reimburse business expenses for
12 the purchase of work uniforms. The other arguments for PAGA penalties, including inaccurate
13 paystubs, not paying all wages owed every pay period and at the end of employment, and not
14 keeping accurate time records, are all derivative claims that have no value on their own, and
15 especially when the substantive labor code violations, like business expense reimbursement is
16 being used as a predicate. *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal App5th 444.
17 HM, ¶ 17.

18 There are risks to Plaintiff’s meal and rest period claims. Out of the 8,809 total shifts
19 recorded in the sample, 10.3% of the shifts had no meal periods, 27.9% of the shifts had a late
20 meal period and 0.3% of the shifts had meal periods that were short. This is a presumptive meal
21 period violation rate of approximately 38.3% and required a significant discount during
22 settlement negotiations. HM, ¶ 18.

23 Moreover, Defendants contend that, to establish a violation for missed meal periods, a
24 plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v.*
25 *Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a
26 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
27 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. Instead, a plaintiff must show
28 the employer impeded, discouraged, or prohibited the employee from taking a proper break, or

1 otherwise failed to release the employee of all control. Id. “Thus, the crucial issue with regard to
2 the meal break claim is the reason that a particular employee may have failed to take a meal
3 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by
4 a review of Defendants’ time records the exact reasons why a meal period appears to be short or
5 late would be difficult and pinpointing those days in which Plaintiff and the PAGA Members
6 worked during their meal periods will be a challenge. Additionally, Defendants provided
7 evidence that they provide employees with the opportunity to take meal and rest breaks.
8 Province’s Employee Handbook contains legally compliant meal period and rest break policies.
9 HM, ¶ 18.

10 Defendants contend they provided their non-exempt employees with the opportunity to
11 take rest periods in accordance with California law, and, accordingly, Plaintiff’s rest break claim
12 has no support. Additionally, there are other risks to Plaintiff’s rest period claim. Employers are
13 not required to record rest periods and such periods are paid. Unlike meal periods, where there
14 are often records showing whether an employee clocked out or not, there is no such evidence to
15 prove a missed rest period or that the employer refused to authorize and permit one. HM, ¶ 19.

16 There are risks to Plaintiff’s claim for unreimbursed expenses. There is a risk that the
17 Court may consider Plaintiff’s claims as to Defendants’ alleged failure to indemnify for business
18 expenses to be individual in nature. Plaintiff alleges that Defendants did not reimburse him or
19 the other Aggrieved Employees for their purchase of work uniforms. Defendants provided
20 evidence at mediation that Province never required its employees to purchase their own uniforms.
21 Employees were only required to wear a black or white non-flammable shirt. Furthermore,
22 California’s business reimbursement law does not require an employer to reimburse its
23 employees for the cost of items that are generally usable, including black or white shirts and slip-
24 resistant shoes because such items do not qualify as a “necessary expenditure.” (*Townley v. BJ’s*
25 *Restaurants, Inc.* (2019) 37 Cal.App.5th 179.) Uniforms are only subject to reimbursement if the
26 items are not “usual and generally usable” in the applicable industry (here, the restaurant
27 industry). As such, I had to significantly discount the value of this claim during settlement
28 negotiations. HM, ¶ 20.

1 Additionally, PAGA states a court has discretion to award a lesser amount than the
2 maximum penalty. See Lab. Code § 2699(e)(2) (“...a court may award a lesser amount than the
3 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
4 the particular case, to do otherwise would result in an award that is unjust, arbitrary and
5 oppressive, or confiscatory.”); see also *Thurman v. Bayshore Transit Management, Inc.* (2012)
6 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court
7 could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff’s evidence
8 of willful and intentional conduct. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
9 (“*Carrington*”) illustrates this. In that case, the Court of Appeal affirmed a trial court’s heavily
10 discounted award of only \$5 per violation because it was within the Court’s discretion to
11 significantly reduce PAGA penalties even when there is a finding that a violation of the
12 California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of
13 \$70 million and was successful in proving the PAGA claim during a bench trial. However, the
14 trial court reduced the total award after trial to only \$150,000 (30,000 violations x \$5) and stated
15 that this reduction was warranted because imposing the maximum penalty would be “unjust,
16 arbitrary, and oppressive”, based on Starbucks’s “good faith attempts” to comply with meal break
17 obligations and because the Court found the violations were minimal. Applying the same formula
18 here and assuming there was one violation during each pay period, the award of civil penalties
19 could not exceed \$8,160.00 in PAGA penalties (1,632 violations x \$5). As such, this Settlement
20 is a great result based solely on the risk the Court chooses to apply the *Carrington* formula.
21 Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff’s
22 allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement
23 Amount is uncertain. HM, ¶ 21.

24 Further, although, class certification is not required for a PAGA claim, Defendant could
25 contend that Plaintiff should show that the PAGA claims are manageable, especially as it relates
26 to the business expense reimbursement claim for uniforms, which will invariably be an
27 individualized assessment. As such, Defendant could also convince the Court to dismiss the
28 claims due to unmanageability. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA

claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The Ortiz court cited the “multitude of individualized assessments” that case would have required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA claims where, as here, there are a large number of allegedly aggrieved individuals whose claims require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved employees, judicial economy favors deferring the representative portion of the PAGA claim”); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). HM, ¶ 22.

Furthermore, on September 9, 2021, the California Court of Appeal issued a significant decision in *Wesson v. Staples the Office Superstore, LLC*, No. B302988, 2021 Cal. App. LEXIS 743 (Ct. App. Sep. 9, 2021) (“*Wesson*”), holding that courts have authority to ensure that PAGA claims are manageable, and that courts may limit or strike unmanageable PAGA claims.³ HM, ¶ 23.

The Parties further recognize that the issues presented in the representative PAGA claim are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that further litigation will cause inconvenience, distraction, disruption, delay, and expense disproportionate to the maximum potential benefits to the Aggrieved Employees and Plaintiff from continued litigation, especially in the pandemic era where further and extensive litigation may cause businesses to shut down, resulting in no monetary compensation to Plaintiff, Plaintiff’s attorneys, other Aggrieved Employees, and the State of California. HM, ¶ 24.

The settlement of the representative PAGA claim involves monetary relief to all Aggrieved Employees, Plaintiff, his attorneys, and the State of California. The Settlement is reasonable given the uncertainties this lawsuit entails. It is also reasonable given the structure and purpose of the PAGA, since the PAGA is not a restitution statute. Rather, it is essentially a

³ The *Wesson* decision marks the first time an appellate court has weighed in on whether PAGA claims must be manageable.

1 punishment statute. It provides for civil penalties only. Within the PAGA framework he is bound
2 by, Plaintiff, considering the evidence he faced, achieved a great result for the employees
3 concerned. Furthermore, any employees who are dissatisfied with the amount they received in
4 civil penalties can pursue any damages they believe they are owed by the Defendants. The
5 Settlement does not require them to opt out to do so. HM, ¶ 25.

6 Furthermore, Plaintiff recognizes that continued litigation presents significant risks that
7 support a significant downward departure from Plaintiff's estimated civil penalties amount. In
8 view of the risks, the Settlement represents a fair, adequate, and reasonable compromise amount
9 for these claims and is in the best interest of Plaintiff and Aggrieved Employees and thus,
10 warrants approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3,
11 2014) 2014 WL 2465049, * 3. The PAGA settlement and its terms are fair, just, reasonable,
12 adequate, and equitable to Defendants, Plaintiff, and the State, especially in light of the current
13 economic climate, and are the product of good faith, and informed arms-length negotiations
14 between the Parties consistent with public policy and fully comply with applicable provisions of
15 law. HM, ¶ 26.

16 As such, the settlement of PAGA penalties in the gross sum of \$82,500.00, of which 75%
17 of the net amount after attorney's fees, litigation costs, and settlement administration costs
18 (\$30,869.52) will be paid to the LWDA and 25% (\$10,289.84) will be distributed to the Aggrieved
19 Employees, is reasonable and appropriate under the circumstances. HM, ¶ 27.

20 **4. Each Aggrieved Employee Will Be Paid Based on the Potential Extent of His or**
21 **Her Injury Compared to Other Aggrieved Employees**

22 Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis
23 depending on the number of pay periods Defendants employed them for during the Release
24 Period. Agreement, ¶ 3.04(b). With a total of 125 Aggrieved Employees, the average estimated
25 individual PAGA payment for each Aggrieved Employee is approximately \$82.32 (\$10,289.84
26 (25% of the estimated Net Settlement of \$41,159.36) / 125 Aggrieved Employees). This is a great
27 result given the uncertainties this lawsuit entails. HM, ¶¶ 25,28.

28 ///

1 **5. Counsel for the Parties Are Experienced in Similar Litigation**

2 Plaintiff's counsel has considerable experience in wage and hour litigation and is
3 qualified to evaluate the PAGA claims, the value of settlement versus moving forward with
4 litigation, and viability of possible affirmative defenses. Similarly, Defendants' counsel, Jenn
5 Protas from the Hoge Fenton, has vast experience in handling employment matters and wage and
6 hour litigation. See HM, ¶¶ 2, 34-35, Ex. 7.

7 **6. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and Reasonable**
8 **and Should Be Approved.**

9 Of the \$82,500.00 allocated towards the GSA, Plaintiff's counsel requests \$27,500.00 (1/3
10 of the GSA) in attorney's fees and \$8,340.64 in litigation expenses, which is fair and reasonable.
11 HM, ¶ 29.

12 It is an accepted practice in wage and hour class action settlements to award attorneys'
13 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
14 parties. California courts have long recognized that an appropriate method for awarding
15 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
16 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific
17 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
18 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
19 fund"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
20 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

21 California courts have the discretion to employ (or decline to employ) a "lodestar cross-
22 check" on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
23 1 Cal. 5th 480, 505 ("*Laffitte*"). However, the California Supreme Court in *Laffitte* has now made
24 clear that this cross-check is not required and approved one-third of the class action settlement
25 fund as reasonable attorney fees as "[t]he percentage of the fund method survives in California
26 class action cases...." *Id.* at 574. As other courts have acknowledged since *Laffitte*, "California
27 courts routinely award attorneys' fees of one-third of the common fund." *Lopez v. Mgmt. &*
28 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not "engage

1 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
2 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
3 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
4 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
5 reasonableness of a requested percentage fee.’”⁴ *Id.* (citing *Laffitte*)).

6 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
7 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
8 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
9 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
10 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
11 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
12 settlements. HM, ¶ 29.

13 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
14 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
15 fee request of \$27,500.00 (one-third of GSA) is also justified under the lodestar method, since
16 the value of the actual work performed is higher than the attorneys’ fees requested, even without
17 applying a risk multiplier. HM, ¶¶ 30-32, Ex. 5. Plaintiff’s counsel’s previous experience in
18 litigating wage and hour class actions and the caliber of opposing counsel also support the
19 reasonableness of the fee request. HM, ¶¶ 34-35, Ex. 7. The award of attorneys’ fees sought is
20 also justified by the contingency nature of the attorney-client relationship, the risks of non-
21 payment and non-reimbursement, the delay in payment and cost reimbursement, and the great
22 results Plaintiff’s Counsel has achieved for the Aggrieved Employees. HM, ¶ 36.

23 In addition, Plaintiff’s Counsel incurred substantial costs, \$8,340.64 to date, including the
24 costs of a mediator, to aid in the representation of the Aggrieved Employees. HM, ¶ 33, Ex. 6. As
25 the evidence submitted herewith shows, all of these costs are documented and reasonably

26 _____
27 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to
28 unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn.
18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal
courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive
authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

1 incurred. *Id.* Accordingly, they warrant the Court's approval.

2 **7. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
3 **Should Be Approved.**

4 With regard to the settlement administration costs provision, it is reasonable. Before
5 agreeing to Phoenix Class Action Administration Solutions, the Parties sought and reviewed bids
6 from other reputable third-party administrators which provided higher bids. HM, ¶¶ 37-38, Exs.
7 8-10. *See generally* Declaration of Michael E. Moore. Thus, the settlement administration costs
8 provision should be given approval.

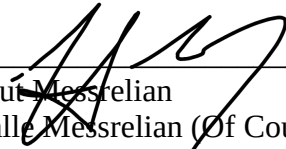
9 **V. CONCLUSION**

10 For the reasons stated above, this Court should grant the Plaintiff's Motion in its entirety
11 and adopt the proposed order submitted concurrently herewith.

12 Respectfully submitted,

13
14 MESSRELIAN LAW INC.

15 Dated: September 27, 2022

16 By: 
17 Harout Messrelian
18 Maralle Messrelian (Of Counsel)
19 Attorneys for Plaintiff,
20 David Xiqui Vasquez