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7 Attorneys for Plaintiff Ferdinand Abad, on behalf of himself and all “aggrieved employees”
8 pursuant to Labor Code § 2698 *et seq.*

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN MATEO**

11 FERDINAND ABAD, on behalf of himself
12 and all “aggrieved employees” pursuant to
13 Labor Code § 2698 *et seq.*,

14 Plaintiffs,

15 v.

16 ST. THERESE CONVALESCENT
HOSPITAL, INC., a California corporation,
17 d/b/a DEVONSHIRE OAKS NURSING
CENTER, and DOES 1 through 10, inclusive,

18 Defendants.
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CASE NO: 22-CIV-02119

Assigned to the Hon. Nancy L. Fineman, Dept. 4

**NOTICE OF RENEWED UNOPPOSED
MOTION AND RENEWED MOTION FOR
AN ORDER APPROVING SETTLEMENT OF
CLAIMS BROUGHT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT OF
2004, AWARDING ATTORNEYS’ FEES,
COSTS, ENHANCEMENT AWARD, AND
REIMBURSEMENT OF SETTLEMENT
ADMINISTRATION EXPENSES, AND
DISMISSING ACTION WITH PREJUDICE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: December 5, 2023

Time: 2:00 P.M.

Dept.: 4

Complaint Filed: May 26, 2022

Trial Date: None

1 **PLEASE TAKE NOTICE THAT** on December 5, 2023 at 2:00 p.m., or as soon thereafter
2 as the matter may be heard, in Department 4 of the above-entitled Court, located at 400 County
3 Center, Redwood City, California 94063, Plaintiff Ferdinand Abad will and hereby does again
4 move unopposed for an Order: (1) granting approval of the proposed settlement of claims brought
5 pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698 *et seq.*) (“PAGA”) set forth in the Parties’ PAGA Settlement Agreement (the “Settlement Agreement”); (2) appointing
6 Phoenix Settlement Administrators as the Settlement Administrator and approving payment of its
7 fees not to exceed \$2,000.00 from the PAGA Gross Settlement Amount; (3) directing disbursement
8 of the PAGA Gross Settlement Amount pursuant to the terms of the Settlement Agreement; (4)
9 directing payment of attorneys’ fees and litigation costs from the PAGA Gross Settlement Amount
10 not to exceed \$33,000.00 to Plaintiff’s counsel; (5) directing an enhancement award from the
11 PAGA Gross Settlement Amount in the amount of \$5,000.00 to Plaintiff Ferdinand Abad; and (6)
12 dismissing this action with prejudice.
13

14 This motion will be based on this Notice, the supporting memorandum of points and
15 authorities, the Parties’ Settlement Agreement, the Declarations of Daniel F. Gaines, Plaintiff
16 Ferdinand Abad, and Jodey Lawrence, the documents and records on file in this matter, and such
17 additional arguments, authorities, and evidence and other matters as may be presented by the Parties
18 hereafter.

19 Date: October 24, 2023

Respectfully submitted,

GAINES & GAINES, APLC

22 By: _____

23 DANIEL F. GAINES
24 ALEX P. KATOFISKY
25 Attorneys for Plaintiff
26 FERDINAND ABAD
27
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On August 15, 2023, Plaintiff Ferdinand Abad's ("Plaintiff" or "Abad") initial Motion for
4 an Order Approving Settlement of Claims Brought Pursuant to the Private Attorneys General Act
5 of 2004, Awarding Attorneys' Fees, Costs, Enhancement Award, and Reimbursement of Settlement
6 Administration Expenses, and Dismissing Action With Prejudice (the "Motion") was denied
7 without prejudice. The Court held that (1) Plaintiff had not sufficiently addressed his calculation of
8 the maximum exposure for the Private Attorneys General Act of 2004 ("PAGA") claims based on
9 a single unstacked penalty of \$100 per pay period, where he alleges multiple statutory violations;
10 (2) Plaintiff had failed to present the Court with either the qualifications of the proposed Claims
11 Administrator, Phoenix Settlement Administrators, or its proposal for the administrator costs; (3)
12 Plaintiff's Counsel's fees appeared to contain duplication of work, and the Court would not award
13 more than 30% for attorneys' fees; (4) Plaintiff's Counsel did not state what it is recovering from
14 Plaintiff's individual settlement and also did not present enough facts regarding Plaintiff's
15 individual settlement; and (5) the Parties should consider the selection of a *cy pres* recipient for
16 uncashed checks. In this renewed Motion, Plaintiff will address the Court's concerns.¹

17 Plaintiff Abad and all individuals who currently and/or formerly worked for Defendant St.
18 Therese Convalescent Hospital, Inc., d/b/a Devonshire Oaks Nursing Center ("Defendant") in
19 California as hourly and/or non-exempt employees at any time between March 22, 2021 and May
20 1, 2023 (the "PAGA Release Period") (the "Aggrieved Employees") under the PAGA respectfully
21 again move this Court for an Order granting approval of the proposed Settlement of the above-
22 captioned lawsuit against Defendant. The proposed Settlement will dispose of the Released Claims
23
24
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27 ¹ The Court also noted that the proposed notice shall repeat verbatim the definition of "Aggrieved
28 Employee" in the Settlement Agreement. The Parties have revised the notice accordingly, so this
issue is not addressed in this Motion. *See* Exhibit A at ¶ 1 to **Exhibit C** of Gaines Decl.

1 asserted on behalf of Plaintiff and approximately 40 Aggrieved Employees. *See Settlement*
2 *Agreement*, at § 1.01(a).

3 This case addresses claimed violations of employee protections embodied in the California
4 Labor Code and penalties stemming therefrom for the violation of the PAGA. Plaintiff alleged that
5 Defendant failed to pay Plaintiff and Aggrieved Employees all minimum and overtime wages
6 earned, in violation of Labor Code §§ 510, 558, and 1194, required Plaintiff and Aggrieved
7 Employees to be on-call, without pay, in violation of Labor Code §§ 510, 558, and 1194, failed to
8 provide legally compliant rest periods, or compensation in lieu thereof, to Plaintiff and Aggrieved
9 Employees, in violation of Labor Code § 226.7, failed to provide legally compliant meal periods,
10 or compensation in lieu thereof, to Plaintiff and Aggrieved Employees, in violation of Labor Code
11 §§ 226.7, 510, 512, 558, and 1194, failed to reimburse Plaintiff and Aggrieved Employees for
12 necessary business expenses incurred, in violation of Labor Code § 2802, failed to timely pay
13 Plaintiff and Aggrieved Employees all wages due during their employment, in violation of Labor
14 Code §§ 204 and 210, failed to issue accurately itemized wage statements to Plaintiff and Aggrieved
15 Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay Plaintiff and
16 Aggrieved Employees all wages due at the separation of their employment, in violation of Labor
17 Code §§ 201-202. As a result of Defendant's alleged violations of the Labor Code, approximately
18 40 employees are claimed to have suffered Labor Code violations for up to 1,174 aggregate pay
19 periods at the rate of \$100 each based on PAGA's penalty provisions. *Gaines Decl.*, ¶ 16.

20 In deciding whether to grant approval of the proposed Settlement, the primary issue to be
21 decided is whether the Settlement is fair, adequate and reasonable. As set forth herein, the proposed
22 Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is
23 the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage and
24 hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative
25 strength and value of the PAGA claim, and (4) it reflects a reasoned compromise based directly on
26 the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and
27 likely duration of further litigation.

28 The value achieved by the Settlement may be gleaned from the fact that the Labor and

1 Workforce Development Agency (“LWDA”) and the approximately 40 Aggrieved Employees
2 encompassed by the Settlement will receive no less than \$20,000.00 under the terms of the
3 Settlement, which, pursuant to the operative statute, shall be allocated “75 percent to the Labor and
4 Workforce Development Agency . . . and 25 percent to the Aggrieved Employees.” *See* Cal. Lab.
5 Code § 2699(i). This is a reasonable recovery, not only because further litigation may have resulted
6 in a net-zero recovery based on the defenses available to Defendant, but because the amount secured
7 by Plaintiff is sizable and in line with similar settlements of these types of claims under PAGA. It
8 is also important to underscore that all penalty amounts paid to Aggrieved Employees will be an
9 unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA
10 penalties.

11 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
12 Court enter the Order submitted herewith.

13 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

14 **A. The Parties**

15 Defendant does business as Devonshire Oaks Nursing Center, a small short-term
16 rehabilitation and long-term support 24-hour nursing facility in San Mateo County, California,
17 where Plaintiff worked. Gaines Decl. at ¶ 8.

18 Defendant employed Plaintiff as a non-exempt employee from August 2018 through May
19 2021. The Aggrieved Employees are all current and former hourly and/or non-exempt employees
20 who worked for Defendant in California at any time between March 22, 2021 and May 1, 2023.
21 Gaines Decl. at ¶ 9.

22 **B. The Claims Asserted**

23 Plaintiff asserts claims that Defendant failed to pay Plaintiff and Aggrieved Employees for
24 all minimum and overtime wages earned, required Plaintiff and Aggrieved Employees to be on-
25 call, without pay, failed to provide legally compliant rest periods, or compensation in lieu thereof,
26 to Plaintiff and Aggrieved Employees, failed to provide legally compliant meal periods, or
27 compensation in lieu thereof, to Plaintiff and Aggrieved Employees, failed to reimburse Plaintiff
28 and Aggrieved Employees for necessary business expenses incurred, failed to timely pay Plaintiff

1 and Aggrieved Employees all wages due during their employment, failed to issue accurately
2 itemized wage statements to Plaintiff and Aggrieved Employees, and failed to timely pay Plaintiff
3 and Aggrieved Employees all wages due at the separation of their employment. Plaintiff asserts
4 these claims under PAGA, on behalf of himself, individually, and on behalf of the State of
5 California and other Aggrieved Employees, seeking civil penalties for the alleged Labor Code
6 violations. Gaines Decl. at ¶ 10.

7 **C. Procedural Posture**

8 On March 22, 2022, pursuant to Labor Code section 2699.3, Plaintiff gave written notice
9 by online filing with the LWDA and by certified mail, return receipt requested, to Defendant of the
10 specific provisions of the Labor Code alleged to have been violated, including the facts and theories
11 to support the alleged violation. Gaines Decl., ¶¶ 6-7; **Exhibit B** (LWDA Notice Letter). On May
12 26, 2022, and after the LWDA declined to take action within the statutorily permissible time with
13 respect to Plaintiff's March 22, 2022 letter, Plaintiff filed his representative action complaint in this
14 Court. Gaines Decl., ¶ 6.

15 **D. Plaintiff's Counsel's Investigation**

16 Counsel for Plaintiff engaged in targeted, informal discovery of Defendant's alleged Labor
17 Code violations, which specifically evaluated the strength and value of the PAGA claims in
18 preparation for a resolution of this Action. Gaines Decl. at ¶ 12.

19 Plaintiff's Counsel obtained and reviewed multiple documents, including (i) Plaintiff's
20 employee file and wage statements, (ii) policy documents relating to the employment of Plaintiff
21 and Aggrieved Employees, and (iii) data relating to the number of alleged violations and the value
22 of the recoverable penalties, including time and payroll data. Gaines Decl. at ¶ 13.

23 Based on the information received, as well as through discussions with Defendant's
24 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
25 within the definition of "Aggrieved Employee" for the relevant statutory period, (ii) the number of
26 affected pay periods at issue among them, and (iii) construct a damage model that calculated the
27 maximum realistic amount of PAGA penalties that could be levied against Defendant within the
28 PAGA Release Period based on employee timekeeping and payroll data produced by Defendant.

Gaines Decl. at ¶ 14. At all relevant times, Defendant has disputed Plaintiff's claims and contested both the existence of and extent of liability as alleged by Plaintiff. *Id.*

Plaintiff's Counsel's experience in litigating similar "representative" wage and hour claims, the degree of investigation that was conducted here, the amount of data that was obtained, and the discussions guided by mediation was sufficient to determine the potential value of the PAGA claim and to evaluate the strength of this claim for purposes of settlement. Gaines Decl. at ¶¶ 2-5, 12-24, 29-31. Defendant, however, disputed Plaintiff's claims and disputed both the existence of and extent of liability as alleged by Plaintiff.

Below is Plaintiff's PAGA damage model, which includes stacked penalties.

PAGA Penalties		
Number of Pay Periods in PAGA Period	1,174	
Number of Pay Periods in PAGA Period - Unpaid Wages	1,174	100.0%
Number of Pay Periods in PAGA Period - Assumed Meal Breaks	1,089	92.8%
Number of Pay Periods in PAGA Period - Rest Breaks	1,155	98.4%
Number of Pay Periods in PAGA Period - Wage Statements	1,174	100.0%
Number of Pay Periods in PAGA Period - Reimbursements	1,174	100.0%
PAGA for Waiting Time (14 former employees in PAGA Period)	\$1,400	\$100/\$0
PAGA for Unpaid Wages (40 employees and all pay periods)	\$117,400	\$100/\$100
PAGA for Meal Breaks (40 employees from 3/22/21 to 2/2/23)	\$108,900	\$100/\$100
PAGA for Rest Breaks (40 employees from 3/22/21 to 2/2/23)	\$115,500	\$100/\$100
PAGA for Wage Statements (40 employees and all pay periods)	\$117,400	\$100/\$100
PAGA for Reimbursements (40 employees and all pay periods)	\$117,400	\$100/\$100
TOTAL EXPOSURE		
Total PAGA Penalties	\$578,000	

Prior to settlement, Plaintiff's Counsel created the above comprehensive damage analysis using sampling information obtained through informal discovery. This damage analysis reveals that the negotiated settlement falls within a realistic range of recovery on Aggrieved Employees' claims. Gaines Decl. at ¶ 15.

Plaintiff alleges that Defendant failed to pay Aggrieved Employees all wages due in three ways. Plaintiff contends that (1) Defendant allegedly paid Aggrieved Employees straight time wages only, with no adjustment for premium overtime wages, thereby failing to pay them all overtime wages earned, in violation of Labor Code §§ 510, 558, and 1194; (2) Defendant allegedly

1 required Aggrieved Employees to work off-the-clock, before and/or after their shifts ended, without
2 compensation, in violation of Labor Code §§ 510, 558, and 1194; and (3) Defendant allegedly
3 required Aggrieved Employees to be on-call, without pay, in violation of Labor Code §§ 510, 558,
4 and 1194 and IWC Wage Order 5-2001. Based on 1,174 pay periods, Defendant's liability for
5 these claims is up to \$117,400 in theoretical civil PAGA penalties. But Defendant maintained
6 numerous defenses to these claims: among them, Defendant contends that it paid all employees for
7 all hours worked at the proper rates; that Defendant maintained written policies that stated that
8 employees must accurately record all hours worked, including all overtime hours experienced
9 would be quite individualized. Defendant also provided Plaintiff's Counsel with wage and time
10 data showing that it paid Aggrieved Employees proper overtime wages and double time wages.
11 Therefore, the value of this claim was minimal. Gaines Decl. at ¶ 16.

12 Plaintiff also contends that Defendant failed to provide Aggrieved Employees with legally
13 compliant rest periods, or premium wages of one hour's pay in lieu thereof, as required by Labor
14 Code § 226.7 and Wage Order 5-2001. Plaintiff reports that he and other Aggrieved Employees
15 were routinely not authorized and unable to take an off-duty, 10-minute rest period for every four
16 (4) hours of work or major fraction thereof but were not paid premium wages of one hour's pay for
17 each missed rest period. Based on an assumed 100% violation rate for 1,155 pay periods,
18 Defendant's liability for this claim is up to \$115,500 in civil PAGA penalties. However, this claim
19 was subject to significant litigation risks: Defendant argued its compliant written policy was
20 rigorously enforced among its workforce, and because employees need not record their rest periods
21 under California law, it would be unmanageable to determine which employees were purportedly
22 denied rest periods and when that occurred. It would require dozens of mini-trials to gauge liability
23 on, and penalties for, this claim, which would make litigating the PAGA claim unmanageable.
24 Difficulties of proof justify the compromised settlement amount here; it represents a fair
25 compromise in light of the litigation risks that lied ahead. Gaines Decl. at ¶ 17.

26 Plaintiff also alleges that Aggrieved Employees were routinely denied, and not authorized
27 to take, a proper, timely, uninterrupted, 30-minute meal period for every shift worked that exceeded
28 five hours, or a second proper, timely, uninterrupted, 30-minute meal period for every shift worked

1 that exceeded ten hours, but were not paid premium wages of one hour's pay for each missed first
2 or second meal period. Plaintiff alleges that when he and Aggrieved Employees were provided with
3 a meal period, they were late, cut short or they would be required to work through them (off-the-
4 clock and without compensation), in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194
5 and IWC Wage Order 5-2001. Gaines Decl. at ¶ 18. Plaintiff also alleges that Defendant maintained
6 an unlawful written meal period policy – the policy omitted any requirement for a second meal
7 period for shifts worked in excess of ten hours in a workday. *Id.* Based on an analysis prepared by
8 Plaintiff's expert based on a sampling of wage and time data provided by Defendant, 92.8% of the
9 1,174 pay periods during the PAGA Period exhibited at least one unique meal break violation,
10 exposing Defendant to up to \$108,900 in civil PAGA penalties. Defendant maintained various
11 defenses to this claim: that employees always took their meal periods; that any employee who did
12 not take a meal period voluntarily waived it; that Defendant did not know or have any reasonable
13 reason to know that any employee was working through authorized meal periods; and that this
14 claim had significant manageability issues. *Id.*

15 Plaintiff further alleges that Defendant failed to reimburse Aggrieved Employees for
16 necessary business expenses incurred, including, but not limited to, their personal cell phones and
17 vehicles, in violation of Labor Code § 2802. Defendant maintained defenses to this claim,
18 including, but not limited to, that it did not require Plaintiff or any Aggrieved Employee to use their
19 personal cell phones or vehicles for work-related purposes and that Defendant properly reimbursed
20 its employees for any business-related expenses incurred. Defendant's maximum civil penalties for
21 this claim was \$117,400 based on one violation per Aggrieved Employee per pay period. Gaines
22 Decl. at ¶ 19.

23 Plaintiff also alleged that Defendant failed to timely issue Aggrieved Employees all wages
24 due during their employment, in violation of Labor Code §§ 204 and 210. However, after further
25 investigation, Plaintiff discovered that this was not a viable claim because Defendant properly
26 complied with the timing requirements of Labor Code § 204. Gaines Decl. at ¶ 20.

27 Plaintiff sought up to \$117,400 under PAGA for wage statement violations pursuant to
28 Labor Code § 226(e), premised on "derivative" violations for failing to pay all wages due, as

1 discussed above. Defendant argued that Plaintiff would not prevail on his underlying unpaid wages
2 and meal and rest period claims at all, so there would be no wage statement penalties awarded.
3 Defendant argued that employees were always appropriately compensated and suffered no injury,
4 such that a condition to recovery of penalties under Labor Code § 226(e) was not satisfied. Gaines
5 Decl. at ¶ 21.

6 Finally, Plaintiff asserted a claim for waiting time penalties under Labor Code § 203 which
7 was valued at up to \$1,400 for approximately 14 former employees. This claim also faced
8 substantial risk because of the good faith defense proffered by Defendant. Gaines Decl. at ¶ 22.

9 If Plaintiff stacked penalties, the value of the PAGA claims would be approximately
10 \$578,000. However, recovery on these claims was not certain. PAGA claims are discretionary,
11 such that the Court could decline to award their full value. Furthermore, the Court may award far
12 less than the maximum value on these penalty claims, particularly where, as here, they approach or
13 exceed the value of the underlying wage claims. Considering the numerous claims asserted by
14 Plaintiff and the obstacles to prevailing on many of them, it is possible that he would not prevail
15 on one or more of them, such that his PAGA claims as to some or all of his claims would also fail.
16 The compromised settlement amount takes these risks into account. A discount on the maximum
17 value of Aggrieved Employees' claims was required (and warranted) to resolve the matter at this
18 stage of the litigation. Gaines Decl. at ¶ 23.

19 **E. Settlement Negotiations**

20 On February 2, 2023, the Parties participated in a mediation session with a respected
21 mediator, David Phillips, Esq. with Signature Resolution. During the mediation, the Parties
22 engaged in arm's-length negotiations and reached a resolution of the PAGA claims asserted in this
23 Action. Gaines Decl. at ¶ 24.

24 **F. The Proposed Settlement**

25 The Parties jointly prepared and executed a Private Attorneys General Act (Labor Code §
26 2698 *et seq.*) Settlement Agreement (the "Settlement Agreement"). Gaines Decl., ¶ 24; **Exhibit C**.
27 The Settlement Agreement sets forth the terms of the Settlement reached by the Parties, including
28 the following key points:

1 1. Defendant agrees to settle this matter for the payment of Sixty Thousand Dollars
2 and Zero Cents (\$60,000.00) (hereinafter the “PAGA Gross Settlement Amount”), which shall be
3 all inclusive, encompassing (i) all payments to the LWDA and Aggrieved Employees, (ii) any and
4 all costs of third-party administration of the settlement, (iii) Plaintiff’s Counsel’s attorneys’ fees
5 and costs of suit, and (iv) a modest enhancement award to Plaintiff.² *See* Settlement Agreement,
6 at §§ 4.02(a)(1) – (4).

7 2. The total sum available for payment of PAGA penalties shall be calculated by
8 deducting from the \$60,000.00 PAGA Gross Settlement Amount, \$33,000.00 for the payment of
9 Plaintiff’s Counsel’s fees and costs (\$18,000.00 in fees³ and \$15,000.00 in costs), \$5,000.00 for
10 the payment of Plaintiff’s enhancement award, and the costs of administration not to exceed
11 \$2,000.00, which yields \$20,000.00, and of which seventy-five percent (75%) or \$15,000.00, shall
12 be distributed to the LWDA, and the remaining twenty-five percent (25%) or \$5,000.00, shall be
13 distributed to the Aggrieved Employees. *See* Settlement Agreement, at § 4.02(a)(3).

14 3. All Aggrieved Employees will receive a pro rata share of the \$5,000.00 allocated to
15 Aggrieved Employees, which shall be distributed based on the number of pay periods each
16 Aggrieved Employee worked for Defendant in California during the PAGA Release Period. *See*
17 Settlement Agreement, at § 4.02(a)(4). Although these calculations will not be made until after
18 approval, a rough estimation of the value to the 40 individuals falling within the definition of
19 “Aggrieved Employee” may be gleaned from the fact that an equal division would provide about
20 \$125.00 to each Aggrieved Employee, net of payments to the LWDA, the Settlement
21 Administrator, attorney’s fees and costs, and a modest enhancement to Plaintiff. The LWDA will
22 be paid a substantial \$15,000.00. *See* Gaines Decl., at ¶ 26; Settlement Agreement, at § 4.02(a)(3).

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25 ² By a separate agreement, the Parties have resolved all of Plaintiff’s individual claims through a
26 comprehensive general release in favor of Defendant. In connection with his general release of all
27 claims, Plaintiff will be paid Twenty Thousand Dollars and Zero Cents (\$20,000.00). **Exhibit F** to
28 Gaines Decl.

³ Plaintiff’s Counsel are requesting less in attorney’s fees than allotted in the Parties’ Settlement
Agreement. *See* Settlement Agreement at § 4.02(a)(2).

1 4. In exchange for the above settlement consideration, Defendant and the Released
2 Parties shall be entitled to a limited release from each and every Aggrieved Employee, including
3 Plaintiff⁴:

4 Upon Court approval of the Settlement, dismissal of the action, and subject to
5 Defendant's funding in full of the PAGA Gross Settlement Amount, Plaintiff and
6 the Aggrieved Employees will fully and finally release and discharge Defendant and
7 its former, present, and future owners, parents, affiliates, and subsidiaries, and all of
8 their current, former, and future officers, directors, members, managers, partners,
9 shareholders, agents, employees, joint ventures, successors, assigns, attorneys,
10 accountants, insurers, or legal representatives (the "Released Parties"), from all
11 claims, rights, demands, liabilities, and causes of action for civil penalties under the
12 PAGA that arose during the PAGA Release Period that were alleged in the Action,
13 including but not limited to the following claims: (a) failure to pay all wages owed;
14 (b) failure to pay all overtime and/or double time wages owed; (c) failure to pay all
15 overtime and/or double time wages owed at the correct rate(s) of pay; (d) failure to
16 provide compliant meal periods, or premium pay for non-compliant meal periods;
17 (e) failure to authorize and permit complaint rest periods, or premium pay for non-
18 complaint rest periods; (f) failure to provide accurate, itemized wage statements; (g)
19 failure to timely pay wages during employment and/or upon separation of
20 employment; (h) failure to reimburse all necessary business expenses; (i) all claims
21 for PAGA penalties that could have been premised on the facts, claims, causes of
22 action, or legal theories described above; and (j) all other claims under PAGA that
23 could have been premised on the facts, claims, causes of action, or legal theories
24 described above and in Plaintiff's Complaint, including but not limited to California
25 Labor Code sections 201, 202, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1194,
26 1194.2, 2802, 2698, 2699, and 2699.3 (the "Released Claims").

18 Plaintiff and the State of California shall be deemed to have, and by operation of the
19 Order granting approval of this Agreement, shall have fully, finally, and forever
20 released, relinquished, and discharged each and all of the Released Parties from the
21 Released Claims that arose during the PAGA Release Period. As a result of this
22 release, Aggrieved Employees will be unable to bring a claim under, or recover in
23 any other claim brought under the PAGA for any violations of the Released Claims
24 that took place during the PAGA Release Period.

22 See Settlement Agreement, at § 6.01.

23 5. Settlement administration, which is to be paid from the PAGA Gross Settlement
24 Amount, shall not exceed \$2,000.00. See Declaration of Jodey Lawrence ("Lawrence Decl."), ¶ 16;

26 ⁴ This comports with settled California Supreme Court authority. See *Arias v. Superior Court*
27 (2009) 46 Cal. 4th 969, 986 (concluding that "with respect to the recovery of civil penalties,
28 nonparty employees as well as the government are bound by the judgment in an action brought
under the act . . .").

1 **Exhibit B** to Lawrence Decl. Phoenix Settlement Administrators, a reputable settlement
2 administration company, has agreed to administer the settlement for this amount, submitting a
3 competitive bid. *Id.* at ¶¶ 5-15; **Exhibit A**.

4 6. As detailed herein, Plaintiff’s counsel seeks an award of attorneys’ fees and
5 litigation costs totaling \$33,000.00, and Plaintiff seeks an enhancement award of \$5,000.00. *See*
6 Settlement Agreement, at §§ 4.02(a)(2) – (3).

7 7. Finally, under the terms of the Settlement Agreement, the value of checks
8 uncashed more than 180 days after issuance shall be remitted to the Unclaimed Property Fund of
9 the California State Controller’s Office to be held in the name of the Aggrieved Employee. *See*
10 Settlement Agreement, at § 4.02(a)(8). The Parties believe that it is in the best interest of the
11 Aggrieved Employees for the value of checks uncashed more than 180 days after issuance to be
12 remitted to the Unclaimed Property Fund of the California State Controller’s Office to be held in
13 the name of the Aggrieved Employee. *Id.* Counsel for Plaintiff attests that their office regularly
14 receives calls from class members or aggrieved employees years after a case has settled to inquire
15 about obtaining their settlement share because they did not cash their check in time or lost their
16 check. Gaines Decl. at ¶ 28. By remitting the unclaimed checks to the State Controller, the
17 Aggrieved Employees have a chance to receive their individual settlement payment after the
18 check cashing deadline. *Id.*

19 *Cy pres*, expanded to its “full implication,” is *cy pres comme possible*, which means “as
20 near as possible.” *Estate of Jackson* (1979) 92 Cal.App.3d 486, 489. *Cy pres* “is the doctrine that
21 equity will, when a charity is originally or later becomes impossible, inexpedient, or
22 impracticable of fulfillment, substitute another charitable object which is believed to approach
23 the original purpose as closely as possible.” *Id.* Here, the nearest possibility for the Aggrieved
24 Employees to obtain their settlement shares is to allow the uncashed checks to be remitted to the
25 Unclaimed Property Fund of the California State Controller’s Office to be held in the name of
26 the Aggrieved Employee.

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1 **III. LEGAL ARGUMENT**

2 **A. Standards for Approval of a PAGA Settlement**

3 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
4 statute, which states that the “[t]he superior court shall review and approve any settlement of any
5 civil action filed pursuant to this part.” *See Labor Code* § 2699(1)(2).

6 As with any settlement, the Court must be mindful in conducting its inquiry that
7 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
8 litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
9 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
10 absolutes and an abandoning of highest hopes”’ [*Officers for Justice v. Civil Service Com.*, 688
11 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
12 of wasteful and expensive litigation that induce consensual settlements.” *See id.*, at 625. As such,
13 “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits”
14 or “judged against a hypothetical or speculative measure of what might have been achieved by the
15 negotiators.” *See id.*

16 Although the operative PAGA statute does not set forth the criteria on which a PAGA
17 settlement is to be judged, California law does state that some of the factors for review of a class
18 action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. section 382 and Cal. Rules of Court,
19 Rule 3.769, may be “useful in evaluating the fairness of a PAGA settlement” to the reviewing court.
20 *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56, 77 (“Thus, while PAGA does not require
21 the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for
22 settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public
23 and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors
24 used to evaluate class action settlements bear on a settlement's fairness—including the strength of
25 the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of
26 further litigation, and the settlement amount—these factors can be useful in evaluating the fairness
27 of a PAGA settlement.”) Courts within California have continued to approve settlements of PAGA
28

1 claims using Rule 23 criteria⁵. However, it is important to underscore that not all Rule 23 factors
2 can be applied, as “a PAGA claim asserted on a non-class representative basis . . . is not considered
3 a class action but a law enforcement action, and therefore does not have to meet the requirements
4 of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan.
5 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2,
6 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010).
7 Based thereon, a court’s review of a PAGA settlement necessarily implicates the following unique
8 features that render the approval process completely distinct from approval of a class action
9 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

10 First, in evaluating the adequacy of the settlement amount, the Court’s focus is not
11 concerned with the amount which “Aggrieved Employees” are to receive, but rather, must focus on
12 the total settlement amount in achieving PAGA’s objective.

13 While “[a PAGA] action is . . . designed to protect the public and penalize the employer for
14 past illegal conduct” [*Mendez*, 2010 U.S. Dist. LEXIS 66454, at 11], a reviewing Court must take
15 into account the fact that settlement of a PAGA claim – like any settlement – involves a
16 “compromise” that stops short of rendering findings of liability and damages. Moreover, the Court
17 must not lose sight of the fact that “[u]nlike a class action seeking damages or injunctive relief for
18 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties
19 for the government that otherwise may not have been assessed and collected by overburdened state
20 enforcement agencies.” *See Ochoa-Hernandez v. CJADER Foods, Inc.*, 2010 U.S. Dist. LEXIS
21 32774, 12 (N.D. Cal. Apr. 2, 2010).

22 ⁵ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
23 balancing of several factors which may include, among others, some or all of the following: [1] the
24 strength of plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further
25 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
26 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
27 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
28 reaction of the class members to the proposed settlement.” *See Linney v. Cellular Alaska P’ship*,
151 F.3d 1234, 1242 (9th Cir., 1998). “Not all of these factors will apply to every class action
settlement” and “[u]nder certain circumstances, one factor alone may prove determinative in
finding sufficient grounds for court approval.” *See Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*,
221 F.R.D. 523, 525-526 (C.D. Cal., 2004).

1 **B. The Settlement Meets All the Criteria For Approval**

2 Applying the Rule 23 fairness factors – limited to those compatible with the unique PAGA
3 considerations detailed above – the proposed Settlement embodies all of the key features of a
4 settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for
5 approval.

6 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

7 In conducting a review of a settlement, it is generally recognized that an “agreement . . .
8 reached through arms-length negotiation between experienced parties . . . is entitled to a
9 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS
10 43377, 44 (C.D. Cal. Apr. 12, 2010).

11 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-
12 length negotiations brokered through a respected third party neutral [Gaines Decl. at ¶ 24], (2) was
13 negotiated by Counsel with significant experience in similar wage and hour litigation [*see id.*, at ¶¶
14 2-5, 34-36 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient investigation
15 to evaluate the strength and potential value of the PAGA claims, as well as evaluating the risks of
16 litigating this claim through trial. *See id.*, at ¶¶ 12-24, 29-31. Based thereon, the Court should give
17 considerable weight to the competency and integrity of counsel in assuring itself that the Settlement
18 Agreement represents an arms-length transaction entered without self-dealing or other potential
19 misconduct.

20 **2. The Relative Strength Of The PAGA Claim, And the Realistic Range of**
21 **Outcomes In The Litigation, Strongly Favor Approval of the Settlement**

22 The relative strength of the PAGA claim brought by Plaintiff weighs in favor of the Court
23 finding that the settlement is fair, adequate, and reasonable, as Defendant maintained numerous
24 defenses to the theories of penalty-liability put forward by Plaintiff that, if successful, had the
25 potential to completely eliminate any recovery.

26 This case addresses violations of important employee protections embodied in the
27 California Labor Code – namely, that Defendant failed to pay Plaintiff and Aggrieved Employees
28 all minimum and overtime wages earned, in violation of Labor Code §§ 510, 558, and 1194,

1 required Plaintiff and Aggrieved Employees to be on-call, without pay, in violation of Labor Code
2 §§ 510, 558, and 1194, failed to provide legally compliant rest periods, or compensation in lieu
3 thereof, to Plaintiff and Aggrieved Employees, in violation of Labor Code § 226.7, failed to provide
4 legally compliant meal periods, or compensation in lieu thereof, to Plaintiff and Aggrieved
5 Employees, in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194, failed to reimburse
6 Plaintiff and Aggrieved Employees for necessary business expenses incurred, in violation of Labor
7 Code § 2802, failed to timely pay Plaintiff and Aggrieved Employees all wages due during their
8 employment, in violation of Labor Code §§ 204 and 210, failed to issue accurately itemized wage
9 statements to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226(a) and 226.3,
10 and failed to timely pay Plaintiff and Aggrieved Employees all wages due at the separation of their
11 employment, in violation of Labor Code §§ 201-202. *See* Gaines Decl. at ¶ 29.

12 Defendant's maximum theoretical exposure in this Action, without stacking penalties, totals
13 approximately \$117,400 computed by multiplying 1,174 aggregate pay periods by \$100 each. *See*
14 Gaines Decl. at ¶ 16. The Ninth Circuit, however, has held that heightened penalties are not
15 appropriate where the defendant was not notified by the Labor Commissioner or any court that it
16 was subject to the California Labor Code. *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th
17 Cir. 2021). *See also Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 340 (reversing
18 heightened penalties awarded by trial court for Labor Code § 226.3 because "the plain language of
19 the statute [Labor Code § 226.3] provides that heightened penalties apply only where the employer
20 fails to provide wage statements or fails to keep required records.") Additionally, courts are often
21 hesitant to award a heightened penalty where there is no prior citation by the Labor Commissioner.
22 *See Bernstein* at 1144. *See also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209
23 (holding that "[u]ntil the employer has been notified that it is violating a Labor Code provision...the
24 employer cannot be presumed to be aware that its continuing underpayment of employee's is a
25 violation subject to penalties.") (internal quotations omitted). Defendant was not notified by the
26 Labor Commissioner or any court that it was subject to the California Labor Code, and has not been
27 previously cited by the Labor Commissioner for Labor Code violations. Therefore, any violations
28 prior to Plaintiff's March 22, 2022 LWDA letter are not subject to heightened penalties.

1 Additionally, Defendant contends it acted within the requirements of California law at all
2 times as to all Aggrieved Employees. In particular, Defendant contends that it paid all employees
3 all minimum and overtime wages due. Defendant also contends that it has compliant meal and rest
4 break practices. Defendant further contends that not every pay period at issue involved an alleged
5 Labor Code violation subject to civil penalties. Moreover, Defendant maintained that even if the
6 Court did award penalties, the Court could and would *substantially* reduce the penalties awarded
7 based on the discretionary factors contained in Labor Code § 2699(e)(2) (“In any action by an
8 aggrieved employee . . . , a court may award a lesser amount than the maximum civil penalty
9 amount specified by this part if, based on the facts and circumstances of the particular case, to do
10 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”). *See*
11 *Gaines Decl.*, ¶ 30.

12 Based on these disputes, which had the potential to completely eliminate Plaintiff’s
13 recovery, the range of realistic “litigation outcomes” on the Plaintiff’s PAGA claim was defined
14 by a “maximum possible liability” amount of approximately \$117,400 [*Gaines Decl.*, ¶ 16], and a
15 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
16 such issues, the Settlement achieves a significant benefit – approximately 51% recovery of the
17 maximum possible liability. As such, this factor weighs very heavily in favor of resolution by way
18 of the compromise set forth in the Settlement Agreement. *Gaines Decl.*, ¶ 31.

19 **3. The Risk, Expense, and Complexity of Further Litigation Balances**
20 **Strongly in Favor of Approval of the Settlement**

21 Approval of the Settlement Agreement is also appropriate in light of the risk, expense, and
22 complexity of further litigation. As discussed above, the Settlement Agreement takes into
23 consideration the specific factual and legal hurdles faced by Plaintiff in establishing Defendant’s
24 penalty-liability in this case, which again, may have resulted in a net-zero recovery. Any recovery
25 on these claims is not certain. And even when liability is found, PAGA claims are discretionary,
26 such that the Court could decline to award their full value. Some of Plaintiff’s claims are also
27 derivative, and as such, Plaintiff must prevail on his underlying Labor Code claims in order to
28 prevail on the derivative claims. These risks – when balanced with the fact that the settlement

1 achieved a very significant recovery (as demonstrated below), and that further litigation posed a
2 risk of diminishing such recovery by increasing litigation expenses – weigh strongly in favor of
3 settlement approval.

4 **4. The Benefits Conferred by the Settlement Balance in Favor of Approval**

5 The Settlement Agreement provides a significant monetary benefit that falls well within
6 “the range of an acceptable settlement” under the circumstances, which is the standard on which
7 the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and
8 reasonable even where it only provides a fraction of what could have been obtained at trial:

9 The proposed settlement is not to be judged against a hypothetical or
10 speculative measure of what might have been achieved by the
11 negotiators.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d at
12 625 (emphasis in original). Thus, “the very essence of a settlement is
13 compromise, ‘a yielding of absolutes and an abandoning of highest
14 hopes.’” *Id.* at 624 (citations omitted). As the Second Circuit has
15 pointed out: “The fact that a proposed settlement may only amount
16 to a fraction of the potential recovery does not, in and of itself, mean
17 that the proposed settlement is grossly inadequate and should be
18 disapproved.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 &
19 n.2 (2nd Cir. 1974).

20 *See Linney, supra*, 151 F.3d at 1242.

21 Here, after all deductions are made for administration, an enhancement award, attorneys’
22 fees and costs, \$20,000.00 will be paid out, of which \$15,000.00 (i.e. 75%) will go to the LWDA,
23 and \$5,000.00 (i.e. 25%) will go to the Aggrieved Employees, as required by Labor Code § 2699(i)
24 (“civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to
25 the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees.”).
26 *See Settlement Agreement*, at § 4.02(a)(3).

27 This result is exceptional, as settlements of PAGA claims impacting thousands of
28 individuals have been approved as reasonable for amounts far less than the payment in this case.
29 *See e.g., Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27,
30 2012) (“Defendant has agreed to pay \$10,000 as civil penalties pursuant to the PAGA Of the
31 \$10,000, 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will
32 benefit the class The Court finds that the PAGA payment is set at a reasonable amount, and it

1 shall be approved.”); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D.
2 Cal. Oct. 29, 2012) (“GTI agrees to allocate \$10,000 to Plaintiff’s PAGA claims, and will pay
3 \$7,500 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports
4 with settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the
5 allocation of the Settlement to Plaintiff’s PAGA claim.”); *Schiller v. David’s Bridal, Inc.*, 2012
6 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) (“Pursuant to the Settlement Agreement, the
7 parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency . .
8 . . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it
9 be approved.”); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11,
10 2012) (“Pursuant to the Settlement Agreement, Defendant has agreed to pay \$15,000 to the
11 California Labor and Workforce Development Agency The Court finds that the PAGA
12 payment is set at a reasonable amount, and it shall be approved.”).⁶

13 Thus, notwithstanding the existence of issues having the potential to completely eliminate
14 recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds
15 typical PAGA awards routinely approved by the courts, but it also recovers monies for Aggrieved
16 Employees which they otherwise would not receive. As such, this factor balances strongly in favor
17 of approval of the Settlement.

18 **5. The Scope of the Release is Narrowly Tailored**

19 As discussed above, the California Supreme Court has concluded that in the context of
20 PAGA “the nonparty employees, because they were not given notice of the action or afforded any
21 opportunity to be heard, would not be bound by the judgment as to remedies other than civil
22 penalties.” *See Arias*, 46 Cal. 4th, at 987. Thus, the scope of the limited release provided in
23 exchange for the foregoing consideration is limited to the civil penalties asserted in the Action
24 under Labor Code §§ 2698 *et seq.* *See* Settlement Agreement, at § 6.01. As such, the scope of the

25 ⁶ Significantly, each of the above-cited actions involved a *higher* number of “aggrieved employees”
26 than at issue here. *See Franco*, 2012 U.S. Dist. LEXIS 169057, 14 (“2,055 Class Members were
27 ultimately identified”); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of
28 “approximately 1,869 individuals”); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16 (“3,327 California
Class members were ultimately identified”); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 (“2,051
California Class Members were ultimately identified”).

1 release in the Settlement Agreement is narrowly tailored and favors approval of the Settlement.

2 **6. The Experience and Views of Plaintiff's Counsel Favor Approval of the Settlement**

3 Plaintiff's Counsel has a significant degree of experience in complex wage and hour
4 litigation. *See* Gaines Decl., ¶¶ 2-5, 34-36, Gaines Decl. at **Exhibit A**. In the view of Plaintiff's
5 Counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under
6 the circumstances, as it reflects a reasoned compromise which takes into consideration the risks
7 inherent in this case, which had the potential to completely eliminate recovery. Gaines Decl., ¶¶
8 12-24, 29-31, 39. As such, this factor balances in favor of approval of the Settlement.

9 **7. The Extent of Discovery Completed And The Stage Of The Proceedings Favor Approval of the Settlement**

10 In evaluating this element, the Court should be mindful that "formal discovery is not a
11 necessary ticket to the bargaining table" [*Linney*, 151 F.3d at 1239], as the relevant consideration
12 is "whether 'the parties have sufficient information to make an informed decision about
13 settlement.'" *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
14 26 (C.D. Cal. Nov. 9, 2011).

15 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff's
16 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
17 ¶¶ 12-24. Prior to mediation, Defendant provided Plaintiff with documents related to the policies
18 and practices at issue in this PAGA action, as well as Plaintiff's personnel file, and timekeeping
19 and payroll data and wage statements. As discussed above, Plaintiff's Counsel's investigation was
20 sufficient to, among other things, tabulate with precision the total number of alleged Labor Code
21 violations at issue during the PAGA Release Period and identify the total number of individuals
22 falling within the definition of "Aggrieved Employee" for the PAGA Release Period.

23 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such
24 investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate
25 the strength of this claim for purposes of settlement. *See* Gaines Decl., ¶¶ 2-5; 34-36.

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27 ///

1 **8. Additional Factors Weigh In Favor Of Finding The Terms Of The Proposed**
2 **Settlement To Be Fair, Adequate, And Reasonable**

3 In addition to the factors presented above, the proposed Settlement does not possess any
4 obvious deficiencies. The Settlement contemplates entry of an Order (submitted concurrently
5 herewith) which approves the Settlement and dismisses the action with prejudice. Section 7.15 of
6 the Settlement Agreement and paragraph 9 of the Proposed Order authorize the Court to retain
7 jurisdiction over the Parties, the Action, and the Settlement. This procedure effectively disposes
8 of the Action in its entirety, documents the Court's approval of the Settlement as required by
9 PAGA, and allows for Court intervention if necessary to enforce the terms of the Settlement
10 Agreement. In sum, under the applicable standards for approval of PAGA settlements in California,
11 the settlement in this case meets the standards for approval.

12 **IV. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER THEIR**
13 **REASONABLE FEES AND COSTS**

14 Pursuant to the terms of the Settlement, Plaintiff's Counsel seeks attorneys' fees of thirty
15 percent of the PAGA Gross Settlement Amount (\$18,000) and reimbursement of litigation costs of
16 \$15,000.00, falling within the bounds authorized by the Settlement Agreement. *See* Settlement
17 Agreement, at § 4.02(a)(2). Plaintiff's Counsel's entitlement to an award of attorneys' fees and
18 costs is warranted on multiple independent grounds. Further, the amount of fees requested falls
19 well within the range of reasonableness under applicable standards, as the amount requested
20 constitutes a "percentage of the fund" deemed reasonable in similar wage and hour settlements of
21 this size and approved by California courts, which is not only warranted based on the contingency
22 risk Plaintiff's Counsel has agreed to incur for the benefit of the State of California and Aggrieved
23 Employees, but also based on the significant results achieved, as the Settlement obtains a recovery
24 substantially above the range approved as reasonable by California state and federal courts. Based
25 thereon, Plaintiff's Counsel respectfully requests that the Court enter an order approving the fee
26 and cost amounts requested.

27 **A. Plaintiff's Counsel Are Entitled To Recover Their Reasonable Fees And**
28 **Costs As A Matter Of Right**

 Plaintiff's Counsel are entitled to recover attorneys' fees and costs under the "common
fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a

1 common fund for the benefit of persons other than himself or his client is entitled to a reasonable
2 attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

3 Courts have long recognized the "common fund" or "common benefit" doctrine, under
4 which attorneys who create a common fund or benefit for a group of persons may be awarded their
5 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
6 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
7 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
8 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
9 *Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

10 The California Supreme Court has held that, "when a number of persons are entitled in
11 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
12 results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded
13 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d
14 1; *see also Boeing, supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit
15 of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as
16 a whole."); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
17 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
18 Group) at § 17:172.3 explains the common fund doctrine as follows:

19 Where the lawsuit results in the recovery of a fund or property
20 benefiting others as well as Plaintiffs (e.g., a class action), the court
21 has inherent equitable power to order Plaintiffs' attorney fees paid
22 out of the common fund or property [citations]. Such fee spreading
assures that all of those benefited by the litigation pay their fair share
of obtaining the recovery.

23 The percentage-of-the-fund approach appears to be the preferred method of awarding fees
24 in traditional common fund cases, such as this case. Where the settlement amount is a "certain or
25 easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. *Serrano*
26 *III*, 20 Cal. 3d at 35.

27 In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341
28 fn.19, the California Supreme Court upheld an attorney's fee award based on a percentage of the

1 common benefit obtained in a lawsuit by a city employee's association for retroactive wages:

2 It is not necessary to find this suit a proper class action in order to
3 uphold the portion of the judgment awarding counsel for Plaintiffs
4 25 percent of all retroactive salaries and wages received. That award
5 may be sustained under the rule that a litigant who creates a fund in
6 which others enjoy beneficial rights may require those beneficiaries
7 to pay their fair share of the expense of litigation. (*See Sprague v.*
8 *Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer*
9 (1959) 53 Cal.2d 124, 132).

10 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court
11 stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which
12 others derive benefits may require those passive beneficiaries to bear a fair share of the litigation
13 costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,
14 the California Supreme Court recognized that the common benefit doctrine has been applied
15 "consistently in California when an action brought by one party creates a fund in which other
16 persons are entitled to share."

17 Numerous appellate courts have ruled similarly. *See e.g., Knoff v. City and County of San*
18 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of
19 attorneys' fees in a representative action as the proper exercise of the court's broad equitable
20 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
21 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
22 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit
23 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
24 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners
25 of residential property in an inverse condemnation action).

26 Moreover, at least eight federal courts of appeal—the First, Third, Sixth, Seventh, Ninth,
27 Tenth, Eleventh and the D.C. Circuit—have endorsed the "percentage fee" method for determining
28 reasonable attorneys' fees in common benefit cases. *See e.g., In re Sumitomo Copper Litig.* 74 F.
Supp. 2d 393, 396-398 (S.D.N.Y. 1999) (describing the overwhelming weight of federal authority
in favor of the percentage fee method); *see also, Lealao v. Beneficial California, Inc.* (2000) 82
Cal.App.4th 19, 30-31 (describing same).

1 Thus, as Plaintiff's Counsel has expended a significant amount of time and money to secure
2 a \$60,000.00 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
3 LEXIS 80776, at 43 ("A common fund results when 'the activities of the party awarded fees have
4 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
5 sum or 'fund' the fees are to be paid.'")], and in doing so, has exclusively bore the risk of loss for
6 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
7 the PAGA Notice), Plaintiff's Counsel is entitled to claim reasonable fees from that fund under
8 applicable precedent.⁷

9 **B. The Fee Amount Requested Is Reasonable**

10 In addition to the forgoing, Plaintiff's Counsel's request for attorneys' fees in the amount
11 of thirty percent of the \$60,000.00 PAGA Gross Settlement Amount falls well within the "zone of
12 reasonableness." It is important to highlight at the outset that the fee amount presently sought is
13 not extraordinary, but actually falls at the "average" fee deemed reasonable under California State
14 court authority, as it is recognized that "courts may award attorney's fees in the 30-40% range in
15 wage and hour class actions that result in recovery of a common fund under \$10 million." *See e.g.*,
16 *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011). This fee
17 falls directly within that range.

18 Moreover, Plaintiff's Counsel agreed to incur the contingency risk for the benefit of the
19 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
20 Decl., ¶¶ 37-42. The significant results achieved, and the underlying facts therefrom, justify
21 Plaintiff's Counsel's requested fee as reasonable under all applicable standards.

22
23 ⁷ Plaintiff's Counsel is also entitled to recover attorney's fees and costs as a matter of right under
24 the PAGA statute [*Labor Code* § 2699(g)(1) ("Any employee who prevails in any action shall be
25 entitled to an award of reasonable attorney's fees and costs.")], and under *C.C.P.* § 1021.5, as the
26 instant PAGA action was by definition "for the public benefit" and secured monetary awards for
27 approximately 110 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
28 (2007) 154 Cal.App.4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the fact
that he pursued this public interest class action not only for himself but on behalf of a class
comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers. []
No more is required to satisfy the 'significant benefit,' 'public interest,' and 'large class of persons'
requirements of Code of Civil Procedure section 1021.5.").

1 C. **The Fee Amount Allocated by The Settlement Agreement Is Within the**
2 **Zone of Reasonableness Under the “Percentage of the Fund” Method**

3 The amount of fees requested by Plaintiff’s Counsel is reasonable based on standards
4 applicable to the “percentage of the fund” method. “When assessing whether the percentage
5 requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of
6 litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the
7 financial burden; and (f) the awards made in similar cases.” *See Vasquez v. Coast Valley Roofing,*
8 *Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

9 First, the results achieved by Plaintiff’s Counsel are significant as Defendant has agreed to
10 pay \$60,000.00 under the Settlement. This is a significant recovery given the risks associated with
11 obtaining any recoverable penalties. Gaines Decl., ¶¶ 16-24, 30-31. Further, the settlement of
12 PAGA claims impacting a comparable number of individuals have been approved as reasonable for
13 between \$7,500.00 and \$15,000.00. *See* Section III.B.4., *supra*.

14 Second, such results were achieved in the face of significant risks. As explained above,
15 Defendant maintained defenses to Plaintiff’s PAGA claims that very well could have resulted in a
16 net-zero recovery at trial.

17 Third, notwithstanding this risk of loss, Plaintiff’s Counsel undertook representation of the
18 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
19 Decl. at ¶¶ 37-42. This required Plaintiff’s Counsel to personally assume the risk of nonpayment
20 in securing the very substantial financial benefit the State of California stands to receive, and also
21 constitutes a “loan” on Plaintiff’s Counsel services – both of which are factors that warrant fee
22 enhancement under applicable California Supreme Court authority:

23 One of the most common fee enhancers . . . is for contingency risk.
24 We reaffirmed the propriety of a contingency risk enhancement in
25 Ketchum: “The economic rationale for fee enhancement in
26 contingency cases has been explained as follows: ‘A contingent fee
27 must be higher than a fee for the same legal services paid as they are
28 performed. The contingent fee compensates the lawyer not only for
 the legal services he renders but for the loan of those services. The
 implicit interest rate on such a loan is higher because the risk of
 default (the loss of the case, which cancels the debt of the client to
 the lawyer) is much higher than that of conventional loans.’ (Posner,

1 Economic Analysis of Law (4th ed. 1992) pp. 534, 567.) ‘A lawyer
2 who both bears the risk of not being paid and provides legal services
3 is not receiving the fair market value of his work if he is paid only
4 for the second of these functions. If he is paid no more, competent
5 counsel will be reluctant to accept fee award cases.”

6 *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580.

7 Finally, the percentage requested by Plaintiff’s Counsel falls within a typical range,
8 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
9 23 (“[C]ourts may award attorney’s fees in the 30-40% range in wage and hour class actions that
10 result in recovery of a common fund under \$10 million.” *See also Crandall v. U-Haul*
11 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys’ fees of 40% of a common
12 fund)).

13 Attorneys’ fee awards in the amount sought here are well-established by California law and
14 practice. Accordingly, Plaintiff’s Counsel’s fee request is fair and reasonable, and is consistent with
15 the awards in California and the Ninth Circuit. It is also reasonable given the history of this action
16 and the results obtained.

17 **D. While the Requested Award of Attorneys’ Fees is Reasonable as a**
18 **Percentage of the Common Fund, It is Further Confirmed by a**
19 **Lodestar Cross-Check**

20 The California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.* (2016) 1
21 Cal.5th 480, 506, that “[t]he percentage of fund method survives in California class action cases.”
22 Specifically, the *Laffitte* Court held:

23 The recognized advantages of the percentage method—including relative
24 ease of calculation, alignment of incentives between counsel and the class, a
25 better approximation of market conditions in a contingency case, and the
26 encouragement it provides counsel to seek an early settlement and avoid
27 unnecessarily prolonging the litigation—convince us the percentage method
28 is a valuable tool that should not be denied our trial courts.

Id. at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d
621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial

1 court acts within its equitable power to prevent the other parties' unjust enrichment.); *Rawlings v.*
2 *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund
3 method for calculating attorneys' fees more accurately reflects the results achieved for the putative
4 class than the lodestar method and "establishes reasonable expectations on the part of plaintiffs'
5 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
6 litigation."); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) ("The
7 percentage-of-recovery method is generally favored in common fund cases because it allows courts
8 to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for
9 failure.'").

10 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
11 tools such as the "lodestar cross-check," whereby the trial court calculates class counsel's lodestar
12 (hours worked multiplied by hourly rate) and determines whether the "lodestar multiplier" needed
13 to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-
14 06. While a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 ("[w]e hold
15 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the
16 court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
17 evaluate the reasonableness of a requested percentage fee.")

18 Here, Plaintiff's Counsel's fee request of thirty percent of the PAGA Gross Settlement
19 Amount is fair and reasonable based on a percentage of the recovery, and as well as when confirmed
20 with a lodestar cross-check. First, "regardless whether the percentage method or the lodestar
21 method is used, fee awards in class actions average around one-third of the recovery." *Chavez v.*
22 *Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff's Counsel's
23 experience in similar wage and hour class action matters. *Gaines Decl.*, ¶¶ 2-5; 34-36. Thus, the
24 percentage sought by Plaintiff's Counsel here is reasonable.

25 Next, as stated, under the lodestar method the court computes the "lodestar" amount by
26 multiplying the number of hours reasonably expended by each attorney or legal staff member by
27 their reasonable hourly rates. *See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 48. The court then
28 enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty

1 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49;
2 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *Thayer v. Wells Fargo Bank* (2001) 92
3 Cal.App.4th 819, 834 (“There is no hard-and-fast rule limiting the factors that may justify an
4 exercise of judicial discretion to increase or decrease a lodestar calculation”).

5 Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.,*
6 *Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of*
7 *Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (approving multiplier of ~2.34); *Coalition*
8 *for L. County Planning etc. Interest v. Bd. of Supervisors* (1977) 76 Cal.App.3d 241, 251 (approving
9 multiplier of ~2.04). In representative actions such as this one, where the value of the benefit
10 conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust
11 the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is
12 reasonable and within the range of fees freely negotiated in the legal marketplace in comparable
13 litigation.” *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. In doing so, “the court
14 determines, retrospectively, whether the litigation involved a contingent risk or required
15 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate
16 the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

17 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$18,000.00.
18 Based on a projected final lodestar of \$69,697.50, this yields a “negative multiplier” of
19 approximately 0.25 *under* the \$18,000.00 fee request. Gaines Decl., ¶ 32; **Exhibit D** to Gaines
20 Decl. The billing rates used to compute the lodestar are reasonable in view of the evidence submitted
21 herewith. Gaines Decl., ¶¶ 2-5; 34-36; **Exhibit D**.

22 The Court noted in its denial of the initial Motion that the fees attached as **Exhibit D** appear
23 to contain duplication of work. Plaintiff’s Counsel contends that even if their fees included
24 duplication of work – which they do not – the amount of time spent in this case greatly exceeds the
25 requested fee award. Both Daniel F. Gaines and Alex P. Katofsky attended the mediation, and both
26 estimate they will spend time finalizing the approval paperwork, attending the approval hearing,
27 and/or communicating with Defendant, Aggrieved Employees, and the Claims Administrator. *See*
28 Gaines Decl., ¶ 33. Even if the Court were to approve time spent at mediation and estimated time

1 spent after the settlement is finalized for only one of the attorneys, the final lodestar would be
2 \$56,572.50, which is far greater than the \$18,000.00 fee request. *Id.*

3 Based thereon, and for the reasons discussed above (the significant risk in continuing to
4 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
5 burden involved in representation on a contingency basis; the knowledge and experience of
6 Plaintiff's Counsel; and the value obtained by Plaintiff's Counsel for the Aggrieved Employees), it
7 is fair and reasonable to account for these risks and compensate Plaintiff's Counsel with a fee award
8 of \$18,000.00 (thirty percent of the PAGA Gross Settlement Amount).

9 **E. Plaintiff's Counsel's Request for Costs is Reasonable**

10 In the course of this litigation, Plaintiff's Counsel incurred out-of-pocket costs of
11 \$15,311.38.⁸ *See* Gaines Decl. at ¶ 43, **Exhibit E**. As demonstrated in the Gaines Declaration
12 submitted herewith, the incurred costs included filing fees, expert analysis fees, mediation fees,
13 service of process fees, and other charges typical of litigation of this nature. *Id.* Such costs are
14 appropriate for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp.*
15 *Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (C.D. Cal. 1989) (quoting *Newberg*, Attorney Fee
16 Awards, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* 668 F.Supp. 450, 452 (W.D.
17 Pa. 1987).

18 The costs incurred by Plaintiff's Counsel in this litigation benefited Plaintiff, Aggrieved
19 Employees, and the State. Plaintiff's cost request is reasonable and represents the costs that
20 Plaintiff's Counsel was required to incur to prosecute this action and should therefore be granted.

21 **V. THE ENHANCEMENT AWARD SOUGHT BY PLAINTIFF IS REASONABLE**
22 **AND SHOULD BE APPROVED**

23 The Parties have agreed that Plaintiff will be paid an enhancement award in the amount of
24 \$5,000.00. This payment is intended to recognize the time and effort that Plaintiff spent on behalf
25
26

27 ⁸ Plaintiff's Counsel incurred out-of-pocket costs higher than what is allotted in the Settlement
28 Agreement. Accordingly, Plaintiff's Counsel is only seeking reimbursement of litigation costs of
\$15,000.00.

1 of other Aggrieved Employees and the State.⁹ See Settlement Agreement at § 4.02(a)(3). See
2 Declaration of Ferdinand Abad, submitted herewith. See Gaines Decl., ¶ 44.

3 As to an incentive award, case law supports the award of incentive payments in private
4 attorney general actions. The Ninth Circuit has recognized that a named plaintiff's "willingness to
5 act as a private attorney general" may justify the award of an incentive payment. *Rodriguez v. West*
6 *Publishing Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). In *Kinney v Harvest AL Management Sub*
7 *LLC*, 2013 WL 12415482 (E.D. Cal., Sep. 6, 2013), the United States District Court for the Eastern
8 District of California approved a similar PAGA-only settlement and awarded a service payment to
9 the representative plaintiff in recognition of his efforts.

10 The traditional bases for awarding incentive awards in class settlements support the award
11 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)
12 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
13 awards and held that "the rationale for making enhancement or incentive awards to named Plaintiffs
14 is that he or she should be compensated for the expense or risk he has incurred in conferring a
15 benefit" on others. *Id.* at 806. That rationale applies synonymously in this Action.

16 Without Plaintiff's efforts, there would be no recovery at all. The requested award is
17 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
18 the Aggrieved Employees and the State of California. As a result of the named Plaintiff's efforts,
19 the Aggrieved Employees will receive monetary settlement payments, and the State of California
20 will receive \$15,000.00 to be put toward education about and enforcement of California's labor
21 laws. See Gaines Decl., ¶ 45.

22 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
23 investigating and substantiating the claims alleged in this action, including multiple interviews with
24 counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the
25 Complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the

26 _____
27 ⁹ As noted above and disclosed to the Court (*see* Gaines Decl., **Exhibit F**), Plaintiff has also entered
28 into a full general release of all individual claims against Defendant in exchange for a separate
\$20,000.00 payment. Plaintiff's Counsel are not recovering any attorney's fees from Plaintiff's
individual settlement. Gaines Decl., ¶ 46.

1 settlement of this litigation. *See generally*, Abad Declaration. Moreover, as with any plaintiff who
2 files a civil action, the named Plaintiff undertook the financial risk that, in the event of a judgment
3 for Defendant in this action, he could have been personally responsible for any attorneys' fees and
4 costs awarded in Defendant's favor. The award of such payment to Plaintiff is especially warranted
5 in a case like this one. It is necessary to ensure that employees continue to bring forth claims that
6 enforce their rights. Individuals like the named Plaintiff (and most Aggrieved Employees) would
7 have little, if any, recourse without the representative action device. Most Aggrieved Employees
8 – like the named Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much
9 less a representative action suit. Plaintiff must be commended for pursuing his claims; the modest
10 payment sought here is an appropriate means of doing so.

11 Plaintiff is also entering into a full general release against Defendant and its Released
12 Parties, which is far broader than the release by other Aggrieved Employees. Specifically,
13 Aggrieved Employees are releasing only limited PAGA civil penalty claims, while Plaintiff is
14 releasing all claims which he asserts or could assert against Defendant. *See Exhibit F* to Gaines
15 Decl., ¶ 46. The value of his individual wage and hour claims is substantial. Gaines Decl. at ¶ 47;
16 **Exhibit G**. No other Aggrieved Employee is subject to this broad form of release. *Id.* at ¶ 46.

17 This broad release by Plaintiff was negotiated (and necessary) to resolve the Action.
18 Plaintiff threatened to assert his very valuable individual claims (valued at over \$100,000) which
19 accrued during his nearly three years of employment by Defendant. Most valuable was Plaintiff's
20 claim that he worked off-the-clock, without compensation, for nearly two hours every day. This
21 resulted in over \$56,000 in unpaid wages to Plaintiff alone. Defendant argued that Plaintiff's claims
22 for Defendant's alleged failure to pay all wages due, if accurate, were very individualized to
23 Plaintiff. To resolve the Action, Defendant sought a full general release of Plaintiff's claims. The
24 Parties first negotiated a resolution of the PAGA claim and then negotiated a resolution of
25 Plaintiff's individual claims. The separate individual settlement agreement provides an amount,
26 separate from the PAGA Gross Settlement Amount, to resolve Plaintiff's individual claims against
27 Defendant. Plaintiff only disclosed this individual settlement to the Court in the spirit of full
28 transparency. It is not an amount that is part of the PAGA Gross Settlement Amount to be approved.

1 Gaines Decl. at ¶¶ 48-49.

2 Without the resolution and release of Plaintiff's individual claims, litigation would continue
3 in a piecemeal fashion. Plaintiff was prepared to assert his individual claims against Defendant
4 either in a separate action, or through arbitration. The Parties wished to avoid further litigation, and
5 agreed that a global resolution of Plaintiff's individual claims and the PAGA claims asserted in the
6 Complaint was in the best interest of all parties involved, and thus, a general release by Plaintiff
7 was appropriate. The Parties have also entered into an agreement to toll Plaintiff's statute of
8 limitations on all claims he may have against Defendant. Gaines Decl. at ¶ 50.

9 **VI. CONCLUSION**

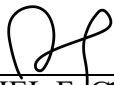
10 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it represents
11 a reasoned compromise obtained through arms-length negotiations. For all the reasons set forth
12 above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order Approving
13 Settlement, do the following:

- 14 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
15 2699, subpart 1;
 - 16 2. Appoint Phoenix Settlement Administrators as the Settlement Administrator and
17 approve its administration fees up to \$2,000.00 for payment out of the PAGA Gross Settlement
18 Amount;
 - 19 3. Approve the award of attorneys' fees of \$18,000.00, and costs of \$15,000.00, to
20 Plaintiff's Counsel, payment of which shall come from the PAGA Gross Settlement Amount;
 - 21 4. Approve the enhancement award to Plaintiff Ferdinand Abad in the amount of
22 \$5,000.00 from the PAGA Gross Settlement Amount;
 - 23 5. Direct disbursement of the Net Settlement Amount to the LWDA and all Aggrieved
24 Employees as provided for in the Settlement Agreement; and
 - 25 6. Dismiss the Action with prejudice.
- 26
27
28

1 Date: October 24, 2023

Respectfully submitted,

GAINES & GAINES, APLC

4 By: 
5 DANIEL F. GAINES
6 ALEX P. KATOFSKY
7 Attorneys for Plaintiff
8 FERDINAND ABAD