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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 UNOPPOSED MOTION AND
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: September 12, 2023

Time: 2:00 P.M.

Dept.: 4

Complaint Filed: May 26, 2022

Trial Date: None

1 **PLEASE TAKE NOTICE THAT** on September 12, 2023 at 2:00 p.m., or as soon
2 thereafter as the matter may be heard, in Department 4 of the above-entitled Court, located at 400
3 County Center, Redwood City, California 94063, Plaintiff Ferdinand Abad will and hereby does
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 \$2,500.00 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 \$36,000.00 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 and Plaintiff
16 Ferdinand Abad, the documents and records on file in this matter, and such additional arguments,
17 authorities, and evidence and other matters as may be presented by the Parties hereafter.

18 Date: April 13, 2023

Respectfully submitted,

GAINES & GAINES, APLC

21 By: Daniel F. Gaines
22 DANIEL F. GAINES
23 ALEX P. KATOFISKY
24 Attorneys for Plaintiff
25 FERDINAND ABAD
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Ferdinand Abad (“Plaintiff”) and aggrieved employees under the Labor Code’s
4 Private Attorneys General Act of 2004 (“PAGA”) respectfully move this Court for an Order
5 granting approval of the proposed Settlement of the above-captioned lawsuit against Defendant St.
6 Therese Convalescent Hospital, Inc., d/b/a Devonshire Oaks Nursing Center (“Defendant”). The
7 proposed Settlement will dispose of the Released Claims asserted on behalf of Plaintiff and
8 approximately 40 hourly and/or non-exempt employees who worked for Defendant in California at
9 any time between March 22, 2021 and the date that the Court grants approval of the Settlement or
10 May 1, 2023, whichever date comes first (the “PAGA Release Period”) (the “Aggrieved
11 Employees”). *See* Settlement Agreement, at § 1.01(a).

12 This case addresses claimed violations of employee protections embodied in the California
13 Labor Code and penalties stemming therefrom for the violation of the PAGA. Plaintiff alleged that
14 Defendant failed to pay Plaintiff and Aggrieved Employees all minimum and overtime wages
15 earned, in violation of Labor Code §§ 510, 558, and 1194, required Plaintiff and Aggrieved
16 Employees to be on-call, without pay, in violation of Labor Code §§ 510, 558, and 1194, failed to
17 provide legally compliant rest periods, or compensation in lieu thereof, to Plaintiff and Aggrieved
18 Employees, in violation of Labor Code § 226.7, failed to provide legally compliant meal periods,
19 or compensation in lieu thereof, to Plaintiff and Aggrieved Employees, in violation of Labor Code
20 §§ 226.7, 510, 512, 558, and 1194, failed to reimburse Plaintiff and Aggrieved Employees for
21 necessary business expenses incurred, in violation of Labor Code § 2802, failed to timely pay
22 Plaintiff and Aggrieved Employees all wages due during their employment, in violation of Labor
23 Code §§ 204 and 210, failed to issue accurately itemized wage statements to Plaintiff and Aggrieved
24 Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay Plaintiff and
25 Aggrieved Employees all wages due at the separation of their employment, in violation of Labor
26 Code §§ 201-202. As a result of Defendant’s alleged violations of the Labor Code, approximately
27

1 40 employees are claimed to have suffered Labor Code violations for up to 1,174 aggregate pay
2 periods at the rate of \$100 each based on PAGA's penalty provisions. Gaines Decl., ¶ 16.

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

11 The value achieved by the Settlement may be gleaned from the fact that the Labor and
12 Workforce Development Agency ("LWDA") and the approximately 40 Aggrieved Employees
13 encompassed by the Settlement will receive no less than \$16,500.00 under the terms of the
14 Settlement, which, pursuant to the operative statute, shall be allocated "75 percent to the Labor and
15 Workforce Development Agency . . . and 25 percent to the Aggrieved Employees." *See Cal. Lab.*
16 *Code* § 2699(i). This is a reasonable recovery, not only because further litigation may have resulted
17 in a net-zero recovery based on the defenses available to Defendant, but because the amount secured
18 by Plaintiff is sizable and in line with similar settlements of these types of claims under PAGA. It
19 is also important to underscore that all penalty amounts paid to Aggrieved Employees will be an
20 unexpected windfall, as employees typically do not bring individual lawsuits asserting only PAGA
21 penalties.

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

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

25 **A. The Parties**

26 Defendant does business as Devonshire Oaks Nursing Center, a small short-term
27 rehabilitation and long-term support 24-hour nursing facility in San Mateo County, California,

1 where Plaintiff worked. Gaines Decl. at ¶ 8.

2 Defendant employed Plaintiff Ferdinand Abad as a non-exempt employee from August
3 2018 through May 2021. The Aggrieved Employees are all current and former hourly and/or non-
4 exempt employees who worked for Defendant in California at any time between March 22, 2021
5 and the date that the Court grants approval of the Settlement or May 1, 2023, whichever date comes
6 first. Gaines Decl. at ¶ 9.

7 **B. The Claims Asserted**

8 Plaintiff asserts claims that Defendant failed to pay Plaintiff and Aggrieved Employees for
9 all minimum and overtime wages earned, required Plaintiff and Aggrieved Employees to be on-
10 call, without pay, failed to provide legally compliant rest periods, or compensation in lieu thereof,
11 to Plaintiff and Aggrieved Employees, failed to provide legally compliant meal periods, or
12 compensation in lieu thereof, to Plaintiff and Aggrieved Employees, failed to reimburse Plaintiff
13 and Aggrieved Employees for necessary business expenses incurred, failed to timely pay Plaintiff
14 and Aggrieved Employees all wages due during their employment, failed to issue accurately
15 itemized wage statements to Plaintiff and Aggrieved Employees, and failed to timely pay Plaintiff
16 and Aggrieved Employees all wages due at the separation of their employment. Plaintiff asserts
17 these claims under PAGA, seeking civil penalties for the alleged Labor Code violations. Gaines
18 Decl. at ¶ 10.

19 **C. Procedural Posture**

20 On March 22, 2022, pursuant to Labor Code section 2699.3, Plaintiff gave written notice
21 by online filing with the LWDA and by certified mail, return receipt requested, to Defendant of the
22 specific provisions of the Labor Code alleged to have been violated, including the facts and theories
23 to support the alleged violation. Gaines Decl., ¶¶ 6-7; **Exhibit B** (LWDA Notice Letter). On May
24 26, 2022, and after the LWDA declined to take action within the statutorily permissible time with
25 respect to Plaintiff's March 22, 2022 letter, Plaintiff filed his representative action complaint in this
26 Court. Gaines Decl., ¶ 6.

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

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

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

9 Based on the information received, as well as through discussions with Defendant's
10 Counsel, Plaintiff's Counsel was able to (i) determine the total number of distinct individuals falling
11 within the definition of "Aggrieved Employee" for the relevant statutory period, and (ii) construct
12 a damage model that calculated the maximum realistic amount of PAGA penalties that could be
13 levied against Defendant within the PAGA Release Period based on employee timekeeping and
14 payroll data produced by Defendant. Defendant, however, disputed Plaintiff's claims and disputed
15 both the existence of and extent of liability as alleged by Plaintiff.

16 Based on the information received, as well as through discussions with Defendant's
17 Counsel, Plaintiff's Counsel was able to ascertain (i) the size of the Aggrieved Employee group,
18 (ii) the number of affected pay periods at issue among them, and (iii) the strength of Plaintiff's
19 claims. Gaines Decl. at ¶ 14. Plaintiff's Counsel's experience in litigating similar "representative"
20 wage and hour claims, the degree of investigation that was conducted here, the amount of data that
21 was obtained, and the discussions guided by mediation was sufficient to determine the potential
22 value of the PAGA claim and to evaluate the strength of this claim for purposes of settlement.
23 Gaines Decl. at ¶¶ 2-5, 12-15, 23-25.

24 **E. Settlement Negotiations**

25 On February 2, 2023, the Parties participated in a mediation session with a respected
26 mediator, David Phillips, Esq. with Signature Resolution. During the mediation, the Parties
27 engaged in arm's-length negotiations and reached a resolution of the PAGA claims asserted in this

1 Action. Gaines Decl. at ¶ 15.

2 **F. The Proposed Settlement**

3 The Parties jointly prepared and executed a Private Attorneys General Act (Labor Code §
4 2698 *et seq.*) Settlement Agreement (the “Settlement Agreement”). Gaines Decl., ¶ 15; **Exhibit C**.
5 The Settlement Agreement sets forth the terms of the Settlement reached by the Parties, including
6 the following key points:

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

13 2. The total sum available for payment of PAGA penalties shall be calculated by
14 deducting from the \$60,000.00 PAGA Gross Settlement Amount, \$36,000.00 for the payment of
15 Plaintiff’s Counsel’s fees and costs (\$21,000.00 in fees and \$15,000.00 in costs), \$5,000.00 for the
16 payment of Plaintiff’s enhancement award, and the costs of administration not to exceed \$2,500.00,
17 which yields \$16,500.00, and of which seventy-five percent (75%) or \$12,375.00, shall be
18 distributed to the LWDA, and the remaining twenty-five percent (25%) or \$4,125.00, shall be
19 distributed to the Aggrieved Employees. *See* Settlement Agreement, at § 4.02(a)(3).

20 3. All Aggrieved Employees will receive a pro rata share of the \$4,125.00 allocated to
21 Aggrieved Employees, which shall be distributed based on the number of pay periods each
22 Aggrieved Employees worked for Defendant in California during the PAGA Release Period. *See*
23 Settlement Agreement, at § 4.02(a)(4). Although these calculations will not be made until after
24 approval, a rough estimation of the value to the 40 individuals falling within the definition of

25 ¹ 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.

1 “Aggrieved Employee” may be gleaned from the fact that an equal division would provide about
2 \$103.12 to each Aggrieved Employee, net of payments to the LWDA, the Settlement
3 Administrator, attorney’s fees and costs, and a modest enhancement to Plaintiff. The LWDA will
4 be paid a substantial \$12,375.00. *See* Gaines Decl., at ¶ 17; Settlement Agreement, at § 4.02(a)(3).

5 4. In exchange for the above settlement consideration, Defendant and the Released
6 Parties shall be entitled to a limited release from each and every Aggrieved Employee, including
7 Plaintiff²:

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

Plaintiff and the State of California shall be deemed to have, and by operation of the
Order granting approval of this Agreement, shall have fully, finally, and forever
released, relinquished, and discharged each and all of the Released Parties from the
Released Claims that arose during the PAGA Release Period. As a result of this

² This comports with settled California Supreme Court authority. *See Arias v. Superior Court*
(2009) 46 Cal. 4th 969, 986 (concluding that “with respect to the recovery of civil penalties,
nonparty employees as well as the government are bound by the judgment in an action brought
under the act . . .”).

1 release, Aggrieved Employees will be unable to bring a claim under, or recover in
2 any other claim brought under the PAGA for any violations of the Released Claims
3 that took place during the PAGA Release Period.

4 See Settlement Agreement, at § 6.01.

5 5. Settlement administration, which is to be paid from the PAGA Gross Settlement
6 Amount, shall not exceed \$2,500.00. Phoenix Settlement Administrators, a reputable settlement
7 administration company, has agreed to administer the settlement for this amount, submitting a
8 competitive bid. See Gaines Decl., ¶ 18.

9 6. As detailed herein, Plaintiff's counsel seeks an award of attorneys' fees and
10 litigation costs totaling \$36,000.00, and Plaintiff seeks an enhancement award of \$5,000.00. See
11 Settlement Agreement, at §§ 4.02(a)(2) – (3).

12 7. Finally, under the terms of Settlement Agreement, the value of checks uncashed
13 more than 180 days after issuance shall be remitted to the Unclaimed Property Fund of the
14 California State Controller's Office to be held in the name of the Aggrieved Employee. See
15 Settlement Agreement, at § 4.02(a)(8).

16 **III. LEGAL ARGUMENT**

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

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

21 As with any settlement, the Court must be mindful in conducting its inquiry that
22 "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
23 litigating further." See *In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
24 24 (N.D. Cal. Sept. 12, 2011). Indeed, "the very essence of a settlement is ... 'a yielding of
25 absolutes and an abandoning of highest hopes'" [*Officers for Justice v. Civil Service Com.*, 688
26 F.2d 615, 624 (9th Cir., 1982)], as "it is the very uncertainty of outcome in litigation and avoidance
27 of wasteful and expensive litigation that induce consensual settlements." See *id.*, at 625. As such,

1 “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits”
2 or “judged against a hypothetical or speculative measure of what might have been achieved by the
3 negotiators.” *See id.*

4 Although the operative PAGA statute does not set forth the criteria on which a PAGA
5 settlement is to be judged, California law does state that some of the factors for review of a class
6 action settlement under Fed. R. Civ. P. 23 (“Rule 23”), C.C.P. section 382 and Cal. Rules of Court,
7 Rule 3.769, may be “useful in evaluating the fairness of a PAGA settlement” to the reviewing court.
8 *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal. App. 5th 56, 77 (“Thus, while PAGA does not require
9 the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for
10 settlements that prevents ‘fraud, collusion or unfairness,’ and protects the interests of the public
11 and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors
12 used to evaluate class action settlements bear on a settlement's fairness—including the strength of
13 the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of
14 further litigation, and the settlement amount—these factors can be useful in evaluating the fairness
15 of a PAGA settlement.”) Courts within California have continued to approve settlements of PAGA
16 claims using Rule 23 criteria³. However, it is important to underscore that not all Rule 23 factors
17 can be applied, as “a PAGA claim asserted on a non-class representative basis . . . is not considered
18 a class action but a law enforcement action, and therefore does not have to meet the requirements
19 of Rule 23.” *See Casida v. Sears Holdings Corp.*, 2012 U.S. Dist. LEXIS 9302, 8 (E.D. Cal. Jan.
20 25, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 U.S. Dist. LEXIS 59377 (E.D. Cal. June 2,

21 ³ As held by the Ninth Circuit, evaluation of a class action settlement under Rule 23 “[involves] a
22 balancing of several factors which may include, among others, some or all of the following: [1] the
23 strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further
24 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered
25 in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the
26 experience and views of counsel; [7] the presence of a governmental participant; and [8] the
27 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 2011); *Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist. LEXIS 66454 (E.D. Cal. June 30, 2010).
2 Based thereon, a court’s review of a PAGA settlement necessarily implicates the following unique
3 features that render the approval process completely distinct from approval of a class action
4 settlement under Rule 23 or C.C.P. § 382 and Cal. Rules of Court, Rule 3.769.

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

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

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

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

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

23 In conducting a review of a settlement, it is generally recognized that an “agreement . . .
24 reached through arms-length negotiation between experienced parties . . . is entitled to a
25 presumption of fairness.” See *Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS
26 43377, 44 (C.D. Cal. Apr. 12, 2010).

27 A presumption of fairness exists here, as the proposed Settlement (1) is the product of arms-

length negotiations brokered through a respected third party neutral [Gaines Decl. at ¶ 15], (2) was negotiated by Counsel with significant experience in similar wage and hour litigation [*see id.*, at ¶¶ 2-5, 23-25 and **Exhibit A**], (3) which occurred after Counsel had conducted sufficient investigation to evaluate the strength and potential value of the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *See id.*, at ¶¶ 12-14, 20-21. Based thereon, the Court should give considerable weight to the competency and integrity of counsel in assuring itself that the Settlement Agreement represents an arms-length transaction entered without self-dealing or other potential misconduct.

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

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

This case addresses violations of important employee protections embodied in the California Labor Code – namely, that Defendant failed to pay Plaintiff and Aggrieved Employees all minimum and overtime wages earned, in violation of Labor Code §§ 510, 558, and 1194, required Plaintiff and Aggrieved Employees to be on-call, without pay, in violation of Labor Code §§ 510, 558, and 1194, failed to provide legally compliant rest periods, or compensation in lieu thereof, to Plaintiff and Aggrieved Employees, in violation of Labor Code § 226.7, failed to provide legally compliant meal periods, or compensation in lieu thereof, to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226.7, 510, 512, 558, and 1194, failed to reimburse Plaintiff and Aggrieved Employees for necessary business expenses incurred, in violation of Labor Code § 2802, failed to timely pay Plaintiff and Aggrieved Employees all wages due during their employment, in violation of Labor Code §§ 204 and 210, failed to issue accurately itemized wage statements to Plaintiff and Aggrieved Employees, in violation of Labor Code §§ 226(a) and 226.3, and failed to timely pay Plaintiff and Aggrieved Employees all wages due at the separation of their

1 employment, in violation of Labor Code §§ 201-202. *See* Gaines Decl. at ¶ 19.

2 Defendant's maximum theoretical exposure in this Action, without stacking penalties, totals
3 approximately \$117,400 computed by multiplying 1,174 aggregate pay periods by \$100 each. *See*
4 Gaines Decl. at ¶ 19. The Ninth Circuit, however, has held that heightened penalties are not
5 appropriate where the defendant was not notified by the Labor Commissioner or any court that it
6 was subject to the California Labor Code. *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th
7 Cir. 2021). Additionally, courts are often hesitant to award a heightened penalty where there is no
8 prior citation by the Labor Commissioner. *See id.* Defendant was not notified by the Labor
9 Commission or any court that it was subject to the California Labor Code, and has not been
10 previously cited by the Labor Commissioner for Labor Code violations.

11 Additionally, Defendant contends it acted within the requirements of California law at all
12 times as to all Aggrieved Employees. In particular, Defendant contends that it paid all employees
13 all minimum and overtime wages due. Defendant also contends that it has compliant meal and rest
14 break practices. Defendant further contends that not every pay period at issue involved an alleged
15 Labor Code violation subject to civil penalties. Moreover, Defendant maintained that even if the
16 Court did award penalties, the Court could and would *substantially* reduce the penalties awarded
17 based on the discretionary factors contained in Labor Code § 2699(e)(2) ("In any action by an
18 aggrieved employee . . . , a court may award a lesser amount than the maximum civil penalty
19 amount specified by this part if, based on the facts and circumstances of the particular case, to do
20 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."). *See*
21 Gaines Decl., ¶ 20.

22 Based on these disputes, which had the potential to completely eliminate Plaintiff's
23 recovery, the range of realistic "litigation outcomes" on the Plaintiff's PAGA claim was defined
24 by a "maximum possible liability" amount of approximately \$117,400 [Gaines Decl., ¶ 19], and a
25 net-zero recovery based on the defenses asserted by Defendant. Notwithstanding the existence of
26 such issues, the Settlement achieves a significant benefit – approximately 51% recovery of the
27 maximum possible liability. As such, this factor weighs very heavily in favor of resolution by way

of the compromise set forth in the Settlement Agreement. Gaines Decl., ¶ 21.

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

Approval of the Settlement Agreement is also appropriate in light of the risk, expense, and complexity of further litigation. As discussed above, the Settlement Agreement takes into consideration the specific factual and legal hurdles faced by Plaintiff in establishing Defendant's penalty-liability in this case, which again, may have resulted in a net-zero recovery. Any recovery on these claims is not certain. And even when liability is found, PAGA claims are discretionary, such that the Court could decline to award their full value. Some of Plaintiff's claims are also derivative, and as such, Plaintiff must prevail on his underlying Labor Code claims in order to prevail on the derivative claims. These risks – when balanced with the fact that the settlement achieved a very significant recovery (as demonstrated below), and that further litigation posed a risk of diminishing such recovery by increasing litigation expenses – weigh strongly in favor of settlement approval.

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

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

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

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

1 Here, after all deductions are made for administration, an enhancement award, attorneys'
2 fees and costs, \$16,500.00 will be paid out, of which \$12,375.00 (i.e. 75%) will go to the LWDA,
3 and \$4,125.00 (i.e. 25%) will go to the Aggrieved Employees, as required by Labor Code § 2699(i)
4 (“civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to
5 the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees.”).
6 See Settlement Agreement, at § 4.02(a)(3).

7 This result is exceptional, as settlements of PAGA claims impacting thousands of
8 individuals have been approved as reasonable for amounts far less than the payment in this case.
9 See e.g., *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, 41-42 (E.D. Cal. Nov. 27,
10 2012) (“Defendant has agreed to pay \$10,000 as civil penalties pursuant to the PAGA Of the
11 \$10,000, 75 percent (\$7,500) will be paid to the State of California, and the remainder (\$2,500) will
12 benefit the class The Court finds that the PAGA payment is set at a reasonable amount, and it
13 shall be approved.”); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, 21-22 (E.D.
14 Cal. Oct. 29, 2012) (“GTI agrees to allocate \$10,000 to Plaintiff’s PAGA claims, and will pay
15 \$7,500 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports
16 with settlement approval of PAGA awards in other cases. . . . Therefore, the Court will approve the
17 allocation of the Settlement to Plaintiff’s PAGA claim.”); *Schiller v. David’s Bridal, Inc.*, 2012
18 U.S. Dist. LEXIS 80776, 40 (E.D. Cal. June 11, 2012) (“Pursuant to the Settlement Agreement, the
19 parties have agreed to pay \$7,500 to the California Labor and Workforce Development Agency . .
20 . . The Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it
21 be approved.”); *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, 45-46 (E.D. Cal. July 11,
22 2012) (“Pursuant to the Settlement Agreement, Defendant has agreed to pay \$15,000 to the
23 California Labor and Workforce Development Agency The Court finds that the PAGA
24 payment is set at a reasonable amount, and it shall be approved.”).⁴

25 _____
26 ⁴ Significantly, each of the above-cited actions involved a comparable number of “aggrieved
27 employees” as at issue here. See *Franco*, 2012 U.S. Dist. LEXIS 169057, 14 (“2,055 Class
Members were ultimately identified”); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class

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

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

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

14 **6. The Experience and Views of Plaintiff’s Counsel Favor Approval of the Settlement**

15 Plaintiff’s Counsel has a significant degree of experience in complex wage and hour
16 litigation. *See* Gaines Decl., ¶¶ 2-5, 23-25, Gaines Decl. at **Exhibit A**. In the view of Plaintiff’s
17 Counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under
18 the circumstances, as it reflects a reasoned compromise which takes into consideration the risks
19 inherent in this case, which had the potential to completely eliminate recovery. *Gaines Decl.*, ¶¶
20 20-21, 28. As such, this factor balances in favor of approval of the Settlement.

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

23 In evaluating this element, the Court should be mindful that “formal discovery is not a
24 necessary ticket to the bargaining table” [*Linney*, 151 F.3d at 1239], as the relevant consideration

25
26 comprised of “approximately 1,869 individuals”); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16
27 (“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 is “whether ‘the parties have sufficient information to make an informed decision about
2 settlement.’” *See Sandoval v. Roadlink United States Pac., Inc.*, 2011 U.S. Dist. LEXIS 130378, at
3 26 (C.D. Cal. Nov. 9, 2011).

4 Here, the extent of informal discovery conducted was sufficient to enable Plaintiff’s
5 Counsel to evaluate the strength and value of the claim for purposes of settlement. Gaines Decl.,
6 ¶¶ 12-15. Prior to mediation, Defendant provided Plaintiff with documents related to the policies
7 and practices at issue in this PAGA action, as well as Plaintiff’s personnel file, and timekeeping
8 and payroll data and wage statements. As discussed above, Plaintiff’s Counsel’s investigation was
9 sufficient to, among other things, tabulate with precision the total number of alleged Labor Code
10 violations at issue during the PAGA Release Period and identify the total number of individuals
11 falling within the definition of “Aggrieved Employee” for the PAGA Release Period.

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

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

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

26 **IV. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER THEIR
27 REASONABLE FEES AND COSTS**

28 Pursuant to the terms of the Settlement, Plaintiff’s Counsel seeks attorneys’ fees of thirty-

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

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

15 Plaintiff's Counsel are entitled to recover attorneys' fees and costs under the "common
16 fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a
17 common fund for the benefit of persons other than himself or his client is entitled to a reasonable
18 attorney's fee from the fund as a whole." *See Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478.

19 Courts have long recognized the "common fund" or "common benefit" doctrine, under
20 which attorneys who create a common fund or benefit for a group of persons may be awarded their
21 fees and costs to be paid out of the fund. *Serrano v. Priest* ("Serrano III") (1977) 20 Cal.3d 25,
22 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees'*
23 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California* (1995)
24 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills v. Electric*
Auto-Lite Co. (1970) 396 U.S. 375, 391-392.

25 The California Supreme Court has held that, "when a number of persons are entitled in
26 common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all
27

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

Where the lawsuit results in the recovery of a fund or property benefiting others as well as Plaintiffs (e.g., a class action), the court has inherent equitable power to order Plaintiffs' attorney fees paid 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.

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

In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19, the California Supreme Court upheld an attorney's fee award based on a percentage of the common benefit obtained in a lawsuit by a city employee's association for retroactive wages:

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

In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs.” Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,

1 the California Supreme Court recognized that the common benefit doctrine has been applied
2 “consistently in California when an action brought by one party creates a fund in which other
3 persons are entitled to share.”

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

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

19 Thus, as Plaintiff’s Counsel has expended a significant amount of time and money to secure
20 a \$60,000.00 settlement fund for the LWDA and Aggrieved Employees [*Schiller*, 2012 U.S. Dist.
21 LEXIS 80776, at 43 (“A common fund results when ‘the activities of the party awarded fees have
22 resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which
23 sum or ‘fund’ the fees are to be paid.”)], and in doing so, has exclusively bore the risk of loss for
24 such expenditures of time and expenses (as the LWDA elected not to take the case after receiving
25 the PAGA Notice), Plaintiff’s Counsel is entitled to claim reasonable fees from that fund under
26
27

1 applicable precedent.⁵

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

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

11 Moreover, Plaintiff's Counsel agreed to incur the contingency risk for the benefit of the
12 State of California (which elected not to take the case after receiving the PAGA Notice). Gaines
13 Decl., ¶¶ 26-31. The significant results achieved, and the underlying facts therefrom, justify
14 Plaintiff's Counsel's requested fee as reasonable under all applicable standards.

15 **C. The Fee Amount Allocated by The Settlement Agreement Is Within the**
16 **Zone of Reasonableness Under the "Percentage of the Fund" Method**

17 The amount of fees requested by Plaintiff's Counsel is reasonable based on standards
18 applicable to the "percentage of the fund" method. "When assessing whether the percentage
19 requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of
20 litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the
21 financial burden; and (f) the awards made in similar cases." *See Vasquez v. Coast Valley Roofing,*

22 ⁵ Plaintiff's Counsel is also entitled to recover attorney's fees and costs as a matter of right under
23 the PAGA statute [*Labor Code* § 2699(g)(1) ("Any employee who prevails in any action shall be
24 entitled to an award of reasonable attorney's fees and costs.")], and under *C.C.P.* § 1021.5, as the
25 instant PAGA action was by definition "for the public benefit" and secured monetary awards for
26 approximately 110 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*
27 (2007) 154 Cal.App.4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the fact
28 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 *Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

2 First, the results achieved by Plaintiff's Counsel are significant as Defendant has agreed to
3 pay \$60,000.00 under the Settlement. This is a significant recovery given the risks associated with
4 obtaining any recoverable penalties. Gaines Decl., ¶¶ 20-21, 28. Further, the settlement of PAGA
5 claims impacting a comparable number of individuals have been approved as reasonable for
6 between \$7,500.00 and \$15,000.00. *See* Section III.B.4., *supra*.

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

10 Third, notwithstanding this risk of loss, Plaintiff's Counsel undertook representation of the
11 instant PAGA claim for the benefit of the State of California on a contingency basis. *See* Gaines
12 Decl. at ¶¶ 26-31. This required Plaintiff's Counsel to personally assume the risk of nonpayment
13 in securing the very substantial financial benefit the State of California stands to receive, and also
14 constitutes a "loan" on Plaintiff's Counsel services – both of which are factors that warrant fee
15 enhancement under applicable California Supreme Court authority:

16 One of the most common fee enhancers . . . is for contingency risk.
17 We reaffirmed the propriety of a contingency risk enhancement in
18 Ketchum: "The economic rationale for fee enhancement in
19 contingency cases has been explained as follows: 'A contingent fee
20 must be higher than a fee for the same legal services paid as they are
21 performed. The contingent fee compensates the lawyer not only for
22 the legal services he renders but for the loan of those services. The
23 implicit interest rate on such a loan is higher because the risk of
24 default (the loss of the case, which cancels the debt of the client to
25 the lawyer) is much higher than that of conventional loans.' (Posner,
26 *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) 'A lawyer
27 who both bears the risk of not being paid and provides legal services
28 is not receiving the fair market value of his work if he is paid only
for the second of these functions. If he is paid no more, competent
counsel will be reluctant to accept fee award cases.'"

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

26 Finally, the percentage requested by Plaintiff's Counsel falls within a typical range,

1 particularly in light of the modest settlement size. *Martin, supra*, 2011 U.S. Dist. LEXIS 61796,
2 23 (“[C]ourts may award attorney’s fees in the 30-40% range in wage and hour class actions that
3 result in recovery of a common fund under \$10 million.” *See also Crandall v. U-Haul*
4 *International, Inc.*, LASC Case No. BC178775 (awarding attorneys’ fees of 40% of a common
5 fund).

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

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

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

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

18 *Id.* at 503 (internal citation omitted); *see also e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (“when
19 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff
20 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
21 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh* (1982) 32 Cal.3d
22 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties, the trial
23 court acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v.*
24 *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund
25 method for calculating attorneys’ fees more accurately reflects the results achieved for the putative
26 class than the lodestar method and “establishes reasonable expectations on the part of plaintiffs’
27

1 attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted
2 litigation.”); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The
3 percentage-of-recovery method is generally favored in common fund cases because it allows courts
4 to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for
5 failure.’”).

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

14 Here, Plaintiff’s Counsel’s fee request of thirty-five percent of the PAGA Gross Settlement
15 Amount is fair and reasonable based on a percentage of the recovery, and as well as when confirmed
16 with a lodestar cross-check. First, “regardless whether the percentage method or the lodestar
17 method is used, fee awards in class actions average around one-third of the recovery.” *Chavez v.*
18 *Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11. This is also consistent with Plaintiff’s Counsel’s
19 experience in similar wage and hour class action matters. Gaines Decl., ¶¶ 2-5; 23-25. Thus, the
20 percentage sought by Plaintiff’s Counsel here is reasonable.

21 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
22 multiplying the number of hours reasonably expended by each attorney or legal staff member by
23 their reasonable hourly rates. *See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 48. The court then
24 enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty
25 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.* at 49;
26 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *Thayer v. Wells Fargo Bank* (2001) 92
27 Cal.App.4th 819, 834 (“There is no hard-and-fast rule limiting the factors that may justify an

1 exercise of judicial discretion to increase or decrease a lodestar calculation”).

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

14 In this case, Plaintiff’s Counsel is submitting an attorney fee request equaling \$21,000.00.
15 Based on a projected final lodestar of \$48,722.50, this yields a “negative multiplier” of
16 approximately 0.43 *under* the \$21,000.00 fee request. Gaines Decl., ¶ 22; **Exhibit D** to Gaines
17 Decl. The billing rates used to compute the lodestar are reasonable in view of the evidence submitted
18 herewith. Gaines Decl., ¶¶ 2-5; 23-25; **Exhibit D**.

19 Based thereon, and for the reasons discussed above (the significant risk in continuing to
20 litigate this matter and in seeking to obtain penalties based on the claims asserted; the risks and
21 burden involved in representation on a contingency basis; the knowledge and experience of
22 Plaintiff’s Counsel; and the value obtained by Plaintiff’s Counsel for the Aggrieved Employees), it
23 is fair and reasonable to account for these risks and compensate Plaintiff’s Counsel with a fee award
24 of \$21,000 (thirty-five percent of the PAGA Gross Settlement Amount).

25 **E. Plaintiff’s Counsel’s Request for Costs is Reasonable**

26 In the course of this litigation, Plaintiff’s Counsel incurred out-of-pocket costs of
27 \$15,000.00. *See* Gaines Decl. at ¶ 32, **Exhibit E**. As demonstrated in the Gaines Declaration

1 submitted herewith, the incurred costs included filing fees, expert analysis fees, mediation fees,
2 service of process fees, and other charges typical of litigation of this nature. *Id.* Such costs are
3 appropriate for cost reimbursement in these types of cases. *See e.g., In re United Energy Corp.*
4 *Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (C.D. Cal. 1989) (quoting *Newberg*, Attorney Fee
5 Awards, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* 668 F.Supp. 450, 452 (W.D.
6 Pa. 1987).

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

10 **V. THE ENHANCEMENT AWARD SOUGHT BY PLAINTIFF IS REASONABLE**
11 **AND SHOULD BE APPROVED**

12 The Parties have agreed that Plaintiff will be paid an enhancement award in the amount of
13 \$5,000.00. This payment is intended to recognize the time and effort that Plaintiff spent on behalf
14 of other Aggrieved Employees and the State.⁶ *See* Settlement Agreement at § 4.02(a)(3). *See*
15 Declaration of Ferdinand Abad, submitted herewith. *See* Gaines Decl., ¶ 33.

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

23 The traditional bases for awarding incentive awards in class settlements support the award
24 of incentive awards in PAGA settlements. In *Clark v. American Residential Services LLC* (2009)

26 ⁶ As noted above and disclosed to the Court (*see* Gaines Decl., **Exhibit F**), Plaintiff has also entered
27 into a full general release of all individual claims against Defendant in exchange for a separate
\$20,000.00 payment.

1 175 Cal.App.4th 785, 804-806, the Court of Appeal traced back the case law history of incentive
2 awards and held that “the rationale for making enhancement or incentive awards to named Plaintiffs
3 is that he or she should be compensated for the expense or risk he has incurred in conferring a
4 benefit” on others. *Id.* at 806. That rationale applies synonymously in this Action.

5 Without Plaintiff’s efforts, there would be no recovery at all. The requested award is
6 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit on
7 the Aggrieved Employees and the State of California. As a result of the named Plaintiff’s efforts,
8 the Aggrieved Employees will receive monetary settlement payments, and the State of California
9 will receive \$12,375.00 to be put toward education about and enforcement of California’s labor
10 laws. *See* Gaines Decl., ¶ 34.

11 In this case, Plaintiff performed the following tasks, among others: (1) assisted Counsel in
12 investigating and substantiating the claims alleged in this action, including multiple interviews with
13 counsel to review facts, documents, and Defendant’s policies; (2) assisted in the preparation of the
14 Complaint in this action; (3) produced evidentiary documents to Counsel; and (4) assisted in the
15 settlement of this litigation. *See generally*, Abad Declaration. Moreover, as with any plaintiff who
16 files a civil action, the named Plaintiff undertook the financial risk that, in the event of a judgment
17 for Defendant in this action, he could have been personally responsible for any attorneys’ fees and
18 costs awarded in Defendant’s favor.

19 The award of such payment to Plaintiff is especially warranted in a case like this one. It is
20 necessary to ensure that employees continue to bring forth claims that enforce their rights.
21 Individuals like the named Plaintiff (and most Aggrieved Employees) would have little, if any,
22 recourse without the representative action device. Most Aggrieved Employees – like the named
23 Plaintiff – would be fearful of retaliation in response to filing any lawsuit, much less a
24 representative action suit. Plaintiff must be commended for pursuing his claims; the modest
25 payment sought here is an appropriate means of doing so.

26 Plaintiff is also entering into a full general release against Defendant and its Released
27 Parties, which is far broader than the release by other Aggrieved Employees. Specifically,

1 Aggrieved Employees are releasing only limited PAGA civil penalty claims, while Plaintiff is
2 releasing all claims which he asserts or could assert against Defendant. *See Exhibit F* to Gaines
3 Decl., ¶ 7. The value of his individual wage and hour claims is substantial. Gaines Decl. at ¶ 36;
4 **Exhibit G**. No other Aggrieved Employee is subject to this broad form of release. *Id.* at ¶ 35.

5 This broad release by Plaintiff was negotiated (and necessary) to resolve the Action.
6 Plaintiff threatened to assert his individual claims and Defendant sought to resolve those claims in
7 connection with the resolution of the Action. Without the resolution and release of Plaintiff's
8 individual claims, litigation would continue in a piecemeal fashion. The Parties wished to avoid
9 further litigation, and agreed that a global resolution of Plaintiff's individual claims and the PAGA
10 claims asserted in the Complaint was in the best interest of all parties involved, and thus, a general
11 release by Plaintiff was appropriate. Gaines Decl. at ¶ 37.

12 VI. CONCLUSION

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

- 17 1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §
18 2699, subpart 1;
- 19 2. Appoint Phoenix Settlement Administrators as the Settlement Administrator and
20 approve its administration fees up to \$2,500.00 for payment out of the PAGA Gross Settlement
21 Amount;
- 22 3. Approve the award of attorneys' fees of \$21,000.00, and costs of \$15,000.00, to
23 Plaintiff's Counsel, payment of which shall come from the PAGA Gross Settlement Amount;
- 24 4. Approve the enhancement award to Plaintiff Ferdinand Abad in the amount of
25 \$5,000.00 from the PAGA Gross Settlement Amount;
- 26 5. Direct disbursement of the Net Settlement Amount to the LWDA and all Aggrieved
27 Employees as provided for in the Settlement Agreement; and

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6. Dismiss the Action with prejudice.

Date: April 13, 2023

Respectfully submitted,
GAINES & GAINES, APLC

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