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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

A.J. NICHOLAS BOLDING, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

CARDINAL FINANCIAL COMPANY, a
Pennsylvania limited partnership; and
DOES 1 through 50, inclusive,

Defendants.

Case No. CIVSB2206543

[Assigned to the Hon. Jessica Morgan, Dept. S-26]

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

Date: July 1, 2023

Time: 8:30 a.m.

Dept.: S-26

Action Filed: March 22, 2022

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on July 1, 2024, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard, before the Honorable Jessica Morgan, judge presiding, in Department S-26
4 of the above referenced Court, located at 247 W. Third Street, San Bernardino, California 92415,
5 Plaintiff A.J. Nicholas Bolding (“Plaintiff”) will seek an Order approving the concurrently filed
6 Settlement Agreement and Release of PAGA Claims (“Settlement Agreement”), pursuant to the
7 procedures set forth in Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Larry W. Lee, Christine S. Lee, Edward W.
10 Choi, Dennis S. Hyun, and Plaintiff A.J. Nicholas Bolding, upon the oral arguments of counsel
11 (should there be any), and on the complete records and file herein.

12
13 DATED: April 23, 2024

DIVERSITY LAW GROUP, P.C.

14
15 By: 
16 Larry W. Lee
Christine S. Lee
17 Attorneys for Plaintiff and the Aggrieved
Employees

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	8
II. PROCEDURAL HISTORY.....	10
A. Summary of the Litigation and Settlement	10
1. Plaintiff’s Claims and Allegations	10
2. Procedural History of the Key Pleadings.....	10
3. The Parties Agree to Mediation.....	11
III.SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	11
A. The Aggrieved Employees.....	11
B. Gross Settlement Amount and Allocation	12
C. Scope of the Released Claims.....	13
IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED.....	13
A. PAGA Overview.....	13
B. Class Action Settlement Standards Do Not Govern the Settlement Approval Process for PAGA Claims	14
C. The Settlement is Reasonable and Effectuates PAGA’s Objectives.....	15
D. The Scope of the Release is Appropriately Limited.....	16
E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation.....	17
1. Plaintiff’s Claims are Contested	17
2. Recovery of Penalties After Trial	17
F. The Attorneys’ Fees and Costs are Reasonable	19
G. The Costs are Reasonable	23
H. The Settlement Administrator’s Fees Should be Approved	24
I. Plaintiff’s Enhancement Award Should be Approved	24
J. Notice to the LWDA Has Been Provided.....	25
V. CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> (2009) 46 Cal. 4th 969	passim
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal. App. 5th 504.....	18
<i>Chavez v. Netflix</i> (2008) 162 Cal. App. 4th 43	21
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal. 4th 105.....	20
<i>City of Oakland v. Oakland Raiders</i> (1988) 203 Cal. App. 3d 78.....	21
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> (2006) 141 Cal. App. 4th 46.....	16
<i>Flannery v. California Highway Patrol</i> (1998) 61 Cal. App. 4th 629.....	22
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> (2014) 59 Cal. 4th 348	8
<i>Ketchum v. Moses</i> (2001) 24 Cal. 4th 1122	23
<i>Laffitte v. Robert Half Int'l</i> (2016) 1 Cal. 5th 480	20, 21
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal. App. 4th 19	21, 23
<i>Martino v. Denevi</i> (1986) 182 Cal. App. 3d 553	22
<i>Neary v. Regents of Univ. of Cal.</i> (1992) 3 Cal. 4th 273	16
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal. 4th 1084.....	22
<i>Serrano v. Priest</i> (1977) 20 Cal. 3d 25	19, 20, 23
<i>Serrano v. Unruh</i> (1982) 32 Cal. 3d 621	22
<i>Sutter Health Uninsured Pricing Cases</i> (2009) 171 Cal. App. 4th 495	21
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal. App. 4th 224.....	19, 21

Federal Cases

<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472.....	19
<i>Brotherton v. Cleveland</i> (S.D. Ohio 2001) 141 F. Supp. 2d 907.....	25
<i>Cook v. Niedert</i> (7th Cir. 1998) 142 F.3d 1004	25
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> (S.D. Ohio 1991) 137 F.R.D. 240 ..	25
<i>Glass v. UBS Fin. Servs., No. C-06-4068</i> (N.D. Cal. Jan. 27, 2007) 2007 U.S. Dist. LEXIS 8476	
.....	25
<i>Hanlon v. Chrysler Corp.</i> (9th Cir. 1998) 150 F.3d 1011	15

1	<i>Hopson v. Hanesbrands Inc.</i> (N.D. Cal. 2009) 2009 WL 928133.....	19
2	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> (S.D. Ohio 1990) 130 F.R.D. 366	25
3	<i>In re Rite Aid Corp. Secs. Litig.</i> (3d Cir. 2005) 396 F.3d 294	21
4	<i>Lusby v. Gamestop Inc.</i> (N.D. Cal. 2013) 97 F.R.D. 400	19
5	<i>Moore v. PetSmart, Inc.</i> (N.D. Cal. 2015) 2015 WL 5439000	19
6	<i>New York Gaslight Club, Inc. v. Carey</i> (1980) 447 U.S. 54.....	22
7	<i>O'Connor v. Uber Techs, Inc.</i> (N.D. Cal. 2016) 2016 WL 4398271	16, 18
8	<i>Ochoa-Hernandez v. Cjaders Foods, Inc.</i> (N.D. Cal. Apr. 2, 2010) 2010 WL 1340777	15
9	<i>Rodriguez v. W. Publ'g Corp.</i> (9th Cir. 2009) 563 F.3d 948.....	24
10	<i>Van Vranken v. Atlantic Richfield Co.</i> (N.D. Cal. 1995) 901 F. Supp. 294.....	24
11	<i>Vincent v. Hughes Air West, Inc.</i> (9th Cir. 1997) 557 F. 2d 759	19, 20
12	Statutes	
13	Business and Professions Code § 17200, <i>et seq.</i>	10
14	Labor Code § 1194.....	passim
15	Labor Code § 1197.....	passim
16	Labor Code § 1197.1.....	passim
17	Labor Code § 201.....	9, 16, 17
18	Labor Code § 202.....	9, 16, 17
19	Labor Code § 203.....	9, 16, 17
20	Labor Code § 204.....	9, 16, 17
21	Labor Code § 226.....	passim
22	Labor Code § 226.3.....	9, 16, 17
23	Labor Code § 2698, <i>et seq.</i>	passim
24	Labor Code § 2699.....	passim
25	Labor Code § 2699(1).....	8
26	Labor Code § 2699.3.....	10, 14
27	Labor Code § 510.....	passim
28	Labor Code § 515.....	passim
	Labor Code § 558.....	passim

1	Labor Code §§ 201-203	8, 10
2	Labor Code §§ 201-204	10, 11
3	Other Authorities	
4	Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 11.25, et seq. (4th ed. 2002)	
5		15
6	Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 13.64 (Supp. 2004)	15
7	<i>Manual for Complex Litigation, Fourth</i> § 21.632 (Fed. Jud. Ctr., 4th ed. 2004)	15
8	<i>Report of the Third Circuit Task Force, Court Awarded Attorney Fees</i> (1985) 108 F.R.D. 237. 21	

1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et*
3 *seq.*, Plaintiff A.J. Nicholas Bolding (“Plaintiff”) hereby moves the Court for an order approving
4 the PAGA settlement as set forth in the Settlement Agreement and Release of PAGA Claims
5 (“Settlement Agreement”).¹

6 The operative Complaint in this case alleges that Defendant Cardinal Financial Company
7 (“Defendant”) (Defendant and Plaintiff together, the “Parties”) violated the PAGA by (i) failing
8 to pay overtime wages for all overtime hours worked in violation of Labor Code §§ 201-203,
9 510, 515, 558, 1194, 1197, and 1197.1; (ii) failing to provide accurate itemized wage statements
10 in violation of Labor Code § 226; and (iv) failing to pay all wages earned in a timely manner.
11 With respect to the afore-mentioned PAGA claims, Plaintiff seeks to recover civil penalties
12 against Defendant on behalf of the State of California and other similarly aggrieved employees.
13 Importantly, this is a very limited scope matter involving only 18 individuals.

14 As will be explained in further detail below, based on the California Supreme Court’s
15 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
16 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as called
17 for under the PAGA, on behalf of the State of California and other similarly situated aggrieved
18 employees, without seeking class certification or meeting the requirements of class certification
19 (*i.e.*, numerosity, typicality, commonality and adequacy). As such, while the PAGA settlement
20 reached herein is on behalf of the State of California and other aggrieved employees, the usual
21 two-step preliminary and final approval process is not required. Rather, as called for under Labor
22 Code § 2699(1), all that is required is an approval by this Court of the settlement of the PAGA
23 claim by the Parties.

24 The Parties have reached such an agreement, and thus now seek this Court’s approval of
25 the settlement which provides for the payment of civil penalties under the PAGA. As

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

demonstrated below, the proposed settlement warrants the Court's approval. Significantly, this settlement was reached after extensive investigation and exchange of formal and informal discovery, including data pertaining to the aggrieved employees, a sample of time and payroll records of the aggrieved employees, and documents pertaining to Defendants' relevant payroll policies. The Parties also participated in a full-day mediation with mediator, Jeffrey P. Fuchsman, Esq., and the Parties were ultimately able to reach this settlement.

Pursuant to the terms of the Parties' proposed Settlement Agreement, as is reflective of the size of the group of employees at issue, Defendant will pay the total amount of \$72,500.00 (the "Gross Settlement Amount"). This amount encompasses a payment of attorneys' fees to Plaintiff's Counsel in the amount of \$24,166.66, Plaintiff's Counsel's actual litigation costs in the amount of \$8,386.03, a service award to Plaintiff in the amount of up to \$5,000.00, and settlement administration costs in the amount of \$1,825.00. Assuming the Court grants the foregoing amounts in full, the PAGA Fund totals approximately \$33,122.31. Pursuant to the PAGA, 75% of the PAGA Fund, or \$24,841.73, will be paid to the Labor & Workforce Development Agency ("LWDA") as civil penalties, and 25% of the PAGA Fund, or \$8,280.58, will be paid to the Aggrieved Employees. The Aggrieved Employees include "all current and former Account Executives who were classified as exempt employees who worked for Defendant in the State of California from March 18, 2021 to the date Plaintiff files the Motion to Approve this Agreement ("Aggrieved Employees"). Settlement Agreement ¶ 2.

The proposed settlement also has a limited and tailored release for Aggrieved Employees that does not release any of their underlying wage claims which are subject to arbitration agreements with class waivers. Specifically, the Aggrieved Employees are releasing "all claims for civil PAGA penalties predicated on Labor Code sections 201, 202, 203, 204, 226, 226.3, 510, 515, 558, 1194, 1197, 1197.1, 2698, *et seq.* and/or the California Wage Order(s), including but not limited to costs and attorneys' fees related thereto, that were alleged in Plaintiff's PAGA letter, the complaint, and/or the operative First Amended Complaint filed in the Action and accrued during the PAGA Period." Settlement Agreement ¶ 37.a.

In light of the above, the proposed settlement constitutes an adequate, fair, and reasonable

1 settlement on behalf of the LWDA and Aggrieved Employees and accomplishes the goals of
2 PAGA. Thus, the Court should grant approval of the settlement.

3 **II. PROCEDURAL HISTORY**

4 **A. Summary of the Litigation and Settlement**

5 **1. Plaintiff's Claims and Allegations**

6 Plaintiff asserts claims against Defendant under the PAGA based on Defendant's failure
7 to pay overtime wages for all overtime hours worked in violation of Labor Code §§ 201-203,
8 510, 515, 558, 1194, 1197, and 1197.1; provide accurate itemized wage statements in violation
9 of Labor Code § 226; and pay all wages earned in a timely manner. L. Lee Decl. ¶ 2.

10 With respect to Plaintiff's claims under Labor Code §§ 201-203, 510, 515, 558, 1194,
11 1197, and 1197.1, Plaintiff alleges that Plaintiff and Aggrieved Employees were misclassified as
12 exempt employees and worked overtime hours without payment of overtime wages. As a result,
13 Plaintiff and other employees are owed additional wages. Said wages were not timely paid to
14 Plaintiff and other employees, or upon separation of employment, and as such waiting time
15 penalties are owed.

16 Plaintiff also alleges wage statement violations under Labor Code § 226 resulting from
17 Defendant's unpaid/underpaid overtime wage violations.

18 **2. Procedural History of the Key Pleadings**

19 On or about March 18, 2022, Plaintiff submitted written notice under Labor Code §
20 2699.3 (the "PAGA Notice") to the LWDA and Defendant. As set forth in the PAGA Notice,
21 Plaintiff alleged that Defendant violated California Labor Code §§ 201-204, 226, 558, 1194,
22 1197, and 1197.1, based on the theories alleged above. L. Lee Decl. ¶ 2, Ex. A.

23 On March 22, 2022, Plaintiff filed a class action complaint against Defendant in the
24 Superior Court of California, County of San Bernardino, alleging causes of action for (1)
25 violation of Labor Code §§ 201-203, 510, 515, 558, 1194, 1197, and 1197.1; (2) violation of
26 Labor Code § 226; and (3) violation of Business and Professions Code § 17200, *et seq.* (the
27 "Action"). *Id.* ¶ 3.

28 On May 25, 2022, after learning that Aggrieved Employees were subject to arbitration

1 agreements with class waivers, Plaintiff filed a First Amended Complaint, alleging a single cause
2 of action for violation of Labor Code § 2698, *et seq.*, predicated on underlying violations of
3 Labor Code §§ 201-204, 226, 510, 515, 558, 1194, 1197, and 1197.1. *Id.* ¶ 4. The First Amended
4 Complaint is the operative Complaint (“Complaint”).

5 **3. The Parties Agree to Mediation**

6 In about July 2023, the Parties agreed to participate in mediation with Jeffrey P.
7 Fuchsman, Esq. L. Lee Decl. ¶ 5. The Parties also agreed to conduct informal discovery to
8 facilitate an effective mediation. *Id.* As part of informal discovery, Defendant provided Plaintiff
9 with the number of aggrieved employees, the number of pay periods at issue, sample time and
10 payroll records, employee handbooks, and relevant payroll policies. *Id.* The data provided by
11 Defendant allowed Plaintiff to analyze liability and calculate Defendant’s potential exposure. *Id.*

12 The Parties participated in mediation with Mr. Fuchsman on December 18, 2023. *Id.* ¶ 6.
13 During the mediation, the Parties spoke at length about the strengths and weaknesses of each
14 side’s claims and defenses and the scope of Defendant’s liability. After engaging in extensive
15 document and information exchange, the Parties were able to reach the current settlement. *Id.*

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

17 The material terms of the settlement are described below and set forth in detail in the
18 Settlement Agreement.

19 **A. The Aggrieved Employees**

20 The aggrieved employees affected by this settlement include “all current and former
21 Account Executives who were classified as exempt employees who worked for Defendant in the
22 State of California from March 18, 2021 to the date Plaintiff files the Motion to Approve this
23 Agreement” (“Aggrieved Employees”). Settlement Agreement ¶ 2. The PAGA Period in this
24 matter is the period from March 18, 2021 through the date that Plaintiff files the Motion to
25 Approve this [Settlement] Agreement. *Id.* ¶ 17. Based upon Defendant’s records, Defendant
26 represents that there are approximately 18 Aggrieved Employees and approximately 375 pay
27 periods at issue during the PAGA Period. L. Lee Decl. ¶ 11; Settlement Agreement ¶ 37.d.

28 //

1 **B. Gross Settlement Amount and Allocation**

2 The Settlement Agreement requires Defendant to pay the amount of Seventy-Two
3 Thousand Five Hundred Dollars (\$72,500.00) (the “Gross Settlement Amount”) for the
4 resolution of this Action. Settlement Agreement ¶ 13. The Gross Settlement Amount includes the
5 civil penalties pursuant to the PAGA to be paid to the LWDA and Aggrieved Employees,
6 Plaintiff’s Individual Settlement Payment (or enhancement award), Plaintiff’s Counsel’s fees and
7 costs, and settlement administration costs. *Id.*

8 The balance of the Gross Settlement Amount remaining after deduction of the court-
9 approved Plaintiff’s enhancement award, Plaintiff’s Counsel’s fees and costs, and settlement
10 administration costs (the “PAGA Fund”), will be available for distribution to the LWDA and
11 Aggrieved Employees. *Id.* ¶¶ 13, 16, 37.f-h. Pursuant to the PAGA, seventy-five percent (75%)
12 of the PAGA Fund, or approximately \$24,841.73, will be paid to the LWDA for PAGA
13 penalties. *Id.* ¶ 12; L. Lee Decl. ¶ 13. The remaining twenty-five percent (25%), or
14 approximately \$8,280.58, will be distributed to Aggrieved Employees (“Individual PAGA
15 Payments”) based on the number of pay periods each individual Aggrieved Employee worked as
16 an exempt employee during the PAGA Period. Settlement Agreement ¶¶ 9, 22, 37.e.i.

17 Based on the number of Aggrieved Employees, employees will be entitled to recover, on
18 average, approximately **\$460.03** each. L. Lee Decl. ¶ 14. The amount each particular Aggrieved
19 Employee will be entitled to recover may be greater or lower than this average depending on the
20 number of pay periods he or she worked as an exempt employee during the PAGA Period. *Id.*
21 This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who
22 were employed longer and thus allegedly suffered greater harm. *Id.*

23 With respect to Plaintiff’s Counsel’s attorneys’ fees and costs, Defendant does not object
24 to Plaintiff’s Counsel’s request for attorneys’ fees of approximately thirty-three and one-third
25 percent of the Gross Settlement Amount, *i.e.*, Twenty-Four Thousand One Hundred Sixty-Six
26 Dollars and Sixty-Six Cents (\$24,166.66). Settlement Agreement ¶ 37.g. Although the
27 Settlement Agreement provides for a payment of up to \$20,000.00 in actual litigation costs,
28 Plaintiff only seeks \$8,386.03 of that amount. *Id.*; L. Lee Decl. ¶ 27, Ex. D.

1 In addition, the Settlement Agreement contemplates an enhancement award to Plaintiff in
2 recognition of his efforts in prosecuting this Action as the PAGA representative on behalf of the
3 State of California and other aggrieved employees, in the amount of up to \$5,000.00. Settlement
4 Agreement ¶ 37.f.

5 Finally, the Settlement Agreement provides for the payment of the fees and expenses
6 reasonably incurred by the Settlement Administrator for administration of this PAGA settlement.
7 *Id.* ¶ 37.h. The Parties have agreed to utilize Phoenix Settlement Administrators, a well-known
8 third-party settlement administrator, to administer the settlement. *Id.* ¶ 26.

9 C. Scope of the Released Claims

10 In exchange for the payments described above, Plaintiff and Aggrieved Employees
11 release the Released Parties from the following:

12 all claims for civil PAGA penalties predicated on Labor Code
13 sections 201, 202, 203, 204, 226, 226.3, 510, 515, 558, 1194, 1197,
14 1197.1, 2698, *et seq.* and/or the California Wage Order(s), including
15 but not limited to costs and attorneys' fees related thereto, that were
16 alleged in Plaintiff's PAGA letter, the complaint, and/or the
operative First Amended Complaint filed in the Action and accrued
during the PAGA Period.

17 Settlement Agreement ¶ 37.a. The settlement, however, does not release Defendant from
18 violations of any predicate statutes other than PAGA, and will not affect a waiver of individual
19 claims by Aggrieved Employees against Defendant for any of the underlying Labor Code claims.
20 The release is expressly limited to claims for civil penalties under PAGA. *Id.* Accordingly, the
21 release for Aggrieved Employees is narrowly tailored and appropriate.

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

23 A. PAGA Overview

24 Prior to the enactment of PAGA, many of the penalties provided against employers for
25 violations of certain Labor Code provisions were solely within the province of the California
26 Department of Labor to seek, enforce, and assess. *Arias v. Superior Court* (2009) 46 Cal. 4th
27 969, 980. However, due to the lack of financing to California's agencies and the potential
28 number of Labor Code violations by California employers, the California Legislature found that

1 it was in the public interest to allow aggrieved employees to act as private attorneys general and
2 to enforce and recover penalties on behalf of other similarly situated aggrieved employees for
3 Labor Code violations committed by their employers. *Id.* Thus, PAGA was enacted to allow such
4 enforcement and recovery by private individuals who have been aggrieved by their employers.
5 Under the PAGA, 75% of any penalties recovered under PAGA by an aggrieved employee is to
6 be paid to the state agency, the LWDA, and the remaining 25% is to be shared amongst the
7 aggrieved employees. Cal. Lab. Code § 2699, subd. (i).

8 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
9 employee must first provide written notice to the LWDA and the employer of the particular
10 Labor Code violation(s) alleged to have been violated by the employer. *See* Cal. Labor Code §
11 2699.3, subd. (a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to
12 investigate the alleged violations or the time for the LWDA to investigate the violations passes,
13 the aggrieved employee is allowed to proceed in a civil action against the employer on behalf of
14 all other similarly aggrieved employees. *See* Cal. Lab. Code § 2699.3, subd. (a)(2)(A).

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

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

28 In class action cases, the purpose of the Court's preliminary evaluation of the settlement

1 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
2 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
3 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* §
4 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a
5 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
6 and must direct the preparation of notice of the certification, proposed settlement, and date of the
7 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
8 2004). To make the preliminary fairness determination, courts may consider several relevant
9 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
10 duration of further litigation; the risk of maintaining class action status through trial; the amount
11 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
12 the experience and views of counsel...” *See Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d
13 1011, 1026.

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

20 Notably, unlike the class action settlement approval process, there is also no statutory
21 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
22 2699, subd. (1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim,
23 nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
24 settlement, if any, reached between the parties.” *Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D.
25 Cal. Apr. 2, 2010) 2010 WL 1340777 at p. *13.

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

27 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
28 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount

1 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
2 agency funding for education and enforcement purposes. *See* Cal. Lab. Code § 2699, subd. (i).

3 Here, the settlement represents an excellent recovery for the small group of Aggrieved
4 Employees and the State, and thus the settlement certainly effectuates PAGA’s purpose. The
5 settlement accomplishes PAGA’s primary objective to enforce the Labor Code. *See O’Connor v.*
6 *Uber Techs, Inc.* (N.D. Cal. 2016) 2016 WL 4398271, at p. *18 (noting that deterring
7 noncompliance with the Labor Code is one of PAGA’s objectives). The settlement is also
8 consistent with the State’s public policy favoring resolution of disputes. “California law favors
9 the settlement of disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces
10 costs, saves resources, and minimizes court congestion. [] The parties are best positioned to
11 understand their interests and resolve a dispute in a mutually beneficial manner without court
12 intervention into the settlement.” *Consumer Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal.
13 App. 4th 46, 62-63 (citing *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal. 4th 273, 277- 278).

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

15 If approved, the settlement would release the Released Parties from PAGA claims
16 predicated on the violations of Labor Code §§ 201, 202, 203, 204, 226, 226.3, 510, 515, 558,
17 1194, 1197, 1197.1, and 2698, *et seq.*, arising from the facts in the Action, and nothing more.
18 The settlement would not impact any other Aggrieved Employees’ ability to pursue PAGA
19 claims predicated on other Labor Code violations or any Labor Code claims not predicated on
20 PAGA. Therefore, the limited scope of the release also supports approval.

21 Because an aggrieved employee’s PAGA action is a substitute for an action brought by
22 the government, “judgment in [a PAGA] action is binding not only on the named employee
23 plaintiff but also on government agencies and any aggrieved employee not a party to the
24 proceeding.” *Arias*, 46 Cal. 4th at p. 986. However, “the nonparty employees, because they were
25 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
26 judgment as to remedies other than civil penalties.” *Id.* at p. 987; *see also*, Lab. Code §
27 2699(g)(l) (non-party aggrieved employees retain all rights “to pursue or recover other remedies
28 available under state or federal law, either separately or concurrently with an action taken under

1 this part”).

2 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
3 confined to the statutory penalties available under PAGA for violations of Labor Code §§ 201,
4 202, 203, 204, 226, 226.3, 510, 515, 558, 1194, 1197, 1197.1, and 2698, *et seq.* Settlement
5 Agreement ¶ 37.a. The release is therefore appropriately tailored.

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

8 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
9 litigation entails significant risk on the underlying merits of Plaintiff’s theory, in addition to the
10 still-developing law under PAGA. L. Lee Decl. ¶ 18.

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

12 Plaintiff asserts that his representative PAGA claim is based on the allegation that
13 Defendant misclassified employees as exempt, and as a result failed to pay overtime wages,
14 timely pay wages, and provide accurate itemized wage statements. L. Lee Decl. ¶¶ 2-4.

15 Defendant has denied violation of any applicable laws and liability for any claims
16 asserted in the Action. Specifically, Defendant argued that Plaintiff and other aggrieved
17 employees were properly classified as exempt outside salespersons and were timely paid. *Id.* ¶
18 16. Defendant also argued that even if Plaintiff and the Aggrieved Employees were misclassified
19 as exempt, they did not engage in overtime work. *Id.* ¶ 16. Moreover, Defendant argued that
20 even if the Court ultimately found its employment practices violative of the Labor Code, the
21 Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its
22 discretion. *Id.* Defendant may have sought summary judgment on this issue or proceeded to trial.
23 Should Defendant have prevailed, the State of California and Aggrieved Employees would have
24 been left with zero recovery. Even if Plaintiff prevailed at trial, Defendant could have appealed,
25 which would have continued litigation in this action for several years thus depriving the State
26 and Aggrieved Employees of any recovery for the foreseeable future.

27 **2. Recovery of Penalties After Trial**

28 Defendant has represented that there are approximately 18 individuals who comprise the

1 Aggrieved Employees and approximately 375 total pay periods at issue during the PAGA Period.
2 L. Lee Decl. ¶ 11; Settlement Agreement ¶ 37.d. Based on the data provided by Defendant,
3 Plaintiff has calculated the maximum exposure for all PAGA claims to be \$112,500.00 if the
4 Court were to award a \$100 penalty for each pay period encompassed by the proposed settlement
5 for each violation. L. Lee Decl. ¶ 15. However, even if Plaintiff were to prevail on the merits of
6 the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the
7 Court can decline to award the full amount of PAGA penalties where “if, based on the facts and
8 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
9 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
10 *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517, while the plaintiff prevailed on
11 his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%,
12 citing the employer’s good faith attempt at complying with the law. Upon review, the Court of
13 Appeal found such reduction to be proper. *Id.* at p. 539; *see O’Connor*, 2016 WL 4398271, at p.
14 *17 (noting that even if PAGA penalties amounted to \$1 billion, such award “could well be
15 reduced, as a court may reduce the penalty when to do otherwise would result in an award that is
16 unjust, arbitrary and oppressive, or confiscatory”).

17 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
18 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
19 contrary. Even if there were a finding of liability, Defendant has argued that these violations
20 were not intentional violations of the law and did not occur every pay period or apply to all
21 employees. As such, the Court may be disinclined to award full PAGA penalties. On this basis,
22 the Court again may find there is reason to significantly reduce the PAGA penalties awarded.

23 The Court’s assessment of the proposed settlement must take into account that any
24 penalties awarded may be subject to substantial reduction. When this is considered, in
25 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
26 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced value
27 allows for the distribution of penalties in an amount which accounts for the risk of continued
28 litigation, and Defendant’s likely arguments that higher penalties would have been confiscatory.

1 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
2 of the primary goals of PAGA.

3 The proposed settlement exceeds PAGA settlements that courts have approved in other
4 cases, when considered as a percentage of the overall settlement value of the case. The proposed
5 settlement amounts to approximately **64.44%** of the potential maximum of PAGA penalties,
6 which exceeds other PAGA settlements approved by courts — including those that provide for
7 less than the one percent allocation to PAGA penalties. L. Lee Decl. ¶ 17; *see, e.g., Hopson v.*
8 *Hanesbrands Inc.* (N.D. Cal. 2009) 2009 WL 928133, p. *9 (approving total PAGA allocation
9 that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.* (N.D. Cal. 2015) 2015
10 WL 5439000, p. *8 (approving total PAGA allocation that was 0.5% of \$10,000,000 gross
11 settlement); *Lusby v. Gamestop Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407 (approving total PAGA
12 allocation that was 0.67% of \$750,000 gross settlement).

13 A PAGA allocation need not represent any particular percentage of the overall settlement
14 value in order to secure court approval, and courts routinely approve PAGA settlements
15 representing only a tiny fraction of the overall settlement value. The proposed Gross Settlement
16 Amount in this case exceeds the percentage of overall settlement value of the typical PAGA
17 settlement and thus, the settlement should be approved by the Court.

18 **F. The Attorneys' Fees and Costs are Reasonable**

19 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
20 2699, subd. (g). Similar to awarding fees in a class action, California state and federal courts
21 have recognized that an appropriate method for determining award of attorneys' fees for
22 representative actions is to use a percentage of the total value of benefits to class members by the
23 settlement. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v. Priest*
24 (1977) 20 Cal. 3d 25, 34 (“*Serrano II*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478;
25 *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769. The purpose of this
26 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
27 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
28 burden alone.” *Vincent*, 557 F. 2d at p. 769.

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

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

23 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
24 percent of the fund. *Laffitte*, 1 Cal.5th at p. 506. And this was based on a lodestar amount that
25 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
26 "extraordinarily high or low [should] the trial court [] consider whether the percentage method
27 should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at p. 505.

28 As a secondary support for the percentage of the fund method, when fees are allocated by

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

The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check “undermines” one of the primary reasons for using the percentage method: aligning counsel’s incentives with the benefits delivered to the class and discouraging protracted litigation. *Id.* at p. 506 (finding trial courts “retain the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, pp. 29-30 (citing the recommendations of the Third Circuit Task Force with approval and observing that “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many authorities, who have been most vocal about the manner in which it exacerbates the problem of ‘cheap settlements’ and burdens already overworked trial judge”).

Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also*, e.g., *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix* (2008) 162 Cal. App. 4th 43, 60 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders* (1988) 203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).

With respect to Plaintiff’s Counsel’s lodestar, to date, approximately 117.5 hours have

1 been expended by Plaintiff's Counsel this matter. L. Lee Decl. ¶ 23, Ex. C; Declaration of
2 Christine S. Lee ("C. Lee Decl.") ¶ 8, Ex. A; Declaration of Edward W. Choi ("Choi Decl.") ¶ 7,
3 Ex. A; Declaration of Dennis S. Hyun ("Hyun Decl.") ¶ 8, Ex. A. Larry Lee requests an hourly
4 rate of \$900.00 per hour. L. Lee Decl. ¶ 25. Christine Lee requests an hourly rate of \$400.00 per
5 hour. C. Lee Decl. ¶ 9. Mr. Choi requests an hourly rate of \$900.00 per hour. Choi Decl. ¶ 6. Mr.
6 Hyun requests an hourly rate of \$850.00 per hour. Hyun Decl. ¶ 10. The courts are quite liberal
7 in the evidence required to prove an attorney's hours. Detailed time records are not required. An
8 attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours
9 worked on a particular case is sufficient evidence to support an award of attorney fees, even in
10 the absence of detailed time records." *Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.

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

16 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
17 experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084,
18 1095. The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
19 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
20 and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal.
21 App. 4th 629, 632-33.

22 Plaintiff's Counsel's skill and experience justify the requested rate. As shown in the
23 supporting declarations, Plaintiff's Counsel have significant experience in the area of
24 employment and wage and hour class actions. Specifically, Plaintiff's Counsel's practice focuses
25 on representing employees in employment matters, particularly wage and hour cases. L. Lee
26 Decl. ¶¶ 20-22; C. Lee Decl. ¶¶ 5-7; Choi Decl. ¶¶ 4, 5; Hyun Decl. ¶¶ 3-6. As such, based on
27 the hours and applicable rate, the total lodestar to be expended by Plaintiff's Counsel through
28 finalizing this settlement will be approximately \$89,610.00, based on 117.5 total hours. L. Lee

Decl. ¶ 23, Ex. C; C. Lee Decl. ¶ 8, Ex. A; Choi Decl. ¶ 7, Ex. A; Hyun Decl. ¶8, Ex. A.

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

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

Here based upon Plaintiff’s Counsel’s lodestar of \$89,610.00, Plaintiff’s request for a fee award of \$24,166.66 is more than reasonable and fair. As the Court can see, the lodestar cross check results in a **negative multiplier**. Based thereon, Plaintiff’s Counsel’s request for attorneys’ fees in the amount of \$24,166.66 is fair and reasonable, and the Court should approve this amount.

G. The Costs are Reasonable

Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of \$8,386.03 is also reasonable, especially in light of the fact that the Parties agreed that Plaintiff’s Counsel may seek up to \$20,000.00 as reimbursement for litigation costs under the Settlement Agreement. L. Lee Decl. ¶ 27, Ex. D; Settlement Agreement ¶ 37.g. As set forth in Plaintiff’s Counsel’s declaration, the costs were all directly incurred in the prosecution of this action, including without limitation, filing fees, service of process fees, postage fees, mediation fees, and other litigation expenses. L. Lee Decl. ¶ 27. As such, the requested costs are fair and reasonable, and should be awarded by the Court.

1 **H. The Settlement Administrator’s Fees Should be Approved**

2 The Parties have agreed to pay actual costs of administration, which will not exceed
3 \$1,825.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
4 this Settlement. Settlement Agreement ¶¶ 26, 37.h. The Parties believe that the administration fee
5 is reasonable and should be approved.

6 **I. Plaintiff’s Enhancement Award Should be Approved**

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

13 Here, Plaintiff seeks \$5,000.00 for the service award, which is intended to compensate
14 Plaintiff for the time spent on this case and for his efforts in prosecuting this case as the
15 representative on behalf of the State of California and other aggrieved employees. In particular,
16 Plaintiff has met with his counsel to discuss the case, had numerous telephonic discussions with
17 his counsel regarding the case, and reviewed pleadings and documents, including the PAGA
18 Notice, Complaint, and Settlement Agreement. Declaration of A.J. Nicholas Bolding (“Bolding
19 Decl.”) ¶¶ 6, 7. Additionally, by serving as the PAGA representative and filing this lawsuit,
20 which is a public record, Plaintiff also faced significant risk in not being able to find prospective
21 employment and/or face retaliation from prospective employers. *Id.* ¶ 9. In this regard, future
22 employers are less likely to hire and/or continue employment with individuals who have filed
23 employment-related lawsuits, particularly cases of this nature. In light of Plaintiff’s efforts, the
24 service award should be awarded to Plaintiff for his commitment, dedication, and risks taken for
25 this litigation.

26 Furthermore, the requested service award is consistent with awards approved in other
27 common fund cases. *See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp.
28 294, 299-300 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer*

1 *Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three
2 incentive awards of \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907,
3 913-14 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
4 *Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class
5 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068 (N.D. Cal. Jan. 27, 2007) 2007 U.S.
6 Dist. LEXIS 8476, *51-52 (awarding \$25,000 incentive award in FLSA overtime wages class
7 action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award
8 to class representative in ERISA case).

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

10 Pursuant to California Labor Code § 2699(1), on April 24, 2024, Plaintiff uploaded the
11 instant motion, Settlement Agreement, and proposed order to the LWDA's website. L. Lee Decl.
12 ¶ 28. In addition, Plaintiff shall submit to the LWDA a copy of the Court's judgment and order
13 approving the Settlement Agreement within ten (10) days after entry of judgment or order. *Id.*

14 **V. CONCLUSION**

15 Based on the above, Plaintiff requests that the Court approve the current PAGA
16 settlement.

18 DATED: April 23, 2024

DIVERSITY LAW GROUP, P.C.

19
20 By: 
Larry W. Lee
Christine S. Lee
21 Attorneys for Plaintiff and the Aggrieved
22 Employees
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