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Attorneys for Plaintiff and aggrieved employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

STEPHEN JARAMILLO, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

USS-UPI, LLC, a Delaware limited
liability company formerly known as
USS POSCO Industries; and DOES 1
through 50, inclusive,

Defendants.

Case No.: C22-00641

(Assigned to the Honorable Charles S. Treat,
Dept. 12)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT OF
2004; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: TBD
Time: 8:30 A.M.
Dept.: 12

Complaint Filed: April 7, 2022
Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on that on a date to be set by the Clerk, before the
3 Honorable Charles S. Treat in Department 12 of the Superior Court of the State of California for
4 the County of Contra Costa, located at 725 Court Street, Martinez, California 94553, Plaintiff
5 Stephen Jaramillo (“Plaintiff”) will and hereby does move the Court for entry of an order
6 approving the proposed Private Attorneys General Act Settlement Agreement and Release
7 (“Settlement Agreement” or “Settlement”) entered into in the above-captioned civil action
8 between Plaintiff and Defendant USS-UI, LLC (“Defendant”) (Plaintiff and Defendant shall
9 collectively be referred to as the “Parties”) under the Labor Code Private Attorneys General Act
10 of 2004 (the “PAGA”).

11 This motion is made pursuant to California Labor Code § 2699(1)(2), which requires trial
12 courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],” *see*
13 Cal. Lab. Code § 2699(1)(2), and on the grounds that the parties’ settlement is fundamentally fair,
14 adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
15 concurrently filed declaration of Max W. Gavron, a copy of the Parties’ proposed Settlement
16 Agreement and this motion was electronically submitted to the Labor and Workforce
17 Development Agency in accordance with California Labor Code §§ 2699(1)(2) and 2699(1)(4)
18 concurrent with the filing of this motion.

19 This motion is based on this notice of motion and motion for approval of the Parties’
20 Settlement Agreement attached to the Declaration of Max Gavron and the Settlement Agreement
21 attached thereto as **Exhibit A**, concurrently filed herewith; the attached memorandum of points
22 and authorities in support of this motion; the concurrently filed declarations of Max W. Gavron
23 (and any exhibits attached thereto), Larry W. Lee, Kwanporn “Mai” Tulyathan, and Plaintiff
24 Stephen Jaramillo in support of this motion; all pleadings, records, and files in this action; and
25 upon such other matters as may be properly presented to, or received by, the Court at or before
26 the hearing on this motion.

1 DATED: January 17, 2024

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Max W. Gavron

5 Kwanporn "Mai" Tulyathan

6 Attorneys for Plaintiff and aggrieved employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Stephen Jaramillo (“Plaintiff”) respectfully requests the
4 Court’s approval of the Private Attorneys General Act Settlement Agreement and Release
5 (“Settlement Agreement” or “Settlement” or “SA”). After this lawsuit was commenced, the
6 Parties engaged in written discovery and meet and confer efforts, and ultimately, mediation. As
7 part of their privileged settlement negotiations, Defendant USS-UPI, LLC (“Defendant”)
8 produced data regarding the PAGA Members, from which Plaintiff’s counsel calculated the
9 maximum PAGA penalty exposure. Declaration of Max W. Gavron (“Gavron Decl.”) ¶¶ 10-15.
10 Based on this information and evidence, the Parties have settled this case on a representative
11 PAGA basis for \$1,000,000.00, or approximately 15.5% of the originally calculated maximum
12 exposure. *Id.*

13 The Settlement Agreement allocates approximately one-third of the Total Settlement
14 Amount for attorneys’ fees, or \$333,333.33, up to \$25,000.00 in litigation costs incurred by
15 Plaintiff’s counsel,¹ \$10,000.00 to Plaintiff for a service award, and up to \$6,250.00 for
16 settlement administration costs. SA ¶¶ 3(a)(1)-(3). The remainder, or the “Net Settlement
17 Amount,” is allocated to the payment of civil penalties under the Private Attorneys General Act
18 (“PAGA”), 75% of which is for distribution to the Labor and Workforce Development Agency
19 and 25% of which is for distribution to the “PAGA Members,” the aggrieved employees on
20 whose behalf Plaintiff filed this action, as required by PAGA. *Id.* ¶¶ 3(a)(4)-(5). Based on these
21 amounts, Plaintiff estimates that the Labor and Workforce Development Agency (“LWDA”) will
22 receive approximately \$469,062.50, and the aggrieved employees will receive approximately
23 \$156,354.17. Gavron Decl. ¶ 16.

24 Under PAGA, the Court must review and approve the proposed settlement. *See* Cal. Lab.
25 Code § 2699(1)(2). Accordingly, Plaintiff brings this motion to request approval of the
26

27 ¹ Plaintiff’s counsel actually incurred \$11,476.84 in costs. Gavron Decl. ¶ 35; Ex. C (Cost
28 Report). Accordingly, the difference between what the agreement allocates and those actually
incurred will be distributed to the LWDA and PAGA Members.

1 Settlement Agreement on the grounds it is fundamentally fair, adequate, and reasonable in light
2 of PAGA’s policy and purpose and the facts and circumstances discussed in detail below.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 On June 10, 2021, Plaintiff sent notice to the Labor and Workforce Development Agency
5 (“LWDA”) giving notice of his intent to pursue a representative PAGA action, on behalf of
6 himself and the State of California, as well as on behalf of other PAGA Members (the “PAGA
7 Notice”). Gavron Decl. ¶ 2.

8 On April 7, 2022, Plaintiff filed a class action complaint against Defendant asserting a
9 claim for violation of Labor Code §§ 201-203 (the “Action”). *Id.* ¶ 3. Plaintiff subsequently
10 amended the complaint on May 9, 2022, adding a cause of action for violation of the PAGA,
11 Labor Code § 2698, *et seq.* *Id.* ¶ 4.

12 On July 18, 2023, the Court signed a stipulation and order dismissing Plaintiff’s first
13 cause of action without prejudice and allowing Plaintiff to file a Second Amended Complaint
14 (the “Operative Complaint”). *Id.* ¶ 5. Plaintiff filed the Second Amended Complaint on July 20,
15 2022. *Id.* ¶ 6.

16 The Second Amended Complaint alleges a single cause of action for violation of Labor
17 Code § 2698, *et seq.*, predicated on an underlying violation of Labor Code § 204. *Id.* ¶ 6.

18 After the filing of the initial complaint, the Parties engaged in formal and informal
19 discovery and engaged in several meet and confer efforts. Gavron Decl. ¶ 7. Plaintiff propounded
20 discovery requests upon Defendant, including requests for production of documents and
21 interrogatories. *Id.* ¶ 7. The Parties also met and conferred extensively on Defendant’s
22 anticipated motion for summary judgment. *Id.* ¶ 7.

23 Thereafter, the Parties agreed to engage in mediation before neutral Louis Marlin, Esq. In
24 connection with the mediation, Defendant provided Plaintiff and his counsel with information
25 about the number of aggrieved employees, the number of pay periods at issue, and other data to
26 analyze Defendant’s potential liability. Based on this information, the Parties conducted
27 settlement negotiations. Gavron Decl. ¶ 8.

28 The Parties engaged in mediation on July 20, 2023. Gavron Decl. ¶ 9. After continued

1 arm's length negotiations facilitated by Mr. Marlin following the mediation, with each Party
2 having had the opportunity to consider all known facts and circumstances, the Parties agreed to
3 terms for complete settlement of the Action. *Id.* ¶ 9.

4 The Parties have agreed that Defendant will fund the Total Settlement Amount of
5 \$1,000,000.00. SA ¶ 3(a). The Settlement Agreement allocates approximately one-third of the
6 Total Settlement Amount for attorneys' fees, or \$333,333.33, up to \$25,000.00 in litigation costs
7 incurred by Plaintiff's counsel ("PAGA Counsel"), \$10,000.00 to Plaintiff for a service award,
8 and up to \$6,250.00 for settlement administration costs. *Id.* ¶¶ 3(a)(1)-(3). The remainder (or Net
9 Settlement Amount) is allocated to the payment of civil penalties under PAGA, 75% of which is
10 for distribution to the LWDA and 25% of which is for distribution to the PAGA Members on
11 whose behalf Plaintiff filed this action, as required by PAGA. *Id.* ¶¶ 3(a)(4)-(5).

12 The Settlement Agreement provides the following release:

13 Upon the date the Court has entered an order and/or judgment
14 approving the Settlement Agreement, and except as to the rights and
15 obligations created by this Settlement Agreement, Plaintiff, the State
16 of California, and each of the PAGA Members will be deemed to
17 have knowingly and voluntarily released and forever discharged
18 Defendant and its parent corporation, affiliates, subsidiaries, joint
19 ventures, related entities, divisions, predecessors, insurers,
20 reinsurers, successors, and assigns, including but not limited to,
21 United States Steel Corporation, POSCO-California Corporation,
22 and USS-POSCO Industries, and their current and former
23 employees, attorneys, officers, directors, executives, managers,
24 members, owners, shareholders, representatives, administrators and
25 agents thereof, both individually and in their business capacities,
26 and their employee benefit plans and programs and the trustees,
27 administrators, fiduciaries, and insurers of such plans and programs,
28 both individually and in their business capacities, and any individual
or entity that could be liable for any of the Released Claims as
defined below (collectively, the "Released Parties"), to the full
extent permitted by law, of and from the PAGA Action and from
any and all claims, arising during the PAGA Period, for civil
penalties under California Labor Code section 2698, et seq.
("PAGA") as well as any interest, fees, and costs available under
PAGA, based on the factual allegations in the Operative Complaint
and PAGA Notice, which occurred during the PAGA Period,
including claims for civil penalties under PAGA premised on the
violation of Labor Code section 204 (time period for payment of

wages) as well as Labor Code section 210 as it relates to Labor Code section 204 (collectively, the “Released Claims”).

Id. ¶ 8(a). These claims are defined as the Released Claims. *Id.*

Each PAGA Member will receive a payment proportionate to the number of pay periods worked during the PAGA Period (“Individual Settlement Share”). *See* SA ¶ 7(a)(1). Each Individual Settlement Share will be considered the payment of penalties and treated as IRS Form 1099 income. *See id.* ¶ 7(a)(2). Finally, any checks not cashed by PAGA Members will be voided and the unclaimed amount will be forwarded to the State of California Controller’s Unclaimed Property Division in the name of the respective PAGA Members. *See id.* ¶ 7(b)(4).

III. STANDARD OF REVIEW

Although PAGA requires courts to “review and approve” the settlement of any civil action filed under PAGA, *see* Cal. Lab. Code § 2699(l)(2), neither the Legislature, the California Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark” and stated only that the relief provided under PAGA must be “genuine and meaningful,” “consistent with the underlying purpose of the statute to benefit the public” and, in the context of a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber Techs.*, No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

Left to develop their own standards, federal district courts have typically followed the LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and reasonable in light of PAGA’s policies and purposes.” *See Haralson*, 383 F. Supp. 3d at 972 (collecting cases). When applying this test, federal district courts often consider factors such as strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further

litigation; the amount offered in settlement; the extent of discovery completed; and the expertise and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab. Code § 2699(e)(2).

IV. ARGUMENT

A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant to Labor Code § 2699(l)(2)

When enacting PAGA, the Legislature intended to ensure that the LWDA retained “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end, PAGA requires parties who seek approval of a proposed PAGA settlement to submit the proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§ 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system in conjunction with filing this motion. *See* Gavron Decl. ¶ 36, Ex. D.

B. The Court Should Approve the Settlement Agreement

1. The Settlement Agreement is Entitled to a Presumption of Fairness

In class actions, judicial review of a settlement’s fairness is designed to protect class members who had no say in the negotiation of the settlement by ensuring that the settlement is not the product of “fraud,” “overreaching,” or “collusion” by the negotiating parties and that “due regard” was given to the rights and interests of absent class members subject to the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Although PAGA actions and class actions have certain “fundamental” differences, *see Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 435 (9th Cir. 2015), PAGA settlements are also subject to Court approval. *See Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing the scope of a judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).

1 Against this backdrop, California courts have identified a set of circumstances entitling
2 class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In
3 particular, a presumption of fairness arises where “(1) the settlement is reached through arm’s-
4 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
5 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
6 objectors is small.” *See id.*

7 All of the factors that would give rise to a presumption of fairness in the context of a
8 class action settlement are present in this PAGA action. After this lawsuit was commenced, the
9 Parties agreed to engage in arm’s-length negotiations between highly experienced counsel. As
10 part of their privileged settlement negotiations, Defendant produced data regarding the PAGA
11 Members, from which Plaintiff’s counsel calculated the maximum PAGA penalties and analyzed
12 Defendant’s potential liability. Gavron Decl. ¶ 11. Plaintiff’s counsel has significant experience
13 in litigating wage and hour class and PAGA actions, which further supports the reasonableness
14 of the settlement. Gavron Decl. ¶¶ 25-31; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 6, 7;
15 Declaration of Kwanporn “Mai” Tulyathan (“Tulyathan Decl.”) ¶¶ 6-11. Therefore, the
16 Settlement is entitled to a presumption of fairness.

17 **2. The Scope of the Settlement Agreement is Fair, Adequate, and** 18 **Reasonable**

19 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
20 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to
21 sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted
22 PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement
23 capability of the LWDA with private enforcement actions by “PAGA Members” acting as
24 private attorneys general. *See* 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS*
25 *Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of
26 in the nature of an enforcement action, where the named plaintiff acts as a proxy of the LWDA
27 to collect penalties otherwise recoverable only by the LWDA. *See Arias*, 46 Cal. 4th at 986; *see*
28 *also Iskanian*, 59 Cal. 4th at 381-82. In that role, the named plaintiff “take[s] on a special

responsibility to their fellow aggrieved workers who are effectively bound by any judgment.”
See O'Connor, 201 F. Supp. 3d at 1134.

Plaintiff’s claims in this action are based on alleged violations of Labor Code § 204, as enforced through the PAGA, Cal. Lab. Code §§ 2698, *et seq.* *See generally*, Second Amended Complaint. When reviewing a settlement agreement, “the test is not the maximum amount plaintiffs might have obtained at trial on the complaint,” *see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the settlement agreement is perfect in the estimation of the reviewing court.” *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is “whether the settlement is reasonable under all of the circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant considerations include the strength of a plaintiff’s case and the risk, expense, complexity, and likely duration of further litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912 at *2 (E.D. Cal. Apr. 20, 2018). In PAGA settlements, courts also consider their authority to award less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2); *see also Smith*, 2018 WL 1899912 at *3.

Here, Defendant produced data for the PAGA Members, which permitted Plaintiff to analyze Defendant’s potential exposure and liability. Gavron Decl. ¶ 11. As detailed in the Settlement Agreement, there are approximately 609 PAGA Members and approximately 32,500 pay periods at issue during the time encompassed by this settlement. SA ¶ 3(a)(5).

Labor Code § 210 provides the penalty structure for violations of Labor Code § 204 where an employee’s wages are unlawfully withheld, and provides \$100 for initial violations, and \$200 for subsequent ones, plus 25 percent of the amount unlawfully withheld. Lab. Code § 210. The PAGA’s default penalty structure also provides \$100 for the initial violation and \$200 for subsequent violations. Cal. Labor Code § 2699(f).

Defendant’s potential exposure could be as high as \$6.44 million if the Court were to award a \$100 penalty for an initial violation and a \$200 penalty for each subsequent violation during each pay period encompassed by the proposed settlement $[(32,500 \times \$200) - (609 \text{ PAGA Members} \times \$100) = \$6,439,100]$. Gavron Decl. ¶ 12. However, Defendant argued that its

1 exposure was significantly less because it always complied with the law. Gavron Decl. ¶ 12.
2 Defendant also argued that it was exempt from the requirements of Labor Code § 204 because it
3 had a valid collective bargaining agreement. Labor Code § 204(c) provides an exemption for the
4 rules regarding the timing of payment where employees are covered by a valid collective
5 bargaining agreement that provides a different payment schedule. The Parties debated whether
6 the collective bargaining agreement at issue satisfied the exemption requirement. Had Defendant
7 been successful in its argument, Plaintiff's claim would have been completely extinguished. *Id.*

8 While the PAGA does provide for a potentially heightened penalty of \$200 for
9 "subsequent" violations, many courts do not award that penalty unless there has been a prior
10 citation by the LWDA or court ruling demonstrating that the employer previously violated the
11 Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *accord*
12 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.*, 2009 WL 2448430,
13 at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are
14 not subject to heightened penalties for subsequent violations unless and until a court or
15 commissioner notifies the employer that it is in violation of the Labor Code"); *see also*
16 *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
17 penalty unless prior citation or court ruling). Thus, Defendant argued that even if Plaintiff was
18 able to establish any violation of the Labor Code, the PAGA penalties assessed for these
19 violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at
20 maximum, and there is a likelihood that a further reduction of the penalty would be appropriate
21 given Defendant's good faith efforts to comply with the Labor Code and their contentions that
22 they complied with the Labor Code at all times, had a proper collective bargaining agreement
23 that provided an alternate timing for payment, and any alleged violations did not cause real
24 harm to employees who received all wages due and owing. Gavron Decl. ¶ 13.

25 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
26 PAGA are minimal. Indeed, courts often significantly reduce the penalties awarded. *See*
27 *Carrington v. Starbucks Corporation*, 30 Cal. App. 5th 504, 517 (2018) (approving PAGA
28 penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27 Cal. App. 5th 809

1 (2018). If the Court in this case were to reduce penalties as was approved in *Carrington*, the
2 potential exposure would be significantly less, falling somewhere close to \$162,500 (32,500 x
3 \$5).

4 Under the circumstances of this case, the payment of \$1,000,000.00 in civil penalties is
5 fair, adequate, and reasonable. The payment of \$1,000,000.00 in exchange for a release of only
6 those claims for civil penalties that are pleaded in the action or that could have been pleaded
7 based on the facts alleged in the Operative Complaint will have a substantial deterrent effect on
8 Defendant and other California employers and will confer benefits on the PAGA Members, who
9 will each receive a portion of the settlement, and the LWDA. This is approximately 15.5% of the
10 calculated maximum exposure ($\$1,000,000.00 \div \$6,439,100.00$), and a significantly higher
11 percentage if the Court were to reduce the PAGA penalties, as done in *Carrington*. Gavron Decl.
12 ¶ 15. While Labor Code § 210 provides for the possibility of an award of 25% of the wages
13 unlawfully withheld, it is still subject to the Court's discretion to reduce penalties under the
14 PAGA and the considerations addressed above. Section 210(c) also provides that "An employee
15 is only entitled to either recover the statutory penalty provided for in this section or to enforce a
16 civil penalty as set forth in subdivision (a) of Section 2699, but not both, for the same violation."
17 Accordingly, the analysis of Defendant's potential exposure and the reasonableness of the
18 settlement demonstrates that the settlement is fair, reasonable, and consistent with PAGA's
19 policies and purposes under these circumstances.

20 **3. The Settlement Agreement Apportions Civil Penalties Between the** 21 **LWDA and the PAGA Members as Required by PAGA**

22 Except when civil penalties are recovered from a defendant who did not have any
23 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
24 distributed so that 75% of the civil penalties are paid to the to LWDA and 25% are paid to the
25 "aggrieved employees" on whose behalf the PAGA action was brought. *See* Cal. Lab. Code §
26 2699(i). In full compliance with that rule, the Settlement Agreement requires 75% of the PAGA
27 penalties to be paid to the LWDA and 25% to be paid to the PAGA Members. SA ¶ 3(a)(5). The
28 PAGA Members will receive penalties based on the number of pay periods they worked during

the applicable period using a pro rata distribution formula. *Id.* ¶ 7(a)(1).

4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys’ Fees

a. Percentage of the Fund

PAGA allows a prevailing plaintiff to recover reasonable attorneys’ fees. *See* Cal. Lab. Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff’s counsel to request up to \$333,333.33, in attorneys’ fees. *See* SA ¶ 3(a)(1). For two reasons, this amount is fair, adequate, and reasonable in light of PAGA’s policy and purpose.

First, in class actions, state and federal courts have held that when a class action establishes a monetary fund for the benefit of the class members out of which attorneys’ fees may be paid, courts may determine the amount of a reasonable fee by “choosing an appropriate percentage of the fund created.” *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee award representing 33 1/3 percent of the fund and joining “the overwhelming majority of federal and state courts” in approving the “percentage method” as a reasonable means for determining attorney fee awards in class actions). While different from class action settlements in important ways, PAGA settlements also involve the establishment of a common fund for the benefit of persons other than the named plaintiff, so the reasons for utilizing the percentage method are the same. *See id.* (noting that the percentage method provides “ease of calculation,” “alignment of incentives between counsel and the class,” “a better approximation of market conditions in a contingency case,” and the “encouragement...to seek an early settlement”). The \$333,333.33 requested by Plaintiff’s counsel represents approximately one-third of the Total Settlement Amount, which is consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) (“[F]ee awards in class actions average around one-third of the recovery”); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to one-third of the total settlement amount).

b. Lodestar Cross-Check

When the primary method employed to determine fees is the percentage method, courts have discretion to use the lodestar method to “cross-check” the amount of fees calculated by way

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

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

21 Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or
22 even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also, e.g.*,
23 *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
24 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
25 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
26 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
27 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
28 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was

1 affirmed in full by the California Supreme Court in its decision guiding lower courts on
2 assessing fees.

3 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
4 awarded by the percentage method showing that the majority of multipliers awarded are “in the
5 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
6 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
7 over 30 cases). Federal district courts applying California law have likewise routinely approved
8 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
9 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a
10 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
11 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in lodestar
12 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,
13 at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code
14 violations). Other courts have found even higher multipliers to be reasonable by comparison to
15 other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal.
16 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases
17 affirming a higher multiplier).

18 With respect to PAGA Counsel’s lodestar, PAGA Counsel will have expended
19 approximately 269.5 hours litigating this case, which includes approximately 15 hours of
20 anticipated time spent after approval responding to correspondence and phone calls from PAGA
21 Members, the settlement administrator, and defense counsel. Gavron Decl. ¶ 32; Ex. B; Lee
22 Decl. ¶ 8, Ex. A; Tulyathan Decl. ¶ 12; Ex. A. PAGA Counsel request hourly rates ranging from
23 \$600.00 to \$800.00, which have been approved by numerous courts. *See Gavron Decl. ¶ 33; Lee*
24 *Decl. ¶ 9; Tulyathan Decl. ¶ 13.* The courts are quite liberal in the evidence required to prove an
25 attorney’s hours. Detailed time records are not required. An attorney’s testimony alone may
26 suffice: “Testimony of an attorney as to the number of hours worked on a particular case is
27 sufficient evidence to support an award of attorney fees, even in the absence of detailed time
28 records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

1 Reasonable hours include, in addition to time spent during litigation, the time spent
2 before the action is filed, including time spent interviewing the clients, investigating the facts and
3 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
4 62 (1980). The fee award should also include fees incurred to establish and defend the attorneys'
5 fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which PAGA Counsel
6 seeks compensation involve only these types of tasks. Thus, the number of hours for which fees
7 are sought is reasonable.

8 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
9 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
10 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
11 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
12 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
13 4th 629, 632-33 (1998).

14 PAGA Counsel's skill and experience justify the requested rates. As shown in the
15 supporting declarations, PAGA Counsel have significant experience in the area of employment
16 and wage and hour class and representative actions. PAGA Counsel's practice focuses on
17 representing employees in employment matters, particularly wage and hour cases on a
18 contingency basis. Gavron Decl. ¶¶ 25-31. As such, based on the hours and applicable rates,
19 PAGA Counsel's lodestar amount through the finalization of this settlement – without a
20 multiplier – will be approximately \$186,585.00, which results in a modest multiplier of 1.78.
21 Gavron Decl. ¶ 32, Ex B; Lee Decl. ¶ 8, Ex A; Tulyathan Decl. ¶ 12, Ex. A. This is well within
22 the range approved by the California Supreme Court in *Laffitte* and significantly lower than the
23 multiplier of 2.13 approved in that case. Accordingly, the cross-check supports the fee requested.

24 **5. The Settlement Agreement Allocates a Fair, Adequate, and**
25 **Reasonable Amount to the Payment of Litigation Costs**

26 PAGA also allows a prevailing plaintiff to recover litigation costs. *See* Cal. Lab. Code §
27 2699(g). Accordingly, the Settlement Agreement allows PAGA Counsel to request up to
28 \$25,000.00 in litigation costs. SA ¶ 3(a)(1).

1 PAGA Counsel requests \$11,476.84 for the reimbursement of litigation costs. As set
2 forth in accompanying declarations of PAGA Counsel, these costs were all directly incurred in
3 the prosecution of this action, including, but not limited to, filing fees, service fees, and
4 mediation fees. Gavron Decl. ¶ 35, Ex. C (Cost Report). As such, PAGA Counsel's request for
5 costs in the amount of \$11,476.84 is fair, adequate, reasonable, and consistent with PAGA's
6 policies. Because this amount is less than what was provided in the Settlement Agreement, the
7 difference will be distributed to the LWDA and PAGA Members.

8 **6. Plaintiff's Service Award Should be Approved**

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

15 Here, Plaintiff respectfully requests \$10,000.00 for his service award, which is intended
16 to compensate Plaintiff for the time spent on this case. Declaration of Stephen Jaramillo ¶ __.
17 Plaintiff estimates he spent approximately 25 hours assisting in the litigation of this case,
18 including conferring with his attorneys, providing documents, and reviewing filings. Jaramillo
19 Decl. ¶ __. This requested enhancement is consistent with awards approved in other common fund
20 cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)
21 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D.
22 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of
23 \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a matter of public record.
24 Future employers may be less likely to hire an employee who has previously filed an action
25 against an employer. This supports the requested award.

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28 //

1 **7. The Settlement Agreement Allocates a Fair, Adequate, and**
2 **Reasonable Amount to the Payment of Settlement Administration**
3 **Costs**

4 Because the Settlement Agreement requires payments not only to Plaintiff, PAGA
5 Counsel, and the LWDA, but also to Defendant's current and former employees, significant time
6 and effort will be required to administer the settlement if it is approved by this Court. Among
7 other things, the administrator will calculate each PAGA Member's settlement shares;
8 appropriate tax forms must be issued to all parties who receive payments under the Settlement
9 Agreement; payments must be mailed to Plaintiff, PAGA Counsel, the LWDA, and each PAGA
10 Member; and any checks not cashed by PAGA Members must be voided so that the unclaimed
11 amount can be forwarded to the State of California Controller Office's Unclaimed Property
12 Division in the name of the PAGA Members who did not cash their respective Individual
13 Settlement Shares. *See* SA ¶¶ 7(a)-(f). The Settlement Administrator will also distribute a short
14 letter to PAGA Members explaining the release of claims and settlement. SA; Ex. A (Cover
15 Letter).

16 In contemplation of these expenses, the Parties will engage Phoenix Settlement
17 Administrators to act as a third-party settlement administrator and have allocated up to \$6,250.00
18 to cover the cost of settlement administration. SA ¶ 3(a)(3); Gavron Decl. ¶ 38; Ex. E (Phoenix
19 Bid).

20 **V. CONCLUSION**

21 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
22 Agreement pursuant to Labor Code § 2699(1)(2).
23

24 DATED: January 17, 2024

DIVERSITY LAW GROUP, P.C.

25
26 By: 

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