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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

MATTHEW ONG, as an individual and on behalf
of aggrieved employees,

Plaintiff,

vs.

EHEALTHINSURANCE SERVICES, INC., a
Delaware corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 22CV399893

[Assigned for all purposes to the Hon. Charles F.
Adams, Dept. 7]

**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: June 6, 2024

Time: 1:30 P.M.

Dept.: 7

Complaint Filed: July 5, 2022

Trial Date: None

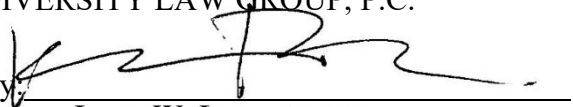
1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 6, 2024, at 1:30 p.m., or as soon thereafter as the matter
3 may be heard, before the Honorable Charles F. Adams, judge presiding, in Department 7 of the above
4 referenced Court located at 191 N. First Street, San Jose, California 95113, Plaintiff Matthew Ong
5 (“Plaintiff”) will seek an Order approving the concurrently filed Settlement Agreement of California
6 Labor Code Private Attorneys General Act Claims (“Settlement Agreement”), pursuant to the
7 procedures set forth in Labor Code § 2698, *et seq.*, the Private Attorneys General Act of 2004
8 (“PAGA”).

9 This motion will be based on this notice of motion, the attached memorandum of points and
10 authorities, the accompanying declarations of Max W. Gavron, Mai Tulyathan, Kelsey Webber, and
11 Plaintiff Matthew Ong, the records and file herein, and on such other evidence as may be presented at
12 the hearing of the motion.

13
14 DATED: January 23, 2024

DIVERSITY LAW GROUP, P.C.

15 By: 

16 Larry W. Lee

17 Max W. Gavron

18 Mai Tulyathan

19 Attorneys for Plaintiff and Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et seq.*,
4 Plaintiff Matthew Ong (“Plaintiff”) hereby moves the Court for an order approving the non-reversionary
5 PAGA settlement as set forth in the concurrently filed Settlement Agreement of California Labor Code
6 Private Attorneys General Act Claims (the “Settlement Agreement” or “Settlement”)¹.

7 The Complaint in this case alleges that Defendant eHealthInsurance Services, Inc. (“Defendant”)
8 (Defendant and Plaintiff together, the “Parties”) violated the PAGA based on Labor Code §§ 201-204,
9 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1, by: (a) failing to pay minimum, regular, and
10 overtime wages; (b) failing to provide compliant meal breaks, or pay meal period premiums in lieu
11 thereof; (c) failing to pay meal and rest and rest period premiums at the correct regular rate of pay; (d)
12 failing to pay employees sick pay at the correct regular rate of pay; and (e) failing to provide accurate
13 itemized wage statements. Based on those violations, Plaintiff seeks to recover civil penalties under the
14 PAGA against Defendant on behalf of the State of California and other similarly aggrieved employees.

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

26 As demonstrated below, the proposed settlement warrants the Court’s approval. The settlement

27
28 ¹ The Settlement Agreement is attached to the Declaration of Mai Tulyathan (“Tulyathan Decl.”) as **Exhibit B**.

1 was reached after the exchange of significant information including data pertaining to the PAGA Group
2 and information regarding Defendant’s payroll practices, and after arms’ length negotiations at
3 mediation with a well-respected wage-and-hour mediator, Francis J. Ortman III. Pursuant to the terms
4 of the Parties’ proposed Settlement Agreement, Defendant will pay the total amount of \$355,000.00 (the
5 “Gross Settlement Amount”). This amount encompasses a settlement of PAGA claims asserted in this
6 lawsuit, a service award to Plaintiff in the amount of \$10,000.00, attorneys’ fees to Plaintiff’s counsel in
7 the amount of \$118,333.33, Plaintiff’s counsel’s actual litigation costs of \$16,817.23, and settlement
8 administration costs in an amount not to exceed \$4,750.00.

9 Based on the amounts above, the Net Settlement Amount is \$205,099.44. (Declaration of Mai
10 Tulyathan (“Tulyathan Decl.”) at ¶ 18.) Pursuant to the PAGA, this amount includes approximately
11 \$153,824.58 to be distributed to the California Labor and Workforce Development Agency (“LWDA”),
12 and approximately \$51,274.86 to be distributed to “Aggrieved Employees,” defined as all current and
13 former non-exempt employees of Defendant who worked in California at any time from April 29, 2021,
14 through April 1, 2023 (the “PAGA Period”). (*Id.* at ¶ 19; Settlement Agreement at ¶ I.2.) The proposed
15 settlement, moreover, does not release any substantive claims of members of the PAGA Group, merely
16 their rights to bring PAGA claims predicated on the same violations of the Labor Code raised in this
17 Action that accrued during the PAGA Period. (Settlement Agreement at ¶ I.19.)

18 In light of the above, the proposed settlement constitutes an adequate, fair, and reasonable
19 settlement on behalf of the State of California and Aggrieved Employees and accomplishes the goals of
20 PAGA.

21 **II. FACTUAL AND PROCEDURAL BACKGROUND**

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

23 On April 29, 2022, Plaintiff provided written notice to the LWDA and Defendant asserting
24 claims for civil penalties pursuant to PAGA predicated on violations of Labor Code §§ 201-204, 226,
25 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1. (Tulyathan Decl. at ¶ 2.) On June 3, 2022, Plaintiff
26 filed a class action complaint in the Superior Court of California, County of Santa Clara. (*Id.* at ¶ 3.)
27 Thereafter, on July 5, 2022, Plaintiff filed a concurrent PAGA action complaint, asserting a single cause
28 of action for violation of Labor Code § 2698, *et seq.*, predicated on violations of Labor Code §§ 201-

204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1. (*Id.* at ¶ 4.)

Specifically, with respect to the failure to pay wages claim, Plaintiff alleges that Defendant failed to pay all wages owed for off-the-clock work performed by Plaintiff and employees. In this regard, Plaintiff alleges that employees were required to boot up their computers, log-in, and use their cell phones to authenticate the log-in process, at the start of each work shift and during their meal breaks. This procedure was done entirely off-the-clock. As a result of such policy and practice, Plaintiff alleges that Plaintiff and employees were not paid all wages owed. (*Id.* at ¶ 5.)

With respect to the regular rate claims, Plaintiff alleges that Defendant failed to pay employees meal and rest period premium wages at the correct regular rate of pay. In this regard, Plaintiff and employees earned non-discretionary remuneration, such as bonuses and incentives. During periods where Plaintiff and employees earned non-discretionary pay and were paid meal and rest period premiums, the non-discretionary remuneration was not factored into the calculation of the regular rate of pay. Instead, Defendant paid meal and rest periods based on the base rate of pay only. Based on that, Plaintiff alleges that Defendant underpaid meal and rest period premiums to its employees. (*Id.* at ¶ 6.) As a separate regular rate violation, Plaintiff alleges that Defendant failed to pay sick pay wages at the correct regular rate of pay. Similar to Plaintiff's regular rate meal/rest period premium claim, Plaintiff alleges that Defendant does not factor in non-discretionary remuneration into the calculation of the regular rate of pay when paying sick pay wages. (*Id.* at ¶ 7.)

Lastly, as a result of the claims above, Plaintiff asserts wage statement violations under the PAGA. (Tulyathan Decl. at ¶ 8.) Based on the above, Plaintiff alleges violations of Labor Code §§ 201-204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1. (*Id.* at ¶ 9.)

After commencement of the lawsuit, Defendant informed Plaintiff of the existence of an arbitration agreement and the Parties met and conferred to discuss participating in early mediation. (*Id.* at ¶ 10.) The Parties subsequently agreed to participate in private mediation with wage-and-hour mediator Francis J. Ortman III. (*Id.*) In connection with mediation, the Parties engaged in informal discovery. Defendant has provided informal discovery pertaining to aggrieved employees during the PAGA period, the number of pay periods at issue, Plaintiff's personnel file and wage statements, a sample of payroll records of the PAGA group, as well as production of pertinent policies. (*Id.* at ¶ 11.)

1 The data provided allowed Plaintiff's counsel to analyze liability and exposure in preparation for the
2 mediation. (*Id.*)

3 On April 13, 2023, the Parties participated in private mediation with wage-and-hour mediator,
4 Francis J. Ortman III. (Tulyathan Decl. at ¶ 12.) The Parties spoke at length about the strengths and
5 weaknesses of each side's claims and defenses. While the Parties did not reach a settlement at the
6 mediation, the Parties continued extended settlement negotiations following the mediation, facilitated by
7 the mediator, and ultimately reached the current settlement of Plaintiff's PAGA claims. (*Id.*) In
8 resolution of Plaintiff's PAGA claims, the Parties entered into the Settlement Agreement, a true and
9 correct copy of which is attached as **Exhibit B** to the Declaration of Mai Tulyathan.

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

11 The material terms of the Settlement are described below and set forth in detail in the Settlement
12 Agreement.

13 **A. The Aggrieved Employees**

14 The "Aggrieved Employees" affected by this Settlement include "all current and former non-
15 exempt employees of Defendant who worked in California at any time from April 29, 2021, through
16 April 1, 2023." (Settlement Agreement at ¶ I.2.) The PAGA Period is defined as any time from April
17 29, 2021, through April 1, 2023. (*Id.* at ¶ I.14.)

18 Based upon Defendant's records, Defendant represents that the number of Aggrieved Employees
19 during the PAGA Period is approximately 475 individuals. (*Id.* at ¶ I.2.) Defendant also represents that
20 the total number of pay periods worked by Aggrieved Employees during the PAGA Period is
21 approximately 12,500. (*Id.* at ¶ III.3.)

22 **B. Settlement Sum and Allocation**

23 The Settlement Agreement requires Defendant to pay the Gross Settlement Amount of Three
24 Hundred Fifty-Five Thousand Dollars and Zero Cents (\$355,000.00). (Settlement Agreement at ¶¶ I.7;
25 III.2.) The terms of the Settlement Agreement provide for an award of attorneys' fees not to exceed
26 \$118,333.33, and reimbursement of litigation costs of up to \$30,000.00 to Plaintiff's counsel²; service
27

28 ² As explained below, Plaintiff's counsel seeks reimbursement of actual litigation costs in the amount of \$16,817.23.

award to Plaintiff in the amount of \$10,000.00 for serving as the PAGA representative; and settlement administration costs of up to \$4,750.00. (*Id.* at ¶ III.2.)

The balance of the Gross Settlement Amount remaining after deduction of the amounts above will be available for distribution to the LWDA and Aggrieved Employees (the balance of the Gross Settlement Amount remaining after the above deductions shall be referred to as the “Net Settlement Amount”). (*Id.* at ¶ I.12.) Pursuant to the PAGA, seventy-five percent (75%) of the Net Settlement Amount, or approximately \$153,824.58, will be distributed to the LWDA for PAGA penalties. (*Id.* at ¶ I.11; III.2.a.1; Tulyathan Decl. at ¶ 19.) The remaining twenty-five percent (25%) of the Net Settlement Amount, or approximately \$51,274.86 will be distributed to the Aggrieved Employees. (Settlement Agreement at ¶ I.8; III.2.a.2; Tulyathan Decl. at ¶ 19.)

The portion of the Net Settlement Amount distributed to the Aggrieved Employees will be distributed on a *pro rata* basis, based on the number of pay periods each Aggrieved Employee worked as a non-exempt employee in California during the PAGA Period divided by the aggregate total number of pay periods worked by all Aggrieved Employees as non-exempt employees in California during the PAGA Period. (Settlement Agreement at ¶ IV.2.f.2; Tulyathan Decl. at ¶ 20.)

Defendant has represented that there are 475 Aggrieved Employees. (Settlement Agreement at ¶ I.2; Tulyathan Decl. at ¶ 16.) Based thereon, on a raw average, each Aggrieved Employee may potentially recover approximately \$107.95 from the portion of the Net Settlement Amount attributable to the Aggrieved Employees. (*Id.* at ¶ 21.) The amount any particular Aggrieved Employee will be entitled to recover will fluctuate depending on the number of pay periods he or she worked as a non-exempt employee in California during the PAGA Period. This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who have allegedly suffered greater harm. (*Id.*)

As part of the Settlement Agreement, Defendant does not object to Plaintiff’s counsel’s request for attorneys’ fees of approximately one-third (1/3) of the Gross Settlement Amount, *i.e.*, One Hundred Eighteen Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$118,333.33), plus reimbursement of litigation costs in an amount of Sixteen Thousand Eight Hundred Seventeen Dollars and Twenty-Three Cents (\$16,817.23), subject to the Court approving this Settlement. (Settlement Agreement at ¶ III.2.b.) Any portion of the attorneys’ fees and costs not approved by the Court will be

1 added to the Net Settlement Amount. (*Id.*) Also, as part of the Settlement Agreement, Defendant does
2 not object to Plaintiff's request for a Service Award of Ten Thousand Dollars (\$10,000.00). (*Id.* at ¶
3 III.2.d.)

4 Finally, the Settlement Agreement provides for the payment of the fees and expenses
5 reasonably incurred by the Settlement Administrator. (*Id.* at ¶ III.2.c.) The Parties have agreed to
6 retain Phoenix Settlement Administrators to administer the Settlement, with the administration costs
7 estimated not to exceed \$4,750.00. (*Id.* at ¶¶ I.21, III.2.c; Tulyathan Decl. at ¶ 23, Ex. D.)

8 **C. Scope of the Released Claims**

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

11 [A]ll claims for civil penalties under the PAGA that were set forth, or could
12 have been set forth based on the facts alleged in the Action, for penalties
13 pursuant to PAGA for violation of Labor Code §§ 201-204, 226, 226.7, 246,
14 510, 512, 558, 1194, 1197, and 1197.1, that accrued during the PAGA
Period.

15 (*Id.* at ¶¶ I.19, III.5.) The Settlement does not release Defendant from violations of any predicate
16 statutes other than PAGA and will not affect a waiver of individual claims by Aggrieved Employees
17 against Defendant for any of the underlying Labor Code claims. (*See id.*) The release is expressly
18 limited to claims for civil penalties under the PAGA pertaining to the Labor Code violations raised in
19 this lawsuit that accrued during the PAGA Period. (*Id.*) The release applicable to PAGA Group
20 Members expressly excludes claims outside of the PAGA Period, and excludes non-PAGA claims or
any individual claims. (*Id.*)

21 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

22 **A. PAGA Overview**

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

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

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

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

24 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the Superior Court
25 must “review and approve any settlement of any civil action filed pursuant to” PAGA. (Cal. Lab. Code
26 § 2699, subd. (l)(2).) As the Parties to this current PAGA action have reached such an agreement, the
27 Parties now seek this Court’s approval as to the settlement of the penalties amount.

28 //

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

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

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

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

//

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

2 The Court’s focus in a PAGA case is not the amount that aggrieved employees will ultimately
3 receive as a result of a settlement, but instead, on whether the total settlement amount achieves PAGA’s
4 objectives. Under PAGA, the penalties recovered are meant to supplement agency funding for purposes
5 of education of employers and employees and enforcement of labor laws and rights. (*See* Cal. Lab.
6 Code § 2699, subd. (i).) Here, the settlement provides monetary recovery for the aggrieved employees
7 and the State and accomplishes PAGA’s primary objective to enforce the Labor Code, and thus the
8 Settlement certainly effectuates PAGA’s purpose. (*See O’Connor v. Uber Techs, Inc.* (N.D. Cal. August
9 18, 2016) 2016 WL 4398271, at p. *18 (noting that deterring noncompliance with the Labor Code is one
10 of PAGA’s objectives).)

11 The Settlement is also consistent with the State’s public policy favoring resolution of disputes.
12 “California law favors the settlement of disputes as our high court clarified in *Neary*[]. Settlement is
13 efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best
14 positioned to understand their interests and resolve a dispute in a mutually beneficial manner without
15 court intervention into the settlement.” (*Consumer Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal.
16 App. 4th 46, 62-63 (citing *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal. 4th 273, 277- 278).)

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

18 The limited scope of the release supports approval of this PAGA settlement. If approved, the
19 Settlement would release the Released Parties from PAGA claims predicated on the underlying
20 violations of Labor Code §§ 201-204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1, that
21 accrued during the PAGA Period, and nothing more. (Settlement Agreement at ¶¶ I.19, III.5.) The
22 Settlement would *not* impact any other aggrieved employees’ ability to pursue PAGA claims predicated
23 on other allegations aside from those raised in this lawsuit or any Labor Code claims not predicated on
24 the PAGA.

25 Because an aggrieved employee’s PAGA action is a substitute for an action brought by the
26 government, “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also
27 on government agencies and any aggrieved employee not a party to the proceeding.” (*Arias*, 46 Cal. 4th
28 at p. 986.) However, “the nonparty employees, because they were not given notice of the action or

1 afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than
2 civil penalties.” (*Id.* at p. 987; *see also*, Cal. Lab. Code § 2699(g)(l) (non-party aggrieved employees
3 retain all rights “to pursue or recover other remedies available under state or federal law, either
4 separately or concurrently with an action taken under this part”).)

5 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly confined
6 to the civil penalties under the PAGA based on the facts alleged in the Action pertaining to violations of
7 Labor Code §§ 201-204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1, that accrued during the
8 PAGA Period. (Settlement Agreement at ¶¶ I.19, III.5.) The release is therefore appropriately tailored
9 and the settlement should be approved.

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

12 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in litigation
13 entails significant risk on the underlying merits of Plaintiff’s theory, in addition to the still-developing
14 law under PAGA. (Tulyathan Decl. at ¶ 27.)

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

16 Plaintiff asserts that his representative PAGA claims are based on the allegations that Defendant
17 (a) failed to pay all minimum, regular, and overtime wages, and meal period premiums owed in
18 violation of Labor Code §§ 201-204, 226.7, 510, 558, 1194, 1197, and 1197.1; (b) failed to pay
19 employees meal period premium wages at the correct regular rate of pay that included all non-
20 discretionary remuneration, in violation of Labor Code §§ 201-203, 226.7, and 512; (c) failed to pay
21 employees rest period premium wages at the correct regular rate of pay that included all
22 nondiscretionary remuneration, in violation of Labor Code §§ 201-203 and 226.7; (d) failed to pay
23 employees sick pay at the correct regular rate of pay, in violation of Labor Code §§ 201-204 and 246;
24 and (e) failed to provide accurate itemized wage statements in violation of Labor Code § 226.
25 (Tulyathan Decl. at ¶ 26.)

26 Defendant has denied violations of any applicable laws and denied liability for any claims
27 asserted in the Action. (*Id.* at ¶ 28.) In this regard, Defendants assert that they maintained lawful
28 policies and practices in place. Defendant argued that it appropriately paid the premium payments for

missed meal and rest periods. With respect to sick pay, Defendant contends that it appropriate pays sick pay under its paid time off policy. Furthermore, with respect to the off-the-clock claims, Defendant contends that it has also revised its practices to pay for minutes spent for boot-up time as of July 23, 2023, which limits any potentially recoverable PAGA penalties to the State of California and aggrieved employees. Defendant also argues that the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties, or to decide not to award PAGA penalties at all. Should Defendant have prevailed on its arguments or defenses above, the State of California and aggrieved employees would have been left with minimal or zero recovery. (*Id.*)

2. Recovery of Penalties After Trial

Based on the data provided by Defendant, Plaintiff calculated total exposure to be approximately \$4,564,800.00, based on the following:

- \$1,250,000 for the off-the-clock violations (calculated based on 12,500 total pay periods x \$100 penalty per violation);
- \$163,900 for the meal and rest period premium violations (calculated based on 1,639 pay periods where employees were received meal or rest period premium pay and non-discretionary remuneration in the same pay period x \$100 penalty per violation);
- \$25,900 for the sick pay regular rate violations (calculated based on 259 individuals with sick pay underpayment x \$100 penalty per violation);
- \$3,125,000 for the derivative wage statement violations (calculated based on 12,500 total pay periods x \$250 per pay period, pursuant to Labor Code § 226.3 and *Raines v. Coastal Pac. Food Dist.* (2018) 23 Cal. App. 5th 667).

(Tulyathan Decl. at ¶ 25.)

However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the full amount of PAGA penalties where “if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum

1 PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with the law.
2 Upon review, the Court of Appeal found such a reduction to be proper. (*Id.* at p. 539; *see O’Connor*,
3 2016 WL 4398271, at p. *17 (noting that even if PAGA penalties amounted to \$1 billion, such award
4 “could well be reduced, as a court may reduce the penalty when to do otherwise would result in an
5 award that is unjust, arbitrary and oppressive, or confiscatory”).)

6 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA penalties.
7 However, Plaintiff is aware that Defendant could make a compelling argument to the contrary.

8 The Court’s assessment of the proposed Settlement must take into account that any penalties
9 awarded may be subject to substantial reduction. When this is considered, in conjunction with the
10 history of PAGA case law and settlements, and the fact that Plaintiff may recover nothing, the proposed
11 settlement is patently reasonable. Settlement for a reduced value allows for the distribution of penalties
12 in an amount which accounts for the risk of continued litigation, and Defendant’s likely arguments that
13 higher penalties would have been confiscatory. It also sufficiently deters Defendant from engaging in
14 similar conduct in the future, which is one of the primary goals of PAGA.

15 The proposed settlement for \$355,000.00 exceeds PAGA settlements that courts have approved
16 in other cases, when considered as a percentage of the overall settlement value of the case. Here, the
17 proposed settlement amounts to **7.78%** of the total possible liability in this matter, which exceeds other
18 PAGA settlements approved by courts. (Tulyathan Decl. at ¶ 30; *see, e.g., Hopson v. Hanesbrands Inc.*
19 (N.D. Cal. Apr. 3, 2009) 2009 WL 928133, *9 (approving total PAGA allocation that was 0.49% of
20 \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.* (N.D. Cal. Aug. 4, 2015) 2015 WL 5439000, *8
21 (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop*
22 *Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407 (approving total PAGA allocation that was 0.67% of \$750,000
23 gross settlement).)

24 A PAGA allocation need not represent any particular percentage of the overall settlement value
25 in order to secure court approval, and courts routinely approve PAGA settlements representing only a
26 tiny fraction of the overall settlement value. The proposed settlement sum in this case exceeds the
27 percentage of overall settlement value of other PAGA settlements and should be approved by the Court.

28 //

1 **F. The Attorneys’ Fees are Reasonable**

2 PAGA allows a prevailing plaintiff to obtain attorneys’ fees and costs. (Cal. Lab. Code § 2699,
3 subd. (g).) Similar to awarding fees in a class action, California state and federal courts have recognized
4 that an appropriate method for determining award of attorneys’ fees for representative actions is to use a
5 percentage of the total value of benefits to class members by the settlement. (*Wershba v. Apple*
6 *Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v. Priest* (1977) 20 Cal. 3d 25, 34 (“*Serrano*
7 *III*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir.
8 1997) 557 F. 2d 759, 769.) The purpose of this equitable doctrine is to avoid unjust enrichment of
9 counsel and to “spread litigation costs proportionally among all the beneficiaries so that the active
10 beneficiary does not bear the entire burden alone.” (*Vincent*, 557 F. 2d at p. 769.)

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

24 Indeed, most recently, the California Supreme Court has also held that the award of attorneys’
25 fees in common fund wage and hour class action settlements should start with the percentage method.
26 (*See Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (“We join the overwhelming majority of
27 federal and state courts in holding that when class action litigation establishes a monetary fund for the
28 benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of

1 that fund, the court may determine the amount of a reasonable fee by choosing an appropriate
2 percentage of the fund created.”.)

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

8 As a secondary support for the percentage of the fund method, when fees are allocated by
9 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
10 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in this
11 manner, does not override the trial court’s primary determination of the fee as a percentage of the
12 common fund and thus does not impose an absolute maximum or minimum on the potential fee award.”
13 (*Laffitte*, 1 Cal. 5th at p. 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d
14 294, 306-307 (“[The lodestar cross-check does not trump the primary reliance on the percentage of
15 common fund method”).)

16 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-
17 check is extraordinarily high or low, the trial court should consider whether the percentage used should
18 be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not
19 necessarily required to make such an adjustment.” (*Id.*) Thus, a lodestar cross-check is aimed at
20 astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check
21 “undermines” one of the primary reasons for using the percentage method: aligning counsel’s incentives
22 with the benefits delivered to the class and discouraging protracted litigation. (*Id.* at p. 506 (finding trial
23 courts “retain the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force,*
24 *Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao*, 82 Cal. App. 4th 19, pp. 29-30
25 (citing the recommendations of the Third Circuit Task Force with approval and observing that “[t]he
26 criticisms of the lodestar approach set forth in this Report are now echoed by many authorities, who
27 have been most vocal about the manner in which it exacerbates the problem of ‘cheap settlements’ and
28 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*, 162 Cal. App. 4th at 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 145.2 hours have been expended to date by Plaintiff’s counsel this matter. (Tulyathan Decl. at ¶ 38, Ex. E; Declaration of Max W. Gavron (“Gavron Decl.”) at ¶ 11, Ex. A; Declaration of Kelsey Webber (“Webber Decl.”) at ¶ 11.) Plaintiff’s counsel expects to incur approximately 16 additional hours of attorney time in handling post-approval matters and any settlement issues. (Tulyathan Decl. at ¶ 39; Gavron Decl. at ¶ 12.) Mr. Gavron and Ms. Tulyathan request an hourly rate of \$600.00 per hour. (Tulyathan Decl. at ¶ 40; Gavron Decl. at ¶ 13.) Mr. Webber requests an hourly rate of \$750.00 per hour. (Webber Decl. at ¶ 11.) The courts are quite liberal in the evidence required to prove an attorney’s hours. Detailed time records are not required. An attorney’s testimony alone may suffice: “Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.)

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

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

Plaintiff’s counsel’s skill and experience justify the requested rate. As shown in the supporting

1 declarations, Plaintiff's counsel have significant experience in the area of employment and wage and
2 hour class actions. Specifically, Plaintiff's counsel's practice focuses on representing employees in
3 employment matters, particularly wage and hour cases. (Gavron Decl. at ¶¶ 8-10; Tulyathan Decl. at ¶¶
4 33-37; Webber Decl. at ¶¶ 7-8.) As such, based on the hours and applicable rate, the total lodestar to be
5 expended by Plaintiff's counsel through finalizing this Settlement will be approximately \$97,410.00,
6 based on 161.2 total hours. (Gavron Decl. at ¶¶ 11-13, Ex. A; Tulyathan Decl. at ¶¶ 38-40, Ex. E;
7 Webber Decl. at ¶ 11.)

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

15 *Lealao* contains several factors justifying an enhancement based on the percentage-of-the-
16 benefit, namely, no objections by class members, commendable conduct by counsel, and significant
17 recoveries by class members, all of which were previously detailed above. (*Lealao*, 82 Cal. App. 4th at
18 51-53.) The extreme effort undertaken by counsel, as shown by their hours and the significantly high
19 amount of each claim being paid out, shows commendable conduct.

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

25 Here, based upon Plaintiff's counsel's lodestar of \$97,410.00, Plaintiff's request for a low
26 multiplier of approximately **1.2** is reasonable and fair, particularly based on the factors described above
27 and that it is well below the typical range of multipliers awarded by the court. (*Wershba v. Apple*
28 *Computer, Inc.* (Ct. App. 2001) 91 Cal.App.4th 224 (noting that courts using the lodestar method to

1 calculate attorney fees awards in class actions typically apply multipliers in the range of 2 to 4); *Boyd v.*
2 *Bank of Am. Corp.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 162880 (awarding 33% of the common
3 fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa*
4 *Capital Corp.* (C.D. Cal. 2014) 8 F.Supp.3d 1200, 1210 (awarding 33% of the common fund, based on a
5 multiplier of 2.52).)

6 As such, the requested fee award in the amount of \$118,333.33 is fair and reasonable, and should
7 be awarded in its entirety.

8 **G. The Costs are Reasonable**

9 Additionally, Plaintiff's counsel's request for reimbursement of actual litigation costs in the
10 amount of \$16,817.23 is also reasonable, given that the Settlement Agreement allocates for
11 reimbursement of litigation costs of up to \$30,000.00. As set forth in Plaintiff's counsel's declaration,
12 Plaintiff's counsel incurred actual litigation costs in the amount of \$16,817.23, which are costs that were
13 directly incurred in the prosecution of this action, including filing fees, court fees, service of process
14 fees, mediation fees, and postage. (Tulyathan Decl. at ¶ 41, Ex. F.) As such, the requested costs should
15 be awarded as fair and reasonable.

16 **H. The Settlement Administrator's Fees Should be Approved**

17 The Parties have agreed to pay actual costs of administration, which will not exceed \$4,750.00,
18 to the Settlement Administrator – Phoenix Settlement Administrators, to administer this Settlement.
19 (Settlement Agreement at ¶¶ I.21, III.2.c; Tulyathan Decl. at ¶ 23, Ex. D.) The Parties believe that the
20 administration fee is reasonable and should be approved.

21 **I. Plaintiff's Enhancement Payment Should be Approved**

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

27 Here, Plaintiff seeks \$10,000.00 for the Service Award, which is intended to compensate
28 Plaintiff for the efforts in prosecuting the case and his time spent on this case, including discussing the

1 case and facts pertaining to Defendant’s policies and practices, searching for and providing documents,
2 and reviewing the various pleadings and documents in connection with this lawsuit, including payroll
3 documents, the PAGA letter, the complaints, and the Settlement Agreement. (Declaration of Matthew
4 Ong (“Ong Decl.”) at ¶¶ 7.) As Plaintiff’s requested service award is a modest amount, the Court should
5 approve this service award as requested.

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

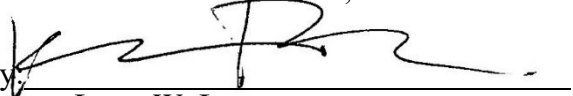
7 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion, the Settlement
8 Agreement, and Proposed Order to the LWDA’s website. (Tulyathan Decl. at ¶ 42, Ex. G.)

9 **V. CONCLUSION**

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

11
12 DATED: January 23, 2024

DIVERSITY LAW GROUP, P.C.

13 By: 

14 Larry W. Lee

Max W. Gavron

Mai Tulyathan

15 Attorneys for Plaintiff and Aggrieved Employees
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