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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

GZIM KOVACEVIC, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

PURE WAFER, INC, a Delaware corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 22CV401779

**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: October 9, 2024

Time: 1:30 p.m.

Dept.: 19

Complaint Filed: August 4, 2022

Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on October 9, 2024, at 1:30 p.m., or as soon thereafter as the
3 matter may be heard, in Department 19 of the above-referenced Court located at 191 N. First Street, San
4 Jose, California 95113, Plaintiff Gzim Kovacevic ("Plaintiff") will seek an Order approving the
5 concurrently filed PAGA Settlement Agreement and Release ("Agreement" or "Settlement"), pursuant
6 to the procedures set forth in Labor Code § 2698, *et seq.*

7 This motion will be based on this notice of motion, the attached memorandum of points and
8 authorities, the accompanying declarations of Kristen M. Agnew, Plaintiff Gzim Kovacevic and Jodey
9 Lawrence (Phoenix Settlement Administrators), the records and file herein, and on such other evidence
10 as may be presented at the hearing of the motion.

11
12 DATED: September 13, 2024

DIVERSITY LAW GROUP, P.C.

13 By: _____

14 Larry W. Lee

Kristen M. Agnew

15 Attorneys for Plaintiff and the Aggrieved Employees
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TABLE OF CONTENTS

I.	INTRODUCTION.....	8
II.	PROCEDURAL HISTORY.....	8
A.	The PAGA Notice.....	8
B.	The Operative Complaint.....	8
C.	The Court Compels the Arbitration of Plaintiff’s “Individual” PAGA Claim.....	9
D.	The Parties Engage in Informal Discovery and Investigation.....	9
E.	The Reach a Settlement Through Arm’s Length Negotiations.....	10
III.	SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	10
A.	The PAGA Settlement Members.....	10
B.	The Gross Settlement Amount.....	11
C.	The Allocation of the Net Settlement Amount.....	11
D.	Attorneys’ Fees, Litigation Costs and Enhancement Payment.....	11
E.	Settlement Administration Costs.....	12
F.	The <i>Cy Pres</i> Recipient.....	12
G.	The Scope of the Released Claims.....	12
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 Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation....	16
1.	Plaintiff’s Claims are Contested.....	16
a.	Unpaid Minimum and Overtime Wages.....	16
b.	Failure to Provide Meal and Rest Periods.....	17
c.	Derivative Wage Statement Violation.....	17

1	2.	Recovery of Civil PAGA Penalties Is Uncertain	17
2	3.	Maximum PAGA Civil Penalties Recoverable After Trial	18
3	4.	Settlement is Reasonable When Compared to the Realistic Amount of PAGA Civil	
4		Penalties At Issue	19
5	E.	The Scope of the Release is Appropriately Limited.....	19
6	F.	The Attorneys' Fees are Reasonable.....	20
7	G.	The Settlement Administrator's Costs Should be Approved.....	25
8	H.	Plaintiff's Enhancement Payment Should be Approved.....	25
9	I.	Notice to the LWDA Has Been Provided.....	26
10	V.	CONCLUSION	26

TABLE OF AUTHORITIES

Statutes

Cal. Lab. Code § 2699(i).....	15
Lab. Code § 2699(c)	14
Lab. Code § 2699(g)(l)	20
Lab. Code § 2699.3(a)(2).....	14
Lab. Code § 2699.3(a)(l).....	14

Other Authorities

Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 11.25, <i>et seq.</i> and § 13.64 (4th ed. 2002 and Supp. 2004)	14
Brickman, <i>Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees</i> , 81 Wash U.L.Q. 653, 659 n.11 (Fall 2003).....	21
Eisenberg & Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008</i> , 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010)	21
<i>Manual for Complex Litigation, Fourth</i> § 21.632 (Fed. Jud. Ctr., 4th ed. 2004)	14

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 980 (2009)	13, 14, 15, 20
<i>Brinker Restaurant Corp. v. Superior Court</i> , 53 Cal. 4th 1004 (2012)	17
<i>Chavez v. Netflix, Inc.</i> , 162 Cal. App. 4th 43, 66 n.11 (2008)	21, 23
<i>City of Oakland v. Oakland Raiders</i> , 203 Cal. App. 3d 78 (1988)	23
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46, 62-63 (2006)	16
<i>Flannery v. California Highway Patrol</i> , 61 Cal. App. 4th 629, 632-33 (1998)	24
<i>Frlekin v. Apple Inc.</i> , 8 Cal. 5th 1038, 1056, (2020)	16
<i>Gzim Kovacevic v. Pure Wafer, Inc.</i> , Santa Clara County Superior Court Case No. 22CV398811.....	8
<i>Ketchum v. Moses</i> , 24 Cal.4th 1122, 1139 (2001)	24
<i>Kim v. Reins International California, Inc.</i> , 9 Cal.5th 73, 81 (2020)	13
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	20, 21, 22

1	<i>Laffitte</i> , 231 Cal. App. 4th at pp. 881-82	23
2	<i>Lealao v. Beneficial California, Inc.</i> , 82 Cal. App. 4th 19, 29-30 (2000)	22, 24
3	<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal. App. 5th 1308 (2018)	17
4	<i>Martino v. Denevi</i> , 182 Cal. App. 3d 553, 559 (1986)	23
5	<i>Moniz v. Adecco USA, Inc.</i> , 72 Cal.App.5th 56, 77 (2021)	15
6	<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal. 4th 273, 277- 278 (1992)	15, 16
7	<i>PLCM Group, Inc. v. Drexler</i> , 22 Cal. 4th 1084, 1095 (2000)	23
8	<i>Raines v. Coastal Pac. Food Distributors, Inc.</i> , 23 Cal. App. 5th 667, 681 (2018)	18
9	<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977) (“ <i>Serrano III</i> ”)	20, 24
10	<i>Serrano v. Unruh</i> , 32 Cal. 3d 621, 639 (1982) [<i>Serrano IV</i>]	23
11	<i>Sutter Health Uninsured Pricing Cases</i> , 171 Cal. App. 4th 495, 512 (2009)	23
12	<i>Thurman v. Bayshore Transit Management, Inc.</i> 203 Cal. App. 4th 1112, 1136 (2012)	17
13	<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 254 (2001)	20, 23, 25
14	Federal Cases	
15	<i>Adolph v. Uber Technologies, Inc.</i> (June 16, 2022, No. S274671	9
16	<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F.3d 1117, 1123 (9th Cir. 2014)	14
17	<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980)	20
18	<i>Boone v. Amazon.com Services, LLC</i> , 562 F.Supp.3d 1103, 1113 (E.D. Cal. 2022)	16
19	<i>Boyd v. Bank of Am. Corp.</i> , 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014)	25
20	<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001)	26
21	<i>City of Detroit v. Grinnell Corp.</i> 495 F.2d 448, 470 (2d Cir. 1974)	22
22	<i>Cook v. Niedert</i> , 142 F.3d 1004, 1016 (7th Cir. 1998)	26
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24	<i>Fernandez v. Victoria Secret Stores LLC</i> , 2008 WL 8150856 at p. *16 n. 59 (C.D. Cal. 2008)	21
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27	2007)	26

1	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1026 (9th Cir. 1998)	15
2	<i>Hartley v. On My Own, Inc.</i> , 2020 WL 5017608, * 4 (E.D. Cal. Aug. 25, 2020)	19
3	<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990)	26
4	<i>In re Rite Aid Corp. Secs. Litig.</i> , 396 F.3d 294, 306-307 (3d Cir. 2005).....	22
5	<i>Kang v. Wells Fargo Bank, N.A.</i> , 2021 WL 5826230, at *15 (N.D. Cal., 2021).....	15
6	<i>Magadia v. Wal-Mart Assocs. et al.</i> 2019 U.S. Dist. Lexis 91792 at *87-*100.....	18
7	<i>Manzo v. McDonald's Restaurants of California, Inc.</i> , 2022 WL 4586236, at *6 (E.D. Cal., 2022).....	19
8	<i>Martin v. AmeriPride Servs.</i> , 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011).....	21
9	<i>New York Gaslight Club, Inc. v. Carey</i> , 447 U.S. 54, 62 (1980).....	23
10	<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010).....	13, 15
11	<i>Ramirez v. Benito Valley Farms, LLC</i> , 2017 WL 3670794, *4 (N.D. Cal. Aug. 25, 2017)	19
12	<i>Report of the Third Circuit Task Force, Court Awarded Attorney Fees</i> , 108 F.R.D. 237, 258 (1985)....	22
13	<i>Rodriguez v. W. Publ’g Corp.</i> , 563 F.3d 948, 958-59 (9th Cir. 2009)	25
14	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	26
15	<i>Vandervort v. Balboa Capital Corp.</i> , 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014).....	25
16	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	20

1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section 2698, *et*
3 *seq.*, Plaintiff Gzim Kovacevic (“Plaintiff”) hereby moves the Court for an order approving the non-
4 reversionary settlement with Defendant Pure Wafer, Inc. (“Defendant” or “Pure Wafer”), as set forth in
5 the concurrently filed PAGA Settlement Agreement and Release (“Agreement” or “Settlement”).

6 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the proposed
7 settlement warrants the Court’s approval. This settlement was reached after extensive investigation and
8 informal discovery, including Defendant’s production of payroll data, as well as information pertaining to
9 Defendant’s payroll policies and procedures. Furthermore, pursuant to the terms of the Settlement,
10 Defendant will pay the gross amount of \$225,585.00 (the “Gross Settlement Amount”), which includes
11 an estimated payment of approximately \$136,375.02 in civil penalties to aggrieved employees and the
12 California Labor and Workforce Development Agency (“LWDA”). The proposed release is narrowly
13 tailored to release only claims for civil penalties under PAGA predicated on the specific Labor Code
14 violations alleged in the Complaint.

15 The proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the
16 LWDA and aggrieved employees, and accomplishes the goals of the PAGA.

17 **II. PROCEDURAL HISTORY**

18 **A. The PAGA Notice**

19 On April 29, 2022, Plaintiff submitted written notice under Labor Code section 2699.3 to the
20 LWDA and Defendant, alleging that Defendant violated Labor Code sections 201, 202, 203, 204, 226,
21 226.2, 226.7, 510, 512, 558, 1194, 1197, and 1197.1 (the “PAGA Notice”). *See* Declaration of Kristen M.
22 Agnew (“Agnew Decl.”) ¶ 3, Exhibit 2.

23 **B. The Operative Complaint¹**

24 On August 4, 2022, Plaintiff filed a Representative Action Complaint in the Action. *See* Agnew
25 Decl. ¶ 6. As set forth in the Complaint, Plaintiff asserts a single cause of action for violation of PAGA
26

27 ¹ On June 1, 2022, Plaintiff filed a separate putative class action against Defendant in the matter of *Gzim Kovacevic v. Pure*
28 *Wafer, Inc.*, Santa Clara County Superior Court Case No. 22CV398811. *See* Agnew Decl. ¶ 5. On April 14, 2023, the
putative class claims were dismissed and Plaintiff’s individual claims were compelled to arbitration. *See id.* at ¶ 11.

1 predicated on the alleged Labor Code violations set forth in the PAGA Notice. *See id.* Plaintiff seeks civil
2 penalties under PAGA, as well as attorneys’ fees, and costs. *See id.* Defendant disputes and denies
3 Plaintiff’s allegations and claims asserted in the operative Complaint. *See id.* at ¶ 10.

4 Plaintiff articulates three primary theories of liability. First, Plaintiff alleges that, as a pattern and
5 practices, Defendant failed to pay wages for all hours worked due to mandatory COVID-19 screen
6 protocols. *See Agnew Decl.* ¶ 7. Defendant required Plaintiff and other non-exempt employees to submit
7 to COVID-19 screenings, such as temperature checks and questionnaires, prior to the start of each shift.
8 *See id.* Plaintiff contends that employees did not receive the payment of wages for time spent completing
9 such activities. *See id.*

10 Second, Plaintiff further alleges that Defendant failed in its affirmative obligation to ensure that
11 Plaintiff and other non-exempt employees had the opportunity to take and were provided with off-duty
12 10-minute rest periods and off-duty 30-minute meal periods in accordance with the mandates of the
13 California Labor Code. *See Agnew Decl.* ¶ 8. In this respect, Plaintiff alleges that, as a pattern and practice,
14 Defendant routinely required employees to work through their meal and/or rest periods or their meal
15 and/or rest periods were frequently interrupted and shortened. *See id.* Plaintiff contends that Defendant
16 failed to pay employees premium compensation for such missed or shortened breaks, as mandated by
17 Labor Code section 226.7. *See id.*

18 Third, due to the alleged non-payment of wages and meal/rest period premiums, Plaintiff alleges
19 that the wage statements provided to employees failed to identify all applicable hourly rates in effect
20 during the pay period, the corresponding number of hours worked at each hourly rate, the total hours
21 worked, and the gross and net wages earned. *See Agnew Decl.* ¶ 9.

22 **C. The Court Compels the Arbitration of Plaintiff’s “Individual” PAGA Claim**

23 On April 14, 2023, the Court issued an order granting Defendant’s motion to compel arbitration
24 as to the individual component of Plaintiff’s PAGA claim, and stayed the remaining representative PAGA
25 claim pending a ruling in *Adolph v. Uber Technologies, Inc.* (June 16, 2022, No. S274671). *See Agnew*
26 *Decl.* ¶ 11. Consistent with the order, on May 1, 2023, Plaintiff submitted a demand for arbitration with
27 the American Arbitration Association (“AAA”). *See id.* at ¶ 12.

28 **D. The Parties Engage in Informal Discovery and Investigation**

Shortly after commencing arbitration, the Parties agreed to redirect their efforts towards an early

1 resolution of the Action. *See* Agnew Decl. ¶ 13. In connection with the Parties’ negotiations, Defendant
2 produced data points relating to: (1) the number of pay periods in which non-exempt employees were
3 subject to temperature checks during the liability period; (2) the number of pay periods in which non-
4 exempt employees worked at least one workweek in which the employee worked at least one shift
5 lasting 3.5 hours or more during the liability period; and (3) the number of pay periods in which non-
6 exempt employees worked at least one workweek in which the employee worked at least one shift
7 lasting more than 5 hours during the liability period. *See id.* at ¶ 14. Defendant also provided its written
8 wage and hour policies, as well as other relevant information. *See id.* at ¶ 15. Based on the information
9 provided by Defendant, Plaintiff’s Counsel conducted a full penalties analysis as to the value of the
10 PAGA claims. *See id.* at ¶ 14.

11 **E. The Reach a Settlement Through Arm’s Length Negotiations**

12 The Parties conducted settlement negotiations at arm’s length in an adversarial position. *See*
13 Agnew Decl. ¶ 20. As part of these negotiations, the Parties extensively discussed all aspects of the case,
14 including the risks and delays of further litigation, the risks to the parties of proceeding with arbitration
15 and trial, the law relating to off-the-clock theory, meal and rest periods, and the possibility of appeals,
16 among other things. *See id.* at ¶¶ 16-19. Arriving at a settlement that was acceptable to the Parties was
17 not easy. The risks of further litigation include, and are not limited to, the real possibility of no recovery
18 after years of litigation.

19 On October 16, 2023, the Parties entered into a Memorandum of Understanding (“MOU”) that
20 contained the material terms of the settlement which was later circulated for comment and revisions. *See*
21 Agnew Decl. ¶ 21. The Parties subsequently negotiated the terms of the PAGA Settlement Agreement
22 and Release. *See id.* at ¶ 22.

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

24 The material terms of the Settlement are described below and set forth in detail in the concurrently
25 filed PAGA Settlement Agreement, a true and correct copy of which is attached as **Exhibit 1** to the
26 Declaration of Kristen M. Agnew.

27 **A. The PAGA Settlement Members**

28 The current Action is being settled on behalf of the following employees: Defendant’s current and

former non-exempt employees in the State of California from June 1, 2021, through November 30, 2023 (“PAGA Settlement Members”). *See* Settlement Agreement (“SA”) § I-h. The PAGA Claim Period is the period of June 1, 2021, through November 30, 2023. *See id.* at I-s. Based on Defendant’s records, there are approximately 201 PAGA Settlement Members. *See id.* at §§ II-C-(c). These individuals worked in approximately 5,013 pay periods during the period of June 1, 2021 and July 31, 2023. *See id.*

B. The Gross Settlement Amount

The Settlement Agreement requires Defendant to pay the gross amount of Two Hundred Twenty-Five Thousand Five Hundred Eighty-Five Dollars (\$225,585.00) (the “Gross Settlement Amount”). *See* SA § II-C(a). Based on the Gross Settlement Amount, Defendant will pay approximately \$45.00 per pay period to resolve the claims in this case. *See* Agnew Decl. ¶ 24.

C. The Allocation of the Net Settlement Amount

The balance of the Gross Settlement Amount remaining after deduction of the approved attorneys’ fees and litigation costs, settlement administration fees, and Plaintiff’s enhancement payment (the “Net Settlement Amount”), will be available for distribution to the LWDA and PAGA Settlement Members. *See* SA §II-C-(a)-(4). The Net Settlement Amount will total approximately \$136,375.02. *See* Agnew Decl. ¶ 28. Seventy-five percent (75%) of the Net Settlement Amount, or approximately \$102,281.27, will be paid to the LWDA for PAGA penalties (“LWDA Payment”). *See* SA §II-C-(a)-(4); Agnew Decl. ¶ 28. The remaining twenty-five percent (25%), or approximately \$34,093.75, will be distributed to PAGA Settlement Members (“PAGA Settlement Member Payment”). *See* SA §II-C-(a)-(4); Agnew Decl. ¶ 28.

Based on the number of PAGA Settlement Members, employees will be entitled to recover, on average, up to \$169.90 each. *See* Agnew Decl. ¶ 29. However, the amount that any particular PAGA Settlement Member will be entitled to recover will be greater or lower than this average depending on the number of pay period in which the individual was employed as a non-exempt employee by Defendant during the PAGA Claim Period. *See* SA §II-C-(a)-(4)-(i). This is fair, as it directly allocates greater penalties to PAGA Settlement Members who have allegedly suffered greater harm. *See* Agnew Decl. ¶ 29.

D. Attorneys’ Fees, Litigation Costs and Enhancement Payment

As part of the Settlement, Defendant does not object to Plaintiff’s Counsel’s request for attorneys’

1 fees of approximately one-third of the Gross Settlement Amount, *i.e.*, Seventy-Five Thousand One
2 Hundred Ninety-Five Thousand Dollars (\$75,195.00), and reimbursement for litigation costs in an amount
3 up to Fifteen Thousand Dollars (\$15,000.00), subject to the Court finally approving this Settlement. *See*
4 SA §II-C-(a)-(1).²

5 Also, as part of the Settlement, Defendant does not object to Plaintiff's request for an enhancement
6 payment to Plaintiff in an amount not to exceed Seven Thousand Five Hundred Dollars (\$7,500.00). *See*
7 SA § II-C-(a)-(3). Any portion of the enhancement payment that is not approved by the Court shall become
8 part of the Net Settlement Amount. *See id.*

9 **E. Settlement Administration Costs**

10 The Settlement provides for the payment of the fees and expenses reasonably incurred by the
11 Settlement Administrator. *See* SA § II-C-(a)-(2). The Parties have agreed to utilize Phoenix Settlement
12 Administrators to administer the settlement, with the administration costs estimated to be Three Thousand
13 One Hundred Ninety-Five Dollars (\$3,195.00). *See id.*; Declaration of Jodey Lawrence ¶ 16, Exhibit B.

14 **F. The *Cy Pres* Recipient.**

15 Any uncashed checks will be paid out pursuant to California Code of Civil Procedure section 384
16 to the *cy pres* recipient, East Bay Community Law Center. *See* SA § II-C-(b). East Bay Community Law
17 Center, is a 501(c)(3) non-profit organization that provides legal services to low-income families. *See id.*
18 The Parties warrant and represent that they do not have a relationship, financial or otherwise, with the *cy*
19 *pres* recipient. *See id.*; Agnew Decl. ¶ 30.

20 **G. The Scope of the Released Claims**

21 Upon the deposit of the Gross Settlement Amount, Plaintiff and PAGA Settlement Members will
22 release Defendant and Released Parties from the PAGA Claims. *See* SA § IV-A. As defined in the
23 Agreement, the term "PAGA Claims" means:

24 All claims, demands, liabilities, damages, attorney's fees, costs, and
25 penalties against the Released Parties, that could have been recovered
26 under the PAGA based on the facts asserted in the PAGA Action for
alleged: (1) unpaid wages, minimum wages, regular wages, overtime and

27 ² At the time the Parties negotiated the Settlement Agreement, Plaintiff's Counsel did not have a final tally of the litigation
28 costs incurred to date. As such, the Parties included a maximum amount that could be attributed to costs under the settlement.
Plaintiff's Counsel requests reimbursement of \$3,319.98 for litigation related expenses. *See* Agnew Decl. ¶ 51.

double time wages, in violation of Labor Code sections 510, 558, 1194, 1197 and 1197.1; (2) meal and rest period violations, in violation of Labor Code sections 226.7 and 512; (3) untimely payment of wages, in violation of Labor Code section 204; (4) wage statement violations, in violation of Labor Code section 226(a); and (5) separation pay violations in violation of Labor Code sections 201, 202 and 203, and corresponding Wage Orders during the PAGA Claim Period.

See id. at § I-q. The Settlement is not intended to release does not extend to violations of any predicate statutes other than PAGA. *See id.* at § IV-A. The Settlement also does not affect a waiver of claims by PAGA Settlement Members against the Released Parties for any individual wage and hour claims. *See id.*

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the LWDA and other aggrieved employees, to bring suit against their employers for alleged violations of the California labor laws and to obtain penalties that previously could only be obtained by the State. The PAGA was enacted because the Legislature determined that it was “in the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover civil penalties for Labor Code violations,” since the State had not been able to fully or adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 81 (2020) (“The Labor Commissioner and other agencies were likewise hampered in their enforcement of civil penalties by inadequate funding and staffing constraints. [] To facilitate broader enforcement, the Legislature enacted PAGA, authorizing “aggrieved employees” to pursue civil penalties on the state's behalf”); *Ochoa- Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” [citations omitted].)

Labor Code section 2699(a) states that any Labor Code provision “that provides for a civil penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former

employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved employee” means “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an action, the allegedly aggrieved employee must provide notice to the LWDA and the employer setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA decides not to investigate the allegations or issue a citation to the employer, the proposed representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code § 2699.3(a)(2).

The California Supreme Court has explained that a plaintiff who brings a PAGA claim “represents the same legal right and interest as state labor law enforcement agencies,” and brings PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA representative’s recovery is “an incentive to perform a service to the state, not restitution for wrongs done to members of the class”).

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, *4 Newberg on Class Actions* § 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*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* § 21.632 (Fed. Jud. Ctr., 4th ed. 2004). 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.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

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 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(i). 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*, 2010 WL 1340777 at *13.

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

The Court’s focus in a PAGA case is not the amount that aggrieved employees will ultimately receive as a result of a settlement. Instead, “a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.” *See Moniz v. Adecco USA, Inc.*, 72 Cal.App.5th 56, 77 (2021) (emphasis added); *see also Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, at *15 (N.D. Cal., 2021) (evaluating a PAGA settlement under the standard of whether the settlement terms “are fundamentally fair, reasonable, and adequate in view of PAGA’s public policy goals”). Here, the Settlement vindicates the rights of PAGA Settlement Members who have experienced alleged violations of the Labor Code. Additionally, the six-figure Gross Settlement Amount acts as a deterrent to other California employers.

The Settlement is also consistent with the State’s public policy favoring resolution of disputes. “California law favors the settlement of disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best positioned to understand their interests and resolve a dispute in a mutually beneficial manner without court intervention into the settlement.” *Consumer Advocacy Group, Inc. v. Kintetsu*, 141 Cal. App. 4th

46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277- 278 (1992)).

D. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation

Though Plaintiff is reasonably confident that he would prevail at trial, proceeding in litigation entails significant risk on the underlying merits of Plaintiff’s theories, in addition to the still-developing law under PAGA.

1. Plaintiff’s Claims are Contested

a. Unpaid Minimum and Overtime Wages

Plaintiff maintains that the time spent submitting to COVID-19 screenings constitutes compensable hours worked. *See* DIR Frequently Asked Questions (“Employers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health orders, must compensate workers for that time worked”).³ Recently, the district court in *Boone v. Amazon.com Services, LLC*, considered this precise question and held that “this case falls squarely within the parameters of the decision in *Frlekin*.” 562 F.Supp.3d 1103, 1113 (E.D. Cal. 2022).

Defendant, however, argues that the time spent in COVID-19 screenings does not constitute hours worked under California law. *See* Agnew Decl. ¶ 17. Defendant maintains that the screening is not primarily for its benefit, but instead was implemented to comply with state and local policies directed at advancing public health objectives. *See Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1056, (2020) (in determining whether an activity constitutes hours worked, “courts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer's control, *whether the activity primarily benefits the employee or employer*, and whether the activity is enforced through disciplinary measures”) (emphasis). Furthermore, Defendant maintains that employees are not under its control until after they pass through the screening – they are not confined to the worksite and can engage in non-work related tasks, such as talking on the phone or texting.

³ https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm#:~:text=Employers%20must%20pay%20workers%20for,workers%20for%20that%20time%20worked.

1 **b. Failure to Provide Meal and Rest Periods**

2 Plaintiff contends that Defendant failed to provide proper duty-free meal and rest periods. In
3 response, Defendant maintains that it complied with the law, had lawful and compliant practices, and
4 provided Aggrieved employees with duty-free meal and rest periods. *See* Agnew Decl. ¶ 18. As
5 articulated in the employee handbook, Defendant’s written policy strictly require that employees take
6 uninterrupted meal and rest periods. *See id.* Defendant contends that during the on-boarding process,
7 employees are provided with a copy of the employee handbook and sign an acknowledgement that they
8 have read and understood the handbook. Citing to *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.
9 4th 1004 (2012) and its progeny, Defendant argues that, an adjudication of the alleged meal and rest
10 period violation would require individualized assessments as to the circumstances of each missed,
11 delayed or interrupted break. *See id.* Defendant argues that, even if Plaintiff was able to establish that
12 some aggrieved employees experienced a meal and/or rest period violation, such a claim would not be
13 manageable. *See id.*

14 **c. Derivative Wage Statement Violation**

15 Plaintiff alleges a derivative wage statement violation. *See* Agnew Decl. ¶ 19. As a result of the
16 alleged underpayment and/or non-payment of wages to aggrieved employees, Plaintiff contends that the
17 wage statements omit information required by Labor Code 226, including all applicable hourly rates and
18 the total hours worked. *See id.* As argued by Defendant, Plaintiff’s derivative wage statement violation
19 is vulnerable to a motion for summary judgment based on the weaknesses of the underlying primary
20 claims. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308 (2018) (finding that the
21 employees did not suffer a violation under 226(a) where their wage statement cause of action was
22 derived from an underlying wage and hour violation for overtime).

23 **2. Recovery of Civil PAGA Penalties Is Uncertain**

24 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
25 recovery is uncertain. Defendant contends that it made a good faith effort to comply with the law. As
26 argued by Defendant, in deciding whether to award the maximum penalty amount, courts may focus on
27 whether the employer made a good faith effort to follow the law. For example, in *Thurman v. Bayshore*
28 *Transit Management, Inc.*, the Court of Appeal upheld the trial court’s significant reduction of PAGA

penalties by 30% because the employer was not initially on notice that it was in violation of the law and because it would have been unfair to award penalties where the employer was unaware of the violations. 203 Cal. App. 4th 1112, 1136 (2012). When the employer made aware of the violations, it timely took steps to come into compliance. *Id.* By contrast, the imposition of full penalties was justified when an employer took a “cavalier approach to fulfilling its contractual and statutory obligations” and demonstrated “reckless disregard.” *Id.* Furthermore, as the California Court of Appeal has affirmed, trial courts are well within their discretion to reduce PAGA penalties “for technical violations that cause no injury,” especially where the “violation was inadvertent.” *Raines v. Coastal Pac. Food Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018).

In this case, Defendant asserted that a substantial reduction in potential PAGA penalties was warranted because: (1) even assuming that Plaintiff could establish the predicate violations, the alleged violations were inadvertent; and (2) PAGA Settlement Members did not suffer substantial economic harm as a result of the alleged violations of Labor Code. *See* Agnew Decl. ¶ 36. Thus, Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its inadvertent behavior, much less to deter it from committing any future violations that were completely foreclosed by its new payroll practices. *See id.*

3. Maximum PAGA Civil Penalties Recoverable After Trial

Defendant has indicated that PAGA Settlement Members worked approximately 5,013 pay periods during the period of June 1, 2021 and July 31, 2023. *See* Agnew Decl. ¶ 31. Assuming that Plaintiff was to prevail on the merits of the PAGA claim, applying the standard penalty of \$100 per pay period yields \$501,300 in potential liability. *See id.* In the alternative, if the Court were to “stack” penalties, (*ie*, award multiple PAGA penalties for different Labor Code violations in the same pay period), the potential PAGA penalties could total as high as \$2,005,200. *See id.* at ¶ 32.

However, trial courts routinely award far less than the statutory maximum amount of civil penalties, even where an underlying violation of the Labor Code is found. Indeed, in the matter of *Magadia v. Wal-Mart Assocs. et al.*, while the trial court imposed substantial PAGA penalties upon the defendant, such amount still represented reductions of 67% and 80% of the potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100. Here, Plaintiff maintains that there does not exist any

reason for reducing PAGA penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the contrary, particularly under the legal and factual issues in this case.

4. Settlement is Reasonable When Compared to the Realistic Amount of PAGA Civil Penalties At Issue

Assuming that the Court awards \$100 per pay period at issue, without stacking, the Gross Settlement Amount is approximately 45% of the maximum amount of penalties at issue. *See Agnew Decl.* ¶ 31. Alternatively, if the Court were to award multiple PAGA penalties for different Labor Code violations in the same pay period, the Gross Settlement Amount is approximately 11.25% of the penalties at issue. Settlement for this reduced value allows for the distribution of penalties in an amount which accounts for the risk of continued litigation, and Defendant’s likely arguments that higher penalties would have been confiscatory. *See id.* at ¶¶ 35-37. It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one of the primary goals of PAGA.

The amount of a PAGA settlement need not represent any particular percentage of the potential penalty amount that may be recovered after trial. *See Manzo v. McDonald's Restaurants of California, Inc.*, 2022 WL 4586236, at *6 (E.D. Cal., 2022) (“There is no express or even baseline percentage of recovery required”). Consequently, trial courts routinely approve PAGA settlements representing only a tiny fraction of the potential verdict value of the claim. *See id.* (approving PAGA allocation that “is less than one percent (1%) of the verdict value” of the claim”); *Hartley v. On My Own, Inc.*, 2020 WL 5017608, * 4 (E.D. Cal. Aug. 25, 2020) (approving settlement at 3.47% of verdict value of PAGA penalty, resulting in average payment per employee of \$61); *Ramirez v. Benito Valley Farms, LLC*, 2017 WL 3670794, *4 (N.D. Cal. Aug. 25, 2017) (considering early stage of litigation, defendant's weak financial condition, and injunctive relief provided by settlement, approving PAGA settlement of 4.5% of verdict value). Here, the Gross Settlement Amount exceeds both in terms of the total dollar amount and as a percentage of overall settlement value, the typical PAGA settlement.

E. The Scope of the Release is Appropriately Limited

The limited scope of the release also supports approval. *See* Section III-G, *supra*. The Settlement only releases Defendant from civil PAGA predicated on Labor Code violations alleged in the Complaint and PAGA Notice, as well as attorneys’ fees and costs. The Settlement would not impact any other

PAGA Settlement Members ability to pursue PAGA claims predicated on other Labor Code violations or any Labor Claims not predicated on PAGA.⁴

F. The Attorneys' Fees are Reasonable

Plaintiff's Counsel seeks a fee award calculated as one-third of the total value of the settlement for the successful prosecution and resolution of this action. Labor Code section 2699(g)(1) provides for the recovery of attorneys' fees and costs in any successful action brought under PAGA. Although this is not a class action, in class actions California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F. 2d at 769.

Recently, the California Supreme Court issued its ruling regarding the award of attorney's fees in wage and hour class action settlements. Under California law, the award of attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created"). Under the percentage of the fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner)

⁴ Because an aggrieved employee's PAGA action is a substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias*, 46 Cal. 4th at 986. However, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(1) (non-party PAGA Settlement Members retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part").

1 (“When a fee is set by a court rather than by contract, the object is to set it at a level that will
2 approximate what the market will set....The judge, in other words, is trying to mimic the market in legal
3 services”).

4 An award of one-third of the Gross Settlement Amount in attorneys’ fees “mimics the
5 marketplace” as it is “supported by the fact that typical contingency fee agreements provide that class
6 counsel will recover 33% if the case is resolved before trial and 40% if the case is tried.” *Fernandez v.*
7 *Victoria Secret Stores LLC*, 2008 WL 8150856 at p. *16 n. 59 (C.D. Cal. 2008) (citing Brickman,
8 *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81
9 Wash U.L.Q. 653, 659 n.11 (Fall 2003)). Indeed, “empirical studies [that] show that...fee awards in
10 class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66
11 n.11 (2008).

12 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the
13 fund, which is similar to the percentage of fee award sought in this case. *Laffitte*, 1 Cal. 5th at 506. And
14 this was based on a lodestar amount that required a multiplier of 2.13. *Id.* at p. 487. As the Court held,
15 only when the multiplier is “extraordinarily high or low [should] the trial court [] consider whether the
16 percentage method should be adjusted so as to bring the imputed multiplier within a justifiable range.”
17 *Id.* at 505. Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3 percent
18 of the common fund is consistent with, and in the range of, awards in other class action lawsuits.” *Id.* at
19 871.

20 Here, the fee award representing one-third of the Gross Settlement Amount is consistent with
21 other comprehensive surveys of class action settlements and fee awards. *See Martin v. AmeriPride*
22 *Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011) (recognizing that “courts may award
23 attorney’s fees in the 30-40% range in wage and hour class actions that result in recovery of a common
24 fund under \$10 million”); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An*
25 *Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010) (independent studies
26 of class action litigation nationwide conclude that fees in the range sought here are consistent with
27 market rates).

28 In addition, it is recognized that one of the primary factors justifying an enhanced attorney’s fees

1 reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.*:

2 No one expects a lawyer whose compensation is contingent upon his
3 success to charge, when successful, as little as he would charge a client who
4 had agreed to pay for his services, regardless of success. Nor, particularly
5 in complicated cases producing large recoveries, is it just to make a fee
6 depend solely on the reasonable amount of time expended.

7 495 F.2d 448, 470 (2d Cir. 1974). For Plaintiff’s Counsel, the fees here were wholly contingent in nature
8 and the case presented far more risk than the usual contingent fee case. Among the risks was the cost
9 inherent in class action litigation, as well as a potentially drawn-out battle with a corporate Defendant.

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

17 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-
18 check is extraordinarily high or low, the trial court should consider whether the percentage used should
19 be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not
20 necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is aimed at
21 astronomical multipliers. Indeed, cross-checks are not required; in many cases, performing a cross-check
22 “undermines” one of the primary reasons for using the percentage method: aligning counsel’s incentives
23 with the benefits delivered to the class and discouraging protracted litigation. *Id.* at p. 506 (finding trial
24 courts “retain the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force,*
25 *Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82
26 Cal. App. 4th 19, 29-30 (2000) (citing the recommendations of the Third Circuit Task Force with
27 approval and observing that “[t]he criticisms of the lodestar approach set forth in this Report are now
28 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.*, 91 Cal. App. 4th 224, 255 (2001); *see also, e.g., Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 60 (2008) (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at pp. 881-82. The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

With respect to Plaintiff’s Counsel’s lodestar, to date, at least approximately 71.80 hours have been expended by Class Counsel in this matter. *See* Agnew Decl. ¶ 49, Exhibit 3. Counsel anticipates spending an additional three hours on this matter through its final resolution, including preparing for the approval hearing, conferring with Settlement Administrator regarding distribution of payment to Aggrieved Employees, and fielding phone calls regarding inquiries about the Settlement. *See id.* Counsel requests an hourly rate of \$800.00 per hour. *See id.* at ¶ 50. 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*, 182 Cal. App. 3d 553, 559 (1986).

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*, 447 U.S. 54, 62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys’ fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*]. Thus, Plaintiff’s Counsel requests that the court find that these hours were reasonable in this litigation. 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*, 22 Cal. 4th 1084, 1095 (2000). 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

1 expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal.
2 App. 4th 629, 632-33 (1998).

3 Here, Plaintiff's Counsel's skill and experience justify the requested rate. As shown in the
4 supporting declaration, Plaintiff's Counsel has significant experience in the area of employment and
5 wage and hour class actions. *See* Agnew Decl. ¶ 41. Specifically, Plaintiff's Counsel's practice focuses
6 on representing employees in employment matters, particularly wage and hour cases. *See* Agnew Decl.
7 ¶¶ 43-48. As such, based on the hours and applicable rate, the total lodestar to be expended by Plaintiff's
8 Counsel through finalizing this settlement will be approximately \$59,840. *See* Agnew Decl. ¶ 50.

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

16 *Lealao* contains several factors justifying an enhancement based on the percentage-of-the-
17 benefit, namely, no objections by Class Members, commendable conduct by counsel, and significant
18 recoveries by Class Members, all of which were previously detailed above. *Lealao*, 82 Cal.App.4th at
19 51-53. As in *Lealao*, the Class Members were notified of the Settlement and attorneys' fees with no
20 objections. The extreme effort undertaken by counsel, as shown by their hours and the significantly high
21 amount of claims being paid out, shows commendable conduct.

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

27 The multiplier should be enhanced by the contingent nature of counsel's fee recovery. The risks
28 in taking on a representative action case are enormous, not the least of which is time and effort. Not only

1 was there significant risk taken upon by Plaintiff's Counsel, but their ability to obtain the current
2 settlement should be seen as quite commendable.

3 Here based upon Class Counsel's lodestar of \$59,840, the requested fees result in a multiplier of
4 1.257 [$\$75,195.00$ (requested fees) $\div$ $\$59,840$ (lodestar amount)]. This demonstrates that the requested
5 fees are reasonable and fair, particularly based on the factors described above. *Wershba v. Apple*
6 *Computer, Inc.*, 91 Cal.App.4th 224 (Ct. App. 2001) (noting that courts using the lodestar method to
7 calculate attorney fees awards in class actions typically apply multipliers in the range of 2 to 4); *Boyd v.*
8 *Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33% of the
9 common fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v.*
10 *Balboa Capital Corp.*, 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund,
11 based on a multiplier of 2.52).

12 As such, the requested fee award is fair and reasonable, and should be awarded in its entirety.
13 Plaintiff's Counsel risked not only a great deal of time, but also a great deal of expense to ensure the
14 successful litigation of this action on behalf of all Class Members. For such reasons, Class Counsel's
15 request for attorneys' fees in the amount of \$75,195.00 is fair and reasonable.

16 Additionally, Plaintiff's Counsel's cost reimbursement request in the amount of \$3,319.98 is also
17 reasonable. *See* Agnew Decl. ¶ 51, Exhibit 4. The costs were all directly incurred in the prosecution of
18 this action, including filing fees, postage and copying. *See id.* As such, the requested costs should be
19 awarded as fair and reasonable

20 **G. The Settlement Administrator's Costs Should be Approved**

21 The Parties have agreed to pay actual costs of administration, or Three Thousand One Hundred
22 Ninety-Five Dollars (\$3,195.00), to the Settlement Administrator, Phoenix Settlement Administrators, to
23 administer this Settlement. *See* SA §§ II-C(a)(2). The Parties believe that the administration fee is
24 reasonable and should be approved.

25 **H. Plaintiff's Enhancement Payment Should be Approved**

26 Courts have held that named plaintiffs in class, or private attorney general actions can request a
27 service award. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (explaining that
28 service awards "are intended to compensate class representatives for work done on behalf of the class, to

1 make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
2 recognize their **willingness to act as a private attorney general**”) (emphasis added).

3 Here, Plaintiff seeks \$7,500 for his service award, which is intended to compensate Plaintiff for
4 the time spent on this case, including reviewing pleadings, the potential for hesitation from later
5 prospective employers that might find out he brought this claim. See SA §II-C-(a)-(3); Declaration of
6 Gzim Kovacevic ¶¶ 6-8. This requested enhancement is consistent with awards approved in other
7 common fund cases. See *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal.
8 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D.
9 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000);
10 *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive
11 award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio
12 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
13 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in
14 FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming
15 \$25,000 Incentive award to class representative in ERISA case).

16 **I. Notice to the LWDA Has Been Provided**

17 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the LWDA’s
18 website. See Agnew Decl. ¶ 52, Exhibit 5.

19 **V. CONCLUSION**

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

21 DATED: September 13, 2024

DIVERSITY LAW GROUP, P.C.

22 By: _____

Larry W. Lee

Kristen M. Agnew

23 Attorneys for Plaintiff and the Aggrieved Employees
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