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

BAKIR FEJZIC, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

HOMETEAM PEST DEFENSE, INC., a
Delaware corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 37-2022-00031318-CU-OE-CTL

[Assigned for all purposes to the Hon. Richard S.
Whitney, Department C-68]

**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: February 2, 2024
Time: 10:30 a.m.
Dept: C-68

Reservation Number: 3015480

Complaint Filed: August 5, 2022
Trial Date: None

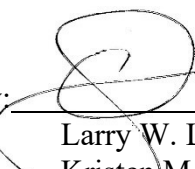
1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on February 2, 2024, at 10:30 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Richard S. Whitney, Judge presiding in
4 Department C-68 of the above-referenced Court located at 330 W. Broadway, San Diego,
5 California 92101, Plaintiff Bakir Fejzic (“Plaintiff”) will seek an Order approving the
6 concurrently filed Joint Stipulation of Settlement and Release Under the Private Attorneys
7 General Act (“Agreement” or “Settlement”), pursuant to the procedures set forth in Labor Code
8 § 2698, *et seq.*

9 This motion will be based on this notice of motion, the attached memorandum of points
10 and authorities, the accompanying declarations of Kristen M. Agnew and Plaintiff Bakir Fejzic,
11 the records and file herein, and on such other evidence as may be presented at the hearing of the
12 motion.

13
14 DATED: September 7, 2023

DIVERSITY LAW GROUP, P.C.

15
16 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

17
18 Attorneys for Plaintiff and the Aggrieved
19 Employees

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1 **I. INTRODUCTION**

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

7 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the
8 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
9 investigation and both formal and informal discovery, including Defendant’s production of payroll
10 data, as well as information pertaining to Defendant’s payroll policies and procedures.
11 Furthermore, pursuant to the terms of the Settlement, Defendant will pay the gross amount of
12 \$50,000.00 (the “Gross Settlement Amount”), which includes an estimated payment of
13 approximately \$10,190.58 in civil penalties to the California Labor and Workforce Development
14 Agency (“LWDA”). The proposed release is narrowly tailored to release only claims for civil
15 penalties under PAGA predicated on the specific Labor Code violations alleged in the Complaint.

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

18 **II. PROCEDURAL HISTORY**

19 **A. The PAGA Notice**

20 On April 22, 2022, Plaintiff submitted written notice under Labor Code section 2699.3 to
21 the California Labor and Workforce Development Agency (“LWDA”) and Defendant, alleging
22 that Defendant violated Labor Code sections 201, 202, 203, 204, 226, 226.2, 226.7, 246, 510, 512,
23 558, 1194, 1197, 1197.1 and 2802 (the “PAGA Notice”). *See* Declaration of Kristen M. Agnew
24 (“Agnew Decl.”) ¶ 3, Exhibit 1.

25 As set forth in the PAGA Notice, Plaintiff contends that, as matter of policy and practice,
26 Defendant: (1) failed to pay minimum, regular and overtime wages for the time employees spent
27 watching training videos, completing Covid questionnaires and responding to work-related calls
28 during off-hours; (2) failed to pay meal and rest period premiums at an employee’s regular rate of

1 pay; (3) failed to pay sick pay wages at an employee's regular rate of pay; (4) failed to reimburse
2 employees for the costs associated with the use of their person cell phones for work-related
3 purposes; and (5) as a result of the nonpayment or underpayment of wages, failed to provide
4 accurate wage statements and pay all earned wages upon separation of employment. *See Agnew*
5 Decl. ¶ 4.

6 **B. The Operative Complaint**

7 Thereafter, on August 5, 2022, Plaintiff initiated a representative PAGA action against
8 Defendant in the Superior Court of the State of California, County of San Diego. *See Agnew Decl.*
9 at ¶ 6. Plaintiff asserts a single cause of action for violation of PAGA predicated on the alleged
10 Labor Code violations set forth in the PAGA Notice. *See id.* Plaintiff seeks civil penalties under
11 PAGA, as well as attorneys' fees, and costs. *See id.* Defendant disputes and denies Plaintiff's
12 allegations and claims asserted in the operative Complaint. *See id.* at ¶ 7.

13 **C. The Parties Engage in Written Discovery and Investigation**

14 On November 8, 2022, Plaintiffs propounded written discovery, including Special
15 Interrogatories (Set One) and Requests for Production of Documents (Set One). *See Agnew*
16 Decl. ¶ 9. The discovery required Defendant to produce Plaintiff's time and payroll records,
17 Defendant's commission and non-discretionary bonus plans, as well as its policies and
18 procedures relating to the calculation of hours worked (including whether time spent watching
19 training videos and/or tutorials is compensable time), any requirement that employees complete a
20 Covid-19 questionnaire, the calculation of meal/rest period premiums, the calculation of sick pay
21 wages, and the reimbursement of work-related expenses. *See id.* The discovery further required
22 Defendant to provide information relevant to the number of alleged aggrieved employees, the
23 aggregate number of pay periods worked by aggrieved employees, the number of pay periods in
24 which aggrieved employees worked at least one workweek in which he or she earned both non-
25 discretionary incentive pay and a meal/rest premium and the number of aggrieved employees
26 who separated employment. *See id.*

27 Shortly after Plaintiff propounded the initial round of discovery, the Parties agreed to
28 redirect their efforts towards an early resolution of the Action and agreed to participate in private

mediation. *See* Agnew Decl. ¶ 10. In lieu of formal responses to the discovery, the Parties agreed to the informal exchange of information leading up to mediation. *See id.*

In connection with the Parties’ negotiations, Defendant provided more than one hundred pages of documents, which included Plaintiff’s time and payroll records, Defendant’s commission and non-discretionary bonus plans, mobile device policy and employee handbook. Agnew Decl. ¶ 11. Defendant also provided data points relating to the number of aggrieved employees, the total number of pay periods worked by aggrieved employees, the number of pay period in which aggrieved employees received the payment of meal/rest period premiums, the number of pay period in which aggrieved employees received the payment of sick pay wages, and the number of aggrieved employees who separated employment. *See id.*

Based on the information provided by Defendant, Plaintiff’s Counsel conducted a full penalties analysis as to the value of the PAGA claims. *See* Agnew Decl. ¶ 12. Plaintiff’s Counsel also investigated the applicable law as applied to the facts discovered regarding Plaintiff’s alleged claims and potential defenses thereto. *See id.* Thus, Plaintiff’s Counsel entered mediation with a clear understanding of Defendant’s maximum exposure. *See id.*

D. The Parties Participate in Private Mediation

On June 7, 2023, the Parties engaged in a full-day mediation with mediator Mike Young. *See* Agnew Decl. ¶ 13. As a result of the mediation, Plaintiff and Defendant reached the present settlement, memorialized by a written Memorandum of Understanding (“MOU”) fully executed on June 8, 2023. *See id.* The Parties subsequently negotiated the terms of the Joint Stipulation of Settlement and Release Under the Private Attorneys General Act. *See id.* at ¶ 14. The settlement discussions were conducted at arm’s length. *See id.*

The Parties recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. *See* Agnew Decl. ¶ 44. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims arising from or relating to the afore-referenced claims and allegations.

III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

The material terms of the Settlement are described below and set forth in detail in the

1 concurrently filed PAGA Settlement Agreement, a true and correct copy of which is attached as
2 **Exhibit 2** to the Declaration of Kristen M. Agnew.

3 **A. The Aggrieved Employees**

4 The current Action is being settled on behalf of the following employees: all current and
5 former California non-exempt employees who worked at least one pay period for HomeTeam in
6 California at any time during May 27, 2021, to July 1, 2023 (“PAGA Period”) (“Aggrieved
7 Employees”). *See* Settlement Agreement (“SA”) §§ B-2, B-14. Based on Defendant’s records,
8 there are 134 Aggrieved Employees. These individuals worked in 3,003 pay periods during the
9 PAGA Period. *See* SA § C-2.

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

11 The Settlement Agreement requires Defendant to pay the gross amount of Fifty Thousand
12 Dollars (\$50,000.00) (the “Gross Settlement Amount”). *See* SA § B-11. Based on the Gross
13 Settlement Amount, Defendant will pay approximately \$16.65 per pay period to resolve the claims
14 in this case. *See* Agnew Decl. ¶ 16.

15 The balance of the Gross Settlement Amount remaining after deduction of the approved
16 attorneys’ fees and litigation costs, Settlement Administration Costs, and Plaintiff’s Enhancement
17 Payment (the “PAGA Penalties Fund”), will be available for distribution to the LWDA and
18 Aggrieved Employees. *See* SA § C-4.. The PAGA Penalties Fund will total approximately
19 \$13,587.44. *See* Agnew Decl. ¶ 22. Seventy-five percent (75%) of the PAGA Penalties Fund, or
20 approximately \$10,190.58, will be paid to the LWDA for PAGA penalties (“LWDA Payment”).
21 *See* SA § C-4; Agnew Decl. ¶ 22. The remaining twenty-five percent (25%), or approximately
22 \$3,396.86, will be distributed to Aggrieved Employees. *See* SA § C-4; Agnew Decl. ¶ 22.

23 The amount any particular Aggrieved Employee will be entitled to recover will depend on
24 the number of pay periods in which he or she worked during the PAGA Period, with some entitled
25 to receive more and others less. *See* SA § C-5. This is fair, as it directly allocates greater penalties
26 to individuals who have allegedly suffered greater harm. *See* Agnew Decl. ¶ 23. Any uncashed
27 checks will be paid out pursuant to California Code of Civil Procedure section 384 to the *cy pres*
28 recipient, Legal Aid at Work. *See* SA § D-5. Legal Aid At Work is a 501(c)(3) non-profit

1 organization that provides legal services to low-income families. *See id.* The Parties warrant and
2 represent that they do not have a relationship, financial or otherwise, with the cy pres recipient.
3 *See id.*; Agnew Decl. ¶ 25.

4 As part of the Settlement, Defendant does not object to Plaintiff's Counsel's request for
5 attorneys' fees of approximately one-third of the Gross Settlement Amount, *i.e.*, Sixteen Thousand
6 Six Hundred Sixty-Six Dollars and Sixty-Six Cents (\$16,666.66), and reimbursement for litigation
7 costs in an amount up to Fifteen Thousand Dollars (\$15,000.00), subject to the Court finally
8 approving this Settlement. *See* SA § C-9.¹ Any partition of the requested attorneys' fees and/or
9 costs not approved by the Court shall be added to the PAGA Penalties Fund. *See id.*

10 Also, as part of the Settlement, Defendant does not object to Plaintiff's request for an
11 Enhancement Payment to Plaintiff in an amount not to exceed Five Thousand Dollars (\$5,000.00).
12 *See* SA §§ B-10, C-8. Any portion of the Enhancement Payment to Plaintiff that is not approved
13 by the Court shall become part of the PAGA Penalties Fund. *See id.*

14 Finally, the Settlement provides for the payment of the fees and expenses reasonably
15 incurred by the Settlement Administrator. *See* SA § C-10. The Parties have agreed to utilize
16 Phoenix Settlement Administrators to administer the settlement, with the administration costs
17 estimated to be Two Thousand Eight Hundred Fifty Dollars (\$2,850.00). *See* SA §§ B-20, C-10.

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

19 In exchange for the payments described above, Plaintiff and Aggrieved Employees will
20 release Defendant and Released Parties from all Released Claims that that arose during the PAGA
21 Period. *See* SA § E-6. As defined in the Agreement, the term "Released Claims" means:

22 all claims, rights, demands, liabilities and causes of action for civil
23 penalties under the PAGA based on the factual allegations pled in
24 the operative complaint in the Action, with respect to the following
25 claims: (a) failure to pay minimum, regular, and overtime wages for
all hours worked, in violation of Labor Code sections 201, 202, 203,
204, 510, 1194, 1197, and 1197.1; (2) failing to pay meal and rest

26
27 ¹ At the time the Parties negotiated the Settlement Agreement, Plaintiff's Counsel did not have a
28 final tally of the litigation 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 \$11,895.90 for litigation related expenses. *See* Agnew Decl. ¶ 52.

1 period premium at the correct regular rate of pay, in violation of
2 Labor Code sections 201, 202, 203, 226.7 and 512; (3) failing to pay
3 sick pay at the correct regular rate of pay, in violation of Labor Code
4 sections 201, 202, 203, 204, and 246; (4) failing to reimburse
5 business expenses, in violation of Labor Code section 2802; and (5)
6 failing to provide accurate itemized wage statements, in violation of
7 Labor Code section 226.

8 *See* SA § B-17. The Settlement is not intended to release does not extend to violations of any
9 predicate statutes other than PAGA. *See* SA § B-17, E-6. The Settlement also does not affect a
10 waiver of claims by Aggrieved Employees against the Released Parties for any individual wage
11 and hour claims. *See* SA § B-17, E-6.

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

13 **A. PAGA Overview**

14 In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the
15 LWDA and other aggrieved employees, to bring suit against their employers for alleged
16 violations of the California labor laws and to obtain penalties that previously could only be
17 obtained by the State. The PAGA was enacted because the Legislature determined that it was “in
18 the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover
19 civil penalties for Labor Code violations,” since the State had not been able to fully or
20 adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Ochoa-*
21 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s
22 declared purpose is to supplement enforcement actions by public agencies, which lack adequate
23 resources to bring all such actions themselves. Unlike class actions, these civil penalties are not
24 meant to compensate unnamed employees because the action is fundamentally a law
25 enforcement action.” [citations omitted].)

26 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
27 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
28 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

1 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
2 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
3 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
4 decides not to investigate the allegations or issue a citation to the employer, the proposed
5 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
6 2699.3(a)(2).

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

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

17 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
18 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
19 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
20 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* §
21 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a
22 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
23 and must direct the preparation of notice of the certification, proposed settlement, and date of the
24 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
25 2004). To make the preliminary fairness determination, courts may consider several relevant
26 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
27 duration of further litigation; the risk of maintaining class action status through trial; the amount
28 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]

1 the experience and views of counsel....” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
2 Cir. 1998).

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

9 Notably, unlike the class action settlement approval process, there is also no statutory
10 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
11 2699(i). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
12 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
13 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

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

15 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
16 ultimately receive as a result of a settlement, but instead, on whether the Gross Settlement
17 Amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
18 supplement agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i).
19 Here, the Settlement represents an extraordinary recovery for the Aggrieved Employees and the
20 State, and thus the Settlement certainly effectuates PAGA’s purpose.

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

28 //

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

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

11 Here, if approved, the Settlement would release Defendant and Released Parties from all
12 claims for civil PAGA penalties predicated on Labor Code sections 201, 202, 203, 204, 226,
13 226.7, 246, 510, 512, 558, 1194, 1197, 1197.1 and 2802—and nothing more. *See* SA § B-17. The
14 Settlement would not impact any Aggrieved Employee’s ability to pursue PAGA claims
15 predicated on other Labor Code violations. *See id.* Nor does the Settlement release individual
16 wage and hour claims that Aggrieved Employees may have against Defendant. *See id.* Therefore,
17 the limited scope of the release also supports approval.

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

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

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

24 **a. Unpaid Minimum and Overtime Wages**

25 Plaintiff contends that Defendant required Aggrieved Employees to perform a wide array
26 of uncompensated work related tasks. *See* Agnew Decl. ¶ 29. Specifically, Plaintiff alleges that
27 Defendant, as a matter of policy, mandates that: (1) Aggrieved Employees watch training and
28 tutorial videos as a part of the new hire orientation process, without the payment of wages; (2)

1 Aggrieved Employees use their personal cell phones to receive and make work related calls
2 during non-work hours; and (3) Aggrieved Employees use their personal cell phones to complete
3 a COVID-19 symptom screening questionnaire prior to the start of each shift. *See id.*

4 Defendant argues that the minimum wage and overtime claims are not suitable to be
5 adjudicated on a representative basis because its policies and training materials required accurate
6 recording of time and prohibited off-the-clock work. *See Agnew Decl.* ¶ 30. As articulated in the
7 employee handbook, Defendant's written policy strictly prohibits non-exempt employees from
8 working off the clock for any reason. *See id.* Furthermore, all time spent working must be
9 reported, including time spent using electronic devices for work-related purposes. *See id.*

10 Defendant contends that during the on-boarding process, employees are provided with a copy of
11 the employee handbook and sign an acknowledgement that they have read and understood the
12 handbook. Citing to *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) and its
13 progeny, Defendant argues that its liability is contingent on proof that Defendant knew or should
14 have known that off-the-clock work was occurring. *See id.* In the absence of a uniform policy,
15 Defendant contends that Plaintiff will not be able to establish the requisite knowledge through
16 common proof. *See id.* Defendant further represented that the Company stopped requiring
17 employees to utilize the COVID-19 symptom screening questionnaire by the end of June 2022.
18 *See id.* at ¶ 31. Additionally, to the extent that Plaintiff asserts that Defendant failed to pay
19 overtime based on an employee's regular rate of pay (and instead calculated overtime based
20 solely on the base hourly rate), Defendant provided evidence that it did in fact calculate overtime
21 premiums based on the regular rate of pay. *See id.*

22 **b. Meal and Rest Period Regular Rate Violation**

23 Plaintiff contends that Defendant did not pay meal and rest period premiums at the
24 regular rate of pay to Aggrieved Employees. *See Agnew Decl.* ¶ 32. Aggrieved Employees
25 earned non-discretionary incentive wages, such as commissions and bonuses. *See id.* As these
26 items are non-discretionary forms of remuneration, they should have been include in the regular
27 rate of pay for purposes of paying meal and rest period premium compensation. *See id.* However,
28 during workweeks when Aggrieved Employees earned non-discretionary incentives and

1 meal/rest period premiums, Defendant paid the premiums at the employee’s base rate of pay. *See*
2 *id.* Plaintiff’s wage statements do not reflect the payment of a meal or rest period penalties paid
3 at the regular rate of pay. *See id.*

4 Defendant maintains that it complied with the law, had lawful and compliant practices,
5 and provided Aggrieved Employees with duty-free meal and rest periods. *See* Agnew Decl. ¶ 33.
6 According to Defendant, an adjudication of the alleged meal and rest period regular rate
7 violations would require individualized assessments as to the circumstances of each missed,
8 delayed or interrupted break. *See id.* Defendant argues that, even if Plaintiff was able to establish
9 that some Aggrieved Employees experienced a meal and/or rest period violation, such a claim
10 would not be manageable. *See id.* Defendant further argues that, to the extent that some
11 Aggrieved Employees were underpaid meal/rest period premiums, Defendant modified its
12 payroll practices in or around June 2021. *See id.* Finally, Defendant maintains, and provided
13 confirming documentation, that it pays meal period premiums based the regular rate of pay, not
14 the employee’s base hourly rate. *See id.*

15 c. Sick Pay Regular Rate Violation

16 Plaintiff contends that Defendant did not pay sick pay wages at the regular rate of pay, as
17 required by the Healthy Workplaces, Healthy Families Act of 2014, Cal. Lab. Code section 245
18 *et seq.* (“HWHFA”). *See* Agnew Decl. ¶ 34. Pursuant to the HWHFA, “[p]aid sick time for
19 nonexempt employees shall be calculated in the **same manner as the regular rate of pay** for the
20 workweek in which the employee uses paid sick time, whether or not the employee actually
21 works overtime in that workweek.” Cal. Lab. Code § 226(l)(1) (emphasis added). Here, Plaintiff
22 alleges that during workweeks where an Aggrieved Employees earned incentive wages and sick
23 pay earnings, Defendant paid the sick pay at the employee’s base hourly rate. *See* Agnew Decl. ¶
24 34. Plaintiff contends that the sick pay should have been paid at the employee’s regular rate of
25 pay, which includes all non-discretionary pay, such as incentive wages. *See id.*

26 Defendant contests the sick pay claim on a number of grounds. Defendant maintains that
27 there is no private right of action to bring a paid sick pay claim. *See* Agnew Decl. ¶ 35. This
28 argument presents novel legal issues and there is substantial ground for difference of opinion as

1 to the remedies, if any, available to employees who have experienced a violation of the HWHFA.
2 Plaintiff's Counsel is unaware of the existence of any published California Court of Appeal
3 decision that grapples with this issue. *See id.* There are a handful of unreported district court
4 opinions, including *Titus v. McLane Foodservice, Inc.*, which have held that only the Labor
5 Commissioner may recover penalties for a violation of HWHFA. 2016 WL 4797497. While
6 *Titus* is by no means controlling authority, the Court may look to it as a persuasive authority,
7 despite Plaintiff's contention that it was wrongly decided. Even had Plaintiff ultimately prevailed
8 on the merits, given the novelty of the legal questions it raised, Defendant may have sought
9 immediate appellate review through a writ or appeal. *See id.* Additionally, Defendant argues that,
10 to the extent that some Aggrieved Employees were underpaid sick pay wages, Defendant
11 modified its payroll practices in or around June 2021 to ensure that sick time for nonexempt
12 employees is calculated based on a 90-day lookback pursuant to Labor Code section 246(l). *See*
13 *id.*

14 **d. Derivative Wage Statement Violation**

15 Plaintiff alleges a derivative wage statement violation. *See* Agnew Decl. ¶ 36. As a result
16 of the alleged underpayment and/or non-payment of wages to Aggrieved Employees, Plaintiff
17 contends that the wage statements omit information required by Labor Code 226, including all
18 applicable hourly rates and the total hours worked. *See id.* As argued by Defendant, Plaintiff's
19 derivative wage statement violation is vulnerable to a motion for summary judgment based on
20 the weaknesses of the underlying primary claims. *See Maldonado v. Epsilon Plastics, Inc.*, 22
21 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a)
22 where their wage statement cause of action was derived from an underlying wage and hour
23 violation for overtime).

24 **e. Unpaid Reimbursement**

25 Plaintiff alleges that Defendant required Aggrieved Employees to use their personal cell
26 phones for work related purposes, but did not reimburse employees for the associated costs. *See*
27 Agnew Decl. ¶ 38. Defendant points to potential weaknesses in Plaintiff's theory of liability. *See*
28 *id.* at ¶ 39. Defendant disputes the existence of a common policy that requires Aggrieved

1 Employees to use personal cell phones for work related purposes. *See id.* Defendant produced
2 documents that generally support its position that employees are provided with all necessary
3 tools, including communication devices, in order to assist them in their required duties. *See id.*
4 Defendant’s written reimbursement policy also provides that employees will be reimbursed for
5 all necessary expenditures and reasonable costs incurred in the course of doing their jobs. *See id.*

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

7 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
8 recovery is uncertain. Defendant contends that it made a good faith effort to comply with the
9 law. *See Agnew Decl.* ¶¶ 30, 33, 35, 39. As argued by Defendant, in deciding whether to award
10 the maximum penalty amount, courts may focus on whether the employer made a good faith
11 effort to follow the law. For example, in *Thurman v. Bayshore Transit Management, Inc.*, the
12 Court of Appeal upheld the trial court’s significant reduction of PAGA penalties by 30% because
13 the employer was not initially on notice that it was in violation of the law and because it would
14 have been unfair to award penalties where the employer was unaware of the violations. 203 Cal.
15 App. 4th 1112, 1136 (2012). When the employer made aware of the violations, it timely took
16 steps to come into compliance. *Id.* By contrast, the imposition of full penalties was justified
17 when an employer took a “cavalier approach to fulfilling its contractual and statutory
18 obligations” and demonstrated “reckless disregard.” *Id.* Furthermore, as the California Court of
19 Appeal has affirmed, trial courts are well within their discretion to reduce PAGA penalties “for
20 technical violations that cause no injury,” especially where the “violation was inadvertent.”
21 *Raines v. Coastal Pac. Food Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018).

22 In this case, Defendant asserted that a substantial reduction in potential PAGA penalties
23 was warranted because: (1) even assuming that Plaintiff could establish the predicate violations,
24 the alleged violations were inadvertent; (2) Aggrieved Employees did not suffer substantial
25 economic harm as a result of the alleged violations of Labor Code; and (3) Defendant modified
26 its payroll practices prior to the filing of the PAGA Notice. *See Agnew Decl.* ¶ 41. Thus,
27 Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its
28 inadvertent behavior, much less to deter it from committing any future violations that were

1 completely foreclosed by its new payroll practices. *See id.*

2 **3. Maximum PAGA Civil Penalties Recoverable After Trial**

3 Defendant has indicated that there are approximately 3,003 pay periods in which
4 Aggrieved Employees worked during the PAGA Period. *See* Agnew Decl. ¶ 15; SA § C-2.
5 Assuming that Plaintiff was to prevail on the merits of the PAGA claim, applying the standard
6 penalty of \$100 per pay period (regardless of the number of violations) yields \$300,300 in
7 potential liability. *See* Agnew Decl. ¶ 26.²

8 Even then, pursuant to Labor Code § 2699(f)(2) the Court can decline to award the full
9 amount of PAGA penalties “if, based on the facts and circumstances of the particular case, to do
10 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
11 Courts routinely award far less than the statutory maximum amount of civil penalties, even
12 where an underlying violation of the Labor Code is found. Indeed, as shown in the Court of
13 Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA
14 claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
15 employer’s good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018).
16 Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O’Connor v.*
17 *Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal., 2016). Thus, assuming that the
18 Court uses *Carrington* as a benchmark and assesses PAGA penalties of approximately 10% of
19 the total maximum, a more realistic estimate of the maximum PAGA penalties at issue—even
20 with “stacking”—is \$103,760. *See id.* Agnew Decl. ¶ 42.

21 **4. Settlement is Reasonable When Compared to the Realistic Amount of** 22 **PAGA Civil Penalties At Issue**

23 The Court’s assessment of the proposed settlement must take into account that any
24 penalties awarded may be subject to substantial reduction. When this is considered, in
25

26 ² In the alternative, if the Court were to “stack” penalties (*i.e.*, award multiple PAGA penalties
27 for different Labor Code violations in the same pay period), the potential PAGA penalties could
28 total as high as \$1,037,600. *See* Agnew Decl. ¶ 27.

1 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
2 nothing, the proposed settlement is patently reasonable. Indeed, the Gross Settlement Amount is
3 approximately 16.65% of the amount of penalties at issue, if the Court awarded \$100 per pay
4 period in which wages were untimely paid. *See* Agnew Decl. ¶ 43. Settlement for this reduced
5 value allows for the distribution of penalties in an amount which accounts for the risk of
6 continued litigation and Defendant’s likely arguments that higher penalties would have been
7 confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the future,
8 which is one of the primary goals of PAGA.

9 The proposed settlement exceeds PAGA settlements that courts have approved in other
10 cases, when considered as a percentage of the overall settlement value of the case. The proposed
11 settlement, in fact, far exceeds other PAGA settlements approved by courts—including those
12 that provide for less than the one percent allocation to PAGA penalties. *See, e.g., Hopson v.*
13 *Hanesbrands Inc.*, 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA
14 allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL
15 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of
16 \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013)
17 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in
18 *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as
19 independent contractors. 2016 WL 3561742 (N.D. Cal. June 23, 2016). The parties settled all
20 Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7%
21 of the total settlement. *Id.* at *2. In granting preliminary approval to the proposed settlement in
22 *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the
23 maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the
24 typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at
25 *5.

26 Given Defendant’s potential defenses to the alleged violations at issue, the risks and costs
27 of continued litigation, Plaintiff and his attorneys believe that the Settlement is fair and
28 reasonable. *See* Agnew Decl. ¶ 44. The Settlement proposes a payment of approximately

1 \$10,190.58 in in penalties to the LWDA and approximately \$3,396.86 penalties to the Aggrieved
2 Employees, which is an outstanding result in a PAGA-only case. *See* Agnew Decl. ¶22.
3 Plaintiff’s Counsel has significant experience litigating wage and hour claims including claims
4 for PAGA penalties, and the Settlement here is similar to or greater than similar settlements that
5 courts have approved. Furthermore, as set forth in the accompanying Kristen M. Agnew
6 Declaration, the LWDA has been provided notice of this motion and the PAGA settlement. *See*
7 *id.* at ¶ 55. The decision of the LWDA to accept the Settlement and not oppose the motion should
8 be given considerable weight.

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

10 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
11 successful action brought under PAGA. Although this is not a class action, in class actions
12 California state and federal courts have recognized that an appropriate method for determining
13 award of attorneys’ fees is based on a percentage of the total value of benefits to class members
14 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano*
15 *v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
16 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this
17 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
18 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
19 burden alone.” *Vincent*, 557 F. 2d at 769.

20 The common fund doctrine is predicated on the principle of preventing unjust
21 enrichment. When a litigant’s efforts create or preserve a fund from which others derive benefits,
22 he may require the passive beneficiaries to compensate those who created the fund. Both
23 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
24 *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
25 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
26 been applied “consistently in California when an action brought by one party creates a fund in
27 which other persons are entitled to share.” The reasons for applying the common fund doctrine
28 include: “fairness to the successful litigant, who might otherwise receive no benefit because his

1 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
2 the others who are entitled to share in the fund and who should bear their share of the burden of
3 its recovery; encouragement of the attorney for the successful litigant who will be more willing
4 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
5 if he is assured that he will be properly and directly compensated should his efforts be
6 successful.” *Id.*

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

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

19 Here, as set forth in the Agnew Declaration, Plaintiff’s Counsel estimate that she has
20 spent at least 50.40 hours litigating this current action. *See Agnew Decl.* ¶ 53, Exhibit 4. Based
21 thereon and based on counsel’s hourly rate of \$700, the lodestar equates to \$35,280 (50.40 hours
22 x \$700), which exceeds the amount of the requested fees. *See Agnew Decl.* ¶ 54, Exhibit 4. Thus,
23 the requested fee amount of \$16,666.66 is fair and reasonable.

24 Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of
25 \$11,895.90 is also reasonable. *See Agnew Decl.* ¶ 52, Exhibit 3. The costs were all directly
26 incurred in the prosecution of this action, including filing fees, postage, copying, and mediation.
27 *See id.* As such, the requested costs should be awarded as fair and reasonable.

28 //

1 **G. Plaintiff's Enhancement Payment Should be Approved**

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

8 Here, Plaintiff seeks \$5,000 for his service award, which is intended to compensate
9 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
10 hesitation from later prospective employers that might find out he brought this claim, and for
11 executing a general release, including for all known and unknown claims under Civil Code §
12 1542. See SA §§ C-8, E-8; Declaration of Bakir Fejzic ¶ 7. This requested enhancement is
13 consistent with awards approved in other common fund cases. See *Van Vranken v. Atlantic*
14 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re*
15 *Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
16 incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*,
17 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter.*
18 *Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)
19 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
20 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award
21 in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
22 (affirming \$25,000 Incentive award to class representative in ERISA case).

23 **H. The Settlement Administrator's Costs Should be Approved**

24 The Parties have agreed to pay actual costs of administration, or \$2,850.00, to the
25 Settlement Administrator, Phoenix Settlement Administrators, to administer this Settlement. See
26 SA §§ B-20, C-10. The Parties believe that the administration fee is reasonable and should be
27 approved.

28 //

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

2 As discussed above, and concurrent with the filing of this Motion, Plaintiff uploaded the
3 instant motion to the LWDA's website. Agnew Decl. ¶ 55, Exhibit 5.

4 **V. CONCLUSION**

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

6
7 DATED: September 7, 2023

DIVERSITY LAW GROUP, P.C.

8
9 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

10
11 Attorneys for Plaintiff and the Aggrieved
12 Employees

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of 18
8 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250,
9 Los Angeles, California 90071.

10 On September 7, 2023, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE**
12 **SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS**
13 **GENERAL ACT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
14 **SUPPORT**
- 15 **2. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
16 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
17 **PRIVATE ATTORNEYS GENERAL ACT**
- 18 **3. DECLARATION OF BAKIR FEJZIC IN SUPPORT OF PLAINTIFF'S MOTION**
19 **TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
20 **ATTORNEYS GENERAL ACT**
- 21 **4. [PROPOSED] ORDER APPROVING SETTLEMENT AND JUDGMENT**
22 **THEREON**

23 on the interested parties in this action as follows:

24 Ryan D. Wheeler

25 Lyle M. Chan

26 Nelly Pineda

27 Fisher & Phillips LLP

28 2050 Main Street, Suite 1000

Irvine, California 92614

*Attorneys for Defendant HomeTeam Pest
Defense, Inc.*

rwheeler@fisherphillips.com

lchan@fisherphillips.com

npineda@fisherphillips.com

29 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
30 entitled document(s) to be served through the One Legal E-Filing System at the website
31 www.onelegal.com, addressed to all parties appearing on the electronic service list for the above-
32 entitled case. The service transmission was reported as complete and a copy of the filing
33 receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this
34 office.

1 I declare under penalty of perjury under the laws of the State of California that the above
2 is true and correct. Executed on September 7, 2023, at Los Angeles, California.
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5 Erika Mejia
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