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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

MICHAEL KOTCHERHA, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

DEL'S FLOORING CONTRACTORS, INC, a
California Corporation; and DOES 1 through
100,

Defendants.

CASE NO. CVRI2202654

*[Assigned for all purposes to the Hon.
Harold W. Hopp, Dept. 1]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SETTLEMENT
APPROVAL OF CLAIMS BROUGHT
UNDER THE PRIVATE ATTORNEYS
GENERAL ACT, REASONABLE
ATTORNEYS' FEES AND COSTS, AND
ENHANCEMENT PAYMENT**

Date: January 10, 2025
Time: 8:30 a.m.
Dept.: 1

Action Filed: June 29, 2022
Trial Date: None Set

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on January 10, 2025, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard in Department 1 of the above-entitled Court located at 4050 Main Street,
4 Riverside, California 92501, Plaintiff Michael Kotcherha (“Plaintiff”), individually and on behalf
5 of all similarly aggrieved employees, will and hereby does move this Court for entry of an Order
6 as follows:

- 7 1. Granting approval pursuant to Labor Code § 2699(l) of the proposed Settlement
8 Agreement of claims brought by Plaintiff pursuant to the Private Attorneys General
9 Act of 2004, California Labor Code § 2698 *et seq.*;
- 10 2. Appointing Phoenix Settlement Administrators as the third-party Settlement
11 Administrator, and approving an award of up to \$2,995.00 in anticipated costs to
12 Phoenix Settlement Administrators for its settlement administration services;
- 13 3. Approving as to form and content the proposed Notice of PAGA Settlement and
14 Release of Claims, and directing that it be distributed to the allegedly aggrieved
15 employees pursuant to the terms of the Settlement Agreement;
- 16 4. Directing the distribution of the Maximum Settlement Amount
17 (\$150,000.00) pursuant to the terms of the Settlement Agreement;
- 18 5. Approving an award of up to one-third of the Maximum Settlement Amount
19 (\$50,000.00) in attorneys’ fees to Haines Law Group, APC as Plaintiff’s counsel;
- 20 6. Approving an award of up to \$2,835.60 in litigation costs reimbursement to Haines
21 Law Group, APC;
- 22 7. Approving an enhancement payment of \$5,000.00 to Plaintiff Michael Kotcherha for
23 his service to the aggrieved employees and the State of California; and
- 24 8. Approving the payment of \$66,877.05 to the California Labor & Workforce
25 Development Agency for its share of PAGA civil penalties.

26 This Motion is based on this Notice, the attached Memorandum of Points and Authorities;
27 the declarations of Paul K. Haines, Fletcher W. Schmidt, Andrew J. Rowbotham, Michael
28 Kotcherha, and Jodey Lawrence of Phoenix Settlement Administrators, and all exhibits attached

1 thereto, the Settlement Agreement, all other pleadings and papers on file in this action, and on
2 any further oral or documentary evidence or argument presented at the time of hearing.

3
4 Dated: December 18, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

5 By:

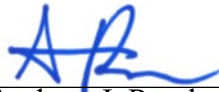

6 Andrew J. Rowbotham
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Michael Kotcherha (“Plaintiff”), an allegedly “aggrieved employee” under the
4 Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”),
5 respectfully moves this Court for an Order granting approval of the Settlement Agreement
6 (“Settlement”)¹ with Defendant Del’s Flooring Contractors, Inc., (“Defendant”) (Plaintiff and
7 Defendant are referred to collectively herein as the “Parties”).²

8 The proposed Settlement, under which Defendant has agreed to pay a non-reversionary
9 amount of \$150,000.00, will dispose of Plaintiff’s representative PAGA claim. This PAGA action
10 seeks civil penalties for Defendant’s Labor Code violations on behalf of the California Labor &
11 Workforce Development Agency (“LWDA”) and all allegedly “aggrieved employees” defined as
12 all current and former non-exempt piece-rate employees in California who worked for Defendant
13 at any time from June 29, 2021 through September 16, 2024 (the “PAGA Period”). Based on the
14 information provided by Defendant, there are approximately 89 individuals who will take part in
15 the Settlement.

16 Plaintiff’s PAGA claim is predicated on Defendant’s alleged: (i) failure to list the address
17 of the legal entity that is the employer, as well as number of piece-rate units earned and any
18 applicable piece rate, on employee wage statements; and (ii) failure to pay piece-rate employees
19 for any nonproductive time (i.e. time spent performing work not directly related to piecework).
20 Notably, the relief provided under the Settlement, and the claims released thereunder, are *solely*
21 for the payment of civil penalties under the PAGA.

22 In deciding whether to grant approval of the Settlement, the primary issue is whether the
23 Settlement is fair, reasonable, and adequate. As set forth herein, the proposed Settlement satisfies
24

25 ¹ The Settlement Agreement is attached as Exhibit 1 to the Declaration of Andrew J. Rowbotham
26 (“Rowbotham Decl.”), filed concurrently with this Motion. The Notice of PAGA Settlement and
27 Release of Claims (“Notice”) is attached as Exhibit A to the Settlement Agreement.

28 ² Concurrently with the filing of this motion, Plaintiff provided notice of the proposed Settlement,
as well as copies of this motion and all papers filed in support hereof, to the LWDA. *See*
Rowbotham Decl., ¶ 10; Exhibit 4.

1 the conditions of a settlement that is fair, reasonable, and adequate, as it (1) is the product of
2 extensive arm's-length negotiations, (2) was negotiated by attorneys experienced in wage-and-
3 hour issues with the assistance of an experienced, neutral mediator, (3) was negotiated after the
4 parties undertook sufficient investigation to evaluate the relative strength and value of the PAGA
5 claim, and (4) reflects a reasoned compromise based directly on the relative strength and value of
6 the PAGA claim, the risks, expense, complexity and likely duration of further litigation, and the
7 risks that further litigation could result in a lesser recovery.

8 Defendant will pay a Maximum Settlement Amount ("MSA") of \$150,000.00 on a non-
9 reversionary basis. After deducting amounts for requested attorneys' fees (\$50,000.00), attorney
10 costs (\$2,835.60), Plaintiff's enhancement payment (\$5,000.00), settlement administration costs
11 (\$2,995.00), and the LWDA's share of PAGA penalties (\$66,877.05), the Settlement provides for
12 distribution of approximately \$22,292.35 in civil penalties to the aggrieved employees, an average
13 of \$250.48 per person.

14 The MSA represents an extremely reasonable recovery for the State of California and
15 aggrieved employees when considering the limited release of only PAGA claims based on the
16 factual allegations in Plaintiff's operative complaint and prefiling LWDA letter. Further litigation
17 may have resulted in a smaller recovery, or even no recovery at all, based on the defenses asserted
18 by Defendant and the significant litigation risks involved in taking the matter through trial.
19 Additionally, the amounts requested for attorneys' fees and costs, Plaintiff's enhancement
20 payment, and settlement administration costs are fair, adequate, and reasonable.

21 In light of the foregoing, this Court should enter the [Proposed] Judgment and Order
22 Granting Plaintiff's Motion for Settlement Approval of Claims Brought Under the PAGA,
23 Reasonable Attorneys' Fees and Costs, and Enhancement Payment, submitted herewith.

24 **II. SUMMARY OF THE LITIGATION**

25 **A. THE PARTIES**

26 Defendant provides project management services for commercial and residential flooring
27 and tile needs. Declaration of Andrew J. Rowbotham ("Rowbotham Decl."), ¶ 11. Defendant is
28 located in Palm Desert, California and serves the Coachella Valley. *Id.* Plaintiff worked for

1 Defendant as a non-exempt piece-rate employee between June 2021 and December 2021.
2 Declaration of Michael Kotcherha (“Kotcherha Decl.”), ¶ 2. As a flooring installer, Plaintiff’s
3 primary job duties included traveling to various work locations, removing and disposing of old
4 flooring, and installing new flooring. *Id.* As a piece-rate employee, Defendant paid Plaintiff solely
5 based on the square footage of the projects he completed, not based on the number of hours he
6 worked. *Id.* Plaintiff, like all other aggrieved employees, worked for Defendant in California and
7 was subjected to Defendant’s wage and hour practices and policies during the PAGA Period. *Id.*

8 **B. PROCEDURAL HISTORY**

9 On June 29, 2022, Plaintiff provided written notice of his intent to file a claim for civil
10 penalties under the PAGA to the LWDA and Defendant. Rowbotham Decl., ¶ 12; Exhibit 2
11 (Plaintiff’s LWDA Letter). On the same day, Plaintiff filed this action seeking unpaid wages and
12 penalties as a result of Defendant’s alleged failure to pay overtime wages for overtime hours
13 worked, failure to pay all minimum wages, failure to provide all meal periods, failure to authorize
14 and permit all rest periods, failure to pay all final wages to employees upon separation of
15 employment, failure to issue accurate, itemized wage statements, and violation of California
16 unfair competition laws. *Id.* On September 6, 2022, Plaintiff amended his complaint to add a
17 cause of action for civil penalties under PAGA. *Id.* Following meet-and-confer discussions
18 between counsel, Defendant provided a copy of Plaintiff’s signed arbitration agreement with a
19 class-action waiver. *Id.* After reviewing the agreement, Plaintiff’s counsel determined that, should
20 a motion to compel arbitration be filed, Plaintiff would likely be forced to dismiss his class claims
21 and pursue his individual claims in arbitration. *Id.* On February 1, 2023, this Court granted the
22 Parties’ stipulation to dismiss Plaintiff’s individual and class claims and stay Plaintiff’s
23 representative PAGA claim pending the California Supreme Court’s decision in *Adolph v. Uber*
24 *Technologies, Inc.* (2023) 14 Cal.5th 1104, 1121 (holding that “aggrieved employee” continues
25 to have standing to pursue non-individual PAGA claims in court even if compelled to arbitrate
26 his individual PAGA claims). *Id.*

27 Soon thereafter, the Parties agreed to an informal exchange of documents and information
28 in conjunction with private mediation to resolve the PAGA claim. Rowbotham Decl., ¶ 16.

1 Specifically, Defendant produced timekeeping and payroll records for all non-exempt employees
2 who worked during the PAGA Period. *Id.* Additionally, Defendant produced sample wage
3 statements and work orders to aid Plaintiff in evaluating the representative exposure. *Id.*

4 After extensive legal research and analysis, the Parties attended a full-day mediation
5 session with the Hon. David M. Chapman (Ret.) on July 18, 2018. Rowbotham Decl., ¶ 17. At
6 mediation, the Parties vigorously debated the legal and factual bases for Plaintiff's allegations
7 and Defendant's defenses, and the Parties' data analyses and conclusions based on the data. *Id.*
8 With the help of Judge Chapman, the Parties were able to successfully negotiate a resolution of
9 the lawsuit at this mediation and, in the following months, the Parties formalized the Settlement
10 Agreement now before the Court. *Id.*

11 **C. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

12 Plaintiff alleges that Defendant did not accurately compensate its piece-rate employees
13 for all hours worked. Rowbotham Decl., ¶ 18. Specifically, Plaintiff alleges that Defendant failed
14 to separately compensate piece-rate employees for "non-productive time," or rather, for time
15 spent working but not performing piece-rate activities such as attending mandatory meetings and
16 trainings, waiting for materials before they could begin their installations, and loading and
17 unloading their trucks with flooring materials each workday. *Id.*; see *Gonzalez v. Downtown LA*
18 *Motors, LP* (2013) 215 Cal.App.4th, 36, 40-41 ("DTLA") ("...we conclude that class members
19 [paid on a piece-rate basis] were entitled to separate hourly compensation for time spent waiting
20 for repair work or performing other non-repair tasks directed by the employer..."). Defendant
21 contends that all work performed by piece-rate employees was "directly related" to the activities
22 that were being compensated on a piece-rate basis, and therefore did not need to be separately
23 compensated. See Labor Code § 226.2 (providing that compensable non-productive time is "time
24 under the employer's control, exclusive of rest and recovery periods, that is not directly related
25 to the activity being compensated on a piece-rate basis").

26 Plaintiff further alleges that Defendant issued facially deficient wage statements to its
27 piece-rate employees which do not include the number of piece-rate units earned and the
28 applicable piece rate, in violation of Labor Code § 226(a). Rowbotham Decl., ¶ 19. Defendant

maintains that the required information is readily available on other documents that accompany the wage statement (such as the paycheck itself or a separate document). *Id.* Defendant also maintains that even if the Court did award PAGA penalties for any of these Labor Code violations, the Court would substantially reduce the penalties awarded based on the discretionary factors contained in Labor Code § 2699(e)(2) (“In action by an aggrieved employee..., a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”) Additionally, Defendant argues Plaintiff could only seek PAGA penalties at the \$100 “initial” violation rate, as opposed to the \$200 “subsequent” violation rate, since before Plaintiff initiated this action, Defendant had never been put on notice by a court or the Labor Commissioner that its practices violated the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (finding “initial” violation rate applies until employer has been notified that it is violating a Labor Code provision).³

III. THE PROPOSED SETTLEMENT

A. “AGGRIEVED EMPLOYEES” DEFINED

Aggrieved employees are defined as, “all current and former non-exempt piece-rate employees in California who worked for Defendant at any time from June 29, 2021 through September 16, 2024.” Settlement, § I.2.

B. ESSENTIAL TERMS OF THE SETTLEMENT

Defendant will pay a MSA of \$150,000.00. Settlement, § I.11. After deducting amounts for requested attorneys’ fees and costs, Plaintiff’s enhancement payment, and settlement administration costs, the remaining Net Settlement Amount (“NSA”) distributable to the LWDA

³ Plaintiff’s complaint also included allegations regarding violations for unpaid overtime, failure to provide meal periods, failure to authorize and permit rest periods, and failure to separately compensate rest periods. However, after a comprehensive review of Defendant’s records provided prior to mediation, it became abundantly clear that these claims provided only nominal settlement value. Specifically, Defendant regularly compensated piece-rate employees for overtime, separate rest periods, and the records reflected facially compliant meal periods taken before the end of the fifth hour of work. As a result, Plaintiff focuses this motion on the remaining allegations supporting PAGA civil penalties. Rowbotham Decl., ¶ 21.

and the aggrieved employees is estimated to be \$89,169.40. *See* Settlement, §§ I.12, III.4 and 5. This non-reversionary Settlement does not require aggrieved employees to submit a claim form to obtain benefits of the Settlement. *Id.*, §§ I.11, III.2. The monetary terms of the Settlement are as follows:

Maximum Settlement Amount:	\$150,000.00
Minus Court-approved attorneys' fees (1/3):	\$50,000.00
Minus Court-approved attorneys' costs:	\$2,835.60
Minus Court-approved administrator costs:	\$2,995.00
Minus Court-approved enhancement payment:	\$5,000.00
Net Settlement Amount:	\$89,169.40
Minus LWDA's 75% Share:	\$66,877.05
Total Paid to Aggrieved Employees:	\$22,292.35

1. Attorneys' Fees and Costs

Plaintiff's counsel requests one-third of the MSA (currently estimated at \$50,000.00) in attorneys' fees, and \$2,835.60 in reimbursement for litigation costs. Settlement, § III.4.a; Rowbotham Decl., ¶ 23; Exhibit 3 (HLG Expense Summary).

2. Settlement Administration Costs

The parties agree to engage Phoenix Settlement Administrators ("Phoenix") as the third-party settlement administrator. *See* Settlement, §§ I.18, IV.1. Phoenix shall be responsible for calculating and mailing the settlement checks and Notice to the aggrieved employees, among other duties. *Id.*, § IV. Phoenix estimates incurring \$2,995.00 in costs in connection with the administration of this settlement. *See* Declaration of Jodey Lawrence ("Lawrence Decl."), Exhibit B.

3. Plaintiff's Enhancement Payment

Plaintiff requests an enhancement payment in the amount of \$5,000.00 in recognition of his efforts to initiate this case, his contributions to the prosecution of this case, and his dedication in bringing this case to a successful resolution. Settlement, § III.4.a; Kotcherha Decl., ¶ 3. This payment is warranted given that Plaintiff has attached his name to the lawsuit to his detriment to seek redress for alleged Labor Code violations on behalf of the State of California and all aggrieved employees. *Id.*

1 **4. Payment to the LWDA and Aggrieved Employees**

2 From the NSA, 75% (\$66,877.05) will be distributed to the LWDA, and 25%
3 (\$22,292.35) will be distributed to the aggrieved employees. Settlement, § III.5; *see also* Labor
4 Code § 2699(i) (“[C]ivil penalties recovered by aggrieved employees shall be distributed as
5 follows: 75 percent to the [LWDA]...and 25 percent to the aggrieved employees.”). 100% of the
6 individual payments to the aggrieved employees will be reported using IRS Form-1099s, since
7 all funds received under Section 2699 are civil penalties that do not trigger payroll taxes or
8 withholdings. *See* Settlement, § IV.3. Individual PAGA payments shall be apportioned based on
9 the proportionate number of pay periods worked during the PAGA Period, by multiplying the Net
10 Settlement Amount by a fraction, the numerator of which is the aggrieved employees’ total pay
11 periods worked during the PAGA Period, and the denominator of which is the total number of
12 pay periods worked by all aggrieved employees during the PAGA Period. *Id.*, § III.5. Plaintiff’s
13 mediation data analysis determined that there were approximately 2,489 aggregate pay periods
14 worked by the 89 aggrieved employees during the PAGA Period. Rowbotham Decl., ¶ 22.
15 Therefore, the average recovery per aggrieved employee is expected to be \$250.48. *Id.*, ¶ 29.

16 **5. Funding and Disbursement of the Settlement**

17 Defendant will fund the entire Maximum Settlement Amount in three equal payments of
18 \$50,000.00 each, with the first payment due 30 days after the Court approves the Settlement, the
19 second payment due 45 days thereafter, and the third and final payment due 45 days thereafter.
20 Settlement, § III.2. Within 21 days of the Court approving the Settlement (the “Effective
21 Date”) Defendant will provide Phoenix with a list of the aggrieved employees’ full name, last
22 known mailing address, last known telephone number, start date(s) of employment, end date(s) of
23 employment, total pay periods worked, and Social Security numbers. The list shall also include
24 the sum total of all pay periods worked by Allegedly Aggrieved Employees during the PAGA
25 Period. *Id.* § IV.2. After receiving this information, Phoenix will circulate to counsel for both
26 parties an anonymized spreadsheet containing the Individual PAGA payments and the data used
27 to calculate said payments. *Id.* Phoenix will then perform a search on the National Change of
28 Address database to update the aggrieved employees’ addresses. *Id.*, § IV.3. After the Settlement

1 is fully funded and Phoenix receives both Plaintiff's and Defendant's counsel approval of the
2 information contained in the anonymized spreadsheet, Phoenix will mail the Individual PAGA
3 payments to the aggrieved employees with the Notice, in English and Spanish, via First-Class
4 U.S. Mail. *Id.* Individual PAGA payments that are mailed to aggrieved employees will expire
5 after one hundred eighty (180) calendar days from the date that they are mailed. *Id.* The amount
6 of any unclaimed funds resulting from checks not being redeemed will be turned over to the
7 Controller of the State of California per California's Unclaimed Property Law to be held in the
8 name of the aggrieved employees to whom the checks were issued. *Id.*

9 **IV. ARGUMENT**

10 **A. Standards for Approval of a PAGA Settlement**

11 The settlement of a PAGA claim requires court approval. *See* Labor Code § 2699(l)
12 (stating, the "court shall review and approve any penalties sought as part of a proposed settlement
13 agreement pursuant to this part."). The Court must be mindful that "[s]ettlement is a compromise,
14 which balances the possible recovery against the risks inherent in litigating further." *In re TD*
15 *Ameritrade Account Holder Litig.*, Case Nos. C 07-2852 SBA, C 07-4903 SBA, 2011 WL
16 4079226, *9 (N.D. Cal. Sept. 13, 2011). Indeed, "the very essence of a settlement is ... 'a yielding
17 of absolutes and an abandoning of highest hopes,'" as "it is the very uncertainty of outcome in
18 litigation and avoidance of wasteful and expensive litigation that induce consensual settlements."
19 *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624-25 (9th Cir., 1982). As such, "the
20 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits,"
21 or "judged against a hypothetical or speculative measure of what might have been achieved." *Id.*

22 Although the operative PAGA statute does not set forth the criteria by which a PAGA
23 settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors
24 for review of a class action settlement. However, "a PAGA claim asserted on a non-class
25 representative basis...is not considered a class action but a law enforcement action, and therefore
26 does not have to meet the requirements of [a class action]." *See Casida v. Sears Holdings Corp.*,
27 2012 WL 253217 at *3 (E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL
28 2650571 at *4 (E.D. Cal. Jul. 1, 2010). A court's review of a PAGA settlement necessarily

implicates the following unique features that render the approval process distinct from approval of a class action settlement under C.C.P. § 382 and C.R.C. Rule 3.769.

First, in evaluating the adequacy of the settlement amount, the Court’s focus is not concerned with the amount(s) that “aggrieved employees” are to receive, but rather, must focus on the total settlement amount in achieving PAGA’s objective. Indeed, “[t]he remedy sought in a PAGA suit consists of civil penalties, not individual or class damages,” and while a “[PAGA] action is ... designed to protect the public and penalize the employer for past illegal conduct,” a reviewing Court must be mindful of the fact that settlement of a PAGA claim involves a compromise. *Mendez, supra*, 2010 WL 2650571 at *4. “Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777 at *4 (N.D. Cal. Apr. 2, 2010). The Court must not lose sight of the fact that “[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.” *Id.*

Second, consistent with the fact that unnamed employees have no property interest in a PAGA claim,⁴ “[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.” *Ochoa-Hernandez*, 2010 WL 1340777 at *5. This renders the approval process of a PAGA settlement distinct from a class action settlement, as there is no need for the Court to employ the “two-step approval process” required under F.R.C.P. Rule 23 (“Rule 23”) and C.R.C. Rule 3.769 (“Rule 3.769”).⁵

⁴ As held by the California Supreme Court, “[PAGA] does not create property rights or any other substantive rights” as “[i]t is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.” *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.* (2009) 46 Cal.4th 993, 1003.

⁵ The “two-step” approval process of Rule 23(e) is required to facilitate “notice” to absent class members, as Rule 23(e) expressly requires notice and an opportunity for absent class members to exclude themselves or object. *See* Fed. R. Civ. Proc. R. 23(e). Rule 3.769 contains similar rules for State court class actions.

1 Finally, unlike class action settlements under Rule 23(e) and Rule 3.769, the scope of
2 release permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is
3 binding not only on the named employee plaintiffs but also on government agencies and any
4 aggrieved employee not a party to the proceeding...the non-party employees, because they were
5 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
6 judgment as to remedies other than civil penalties.” *See Arias v. Sup. Ct.* (2009) 46 Cal.4th 969,
7 986-87. Thus, the scope of a release in a PAGA settlement is confined to the PAGA penalties
8 alleged in the complaint (or the prefiling letters to the LWDA) and to the claims that were, or
9 could have been, alleged pursuant to PAGA based on the factual allegations in the complaint.⁶ In
10 the case at hand, as the only claims at issue are PAGA claims, those will be the only claims
11 extinguished because of this Settlement.

12 **B. Settlement is a Fair, Adequate, and Reasonable Compromise of Claims**

13 California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v.*
14 *Superior Court* (1976) 62 Cal.App.3d 231, 236. Unlike individual settlements, class and
15 representative PAGA settlements involve a court approval process that exists to prevent fraud,
16 collusion, and unfairness to absent individuals. *See Malibu Outrigger Bd. of Governors v.*
17 *Superior Court* (1980) 103 Cal.App.3d 573, 578-79. California law generally follows the same
18 standards applicable under Rule 23. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
19 1998) (stating that Rule 23(e) requires the trial court to determine “whether a proposed settlement
20 is fundamentally fair, adequate, and reasonable”). To be approved, a settlement must be “fair,
21 reasonable and adequate to all concerned.” *Reed v. United Teachers Los Angeles* (2012) 208
22 Cal.App.4th 322, 337. Settlement is the preferred means of dispute resolution, particularly in

23
24 ⁶ This is contrasted with the much broader release permitted in a class action context, which may
25 release all underlying Labor Code violations based on “any matter or fact” alleged in the
26 complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981)
27 (“The weight of authority establishes that ... a court may release not only those claims alleged in
28 the complaint and before the court, but also claims which ‘could have been alleged by reason of
or in connection with any matter or fact set forth or referred to in’ the complaint.”); *Hesse v.*
Sprint Corp., 598 F.3d 581, 590 (9th Cir., 2010) (“we have held that federal district courts
properly released claims not alleged in the underlying complaint where those claims depended on
the same set of facts as the claims that gave rise to the settlement.”).

complex representative litigation. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole is fair and is not the product of fraud or collusion between the negotiating parties. *See, e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was negotiated at arm’s length by experienced counsel. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130. Because this Settlement is fair, adequate, and reasonable, Plaintiff respectfully requests that the Court grant approval.

a. Factors in Evaluating a Representative PAGA Settlement

A settlement is presumptively fair where it is reached through arm’s-length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, and counsel is experienced in similar litigation. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; *see also Kullar, supra*, 168 Cal.App.4th at 130. In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Sup. Ct.* (1979) 89 Cal.App.3d 434, 438. In exercising these powers, the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited to:

[T]he strength of plaintiffs’ 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, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *Id.*

These factors require balancing and are non-exhaustive. Trial courts should therefore tailor the factors to each case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.* In the context of a PAGA settlement, the third and eighth factors (risk of maintaining class action status and reaction of class members to settlement) are inapplicable.

“In the context of a settlement agreement, the test is not the maximum amount plaintiff might have obtained at trial on the complaint, but rather whether the settlement is reasonable

under all of the circumstances.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250. Because settlements inherently involve compromise, settlements providing for narrower relief than can be obtained if the suit were successfully litigated can be reasonable because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Air Lines Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972). Further, courts review the discovery conducted by the parties to aid in assessing whether the parties sufficiently developed the claims and supporting factual bases before reaching settlement. *See Kullar, supra*, 168 Cal.App.4th at 129-31. Information is sufficient where it allows the parties and the court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential Serv. LLC* (2009) 175 Cal.App.4th 785, 801. This requirement exists so that parties can provide the trial court with “a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar, supra*, 168 Cal.App.4th at 132.

i. The Strength of Plaintiff’s Case

Although Plaintiff steadfastly maintains that this action is meritorious, Plaintiff acknowledges that there are substantial risks and uncertainty in proceeding to trial. Defendant presented numerous defenses to Plaintiff’s underlying allegations and arguments to why Plaintiff’s damages calculations were overstated; chief among them were Defendant’s overwhelmingly compliant records and the fact that the Court would utilize its discretion to substantially reduce any award of PAGA penalties. While Plaintiff was prepared to litigate these claims through trial, Plaintiff faced substantial challenges in prevailing in this matter and obtaining a better result than will be provided through the Settlement. Thus, this factor supports approval.

ii. Risk, Expense, Complexity, and Duration of Further Litigation

Prior to mediation, the Parties engaged in a substantial exchange of informal discovery to allow Plaintiff to properly evaluate the representative claims at issue. *See Rowbotham Decl.*, ¶ 16. Absent settlement, the Parties will be required to expend substantial time and resources commencing and completing formal written and deposition discovery. Preparation for trial

1 remained, as well as the prospect of appeals in the wake of a summary judgment ruling for either
2 party, as well as appeals after trial. This Settlement avoids these considerable costs, risks, and the
3 accompanying burden of continued litigation on the Court

4 **iii. Amount Offered in Settlement Given Realistic Value of Claims**

5 The proposed Settlement provides a fair and reasonable monetary recovery for the State
6 of California and Aggrieved Employees in the face of hotly disputed claims. Labor Code
7 § 2699(f)(2) provides for PAGA civil penalties in the amount of \$100 for each aggrieved
8 employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay
9 period for each subsequent violation. *See* Labor Code § 2699(f)(2). However, courts have
10 interpreted Section 2699(f)(2) to only impose the \$200 subsequent penalty after an employer has
11 been notified that its conduct violates the Labor Code. *See, e.g., Amaral v. Cintas Corp.* No. 2,
12 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is
13 notified that it is violating a Labor Code provision); *Trang v. Turbine Engine Components*
14 *Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854, at *5 (C.D. Cal. Dec.
15 19, 2012) (“courts have held that employers are not subject to heightened penalties for
16 subsequent violations unless and until a court or commissioner notifies the employer that it is in
17 violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw*
18 *Transit Services, Inc.*, No. 05cv1199–IEG–CAB, 2009 WL 2448430, at *9 (S.D. Cal.
19 2009) (finding that California law imposes the “subsequent violation penalty” only after an
20 employer has been notified its conduct violates the Labor Code).

21 The wage statements Defendant issued to its piece-rate employees throughout the PAGA
22 Period only state the piece rate wages earned (not the units or rate used to calculate the
23 wages) and fail to list the hours of compensable rest time or any information about nonproductive
24 time (the line item “Misc” is understood to be payment for rest and recovery wages). Rowbotham
25 Decl. ¶ 19. The wage statements also do not include any employer address whatsoever. *Id.* The
26 uniform format of wage statements is confirmed by Plaintiff’s wage statements as well as the
27 wage statements of other non-exempt employees produced by Defendant in advance of
28 mediation. *Id.* Plaintiff assumed he would be able to prove at least one violation each pay period

1 during the PAGA Period. Plaintiff therefore calculated Defendant's maximum PAGA exposure
2 for this claim at \$248,900 (2,489 pay periods x \$100 per violation).

3 Additionally, Plaintiff's review of the relevant payroll records revealed that Defendant
4 did not maintain a line-item for nonproductive time payments. Rowbotham Decl., ¶ 18. This is
5 true even though piece-rate employees performed nonproductive tasks on a regular basis,
6 including attending mandatory meetings and trainings (many of which were mandated by Cal
7 OSHA regulations, which also required Defendant to keep written records showing when the
8 trainings took place), gathering and disposing of materials, and unloading and packing up tools.
9 *Id.* Plaintiff estimates that collectively, these nonproductive tasks took an average of 30 minutes
10 each workday. However, the wage statements confirm that Defendant did not pay any
11 nonproductive time to piece-rate employees during the PAGA Period. Given that this violation
12 accrued each pay period for piece-rate employees, Plaintiff assumed he would be able to prove
13 at least one violation each pay period during the PAGA Period. Plaintiff therefore calculated
14 Defendant's maximum PAGA exposure for this claim at \$248,900 (2,489 pay periods x \$100
15 per violation). *Id.*

16 Defendant contends that the required information is readily available on other documents
17 that accompany the wage statement (such as the paycheck itself or a separate document).
18 Rowbotham Decl., ¶ 19. Defendant also maintains that Plaintiff cannot show actual "injury" or
19 that Defendant's wage statement violations were "knowing and intentional" under Labor Code
20 § 226(e). *Id.* Defendant contends that piece-rate employees did not work non-productive time as
21 all tasks were directly related to their piece-rate earnings. *Id.* Finally, Defendant claims that it
22 substantially complied with the Labor Code and as a result, an award of civil penalties for such
23 violations should be discounted heavily to avoid an unjust, arbitrary, or oppressive result. *Id.*

24 In light of Defendant's arguments and defenses described above, Plaintiff discounted that
25 maximum exposure of \$497,800 by 33% for a risk of losing on the merits and/or not recovering
26 a PAGA penalty for each claim in every pay period, and by an additional 50% for risk of the
27 Court reducing penalties, to arrive at a realistic exposure of approximately \$166,763.
28 Rowbotham Decl., ¶ 20; *see also*, e.g., *Thurman v. Bayshore Transit Management, Inc.*, (2012)

203 Cal.App.4th at 1136 (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, (C.D. Cal. Aug. 12, 2011), 2011 WL 7563047 at *5 (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, (2018) 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just \$5 per pay period).

In the face of Defendant’s defenses on the merits and the Court’s discretion to reduce PAGA penalties, Plaintiff felt that the negotiated settlement of \$150,000, which represents 90% of Plaintiff’s expected potential value for these claims, was clearly in the best interests of the LWDA and the aggrieved employees and was well within the range of reasonableness. Rowbotham Decl., ¶ 20; *see Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”) (internal quotations omitted).

Thus, approval of the Settlement is appropriate, as the Settlement will provide tangible monetary relief to Aggrieved Employees and the State of California while avoiding the risks and costs of continued litigation and trial.

iv. Discovery Completed and the Status of Proceedings

The Parties engaged in a significant exchange of documents and data necessary to evaluate the value of the PAGA claim prior to mediation. *See* Rowbotham Decl., ¶¶ 16. Defendant produced timekeeping and payroll records for all non-exempt employees who worked during the PAGA Period. *Id.* Additionally, Defendant produced sample wage statements and work orders to aid Plaintiff in evaluating the representative exposure. *Id.* It was only after the exchange of this information, a full-day mediation with a respected neutral, and significant discussions about the likelihood of prevailing on the merits of Plaintiff’s claims that the Parties reached the proposed Settlement. *Id.* Thus, this factor supports settlement approval

v. The Experience and Views of Counsel

“Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented

1 by competent and experienced wage and hour class action counsel, who pressed Plaintiff's PAGA
2 claim forward, and who believe this Settlement to be fair and adequate for all involved. *See*
3 Rowbotham Decl., ¶¶ 2-8; Declaration of Fletcher W. Schmidt ("Schmidt Decl."), ¶¶ 2-8; and
4 Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8. Further, the proposed Settlement was
5 reached with the input and assistance of mediator Hon. David M. Chapman (Ret.), who made a
6 mediator's proposal that he determined represented a fair and reasonable settlement, given the
7 limited scope of the PAGA release. Rowbotham Decl., ¶ 17. Thus, this factor strongly supports
8 settlement approval. *See, Kullar, supra*, 168 Cal.App.4th at 130 ("The court undoubtedly should
9 give considerable weight to the competency and integrity of counsel and the involvement of a
10 neutral mediator in assuring itself that a settlement agreement represents an arm's length
11 transaction entered without self-dealing or other potential misconduct.").

12 **C. The Requested Award for Fees is Reasonable as a Percentage of the MSA**

13 Plaintiff, as the prevailing party in settlement, is entitled to recover attorneys' fees and
14 costs for their claims. *See* Labor Code § 2699(g) ("Any employee who prevails in any action shall
15 be entitled to an award of reasonable attorney's fees and costs."); Code of Civil Procedure
16 § 1021.5(a). A fee award is justified where the legal action has produced its benefits by way of a
17 voluntary settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside*
18 *Community for Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983).

19 Fee awards of roughly one-third of the settlement fund are routinely awarded in California
20 state and federal courts in class and representative PAGA actions. Indeed, the California Supreme
21 Court recently approved the use of the "percentage of fund" method. *See Laffitte v. Robert Half*
22 *Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) ("the percentage of fund method survives in California class
23 action cases...") Moreover, "fee awards in class actions average around one-third of the
24 recovery." *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008); *see also, In re Pacific*
25 *Enterprises Securities Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award);
26 *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (holding that
27 class counsel's fee award should have been calculated as one-third of the gross settlement fund);
28 *Chavez v. Saticoy Lemon Ass'n*, Case No. 56-2015-00468600-CU-OE-VTA (2015 WL

5561118) (Ventura Cty. Super. Ct., Aug. 29, 2015) (approving attorneys' fees of one-third of settlement fund in representative PAGA settlement); *Clavel v. Lupe's Thousand Oaks Mexican Restaurant, Inc.*, Case No. 56-2015-00467353-CU-OE-VTA (2015 WL 1601221) (Ventura Cty. Super. Ct., Mar. 25, 2016) (same). This is also consistent with Plaintiff's counsel's experience in similar wage-and-hour class and PAGA matters. Rowbotham Decl., ¶ 23.

The fee award requested here is justified because Plaintiff's counsel achieved a positive monetary recovery for the aggrieved employees in an uncertain and risky case while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys' fees). Plaintiff's counsel negotiated the recovery for the aggrieved employees, in the face of significant defenses presented by Defendant. Plaintiff's counsel expended significant time and resources in litigating this case, which resulted in a favorable result for Plaintiff, the State of California, and the aggrieved employees. Plaintiff's counsel bore the contingency risk of this litigation for the benefit of the aggrieved employees, as well as for the State of California (who elected not to take the case after receiving Plaintiff's PAGA notice).

Critically, Plaintiff's recovery for the State of California and the 89 aggrieved employees is in line with other PAGA awards approved by courts in this district and others when considering the minimal number of aggrieved employees and pay periods at issue. *See, e.g., Aguirre v. DSW, Inc.*, 2012 WL 11875296 at *3 (C.D. Cal. Nov. 29, 2012) (approving \$10,000 PAGA payment); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575 at *7 (E.D. Cal. Oct. 31, 2012) ("GTI agrees to allocate \$10,000 to Plaintiffs' PAGA claims, and will pay \$7,500 to the LWDA, and \$2,500 to participating Class Members on a pro-rata basis. This comports with settlement approval of PAGA awards in other cases. Therefore, the Court will approve the allocation of the Settlement to Plaintiffs' PAGA claim."); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804 at *8 (C.D. Cal. Nov. 18, 2014) (approving \$18,750 PAGA payment); *Franco v. Ruiz Food Prods.*, 2012 WL 5941801 at *14 (E.D. Cal. Nov. 27, 2012) (approving \$10,000 PAGA payment); *Chu v. Wells*

1 *Fargo Inv., LLC*, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (\$10,000 PAGA payment).
2 That Plaintiff's counsel achieved these results in the face of serious defense challenges and an
3 uncertain legal landscape, confirms the strength of the results achieved. Moreover, the MSA
4 results in average individual payments to aggrieved employees of \$250.48, exceeding other
5 PAGA penalty awards approved as reasonable throughout California. *See, e.g., Penaloza v. PPG*
6 *Industries Inc.*, Case No. BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A. County, May 20,
7 2013) (average PAGA penalties of \$7.49); *Cabrera v. Advantage Sale & Marketing, LLC*, Case
8 No. BC485259, 2013 WL 1182822 (Super. Ct. L.A. County, March 12, 2013) (average PAGA
9 penalties of \$3.33).

10 Plaintiff's counsel brings over two decades of wage-and-hour class and representative
11 action experience. *See* Rowbotham Decl., ¶¶ 2-8; *see also* Declarations of Fletcher W. Schmidt
12 and Paul K. Haines. They have been certified as class counsel in numerous cases alleging wage
13 and hour claims. *Id.* Their experience in similar matters played an integral role in evaluating the
14 strengths and weaknesses of the case against Defendant and the reasonableness of the Settlement.
15 Practice in the narrow field of wage-and-hour litigation requires skill and knowledge concerning
16 the rapidly evolving substantive state and federal law, as well as the procedural law of class and
17 representative action litigation. Because it is reasonable to compensate Plaintiff's counsel
18 commensurate with their skill, reputation, and experience, a fee award of one-third of the MSA
19 is reasonable.

20 **D. The Requested Cost Reimbursement is Fair, Adequate, and Reasonable**

21 As discussed above, this case carried substantial risk as to the merits as well as a potential
22 reduction in potential recovery. It is fair and reasonable to account for these risks in compensating
23 Plaintiff's counsel. Plaintiff's counsel should also be compensated for the risks involved in
24 undertaking this litigation, and expending considerable effort, all while working on a pure
25 contingency basis. Since undertaking representation of Plaintiff, Plaintiff's counsel dedicated
26 substantial resources to this litigation, including expending \$2,835.60 in costs. Rowbotham Decl.,
27 ¶ 23; Exhibit 3.

1 **E. The Court Should Approve the Requested Administration Costs**

2 Plaintiff also request that the Court approve up to \$2,995.00 in administration costs to the
3 Settlement Administrator, Phoenix Settlement Administrators. Rowbotham Decl., ¶ 25;
4 Lawrence Decl., Exhibit B; Settlement, § III.4.b. As detailed in the Settlement Agreement and
5 declaration of Jodey Lawrence, submitted concurrently with this Motion, Phoenix will perform
6 duties in connection with this Settlement that are integral in effectuating the Settlement and the
7 Notice process. Among other things, Phoenix will calculate each aggrieved employee's individual
8 PAGA payment, update addresses contained in the employee data supplied by Defendant, format
9 the Notice Packets for mailing and translate them into Spanish, mail Notice Packets to all
10 aggrieved employees, and otherwise administer the Settlement. *See generally*, Lawrence Decl.;
11 Settlement, § IV. Phoenix was selected to administer this Settlement because it is an experienced
12 and well-respected settlement administrator and returned a bid at a competitive rate. Rowbotham
13 Decl., ¶ 25; *see generally*, Lawrence Decl. For these reasons, Phoenix's requested costs are fair,
14 reasonable, and adequate, and should be approved.

15 **F. Plaintiff's Enhancement Payment is Fair, Adequate, and Reasonable**

16 Courts routinely approve enhancement payments to compensate named plaintiffs for the
17 services they provide and the risks they incur during class and representative litigation. *See, e.g.*,
18 *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726 (upholding "service payments" to
19 named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.*
20 (N.D. Cal. 1995) 901 F. Supp. 294 (approving \$50,000 enhancement payment). Here, Plaintiff
21 seeks an enhancement payment of \$2,500.00. *See* Settlement, § III.4.a. This request is reasonable
22 given Plaintiff's efforts in this case and the risks he undertook on behalf of the aggrieved
23 employees. Rowbotham Decl., ¶ 27. Among other things, Plaintiff searched for and gathered
24 relevant documents for use in the lawsuit and provided factual information to Plaintiff's counsel,
25 had regular discussions with Plaintiff's counsel both in person and over the phone regarding the
26 claims in the lawsuit, the facts and legal theories at issue in the case, and Defendant's timekeeping
27 as well as piece-rate practices, Plaintiff discussed the status of the case and general case strategy
28 with his attorneys on many occasions, helped his attorneys prepare for mediation, and made

1 himself available for the entire day of mediation. Kotcherha Decl., ¶ 4. Plaintiff spent at least 25
2 hours on activities that ultimately lead to the Settlement. Rowbotham Decl., ¶ 27; Kotcherha
3 Decl., ¶ 4. Accordingly, Plaintiff's enhancement payment is appropriate and justified as part of
4 the Settlement

5 **V. CONCLUSION**

6 For the reasons stated herein, this Court should grant Plaintiff's Motion in its entirety and
7 adopt the [Proposed] Judgment and Order Granting Plaintiff's Motion for Settlement Approval
8 of Claims Brought Under the PAGA, Reasonable Attorneys' Fees and Costs, and Enhancement
9 Payment, submitted concurrently herewith.

10
11 Dated: December 18, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

12
13 By:



Andrew J. Rowbotham
Attorneys for Plaintiff