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MOISES PEREZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

MOISES PEREZ, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

HEIMARK DISTRIBUTING, LLC, a
California corporation; and DOES 1 through
100, inclusive

Defendants.

Case No.: CIVSB2228849

*[Assigned for All Purposes to Hon. Jessica Morgan,
Dept. S-26]*

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

Date: January 23, 2024

Time: 8:30 a.m.

Department: S-26

Filed: December 28, 2022

Trial: Not Set

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

2 PLEASE TAKE NOTICE that on January 23, 2024 at 8:30 a.m., or as soon thereafter as the matter
3 may be heard in Department S-26 of the above-entitled Court, located at 247 West Third Street, San
4 Bernardino, California 92415, Plaintiff Moises Perez (“Plaintiff”), on behalf of himself and all other
5 aggrieved employees, will and hereby does move this Court for entry of an Order as follows:

- 6 1. Granting approval, pursuant to California Labor Code section 2698 *et seq.*, and specifically
7 Labor Code section 2699(1)(2), of the proposed Settlement of claims brought pursuant to the
8 Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 *et seq.*) and set forth in the
9 Settlement;
- 10 2. Appointing Phoenix Settlement Administrators as the Settlement Administrator, and
11 approving an award of \$3,500.00 in anticipated costs to Phoenix Settlement Administrators
12 for its settlement administration services;
- 13 3. Approving the proposed Notice of PAGA Settlement and Release of Claims as to form and
14 content, and directing that it be distributed to the Aggrieved Employees pursuant to the terms
15 of the Settlement;
- 16 4. Directing Defendant to deposit the Gross Settlement Amount of Two Hundred Thirty-Two
17 Thousand Six Hundred Eighty Dollars and Zero Cents (\$232,680.00) with the Settlement
18 Administrator by no later than thirty (30) calendar days of the Effective Date, which is defined
19 as the latter of: (a) the Court’s final approval of the Settlement or (b) the final resolution of
20 any appeal that has been filed.
- 21 5. Directing the distribution of the Gross Settlement Amount pursuant to the terms of the
22 Settlement;
- 23 6. Approving an award of one-third of the Gross Settlement Amount (currently estimated to be
24 \$77,560.00) in attorneys’ fees to Plaintiff’s Counsel;
- 25 7. Approving an award of \$14,522.00 in actual litigation costs reimbursement to Plaintiff’s
26 Counsel;
- 27 8. Approving an enhancement award of \$5,000.00 to Plaintiff for his service to the Aggrieved
28 Employees and the State of California; and
9. Approving the payment of \$99,073.50 to the California Labor & Workforce Development
Agency for its share of PAGA civil penalties.

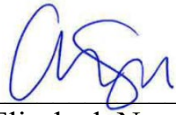
1 10. Approving the payment of \$33,024.50 to the Aggrieved Employees on a pro rata basis based
2 on number of pay periods worked during the relevant time period.

3 This Motion is based on this Notice, the attached Memorandum of Points and Authorities; the
4 declarations of Scott M. Lidman, Elizabeth Nguyen, Paul K. Haines, Milan Moore, Plaintiff Moises
5 Perez, and Jodey Lawrence on behalf of Phoenix Settlement Administrators and the exhibits attached
6 thereto, the pleadings and other papers filed in this action, and on any further oral or documentary
7 evidence or argument presented at the time of hearing.

8 Dated: December 28, 2023

Respectfully submitted,
LIDMAN LAW, APC

9
10 By:



Elizabeth Nguyen
Attorneys for Plaintiff
MOISES PEREZ

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Moises Perez (“Plaintiff”), an “Aggrieved Employee” under the California Labor Code § 2698 *et seq.* (“PAGA”), respectfully requests this Court grant approval of the Settlement¹ with Defendant Heimark Distributing, LLC (“Heimark” or “Defendant”) pursuant to Labor Code section 2699(1)(2). This PAGA action is based on Defendant’s alleged: (a) failure to pay all wages owed based on rounding only; (b) failure to provide meal periods or pay premium pay for non-compliant meal periods; (c) failure to authorize and permit rest periods or pay premium pay for non-complaint rest periods; (d) failure to provide accurate, itemized wage statements; (e) failure to timely pay wages upon separation of employment; (f) failure to reimburse necessary business expenditures.

“Aggrieved Employees” is defined in the Settlement as “all current and former hourly, non-exempt employees of Defendant Heimark Distributing, LLC who worked in California at any time from September 16, 2021 through September 21, 2023.”

As set forth herein, the proposed Settlement should be approved because it is fair, reasonable, and adequate, as it (1) is the product of arm’s-length negotiations with the assistance of a mediator, (2) was negotiated by attorneys experienced in wage-and-hour issues, (3) was negotiated subsequent to undertaking sufficient investigation to evaluate the relative strength and value of the PAGA-based claims, and (4) reflects a reasoned compromise based directly on the relative strength and value of the PAGA-based claims, as well as the risks, expense, complexity and likely duration of further litigation.

This proposed PAGA Settlement requires Defendant to pay a **non-reversionary** Gross Settlement Amount (“GSA”) of \$232,680.00. After deducting amounts for requested attorneys’ fees (one-third of the GSA), currently estimated at (\$77,560.00) requested actual costs incurred by Plaintiff’s counsel (\$14,522.00), an enhancement award for Plaintiff (\$5,000.00), and settlement administration costs (\$3,500.00) to Phoenix Settlement Administrators (“PSA”), the Settlement provides for distribution of civil penalties in the amount of \$132,098.00. Pursuant to Labor Code section 2699(i), 75% of \$132,098.00

¹ The PAGA Settlement Agreement (“Settlement”) is attached to the Declaration of Elizabeth Nguyen as Exhibit 1. The Proposed Notice of PAGA Settlement and Release of Claims is attached to the Settlement as Exhibit B. All defined terms in this Motion have the same definitions as used in the Settlement.

(or \$99,073.50) will be distributed to the California Labor & Workforce Development Agency (“LWDA”) and 25% of \$132,098.00 (or \$33,024.50) will be distributed to the Aggrieved Employees. The amounts requested for attorneys’ fees and costs, Plaintiff’s enhancement award, and settlement administration costs are fair, adequate, and reasonable, particularly in light of the recovery obtained. Because there are approximately 213 Aggrieved Employees, the average payment to each Aggrieved Employees is estimated to be approximately \$155.03.

The GSA of \$232,680.00 represents a fair and reasonable recovery for the State of California and Aggrieved Employees considering the limited scope and time period of the release. The release in the Settlement does not impact any underlying Labor Code claims any of the Aggrieved Employees may have. Further litigation may have resulted in a smaller recovery or even no recovery at all based on the defenses asserted by Defendants and given the significant litigation risks involved.

In light of the foregoing, this Court should enter the [Proposed] Order Granting Approval of Settlement submitted concurrently herewith.

II. SUMMARY OF THE LITIGATION

Heimark is a distribution company that distributes beer and beverages throughout Southern California. *See* Declaration of Elizabeth Nguyen (“Nguyen Decl.”), ¶ 10. Plaintiff started working for Heimark in or around October 2020 as a Line Technician and was responsible for setting up lines at bars and restaurants. *See* Declaration of Moises Perez (“Perez Decl.”), ¶ 2.

A. Procedural History

On September 16, 2022, Plaintiff provided written notice to the LWDA and Heimark asserting claims for civil penalties pursuant to PAGA stemming from alleged violations of the California Labor Code including: (i) failure to provide all legally required rest periods; (ii) failure to issue accurate, itemized wage statements; (iii) failure to pay all earned wages at least twice during each calendar month; (iv) failure to maintain required records; and (v) failure to pay provide all legally required meal periods. Nguyen Decl., ¶ 11; Exh. 1. On December 27, 2022, Plaintiff filed a Class and Representative Action Complaint against Heimark. Plaintiff submitted a supplemental letter to the LWDA on November 25, 2019. *Id.*, Exh. 1. On August 10, 2023, pursuant to a request by Plaintiff, the Court entered an order sending Plaintiff’s individual Labor Code and PAGA claims against Defendant to arbitration, dismissing Plaintiff’s class

1 action claims, and leaving Plaintiff's Sixth Cause of Action for violations of the PAGA as the sole
2 remaining claim in the Action. On October 5, 2023, pursuant to the Parties' agreement, Plaintiff provided
3 a supplemental written notice to the LWDA and Defendant asserting claims for civil penalties pursuant to
4 the PAGA stemming from alleged violations of California Labor Code sections 203 and 2802, as well as
5 unpaid wages based on rounding. *Id.* On December 18, 2023, Plaintiff submitted the Parties Stipulation
6 to file the First Amended Representative Action Complaint. *Id.*

7 **B. Informal Discovery, Mediation, and Arms-Length Negotiations**

8 Prior to mediation, and in response to Plaintiff's request for informal discovery requests for
9 mediation, Defendant provided Plaintiff with information and documents pertaining to Plaintiff and the
10 other Aggrieved Employees, including the timekeeping and payroll data for all employees through July
11 2023. Nguyen Decl., ¶ 12. After a review of the information and documents produced by Heimark,
12 Plaintiff's Counsel drew on their extensive experience in similar cases to assess the strengths and
13 weaknesses of Plaintiff's case. *Id.* This discovery allowed the parties to assess the merits and value of
14 Plaintiff's claims and defenses thereto. *Id.*

15 On September 21, 2023, the Parties participated in mediation with Katherine J. Edwards, Esq., a
16 respected mediator. Nguyen Decl., ¶¶ 12-13. During mediation, the Parties vigorously debated their
17 opposing legal positions and the likelihood of Plaintiff's ability to proceed on a representative basis.
18 Nguyen Decl., ¶ 13. Ultimately, the Parties agreed to fully and finally resolve the PAGA Released Claims.
19 Nguyen Decl., ¶ 13, Exh. 2.

20 **III. ARGUMENT**

21 **A. Standard For Approval Of A PAGA Settlement**

22 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA statute,
23 which states that the "court shall review and approve any penalties sought as part of a proposed settlement
24 agreement pursuant to this part." *See* Lab. Code § 2699(l). Notably, the PAGA statute does not set
25 expressly forth the criteria by which a PAGA settlement is to be judged.

26 In evaluating the adequacy of the settlement amount, the Court's focus is not concerned with the
27 amount(s) that "aggrieved employees" are to receive, but rather, must focus on the total settlement amount
28 in achieving PAGA's objective. Indeed, "[t]he remedy sought in a PAGA suit consists of civil penalties,

not individual or class damages.” *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 (E.D. Cal. Jul. 1, 2010) 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). Moreover, while “[a PAGA] action is ... designed to protect the public and penalize the employer for past illegal conduct” (*Mendez*, 2010 WL 2650571 at *4), a reviewing Court must take into account the fact that settlement of a PAGA claim – like any settlement – involves a “compromise” that stops short of rendering findings of liability and damages. 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.” *Ochoa-Hernandez*, at *4.

Second, consistent with the fact that unnamed employees have no property interest in a PAGA claim,² “[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* at *5.

B. This Court Should Approve The Settlement Because It Is A Fair, Adequate, And Reasonable Compromise Of Disputed Claims

California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v. Superior Court* 62 Cal.App.3d 231, 236 (1976). To be approved, a settlement must be “fair, reasonable and adequate to all concerned.” *Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012). 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.*, 168 Cal.App.4th 116, 130 (2008). Because this Settlement is fair, adequate, and reasonable, Plaintiff respectfully requests that the Court approve the Settlement.

² As held by the California Supreme Court, “[t]he Labor Code Private Attorneys General Act of 2004 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.” *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46 Cal. 4th 993, 1003 (2009).

1 **1. Factors in Evaluating a Representative PAGA Settlement**

2 A settlement is presumptively fair where it is reached through arm's-length bargaining, based on
3 sufficient discovery and investigation to allow counsel and the court to act intelligently, and counsel is
4 experienced in similar litigation. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996). Relevant
5 factors for the Court to consider in determining whether the settlement is "fair, adequate, and reasonable"
6 include, but are not limited to:

7 [T]he strength of Plaintiff's case, the risk, expense, complexity and likely
8 duration of further litigation, the risk of maintaining class action status
9 through trial, the amount offered in settlement, the extent of discovery
10 completed and the stage of the proceedings, the experience and views of
11 counsel, the presence of a governmental participant, and the reaction of the
12 class members to the proposed settlement.
13 *Dunk*, 48 Cal.App.4th at 1801.³

14 "In the context of a settlement agreement, the test is not the maximum amount Plaintiffs might
15 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the
16 circumstances." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001). Because settlements
17 inherently involve compromise, even settlements providing for substantially narrower relief than likely
18 would be obtained if the suit were successfully litigated can be reasonable because "the public interest
19 may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding
20 litigation." *Id.* (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th
21 Cir. 1972)). In addition, courts review the discovery process and information received through it to aid
22 them in assessing whether the parties sufficiently developed the claims and their supporting factual bases
23 before reaching settlement. *See Kullar, supra*, 168 Cal.App.4th at 129-31. Information is sufficient where
24 it allows the parties and the court to form "an understanding of the amount that is in controversy and the
25 realistic range of outcomes of the litigation." *Clark v. Am. Residential Serv. LLC*, 175 Cal.App.4th 785,
26 801 (2009). This requirement exists so that the parties can provide the court with "a meaningful and
27 substantiated explanation of the manner in which the factual and legal issues have been evaluated." *Kullar*,
28 168 Cal.App.4th at 132.

³ As explained above, in the context of a representative PAGA settlement, the third and eighth factors (risk of maintaining class action status and reaction of class members to settlement) are inapplicable.

1 a) **Overview of the Proposed Settlement**

2 i. **“Aggrieved Employees” Defined**

3 Aggrieved Employees are defined as, “all current and former hourly, non-exempt employees of
4 Defendant Heimark Distributing, LLC who worked in California at any time from September 16, 2021
5 through September 21, 2023.” The Aggrieved Employees, including Plaintiff, worked a total of
6 approximately 6,648 pay periods during the PAGA Period. *See* Settlement, ¶ III.3.

7 ii. **Essential Terms Of The Settlement**

8 This Settlement provides that Heimark pay a Gross Settlement Amount of \$232,680.00.
9 Settlement, ¶ III.2. After deducting amounts for requested attorneys’ fees, attorneys’ costs, Plaintiff’s
10 requested enhancement award, and settlement administration costs, the Settlement provides for
11 distribution of the remaining Net Settlement Amount (“NSA”) to Aggrieved Employees and the LWDA
12 distributed as follows: 75% to the LWDA and 25% to Aggrieved Employees pursuant to Labor Code
13 2699(i). Settlement, ¶ III.4.

Gross Settlement Amount:	\$232,680⁴
Minus Court-approved attorneys’ fees (1/3):	\$77,560.00
Minus Court-approved attorneys’ costs:	\$14,522.00
Minus Court-approved enhancement award:	\$5,000.00
Minus settlement administrator costs:	\$3,500.00
Net Settlement Amount:	\$132,098.00

Net Settlement Amount:	\$132,098.00
75% to LWDA	\$99,073.50
25% to Aggrieved Employees	\$33,024.50

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21 Defendant shall pay Two Hundred Thirty-Two Thousand Six Hundred Eighty Dollars and Zero
22 Cents (\$232,680.00) as the **non-reversionary** Gross Settlement Amount. Defendant shall deposit the
23 Gross Settlement Amount with the Settlement Administrator by no later than thirty (30) calendar days of
24 the Effective Date, which means the latter of: (a) the Court’s final approval of the Settlement or (b) the
25 final resolution of any appeal that has been filed. *See* Settlement, ¶ III. 2.

26
27 ⁴ Defendant represents that there are an estimated 6,648 pay periods worked by the Aggrieved Employees during the PAGA
28 Period. If the number of pay periods worked by the Aggrieved Employees during the PAGA Period is 10% or greater than this
figure, Defendant agrees to increase the Gross Settlement Amount on a proportional basis equal to the percentage increase in
the number of pay periods worked by the PAGA Period above the 10% (i.e., if there was an 11% increase in the number pay
periods during the PAGA Period, Defendant agrees to increase the Gross Settlement Amount by 1%). *See* Settlement, ¶ III.3.

1 Within fourteen (14) business days of the Effective Date, Defendant shall provide the Settlement
2 Administrator with information for Aggrieved Employees. *See* Settlement, ¶ IV.2. Within 7 business
3 days of receipt of this information, the Settlement Administrator will prepare and circulate an anonymized
4 spreadsheet containing the estimated individual settlement payments to each Aggrieved Employee for the
5 Parties approval. The Settlement Administrator shall also determine whether the Escalator Clause in
6 Section III.3 has been triggered. Within two business days of receiving the Parties' approval, the
7 Settlement Administrator shall mail copies of the explanatory letter to all Aggrieved Employees with their
8 checks in English and Spanish. *See* Settlement, ¶ IV.3. The Settlement does not require Aggrieved
9 Employees to submit a claim form to reap financial benefit from the Settlement. *Id.* Any checks remaining
10 uncashed for more than 180 days will be tendered to the State Controller's Office under the unclaimed
11 property fund laws in the names of the Aggrieved Employees to whom the checks were issued. *See*
12 Settlement, ¶ IV.4.

13 **iii. Payment to the LWDA and Aggrieved Employees**

14 The entire NSA shall be designated as PAGA civil penalties. Of the NSA, 75% of the NSA will
15 be distributed to the LWDA and 25% will be distributed to the Aggrieved Employees under Labor Code
16 § 2699(i). Based on these distributions, the amount to be paid to the LWDA will be \$99,073.50 and the
17 amount paid to Aggrieved Employees is estimated to be \$33,024.50. Nguyen Decl., ¶ 16. This portion
18 of the NSA shall be paid to all Aggrieved Employees pro rata based on the proportional number of pay
19 periods worked by each Aggrieved Employee during the PAGA Period and will be reported on an IRS
20 Form 1099. Settlement, ¶ III.5.b.; Nguyen Decl., ¶ 15. The average payment to an Aggrieved Employee
21 is estimated to be \$155.03.

22 **b) Risk, Expense, Complexity, and Duration of Further Litigation**

23 The Parties conducted an exchange of informal documents and information for mediation which
24 allowed Plaintiff to thoroughly evaluate the claims. *See* Nguyen Decl., ¶¶ 12-13. Had the Parties not
25 settled, they would need to engage in formal discovery, potential cross-summary judgment motions,
26 preparation for trial as well as the prospect of appeals in the wake of a summary judgment ruling for either
27 party, and/or post trial-motions. As a result, the Parties would incur considerably more attorneys' fees
28 and costs through trial. This settlement avoids those risks, the accompanying expense, and protracted

1 litigation.

2 **c) Strength of Plaintiff's Case and Realistic Value of Claims**

3 Here, the claims arise from Heimark's unlawful timekeeping, meal and rest period, and
4 reimbursement policies and practices. As a result, Plaintiff also alleges Defendants issued inaccurate wage
5 statements and failed to pay all wages owed upon separation of employment to Aggrieved Employees.
6 Although he maintains that the PAGA action is meritorious, Plaintiff acknowledges that his position
7 includes real risks and uncertainty, especially in the face of Heimark's numerous defenses on the merits
8 discussed below. While Plaintiff maintains he could rebut these defenses, Plaintiff nonetheless faced
9 several substantial challenges in prevailing in this matter, and this risk factor weight in favor of approving
10 the Settlement. Plaintiff estimate Heimark's realistic exposure, based on these defenses and risks, follows:

11 Civil Penalties Owed for Failing to Pay for All Wages: Plaintiff alleges that Heimark failed to
12 properly compensate Plaintiff and other non-exempt employees for all of their time worked. Nguyen
13 Decl., ¶ 16. Specifically, Plaintiff alleges that at least for a period of the relevant time period, Heimark
14 rounded the hours worked by the Aggrieved Employees. *Id.* As a result, Plaintiff and other non-exempt
15 employees were systematically underpaid for all hours worked. *Id.* Accordingly, Plaintiff calculated
16 Heimark's exposure for the 195 employees that experienced underpayment due to rounding and applying
17 \$100 for the first violation and \$200 for the subsequent, at \$316,500. *Id.*

18 Heimark counters that it properly compensated Plaintiff and all other non-exempt employees for
19 all of their time worked. Nguyen Decl., ¶ 17. In light of these defenses, Plaintiff discounted the maximum
20 recovery on this claim by 75% to account for the risk that Heimark could prevail in its defenses, to arrive
21 at a projected total of \$79,125.00. *Id.*

22 Civil Penalties Owed for Failing to Provide Legally Compliant Meal Periods: Plaintiff alleges that
23 Defendant failed to provide all legally required meal periods to him and the other non-exempt employees.
24 Nguyen Decl., ¶ 18. Specifically, Plaintiff alleges that due the work demands imposed by Heimark,
25 Defendant often provided meal periods that were either late, short, or failed to provide altogether. *Id.*
26 Based on the records produced in connection with mediation, Heimark had what appeared to be in the
27 records at least one meal period violation in approximately 5,198 pay periods or 70.6% during the relevant
28 time period. As such, and applying \$100 for the first violation and \$200 for the subsequent violations for

1 the 207 employees that experienced at least one meal period violation, Plaintiff calculated Heimark's
2 exposure at \$1,018,900.00. *Id.*

3 Heimark counters that it has always provided non-exempt employees with an opportunity to take
4 legally compliant meal periods, and any non-compliant meal periods reflected in employee timekeeping
5 records were solely the result of employee choice, rather than any policy or practice of Defendant such
6 that they do not trigger any liability. Nguyen Decl., ¶ 19. Heimark points out that under *Brinker*
7 *Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, it is only required to "provide" the
8 opportunity to take meal periods, not "ensure" meal periods are taken, and that they have always done so.
9 *Brinker, supra*, 53 Cal.4th at 1038 (rejecting "ensure" standard). *Id.* Heimark also contends that Plaintiff
10 could not recover the \$200 civil penalty for "subsequent violations" because it did not have notice of any
11 initial violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *In re Taco Bell Wage*
12 *and Hour Actions*, 2016 WL 2755938, at *7 (E.D. Cal. April 8, 2016). Lastly, Heimark contends that the
13 Court would use its discretion provided for in the PAGA to reduce the maximum penalty exposure due to
14 its good faith efforts to comply with applicable law. In light of these defenses, Plaintiff discounted the
15 maximum recovery on this claim by 80% to account for the risk that Heimark could prevail in its defenses,
16 to arrive at a projected total of \$203,780.00. Nguyen Decl., ¶ 19.

17 Civil Penalties Owed for Failing to Authorize and Permit all Legally Required Rest Periods:

18 Plaintiff alleges that Heimark failed to authorize and permit all legally required rest periods. Nguyen Decl.,
19 ¶ 20. Specifically, Plaintiff alleges that due to the work demands imposed by Heimark, Heimark did not
20 authorize and permit any rest periods on shifts in excess of 3.5 hours. Therefore, there was at least one
21 violation per shift worked in excess of 3.5 hours in each of the pay periods during the relevant time period.
22 *Id.* Accordingly, applying \$100 for the first violation and \$200 for the subsequent violations for all 213
23 employees, Plaintiff calculated Heimark's maximum exposure at \$1,400,300. *Id.*

24 Heimark counters that it has always maintained and enforced lawful rest period policies and
25 practices and that the Aggrieved Employees were authorized and permitted to take all off-duty rest periods
26 in compliance with California law. Nguyen Decl., ¶ 21. Heimark also contends that Plaintiff could not
27 recover the \$200 civil penalty for "subsequent violations" because it did not have notice of any initial
28 violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *In re Taco Bell Wage and*
Hour Actions, 2016 WL 2755938, at *7 (E.D. Cal. April 8, 2016). Lastly, Heimark contends that the
Court would use its discretion provided for in the PAGA to reduce the maximum penalty due to its good

1 faith efforts to comply with applicable law. Given these defenses, the maximum recovery on this claim is
2 discounted by 85% to account for the risk that Heimark could prevail in its defenses, to arrive at a projected
3 total of \$210,045.00. *Id.*

4 Civil Penalties for Unreimbursed Business Expenses: Plaintiff alleges that Heimark failed to
5 reimburse him and other non-exempt employees for necessary business expenditures, including the use of
6 their personal tools for work purposes, as required under Labor Code section 2802. Nguyen Decl., ¶ 22.
7 Accordingly, applying \$100 for the first violation and \$200 for the subsequent violations for all 213
8 employees, Plaintiff calculated Heimark's maximum exposure at \$1,452,100. *Id.*

9 Heimark denies that it failed to reimburse for any necessary expenses, notes that its employees did
10 not have to use their personal tools and that any personal tools used by Plaintiff and the other non-exempt
11 employees was due to their own volition. Nguyen Decl., ¶ 23. Lastly, Heimark contends that the Court
12 would use its discretion provided for in the PAGA to reduce the maximum penalty due to its good faith
13 efforts to comply with applicable law. Given these defenses, the maximum recovery on this claim is
14 discounted by 65% to account for the risk that Heimark could prevail in its defenses, to arrive at a projected
15 total of \$508,235.00. *Id.*

16 Civil Penalties for Derivative Wage Statement Violations: As Plaintiff's PAGA claim for deficient
17 wage statements was based on the underlying failure to pay all wages and meal and/or rest period
18 premiums, Plaintiff asserts PAGA penalties for each Aggrieved Employee for each pay period in the
19 PAGA period. Nguyen Decl., ¶ 24. Applying \$100 for the first violation and \$200 for the subsequent
20 violations for all 213 employees and all pay periods, Plaintiff calculated Heimark's exposure at
21 \$1,452,100. *Id.*

22 Heimark argues that Plaintiff's underlying claims will fail and, as a result, the wholly derivative
23 wage statement claim will also fail. Nguyen Decl., ¶ 25. *See Price v. Starbucks Corp.* (2011) 192
24 Cal.App.4th 1136, 1147 ("Because the underlying causes of action fail, the derivative UCL and PAGA
25 claims also fail."). Heimark also contends that since the primary allegations in this case are that Heimark
26 failed to pay all wages and failed to provide all meal and rest periods, imposing multiple penalties based
27 on different Labor Code section under derivative theories of liability for the same conduct would be unjust,
28 arbitrary and oppressive, and confiscatory. As such, Plaintiff discounted that figure by 90% to account

1 for the risk of losing on the merits and for the risk of the Court reducing penalties, to arrive at a realistic
2 recovery for Aggrieved Employees of \$145,210.00. *See, e.g., Thurman, supra*, 203 Cal.App.4th at 1136
3 (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*, Case No. ED CV10-01487 RGK
4 (OPx), 2011 WL 7563047 at *5 (C.D Cal. Aug. 12, 2011) (reducing PAGA penalties by more than 82%);
5 *Id.*

6 Civil Penalties for Failing to Timely Pay Wages Upon Termination: Plaintiff alleges that Heimark
7 is liable for waiting time penalties under Labor Code section 203. Nguyen Decl., ¶ 26. Based on the data
8 provided, 67 Aggrieved Employees have separated their employment with Heimark during the relevant
9 time period who could be entitled to waiting time penalties. *Id.* Applying \$100 for the 67 former
10 employees during the relevant time period, Plaintiff calculated Heimark's exposure at \$6,500.00. *Id.*

11 Heimark asserts it has strong defenses to the waiting time claim because there exist good-faith
12 disputes as to Plaintiff's underlying claims, precluding imposition of penalties. Nguyen Decl., ¶ 27. *See*
13 *also* 8 Cal. Code Regs. § 13520 (a "good faith dispute that any wages are due will preclude imposition of
14 waiting time penalties"); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that "good faith
15 dispute" over whether employee was exempt precluded imposition of waiting time penalties over
16 contested wages owed). In light of these defenses, Plaintiff discounted the maximum recovery on this
17 claim by 75% to account for the risk that Heimark could prevail in its arguments, to arrive at a projected
18 total of \$1,625.00. *Id.*

19 Based on the sum of the foregoing estimated figures, Plaintiff predicts the realistic total recovery
20 for the Aggrieved Employees to be approximately \$865,115.00. Nguyen Decl., ¶ 28. The proposed
21 settlement of \$232,680.00 therefore represents approximately 27% of the realistic total recovery for
22 Aggrieved Employees and avoids the risks of proceeding through trial. *Id.* "The fact that a proposed
23 settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that
24 the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska*
25 *Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotations omitted). Plaintiff acknowledges
26 that there was substantial uncertainty and risk as to these claims. Approval is appropriate since this
27 settlement will provide tangible, monetary relief to Aggrieved Employees and the State of California.
28

1 **d) The Experience and Views of Counsel**

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

5 Here, Plaintiff’s Counsel collectively brings over four decades of wage-and-hour class and
6 representative action experience. *See* Nguyen Decl., ¶¶ 2-8; Declaration of Paul K. Haines (“Haines
7 Decl.”), ¶¶ 2-7; and Declaration of Scott M. Lidman (“Lidman Decl.”), ¶¶ 2-8. They have been certified
8 as class counsel in numerous cases alleging wage and hour claims. *Id.* Their experience in similar matters
9 was integral in evaluating the strengths and weaknesses of the case against Defendants and the
10 reasonableness of the Settlement. Practice in the narrow field of wage-and-hour litigation requires skill
11 and knowledge concerning the rapidly evolving substantive state and federal law, as well as the procedural
12 law of class and representative action litigation. Because it is reasonable to compensate Plaintiff’s Counsel
13 commensurate with their skill, reputation, and experience, a fee award of one-third of the GSA is
14 reasonable. Other factors show that the amount of fees requested is reasonable. This case involved legal
15 issues regarding the propriety of civil PAGA penalties, an unsettled area of law. Defendants were also
16 represented by respected counsel with extensive wage-and-hour litigation experience. This factor strongly
17 supports settlement approval. *See, Kullar, supra*, 168 Cal.App.4th at 130 (“The court undoubtedly should
18 give considerable weight to the competency and integrity of counsel and the involvement of a neutral
19 mediator in assuring itself that a settlement agreement represents an arm’s length transaction entered
20 without self-dealing or other potential misconduct.”).

21 **C. Requested Award of Attorneys’ Fees/Costs Are Fair and Reasonable**

22 Plaintiff, as the prevailing party in settlement, is entitled to recover attorneys’ fees and costs for
23 these claims. *See* Cal. Labor Code § 2699(g) (“Any employee who prevails in any action shall be entitled
24 to an award of reasonable attorney’s fees and costs.”); Cal. Code of Civil Procedure § 1021.5(a). A fee
25 award is justified where the legal action has produced its benefits by way of a voluntary settlement. *See,*
26 *e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Community for Independent Living, Inc.*
27 *v. Obledo*, 33 Cal.3d 348, 352-53 (1983); *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) (“when a number of
28 persons are entitled in common to a specific fund, and an action brought by a plaintiff...for the benefit of

all results in the creation or preservation of that fund, such plaintiff...may be awarded attorney's fees out of the fund.")

Fee awards of roughly one-third of the settlement fund are routinely awarded in California state and federal courts in class and representative PAGA actions.⁵ Indeed, the California Supreme Court approved the use of the "percentage of fund" method in California. *See Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 506 (2016) ("the percentage of fund method survives in California class action cases..."). This is also consistent with Plaintiff's Counsel's experience in similar wage-and-hour class and PAGA matters. *See* Nguyen Decl., ¶ 28. Here, Plaintiff's Counsel's fee request of \$46,666.66 (one-third of the current GSA) is the same percentage sought in *Laffitte*, and is fair and reasonable based on the percentage of the recovery method.

The California Supreme Court in *Laffitte* also held that trial courts have discretion to assess the reasonableness of fee awards with tools such as the "lodestar cross-check," whereby the trial court calculates counsel's lodestar and determines whether the "lodestar multiplier" needed to bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-06. Under the lodestar method, the court multiplies the number of hours reasonably expended by each attorney or legal staff member by their reasonable hourly rates, then enhances this lodestar figure by a "multiplier" to account for a range of factors. *See Serrano v. Priest* 20 Cal.3d 25, 48-49 (1977).

Lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez, supra*, 162 Cal. App. 4th at 49-50 (approving multiplier of approximately 2.5); *Coalition for L. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (approving multiplier of approximately 12.8). In this case, Plaintiff's Counsel have a lodestar of \$147,847.50 without the use of any multiplier, which is approximately 1.91 times more than the \$77,560.00 fee request. *See* Nguyen Decl., ¶ 32. A general summary showing the number of hours of work performed by each attorney and paralegals is set forth in the Nguyen Declaration filed concurrently herewith. The billing rates used are reasonable in light of the hourly rates identified based on years of experience in the *Laffey* Matrix, submitted concurrently herewith. *Id.*, at ¶ 33, Exh. 3.

⁵ *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008); *see also, In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award); *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).

1 The fee award requested here is justified because it is **lower** than lodestar. Further, the fee award
2 requested here is justified because Plaintiff's Counsel achieved a fair civil penalty recovery for the State
3 and the Aggrieved Employees in an uncertain and risky case, while bearing the substantial burdens of
4 representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v.*
5 *Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency
6 case, significant risk and the absence of supporting precedents, are proper considerations in awarding
7 attorneys' fees). Additionally, Plaintiff's recovery for the State of California and Aggrieved Employees
8 exceeds other PAGA awards approved by courts in California. *See, e.g., Boyd v. Bank of Am. Corp.*, 2014
9 WL 6473804 (C.D. Cal. Nov. 18, 2014) (approving \$18,750 PAGA payment); *Penaloza, supra*, 2013 WL
10 2917624 (average PAGA penalties of \$7.49); *Cabrera, supra*, 2013 WL 1182822 (average PAGA
11 penalties of \$3.33). That Plaintiff's Counsel achieved these results without engaging in a protracted legal
12 battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of
13 the results achieved.

14 As discussed above, this case carried substantial risks on the merits and with respect to the
15 propriety of "stacking penalties" based on a single primary allegation and the Court's authority to reduce
16 an award of PAGA penalties. It is fair and reasonable to account for these risks in compensating Plaintiff's
17 Counsel, as well as the risks involved in undertaking this litigation and expending considerable effort
18 while working on a pure contingency basis.

19 Indeed, since undertaking representation of Plaintiff, Plaintiff's Counsel dedicated substantial
20 resources to this litigation, including expending a total of \$14,522.00 (including costs associated with the
21 instant motion and costs to be incurred through the filing of a final distribution declaration) in actual
22 litigation costs, without receiving any compensation to date. *Nguyen Decl.*, ¶ 38, Exh. 4. Plaintiff's
23 Counsel conducted legal research regarding the merits of Plaintiff's claims, the ability to recover penalties
24 under the PAGA, and Defendant's potential defenses. *Id.* Plaintiff's Counsel also analyzed the data and
25 information produced informally prior to mediation and prepared an exposure analysis on the PAGA
26 penalties. *Id.* Plaintiff's Counsel also expended significant additional effort in preparing subsequent
27 settlement documents, this Motion for settlement approval, and supporting declarations, and will oversee
28 the settlement administration process. *Id.* Given the considerable potential for adverse outcomes in this
case, the contingent risk borne by Plaintiff's Counsel was great. The quality of Plaintiff's Counsel's work,

1 and the efficacy and dedication with which it was performed, should be compensated.

2 Thus, Plaintiff's Counsel submit that the requested fee award is fair, reasonable and adequate and
3 should be approved. Plaintiff's request for reimbursement of actual litigation costs of \$14,522.00
4 (included anticipated costs) is also fair and reasonable. As the evidence submitted herewith shows, all of
5 Plaintiff's litigation costs are documented and reasonably incurred. *See* Nguyen Decl., ¶38, Exh. 4.

6 **D. Notice and Requested Settlement Administration Costs Are Fair and Reasonable**

7 The parties agreed to engage Phoenix Settlement Administrators as the settlement administrator.
8 *See* Settlement, ¶ I.18. Under the Settlement, Parties have agreed to have the proposed Notice of PAGA
9 Settlement and Release ("Notice"), subject to Court approval, be sent with the settlement checks to inform
10 the Aggrieved Employees about the scope of the released claims and their responsibility for any taxes
11 payable on the amount received. The PAGA does not require notice and the Aggrieved Employees do not
12 have the right to opt-out. The Notice which is attached as **Exhibit B** to the Settlement and **Exhibit A** to
13 the [Proposed] Order is only being provided as a courtesy.

14 Phoenix Settlement Administrators shall be responsible for translating and mailing the Notice in
15 both English and Spanish and calculating and distributing the settlement checks, among other duties. The
16 parties have designated \$3,500.00 as settlement administration costs. Settlement, ¶ III.4.c. Phoenix
17 Settlement Administrators quote is attached as **Exhibit F** to the Declaration of Jodey Lawrence on behalf
18 of Phoenix Settlement Administrators in support of Motion for Approval of PAGA Settlement filed
19 concurrently herewith ("Lawrence Decl.").

20 **E. Plaintiff's Requested Enhancement Award is Fair, Adequate, and Reasonable**

21 Courts routinely approve enhancement awards to compensate named Plaintiff for the services they
22 provide and the risks they incur during class and representative litigation. *Cellphone Termination Fee*
23 *Cases*, 186 Cal. App. 5th 1380, 1393-94 (2010) ("These awards 'are discretionary, [citation], and are
24 intended to compensate class representatives for work done on behalf of the class, to make up for financial
25 or reputational risk undertaken in bringing the action, and, sometimes, to *recognize their willingness to*
26 *act as a private attorney general.*'")⁶

27 ⁶ California courts, including many judges in Los Angeles Superior Court, routinely award enhancement payments in PAGA-
28 only, non-class actions. *See Canul v. Basmat, Inc.*, Case No. BC674940, Judge Beaudet of this Court (Dept. 50) approved a
PAGA-only settlement including a \$5,000 enhancement award to the named plaintiff. *See also, Pickett v. 99 Cents Only Stores,*
et al, Case No. BC473038, Judge Hiroshige of this Court (Dept. 54) approved a \$12,500 enhancement payment to each of two
named plaintiffs in a PAGA only settlement.

1 Here, pursuant to the Settlement, Plaintiff seeks \$5,000.00 as an enhancement award. *See*
2 Settlement, ¶ III.4.b. Plaintiff will request the Court award an enhancement award of \$5,000.00 in
3 recognition of his unique contributions to the prosecution of this case and her efforts in bringing this case
4 to a successful and significant resolution. *Id.*; Perez Decl., ¶¶ 3-10. This request is reasonable given
5 Plaintiff's efforts in this case and the risks he undertook on behalf of the Aggrieved Employees. Plaintiff
6 provided substantial factual information to Plaintiff's Counsel, attended numerous meetings with
7 Plaintiff's Counsel and numerous hours expended by his assisting in the litigation of this action. Perez
8 Decl., ¶¶ 3-10. Further, Plaintiff put his future employment prospects at risk by becoming a class
9 representative, as the fact that he filed a lawsuit "is searchable on the internet and may become known to
10 prospective employers when evaluating" them for employment. *Guippone v. BH S&B Holdings, LLC*,
11 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011). Accordingly, Plaintiff's request is
12 appropriate and justified as part of the Settlement.

13 **IV. CONCLUSION**

14 For the reasons stated herein, this Court should grant Plaintiff's Motion in its entirety and adopt
15 the [Proposed] Order and Judgment Granting Plaintiff's Motion for Settlement Approval of Claims
16 Brought Under the Private Attorneys General Act and Reasonable Attorneys' Fees, Costs, and
17 Enhancement Award submitted concurrently herewith.

18
19 Dated: December 28, 2023

Respectfully submitted,
LIDMAN LAW, APC

20
21 By:



Elizabeth Nguyen
Attorneys for Plaintiff
MOISES PEREZ