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

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

Plaintiff,

vs.

RED WING BRANDS OF AMERICA,
INC., a Minnesota corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 22CIV03830

[Assigned for all purposes to the Hon. V. Raymond
Swope, Department 23]

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: August 12, 2024

Time: 3:00 P.M.

Dept.: 23

Action Filed: September 20, 2022

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on August 12, 2024, at 3:00 p.m., before the Honorable
3 V. Raymond Swope, judge presiding, in Department 23 of the above referenced Court, located at
4 400 County Center, Redwood City, CA 94063, Plaintiff Michael Conner (“Plaintiff”) will seek
5 an Order approving the concurrently filed PAGA Settlement Agreement, pursuant to the
6 procedures set forth in Labor Code § 2698, *et seq.*

7 This motion will be based on this notice of motion, the attached memorandum of points
8 and authorities, the accompanying declarations of Larry W. Lee, Max W. Gavron, Kwanporn
9 “Mai” Tulyathan, Christine S. Lee, William L. Marder, and Plaintiff Michael Conner, the records
10 and file herein, and on such other evidence as may be presented at the hearing of the motion.

11
12 DATED: June 14, 2024

DIVERSITY LAW GROUP, P.C.

13
14 By: 

Larry W. Lee

Max W. Gavron

Kwanporn “Mai” Tulyathan

Christine S. Lee

Attorneys for Plaintiff and the Class

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1 **I. INTRODUCTION**

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

6 This lawsuit is premised upon Defendant Red Wing Brands of America, Inc.’s
7 (“Defendant”) alleged violation of California Labor Code § 2698 *et seq.*, the Private Attorneys
8 General Act of 2004 (“PAGA”). Specifically, Plaintiff alleged that Defendant failed to pay meal
9 and rest period premiums and sick pay at the regular rate of pay, failed to pay all wages upon
10 separation of employment, and failed to provide accurate wage statements to employees. Based
11 thereon, Plaintiff sought civil penalties under PAGA on behalf of the State of California and
12 other aggrieved employees.

13 As demonstrated below and in the accompanying Declaration of Max W. Gavron
14 (“Gavron Decl.”), the proposed settlement warrants the Court’s approval. This settlement was
15 reached after investigation and discovery, including informal discovery conducted in connection
16 with the Parties’ settlement negotiations.

17 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will pay
18 the gross amount of \$155,000.00 (the “Gross Settlement Amount”) for the release of PAGA
19 claims in this lawsuit by the aggrieved employees. This amount includes the following:

- 20 • A service payment of \$10,000.00 to Plaintiff, in recognition for his efforts in
21 obtaining the benefits of the settlement on behalf of other aggrieved employees
22 and for Plaintiff’s general release of his claims against Defendant (Agreement ¶
23 V.E);
- 24 • Settlement administration costs of \$4,500.00 to Phoenix Settlement
25 Administrators, the third-party Settlement Administrator to be retained by the
26 Parties for issuing settlement payments to aggrieved employees along with an
27 accompanying Settlement Notice (Agreement ¶¶ I.W, I.X); and
- 28 • Plaintiff’s Counsel’s fees of up to \$51,666.67, and actual litigation costs of

1 \$1,977.23 (Agreement ¶¶ V.A, V.B; Gavron Decl. ¶ 9, Ex. B).

2 After subtracting the settlement administration costs, Plaintiff's Counsel's attorneys' fees
3 and costs, Plaintiff's service award, the remaining amount of \$86,856.10 will be distributed in
4 accordance with PAGA's requirements. Gavron Decl. ¶ 10. Pursuant to the PAGA, 75% of the
5 net settlement amount, or approximately \$65,142.08 will be paid to the California Labor and
6 Workforce Development Agency ("LWDA"), and the remaining \$21,714.03 will be distributed
7 to the Aggrieved Employees. *Id.*

8 The proposed release for the aggrieved employees is narrowly tailored to release only
9 claims for civil penalties under PAGA arising out of the facts alleged or that could have been
10 alleged in this lawsuit and does not release any other claims.

11 Accordingly, the proposed settlement constitutes an adequate, fair, and reasonable
12 settlement on behalf of the LWDA and aggrieved employees and accomplishes the goals of
13 PAGA.

14 **II. PROCEDURAL HISTORY**

15 On or about September 14, 2022, Plaintiff submitted his written notice under Labor Code
16 § 2699.3 (the "PAGA Notice") to the California Labor & Workforce Development Agency
17 ("LWDA") and Defendant. Gavron Decl. ¶ 2, Ex. A (PAGA Letter). As set forth in the PAGA
18 Notice, Plaintiff alleged that Defendant violated Labor Code §§ 201-204, 226, 226.7, 246, and
19 512. *Id.* On October 17, 2022, Defendant filed a letter with the LWDA asserting that it cured the
20 violation of Labor Code § 226(a)(8). On November 15, 2022, the LWDA issued a decision
21 confirming that Defendant cured the violation of Labor Code § 226(a)(8), which pertained to
22 whether Defendant identified the correct name of the legal entity that was the employer. *Id.* ¶ 4.

23 On September 20, 2022, Plaintiff filed a class action complaint against Defendant in the
24 Superior Court of California, County of San Mateo, alleging causes of action for (1) violation of
25 Labor Code § 226.7 and 512; (2) violation of Labor Code §§ 201-204 and 246; (3) violation of
26 Labor Code § 226; and (4) violation of Business and Professions Code § 17200, *et seq.* (the
27 "Action"). *Id.* ¶ 5.

28 On November 28, 2022, Plaintiff filed a First Amended Complaint alleging a single cause

1 of action for violation of Labor Code § 2698, *et seq.*, predicated on underlying violations of
2 Labor Code §§ 201, 204, 226, 226.7, 246, and 512. *Id.* ¶ 6. The First Amended Complaint is the
3 operative complaint.

4 On or about January 13, 2023, Defendant file an answer to the operative complaint,
5 denying all material allegations of the Complaint and asserting affirmative defenses. *Id.*

6 Thereafter, the Parties engaged in informal settlement discussions. *Id.* The Parties
7 exchanged informal discovery, including exchanging information regarding the number of
8 employees who received non-discretionary remuneration and meal period premiums and/or sick
9 pay during the same pay period, which allowed Plaintiff to conduct liability and exposure
10 analysis. *Id.* ¶ 8.

11 Following arm's-length negotiations and discussions between the Parties, during which
12 the Parties spoke at length about the strengths and weaknesses of each side's claims and
13 defenses, and the scope of Defendant's purported liability, the Parties were able to reach an
14 agreement in principle. *Id.* ¶ 9. The Parties then finalized the settlement terms in the concurrently
15 filed Settlement Agreement, a true and correct copy of which is attached to the Declaration of
16 Max W. Gavron. *Id.*, Ex. B. The settlement is the result of informed and non-collusive arm's
17 length negotiations.

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

19 The material terms of the settlement are described below and set forth in detail in the
20 concurrently filed Settlement Agreement.

21 **A. The Aggrieved Employees**

22 The purported aggrieved employees affected by this Settlement, or Allegedly Aggrieved
23 Employees, are defined as "all non-exempt employees employed by Red Wing in the State of
24 California during the PAGA Period who received a meal period premium and/or sick pay wages
25 and non-discretionary remuneration during the same pay period." Agreement ¶ I.C. The PAGA
26 Period in this matter runs from September 14, 2021, through July 15, 2023. *Id.* ¶ I.O. Based upon
27 Defendant's records, there are approximately 244 Allegedly Aggrieved Employees and 2,315
28 pay periods during the PAGA Period. *Id.* ¶ III.A.b. The PAGA Period ends as of July 15, 2023

1 because Defendant has represented that it has remedied the alleged violation as of the close of
2 that pay period. Gavron Decl. ¶ 12.

3 **B. Settlement Sum and Allocation**

4 The Settlement Agreement requires Defendant to pay a total of One Hundred Fifty-Five
5 Thousand Dollars (\$155,000.00) (the “Gross Settlement Amount”). Agreement ¶ I.L. The Gross
6 Settlement Amount is for the release of PAGA claims by Allegedly Aggrieved Employees and
7 the Service Payment to Plaintiff for the general release of his individual claims. *Id.* ¶¶ III.A, V.E.
8 The balance of the Gross Settlement Amount remaining after deduction of the approved
9 Plaintiff’s Counsel’s attorneys’ fees and costs, PAGA Representative Service Payment, and
10 Settlement Administration Costs, in the amount of \$86,856.10, will be available for distribution
11 to the LWDA and Allegedly Aggrieved Employees. *Id.* ¶¶ I.M, I.N; Gavron Decl. ¶ 10. Seventy-
12 five percent (75%) of the net amount, or approximately \$65,142.08, will be paid to the LWDA
13 for PAGA penalties. Agreement ¶ I.M; Gavron Decl. ¶ 10. The remaining twenty-five percent
14 (25%), or approximately \$27,714.03, will be distributed to the Allegedly Aggrieved Employees.
15 Agreement ¶ VI.B, Gavron Decl. ¶ 10.

16 The portion of the Gross Settlement Amount (or Net Employee Fund) distributed to
17 Allegedly Aggrieved Employees will be distributed on a *pro rata* basis, based on the number of
18 pay periods each individual Allegedly Aggrieved Employee was paid meal period premium
19 and/or sick pay wages and non-discretionary remuneration during the same pay period (or
20 Applicable Pay Periods) during the PAGA Period. Agreement ¶¶ I.D, VI.B.b. Defendant
21 represents that there are approximately 244 Allegedly Aggrieved Employees who worked
22 approximately 2,315 Applicable Pay Periods during the PAGA Period. *Id.* ¶ III.A.b. Based on
23 the number of Allegedly Aggrieved Employees, each aggrieved employee will be entitled to
24 recover, on average, approximately **\$88.99** each. Gavron Decl. ¶ 11. The amount any particular
25 Allegedly Aggrieved Employee will be entitled to recover will be greater or lower than this
26 average depending on the number of pay periods during which he or she was paid meal period
27 premium and/or sick pay wages and non-discretionary remuneration during the same pay period.
28 *Id.* This is fair, as it directly allocates greater penalties to individual Allegedly Aggrieved

1 Employees who have allegedly suffered greater harm. *Id.*

2 The Net Employee Fund payments to Allegedly Aggrieved Employees (or Settlement
3 Shares) shall be accompanied by a Settlement Notice that explains the settlement and calculation
4 of the Settlement Share amount. The Settlement Notice also provides contact information for the
5 Settlement Administrator in the event any Allegedly Aggrieved Employee has questions. *See*
6 Agreement ¶ VI.A.b, Ex. A.

7 Funds from uncashed Settlement Share checks will be distributed to the State of
8 California Controller's Office's Unclaimed Property Fund in the name of the individual to whom
9 the funds relate (Agreement ¶ VI.B.c).

10 As part of the Settlement Agreement, Defendant does not object to Plaintiff's Counsel's
11 request for attorneys' fees of \$51,666.67, which is approximately one-third of the Gross
12 Settlement Amount. Agreement ¶ V.B. While the Settlement Agreement provides for
13 reimbursement of documented litigation costs of up to \$7,500.00, Plaintiff's Counsel is only
14 requesting for reimbursement of \$1,977.23 in actual litigation costs. *Id.* ¶ V.A; Gavron Decl. ¶
15 35, Ex. D. Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's
16 request for a Service Payment of \$10,000.00, in recognition for Plaintiff's efforts in obtaining
17 the benefits of the settlement on behalf of other purported aggrieved employees and for
18 Plaintiff's general release of his claims against Defendant. Agreement ¶ V.E.

19 Finally, the Settlement Agreement provides for the payment of the fees and expenses
20 reasonably incurred by the Settlement Administrator. *Id.* ¶ I.W. The Parties have agreed to
21 utilize Phoenix Settlement Administrators to administer the settlement, with the administration
22 costs estimated to be \$4,500.00. *Id.* ¶¶ I.W, I.X; Declaration of Jodey Lawrence ¶ 16; Ex. B.
23 (Phoenix Estimate).

24 **C. Scope of the Released Claims by Allegedly Aggrieved Employees**

25 In exchange for such payments, Plaintiff, the Allegedly Aggrieved Employees, and the
26 State of California will release Defendant from the following:

27 all claims, causes of action, demands, damages, or liabilities arising
28 at any time during the PAGA Period that were pled or which could
have reasonably been pled based on the factual allegations contained

1 in the operative Complaint or any amendments thereto and notice(s)
2 filed with the LWDA, including but not limited to claims brought
3 under the Private Attorneys General Act (“PAGA”) for civil
4 penalties premised on the violation of Labor Code Sections 201,
202, 203, 204, 226, 226.7, 246, and 512, and claims under Labor
Code Sections 226.3 and 1021.5 (the “Released Claims”).

5 *Id.* ¶¶ I.T, VII.A. This release is appropriately tailored as it only releases claims for civil
6 penalties under PAGA arising out of the facts alleged or that could have been alleged in this
7 lawsuit and does not release any other claims. Gavron Decl. ¶ 16. Further, other than Plaintiff,
8 none of the Allegedly Aggrieved Employees are bound by any general release or waiver of the
9 protections of Code of Civil Procedure § 1542 as part of this settlement. Agreement *Id.* ¶¶ I.T,
10 VII.A.

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

12 **A. PAGA Overview**

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

25 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
26 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
27 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
28

1 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
2 employee” means “any person who was employed by the alleged violator and against whom one
3 or more of the alleged violations was committed.” Cal. Lab. Code § 2699, subd. (c). Prior to
4 commencing an action, the allegedly aggrieved employee must provide notice to the LWDA and
5 the employer setting forth the “specific provisions of [the Labor Code] alleged to have been
6 violated, including the facts and theories to support the alleged violation.” Cal. Lab. Code §
7 2699.3, subd. (a)(1). If the LWDA decides not to investigate the allegations or issue a citation to
8 the employer, the proposed representative plaintiff is entitled to commence a PAGA action after
9 65 days. Cal. Lab. Code § 2699.3, subd. (a)(2).

10 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
11 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
12 PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at p. 986. Of the civil
13 penalties recovered, seventy-five percent goes to the LWDA, and the remaining twenty-five
14 percent goes to the “aggrieved employees” for collecting the penalties on behalf of the State. Cal.
15 Lab. Code § 2699, subd. (i); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir.
16 2014) (a PAGA representative’s recovery is “an incentive to perform a service to the state, not
17 restitution for wrongs done to members of the class”).

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

20 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
21 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
22 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
23 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* §
24 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a
25 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
26 and must direct the preparation of notice of the certification, proposed settlement, and date of the
27 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
28 2004). To make the preliminary fairness determination, courts may consider several relevant

1 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
2 duration of further litigation; the risk of maintaining class action status through trial; the amount
3 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
4 the experience and views of counsel....” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
5 Cir. 1998).

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

12 Notably, unlike the class action settlement approval process, there is also no statutory
13 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
14 2699, subd. (1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim,
15 nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
16 settlement, if any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at p. *13.

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

18 As explained above, the release for Allegedly Aggrieved Employees is narrowly tailored
19 to release only claims for civil penalties under PAGA pursuant to Labor Code §§ 201, 202, 203,
20 204, 226, 226.7, 246, and 512, arising out of the facts alleged or that could have been alleged in
21 this lawsuit during the PAGA Period. The release does not impact any Allegedly Aggrieved
22 Employees’ ability to pursue any other claims outside of this scope as it does not release their
23 individual Labor Code claims. Therefore, this limited scope of the release also supports approval
24 of the settlement.

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

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

6 Accordingly, the Allegedly Aggrieved Employees will be subject to only a limited
7 release strictly confined to the violations of PAGA under Labor Code §§ 201, 202, 203, 204,
8 226, 226.7, 246, and 512, and any resulting claim for attorneys’ fees and costs. Agreement ¶ I.T,
9 VII.A, VII.B. The release is therefore appropriately tailored.

10 **D. Plaintiff’s Rationale for Agreeing to the Settlement**

11 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
12 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to
13 sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted
14 PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement
15 capability of the LWDA with private enforcement actions by “aggrieved employees” acting as
16 private attorneys general. *See* 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS*
17 *Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of
18 in the nature of an enforcement action, where the named plaintiff acts as a proxy of the LWDA
19 to collect penalties otherwise recoverable only by the LWDA. *See Arias*, 46 Cal. 4th at 986; *see*
20 *also Iskanian*, 59 Cal. 4th at 381-82. In that role, the named plaintiff “take[s] on a special
21 responsibility to their fellow aggrieved workers who are effectively bound by any judgment.”
22 *See O’Connor*, 201 F. Supp. 3d at 1134.

23 Plaintiff’s claims in this action are based on alleged violations of Labor Code §§ 201,
24 202, 203, 204, 226, 226.7, 246, and 512, and 2698, *et seq.* *See generally* Plaintiff’s Complaint
25 and PAGA notice. When reviewing a settlement agreement, “the test is not the maximum
26 amount plaintiffs might have obtained at trial on the complaint,” *see Wershba v. Apple*
27 *Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the settlement agreement
28 is perfect in the estimation the reviewing court.” *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819

1 (9th Cir. 2012). The test is “whether the settlement is reasonable under all of the
2 circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant considerations include the
3 strength of a plaintiff’s case and the risk, expense, complexity, and likely duration of further
4 litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see also*
5 *Smith*, 2018 WL 1899912 at *2. In PAGA settlements, courts also consider their authority to
6 award less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2);
7 *see also Smith*, 2018 WL 1899912 at *3.

8 Here, Defendant produced data for each of Plaintiff’s claims, which permitted Plaintiff to
9 analyze Defendant’s potential exposure and liability. Gavron Decl. ¶ 17. Defendant’s potential
10 exposure could be as high as \$822,650.00 if the Court were to award a \$100 penalty for each pay
11 period encompassed by the proposed settlement for violations based on failure to pay meal
12 and/or rest break premiums and sick pay at the regular rate and \$250 penalty for each pay period
13 a wage statement was issued that included incentive payments that did not state the rate of pay or
14 corresponding hours worked. *Id.* ¶ 17. Specifically, there were approximately 2,315 pay periods
15 wherein meal and/or rest break premiums and sick pay and non-discretionary remuneration were
16 paid during the same pay period, which amounts to a maximum exposure of \$231,500.00, if the
17 Court were to award \$100 for each alleged violation. *Id.* Plaintiff also contended that this
18 resulted in derivative penalties for violation of Labor Code § 226 because the rate of pay and
19 corresponding hours worked were not displayed accurately as a result of these violations. If the
20 Court were to award, \$250 per violative wage statement, Defendant’s exposure for this claim
21 could be as high as \$578,750.00 (2,315 x \$250). *Id.* Finally, there were 124 former employee
22 aggrieved employees which amounts to a maximum exposure of \$12,400.00 for PAGA penalties
23 predicated on waiting time penalties assessed at \$100 per violation. *Id.*

24 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
25 litigation entails significant risk on the underlying merits of Plaintiff’s theory, in addition to the
26 still-developing law under PAGA. Gavron Decl. ¶ 19. Here, Defendant has denied violation of
27 any applicable laws and liability for any claims asserted in the Action. Gavron Decl. 19.
28 Defendant argued the penalties assessed, if any, would be significantly less than Plaintiff
contends. For one, Defendant argued that Plaintiff could not prevail on his derivative wage

statement theory of liability for several reasons. First, Defendant would have argued that penalties under Section 226 are subject to a “good faith” defense. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional.”). The California Supreme Court also recently approved a good faith defense to the imposition of Section 226 penalties, which further undermines the certainty of recovering these damages even if Plaintiff prevailed on liability. *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024). Even if successful on liability, Defendant argued the appropriate penalty for a violation of Section 226 was \$100, not \$250. *See Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 353-54 (2021) (rejecting *Raines* and holding \$100 is appropriate penalty).

Defendant also argued that even if Plaintiff could show that Defendant paid meal/rest premiums at less than the regular rate of pay, Plaintiff would still have to demonstrate that Defendant did not meet its obligation under the Labor Code and *Brinker* to provide employees a meal period. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed.”). Defendant argued this would preclude imposition of penalties altogether.

Furthermore, Defendant argued that the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its discretion. *Id.*; *see* Labor Code § 2699(e)(2) (“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.”). Should Defendant have prevailed on its defenses whether at summary judgment or at trial, the State of California and purported aggrieved employees would have been left with zero or minimal recovery. *Id.*

Under the circumstances of this case, the payment of \$155,000.00 in civil penalties is fair, adequate, and reasonable. The payment of \$155,000.00 in exchange for a release of only those claims for civil penalties that are pleaded in the Action or that could have been pleaded based on the facts alleged in the PAGA Notice and the PAGA cause of action pleaded in the

1 Action will have a substantial deterrent effect on Defendant and other California employers and
2 will confer benefits on the Aggrieved Employees, who will each receive a portion of the
3 settlement.

4 Numerous courts have held that **gross** settlements approximating between only 8 and
5 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
6 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
7 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash
8 settlement amounting to only a fraction of the potential recovery does not per se render the
9 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
10 be assessed relative to risks of pursuing the litigation to judgment"; noting that whether the
11 settlement is fair and adequate depends on the "the difficulties in proving the case");
12 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
13 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
14 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
15 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
16 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
17 litigation) *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
18 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
19 approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A.,*
20 *Inc.*, No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was
reasonable).

21 In the present case, the Gross Settlement Amount is approximately 18.84% of the
22 maximum exposure (\$155,000/\$822,650.00), which is a very reasonable settlement amount. In
23 sum, this settlement is fair, reasonable, and consistent with PAGA's policies and purposes under
24 these circumstances.

25 **E. The Attorneys' Fees are Reasonable**

26 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
27 2699, subd. (g). Similar to awarding fees in a class action, California state and federal courts
28 have recognized that an appropriate method for determining award of attorneys' fees for

1 representative actions is to use a percentage of the total value of benefits to class members by the
2 settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v.*
3 *Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
4 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this
5 equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
6 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
7 burden alone.” *Vincent*, 557 F. 2d at p. 769.

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

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

1 of a reasonable fee by choosing an appropriate percentage of the fund created.”).

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

10 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
11 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
12 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
13 range, but the court is not necessarily required to make such an adjustment.” *Id.* Thus, a
14 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
15 required; in many cases, performing a cross-check “undermines” one of the primary reasons for
16 using the percentage method: aligning counsel’s incentives with the benefits delivered to the
17 class and discouraging protracted litigation. *Id.* at p. 506 (finding trial courts “retain the
18 discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
19 *Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82
20 Cal. App. 4th 19, pp. 29-30 (2000) (citing the recommendations of the Third Circuit Task Force
21 with approval and observing that “[t]he criticisms of the lodestar approach set forth in this
22 Report are now echoed by many authorities, who have been most vocal about the manner in
23 which it exacerbates the problem of ‘cheap settlements’ and burdens already overworked trial
24 judge”).

25 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
26 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see*
27 *also, e.g., Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying
28 a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix, Inc.*, 162 Cal.

1 App. 4th 43, 60 (2008)(applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland*
2 *v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand).

3 With respect to Plaintiff’s Counsel’s lodestar, to date, approximately 63.9 hours have
4 been expended by Plaintiff’s Counsel this matter. Gavron Decl. ¶ 33, Ex. C; Declaration of
5 Larry W. Lee (“L. Lee Decl.”) ¶ 8, Ex. A; Declaration of William L. Marder (“Marder Decl.”)
6 ¶ __, Ex. __. Plaintiff’s Counsel expects to incur approximately 10 additional hours to handle any
7 post-approval matters and any settlement issues. L. Lee Decl. ¶ 8. Mr. Gavron requests an
8 hourly rate of \$650.00 per hour. Gavron Decl. ¶ 34. Mr. Larry Lee requests an hourly rate of
9 \$850.00 per hour. L. Lee Decl. ¶ 9. The courts are quite liberal in the evidence required to
10 prove an attorney’s hours. Detailed time records are not required. An attorney’s testimony
11 alone may suffice: “Testimony of an attorney as to the number of hours worked on a particular
12 case is sufficient evidence to support an award of attorney fees, even in the absence of detailed
13 time records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

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

19 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
20 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
21 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*,
22 the attorney’s skill and experience, the nature of the work performed, the relevant area of
23 expertise and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61
24 Cal. App. 4th 629, 632-33 (1998).

25 Plaintiff’s Counsel’s skill and experience justify the requested rate. As shown in the
26 supporting declarations, Plaintiff’s Counsel have significant experience in the area of
27 employment and wage and hour class actions. Specifically, Plaintiff’s Counsel’s practice
28 focuses on representing employees in employment matters, particularly wage and hour cases.

1 Gavron Decl. ¶¶ 23-32; L. Lee Decl. ¶¶ 5-7; Declaration of Kwanporn “Mai” Tulyathan
2 (“Tulyathan Decl.”) ¶¶ 4-9; Declaration of Christine S. Lee (“C. Lee Decl.”) ¶¶ 5-7;
3 Declaration of William L. Marder (“Marder Decl.”) ¶¶ 3-8. As such, based on the hours and
4 applicable rate, the total lodestar to be expended by Plaintiff’s Counsel through finalizing this
5 settlement will be approximately \$53,195.00, based on 73.9 total hours. Gavron Decl. ¶ 33; L.
6 Lee Decl. ¶ 8.

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

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

20 Here, based upon Plaintiff’s Counsel’s lodestar of \$53,195.00, Plaintiff’s request for a
21 fee award of \$51,666.67 is more than reasonable and fair. As the Court can see, the lodestar
22 well exceeds the requested fee amount, such that it would result in a negative multiplier (0.97).
23 Based thereon, Plaintiff’s Counsel’s request for attorneys’ fees in the amount of \$51,666.67 is
24 fair and reasonable, and the Court should approve this amount.

25 **F. The Costs are Reasonable**

26 Additionally, Plaintiff’s Counsel’s reimbursement of actual litigation costs in the amount
27 of \$1,977.23 is also reasonable, especially in light of the fact that the Parties agreed that
28 Plaintiff’s Counsel may seek up to \$7,500.00 as reimbursement for litigation costs under the

Settlement Agreement. *See* Agreement ¶ V.A; Gavron Decl. ¶ 35, Ex. D. As set forth in Plaintiff's Counsel's declaration, the costs were all directly incurred in the prosecution of the Action, including, but not limited to, filing and service fees, postage fees, and Court fees. Gavron Decl. ¶ 35. As such, the requested costs are fair and reasonable and should be approved.

G. The Settlement Administrator's Fees Should be Approved

The Parties have agreed to pay actual costs of administration, which are estimated not to exceed \$4,500.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer this settlement. Agreement ¶¶ I.W, I.X. The Parties believe that the administration fee is reasonable and should be approved. Plaintiff submits the Declaration of Jodey Lawrence in support of this Motion detailing Phoenix's experience and quote for administration.

H. Plaintiff's Service Payment Should Be Approved

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

Here, Plaintiff seeks \$10,000.00 for the service award, which is intended to compensate Plaintiff for the time spent on this case, including reviewing pleadings, including his PAGA letter to the LWDA, the complaints, the Settlement Agreement, and his declaration, providing information and documents for this lawsuit and the resulting settlement, and for executing a general release, including for all known and unknown claims under Civil Code § 1542. Declaration of Michael Conner ("Conner Decl.") ¶¶ 8, 9. This requested enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter*.

1 *Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)
2 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
3 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award
4 in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
5 (affirming \$25,000 Incentive award to class representative in ERISA case).

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

7 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the
8 LWDA's website. Gavron Decl. ¶ 36, Ex. E.

9 **V. CONCLUSION**

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

12
13 DATED: June 14, 2024

DIVERSITY LAW GROUP, P.C.

14
15 By: 

Larry W. Lee

Max W. Gavron

Kwanporn "Mai" Tulyathan

Christine S. Lee

Attorneys for Plaintiff and the Class
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