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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HOWARD KINCHERLOW, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

PABCO BUILDING PRODUCTS LLC, a
Nevada limited liability company; and DOES
1 through 100, inclusive,

Defendants.

Case No.: 23STCV07711

[Assigned to Hon. Michael Small, Dept. 57]

**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;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: December 12, 2024
Time: 8:30 a.m.
Department: 57
Reservation ID: 064764038778

Complaint Filed: April 7, 2023
Trial Date: None Set

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

PLEASE TAKE NOTICE that on December 12, 2024 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 57 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Plaintiff Howard Kincherlow (“Plaintiff”), on behalf of himself and all other aggrieved employees, will and hereby does move this Court for entry of an Order as follows:

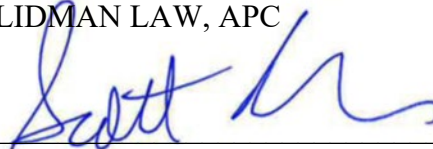
1. Granting approval, pursuant to California Labor Code section 2698 *et seq.*, and specifically Labor Code section 2699(1)(2), of the proposed Settlement of claims brought pursuant to the Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 *et seq.*) and set forth in the Settlement;
2. Appointing Phoenix Settlement Administrators (“Phoenix”) as the Settlement Administrator, and approving an award of \$4,500.00 in anticipated costs to Phoenix for its settlement administration services;
3. Approving the proposed Notice of PAGA Settlement and Release of Claims as to form and content, and directing that it be distributed to the Aggrieved Employees pursuant to the terms of the Settlement;
4. Directing the distribution of the Gross Settlement Amount pursuant to the terms of the Settlement;
5. Approving an award of \$100,000.00, which is one-third of the Gross Settlement Amount in attorneys’ fees to Plaintiff’s Counsel;
6. Approving an award in the amount of \$ \$15,173.35 in actual litigation costs to reimburse Plaintiff’s Counsel;
7. Approving an enhancement award of \$7,500.00 to Plaintiff for his release of claims and service to the Aggrieved Employees and the State of California;
8. Approving the payment of \$129,619.99 to the California Labor & Workforce Development Agency for its share of PAGA civil penalties; and
9. Approving the payment of \$43,206.66 to the Aggrieved Employees on a *pro rata* basis based on number of pay periods worked during the relevant time period.

1 This Motion is based on this Notice, the attached Memorandum of Points and Authorities; the
2 declarations of Scott M. Lidman, Milan Moore, Tiara Gose-Hardy, Plaintiff Howard Kincherlow, and
3 Jodey Lawrence on behalf of Phoenix and the exhibits attached thereto, the pleadings and other papers
4 filed in this action, and on any further oral or documentary evidence or argument presented at the time
5 of hearing.

6
7 Dated: November 12, 2024

Respectfully Submitted,
LIDMAN LAW, APC

8
9 By:



Scott M. Lidman
Attorneys for Plaintiff
HOWARD KINCHERLOW

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Howard Kincherlow (“Plaintiff”), an “Aggrieved Employee” under the California Labor
4 Code § 2698 *et seq.* (“PAGA”), respectfully requests this Court grant approval of the Settlement¹ with
5 PABCO Building Products, LLC (“Defendant”) pursuant to Labor Code section 2699(1)(2). This PAGA
6 action is based on Defendant’s alleged failure to pay all wages owed and failure to provide meal and rest
7 periods to its current and former employees in California who worked for Defendant as hourly, non-
8 exempt employees, pursuant to various sections of the Labor Code. This PAGA action seeks civil
9 penalties on behalf of the California Labor & Workforce Development Agency (“LWDA”) and all
10 “Aggrieved Employees,” defined in the Settlement as “all current and former hourly, non-exempt
11 employees of Defendant PABCO Building Products, LLC who worked in California at any time from
12 January 31, 2022 through the date the Court grants approval of this settlement.”

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

19 This proposed PAGA Settlement obligates Defendant to pay a **non-reversionary** Gross
20 Settlement Amount (“GSA”) of \$300,000.00. After deducting amounts for requested attorneys’ fees
21 (one-third of the GSA, \$100,000.00), costs incurred by Plaintiff’s counsel (\$15,173.35), an enhancement
22 award for Plaintiff (\$7,500.00), and settlement administration costs (\$4,500.00) to Phoenix Settlement
23 Administrators, the Settlement provides for distribution of civil penalties in the amount of \$172,826.65.
24 Pursuant to Labor Code section 2699(i), 75% of \$172,826.65 (or \$129,619.99) will be distributed to the
25 LWDA and 25% of \$172,826.65 (or \$43,206.66) will be distributed to the Aggrieved Employees on a
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27 ¹ The PAGA Settlement Agreement (“Settlement”) is attached to the Declaration of Scott M. Lidman as Exhibit 2.
28 The Proposed Notice of PAGA Settlement and Release of Claims is attached to the Settlement as Exhibit A. All
defined terms in this Motion have the same definitions as used in the Settlement.

1 *pro rata* basis. The amounts requested for attorneys’ fees and costs, Plaintiff’s enhancement award, and
2 settlement administration costs are fair, adequate, and reasonable, particularly in light of the recovery
3 obtained. Because there are approximately 251 Aggrieved Employees, the average individual payment
4 to each Aggrieved Employee is estimated to be approximately \$172 (and will vary based on an
5 employee’s actual number of pay periods worked during the relevant time period).

6 The GSA of \$300,000.00 represents a fair and reasonable recovery for the State of California and
7 Aggrieved Employees considering the limited scope and time period of the release. The release in the
8 Settlement does *not* impact any underlying Labor Code claims any of the Aggrieved Employees may
9 have. Further litigation may have resulted in a smaller recovery or even no recovery at all based on the
10 defenses asserted by Defendant and given the significant litigation risks involved.

11 In light of the foregoing, this Court should enter the [Proposed] Order and Judgment granting
12 approval of the Settlement submitted concurrently herewith.

13 **II. SUMMARY OF THE LITIGATION**

14 **A. The Parties**

15 Defendant is in the business of manufacturing various paper-related products through their various
16 divisions, including PABCO Paper, PABCO Roofing, PABCO Gypsum, and QuietRock. *See* Declaration
17 of Scott M. Lidman (“Lidman Decl.”), ¶ 10. Plaintiff, a former non-exempt Lab Technician, was
18 employed by Defendant from approximately 2021 through approximately January 2023. *See* Declaration
19 of Howard Kincherlow (“Kinchelrow Decl.”), ¶ 3.

20 **B. Procedural History**

21 On January 31, 2023, Plaintiff sent a written notice pursuant to Labor Code section 2698 *et seq.*
22 to the Labor Workforce Development Agency (“LWDA”) and Defendant asserting claims for civil
23 penalties pursuant to the California Labor Code Private Attorney General Act, Labor Code section 2698,
24 *et seq.* (“PAGA) stemming from Defendant’s failure to pay all wages and provide meal and rest periods
25 to all hourly, non-exempt employees. Lidman Decl., ¶¶ 11; Exh. 1.

26 On April 7, 2023, Plaintiff filed the operative complaint in this action which asserted a sole claim
27 for civil penalties pursuant to California Labor Code Private Attorney General Act, Labor Code section
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2698, *et seq.* (“PAGA) stemming from Defendant’s alleged violations of the California Labor Code set forth in the LWDA notices – namely, the failure to pay all wages owed and failure to provide meal and rest periods, in violation of the Labor Code. Lidman Decl., ¶ 12.

A copy of this motion, including the settlement agreement, has been submitted to the California Labor Workforce Development Agency (“LWDA”) on the same date that Plaintiff filed this motion. *Id.* at ¶ 39, Exh. 6.

C. Informal Discovery, Mediation, and Arms-Length Negotiations

After agreeing to participate in a private mediation, Defendant informally produced to Plaintiff information and documents pertaining to Plaintiff and other Aggrieved Employees, including the metrics regarding the number of allegedly aggrieved employees and number of relevant pay periods, as well as its personnel manuals. Lidman Decl., ¶ 13. After the detailed review of the information and documents produced by Defendant, Plaintiff’s Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff’s claims and determine if a settlement could be reached. *Id.*

On July 16, 2024, the Parties participated in mediation with Kevin Barnes, a well-respected wage and hour class and representative action mediator. Lidman Decl., ¶ 14. During mediation, the Parties vigorously debated their opposing legal positions and the likelihood of Plaintiff’s ability to proceed on a representative basis and ultimately obtain a judgment in his favor. *Id.* Ultimately, the Parties reached a settlement, the terms of which were subsequently finalized in writing after mediation. Lidman Decl., ¶ 14, Exh. 2.

III. ARGUMENT

A. Standard For Approval of A PAGA Settlement

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

In evaluating the adequacy of the settlement amount, the Court’s focus is not concerned with the

1 amount(s) that “aggrieved employees” are to receive, but rather, must focus on the total settlement
2 amount in achieving PAGA’s objective. Indeed, “[t]he remedy sought in a PAGA suit consists of civil
3 penalties, not individual or class damages.” *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 (E.D.
4 Cal. Jul. 1, 2010) at *4. “Unlike class actions, these civil penalties are not meant to compensate unnamed
5 employees because the action is fundamentally a law enforcement action.” *Ochoa-Hernandez v. Cjaders*
6 *Foods, Inc.*, 2010 WL 1340777 at *4 (N.D. Cal. Apr. 2, 2010). Moreover, while “[a PAGA] action is
7 ... designed to protect the public and penalize the employer for past illegal conduct” (*Mendez*, 2010 WL
8 2650571 at *4), a reviewing Court must take into account the fact that settlement of a PAGA claim – like
9 any settlement – involves a “compromise” that stops short of rendering findings of liability and damages.

10 The Court must not lose sight of the fact that “[u]nlike a class action seeking damages or
11 injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover
12 civil penalties for the government that otherwise may not have been assessed and collected by
13 overburdened state enforcement agencies.” *Ochoa-Hernandez*, at *4.

14 Second, consistent with the fact that unnamed employees have no property interest in a PAGA
15 claim,² “[u]nnamed employees need not be given notice of the PAGA claim, nor do they have the ability
16 to opt-out of the representative PAGA claim.” *Ochoa-Hernandez* at *5.

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

19 California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v. Superior*
20 *Court* 62 Cal.App.3d 231, 236 (1976). To be approved, a settlement must be “fair, reasonable and
21 adequate to all concerned.” *Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012). The
22 Court’s role in evaluating a proposed settlement is limited to ensuring that the agreement taken as a whole
23 is fair and is not the product of fraud or collusion between the negotiating parties. *See, e.g., Hanlon,*
24 *supra*, 150 F.3d at 1027. There is an initial presumption of fairness when the settlement agreement was

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26 ² As held by the California Supreme Court, “[t]he Labor Code Private Attorneys General Act of 2004 does not
27 create property rights or any other substantive rights” as “[i]t is simply a procedural statute allowing an aggrieved
28 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 negotiated at arm's length by experienced counsel. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th
2 116, 130 (2008).

3 Here, the GSA secured by Plaintiff is greater than other PAGA penalty awards approved as
4 reasonable within California state courts, which often range between \$7,500.00 and \$15,000.00 for
5 PAGA claims impacting hundreds or thousands of individuals, resulting in much lower PAGA penalty
6 payments on a per person basis. *See, e.g., Penaloza v. PPG Industries Inc.*, Case No. BC471369, 2013
7 WL 2917624 at *2 (Super. Ct. L.A. County, May 20, 2013) (approving PAGA penalties of \$5,000.00 to
8 class of 667 members); *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013 WL
9 1182822 (Super. Ct. L.A. County, March 12, 2013) (approving PAGA penalties of \$10,000.00 for class
10 of approximately 3,000 members).

11 Specifically, many other suitable seating PAGA cases have settled for a pay period rate that is
12 similar to or lower than the \$32.72 at issue herein, including the following: *DeLaCruz v. Dollar Tree*,
13 Los Angeles County Superior Court, December 2018 (\$0.40/pay period); *Hanna v. ULTA Salon*,
14 Sacramento County Superior Court, August 2023 (\$1.99/pay period); *Teng v. Nordstrom*, Central District
15 of California, January 2018 (\$2.72/pay period); *Enombang v. Target*, Alameda County Superior Court,
16 June 2018 (\$4.64/pay period); *Sharp v. Safeway, Inc.*, Santa Clara County Superior Court, October 2019
17 (\$4.90/pay period); and *McDermott v. Albertson's*, Orange County Superior Court, May 2019 (\$5.00/pay
18 period).

19 Because this Settlement is fair, adequate, and reasonable, Plaintiff respectfully requests that the
20 Court approve the Settlement.

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

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

27 [T]he strength of Plaintiff's case, the risk, expense, complexity and likely
28 duration of further litigation, the risk of maintaining class action status

1 through trial, the amount offered in settlement, the extent of discovery
2 completed and the stage of the proceedings, the experience and views of
3 counsel, the presence of a governmental participant, and the reaction of the
4 class members to the proposed settlement.

Dunk, 48 Cal.App.4th at 1801.³

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

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

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

22 Aggrieved Employees are defined as, “all current and former hourly, non-exempt employees of
23 Defendant PABCO Building Products, LLC who worked in California at any time from January 31, 2022
24 through the date the Court grants approval of this settlement.” *See* Lidman Decl., ¶ 17, Exh. 2
25 (Settlement, Sec. I.2.). The Aggrieved Employees, including Plaintiff, worked a total of 9,166 pay
26 periods during the period of January 31, 2022 through July 16, 2024 (the date of mediation). *See* Lidman
27 Decl., Exh. 2 (Settlement, Sec. III.3.).

28 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.

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ii. Essential Terms of The Settlement

This Settlement provides for Defendant to pay a Gross Settlement Amount of \$300,000.00. Lidman Decl., Exh. 2 (Settlement, Sec. II.2.). After deducting amounts for requested attorneys' fees, attorneys' costs, Plaintiff's requested enhancement award, and settlement administration costs, the Settlement provides for distribution of the remaining Net Settlement Amount ("NSA") to Aggrieved Employees and the LWDA distributed as follows: 75% to the LWDA and 25% to Aggrieved Employees pursuant to Labor Code 2699(i). Lidman Decl., Exh. 2 (Settlement, Sec. III.5.).

Gross Settlement Amount:	\$300,000.00⁴
Minus Court-approved attorneys' fees (1/3):	\$100,000.00
Minus Court-approved attorneys' costs:	\$15,173.35
Minus Court-approved enhancement award:	\$7,500.00
Minus settlement administrator costs:	\$4,500.00
Net Settlement Amount:	\$172,826.65

Net Settlement Amount:	\$172,826.65
75% to LWDA	\$129,619.99
25% to Aggrieved Employees	\$43,206.66

Lidman Decl., ¶ 15.

The payment of the GSA shall be made within 30 calendar days of the "Effective Date" defined as the date upon entry of an Order by the Court approving the Settlement. *See* Lidman Decl., ¶ 16, Exh. 2 (Settlement, Sec. III.2.). Within ten (10) business days of the Effective Date, Defendant shall provide the Settlement Administrator with information for Aggrieved Employees in order to calculate and distribute checks to Aggrieved Employees. *See id.* (Settlement, ¶ IV.2). Within seven (7) business days of receiving the Aggrieved Employees' information from Defendant, the Settlement Administrator will circulate to counsel for both Parties an anonymized spreadsheet containing the estimated individual settlement payments to each Aggrieved Employee and the data used to calculate such payments. *Id.* The Settlement Administrator shall also determine whether the Escalator Clause in Section III.3 of the

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⁴ Based on its records, Defendant estimates that, as of July 16, 2024, there were 9,166 PAGA Pay Periods during the PAGA Period. In the event that the final number of PAGA Pay Periods during the PAGA Period exceeds 10,081 PAGA Pay Periods, Defendant agrees to increase the GSA on a proportional basis equal to the percentage increase in the number of pay periods worked by the PAGA Period above the 10%. *See* Lidman Decl., ¶ 17, fn.6, Exh. 2 (Settlement, Sec. III.3).

Settlement has been triggered. *Id.* Within two (2) business days of receiving the Parties' approval, the Settlement Administrator shall mail copies of the explanatory letter to all Aggrieved Employees with their checks. Settlement, Sec. III.3. Any checks remaining uncashed for more than 180 days will be tendered to the State Controller's Office under the unclaimed property fund laws in the names of the Aggrieved Employees to whom the checks were issued. Settlement, Sec. IV.4.

iii. Payment to the LWDA and Aggrieved Employees

The entire NSA shall be designated as PAGA civil penalties. Of the NSA, 75% of the NSA will be distributed to the LWDA and 25% will be distributed to the Aggrieved Employees pursuant to Labor Code § 2699(i). Based on these distributions, the amount to be paid to the LWDA will be \$129,619.99 and the amount paid to Aggrieved Employees is estimated to be \$43,206.66. Lidman Decl., ¶ 16. This portion of the NSA shall be paid to all Aggrieved Employees pro rata based on the proportional number of pay periods worked by each Aggrieved Employee during the PAGA Period and **will be reported on an IRS Form 1099**. Lidman Decl., Exh. 2 (Settlement, Sec. IV.3.). The average payment to an Aggrieved Employee is estimated to be \$172.13. Lidman Decl., ¶ 16.

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

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

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

Here, Aggrieved Employees' claims arise from Defendant's failure to pay all wages owed and failure to provide meal and rest periods. Lidman Decl., ¶ 18. Although he maintains that the PAGA action is meritorious, Plaintiff acknowledges that his position includes real risks and uncertainty, especially in the face of Defendant's numerous defenses on the merits discussed below. While Plaintiff maintains he could rebut these defenses, Plaintiff nonetheless faced several substantial challenges in

prevailing in this matter, and this risk factor weigh in favor of approving the Settlement. Plaintiff estimates Defendant's realistic exposure, based on these defenses and risks, as follows:

Civil Penalties Owed for Unpaid Time Due to Rounding and/or Overtime: Plaintiff alleges that Defendant rounded his and other Aggrieved Employees' time records. Lidman Decl., ¶ 19. Plaintiff alleges that Defendant maintained a uniform policy or practice of failing to accurately record all time worked by Plaintiff and other Aggrieved Employees, unlawfully shaving the work time and/or rounding work time such that Plaintiff and other Aggrieved Employees were not fully paid for all time worked. *Id.* Plaintiff further alleges that Defendant rounded time worked for its non-exempt employees up to approximately August 2023 and was in violation of California law because the rounding predominately favored Defendant. *Id.* Plaintiff contends that the aforementioned alleged violations occurred in each and every pay period during the relevant time period, which is approximately 8,825 pay periods. *Id.* Accordingly, pursuant to Labor Code section 1198 and the default penalties set forth in the PAGA, Plaintiff calculated Defendant's exposure at \$882,500 (8,825 x \$100 initial violation). *Id.*

Defendant contends that it compensated Aggrieved Employees for all of their time worked. Lidman Decl., ¶ 20. Defendant also contends that its rounding practices were lawful, and any unpaid time was *de minimis* and therefore non-compensable. *Id.*

In light of these defenses and Defendant's argument that the Court would exercise its discretion to reduce any civil penalty due to its good faith efforts to comply with applicable law, Plaintiff discounted the maximum recovery on this claim by 60% to account for the risk that Defendant could prevail in its defenses, to arrive at a projected total of approximately \$353,000. Lidman Decl., ¶ 20.

Civil Penalties Owed for Meal Period Violations: Plaintiff alleges that he and other Aggrieved Employees were not provided all meal periods due to Defendant's meal period policies and practices. Lidman Decl., ¶ 21. Specifically, first meal periods took place after the fifth hour of work and were oftentimes short, interrupted, missed, or otherwise unlawful. *Id.* Further, Plaintiff alleges that Defendant did not require its non-exempt employees to clock in and out for their meal periods, and instead unlawfully and automatically deducted thirty minutes from Plaintiff's and other Aggrieved Employees' work time each shift for a purported meal period regardless of whether or not a meal period was taken and regardless of whether the meal period, if taken, was less than 30 minutes in length. *Id.* Therefore, pursuant to Labor Code section 226.7 and the default penalties set forth in the PAGA, Plaintiff calculated

1 Defendant's exposure at \$672,600. *Id.*

2 Defendant counters that it has always provided non-exempt employees with an opportunity to
3 take legally compliant meal periods, and any non-compliant meal periods reflected in employee
4 timekeeping records were solely the result of employee choice, rather than any policy or practice of
5 Defendant. Lidman Decl., ¶ 22. Defendant points out that under *Brinker Restaurant Corp. v. Superior*
6 *Court* (2012) 53 Cal. 4th 1004, it is only required to "provide" the opportunity to take meal periods, not
7 "ensure" meal periods are taken, and that it has always done so. *Id.*; *See Brinker, supra*, 53 Cal.4th at
8 1038 (rejecting "ensure" standard).

9 In light of these defenses and Defendant's argument that the Court would exercise its discretion
10 to reduce any civil penalty due to its good faith efforts to comply with applicable law, Plaintiff discounted
11 the maximum recovery on this claim by 65% to account for the risk that Defendant could prevail in its
12 defenses, to arrive at a projected total of approximately \$235,410. Lidman Decl., ¶ 22.

13 Civil Penalties Owed for Rest Period Violations: Plaintiff alleges that he and other Aggrieved
14 Employees were not authorized and permitted to take all required rest periods due to Defendant's policies
15 and practices and heavy work demands. Lidman Decl., ¶ 23. Pursuant to Labor Code section 226.7 and
16 the default penalties set forth in the PAGA, Plaintiff calculated Defendant's exposure at \$881,800. *Id.*

17 Defendant contends it has always maintained and enforced lawful rest period policies and
18 practices, and that hourly, non-exempt employees were authorized and permitted to take all off-duty rest
19 periods in compliance with California law. Lidman Decl., ¶ 24.

20 In light of these defenses and Defendant's argument that the Court would exercise its discretion
21 to reduce any civil penalty due to its good faith efforts to comply with applicable law, Plaintiff discounted
22 the maximum recovery on this claim by 75% to account for the risk that Defendant could prevail in its
23 defenses, to arrive at a projected total of approximately \$220,450. Lidman Decl., ¶ 24.

24 Civil Penalties Owed for Wage Statement Violations: Plaintiff alleges that Defendant issued
25 inaccurate wage statements in violation of Labor Code § 226 as a result of the alleged unpaid minimum
26 wages, overtime wages, and meal and rest period premium wages described above. Lidman Decl., ¶ 25.
27 Plaintiff's data analysis reflected that there were approximately 8,825 wage statements issued during the
28 relevant time period. *Id.* Accordingly, pursuant to Labor Code section 226 and the default penalties set
forth in the PAGA, Plaintiff calculated Defendant's exposure at \$882,500 (8,825 x \$100 initial violation).

1 *Id.*

2 Defendant argues that its alleged wage statement violations could not be shown to be “knowing
3 and intentional,” and that Plaintiff cannot show that he or any other employee “suffer[ed] injury” as a
4 result of the alleged wage statement violations, as required by Lab. Code § 226(e) for imposition of
5 penalties. Lidman Decl., ¶ 26.

6 In light of these defenses and Defendant’s argument that the Court would exercise its discretion
7 to reduce any civil penalty due to its good faith efforts to comply with applicable law, Plaintiff discounted
8 the maximum recovery on this claim by 85% to account for the risk that Defendant could prevail in its
9 defenses, to arrive at a projected total of approximately \$132,375. Lidman Decl., ¶ 26.

10 Civil Penalties Owed for Waiting Time Penalties: Plaintiff alleges that as a result of failing to pay
11 all wages and all meal and rest period premium at the end of employment, Defendants are liable for
12 waiting time penalties under Labor Code § 203. Lidman Decl., ¶ 27. There are 268 former employees
13 and as such, Plaintiff calculated Defendants’ maximum exposure for waiting time penalties to be
14 approximately \$26,800. *Id.*

15 Defendant asserts it has strong defenses to the waiting time claim because there exist good-faith
16 disputes as to Plaintiff’s underlying claims, precluding imposition of penalties. Lidman Decl., ¶ 28; *See*
17 *also* 8 Cal. Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition
18 of waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that “good
19 faith dispute” over whether employee was exempt precluded imposition of waiting time penalties over
20 contested wages owed).

21 In light of these defenses and Defendant’s argument that the Court would exercise its discretion
22 to reduce any civil penalty due to its good faith efforts to comply with applicable law, Plaintiff discounted
23 the maximum recovery on this claim by 40% to account for the risk that Defendant could prevail in its
24 defenses, to arrive at a projected total of approximately \$16,080. Lidman Decl., ¶ 28.

25 The proposed settlement of \$300,000.00 therefore represents approximately 31.33% of the
26 realistic total recovery for Aggrieved Employees and avoids the risks of proceeding through trial.
27 Lidman Decl., ¶ 29. “The fact that a proposed settlement may only amount to a fraction of the potential
28 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should

1 be disapproved.” *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal
2 quotations omitted). Plaintiff acknowledges that there was substantial uncertainty and risk as to his
3 claims of Labor Code violations. Approval is appropriate since this settlement will provide tangible,
4 monetary relief to Aggrieved Employees and the State of California.

5 **d) Experience and Views of Counsel**

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

9 Here, Plaintiff’s Counsel collectively brings over four decades of wage-and-hour class and
10 representative action experience. *See* Lidman Decl., ¶¶ 2-8; Declaration of Milan Moore (“Moore
11 Decl.”), ¶¶ 2-4; and Declaration of Tiara Gose-Hardy (“Hardy Decl.”), ¶¶ 2-7. They have been certified
12 as class counsel in numerous cases alleging wage and hour claims. *Id.* Their experience in similar matters
13 was integral in evaluating the strengths and weaknesses of the case against Defendant and the
14 reasonableness of the Settlement. Lidman Decl., ¶ 31. Practice in the narrow field of wage-and-hour
15 litigation requires skill and knowledge concerning the rapidly evolving substantive state and federal law,
16 as well as the procedural law of class and representative action litigation. *Id.* Because it is reasonable to
17 compensate Plaintiff’s Counsel commensurate with their skill, reputation, and experience, a fee award of
18 one-third of the GSA is reasonable. Other factors show that the amount of fees requested is reasonable.
19 Lidman Decl., ¶¶ 34-35. This case involved legal issues regarding the propriety of civil PAGA penalties,
20 an unsettled area of law. Defendant was also represented by respected counsel with extensive wage-and-
21 hour litigation experience. This factor strongly supports settlement approval. *See, Kullar, supra*, 168
22 Cal.App.4th at 130 (“The court undoubtedly should give considerable weight to the competency and
23 integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement
24 agreement represents an arm’s length transaction entered without self-dealing or other potential
25 misconduct.”).

26 //

C. Requested Award of Attorneys' Fees/Costs Are Fair and Reasonable

Plaintiff, as the prevailing party in settlement, is entitled to recover attorneys' fees and costs for these claims. *See* Cal. Labor Code § 2699(g) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs."); Cal. Code of Civil Procedure § 1021.5(a). A fee award is justified where the legal action has produced its benefits by way of a voluntary settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Community for Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983); *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) ("when a number of 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. Lidman Decl., ¶¶ 34-35. Here, Plaintiff’s Counsel’s fee request of \$100,000.00 (one-third of the 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).

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).

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 \$137,065.00 without the use of any multiplier, which is **more** than the \$100,000.00 fee request. *See* Lidman Decl., ¶ 24. A general summary showing the number of hours of work performed by each attorney and paralegals is set forth in the Lidman 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. Lidman Decl., ¶ 32, Exh. 4.

Name	Rate	Hours	Pre-Multiplier Lodestar
Scott M. Lidman (26 th Year Attorney)	\$900	93.9	\$84,510.00
Milan Moore (9 th Year Attorney)	\$600	60.7	\$36,420.00
Tiara Gose-Hardy (6 th Year Attorney)	\$525	23.7	\$12,442.50
Paralegals	\$175	21.1	\$3,692.50
Total Lodestar			<u>\$137,065.00</u>

The fee award requested here is justified because it is **lower** than lodestar. Further, the fee award requested here is justified because Plaintiff's Counsel achieved a fair civil penalty recovery for the State and 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). Additionally, Plaintiff's recovery for the State of California and Aggrieved Employees exceeds other PAGA awards approved by courts in California. *See, e.g., Boyd v. Bank of Am. Corp.*, 2014 WL 6473804 (C.D. Cal. Nov. 18, 2014) (approving \$18,750 PAGA payment); *Penaloza, supra*, 2013 WL 2917624 (average PAGA penalties of \$7.49); *Cabrera, supra*, 2013 WL 1182822 (average PAGA penalties of \$3.33). That Plaintiff's Counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of the results achieved.

1 As discussed above, this case carried substantial risks on the merits. It is fair and reasonable to
2 account for these risks in compensating Plaintiff's Counsel, as well as the risks involved in undertaking
3 this litigation and expending considerable effort while working on a pure contingency basis.

4 Indeed, since undertaking representation of Plaintiff, Plaintiff's Counsel dedicated substantial
5 resources to this litigation, including expending a total of \$15,173.35 (including costs associated with the
6 instant motion) in actual litigation costs, without receiving any compensation to date. Lidman Decl., ¶
7 37, Exh. 5. Plaintiff's Counsel conducted legal research regarding the merits of Plaintiff's claims, the
8 ability to recover penalties under the PAGA, and Defendant's potential defenses. *Id.* Plaintiff's Counsel
9 spent significant time reviewing and analyzing the data and information Defendant produced informally
10 prior to mediation and prepared an exposure analysis on the PAGA penalties. *Id.* Plaintiff's Counsel
11 expended significant additional effort in preparing subsequent settlement documents, this Motion for
12 settlement approval, and supporting declarations, and will oversee the settlement administration process.
13 *Id.* Given the considerable potential for adverse outcomes in this case, the contingent risk borne by
14 Plaintiff's Counsel was great. Lidman Decl., ¶ 36. The quality of Plaintiff's Counsel's work, and the
15 efficacy and dedication with which it was performed, should be compensated.

16 Thus, Plaintiff's Counsel submit that the requested fee award is fair, reasonable and adequate and
17 should be approved. Plaintiff's request for reimbursement of litigation costs in the amount of \$15,173.35
18 is also fair and reasonable. As the evidence submitted herewith shows, all of Plaintiff's litigation costs
19 are documented and reasonably incurred. *See* Lidman Decl., ¶ 37, Exh. 5.

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

21 The parties agreed to engage Phoenix Settlement Administrators ("Phoenix") as the settlement
22 administrator. Lidman Decl., Exh. 2 (Settlement, Sec. I.18.). Under the Settlement, Parties have agreed
23 to have the proposed Notice of PAGA Settlement and Release ("Notice"), subject to Court approval, be
24 sent with the settlement checks to inform the Aggrieved Employees about the scope of the released claims
25 and their responsibility for any taxes payable on the amount received. The PAGA does not require notice
26 and the Aggrieved Employees do not have the right to opt-out. Settlement, Sec. IV.3. The Notice which
27
28

1 is attached as Exhibit A to the Settlement and Exhibit A to the [Proposed] Order is only being provided
2 as a courtesy.

3 Phoenix shall be responsible for translating and mailing the Notice in English and Spanish, and
4 calculating and distributing the settlement checks, among other duties. Settlement, Sec. IV.3. The parties
5 have designated \$4,500.00 as settlement administration costs. Settlement, Sec. III.4.c. Phoenix's quote
6 is attached as Exhibit F to the Declaration of Jodey Lawrence on behalf of Phoenix in support of Motion
7 for Approval of PAGA Settlement filed concurrently herewith.

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

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

15 Here, pursuant to the Settlement, Plaintiff seeks an enhancement/general release payment of
16 \$7,500.00. *See* Lidman Decl., ¶38, Exh. 2 (Settlement, Sec. III.4.b.). Plaintiff will request the Court
17 award this payment in recognition of his unique contributions to the prosecution of this case and his
18 efforts in bringing this case to a successful and significant resolution. Lidman Decl., ¶38; Kincherlow
19 Decl., ¶¶ 8-11. This request is reasonable given Plaintiff's efforts in this case and the risks he undertook
20 on behalf of the Aggrieved Employees. Plaintiff provided substantial factual information to Plaintiff's
21 Counsel, attended meetings with Plaintiff's Counsel, and otherwise assisted in the litigation of this action.
22 *Id.* Further, Plaintiff put his future employment prospects at risk by becoming a representative, as the
23

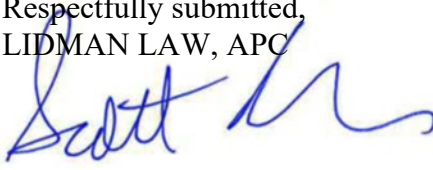
24 ⁶ California courts routinely award enhancement payments in PAGA-only, non-class actions. *See Canul v. Basmat,*
25 *Inc.*, LA County Case No. BC674940, Judge Beaudet (Dept. 50) (approved a PAGA-only settlement including a
26 \$5,000 enhancement award to the named plaintiff); *Pickett v. 99 Cents Only Stores, et al*, LA County Case No.
27 BC473038 (Judge Hiroshige (Dept. 54) approved a \$12,500 enhancement payment to each of two named plaintiffs
28 in a PAGA only settlement); *Vargas v. JTS Modular, Inc.*, Kern County Case No. BCV-20-100645-JEB (Judge
Bradshaw approved a \$7,500 enhancement in a PAGA only settlement); *Johnson v. DCH*, Ventura County Case
No. 56-2018-00510579-Cu-OE-VTA (Judge Kellegrew approved \$12,000 enhancements to each of three named
plaintiffs in a PAGA only settlement).

fact that he filed a lawsuit “is searchable on the internet and may become known to prospective employers when evaluating” them for employment. *Id.*; *Guippone v. BH S&B Holdings, LLC*, 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011). Accordingly, Plaintiff’s request is appropriate and justified as part of the Settlement.

IV. CONCLUSION

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

Dated: November 12, 2024

Respectfully submitted,
LIDMAN LAW, APC

By: _____
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HOWARD KINCHERLOW