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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SUTTER

LIANA BOYD, individually, and on behalf of all others similarly situated, Plaintiff, vs. FLAX HOLDINGS, LLC, a limited liability company; and DOES 1 through 10, inclusive, Defendants.	Case No.: CVCS25-0001907 <u>REPRESENTATIVE ACTION</u> **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT** [Filed with (1) the Declaration of Kane Moon, (2) the Declaration of Plaintiff, (3) the Declaration of Jodey Lawrence, (4) [Proposed] PAGA Approval Order, and (5) [Proposed] Judgment] <u>PAGA APPROVAL HEARING</u>: Date: September 14, 2026 Time: 9:00 a.m. Dept.: 1 Judge: Honorable Tahmina Morrow Action filed: August 4, 2025 Trial date: Not set

TO THIS HONORABLE COURT, TO ALL PARTIES, AND TO COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 14, 2026, at 9:00 a.m. in Department 1 of the Sutter County Superior Courthouse, 1175 Civic Center Blvd., Yuba City, California 95993, Plaintiff Liana Boyd ("Plaintiff") will, and hereby does, move the Court for an Order and Judgment, pursuant to California Labor Code sections 2698, *et seq.*, as follows:

1. Approving the PAGA Settlement Agreement ("Settlement") between Plaintiff and Defendant Flax Holdings, LLC;
2. Appointing Moon Law Group, PC as PAGA Counsel;
3. Approving the requested PAGA Counsel Fees Payment of $41,666.67, subject to potential increase under an escalator clause;
4. Approving the requested PAGA Counsel Litigation Expenses Payment of $24,396.20;
5. Appointing Phoenix Class Action Administration Solutions as the Administrator and approving a $4,750.00 as the Administration Costs;
6. Approving the scope of the Released PAGA Claims and Released Parties;
7. Approving a non-reversionary Gross Settlement Amount of at least $125,000.00, subject to potential increase under an escalator clause;
8. Approving at least $54,187.13 for PAGA Penalties as settlement of the Released PAGA Claims, subject to potential increase pursuant to the escalator clause, to be distributed as 75% (at least $40,640.35 to the LWDA) and 25% (at least $13,546.78 to Aggrieved Employees);
9. Directing consummation of the Settlement pursuant to its terms and provisions;
10. Entering Judgment and dismissing the above-captioned action with prejudice; and
11. Retaining jurisdiction over the Parties, this action, and this Settlement, including following any entry of Judgment for purposes of enforcement, interpretation, settlement administration, and any post-Judgment issues that arise.

This Motion is based upon this notice, the attached Memorandum of Points and Authorities, the declarations and exhibits filed concurrently herewith, the records and files in this action, and any other further records or argument that the Court may properly receive at or before the hearing.

As this Motion is unopposed, the Parties respectfully request relief from the page limit requirement set by California Rules of Court, Rule 3.1113(d).

Respectfully submitted,

DATED: August 12, 2026

MOON LAW GROUP, PC

By:______________________________________

Kane Moon
Allen Feghali
S. Phillip Song
Micaela L. De Guzman
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Liana Boyd ("Plaintiff") seeks approval of a non-reversionary $125,000.00 gross settlement of claims for civil penalties alleged pursuant to the California Private Attorneys General Act, Labor Code sections 2698, *et seq.* ("PAGA"). After a full day of mediation with experienced and neutral mediator Steve Rottman, Esq., and months of extended settlement negotiations, Plaintiff reached a resolution with Defendant Flax Holdings, LLC ("Defendant") (collectively, Plaintiff and Defendant are the "Parties"). The Parties have executed a PAGA Settlement Agreement (the "Settlement"), a true and correct copy of which is attached as **Exhibit 1** to the Declaration of Kane Moon in Support of Motion for Approval of PAGA Settlement ("Moon Decl.") submitted concurrently herewith. Pursuant to Labor Code section 2699(s)(2), Plaintiff now files this motion seeking an order approving the proposed Settlement.

The Settlement resolves all claims for civil penalties under PAGA that arose during the PAGA Period and that were alleged in the above-captioned matter ("Action"). (Settlement, ¶ 1.1.) For purposes of settlement, the "PAGA Period" is August 2, 2024 to April 19, 2026. (*Id.* at ¶ 1.25.) This Settlement is on behalf of the California Labor and Workforce Development Agency (the "LWDA"), Plaintiff, and all persons employed by Defendant in California and classified as a non-exempt, hourly-paid employee who worked for Defendant during the PAGA Period ("Aggrieved Employees"). (*Id.* at ¶ 1.4.) The Parties, PAGA Counsel, and Defense Counsel represent that they are not aware of any other pending matter or action asserting claims that will be extinguished or affected by the Settlement. (Moon Decl., ¶ 24.)

Settlement of a PAGA claim requires court approval. Pursuant to the operative PAGA statute, the "court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part." (Lab. Code § 2699(s)(2).) In deciding whether to grant approval of a proposed settlement, the primary issue to be decided is whether the settlement is fair, adequate, and reasonable. Specifically, the issue is whether the PAGA penalties to which the parties have agreed provide "genuine and meaningful" relief that is "consistent with the underlying purpose of the statute to benefit the public," and whether the penalties are reasonable in light of the potential verdict value in this case. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal. July 22, 2015) No. CV 12-2615 PSG (JEMx), 2015 WL 12732709, at *5; *see also O'Connor v. Uber Techn., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135.)

As set forth herein, the proposed Settlement embodies all the features of a settlement that is fair, adequate, and reasonable, as (1) it is the product of an arm's-length negotiation, (2) negotiated by attorneys experienced in wage and hour litigation, (3) following sufficient investigation necessary to evaluate the relative strength and value of the PAGA claims, and (4) reflects a reasoned compromise based directly on the relative strength and value of the PAGA claims, as well as the risks, expense, complexity, and likely duration of further litigation.

The meaningful value achieved by the Settlement at issue may be gleaned from the fact that the LWDA and the estimated **227** Aggrieved Employees will, cumulatively, receive approximately **$54,187.13** as PAGA Penalties. (Moon Decl., ¶ 20.) This is a significant recovery, not only because further litigation may have resulted in a net-zero recovery based on the facts of the case and defenses asserted by Defendant, but also because an investigation by experienced PAGA counsel and analysis of discovery revealed minimal identifiable violations, the discretionary nature of awarding PAGA penalties, and the risk of not being able to proceed on a representative basis at all due to the potential manageability issues and current state of the law. For these reasons, as set forth more fully below, Plaintiff respectfully requests the Court enter the proposed order and proposed judgment submitted concurrently herewith.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims and Procedural Background

Defendant operates the River Valley Care Center, a skilled nursing and residential care facility located in Live Oak, California that provides 24-hour medical services, memory care, and post-acute therapy. (Moon Decl., ¶ 4.) Plaintiff worked for Defendant from approximately June 2025 to July 2025 as a nurse. (*Id.*) Throughout her employment, Plaintiff was classified as non-exempt and paid on an hourly basis. (*Id.*) Plaintiff contends she and her former coworkers were subjected to the same or similar unlawful labor practices during their employment by Defendant, including failure to pay all wages. (*Id.*)

Plaintiff's claims for unpaid wages stems from allegations of Defendant's failure to pay employees all minimum, overtime, and sick pay owed, including due to Defendant's failure to compensate employees for off-the-clock work, and Defendant's failure to incorporate all remunerations into the regular rate of pay for purposes of calculating the correct overtime pay, meal break premium, and sick pay. (*Id.* at ¶ 5.) Plaintiff's meal and rest period claims are based on allegations that due to the nature of their work and Defendant's employment practices, employees regularly experienced missed, untimely, or interrupted breaks, and that Defendant failed to provide any premiums for non-compliant rest breaks or all premiums for non-compliant meals. (*Id.*) Plaintiff also alleges that Defendant failed to reimburse employees for all reasonable and necessary business expenses incurred, including expenses incurred for the use of employees' personal cellphone for work purposes and purchase of specific types of clothing and scrubs. (*Id.*) Plaintiff further alleges she and other employees did not receive all wages owed at the time of termination nor accurate itemized wage statements due to Defendant's failure to pay all wages and premiums. (*Id.*) Accordingly, Plaintiff alleges Defendant is liable for civil penalties under PAGA. (*Id.*)

Because of the foregoing alleged violations of the Labor Code, Plaintiff filed a Class Action Complaint on August 4, 2025 alleging Defendant systematically: (1) failed to pay minimum wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest breaks, (5) failure to indemnify necessary business expenses, (6) failed to timely pay final wages at termination, (7) failed to provide accurate itemized wage statements, and (8) engaged in unfair business practices. (*Id.* at ¶ 6.)

Pursuant to PAGA, on August 2, 2025, Plaintiff submitted notice of the alleged Labor Code violations to the LWDA, with certified mail service on Defendant, and paid the required filing fee. (*Id.* at ¶ 7, Ex. 2.) The administrative exhaustion period under PAGA expired without the LWDA indicating any intent to investigate the allegations. (*Id.*) On October 7, 2025, Plaintiff filed a First Amended Class and Representative Action Complaint to allege a ninth cause of action for civil penalties under PAGA. (*Id.*) Accordingly, Plaintiff is duly authorized to act as a private attorney general with respect to the PAGA claims involved in this action. (*Id.*)

After this action was filed, Defendant produced an arbitration agreement between Defendant and Plaintiff, signed upon hire, containing a class action waiver. (*Id.* at ¶ 8.) The Parties agreed to proceed with only the representative PAGA claims for purposes of this settlement. (*Id.*) The First Amended Complaint, with the remaining representative claims under PAGA, is the operative complaint in the Action (the "Operative Complaint."). (*Id.*) In compliance with Labor Code section 2699(s)(1), Plaintiff subsequently submitted to the LWDA a file-stamped copy of the First Amended Complaint containing the Court-assigned case number. (*Id.* at ¶ 9.) To date, the LWDA has not sought to intervene in this action. (*Id.*)

Defendant ardently opposes the merits of this case and denies Plaintiff's factual allegations. (*Id.* at ¶ 10.) Defendant argues all employees were properly paid for all hours worked and that it did not require or permit employees to work off-the-clock. (*Id.*) As for the regular rate claim, Defendant argues there was no issue with paying employees the proper regular rate of pay because any additional renumeration was discretionary and thus, not required to be incorporated into the regular rate of pay. (*Id.*) Defendant maintains all employees were provided with the opportunity to take all their code-compliant meal and rest breaks and that missed breaks, if any, were solely the result of employees' voluntary choice. (*Id.*) As for the unreimbursed business expenses, Defendant maintains it did not require employees to incur any business-related expenses. (*Id.*) To the extent employees received wage statements that were allegedly inaccurate, Defendant argues penalties are not warranted because employees suffered no actual damage or harm as a result.. (*Id.*; *see, e.g.*, *Angeles v. U.S. Airways, Inc.* (N.D. Cal. Feb. 19, 2013) No. C 12–05860 CRB, 2013 WL 622032, at *10 ["A plaintiff must adequately plead an injury arising from an employer's failure to provide full and accurate wage statements, and the omission of the required information alone is not sufficient."].) Additionally, Defendant alleges its good-faith belief that it paid all wages precludes the imposition of waiting time penalties because Plaintiff would be unable to show Defendant's alleged conduct was done willfully or knowingly. (Moon Decl., ¶ 10; *see, e.g.*, *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) No. ED CV 11–298 GHK (DTBx), 2012 WL 9506073, *5.) For these reasons, Defendant claims it did not engage in any unfair business practices and denies liability under PAGA. (Moon Decl., ¶ 10.) Defendant also maintains the claims are not susceptible to proof on a representative basis because of the individualized and varying nature of each employee's experience, making this matter unmanageable. (*Id.*)

B. <u>Discovery and Investigation</u>

Before initiating arbitration of Plaintiff's individual claims, the Parties agreed to mediate the representative PAGA claims. (*Id.* at ¶ 11.) The Parties engaged in informal discovery exchange prior to mediation. (*Id.*) Defendant provided information and documents, which enabled Plaintiff's Counsel to meaningfully investigate Plaintiff's allegations and assess the value of the PAGA claims. (*Id.*) Specifically, Defendant produced Plaintiff's personnel file and her time and payroll records, documents regarding Defendant's written policies and practices in effect during the relevant period, and time and corresponding payroll records for approximately 24.7% of all Aggrieved Employees. (*Id.*)

Prior to mediation, Plaintiff's Counsel reviewed and analyzed all the information that Defendant produced, including the time/pay records and Defendant's written policies, in conjunction with information provided by Plaintiff. (*Id.* at ¶ 12.) Plaintiff's Counsel retained an expert to analyze the time/pay records and prepare a damage analysis prior to mediation. (*Id.*) The time/pay records contained 7,939 shifts actually worked (roughly 23.71% of all shifts), which allowed the expert to prepare an analysis with a reasonable degree of certainty. (*Id.*) Further, Plaintiff's Counsel investigated the applicable law regarding the claims and defenses asserted in this action. (*Id.*) Accordingly, Plaintiff's Counsel were able to evaluate the probability of success on the merits and Defendant's monetary exposure. (*Id.*) In sum, Plaintiff and her Counsel's familiarity with the facts of the case and the legal issues involved allowed them to act intelligently in negotiating the Settlement. (*Id.*)

C. <u>Settlement Negotiations</u>

On March 19, 2026, the Parties participated in a full day of private mediation facilitated by Steve Rottman, Esq., an experienced PAGA action mediator. (*Id.* at ¶ 13.) The negotiations were at arm's length and although conducted in a professional manner, were adversarial. (*Id.*) Both sides went into the mediation willing to explore the potential for a settlement of the dispute, but they were also prepared to litigate their position through trial and appeal if a settlement had not been reached.

(*Id.*) Negotiations were protracted, with extended discussions and instances in which it appeared the Parties would not reach a resolution. (*Id.*) Following a full discussion of the strengths and weaknesses of the claims and defenses, the Parties ultimately reached a resolution, the material terms of which are encompassed within the Settlement at issue. (*Id.*)

In reaching a resolution, the Parties recognized that the issues presented in this action are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that further litigation will lead to inconvenience, distraction, disruption, delay, and expense disproportionate to the potential benefits of litigation. (*Id.* at ¶ 14.) Plaintiff and her Counsel also considered the risk and uncertainty of the outcome inherent in any litigation when determining whether this Settlement was the correct option. (*Id.*) In sum, Plaintiff and her Counsel believe the proposed Settlement is in the best interests of Aggrieved Employees and the LWDA. (*Id.*) In compliance with Labor Code section 2699(s)(2), notice of settlement and a copy of the proposed Settlement has been submitted to the LWDA along with a copy of Plaintiff's motion and the hearing date. (*Id.* at ¶ 15, Ex. 3.) To date, the LWDA has not indicated any objection to the Settlement. (*Id.* at ¶ 15.)

D. <u>Key Terms of the Proposed Settlement</u>

The Settlement's key financial and other terms include:

1. <u>Gross Settlement Amount, Funding, Disbursement, and Uncashed Checks</u>. The Gross Settlement Amount ("GSA") is a non-reversionary $125,000.00, subject to potential increase under an Escalator Clause. (Settlement, ¶¶, 3.1, 8.) Defendant shall fully fund the Gross Settlement Amount by transmitting the funds to the Administrator no later than 15 calendar days after the Effective Date. (*Id.* at ¶ 4.1.) Disbursement will occur within 14 calendar days after Defendant fully funds the GSA. (*Id.* at ¶ 4.2.) For any Aggrieved Employee whose Individual PAGA Payment check is uncashed and cancelled after 180 calendar days after the date of mailing (the "Void Date"), the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee who did not cash the check. (*Id.* at ¶¶ 4.21, 4.2.3.)

2. <u>Escalator Clause</u>: Based on its records, Defendant represents that there is a total of 4,849 pay periods during the PAGA Period. (*Id.* at ¶ 8.) If the number of pay periods in the PAGA Period is 5,334 or more, the Gross Settlement Amount shall be increased by the percentage that the actual

number of pay periods exceeds 5,334. (*Id.*) However, should the number of pay periods exceed 5,334, Defendant will have the right, in the exercise of its sole discretion, to limit the PAGA Period to the time at which the number of pay periods reaches 5,334. (*Id.*) If Defendant elects to limit the PAGA Period to a time at which the number of pay periods reaches 5,334, Defendant must provide written notice of the modified end date of the PAGA Period no later than 16 court days before the hearing on the PAGA approval motion. (*Id.*)

3. Attorneys' Fees and Costs. The Settlement includes PAGA Counsel Fees Payment of not more than 33 1/3%, which is currently estimated to be $41,666.67, subject to the escalator clause, and a PAGA Counsel Litigation Expenses Payment of not more than $27,000.00. (*Id.* at ¶ 3.2.1.) In the event actual costs are less and/or the amount of fees and costs approved by the Court are less than the amounts requested, the difference will be allocated to the Net Settlement Amount. (*Id.*) PAGA Counsel has incurred $24,396.20 in litigation costs. (*Id.*, Ex. 4)

4. Administration Costs. The Settlement provides an Administrator Expenses Payment not to exceed $6,000.00 to the Administrator, for its fees and expenses in administering this Settlement. (Settlement, ¶ 3.2.2.) In the event the amount of actual administration costs is less and/or the amount approved by the Court is less than requested, the difference will be allocated to the Net Settlement Amount. (*Id.*) The Parties jointly selected Phoenix Class Action Administration Solutions ("Phoenix") as the neutral entity to administer this Settlement with its bid for $4,750.00. (*Id.* at ¶ 1.2; Moon Decl., ¶ 19, Ex. 5; Declaration of Jodey Lawrence, ¶ 22, Ex. B.)

5. Net Settlement Amount. The Net Settlement Amount is the amount available from the Gross Settlement Amount to distribute as PAGA Penalties. (Settlement, ¶ 1.17.) The Net Settlement Amount is equal to the Gross Settlement Amount, less the following payments in the amounts approved by the Court: the PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, and the Administration Expenses Payment. (*Id.*) The remainder is to be paid to the LWDA as the LWDA PAGA Payment and to the Aggrieved Employees as Individual PAGA Payments. (*Id.*) Accordingly, the Net Settlement Amount is estimated to be approximately **$54,187.13**,[1] which will

[1] The estimated Net Settlement Amount was calculated by deducting the following amounts from the GSA ($125,000.00): $24,396.20 for the PAGA Counsel Litigation Expenses Payment, $41,666.67 for

be distributed 75% (i.e., 75% * $54,187.13 = **$40,640.35**) to the LWDA and 25% (i.e., 25% * $54,187.13 = **$13,546.78**) to Aggrieved Employees. (Moon Decl., ¶ 20.)

6. Individual PAGA Payments. Aggrieved Employees will receive a pro rata share of 25% of the PAGA Penalties calculated according to the number of Pay Periods the Aggrieved Employee worked during the PAGA Period. (Settlement, ¶ 1.13.) This results in an average Individual PAGA Payment of roughly **$59.68** for each of the estimated 227 Aggrieved Employees ($13,546.78 / 227), and a PAGA Pay Period value of **$2.79** for each of the 4,849 estimated PAGA Pay Periods ($13,546.78 / 4,849). (Moon Decl., ¶ 21.) To the extent required by law, Individual PAGA Payments will be reported for tax purposes using IRS form 1099. (*See* Settlement, ¶ 3.2.3.b.)

7. PAGA Released Claims. Upon approval by the Court of the Settlement and as of the Effective Date, Plaintiff, the State of California and all Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, administrators, successors, and assigns, the Released Parties from all claims, rights, demands, liabilities, causes of action, and theories of liability for PAGA penalties that were pled or could have been pled based on the factual allegations contained in the PAGA Notice and Operative Complaint during the PAGA Period. (*Id.* at ¶ 5.1.)

8. Released Parties. Defendant and its, present and future subsidiaries, parents, affiliated and related companies, divisions, successors, predecessors or assigns; and its past, present, and future officers, directors, shareholders, partners, agents, insurers, employees, advisors, accountants, representatives, trustees, heirs, executors, administrators, predecessors, successors or assigns. (*Id.* at ¶ 1.28.)

9. No Related Cases. The Parties, PAGA Counsel, and Defense Counsel represent that they are not aware of any other pending matter or action asserting claims that will be extinguished or affected by the Settlement. (Settlement, ¶ 2.8.)

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the PAGA Counsel Fees Payment, and $4,750.00 for the Administration Expenses Payment. (*See* Settlement, ¶ 3.2, *et. seq.*)

III. DISCUSSION

A. Availability of Civil Penalties

The LWDA and its constituent departments and divisions are authorized to assess and collect civil penalties for specified violations of the Labor Code committed by an employer. With a stated goal of improving enforcement of existing Labor Code obligations, the California Legislature adopted the Private Attorneys General Act of 2004, permitting, as an alternative, an aggrieved employee to initiate a private civil action on behalf of him- or herself and other current or former employees." (Lab. Code § 2699(a).) Before an employee may file an action seeking to recover civil penalties for violations of any of the Labor Code provisions enumerated in Labor Code section 2699.5, he or she must comply with the Act's administrative procedures as set forth in Labor Code section 2699.3, subdivision (a), which include providing notice to the LWDA and the employer of the alleged Labor Code violations, and then waiting a prescribed period of time to permit the LWDA to investigate and to decide whether to cite the employer for the alleged violations. (*Id.* at §§ 2699.3, 2699.5; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370; *see also Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330.)

Here, in compliance with Labor Code section 2699.3, Plaintiff submitted notice of the Labor Code violations at issue to the LWDA, and she exhausted administrative remedies without the LWDA noticing any intent to investigate the claims. (Moon Decl., ¶ 7, Ex. 2.) Accordingly, Plaintiff is duly authorized to act as a private attorney general pursuant to PAGA. (*Id.* at ¶ 7.)

B. The Settlement Merits Approval

Settlement of PAGA claims must be approved by a Court. (Lab. Code § 2699(s)(2).) Here, the circumstances weigh heavily in favor of approval, as explained below.

1. The Relief Is Genuine, Meaningful, and Consistent with the Dual Statutory Purposes of Deterrence and Punishment under PAGA

The $125,000.00 GSA amounts to "genuine and meaningful" relief "consistent with the underlying purpose of the statute to benefit the public." (Moon Decl., ¶ 34; *see O'Connor*, 201 F.Supp.3d at 1133–35 [denying settlement approval where allocation for PAGA claims was 0.1% of the estimated full worth].) This is an excellent result, particularly because, under the Settlement, Aggrieved Employees and the LWDA will receive timely, guaranteed relief and will avoid the risk of not being able to recover anything at all. (Moon Decl., ¶ 34.)

The Settlement is a fair and reasonable resolution that satisfies PAGA's dual statutory purposes of deterrence and punishment, on the one hand, and providing Aggrieved Employees with genuine and meaningful relief, on the other. (*Id.* at ¶ 35; Lab. Code §§ 2698, *et seq.*) As a result of this litigation, Defendant has had to hire legal counsel, engage in employee-wide discovery, and participate in mediation. Assuming approval is granted, Defendant will also have to pay civil penalties pursuant to PAGA. Not including its own attorneys' fees and costs, Defendant will pay at least $125,000.00 to resolve this matter—of which at approximately $54,187.13 is allocated toward PAGA Penalties and will be distributed as 75% to the LWDA and 25% to Aggrieved Employees, in compliance with PAGA law governing the claims in this Action. (*See* Settlement, ¶ 3.2.3.) This amount represents roughly **34%** of the realistic exposure for the claims ($54,187.13 / $161,633.33), as discussed below. (Moon Decl., ¶ 35.)

2. The Settlement Amount Provides a Realistic Value for the Claims that is within the "Ballpark" of Reasonableness

There can be no doubt that this Settlement is the result of vigorous, adversarial, non-collusive, and arm's-length negotiations between the Parties. (Moon Decl., ¶ 13.) Plaintiff's Counsel performed an extensive investigation into the facts, claims, and defenses at issue and Defendant's potential liability, including a review of governing law and analysis of informal discovery, including Defendant's written policies and time/pay data for a majority of Aggrieved Employees. (*Id.* at ¶¶ 11–12.) Plaintiff's Counsel used the foregoing discovery and investigation to prepare for mediation and, with the assistance of a statistics expert, assessed the probability of success on the merits and Defendant's monetary exposure, discussed the strengths and weaknesses of the claims and defenses in depth at mediation and months of continued negotiations, and ultimately negotiated the resulting Settlement. (*Id.* at ¶¶ 11–14.)

Based on Plaintiff's Counsel's analysis of the arguments and information provided by Defendant, on an expert analysis of the time and pay records, and on information from Plaintiff, Plaintiff's Counsel evaluated Defendant's both maximum and risk-adjusted potential exposure in preparation for mediation. (*Id.* at ¶ 25.) Although the expert's analysis revealed that the time and pay records supported several violations by Defendant, the identifiable violation was primarily limited to the regular rate and meal period claims. (*Id.*) The records themselves did not provide strong support for the off-the-clock work, rest periods, and expense reimbursement claims, and derivative penalties for those claims, as these claims are predominantly testimony based. (*Id.*) In other words, Plaintiff's analysis revealed that certain claims were not as strong as originally believed. (*Id.*)

Because Defendant did not require employees to record rest periods, there are no records to establish the rest period claim on the merits. (*Id.* at ¶ 26.) Additionally, there are no records to establish the off-the-clock work claim and reimbursement claim on the merits. (*Id.*) Rather, proof of these claims would need to be supported by declarations from Aggrieved Employees regarding missed rest periods, off-the-clock work, and expenses incurred as the records themselves cannot demonstrate what breaks were missed, when, and why, what expenses were incurred without reimbursement, and they cannot demonstrate the time, if any, Aggrieved Employees spent working off the clock. (*Id.*)

Indeed, the maximum exposure figures that were calculated for mediation were based on assumed high violation rates that would not likely be demonstrated at trial, as they assume either the participation of all Aggrieved Employees, or alternatively, the use of surveys or statistical data as a surrogate (which would still require the participation of a majority of Aggrieved Employees to establish a sound representation of all non-exempt employees). (*Id.* at ¶ 27.) The reality is that many, if not all, employees would be unwilling to participate due to fear of retaliation. (*Id.*) However, even assuming those employees would be willing to participate, obtaining such declarations would potentially reveal that each Aggrieved Employee had a different experience. (*Id.*) The individualized nature of their employment experience and the numerosity of employees affected present significant risk with manageability and proof on the merits. (*Id.*)

Even as to the regular rate and meal period claims, our analysis found that Defendant's exposure is less than initially believed. (*Id.* at ¶ 28.) A review of the time and pay records shows only a 1.9% violation rate for meal periods, and the records also show that nearly each violation was accompanied by a meal waiver. (*Id.*) The records also show that Defendant made some meal premium payments. (*Id.*) Defendant argues that its payment of meal premiums and use of meal waivers indicate that it did not intentionally fail to provide PAGA Employees with meal breaks. (*Id.*) Defendant also argues that many meal breaks were taken and, where a violation appears, it was a result of the Class Member voluntarily choosing to forego a meal period, to take it after the end of the fifth hour, or to stop his or her break early to return to work. (*Id.*) As to the regular rate issue, Plaintiff's expert found that only 1.6% of pay periods included overtime and additional compensation, only 0.3% of pay periods included sick pay and additional compensation, and that only 0.1% of pay periods included meal break premium and additional compensation. (*Id.*) Accordingly, to the extent Defendant failed to incorporate any additional remunerations into the regular rate of pay for purposes of paying overtime, meal break premium, and sick pay, which Defendant denies, such failure resulted in minimal underpayment to the Aggrieved Employees. (*Id.*) Additionally, the violation rates assume that the bonuses were non-discretionary, which Defendant disputes. (*Id.*)

The likelihood that Defendant could assert viable legal defenses would likely further reduce its overall exposure. (*Id.* at ¶ 29.) For example, the individualized and testimony-intensive nature of the claims could bar manageability of this representative action or otherwise significantly reduce Defendant's overall liability. (*Id.*) Further, a claim-by-claim penalty calculation is overly optimistic as it presumes Plaintiff would be able to stack the penalties, although penalty stacking is not expressly permitted by PAGA. (*Id.* at ¶ 30.) Rather, without either (i) a prior finding by the LWDA or a court within the past five years that the employer violated PAGA or (ii) evidence that the employer's conduct was malicious, fraudulent, or oppressive, PAGA only provides for a maximum $100 penalty for each pay period. (Lab. Code § 2699(f)(2)(A)–(B).) Moreover, Plaintiff's Counsel believe it would be unrealistic to expect the Court to award the full (penalty-stacked) exposure given the discretionary nature of awarding penalties and given Defendant's defenses, including that any failure to pay premiums, regular rate wages, or for off-the-clock work was not knowingly or willfully done, and additionally, to the extent employees received wage statements that were allegedly inaccurate, employees suffered no actual resulting damage or harm. (Moon Decl., ¶ 30.) Moreover, awarding the full penalties amount would likely raise Due Process concerns. (*Id.*) For the foregoing reasons, the *realistic* exposure is thus far below the *optimistic* claim by claim estimate. (*Id.* at ¶ 31.)

Based on the foregoing, Plaintiff's Counsel believe it is more reasonable to assess penalties on a $100.00 civil penalty per pay period basis pursuant to Labor Code § 2699(f)(2)(A) for each of the estimated 4,849 pay periods at issue, as opposed to a claim-by-claim approach. (*Id.* at ¶ 32.) Accordingly, Plaintiff's Counsel estimate Defendant's maximum PAGA exposure to be **$484,900.00** ($100.00 x 4,849). (*Id.*) However, based on the discovery, Defendant's arguments at mediation and continued settlement discussions, an understanding that the claims are heavily dependent on the unlikely participation by Aggrieved Employees and their varying employment experience, and other important considerations discussed above, it is reasonable to assume a violation occurred in at most one-third of all pay periods, which results in a realistic (*risk-adjusted*) exposure of **$161,633.33** ($484,900.00 / 3). (*Id.*) As a result, the GSA of $125,000.00 represents approximately **77%** of the realistic exposure ($125,000.00 / $161,633.33). (*Id.*)

The proposed Settlement therefore represents a substantial recovery when compared to the reasonably forecasted recovery. (*Id.* at ¶ 33.) When considering the risks of litigation, the uncertainties involved in continued litigation, the burdens of proof necessary to establish liability, and the probability of appeal, it is clear the GSA of $125,000.00 is within the "ballpark" of reasonableness, and that settlement approval is appropriate. (*Id.*; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133; *see Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399, 408–09 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims," but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation"].)

3. The Settlement Is a Fair and Reasonable Result Following a Thorough Investigation and Accounting of Various Litigation Risks

Plaintiff's Counsel have conducted a thorough investigation into the facts of the allegations. (Moon Decl., ¶ 36.) Based on discovery and on their own independent investigation and evaluation, Plaintiff's Counsel are of the opinion that the proposed Settlement is fair, reasonable, and adequate. (*Id.*) Furthermore, considering all known facts and circumstances, the risk of significant delay, trial risk, appellate risk, the defenses that could be asserted by Defendant on the merits, Plaintiff's Counsel respectfully submit that the Settlement is in the best interests of the Aggrieved Employees and the State of California. (*Id.*)

Although Plaintiff's Counsel believe there is merit to Plaintiff's allegations, they also acknowledge a legitimate controversy exists as to each allegation. (*Id.* at ¶ 37.) Plaintiff's Counsel also recognize that proving the amounts of penalties owed to each Aggrieved Employee would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Moreover, Plaintiff's Counsel are also of the opinion that because the issues here are fairly contested, there is a possibility of the Court not awarding PAGA penalties even if Plaintiff prevailed on the merits due to the largely discretionary nature of awarding PAGA penalties. (*Id.* at ¶ 38.) Indeed, a Court may reduce PAGA penalties "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." (Lab. Code § 2699(e)(2).) In other words, were this matter to go to trial, any award granted would be at the discretion of the Court and subject to a substantial reduction. (Moon Decl., ¶ 38.) While Plaintiff's Counsel believe there would be no persuasive grounds to reduce penalties, they recognize that the Court could determine otherwise and significantly reduce any award of penalties. (*Id.* at ¶ 39.) This wide range of potential recovery and additional delays and risks of trial provide justification to settle for a reasonable amount of recovery at this point in the litigation. (*Id.*) In all, based on the investigation and analysis of the claims in preparation for mediation, the maximum exposure did not comport with the realistic exposure that Defendant faced, as discussed above. (*Id.*)

Plaintiff's Counsel took into account the risk of not being able to proceed on a representative basis at all due to the potential manageability issues, the risk of not prevailing at trial, and the risk that even if Plaintiff prevailed at trial, the penalties would be limited due to the largely discretionary nature of awarding PAGA penalties. (*Id.* at ¶ 40.) The provisions of the Labor Code triggering PAGA penalties in this case include Labor Code sections 203, 210, 226.3, 558, 1197.1, and 2802. However, PAGA penalties are not mandatory, but rather, permissive. (Lab. Code § 2699(e)(2).) Accordingly, it is entirely possible that even if Plaintiff would be successful at trial, assuming she is first able to win on the merits regarding her individual claims at arbitration and then defeat the manageability issues presented at litigation by the large number of Aggrieved Employees in this action, Plaintiff may still be awarded substantially less than what was obtained through the Settlement. (Moon Decl., ¶ 40.)

The Settlement avoids the significant risks, burdens, and the accompanying expense of further litigation. (*Id.* at ¶ 41.) Though the Parties have engaged in a significant amount of investigation, informal discovery, and employee data analysis, they have not completed formal discovery procedures. (*Id.*) Moreover, Plaintiff would have to proceed with arbitration of her individual claims and win on the merits before proceeding with litigation of the representative PAGA claims. (*Id.*) Preparation for trial and the prospect of appeals in the wake of any summary judgment ruling would remain for the Parties. (*Id.*) As a result, the Parties would incur considerably more attorneys' fees and costs through trial, a lengthy and uncertain process that could result in recovering less than was settled for. (*Id.*)

C. <u>The Requested Attorneys' Fees/Costs Are Reasonable and Should Be Approved</u>

In line with the Settlement, my firm requests an award of attorneys' fees in an amount of 33 1/3% of the GSA (i.e., $41,666.67), plus reimbursement for actual litigation costs in the amount of $24,396.20. (Moon Decl., ¶ 73*See* Settlement, ¶ 3.2.1.)

1. Plaintiff's Counsel Request an Award of Fees Based on the Common Fund Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. (*See, e.g.*, *Serrano v. Priest* (1977) 20 Cal.3d 25.) The California Supreme Court has held, "when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund." (*Id.* at p. 34.)

Here, Plaintiff's Counsel seek an award of attorneys' fees on the "percentage of recovery/common fund" theory. (Moon Decl., ¶ 65.) The purpose of this approach is to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air W., Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of Cal.* (1975) 15 Cal.3d 162, the California Supreme Court stated, "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons[ ] are entitled to share." (*Id.* at pp. 110–11 [pincite omitted].) The reasons for applying this doctrine include:

> fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

(*Id.* at p. 111.)

Several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp.1373:

> **This court is compelled to ask, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!"** Not only do the *Lindy* and *Kerr–Johnson* analyses consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members.

(*Id.* at p. 1375 [emphasis added].) The percentage approach is preferable to the lodestar because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on judicial resources. (*Id*. at pp. 1378–79.) California Courts now routinely use the percentage of the common fund approach to determine the award of attorney's fees. (*See*, *e.g.*, *In re Pac. Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 378–79 [approving attorneys' fee award of 33%].)

2. The Matter Involves a Fee and Cost Shifting Provision under PAGA

Labor Code section 2699 provides for the recovery reasonable attorney's fees as well as costs of suit. (Lab. Code § 2699(k)(1).) Specifically, it states: "Any employee who prevails in any [PAGA] action shall be entitled to an award of reasonable attorney's fees and costs . . ." (*Id.*) Under this provision, Plaintiff would be permitted to recover her actual attorneys' fees, even if those fees were larger than the total recovery for the Aggrieved Employees at the conclusion of this case. (*Id.*) This fee/cost-shifting provision reflects the understanding that Plaintiff's Counsel must accept significant risk of substantial expenses and consumption of time, energy, and other resources in litigating a PAGA claim, and thus, that Plaintiff's Counsel is not only permitted, but entitled, to recover reasonable attorneys' fees and costs if successful in litigating a PAGA claim.

The Settlement at issue is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding Plaintiff's Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Plaintiff's Counsel who undertook this matter on a contingent basis, with no guarantee of recovery. (Moon Decl., ¶¶ 66–71.) Once Plaintiff's Counsel undertook this litigation on behalf of the Aggrieved Employees, they committed to pursue it to its conclusion, and were accordingly precluded from focusing on, or taking on, other cases which could have resulted in a larger, and less risky, monetary gain. (*Id.* at ¶ 70.)

3. Counsel's Experience, Reputation, and Ability Support the Requested Fee Award

As demonstrated by their prior experience in pursuing class and representative actions on behalf of employees, Plaintiff's Counsel possess considerable expertise in litigating class action and representative matters. (*Id.* at ¶¶ 42–60.) Plaintiff's Counsel have been involved as lead counsel or co-counsel in a multitude of class and representative actions resulting in beneficial results to class members and aggrieved employees in California. (*Id.*) Because it is reasonable to compensate Plaintiff's Counsel commensurate with their skill, reputation, and experience, the requested fee award is supported here.

Plaintiff's Counsel's experience in wage-and-hour class and representative actions was integral in evaluating the strengths and weaknesses of the case against Defendant and the reasonableness of this Settlement. (*Id.* at ¶ 61.) Practice in the narrow field of wage-and-hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of representative action litigation. (*Id.* at ¶ 59.) Based on these and other factors, Plaintiff's Counsel have frequently received fee awards of this percentage from the gross recovery for aggrieved employees. (*See id.* at ¶¶ 46, 51, 54.) Thus, the requested fee award is reasonable and fair.

4. While the Lodestar Method Is Not Necessary in Common Fund Cases, the Court May Perform a Cross-Check to Award Fees

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." (*Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the lodestar method as a drain on the judicial system and a disincentive on attorneys to take on high-risk, challenging cases. (*Id.* at p. 29.) Indeed, the lodestar approach: "(1) 'increases the workload of an already overtaxed judicial system,' (2) is 'insufficiently objective and produce[s] results that are far from homogenous,' (3) 'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,' (4) 'is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount,' (5) 'encourages lawyers to expend excessive hours, and . . . engage in duplicative and unjustified work,' (6) 'creates a disincentive for the early settlement of cases,' (7) deprives trial courts of 'flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered,' (8) 'works to the particular disadvantage of the public interest bar,' and (9) results in 'confusion and lack of predictability.'" (*Id.* [quoting Third Circuit Task Force, *Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 246–49].)

Although California Courts support the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to 'cross-check' or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 [quoting *Lealao*, *supra*, 82 Cal.App.4th at pp. 49–50].) Applying the lodestar method is a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate, and the second step is to apply a multiplier to the lodestar to account for various factors. (*Id.* at p. 556.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.*) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id.* at pp. 556–57.)

Further, "California case law permits fee awards in the absence of detailed time sheets." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255.) The Court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.) Generally, hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 431.)

Here, Plaintiff's Counsel current lodestar is *no less than* **$58,450.00**, which is based on *no less than* **80.7 hours** of attorney time spent to-date at their customary hourly rates. (Moon Decl., ¶ 65.) Thus, in comparison to this lodestar, the fee request represents a multiplier of 0.71. (*Id.* at ¶ 68(c). Although application of a positive multiplier would be warranted in this case, none is requested. (*Id.* at ¶¶ 67-68.) In other words, Plaintiff's Counsel are requesting less than what they are reasonably entitled to. (*Id.* at ¶ 68(c). Further, the foregoing lodestar does not reflect additional work that will be devoted to this litigation, including to obtain and monitor approval of the Settlement and requested awards, oversee the settlement administration process and distribution of funds, respond to inquiries, and communicate with Plaintiff regarding the case. (*Id.* at ¶ 66.) The amount of fees requested under the Settlement is warranted based on the contingent risk that Plaintiff's Counsel incurred, the difficulty of the questions involved, the substantial benefit conferred on the Aggrieved Employees and State of California as a result of the Settlement, and the skill displayed by Plaintiff's Counsel. (*Id.* at ¶ 68.) Plaintiff's Counsel also bear the risk of taking whatever actions are necessary if Defendant fails to pay. (*Id.* at ¶ 66.) Thus, the request for attorneys' fees is more than reasonable under a lodestar check.

5. Plaintiff's Counsel's Costs Were Actually and Reasonably Incurred

Winning counsel are entitled to recover out-of-pocket costs and expenses they reasonably incurred in investigating, prosecuting, and settling a case. (*Staton v. Boeing Co.* (9th Cir. 2003) 327

F.3d 938, 974; Lab. Code § 2699(k)(1).) Here, Plaintiff's Counsel seek reimbursement in the total amount of $24,396.20 for expenses that were actually and reasonably incurred in this litigation. (Moon Decl., ¶ 73, Ex. 4.) Moreover, this amount is below the maximum allocation under the Settlement and thus, the remainder ($2,603.80) will revert to the PAGA Penalties. (*Id.* at ¶ 74; Settlement, ¶ 3.2.1.) Thus, costs should be reimbursed in full.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant approval of the Settlement and enter the proposed approval order and proposed judgment submitted herewith.

Respectfully submitted,

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MOON LAW GROUP, PC

By: ____________________________________

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