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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

FRANK TAMEZ and SHELAINE MAKEBA SPRINGER, on behalf of themselves, the State of California, and all Aggrieved Employees,

Plaintiffs,

vs.

HEYDAY WELLNESS, LLC, ., Delaware limited liability company; HEYDAY BEVERLY, LLC, a Delaware limited liability company; HEYDAY SAN VICENT, LLC, a Delaware limited liability company; LILLIAN APPELL, an individual; and DOES 4 through 100, Inclusive,

Defendants.

Case No. 23STCV07302

**REPRESENTATIVE ACTION**

[*Assigned for all purposes to Hon. David S. Cunningham III, Dept. SSC-11*]

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

Date: March 18, 2025
Time: 11:00 a.m.
Dept.: SSC-11

Complaint Filed: April 5, 2023
Trial date: None Set

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

PLEASE TAKE NOTICE that on March 18, 2025 at 11:00 a.m., or as soon thereafter as the matter may be heard in Department 11 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California, 90012, Plaintiffs Frank Tamez and Plaintiff Shelaine Makeba Springer ("Plaintiffs"), individually and on behalf of the State of California and 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 § 2699(l), of the proposed settlement of claims brought pursuant to the Private Attorneys General Act of 2004 (Cal. Labor Code § 2698, *et seq*.) and as set forth in the Parties' Settlement Agreement, a true and correct copy of which is attached to the Declaration of Neil M. Larsen filed concurrently herewith;
2. Appointing Phoenix Settlement Administrators ("Phoenix") as the Settlement Administrator;
3. Approving the proposed Explanatory Letter (attached as Exhibit A to the Settlement Agreement), and directing that it be distributed to Aggrieved Employees pursuant to the terms of the Settlement Agreement;
4. Directing the distribution of the Goss Settlement Amount pursuant to the terms of the Settlement Agreement;
5. Approving and confirming payment of PAGA penalties to the LWDA in the amount of $90,009.41 (75% of the penalties) and to Aggrieved Employees in the amount of $30,003.14 (25% of the penalties) as set forth in the Settlement Agreement.
6. Approving an award of attorneys' fees to Plaintiffs' counsel of $80,000.00 and an award of litigation costs to Plaintiffs' counsel of $16,637.45;
7. Approving an enhancement payment of $10,000.00 to each Plaintiff (totaling $20,000.00);
8. Approving $3,350.00 in administration costs to Phoenix; and

This Motion is based on this Notice; the attached Memorandum of Points and Authorities; the declaration of Neil M. Larsen and all exhibits attached thereto; the declaration of David D.

Bibiyan and all exhibits attached thereto; the declaration of Jodey Lawrence of Phoenix and all exhibits attached thereto; the declaration of Plaintiff Frank Tamez; the declaration of Shelaine Makeba Springer; the Settlement Agreement; all other pleadings and papers on file in this action; and on any further oral or documentary evidence or argument presented at the time of hearing.

Respectfully submitted,

Dated: March 5, 2025

ABRAMSON LABOR GROUP

By: Neil Larsen

Neil M. Larsen
Attorneys for Plaintiff

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiffs Frank Tamez and Shelaine Makeba Springer ("Plaintiffs"), are "Aggrieved Employees" under the Private Attorneys General Act of 2004 ("PAGA") and respectfully move this Court for an Order granting approval of the Settlement Agreement ("Settlement") with Defendant Heyday Wellness, LLC ("Heyday" or "Defendant").

This PAGA representative settlement resolves Plaintiffs' claims for civil penalties predicated on Heyday's alleged failure to pay all earned overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to reimburse business expenses, failure to pay sick pay, failure to pay vacation pay, and failure to pay all wages owed at the separation of employment from April 5, 2022 through November 7, 2023 (the "PAGA Period").

The proposed Settlement, under which Heyday has agreed to pay a Gross Settlement Amount ("GSA") of **$240,000.00**, will resolve Plaintiffs' representative claim for civil penalties filed on behalf of the State of California and All "Aggrieved Employees," which consists of approximately 137 current and former non-exempt employees who worked for Heyday in California during the PAGA Period.

Notably, the relief provided for under the Settlement, and the claims released thereunder, are solely for the payment of *civil penalties* under the PAGA, and not for any underlying Labor Code violations. The release encompasses PAGA civil penalties based upon the alleged violations mentioned above, and only for such claims arising during the PAGA Period.

In deciding whether to grant approval of a PAGA settlement, the primary issue is whether the settlement is fair, reasonable, and adequate. As set forth herein, the proposed Settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it: (1) is the product of arm's-length negotiations; (2) was negotiated by attorneys experienced in wage-and-hour issues and PAGA litigation with the assistance of an experienced, neutral mediator; (3) was negotiated after undertaking sufficient informal discovery and investigation to evaluate the relative strength and value of Plaintiffs' PAGA claim and Heyday's defenses thereto; and (4) reflects a reasoned compromise based on the relative strength and value of the PAGA claim, as well as the risks, expenses, complexity, and likely duration of further litigation.

As noted above, the Settlement provides for a GSA of $240,000.00. *See* Settlement §§ 1.12, 3.1. After deducting amounts from the GSA for requested attorneys' fees ($80,000.00), litigation costs ($16,637.45), Plaintiffs' enhancement payments of $10,000.00 each (totaling $20,000.00), and administration costs of $3,350.00, the Settlement provides for distribution of a Net Settlement Amount ("NSA") of approximately $120,012.55 to be paid to Aggrieved Employees and the California Labor and Workforce Development Agency ("LWDA"). *See* Settlement, §§ 1.17, 3.2, 3.2.1-3.2.3; Declaration of Neil M. Larsen ("Larsen Decl."), ¶¶ 18, 19, 31, Exhibit 6; Declaration of David D. Bibiyan ("Bibiyan Decl."), ¶ 19; Declaration of Jodey Lawrence ("Lawrence Decl."), ¶ 16 & Exhibit B.

The NSA shall be distributed 75% (approximately $90,009.41) to the LWDA, and 25% (approximately $30,003.14) to Aggrieved Employees, on a *pro rata* basis based on their respective number of pay periods worked for Heyday during the PAGA Period, pursuant to the requirements of the PAGA as codified in Lab. Code § 2699(i). *See* Settlement, § 3.3; *see also* Larsen Decl., ¶ 19. There are approximately 137 Aggrieved Employees, resulting in average payments of approximately $219 to the Aggrieved Employees. Larsen Decl., ¶ 19.

This Settlement represents a reasonable recovery for the State of California and Aggrieved Employees, who will receive significant monetary benefit in exchange for release of only civil penalties. In addition, the significant monetary recovery furthers the PAGA's purposes to "remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." *Moniz v. Adecco USA, Inc.,* 72 Cal.App.5th 56, 77 (2021). Further, the amounts requested for attorneys' fees and costs, Plaintiffs' enhancement payments, and settlement administration costs are fair, adequate, and reasonable.

## II. <u>SUMMARY OF THE LITIGATION</u>

### A. <u>Brief Factual Background and Summary of Claims</u>

Heyday is a skincare company that sells personal care products and provides skin care services. Larsen Decl., ¶ 8. Plaintiff Tamez was employed by Heyday as a non-exempt employee from approximately April 2022 until approximately November 2022. *See* Declaration of Frank

Tamez ("Tamez Decl."), ¶ 2. Plaintiff Springer was employed by Heyday as a non-exempt employee from approximately September 2021 to March 2023. *See* Declaration of Shelaine Makeba Springer ("Springer Decl.").

In this lawsuit, Plaintiffs contend that Heyday failed pay all earned overtime wages, failed to provide timely meal periods, failed to authorize and permit all required rest periods, failed to reimburse business-related expenses, failed to pay sick pay, failed to pay vacation wages, and failed to pay all waged owed upon separation of employment.

### B. Procedural History

On April 4, 2023, Plaintiff Tamez filed a Class Action compliant, alleging claims for unpaid overtime, meal period violations, rest period violations, unreimbursed business expenses, and derivative claims for waiting time penalties, wage statement penalties, and unfair competition. Larsen Decl., ¶ 9.

On April 5, 2023, Plaintiff Tamez provided written notice to the LWDA and Heyday of his intent to pursue civil penalties under PAGA for alleged violations of California Labor Code Labor Code sections 201-204, 226, 226.7, 510, 512, 516, 558, 1194, 1198, 2802, and 2804, and California Industrial Commission Wage Order 2. *See* Settlement, § 2.1; Larsen Decl., ¶ 10, Exhibits 2-3. On June 14, 2023, Plaintiff Tamez filed a First Amended Complaint, adding a cause of action for PAGA civil penalties. *Id*., ¶ 11.

On May 8, 2023, Plaintiff Shelaine Makeba Springer filed her Class Action lawsuit in Los Angeles Superior Court, Case No. 23STCV10277 (the Springer Action"). Larsen Decl., ¶ 12. On the same day, Plaintiff Springer submitted her PAGA notice to the LWDA. *Id*. Plaintiff Springer's notice to the LWDA alleging violations of California Labor Code section sections: 96, 98.6, 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 232, 232.5, 245, *et seq*., 432, 510, 512, 558, 1102.5, 1174, 1174.5, 1194, 1197, 1197.1, 1197.5, 1198.5, 2699, 2802, and 2810.5. *Id*.

On August 2, 2024, Plaintiff Tamez filed his request to dismiss the alleged Class Action claims without prejudice, and on August 12, 2024, the Court dismissed Plaintiff Tamez's Class Action claims without prejudice and retained jurisdiction of Plaintiff Tamez's representative PAGA claims and individual claims. Larsen Decl., ¶ 13.

On November 12, 2024, Plaintiff Tamez filed a Consolidated Second Amended Representative Complaint to name Plaintiff Springer as a named plaintiff and representative in the PAGA Representative Action in the Springer Action, and to add a claim for civil penalties under PAGA for Heyday's alleged violations of California Labor Code sections 246 and 227.3. Larsen Decl., ¶ 16.

### C. Pre-Mediation Discovery and Mediation

In connection with mediation, the Parties engaged in informal discovery, Heyday informally produced relevant policies to my office, a 20% sampling of timekeeping and payroll data, and other relevant information and documents. Larsen Decl., ¶ 14. Plaintiffs also retained an expert data analyst to assist in assessing potential damages. *Id*.

On November 7, 2023, the Parties participated in a day-long mediation with Hon. Daniel J. Buckley, (Ret.). Larsen Decl., ¶ 15. At the mediation, the Parties debated and determined that Plaintiffs' Class Action claims would likely be compelled to arbitration due to purportedly arbitration agreements, which likely would be found enforceable. *Id*. Thus, at the mediation the Parties focused their efforts on negotiating a potential representative settlement of Plaintiffs' representative PAGA claims. *Id*. During the mediation, the Parties vigorously debated Plaintiffs' ability to proceed on a representative PAGA basis, the legal basis for Plaintiffs' representative claims and Heyday's defenses, the potential amount of civil penalties that could be recovered, and the data analyses and conclusions based thereon. *Id*. While the Parties did not reach a settlement at mediation, with Judge Buckley's assistance, over the following months, the Parties were able to reach a settlement to resolve Plaintiffs' PAGA claim. *Id*.

## III. SUMMARY OF THE SETTLEMENT

### A. "Aggrieved Employees" Defined

As noted above, the settlement covers all current and former non-exempt employees who worked for Heyday in California at any time during the PAGA Period, i.e., from April 5, 2022 through November 7, 2023. *See* Settlement, §§ 1.4, 1.18-1.19.

### B. Monetary Terms

As noted above, the Settlement provides for Heyday's payment of a non-reversionary

GSA of $240,000.00. Settlement, §§ 1.12, 3.1. After deducting amounts for requested attorneys' fees, litigation costs, and settlement administration costs, the Settlement provides for the remaining Net Settlement Amount ("NSA") to be distributed 75% to the LWDA and 25% to Aggrieved Employees, pursuant to Lab. Code § 2699(i). *Id*. at §§ 1.16, 1.17, 3.2, 3.3. The 25% portion to Aggrieved Employees shall be distributed based on each Aggrieved Employee's proportional number of pay periods worked for Heyday in California during the PAGA Period. *Id*. at § 1.13, 3.2, 3.3.

### 1. *Requested Attorneys' Fees, Costs, Administration Costs, and Plaintiffs' Enhancement Payments*

Plaintiffs' counsel requests one-third of the GSA (i.e., $80,000) in attorneys' fees, and $16,637.45 in litigation costs. *See* Settlement, §§ 3.2.1; Larsen Decl., ¶¶ 18, 19, 31 & Exhibit 6; Bibiyan Decl., ¶¶ 18-19. As discussed below, one-third of the GSA is fair, adequate, and reasonable as a percentage of the fund and as confirmed by a lodestar cross-check, and is in line with fee awards in other PAGA settlements.

The Parties have agreed to engage Phoenix Settlement Administrators. ("Phoenix") as the third-party Settlement Administrator. *See* Settlement, § 7.1. Phoenix will update Aggrieved Employees' addresses using the National Change of Address database, calculate and distribute individual payments, mail payments to all Aggrieved Employees together with the Cover Letter, and perform other duties that are integral to the effectuation of the Settlement. *Id.*, §§ 7-7.4. Plaintiffs requests that the Court approve $3,350 in Administration Costs to Phoenix, which will cover all costs incurred by Phoenix in connection with the Settlement. *Id.* at § 3.2.3; *see also* Declaration of Jodey Lawrence ("Lawrence Decl."), ¶ 16 & Exhibit B. Finally, Plaintiffs each requests an enhancement payment of $10,000 (totaling $20,000), in exchange for their general release and in recognition of their contributions to this case and efforts in bringing this case to successful resolution. *See* Settlement, §§ 3.2.2; Tamez Decl., ¶¶ 4-6; Springer Decl.

### 2. *Payment to the LWDA and Aggrieved Employees*

As noted above, the NSA will be distributed 75% to the LWDA and 25% to Aggrieved Employees, pursuant to Labor Code § 2699(i). *See* Settlement, §§ 1.13, 1.16, 1.17, 3.3. Based on the above requested distributions, the NSA is estimated to be $120,012.55, with $90,009.41 paid to the LWDA and $30,003.14 distributed to Aggrieved Employees. *See* Settlement at §§ 1.13, 1.16, 1.17, 3.3; *see also* Larsen Decl., ¶ 19.

#### 3. *Funding of the Settlement*

Heyday will fund the settlement in three instalment payments: (1) $80,000 will be deposited with the Settlement Administrator within 30 calendar days of settlement approval; (2) $80,000 to be paid within 90 days of the first payment; and (3) $80,000 paid 90 days after the second payment. *See* Settlement, § 4.1. Within 21 days after the GSA has been fully funded, and after receiving approval from counsel of the payment calculations, Phoenix will mail the Explanatory Letter and Individual PAGA Payments to Aggrieved Employees via First-Class U.S. Mail. *Id*., § 4.4. Funds represented by undeliverable checks, or checks remaining uncashed after 180 days, shall escheat to the California State Controller's Office for deposit in the Unclaimed Property Fund, in the name of the Aggrieved Employee. *Id*., § 4.5.

## IV. LEGAL ARGUMENT

### A. Standards for Approval of a PAGA Settlement

The settlement of a PAGA claim requires court approval pursuant to the PAGA statute, which states that the "court shall review and approve any settlement of any civil action filed pursuant to this part." Labor Code § 2699(l). Of course, "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further." *See In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226 at *9 (N.D. Cal. Sept. 13, 2011). "[T]he very essence of a settlement is…'a yielding of absolutes and an abandoning of highest hopes,'" as "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice v. Civil Service Com*., 688 F.2d 615, 624 (9th Cir. 1982). As such, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" or "judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.*

Although the PAGA statute does not set forth the criteria by which a PAGA settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a class action settlement. However, "a PAGA claim asserted on a non-class representative basis…is not considered a class action but a law enforcement action, and therefore does not have to meet the requirements of [a class action]." *Casida v. Sears Holdings Corp.*, 2012 WL 253217 at *3 (E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 at *4 (E.D. Cal. Jul. 1, 2010) ("PAGA claims are law enforcement actions, not class actions"). A court's review of a PAGA settlement implicates the following unique features that render the approval process distinct from approval of a class action settlement. First, in evaluating a PAGA settlement, the court is not concerned with amount(s) received by "aggrieved employees," but rather, must focus on the total settlement amount in achieving PAGA's objective. "The remedy sought in a PAGA suit consists of civil penalties, not individual or class damages." *Mendez, supra*, 2010 WL 2650571 at *4. "Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action." *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C-08-2073-MHP, 2010 WL 1340777 at *4 (N.D. Cal. Apr. 2, 2010). As our Supreme Court confirmed, "PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf. The employee… 'represents the same legal right and interest as' those agencies — 'namely, recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA].'" *ZB, N.A. v. Superior Court*, 8 Cal.5th 175, 185 (2019) (citing *Iskanian*, 59 Cal.4th at 380).

Moreover, while "'[a PAGA] action is … designed to protect the public and penalize the employer for past illegal conduct" (*Mendez*, 2010 WL 2650571 at *4), a PAGA settlement – like any settlement – involves a compromise that stops short of rendering findings of liability and damages. "Unlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies." *Ochoa-Hernandez*, 2010 WL 1340777 at *4.

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Second, consistent with the fact that unnamed employees have no property interest in a PAGA claim[1], "[u]nnamed employees need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative PAGA claim." *Ochoa-Hernandez, supra*, 2010 WL 1340777 at *5; *see also Robinson v. Southern Counties Oil Co.*, 53 Cal.App.5th 476, 482 (2020) (recognizing that "there is no mechanism for opting out of the judgment entered on the PAGA claim."). This renders the approval process of a PAGA settlement distinct from a class action settlement, as the Court need not employ the "two-step approval process" required for class action settlements under Fed. R. Civ. Proc. Rule 23(e) and Cal. Rule of Court 3.769.

Finally, unlike a class action settlement under Fed. R. Civ. Proc. Rule 23(e) or Cal. Rule of Court 3.769, the scope of release in a PAGA settlement is limited to *civil penalties*. While "judgment in [a PAGA] action is binding not only on the named employee Plaintiffs but also on government agencies and any aggrieved employee not a party to the proceeding…the non-party employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Arias v. Sup. Ct.*, 46 Cal. 4th 969, 986-87 (2009).

The Settlement is fair and adequate because settlements inherently involve compromise, even a settlement providing for substantially narrower relief than might be obtained if the suit were successfully litigated can be reasonable because "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001) (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)).

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

In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Sup. Ct.*, 89 Cal.App.3d 434, 438 (1979). In exercising these powers, the overriding concern is to

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

ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996) (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited to:

> [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001) (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)). In addition, courts review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129-31 (2008). Information is sufficient where it allows the parties and the court to form "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Clark v. Am. Residential Serv. LLC*, 175 Cal.App.4th 785, 801 (2009). This requirement exists so that the parties can provide the court with "a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated." *Kullar, supra*, 168 Cal.App.4th at 132.

**a. <u>The Strength of Plaintiffs' Case</u>**

Although Plaintiffs steadfastly maintain that their claims are meritorious, Plaintiffs acknowledge that their position includes real risks and uncertainty. Larsen Decl., ¶ 20. Plaintiffs allege Heyday failed to incorporate bonuses and other non-discretionary payments in employees' "regular rate," and that this failure resulted in underpaid overtime, meal period premiums, and sick pay wages. Larsen Decl., ¶ 20; *see also Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858, 862 (2021) (holding "regular rate of compensation" under § 226.7(c), like "regular rate of pay" under § 510(a), "encompasses all nondiscretionary payments, not just hourly wages."); Labor Code § 246(l)(1) (requiring that "[p]aid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek."). Heyday contends that many of the payments in question were discretionary, and/or were not tied to the quantity or quality of work performed, and were therefore excludable from the regular rate. Larsen Decl., ¶ 20; *see also* 29 C.F.R. §§ 778.208, 778.211 (excluding "discretionary" bonuses from regular rate). Heyday also contends that any overtime under-payments were *de minimis* and not recoverable. Larsen Decl., ¶ 20.

Plaintiffs also allege that they and other Aggrieved Employees were often forced to take late, short, and/or missed meal periods, and sometimes were not able to take all rest periods to which they were entitled, as a result of the workload imposed on them by Heyday and work-related interruptions. Larsen Decl., ¶ 21. Heyday argues that it has maintained legally-compliant meal and rest period policies and practices throughout the PAGA Period, and that under *Brinker* it is only required to "provide" the opportunity to take meal periods and "authorize and permit" rest periods, not to "ensure" that breaks are taken. Larsen Decl., ¶ 21; *see also Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038 (rejecting "ensure" standard). Further, Heyday argues that it has always informed employees of their right to take meal and rest periods, and that any failure to take a compliant meal or rest period was the result of employee choice, and not any Heyday policy or practice. *Id*.

Plaintiffs also allege that Heyday failed to indemnify them and other employees for the use of their personal cell phones for work purposes, including to use their personal cellular phones to record their time worked on an app called UltiPro and/or ADP, to clock in and out of their shifts, access their wage statement, and to communicate with supervisors and/or other employees. Larsen Decl., ¶ 22. Heyday counters that if employees need to use their personal cell phones in connection with their job duties, there are procedures in place for employees to request reimbursement of work-related expenses. *Id*. Heyday further contends that employees who used their personal cell phones for work purposes received reimbursement. *Id*.

Plaintiffs' allege that Heyday failed to pay Plaintiffs and other employees their unused vacation wages in violation of Labor Code § 227.3. Larsen Decl., ¶ 23. Heyday argues that it has always paid all unused vacation wages owed in compliance with Labor Code § 227.3. *Id*.

As for Plaintiffs' derivative claims that Heyday failed to timely pay final in violation of Labord Code § 203 and violated its wage statement obligations in violation of Labor Code § 226, Heyday asserts that it did not violate any of its final pay and wage statement obligations, and if an inadvertent clerical error did occur, Heyday has strong, good-faith defenses to Plaintiffs' underlying claims, precluding a finding of waiting time penalties. Larsen Decl., ¶ 24. Heyday also maintains that the wage statements furnished upon Aggrieved Employees accurately reflected amounts paid to employees, and thus Heyday cannot be found liable for wage statement violations under the relevant case law. *Id*.

Heyday further maintains that even if the Court awarded PAGA penalties for any of the alleged violations, in the event that Plaintiffs were successful in a judgement based upon the merits, the Court would substantially reduce the penalties based on the discretionary factors in Labor Code § 2699(e)(2) (authorizing reduction in 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."). *See* Larsen Decl., ¶ 25. Indeed, many courts have reduced PAGA penalties where, as here, the employer presented good-faith defenses and attempted to comply with the law. Larsen Decl., ¶ 25; *see, e.g.*, *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because "defendants took their obligations…seriously and attempted to comply with the law"); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK, 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because employer was "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just $5 per pay period due to "good faith attempts" to comply with the law). Larsen Decl., ¶ 25.

**b. Risk, Expense, Complexity, and Duration of Further Litigation**

Although the Parties had engaged in significant informal discovery, the Parties still had much written and deposition discovery to conduct if the case did not settle. Substantive motion work and trial preparation also remained for the Parties, as well as potential appeals. As a result, the Parties would likely incur considerably more attorneys' fees and costs through trial and possible appeal. The Settlement avoids those risks and the accompanying expense.

**c. Amount Offered in Settlement Given Realistic Value of Claims**

The proposed Settlement provides a fair and reasonable monetary recovery for the State of California and Aggrieved Employees in the face of vigorously disputed claims, when compared with the potential realistic exposure.

Based on the above-described violations, Plaintiffs assert that they would be able to seek PAGA penalties for each Aggrieved Employee for each pay period in the PAGA Period. Larsen Decl., ¶ 26. Based on data provided by Heyday, there were approximately 3,408 pay periods during the PAGA limitations period. *Id.*, ¶ 26; *see also* Settlement, § 8.1. Assuming an initial violation rate of $100 per pay period under Labor Code § 2699(f) (*see Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (holding "initial" violation rate applies to PAGA penalties until employer is notified it violated Labor Code)), Plaintiff estimated a total potential PAGA exposure of $340,800. Larsen Decl., ¶¶ 20-26. However, because the Court maintains discretion to reduce these penalties, and in light of Heyday's arguments and defenses described above, Plaintiff discounted that figure by 10% for a risk of losing on the merits, and an additional 10% for risk of the Court reducing penalties, to arrive at a realistic exposure of $276,048. Larsen Decl., ¶ 26; s*ee also, e.g., Thurman*, 203 Cal.App.4th at 1136 (affirming reduction of PAGA penalties); *Fleming*, 2011 WL 7563047 at *5 (reducing PAGA penalties by over 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just $5 per pay period).

Thus, the proposed $240,000.00 GSA therefore represents approximately 86.9% of Plaintiffs' reasonably forecasted total recovery, while avoiding the risks of proceeding through trial. Larsen Decl., ¶ 26. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Plaintiffs acknowledge there was substantial uncertainty and risk as to their claims. Approval of the Settlement is appropriate, as the Settlement will provide tangible monetary relief to Aggrieved Employees and the State of California.

**d. Discovery Completed and the Status of Proceedings**

Only after the completion of informal discovery and following significant debate and discussion with a third-party mediator regarding the merits and defenses of this case, did the Parties reach the proposed Settlement. Thus, this factor supports settlement approval.

**e. The Experience and Views of Counsel**

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiffs are represented by experienced counsel with extensive experience, who believe this Settlement to be fair and adequate for all involved. Larsen Decl., ¶¶ 2-6; Bibiyan Decl., ¶¶ 4-16. This factor strongly supports settlement approval. *Kullar*, 168 Cal.App.4th at 130 ("The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct.").

**B. The Settlement Furthers the Purpose of PAGA**

The Settlement provides a fair, adequate, and reasonable recovery for the LWDA and the aggrieved employees "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." *Moniz, supra*, 72 Cal.App.5th at 89 ("In review and approval of a proposed settlement under section 2699, subd. (*l*)(2), a trial court [ ] must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state's interests, and hence the public interest."). Courts, in assessing the fairness, adequacy, and reasonableness of a PAGA settlement may compare the potential penalty amount with the actual recovery under the settlement. *See Id.*, at 87. Here, the Settlement represents the state's interests by serving PAGA's remedial, deterrence, and enforcement purposes considering the total potential realistic exposure involved here. Specifically, this lawsuit will likely deter future violations of the Labor Code, and recovers approximately 86.9% of Plaintiffs' reasonably forecasted total recovery.

### C. <u>The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the Settlement Fund as Confirmed by a Lodestar Cross-Check</u>

Plaintiffs are entitled to attorneys' fees in this PAGA action under Labor Code § 2699(g)(1), which provides that "[a]ny employee who prevails in any [PAGA] action shall be entitled to an award of reasonable attorneys' fees and costs." *See also Gouskos v. Aptos Village Garage, Inc.*, 94 Cal.App.4th 754, 765 (2001) (holding that attorneys' fees to prevailing party are mandatory when the statute uses the word "shall"); *see also Graciano v. Robinson Ford Sales*, 144 Cal.App.4th 140, 153 (2006) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in the litigation that achieves some of the benefit the parties sought in bringing suit.").

A fee award is justified where the legal action has produced its benefits by way of settlement. *See, e.g., Maria P. v. Riles,* 43 Cal.3d 1281, 1290-91 (1987); *Westside Comty. 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."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment); *Rawlings v. Prudential-Bache Properties, Inc.,* 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorneys' fees more accurately reflects the results achieved for the putative class than the lodestar method and "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.").

Fee awards of one-third of the settlement fund are routinely awarded in California courts in class and representative PAGA actions. The California Supreme Court confirmed its approval of the use of the "percentage of fund" method. *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…")

Specifically, the *Laffitte* Court held:

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts.

*Id.*, at 503 (internal citation omitted). Indeed, "[F]ee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008); *see also, e.g.*, *Chavez v. Saticoy Lemon Ass'n*, 2015 WL 5561118 (Ventura Cty. Super. Ct., Aug. 29, 2015) (approving attorneys' fees of one-third of settlement fund in PAGA settlement). This is consistent with Plaintiffs' counsel's experience in similar wage-and hour matters. Larsen Decl., ¶ 27.

Here, Plaintiffs' fee request of one-third of the GSA (estimated to be $80,000), which is the same percentage approved by the California Supreme Court in *Laffitte*, is fair and reasonable based on the percentage of the recovery method, as confirmed by a lodestar cross-check.

In *Laffitte*, the California Supreme Court 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. While a trial court may utilize the lodestar cross-check, it need not do so. *Id*., at 506 ("[w]e hold further that the trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee."). Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g.*, *Chavez*, 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 class and representative actions, where the value of the benefit conferred "can be monetized with a reasonable degree of certainty," a court may "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." *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557 (2009).

In this case, my office's lodestar is approximately $69,915. *See* Larsen Decl., ¶ 29. My co-counsel's office's lodestar is approximately $128,468. *See* Bibiyan Decl., ¶ 17. Collectively, Plaintiffs' counsel's lodestar is approximately $198,383, without the use of any multiplier, compared to the $80,000.00 fee request. *See* Larsen Decl., ¶ 29. The billing rates used for my firm and my co-counsel's firm are reasonable in view of the evidence submitted herewith. *See* Larsen Decl., ¶¶ 29-30 & Exhibit 5 (2024-2025 *Laffey* Matrix); *see also* Bibiyan Decl., ¶ 17.

The requested fee award is also justified because Plaintiffs' counsel achieved a significant monetary recovery in an uncertain and risky case, while bearing the substantial burden 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). Here, counsel expended significant time and resources in litigating this case, which resulted in a favorable result for Plaintiff, the State of California, and Aggrieved Employees in the face of significant defenses. Counsel also bore the contingency risk of this litigation for the benefit of the Aggrieved Employees, as well as the State of California (which elected not to take the case after receiving Plaintiffs' PAGA notice).

Critically, Plaintiffs' recovery for the State of California and Aggrieved Employees of approximately $240,000.00 (the Net Settlement Amount) significantly exceeds other PAGA awards approved by California courts. *See, e.g., Aguirre v. DSW, Inc.*, 2012 WL 11875296, *3 (C.D. Cal. Nov. 29, 2012) ($10,000 PAGA payment); *Garcia, supra*, 2012 WL 5364575 at *7 (approving $10,000 PAGA payment, finding it "comports with settlement approval of PAGA awards in other cases. [Citations.]"); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, *8 (C.D. Cal. Nov. 18, 2014) ($18,750 PAGA payment); *Franco v. Ruiz Food Prods.*, 2012 WL 5941801, *14 (E.D. Cal. Nov. 27, 2012) ($10,000 PAGA payment); *Chu v. Wells Fargo Inv., LLC*, 2011 WL 672645, *1 (N.D. Cal. Feb. 16, 2011) ($10,000 PAGA payment).

Plaintiffs' counsel has significant experience wage-and-hour class and representative action experience and have been certified as class counsel in numerous wage and hour class actions. Larsen Decl., ¶¶ 2-6; Bibiyan Decl., ¶¶ 4-16. Because it is reasonable to compensate counsel commensurate with their skill, reputation, and experience, a fee award of one-third of the GSA is reasonable. Other factors show the requested fee is reasonable. This case involved nuanced legal issues and Heyday was also represented by experienced wage-and-hour litigation counsel. Larsen Decl., ¶¶ 20-25. Thus, Plaintiffs submit the requested fee award is fair, reasonable and adequate and should be approved.

### D. The Requested Litigation Costs and Settlement Administration Costs Are Fair, Reasonable, and Adequate

Plaintiffs' request for reimbursement of litigation costs of $16,637.45 is also fair and reasonable. All of Plaintiffs' litigation costs were reasonably incurred. *See* Larsen Decl., ¶¶ 18, 31 & Exhibit 6; Bibiyan Decl., ¶ 19. Moreover, the costs Plaintiffs seeks are the types of costs routinely approved by courts. *See*, *e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out- of-pocket expenses that would normally be charged to a fee paying client"); *Ashker v. Sayre*, 2011 WL 825713 at * 3 (N.D. Cal. Mar. 7, 2011) ("costs of reproducing pleadings, motions and exhibits are typically billed by attorneys to their fee-paying clients" and are reimbursable); *In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, postage, filing fees, messenger and overnight delivery costs, and other costs are reimbursable).

Likewise, the request for administration costs of $3,350.00 is also fair and reasonable. Phoenix was selected because it is an experienced settlement administrator and returned a reasonable bid. *See* Lawrence Decl. ¶ 16 & Exhibit B. Moreover, Phoenix will perform several important functions that are integral to the implementation of the Settlement. *Id.* Its requested fee is therefore reasonable.

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### E. The Court Should Approve Plaintiffs' Requested Enhancement Awards Because They Are Fair, Adequate, and Reasonable in View of Plaintiffs' Efforts and the Risks They Assumed in This Litigation

Courts routinely approve enhancement awards to compensate named plaintiffs for the services they provide and the risks they incur during representative litigation. *See, e.g., Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to named plaintiffs); *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294 (N.D. Cal. 1995) (approving $50,000 incentive payment); *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (observing incentive awards are "fairly typical" and are awarded to named plaintiffs "…to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, **to recognize their willingness to act as a private attorney general**") (emphasis added); *see also Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (awarding $10,000 incentive award in wage-and-hour class/PAGA action). Here, Plaintiffs seek an enhancement payment of $10,000 each. *See* Settlement, § 3.2.2. This request is reasonable given Plaintiffs' efforts in this case and the risks they undertook on behalf of Aggrieved Employees. *See* Tamez Decl., ¶¶ 5-7; Springer Decl. Plaintiffs provided substantial factual information and documents to Counsel, assisted in identifying potential witnesses, and participated in numerous discussions with Counsel regarding the case and the settlement. *Id*.; *see also* Larsen Decl., ¶ 32. Accordingly, Plaintiffs' requested enhancement payment is appropriate and justified as part of the Settlement.

## V. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully requests that this Court grant Plaintiffs' Motion and adopt the [Proposed] Judgment and Order Granting Settlement Approval.

Respectfully submitted,

Dated: March 5, 2025

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