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ALEXANDER FLAMER IV

7 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

8 **COUNTY OF LOS ANGELES**

9 ALEXANDER FLAMER IV, an
10 individual,

11 Plaintiff,
12 vs.

13 ADVERTISE PURPLE, a California
corporation; and DOES 1 through 10,
14 inclusive,
15 Defendants.

Case No. 23STCV14693

**PLAINTIFF'S NOTICE OF MOTION AND
UNOPPOSED MOTION FOR APPROVAL OF
PAGA ACTION SETTLEMENT**

Date: March 14, 2024

Time: 9:00 a.m.

Dept. 54

Judge: Hon. Maurice A. Leiter

[Assigned for all purposes]

Reservation ID: 412407530268

Complaint Filed: June 23, 2023

Trial Date: T.B.D

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

PLEASE TAKE NOTICE that, on March 14, 2024, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 54 of the above-captioned court located at 111 N. Hill St, Los Angeles, California 90012, Plaintiff Alexander Flamer IV, individually and on behalf of all other aggrieved employees, will and hereby does move this Court for entry of an order and judgment approving the Parties' PAGA settlement pursuant to Labor Code Section 2699(1)(2).

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the attached Memorandum of Points and Authorities; (3) the Declarations of Keith Custis, Alexander Flamer IV and Lisa Mullins; (4) the PAGA Action Settlement, which is attached as **Exhibit A** to the Custis Declaration; (5) the Amendment to PAGA Action Settlement, which is attached as **Exhibit B** to the Custis Declaration; (6) the [Proposed] Order Granting Approval of PAGA Action Settlement; (7) the [Proposed] Judgment; (8) the records, pleadings, and papers filed in this action; and (9) any other documentary and oral evidence or argument presented to the Court at or prior to the hearing of this Motion.

Pursuant to Labor Code Section 2699(1)(2), a copy of PAGA Action Settlement and Amendment to PAGA Action Settlement was e-filed with the LWDA on February 16, 2024. Declaration of Keith Custis, **Ex. C**.

Respectfully submitted,

CUSTIS LAW, P.C.

Dated: February 16, 2024

By: _____
Keith Custis

Attorneys for Plaintiff
ALEXANDER FLAMER IV

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I. INTRODUCTION

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”), Plaintiff Alexander Flamer IV respectfully seeks approval of the settlement of his claim for PAGA civil penalties with Defendants Advertise Purple and Jonathan Moisan (collectively, “Defendants”).¹

Under the terms of the Settlement, Advertise Purple will pay \$82,500 in resolution of Plaintiff’s claim for violation of the PAGA. Subject to Court approval, this common fund will be used to pay (a) \$31,590.65 to the State of California; (b) \$10,530.22 to the Aggrieved Employees; (c) attorneys’ fees in the amount of \$27,497.25; (d) litigation costs in the amount of \$7,886.88; (d) Plaintiff’s Service Payment in the amount of \$1,000.00; and (e) the Administration Expenses Payment in the amount of \$3,995.00.

As detailed below, the Settlement satisfies all criteria for approval. The Settlement is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. Accordingly, Plaintiff respectfully requests that the Court grant this Motion.

II. BACKGROUND

A. The Parties

Advertise Purple is in the business of managing online “affiliate advertising” for businesses. Custis Decl., ¶ 5. Advertise Purple employed Plaintiff from May 2021 until July 2022. *Id.*, ¶ 6.

B. Procedural History

On April 3, 2023, Plaintiff’s Counsel provided pre-filing written notice to the LWDA and by certified mail to Defendants of the alleged Labor Code violations on behalf of the LWDA, Plaintiff, and similarly situated employees as required by Labor Code § 2699.3(a). Custis Decl., ¶ 7.

On June 23, 2023, Plaintiff commenced the Action against Defendants by filing his initial complaint. Custis Decl., ¶ 8. Plaintiff subsequently filed the operative Second Amended Complaint

¹ The settlement terms are set forth in the PAGA Settlement Agreement and “Amendment to Settlement (collectively, “SA” or “Settlement”), attached, respectively, as **Exhibits A and B** to the concurrently-filed Declaration of Keith Custis (“Custis Decl.”). Unless otherwise specified, all capitalized terms used herein have the same definitions as those defined in the Settlement.

1 (“SAC”), which asserts a single cause of action under PAGA seeking civil penalties for alleged
2 violations of the Labor Code sections 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558,
3 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751 and 2802. In the Action, Plaintiff sought civil
4 penalties on behalf of all employees of Defendant Advertise Purple who worked in the positions of
5 account executive or business development representative in the State of California. SAC, ¶ 22.

6 Plaintiff’s primary theories of liability are as follows:

7 *Minimum and Overtime Wage Claim.* Plaintiff alleges that Defendants failed to pay the
8 applicable minimum and overtime wages for all hours worked because Advertise Purple
9 misclassified the Aggrieved Employees as exempt, the Aggrieved Employees routinely worked in
10 excess of eight (8) hours in a single workday and forty (40) hours in a single workweek, and Advertise
11 Purple failed to compensate the Aggrieved Employees for all hours worked in excess of eight (8)
12 hours in a workday and forty (40) hours in a workweek. SAC, ¶¶ 55-78.

13 *Failure to Pay All Earned Wages & Unlawful Deductions.* Plaintiff alleges that Advertise
14 Purple failed to pay all earned wages and/or unlawfully deducted earned wages from the Aggrieved
15 Employees’ compensation by deducting a percentage of earned commissions for an undisclosed
16 “credit card processing fee,” and by deducting “chargebacks” that were not disclosed or agreed to in
17 writing by the Aggrieved Employees. SAC, ¶¶ 79-94.

18 *Failure to Provide Rest and Meal Periods.* Plaintiff alleges that Advertise Purple failed to
19 provide compliant rest and meal periods to the Aggrieved Employees because they were
20 misclassified as exempt employees and failed to pay premium wages for same. SAC, ¶¶ 95-116.

21 *Failure to Reimburse Business Expenses.* Plaintiff alleges that Advertise Purple required
22 employees to use their personal cell phones and Internet data plans for work purposes, but failed to
23 reimburse any portion of the cost of their cell phones or Internet data plans. SAC, ¶¶ 117-130.

24 *Waiting Time Penalties, Wage Statement and Labor Code § 204 Claims.* Plaintiff’s
25 allegations that Advertise Purple violated Labor Code Sections 201, 202, 204, and 226 are derivative
26 of Plaintiff’s minimum wage, overtime, and rest and meal period claims. SAC, ¶¶ 131-135, 153-162.

27 *Failure to Provide Written Commission Agreements.* Plaintiff alleges that Defendant failed
28 to provide written commission agreements to Aggrieved Employees, as the Labor Code requires.

1 SAC, ¶¶ 146-152.

2 **C. Discovery and Investigation**

3 Plaintiff's Counsel's investigation of the PAGA claim and theories of liability prior to
4 mediation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker*
5 *Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168
6 Cal.App.4th 116, 129-130. Custis Decl., ¶¶ 10-13. Plaintiff propounded eleven (11) special
7 interrogatories, fifty-two (52) requests for production, nine (9) requests for admissions and general
8 form interrogatories, all of which were responded to by Defendants. During the litigation, Defendants
9 also produced all written wage and hour policies, the time and pay records for Plaintiff, exemplars
10 of wage statements for all other Aggrieved Employees, and the offer letters/commission agreements
11 sent to Plaintiff and other Aggrieved Employees. Plaintiff's counsel also interviewed four Aggrieved
12 Employees in addition to Plaintiff. *Id.*, ¶¶ 10-12.

13 In preparation for the mediation, Advertise Purple also provided Plaintiff's Counsel with (1)
14 the total number of former and current Aggrieved Employees during the PAGA period; (2) the total
15 number of separated Aggrieved Employees during the PAGA period; and (3) the total aggregate
16 number of pay periods during the PAGA period (the "PAGA Data"). Custis Decl., ¶ 13. Using the
17 PAGA Data, Plaintiff's Counsel prepared a comprehensive damage analysis prior to mediation,
18 which is detailed in the Custis Declaration and summarized below. *Id.* ¶¶ 47-72.

19 **D. The Parties Settled After Mediation**

20 On August 7, 2023, the parties and their counsel participated in a full-day mediation with the
21 Hon. Judge Michael Latin (Ret.), a well-respected mediator with considerable experience mediating
22 wage and hour class and PAGA actions. The mediation was not successful. Custis Decl., ¶ 14. On
23 November 3, 2023, the Parties and their counsel participated in a second full-day mediation with the
24 Hon. Judge Louis Meisinger (Ret.), a well-respected mediator with considerable experience
25 mediating wage and hour class actions and PAGA representative actions. *Id.* ¶ 15. After a full day of
26 intense negotiations, Judge Meisinger issued a mediator's proposal to settle the PAGA claim for
27 \$82,500, which the parties accepted on November 9, 2023. *Id.* The negotiations were at all times
28 adversarial and at arm's length. *Id.*, ¶¶ 16-17.

E. The Amendment to the PAGA Settlement Agreement

The parties amended the Settlement because the amounts of the penalties set forth in the PAFGA Settlement Agreement were based on the negotiated amounts of litigation and administrative costs, and not the actual amounts sought by this Motion. The parties also included a PAGA Payment Letter in the Amendment for distribution to the Aggrieved Employees with their payments.

F. Overview of the Settlement

1. The Aggrieved Employees and PAGA Period

The term “Aggrieved Employees” means “a person employed by Advertise Purple in California as a Business Development Representative or Account Executive during the PAGA Period.” SA, ¶ 1.4. The PAGA Period is defined as “period from April 3, 2022 to February 15, 2024.” SA, ¶ 1.20. There are approximately 50 Aggrieved Employees. SA, ¶ 4.1.

2. Monetary Terms

Defendants have agreed to pay a Gross Settlement Amount of \$82,500 (“GSA”) to settle the action. SA, ¶¶ 1.11, 3.1. After deducting amounts for Plaintiff’s Service Payment, Attorneys’ Fees and Costs, and Settlement Administration Costs, the Settlement provides that the remaining Net Settlement Amount (“NSA”) will be distributed pursuant to Labor Code § 2699(i) to the LWDA and the Aggrieved Employees as follows: 75% to the LWDA and 25% to Aggrieved Employees. SA, ¶ 3.2; *see also* ¶ 3.2.4. The Settlement is non-reversionary. SA, ¶ 3.1.

The principal monetary terms of the Settlement, and the amounts sought by this Motion, respectively, are as follows:

	Negotiated Settlement Amounts	Amounts Sought By Motion
Maximum Settlement Amount:	\$82,500.00	\$82,500.00
Less PAGA Counsel’s Attorneys’ Fees	-\$27,497.25	-\$27,497.25
Less PAGA Counsel’s Litigation Costs	-\$8,000.00	-\$7,886.88
Less Plaintiff’s Service Award	-\$1,000.00	-\$1,000.00
<u>Less Settlement Administration Costs</u>	-\$4,000.00	-\$3,995.00

Assuming the Court grants the relief requested by the Motion, the NSA will be \$42,120.87. Seventy-five percent (75%) of the NSA—or \$31,590.65—will be distributed to the LWDA as required by the PAGA. SA, ¶ 3.2.4. The remaining twenty-five percent (25%)—or \$10,530.22—of

will be distributed on a pro-rata basis to the Aggrieved Employees. *Id.* The average net payment of civil penalties to Aggrieved Employees will be \$210.60 (\$10,530.22 / 50 employees).

3. Individual PAGA Payments

Individual PAGA Payments will be calculated and paid from the NSA based on the number of pay periods an Aggrieved Employee worked during the PAGA Period. SA, ¶ 3.2.4.1. To calculate Individual PAGA Payments, the Administrator will calculate the total number of Pay Periods worked by each Aggrieved Employee during the PAGA Period and the aggregate number of Pay Periods worked by all Aggrieved Employees during the PAGA Period. To determine each Aggrieved Employee's Individual PAGA Payment, the Administrator will use the following formula: The Aggrieved Employee Portion of the NSA will be divided by the aggregate number of Pay Periods, resulting in the "pay period value." Each Aggrieved Employee's Individual PAGA Payment will be calculated by multiplying each individual Aggrieved Employee's total number of Pay Periods by the pay period value. *Id.*

4. The Aggrieved Employees' Release

As of the Effective Date, all Aggrieved Employees including Plaintiff will release the Released Claims, which are defined as follows:

[A]ll claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice, including alleged violations of Labor Code §§ 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751 and 2802, as set forth in the PAGA Notice.

SA, ¶ 5.2.

5. Settlement Administration

The Settlement provides that Ilym Group, Inc. ("Ilym") will serve as the Settlement Administrator. SA, ¶ 7.1. Ilym is a reputable administrator that has successfully administered thousands of class and PAGA action settlements. Declaration of Lisa Mullins, ¶¶ 2; *see also id.* Ex. A (Ilym resume). Ilym will administer the Settlement for the capped costs of \$3,995.00. *Id.*, ¶ 5, Ex. C. If the Settlement is approved, Advertise Purple will pay the GSA and provide the Aggrieved Employees List to Ilym, respectively, within 14 and 15 days after the Effective Date. SA, ¶¶ 4.2, 4.3.

1 llym, in turn, will make all payments required by the Settlement including the payments to the
2 LWDA and all Aggrieved Employees within 28 days after the Effective Date. SA, ¶¶ 4.3, 4.3 .

3 **6. Treatment of Uncashed Settlement Checks**

4 Settlement checks will be negotiable for 180 days. If a check is returned to the Administrator
5 as undeliverable during the 180-day period, the Administrator shall take all reasonable efforts to
6 identify the employee’s correct address, including the performance of a “skip-trace,” and to send
7 another check to the employee at his or her updated address. SA, ¶ 4.4.2. For any Aggrieved
8 Employee whose check is uncashed and cancelled after the void date, the Administrator shall transmit
9 the funds represented by such checks to the California Controller’s Unclaimed Property Fund in the
10 name of the Aggrieved Employee. SA, ¶ 4.4.3; *see also* Civ. Proc. Code § 1500, *et seq.*

11 **III. ARGUMENT**

12 **A. A PAGA Settlement Must Be Fair, Reasonable, and Adequate**

13 A court must review and approve any PAGA settlement. Labor Code § 2699(1)(2). In *Moniz*
14 *v. Adecco USA Inc.*, the California Court of Appeal held that “a trial court should evaluate a PAGA
15 settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes to
16 remediate present labor law violations, deter future ones, and to maximize enforcement of state labor
17 laws.” (2021) 72 Cal.App.5th 56, 77.

18 *Moniz* also held that because “many of the factors used to evaluate class action settlements
19 bear on a settlement’s fairness—including the strength of the plaintiff’s case, the risk, the stage of
20 the proceeding, the complexity and likely duration of further litigation, and the settlement amount—
21 these factors can be useful in evaluating the fairness of a PAGA settlement.” *Moniz*, 72 Cal.App.5th
22 at 77.

23 **B. The Settlement is Presumptively Fair, Reasonable and Adequate**

24 A settlement is presumptively fair where it is reached through arm’s-length bargaining, based
25 on sufficient discovery and investigation to allow counsel and the court to act intelligently, and
26 counsel is experienced in similar litigation. *Dunk*, 48 Cal. App. 4th at 1802. All of those factors are
27 satisfied here. Custis Decl., ¶¶ 10-17, 29-43.

28 //

1 **C. The Settlement is Fair, Reasonable and Adequate**

2 When evaluating whether a settlement is fair, reasonable and adequate, courts also consider:
3 (1) the strength of Plaintiff's case; (2) the risk, expense, complexity and likely duration of further
4 litigation; (3) the amount offered in settlement; (4) the extent of discovery completed; and (5) the
5 experience and views of counsel. *Dunk*, 48 Cal. App. 4th at 1801. Application of those factors here
6 demonstrates the proposed settlement is fair, reasonable and adequate.

7 **1. The Strength of Plaintiff's Case**

8 Although Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges there are
9 substantial risks and uncertainties in trying the Action on the merits. As described below and in the
10 Custis Declaration, Advertise Purple could present multiple defenses to Plaintiff's claims. Custis
11 Decl., ¶¶ 45, 47-72. Thus, while Plaintiff was prepared to litigate his claims through trial, success
12 was far from certain. This factor supports approval.

13 **2. Risk, Expense, Complexity and Duration of Further Litigation**

14 If the case had not settled, and continued to be litigated, Plaintiff anticipates that the parties
15 would spend hundreds of hours preparing for a trial. Both parties would engage in extensive,
16 additional discovery including depositions of Plaintiff, other Aggrieved Employees, several defense
17 witnesses, and each party's experts. Defendants also would engage in motion practice. The parties
18 would thus incur considerably more attorneys' fees and costs through trial, and possible appeals. This
19 Settlement avoids those risks and the accompanying expense.

20 **3. Amount Offered in Settlement Given the Realistic Value of the Claims**

21 This Settlement provides a fair and reasonable monetary recovery for the LWDA and the
22 Aggrieved Employees in the face of disputed claims. A comparison of the amount that Defendants
23 offered in settlement to Defendants' total exposure demonstrates that \$82,500 is reasonable.

24 Statutory penalties would be calculated according to Labor Code 2699(f)(2). If, at the time of
25 the alleged violation, the person employs one or more employees, the civil penalty is one hundred
26 dollars (\$100) for each aggrieved employee per pay period for the initial violation, and two hundred
27 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Several
28 courts have found, however, that the "subsequent" penalty under PAGA applies only after a court or

1 the Labor Commissioner determines that the employer has violated the Labor Code. *See Gunther v.*
2 *Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 356 (2021) (“the increased \$200 civil penalty for
3 ‘subsequent violation[s]’ does not apply unless [Plaintiff] presents evidence that the Labor
4 Commission or a court notified [Defendant] that it was in violation of the Labor Code.”); *Bernstein*
5 *v. Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing judgment as to “heightened civil
6 penalties” because the defendant was not given notice by the Labor Commissioner when the
7 “subsequent” violations occurred).

8 According to the PAGA Data produced by Advertise Purple, Advertise Purple employed 50
9 Aggrieved Employees during the PAGA Period. The Aggrieved Employees worked a total of
10 approximately 1,000 pay periods during the PAGA Period. During the PAGA Period, approximately
11 33 Aggrieved Employees separated from Advertise Purple. Custis Decl., ¶ 48; *see also* S.A., ¶ 4.1.

12 Using that data, and assuming a 100% violation rate where Plaintiff could obtain the initial
13 civil penalties available under the PAGA, Plaintiff predicted Advertise Purple’s total exposure for
14 civil penalties would be approximately \$100,000 (1,000 pay periods x \$100 civil penalty) without
15 stacking; and \$828,300 with stacking (i.e., the tabulating and aggregating of all potential penalties).
16 Custis Decl., ¶¶ 49, 71.

17 After calculating Advertise Purple’s maximum exposure under PAGA, Plaintiff then
18 discounted that exposure for settlement purposes to account for the risks of continued litigation,
19 including: (1) the strength of Advertise Purple’s defenses on the merits, which are detailed in the
20 Custis Declaration; (2) the risk of losing on any number of dispositive motions that could have been
21 brought between now and trial (e.g., motions for summary judgment and/or motions in limine), which
22 may have eliminated Plaintiff’s claim, or barred evidence necessary to prove his claim; (3) the risk
23 that the Court would exercise its discretion under PAGA to reduce the maximum civil penalties
24 available by statute; (4) the risk that the court would not stack all available civil penalties; (5) the
25 chances of a favorable verdict being reversed on appeal; and (6) the difficulties attendant to collecting
26 on a judgment. Custis Decl., ¶¶ 51-69 (describing Advertise Purple’s defenses).

27 Advertise Purple would undoubtedly argue that an award of \$828,300 is “unjust, arbitrary
28 and oppressive, or confiscatory.” PAGA authorizes the court to reduce the maximum amount of civil

penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2). In reducing PAGA penalties, courts have considered issues including whether the employees suffered actual injury from the violations, whether the defendant was aware of the violations, and the employer’s willingness to fix the violation. *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 528 (awarding PAGA penalties of only 0.2% of the maximum, reducing approximately \$70,000,000 in penalties to \$150,000); *see also Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal. App. 4th 1112, 1136 (reducing original penalty of \$512,268.88 by 30% to \$358,588.22); *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011), No. ED CV 10-01487 RGK (OPx), 2011 WL 7563047, at *4 (reducing original penalty of \$2.8 million by 82% to \$500,000 where Defendant was “not aware” that its actions violated the law).

Taking into account the above contingencies, as detailed in the Custis Declaration, Plaintiff determined that a realistic total recovery would be approximately \$438,650 with the stacking of available civil penalties. The proposed settlement of \$82,500 thus represents approximately 19% of the predicted realistic total recovery of \$438,650 with stacking, and 82.5% of the maximum recovery without stacking, and is thus reasonable. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1150 (“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.”).

4. Discovery Completed and the Status of Proceedings

As detailed above and in the Custis Declaration, Plaintiff’s Counsel engaged in sufficient investigation, and informal and formal discovery before mediation. Custis Decl., ¶¶ 10-13.

5. The Settlement Was Reached By Competent Counsel With The Involvement of A Neutral Mediator

“The court . . . 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.” *Kullar*, 168 Cal.App.4th at 129. Plaintiff’s Counsel has considerable experience in PAGA and other complex

1 employment litigation and is eminently qualified to evaluate the PAGA claims, the value of the
2 settlement compared to the risks and costs of litigation, and the viability of Defendants' defenses.
3 Custis Decl. ¶¶ 29-43. Plaintiffs' Counsel believe that the settlement is fair, reasonable, and adequate
4 in light of the risks associated with the merits of Plaintiffs' claims, the uncertainties of complex
5 litigation, the Court's discretion to lower the amount of penalties ultimately awarded, and the secured
6 benefit to the LWDA and Aggrieved Employees. In addition, as noted above, the Settlement was
7 reached with the assistance of Judge Louis Meisinger, an experienced mediator with ample
8 experience resolving wage and hour class and PAGA actions. *See Kullar*, 168 Cal.App.4th at 129.

9 For the foregoing reasons, the proposed settlement is fair, reasonable and adequate and should
10 be approved.

11 **D. The Settlement Furthers PAGA's Public Policies**

12 The Settlement should also be approved because it furthers PAGA's public policies. First, it
13 maximizes enforcement of the state's labor laws by augmenting its enforcement capabilities.
14 Assuming the Court approves the requests for fees, costs, and the service payment, the LWDA will
15 receive a net payment of \$31,590.65. Custis Decl., ¶ 23. Second, the claims and the settlement
16 remediate alleged Labor Code violations. Here, the major remediation occurred shortly after the case
17 was filed when Advertise Purple re-classified the Aggrieved Employees as non-exempt. Finally, the
18 GSA of \$82,500 is also robust enough to deter Defendants from committing further Labor Code
19 violations

20 **E. The Settlement Satisfies PAGA's Statutory Requirements**

21 PAGA's statutory requirements are satisfied here. In compliance with Labor Code §
22 2699(1)(2), Plaintiff submitted a copy of the Settlement, along with a copy of the this Motion and
23 supporting documents, to the LWDA on February 16, 2024. Custis Decl., Ex. C. Plaintiff is seeking
24 Court approval of the Settlement, and has otherwise complied with PAGA.

25 **F. The Court Should Approve Plaintiff's Service Payment**

26 While there appears to be no California appellate authority analyzing the appropriateness of
27 service payments to PAGA representatives, California courts routinely approve such payments
28 because the reasons for awarding incentive awards in class actions are similarly present in PAGA

1 litigation.² The purpose of service awards is to incentivize aggrieved employees to step into the shoes
2 of the LWDA and undertake the risks associated with initiating a lawsuit and serving in a
3 representative capacity. *See, e.g., Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715, 726
4 (“service payments” compensate named plaintiff “for [his] efforts in bringing the action”). Service
5 awards thus further the Legislature’s sole purpose in enacting PAGA by incentivizing a plaintiff “to
6 augment the limited enforcement capability of the [LWDA] . . . to enforce the Labor Code as
7 representatives of the [LWDA].” *See Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104,
8 1122.

9 That the PAGA statute is silent on the issue of service payments should not be an impediment
10 to approving such payments. Notably, like the PAGA, the class action statutes—Federal Rule of Civil
11 Procedure Rule 23 and California Code of Civil Procedure section 382—are equally silent as to
12 service payments. *See* 5 Newberg and Rubenstein on Class Actions § 17:5 (5th ed.) (“Rule 23 does
13 not currently make, and has never made, any reference to incentive awards The judiciary has
14 created these awards out of whole cloth.”).

15 The two main California cases that considered the propriety of service payments in class
16 actions relied on federal class action cases, which found service payments to be appropriate based on
17 the policy rationales for the payments: (a) to incentivize the class representatives to bring cases, (b)
18 “to compensate class representatives for work done on behalf of the class, [(c)] to make up for
19 financial or reputational risk undertaken in bringing the action, and, sometimes, [(d)] to recognize
20 their willingness to act as a private attorney general.” *See Cellphone Termination Fee Cases*, 186
21 Cal. App. 4th 1380, 1393-1394 (2010) (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958-
22 59 (9th Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed.
23 2008))); *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). The same policy
24 rationales that support service payments to class representatives also support service payments to
25 PAGA plaintiffs.

26 ² *See, e.g., Galindo v. 20/20 Plumbing and Heating, Inc.*, (Cal.Super. Oct. 24, 2021) No. CIVSB-
27 2118276, 2021 WL 9880030, at *1 (\$5000 incentive award to PAGA representative); *Lawson v.*
28 *California Bank & Trust*, Case No. 37-2016-00005578-CU-OE-CTL, 2020 WL 3579290, at *2 (Feb.
21, 2020 San Diego Cty. Super. Ct.) (court approval of \$10,000 incentive award to PAGA plaintiff).

Notably, the LWDA recently voiced support for the approval of service payments to PAGA plaintiffs. *See* “Comments of LWDA Regarding Proposed Settlement,” filed in *Doe v. Google, Inc., et al.*, Case No. CGC-16-556034 (S.F. Sup. Ct) (“LWDA Comments”), attached as Exhibit A to the concurrently-filed Request for Judicial Notice (“RJN”). In November 2023, the LWDA submitted comments in support of the \$27,000,000 settlement *Doe v. Google, Inc., et al.*, Case No. CGC-16-556034 (S.F. Sup. Ct), a PAGA-only action. *See* RJN, Exhibit 1 at p.4-p.5. In *Doe v Google*, Plaintiffs’ Counsel sought two \$20,000 and two \$10,000 service payments. RJN, Ex. 2 (Order Approving Settlement). In the LWDA Comments, the LWDA wrote that, “[a]lthough the express statutory terms of PAGA do not address incentive awards, the reasons for awarding incentive awards in class actions may similarly be present in PAGA litigation.” RJN, Ex 1 at 4-5. The LWDA also expressed its approval for the proposed settlement in *Doe v. Google*, including the \$20,000 and \$10,000 service payments. RJN, Ex. 1 at 4-5; *see also Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (“An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts.”).

Here, Plaintiff seeks the Court’s approval of a \$1,000 Service Payment for his service to the State of California and the other Aggrieved Employees and the risks incurred in serving as Plaintiff in a PAGA action. SA, ¶ 3.2.2. The requested Service Award is fair and reasonable compensation for Plaintiff’s efforts in representing the interests of the LWDA and other Aggrieved Employees, assisting counsel with the litigation and settlement, introducing Plaintiff’s Counsel to numerous Aggrieved Employees, attending dozens of telephonic meetings with Plaintiff’s counsel to discuss the claims and theories at issue in the litigation, attending the mediations to assist with the Settlement and reviewing drafts of the complaints, the mediation brief and the Settlement Agreement. Flamer Decl., ¶¶ 2-19. The requested Service Payment is reasonable and should be approved.

G. The Court Should Approve Plaintiff’s Counsel’s Attorneys’ Fees

The Settlement establishes a common fund of \$82,500. Pursuant to the Settlement, the Parties agreed that Plaintiff could seek attorneys’ fees up to 33.33% of the GSA, or \$27,497.25. SA, ¶ 3.2.1. By this Motion, Plaintiff seeks an award of \$27,497.25 in attorneys’ fees. Plaintiff’s Counsel is entitled to attorneys’ fees and costs as a matter of right under PAGA. Labor Code § 2699(g)(1).

For well over a century, courts have recognized that when counsel’s efforts result in the creation of a common fund that benefits plaintiffs and unnamed class members, counsel have an equitable right to be compensated from that fund for their successful efforts in creating it. *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478 (1980) (the Supreme Court “has recognized consistently that a litigant or lawyer who recovers a common fund . . . is entitled to a reasonable attorney’s fee from the fund as a whole”). “The [common fund] doctrine has been recognized and applied consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” *City & County of San Francisco v. Sweet* (1995) 12 Cal. 4th 105, 110.

California state and federal courts routinely award attorneys’ fees equaling one-third of the common fund in class and PAGA actions. *Laffitte v. Robert Half Internat. Inc.* (2016) 231 Cal. App. 4th 860, 871 (“33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits”); *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66 n.1 (“empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery”).

Here, Plaintiff’s Counsel’s fee request of \$27,497.25, or 33.33% of the common fund, is fair and reasonable. The result achieved in this case—a \$82,500 settlement—provides an excellent monetary recovery for the State of California and the Aggrieved Employees in the face of hotly-disputed claims. The litigation here was also risky: Plaintiff’s Counsel took this case on contingency, working over 82 hours since April 2023 without being paid, and advancing over \$7,800 in costs without any guarantee of reimbursement. Custis Decl., ¶¶ 80-81, Exs. 5-6, ; *In re Heritage Bond Litig.*, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005) (“Courts consistently recognize that the risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel’s fee award.”). Plaintiff’s Counsel also undertook this representation to the exclusion of other paying work. Custis Decl., ¶ 79.

To further evaluate reasonableness, the Court may—but is not required to—cross-check the percentage of recovery against Plaintiff’s Counsel’s lodestar. *Laffitte*, 1 Cal. 5th at 506. In conducting a lodestar cross-check, the court is not “required to closely scrutinize each claimed attorney-hour.” *Laffitte*, 1 Cal. 5th at 505. An evaluation may be done by reviewing “counsel declarations

1 summarizing overall time spent.” *Id*

2 Here, the requested fees of \$27,497.25 are considerably less than Plaintiff’s Counsel’s
3 lodestar of \$70,380.00, representing a negative multiplier of 2.56%, with additional work to be
4 performed. Custis Decl., ¶ 84.

5 Plaintiff’s Counsel has spent over 82 hours litigating Plaintiff’s PAGA claim, including
6 conducting pre-filing investigation, legal research and analysis, reviewing Advertise Purple’s
7 policies, interviewing other Aggrieved Employees, drafting discovery and reviewing responses,
8 preparing for and attending mediation, negotiating and drafting the settlement agreement, preparing
9 this Motion for Approval, and otherwise litigating the case. Custis Decl., ¶ 82. Plaintiff’s Counsel
10 will continue to incur time preparing for and attending the hearing on this Motion, and submitting a
11 report regarding dissemination of funds to the Court. Custis Decl., ¶ 83. In reaching this figure,
12 Plaintiff’s Counsel has exercised significant billing judgment, reducing hours billed to exclude
13 redundancies, inefficiencies, or other time not appropriately charged to a paying client. *Id.* ¶ 85.
14 Plaintiff’s Counsel also did not include any hours spent prosecuting Plaintiff’s individual claims for
15 wrongful termination the related case, which was settled last year. *Id.* ¶ 86.

16 In determining the reasonableness of the hours expended, “the court should defer to the
17 winning lawyer’s professional judgment as to how much time he was required to spend on the case;
18 after all, he won, and might not have, had he been more of a slacker.” *Kerkeles v. City of San Jose*,
19 243 Cal. App. 4th 88, 104 (2015) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th
20 Cir. 2008)). Given the numerous tasks required and the results obtained, the hours of work performed
21 by Plaintiff’s Counsel in prosecuting the PAGA claim (which have been reduced in the exercise of
22 billing judgment) are reasonable. *Id.* ¶ 80, Ex. D (Plaintiff’s Counsel’s time records).

23 The lodestar should be calculated using hourly rates that are “the prevailing market rates in
24 the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). As detailed in the Custis
25 Declaration, the rate used in calculating the lodestar is reasonable and commensurate with other
26 attorneys with comparable skill and experience litigating wage-and-hour class and PAGA actions.
27 Custis Decl., ¶¶ 87-92; *see also id.*, Ex. E.

28 For the foregoing reasons, Plaintiff’s request for \$27,497.25 in attorneys’ fees—less than

50% of the lodestar—is reasonable and should be approved.

H. The Court Should Approve Plaintiff's Counsel's Costs

Plaintiff is entitled to reimbursement of litigation costs. Labor Code § 2699(g)(1). The Parties agreed that Plaintiff could seek litigation costs in an amount up to \$8,000. SA, ¶ 3.2.1. By this Motion, Plaintiff seeks an award of \$7,886.88 for reasonably incurred costs, including filing fees, mediation fees, and postage. Custis Decl., ¶ 93, Ex. F. Because both Plaintiff's related case asserting individual claims and this case were addressed at the mediations, Plaintiff is seeking reimbursement here of only 40% of the mediation costs. *Id.*, ¶ 93. Because these costs are reasonable and were necessarily incurred during the case's pendency, they should be reimbursed to Plaintiff's Counsel.

I. The Court Should Appoint the Administrator and Approve the Settlement Administration Costs

As noted, the Parties have agreed to use Ilym to administer the settlement. SA, ¶ 7.1. Ilym agreed to conduct the administration for the capped costs of \$3,995.00. Custis Decl., ¶ 94. The Settlement provides that the Court will appoint the Administrator and approve the Settlement Administration Costs when it rules on this Motion. Plaintiff, thus, requests that the Court appoint Ilym as the Administrator, and approve Settlement Administration Costs in the amount of \$3,995.00.

J. The Court Should Approve The PAGA Payment Letter

Although PAGA does not require notice to the Aggrieved Employees of the Settlement, the Parties prepared, and now present for the Court's consideration and approval, a cover letter for transmission to Aggrieved Employees along with their payments, substantially in the form attached as Exhibit 1 to the Amendment to Settlement Agreement (the "PAGA Payment Letter.") Custis Decl., Ex. B, Ex.1. The PAGA Payment Letter accurately informs the Aggrieved Employees about this action and the Settlement. Accordingly, Plaintiff respectfully requests that the Court approve the PAGA Payment Letter.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion in its entirety and adopt the [Proposed] Order Granting PAGA Settlement Approval and [Proposed] Judgment lodged concurrently with this Motion.

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Respectfully submitted,

CUSTIS LAW, P.C.

Dated: February 16, 2024

By: _____
Keith Custis

Attorneys for Plaintiff
ALEXANDER FLAMER IV

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 2121 Avenue of the Stars, Suite 800, Los Angeles, California 90067.

On February 16, 2024, I served the foregoing document(s) described as:

**PLAINTIFF'S NOTICE OF MOTION AND *UNOPPOSED* MOTION
FOR APPROVAL OF PAGA ACTION SETTLEMENT**

on the interested parties in this action,

Debra Ellwood Meppen
Kimberly Westmoreland
Peter Choi
Gordon Rees
Scully Mansukhani, LLP
633 West Fifth Street, 52nd Floor
Los Angeles, CA 90071
kwestmoreland@grsm.com
dmeppen@grsm.com
pchoi@grsm.com

by sending a true copy thereof to the interested parties as follows:

- ☐ **(BY PERSONAL SERVICE)** By causing the document(s) listed above to be personally delivered on the date set forth above to the person(s) at the address(es) set forth above.
- ☒ **(BY EMAIL)** By electronically mailing a true and correct copy through Custis Law, P.C.'s electronic mail system from kcustis@custislawpc.com to the email addresses set forth above pursuant Code of Civil Procedure Section 1010.6(e) and Rule 2.251 of the California Rules of Court.
- ☐ **(BY U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California, that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 16, 2024 in Los Angeles, California.

Keith Custis