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10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF MONTEREY**

12 FERNANDO NINO,

13 Plaintiff,

14 v.

15 PREMO ROOFING COMPANY; and DOES
16 1 through 50, inclusive,

17 Defendants.

Case No. 23CV001620

18 **PLAINTIFF'S NOTICE OF MOTION**
19 **AND MOTION TO APPROVE**
20 **SETTLEMENT AGREEMENT**
21 **PURSUANT TO THE PRIVATE**
22 **ATTORNEY GENERAL ACT;**
23 **MEMORANDUM OF POINTS AND**
24 **AUTHORITIES IN SUPPORT THEREOF**

25 Date: August 9, 2024

26 Time: 8:30 a.m.

27 Dept.: 15

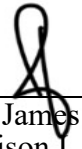
1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 9, 2024, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Thomas W. Wills, judge presiding, in
4 Department 15 of the above-referenced Court located at 1200 Aguajito Road, Monterey,
5 California, Plaintiff Fernando Nino ("Plaintiff") will seek an Order approving the concurrently
6 filed Joint Private Attorneys' General Act Settlement Agreement ("Settlement Agreement"),
7 pursuant to the procedures set forth in Labor Code § 2698, *et seq.*

8 This Motion will be based on this Notice, the Memorandum of Points and Authorities,
9 the Declarations of B. James Fitzpatrick, Alison L. Baker, and Plaintiff, the records and file
10 herein, and on such other evidence as may be presented at the hearing of the motion.

11 Dated: July 12, 2024

FITZPATRICK & SWANSTON

12
13 By: 

14 B. James Fitzpatrick
15 Alison L. Baker
16 Attorneys for Plaintiff,
17 FERNANDO NINO
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698,
4 *et seq.*, Plaintiff Fernando Nino (“Plaintiff”) hereby moves the Court for an order approving
5 the non-reversionary PAGA settlement as set forth in the concurrently filed Settlement
6 Agreement of California Labor Code Private Attorneys General Act Claims (the “Settlement
7 Agreement” or “Settlement”)¹.

8 The Complaint in this case alleges that Defendant Premo Roofing Company
9 (“Defendant”) (Defendant and Plaintiff together, the “Parties”) violated the PAGA based on
10 Labor Code §§ 201, 201.3, 202, 203, 204, 207, 208, 209, 210, 216, 218, 218.5, 218.6, 223,
11 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1175, 1194, 1197, 1197.1, 1198, 1199, 2699,
12 2800, 2802, and 2698.

13 As will be explained in further detail below, based on the California Supreme Court’s
14 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
15 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as
16 called for under the PAGA on behalf of the State of California and other similarly situated
17 aggrieved employees, without seeking class certification or meeting the requirements of class
18 certification (*i.e.*, numerosity, typicality, commonality, and adequacy). As such, while the
19 PAGA settlement reached herein is on behalf of the State of California and other aggrieved
20 employees, the usual two-step preliminary and final approval process is not required. Rather,
21 as called for under Labor Code § 2699(l), all that is required is an approval by this Court of
22 any settlement of the PAGA claims by the Parties. The Parties have reached such a PAGA
23 settlement, and now seek this Court’s approval of their settlement which provides for the
24 payment of civil PAGA penalties.

25 As demonstrated below, the proposed settlement warrants the Court’s approval. The
26 settlement was reached after the exchange of significant information including data pertaining
27

28 ¹ The Settlement Agreement is attached to the Declaration of B. James Fitzpatrick (“Fitzpatrick Decl.”)
as **Exhibit A**.

1 to the PAGA Group and information regarding Defendant's payroll practices, and after arms'
2 length negotiations at mediation with a well-respected wage-and-hour mediator, Christopher
3 Panetta, Esq., of Fenton & Keller.

4 Pursuant to the terms of the Parties' proposed Settlement Agreement, Defendant will
5 pay the total amount of \$250,000.00 (the "Gross Settlement Amount"). This amount
6 encompasses a settlement of PAGA claims asserted in this lawsuit, a service award to Plaintiff
7 in the amount of \$5,000.00, attorneys' fees to Plaintiff's counsel in the amount of \$90,000.00,
8 Plaintiff's counsel's actual litigation costs of \$6,000.00, and settlement administration costs in
9 an amount not to exceed \$5,000.00. (Fitzpatrick Decl. ¶ 9.)

10 Based on the amounts above, the PAGA Fund is \$144,000.00. Pursuant to the PAGA,
11 this amount includes approximately \$108,000.00 to be distributed to the California Labor and
12 Workforce Development Agency ("LWDA"), and approximately \$36,000.00 to be distributed
13 to "Aggrieved Employees," defined as all current and former non-exempt employees of
14 Defendant who worked in California at any time from May 18, 2022, through May 9, 2024
15 (the "PAGA Period"). (*Id.* ¶ 10; Settlement Agreement ¶¶ 8-9.) The proposed settlement,
16 moreover, does not release any substantive claims of members of the PAGA Group, merely
17 their rights to bring PAGA claims predicated on the same violations of the Labor Code raised
18 in this Action that accrued during the PAGA Period. (Settlement Agreement ¶ 14, 48.)

19 In light of the above, the proposed settlement constitutes an adequate, fair, and
20 reasonable settlement on behalf of the State of California and Aggrieved Employees and
21 accomplishes the goals of PAGA.

22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

23 **A. Summary of the Litigation and Settlement**

24 On May 18, 2023, Plaintiff sent a letter to Defendant and the LWDA, on behalf of
25 himself and other aggrieved employees, in compliance with California Labor Code section
26 2699.3. (Fitzpatrick Decl. ¶ 2.)

27 On May 18, 2023, Plaintiff filed an individual complaint. On September 12, 2023,
28 Plaintiff filed a First Amended Complaint adding a representative claim pursuant to Labor

1 Code § 2698. (Fitzpatrick Decl. ¶ 3.)

2 After commencement of the lawsuit, the Parties met and conferred to discuss
3 participating in mediation. (*Id.* ¶ 4.) The Parties subsequently agreed to participate in private
4 mediation. (*Id.*) In connection with mediation, the Parties engaged in informal discovery.
5 Defendant has provided informal discovery pertaining to aggrieved employees during the
6 PAGA period, the number of pay periods at issue, Plaintiff's personnel file and wage
7 statements, a sample of payroll records of the PAGA group, as well as production of pertinent
8 policies. (*Id.* ¶ 5.) The data provided allowed Plaintiff's counsel to analyze liability and
9 exposure in preparation for the mediation. (*Id.*)

10 On May 9, 2024, the Parties participated in private mediation with wage-and-hour
11 mediator, Christopher Panetta, Esq., of Fenton & Keller (*Id.* ¶ 6.) The Parties spoke at length
12 about the strengths and weaknesses of each side's claims and defenses, and ultimately reached
13 the current settlement of Plaintiff's PAGA claims. (*Id.*) In resolution of Plaintiff's PAGA
14 claims, the Parties entered into the Settlement Agreement, a true and correct copy of which is
15 attached as **Exhibit A** to the Declaration of B. James Fitzpatrick.

16 Specifically, with respect to the failure to pay wages claim, Plaintiff alleges that
17 Defendant failed to pay all wages owed for off-the-clock work performed by Plaintiff and
18 employees. In this regard, Plaintiff alleges that employees were required to report to work at
19 Defendant's "yard" to receive their work assignments and supplies. This procedure was done
20 entirely off-the-clock. As a result of such policy and practice, Plaintiff alleges that Plaintiff
21 and employees were not paid all wages owed. (*Id.* ¶ 20.)

22 With respect to meal and rest period claims, Plaintiff alleges that Defendant routinely
23 denied employees the opportunity to take timely, off-duty meal and rest periods, and never
24 provided a second meal period after ten hours of work. In all of these instances, no meal or
25 rest period premium was ever paid, and the sample data set provided by Defendant
26 demonstrates that Defendant never paid any employee a meal period premium. (*Id.* ¶ 21.)

27 With respect to the failure to reimburse work-related expenses, Plaintiff alleges that
28 Defendant required the employees to use their personal cellular telephone to communicate

1 regarding work-related matters and to receive work instructions and schedule changes.

2 Additionally, Defendant required employees to purchase necessary tools and equipment, and
3 deducted the money from their pay. (*Id.* ¶ 22.)

4 Lastly, as a result of the claims above, Plaintiff asserts wage statement violations under
5 the PAGA. (*Id.* ¶ 23.) Based on the above, Plaintiff alleges violations of Labor Code §§ 201-
6 204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, 1197.1, and 2800. (*Id.*)

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

8 The material terms of the Settlement are described below and set forth in detail in the
9 Settlement Agreement.

10 **A. The Aggrieved Employees**

11 The “Aggrieved Employees” affected by this Settlement include “all current and
12 former non-exempt employees of Defendant who worked in California at any time from May
13 18, 2022, through May 9, 2024.” (Settlement Agreement ¶¶ 8-9.)

14 Based upon Defendant’s records, Defendant represents that the number of Aggrieved
15 Employees during the PAGA Period is approximately 80 individuals. Defendant also
16 represents that the total number of pay periods worked by Aggrieved Employees during the
17 PAGA Period is approximately 4,635. (*Id.* ¶ 27.)

18 **B. Settlement Sum and Allocation**

19 The Settlement Agreement requires Defendant to pay the Gross Settlement Amount of
20 Two Hundred Fifty Thousand and No Cents (\$250,000.00). (Settlement Agreement ¶¶ 5, 26.)
21 The terms of the Settlement Agreement provide for an award of attorneys’ fees of Ninety
22 Thousand Dollars and No Cents (\$90,000.00), and reimbursement of litigation costs of up to
23 Six Thousand Dollars and No Cents (\$6,000.00)²; service award to Plaintiff in the amount of
24 \$5,000.00 for serving as the PAGA representative; and settlement administration costs of up to
25 \$5,000.00. (*Id.* ¶¶ 28, 33.)

26 The balance of the Gross Settlement Amount remaining after the deduction of the
27

28 ² As explained below, Plaintiff’s counsel seeks reimbursement of actual litigation costs in the amount of \$5,483.51.

1 amounts above will be available for distribution to the LWDA and Aggrieved Employees (the
2 balance of the Gross Settlement Amount remaining after the above deductions shall be
3 referred to as the “PAGA Fund”). (*Id.* ¶¶ 10, 34.) Pursuant to the PAGA, seventy-five percent
4 (75%) of the Net Settlement Amount, or approximately \$108,000.00, will be distributed to the
5 LWDA for PAGA penalties. (*Id.* ¶ 35.) The remaining twenty-five percent (25%) of the Net
6 Settlement Amount, or approximately \$36,000.00 will be distributed to the Aggrieved
7 Employees. (*Id.*)

8 The portion of the PAGA Fund distributed to the Aggrieved Employees will be
9 distributed on a *pro rata* basis, based on the number of pay periods each Aggrieved Employee
10 worked as a non-exempt employee in California during the PAGA Period divided by the
11 aggregate total number of pay periods worked by all Aggrieved Employees as non-exempt
12 employees in California during the PAGA Period. (Settlement Agreement at ¶ 40; Fitzpatrick
13 Decl. ¶ 11.)

14 Defendant has represented that there are 80 Aggrieved Employees. (Fitzpatrick Decl. ¶
15 12.) Based thereon, on a raw average, each Aggrieved Employee may potentially recover
16 approximately \$450.00 from the portion of the Net Settlement Amount attributable to the
17 Aggrieved Employees. (*Id.*) The amount any particular Aggrieved Employee will be entitled
18 to recover will fluctuate depending on the number of pay periods he or she worked as a non-
19 exempt employee in California during the PAGA Period. This is fair, as it directly allocates
20 greater penalties to individual Aggrieved Employees who have allegedly suffered greater
21 harm. (*Id.*)

22 As part of the Settlement Agreement, Defendant does not object to Plaintiff’s
23 counsel’s request for attorneys’ fees of Ninety Thousand Dollars and No Cents (\$90,000.00)
24 and reasonable costs of up to Six Thousand Dollars and No Cents (\$6,000.00), subject to the
25 Court approving this Settlement. (Settlement Agreement ¶ 30.) Any portion of the attorneys’
26 fees and costs not approved by the Court will be added to the PAGA Fund. (*Id.*) Also, as part
27 of the Settlement Agreement, Defendant does not object to Plaintiff’s request for a Service
28 Award of Five Thousand Dollars (\$5,00.00). (*Id.* ¶¶ 16, 35.)

1 Finally, the Settlement Agreement provides for the payment of the fees and expenses
2 reasonably incurred by the Settlement Administrator. (*Id.* ¶ 31.) The Parties have agreed to
3 retain Phoenix Settlement Administrators to administer the Settlement, with the administration
4 costs estimated not to exceed \$2,500.00. (*Id.* ¶¶ 31-33.)

5 C. Scope of the Released Claims

6 In exchange for the payments described above, Plaintiff and the Aggrieved Employees
7 will release the Released Parties from the following limited release:

8 [A]ll claims for civil penalties under the PAGA that were set forth,
9 or could have been set forth based on the facts alleged in the Action,
10 for penalties pursuant to PAGA for violation of Labor Code §§ 201,
11 201.3, 202, 203, 204, 207, 208, 209, 210, 216, 218, 218.5, 218.6,
12 223, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1175, 1194,
1197, 1197.1, 1198, 1199, 2699, 2800, 2802, and 2698, that accrued
during the PAGA Period.

13 (*Id.* ¶¶ 14, 46.) The Settlement does not release Defendant from violations of any predicate
14 statutes other than PAGA and will not affect a waiver of individual claims by Aggrieved
15 Employees against Defendant for any of the underlying Labor Code claims. (*See id.*) The
16 release is expressly limited to claims for civil penalties under the PAGA pertaining to the
17 Labor Code violations raised in this lawsuit that accrued during the PAGA Period. (*Id.*) The
18 release applicable to PAGA Group Members expressly excludes claims outside of the PAGA
19 Period, and excludes non-PAGA claims or any individual claims. (*Id.*)

20 IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

21 A. PAGA Overview

22 Prior to the enactment of PAGA, many of the penalties provided against employers for
23 violations of certain Labor Code provisions were solely within the province of the California
24 Department of Labor to seek, enforce, and assess. (*Arias v. Superior Court* (2009) 46 Cal. 4th
25 969, 980.) However, due to the lack of financing to California's agencies and the potential
26 number of Labor Code violations by California employers, the California Legislature found
27 that it was in the public interest to allow aggrieved employees to act as private attorneys
28 general and to enforce and recover penalties on behalf of other similarly situated aggrieved

1 employees for Labor Code violations committed by their employers. (*Id.*) As such, PAGA
2 was enacted to allow such enforcement and recovery by private individuals who have been
3 aggrieved by their employers. Under the PAGA, 75% of any penalties recovered under PAGA
4 by an aggrieved employee is to be paid to the state agency, the LWDA, and the remaining
5 25% is to be shared amongst the aggrieved employees. (Cal. Lab. Code § 2699, subd. (i).)

6 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
7 employee must first provide written notice to the LWDA and the employer of the particular
8 Labor Code violation(s) alleged to have been violated by the employer. (*See* Cal. Labor Code
9 § 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not
10 intend to investigate the alleged violations or the time for the LWDA to investigate the
11 violations passes, the aggrieved employee is allowed to proceed in a civil action against the
12 employer on behalf of all other similarly aggrieved employees. (*See* Cal. Labor Code §
13 2699.3, subd. (a)(2)(A).)

14 In 2009, the California Supreme Court considered the issue of whether an aggrieved
15 employee who brings a PAGA claim needs to meet class certification requirements. (*Arias*, 46
16 Cal. 4th at p. 976.) After a substantial review of the legislative history of PAGA, the
17 California Supreme Court held that an aggrieved employee's representative action brought on
18 behalf of other similarly aggrieved employees against an employer for PAGA violations does
19 not need to meet the requirements for class certification. (*Id.* at pp. 975, 980-88.) As held by
20 the California Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or
21 agent of California's labor law enforcement agencies. (*Id.* at p. 986.) Because an employee's
22 PAGA action functions as a substitute for an action brought by the government itself, a
23 judgment in the PAGA action binds all those who would be bound by a judgment in an action
24 brought by the government. (*Id.*)

25 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
26 Superior Court must "review and approve any settlement of any civil action filed pursuant to"
27 PAGA. (Cal. Lab. Code § 2699, subd. (l)(2).) As the Parties to this current PAGA action
28 have reached such an agreement, the Parties now seek this Court's approval as to the

1 settlement of the penalties amount.

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

4 In class action cases, the purpose of the Court’s preliminary evaluation of the
5 settlement is to determine whether it is within the “range of reasonableness,” and thus whether
6 notice to the class of the terms and conditions of the settlement, and the scheduling of a formal
7 fairness hearing, are worthwhile. (*See* Alba Conte & Herbert B. Newberg (4th ed. 2002 and
8 Supp. 2004) *4 Newberg on Class Actions* § 11.25 *et seq.* and § 13.64 (“Newberg”).) The
9 “judge must make a preliminary determination on the fairness, reasonableness, and adequacy
10 of the settlement terms and must direct the preparation of notice of the certification, proposed
11 settlement, and date of the final fairness hearing.” (*Manual for Complex Litigation, Fourth*
12 (*Fed. Jud. Ctr.*, 4th ed. 2004) § 21.632.) To make the preliminary fairness determination,
13 courts may consider several relevant factors, including “the strength of the plaintiff’s case; the
14 risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class
15 action status through trial; the amount offered in settlement; the extent of discovery completed
16 and the stage of the proceedings; [and] the experience and views of counsel...” (*See Hanlon*
17 *v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

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

24 Notably, unlike the class action settlement approval process, there is also no statutory
25 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
26 2699, subd. (1).) In addition, “[u]nnamed employees need not be given notice of the PAGA
27 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
28 settlement, if any, reached between the parties.” (*Ochoa-Hernandez v. Cjaders Foods, Inc.*

(N.D. Cal. 2010) 2010 WL 1340777, p. *13.)

C. The Settlement is Reasonable and Effectuates PAGA's Objectives

The Court's focus in a PAGA case is not the amount that aggrieved employees will ultimately receive as a result of a settlement, but instead, on whether the total settlement amount achieves PAGA's objectives. Under PAGA, the penalties recovered are meant to supplement agency funding for purposes of education of employers and employees and enforcement of labor laws and rights. (*See* Cal. Lab. Code § 2699, subd. (i).) Here, the settlement provides monetary recovery for the aggrieved employees and the State and accomplishes PAGA's primary objective to enforce the Labor Code, and thus the Settlement certainly effectuates PAGA's purpose. (*See O'Connor v. Uber Techs, Inc.* (N.D. Cal. August 18, 2016) 2016 WL 4398271, at p. *18 (noting that deterring noncompliance with the Labor Code is one of PAGA's objectives).)

The Settlement is also consistent with the State's public policy favoring resolution of disputes. "California law favors the settlement of disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best positioned to understand their interests and resolve a dispute in a mutually beneficial manner without court intervention into the settlement." (*Consumer Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal. App. 4th 46, 62-63 (citing *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal. 4th 273, 277- 278).)

D. The Scope of the Release is Appropriately Limited

The limited scope of the release supports approval of this PAGA settlement. If approved, the Settlement would release the Released Parties from PAGA claims predicated on the underlying violations of Labor Code §§ 201, 201.3, 202, 203, 204, 207, 208, 209, 210, 216, 218, 218.5, 218.6, 223, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1175, 1194, 1197, 1197.1, 1198, 1199, 2699, 2800, 2802, and 2698, that accrued during the PAGA Period, and nothing more. (Settlement Agreement ¶¶ 14, 46.) The Settlement would *not* impact any other aggrieved employees' ability to pursue PAGA claims predicated on other allegations aside from those raised in this lawsuit or any Labor Code claims not predicated on the PAGA.

1 Because an aggrieved employee's PAGA action is a substitute for an action brought by
2 the government, "judgment in [a PAGA] action is binding not only on the named employee
3 plaintiff but also on government agencies and any aggrieved employee not a party to the
4 proceeding." (*Arias*, 46 Cal. 4th at p. 986.) However, "the nonparty employees, because they
5 were not given notice of the action or afforded any opportunity to be heard, would not be
6 bound by the judgment as to remedies other than civil penalties." (*Id.* at p. 987; *see also*, Cal.
7 Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights "to pursue or recover
8 other remedies available under state or federal law, either separately or concurrently with an
9 action taken under this part").)

10 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
11 confined to the civil penalties under the PAGA based on the facts alleged in the Action
12 pertaining to violations of Labor Code §§ 201, 201.3, 202, 203, 204, 207, 208, 209, 210, 216,
13 218, 218.5, 218.6, 223, 225.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1175, 1194, 1197,
14 1197.1, 1198, 1199, 2699, 2800, 2802, and 2698, that accrued during the PAGA Period.
15 (Settlement Agreement ¶¶ 14, 46.) The release is therefore appropriately tailored and the
16 settlement should be approved.

17 **E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of**
18 **Litigation**

19 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
20 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to
21 the still-developing law under PAGA.

22 **1. Plaintiff's Claims are Contested.**

23 Plaintiff asserts that his representative PAGA claims are based on the allegations that
24 Defendant (a) failed to pay all minimum, regular, and overtime wages, meal and rest period
25 premiums owed in violation of Labor Code §§ 201-204, 226.7, 510, 558, 1194, 1197, and
26 1197.1; (b) failed to reimburse work-related expenses in violation of Labor Code § 2802; and
27 (c) failed to provide accurate itemized wage statements in violation of Labor Code § 226.
28 (Fitzpatrick Decl. ¶ 17.)

1 Defendant has denied violations of any applicable laws and denied liability for any
2 claims asserted in the Action. (*Id.* ¶ 18.) In this regard, Defendant asserts that it maintained
3 lawful policies and practices in place. With respect to the off-the-clock claims, Defendant
4 contends that it has revised its practices, which limits any potentially recoverable PAGA
5 penalties to the State of California and aggrieved employees. Defendant also argues that the
6 Court has discretion under PAGA to reduce the maximum allowable PAGA penalties, or to
7 decide not to award PAGA penalties at all. Should Defendant have prevailed on its arguments
8 or defenses above, the State of California and aggrieved employees would have been left with
9 minimal or zero recovery. (*Id.*)

10 **2. Recovery of Penalties After Trial**

11 Based on the data provided by Defendant, Plaintiff calculated total exposure to be
12 approximately \$1,627,650.00, based on the following:

- 13 • \$361,700.00 for the off-the-clock violations (calculated based on 3,617 total pay
14 periods x \$100 penalty per violation);
- 15 • \$361,700.00 for the meal and rest period premium violations (calculated based
16 on 3,617 pay periods x \$100 penalty per violation);
- 17 • \$904,250.00 for the derivative wage statement violations (calculated based on
18 3,617 total pay periods x \$250 per pay period, pursuant to Labor Code § 226.3
19 and *Raines v. Coastal Pac. Food Dist.* (2018) 23 Cal. App. 5th 667).

20 (Fitzpatrick Decl. ¶ 19.)

21 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the
22 potential recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the Court can decline to
23 award the full amount of PAGA penalties where “if, based on the facts and circumstances of
24 the particular case, to do otherwise, would result in an award that is unjust, arbitrary and
25 oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
26 *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517, while the plaintiff prevailed
27 on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by
28 90%, citing the employer’s good faith attempt at complying with the law. Upon review, the

1 Court of Appeal found such a reduction to be proper. (*Id.* at p. 539; *see O'Connor*, 2016 WL
2 4398271, at p. *17 (noting that even if PAGA penalties amounted to \$1 billion, such award
3 “could well be reduced, as a court may reduce the penalty when to do otherwise would result
4 in an award that is unjust, arbitrary and oppressive, or confiscatory”).)

5 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
6 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to
7 the contrary.

8 The Court’s assessment of the proposed Settlement must take into account that any
9 penalties awarded may be subject to substantial reduction. When this is considered, in
10 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
11 recover nothing, the proposed settlement is patently reasonable. Settlement for a reduced
12 value allows for the distribution of penalties in an amount which accounts for the risk of
13 continued litigation, and Defendant’s likely arguments that higher penalties would have been
14 confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the
15 future, which is one of the primary goals of PAGA.

16 The proposed settlement for \$250,000.00 exceeds PAGA settlements that courts have
17 approved in other cases, when considered as a percentage of the overall settlement value of the
18 case. Here, the proposed settlement amounts to **15%** of the total possible liability in this
19 matter, which exceeds other PAGA settlements approved by courts. (Fitzpatrick Decl. ¶ 24;
20 *see, e.g., Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133, *9
21 (approving total PAGA allocation that was 0.39% of \$408,420.32 gross settlement; *Moore v.*
22 *PetSmart, Inc.* (N.D. Cal. Aug. 4, 2015) 2015 WL 5439000, *8 (approving total PAGA
23 allocation that was 0.5% of \$10,000,000 gross settlement).)

24 A PAGA allocation need not represent any particular percentage of the overall
25 settlement value in order to secure court approval, and courts routinely approve PAGA
26 settlements representing only a tiny fraction of the overall settlement value. The proposed
27 settlement sum in this case exceeds the percentage of overall settlement value of other PAGA
28 settlements and should be approved by the Court.

1 **F. The Attorneys' Fees are Reasonable**

2 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. (Cal. Lab. Code
3 § 2699, subd. (g).) Similar to awarding fees in a class action, California state and federal
4 courts have recognized that an appropriate method for determining award of attorneys' fees for
5 representative actions is to use a percentage of the total value of benefits to class members by
6 the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano*
7 *v. Priest* (1977) 20 Cal. 3d 25, 34 (“*Serrano III*”); *Boeing Co. v. Van Gemert* (1980) 444 U.S.
8 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose
9 of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
10 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
11 entire burden alone.” (*Vincent*, 557 F. 2d at p. 769.)

12 Indeed, most recently, the California Supreme Court has also held that the award of
13 attorneys' fees in common fund wage and hour class action settlements should start with the
14 percentage method. See *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (“We join the
15 overwhelming majority of federal and state courts in holding that when class action litigation
16 establishes a monetary fund for the benefit of the class members, and the trial court in its
17 equitable powers awards class counsel a fee out of that fund, the court may determine the
18 amount of a reasonable fee by choosing an appropriate percentage of the fund created”).

19 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
20 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. The award approved in *Laffitte* was supported
21 by a lodestar cross-check that employed a multiplier of 2.13. *Id.* at 487. The court in *Laffitte*
22 explained that when cross-checking a percentage fee request against the lodestar method, the
23 court should examine the imputed multiplier in the lodestar calculation and, only when the
24 multiplier is “extraordinarily high or low [should] the trial court [] consider whether the
25 percentage method should be adjusted so as to bring the imputed multiplier within a justifiable
26 range.” *Id.* at 505.

27 When the primary method employed to determine fees is the percentage method, courts
28 have discretion to use the lodestar method to “cross-check” the amount of fees calculated by

1 way of percentage. The *Laffitte* court emphasized, however, that “the lodestar calculation,
2 when used in this manner, does not override the trial court’s primary determination of the fee
3 as a percentage of the common fund and thus does not impose an absolute maximum or
4 minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite*
5 *Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does
6 not trump the primary reliance on the percentage of common fund method”).

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

22 Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or
23 even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*,
24 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a
25 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
26 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
27 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
28 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check,

1 affirmed a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court
2 opinion was affirmed in full by the California Supreme Court in its decision guiding lower
3 courts on assessing fees.

4 With respect to Plaintiff's Counsel's lodestar, Plaintiff's Counsel will have expended
5 approximately 190.3 hours litigating this case, which includes anticipated time spent after
6 approval responding to correspondence and phone calls from Aggrieved Employees, the
7 Settlement Administrator, and defense counsel. (Fitzpatrick Decl. ¶ 25, Ex. B.) The hourly
8 rate for attorneys in this firm is \$800.00 and the hourly rate for paralegals is \$185.00.
9 (Fitzpatrick Decl. ¶ 26.) In this Motion, Plaintiff's Counsel requests a reduced hourly rate of
10 \$595.00 per hour. (Fitzpatrick Decl. ¶ 27.) The courts are quite liberal in the evidence
11 required to prove an attorney's hours. Detailed time records are not required. An attorney's
12 testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a
13 particular case is sufficient evidence to support an award of attorney fees, even in the absence
14 of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

15 Reasonable hours include, in addition to time spent during litigation, the time spent
16 before the action is filed, including time spent interviewing the clients, investigating the facts
17 and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447
18 U.S. 54, 62 (1980). The fee award should also include fees incurred to establish and defend the
19 attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which
20 Plaintiff's Counsel seeks compensation involve only these types of tasks. Thus, the number of
21 hours for which fees are sought is reasonable.

22 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
23 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
24 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*,
25 the attorney's skill and experience, the nature of the work performed, the relevant area of
26 expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*,
27 61 Cal. App. 4th 629, 632-33 (1998).

28 Plaintiff's counsel's skill and experience justify the requested rates. As shown in the

1 supporting declarations, Plaintiff's counsel have significant experience in the area of
2 employment and wage and hour actions. Specifically, Plaintiff's counsel's practice focuses on
3 representing employees in employment matters, particularly wage and hour cases. (Fitzpatrick
4 Decl. ¶¶ 25-30; Baker Decl. ¶¶ 3-6.) As such, based on the hours and applicable rate,
5 Plaintiff's Counsel's lodestar amount through the finalization of this settlement – without a
6 multiplier – will be approximately \$95,200.00. (Fitzpatrick Decl. ¶ 27.)

7 Once the court establishes the lodestar amount, it may enhance the lodestar number by
8 applying a multiplier in order to adjust the fees awarded to an amount appropriate to the
9 circumstances of the case. *Serrano v. Priest*, 20 Cal. 3d 25, 48 (1977). The pertinent factors
10 include the difficulty of the questions involved and the skill in presenting them, the contingent
11 nature of the fee award, the extent to which the litigation precluded other employment, and the
12 percentage-of-the-fund the attorney would have received on the fair market. *Id.*, *Lealao*, 82
13 Cal. App. 4th at 49. However, this list is not exhaustive, and the court may consider other
14 factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1139
15 (2001).

16 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
17 the-benefit, namely, no objections, commendable conduct by counsel, and significant
18 recoveries, all of which were previously detailed above. (*Lealao*, 82 Cal. App. 4th at 51-53.)
19 The extreme effort undertaken by counsel, as shown by their hours and the significantly high
20 amount of each claim being paid out, shows commendable conduct.

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

26 Here, based upon Plaintiff's Counsel's lodestar of \$95,200.00, Plaintiff's lodestar
27 actually exceeds the fees requested, such that a negative multiplier is implicated. *Wershba v.*
28 *Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) (noting that courts using the lodestar

1 method to calculate attorney fees awards in class actions typically apply multipliers in the
2 range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov.
3 18, 2014) (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and
4 hour class action settlement); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210
5 (C.D. Cal. 2014) (awarding 33% of the common fund, based on a multiplier of 2.52).

6 As such, the requested fee award is fair and reasonable, and should be awarded in its
7 entirety. Plaintiff's Counsel risked not only a great deal of time, but also a great deal of
8 expense to ensure the successful litigation of this action. For these reasons, Plaintiff's
9 Counsel's request for attorneys' fees in the amount of \$90,000.00 should be approved as fair,
10 reasonable, and adequate.

11 **G. The Costs are Reasonable**

12 Additionally, Plaintiff's counsel's request for reimbursement of actual litigation costs
13 in the amount of \$5,483.51 is also reasonable, given that the Settlement Agreement allocates
14 for reimbursement of litigation costs of up to \$6,000.00. As set forth in Plaintiff's counsel's
15 declaration, Plaintiff's counsel incurred costs, which were directly incurred in the prosecution
16 of this action, including court fees, service of process fees, and mediation fees. (Fitzpatrick
17 Decl. ¶ 31, Ex. C.) As such, the requested costs should be awarded as fair and reasonable.

18 **H. The Settlement Administrator's Fees Should be Approved**

19 Pursuant to the terms of the Settlement, the fees and costs of the Settlement
20 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
21 funds. For such reasons, it is requested that the Settlement Administration Costs fees be
22 approved.

23 **I. Plaintiff's Enhancement Payment Should be Approved**

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

1 **general**”) (emphasis added).)

2 Here, Plaintiff seeks \$5,000.00 for the Service Award, which is intended to compensate
3 Plaintiff for the efforts in prosecuting the case and his time spent on this case, including
4 discussing the case and facts pertaining to Defendant’s policies and practices, searching for
5 and providing documents, and reviewing the various pleadings and documents in connection
6 with this lawsuit, including payroll documents, the PAGA letter, the complaint, and the
7 Settlement Agreement. (Declaration of Fernando Nino, ¶¶ 8-9.) As Plaintiff’s requested
8 service award is a modest amount, the Court should approve this service award as requested.

9 **J. Notice to the LWDA Has Been Provided**

10 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion, the
11 Settlement Agreement, and Proposed Order to the LWDA’s website. (Fitzpatrick Decl. ¶ 34.)

12 **V. CONCLUSION**

13
14 Based on the above, Plaintiff and Defendant mutually request that this Court grant
15 approval to the PAGA settlement in this matter. The terms of the PAGA settlement
16 completely comply with the requirements of the Labor Code, and are fair, reasonable and
17 adequate.

18 As such, in accordance with PAGA and the relevant case law, including the seminal
19 case of *Arias v. Superior Court* (2009) 46 Cal.4th 969, the Parties respectfully request that this
20 Court grant approval to the joint stipulation regarding the settlement.

21 Dated: July 12, 2024

FITZPATRICK & SWANSTON

22 By: _____

23 B. James Fitzpatrick
24 Alison L. Baker
25 Attorneys for Plaintiff,
26 FERNANDO NINO
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PROOF OF SERVICE

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action; my business address is FITZPATRICK & SWANSTON, 555 S. Main Street, Salinas, California 93901.

On the date written below, I served the foregoing document(s), described as **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEY GENERAL ACT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action as indicated below and by the following means:

Sharilyn R. Payne, Esq. SBN: 203700
NOLAND HAMERLY ETIENNE & HOSS
333 Salinas Street ~
P.O. Box 2510 Salinas, CA 93902
Tel:831-424-1414
Fax: 831-424-1975
spayne@nheh.com

xx _____

(BY ELECTRONIC SERVICE) Pursuant to CCP § 1010.6 and Cal. Rules of Court, Rule 2.251, I caused the document(s) to be served, addressed to the person(s) at the e-mail address(es) listed above. I did not receive within a reasonable time after e-service, any electronic message or other indication that e-service was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 18, 2024, at Salinas, California.

/s/ Josie Favila

Josie Favila