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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

MENCHILA VILLARUBIA WOODALL,
as an individual and on behalf of all others
similarly situated,

Plaintiffs,

vs.

VASONA MANAGEMENT, INC., an
California corporation; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 20CV366143

(Assigned to the Honorable Patricia M. Lucas,
Dept. 3)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: September 1, 2021

Time: 1:30 p.m.

Dept.: 3

Complaint Filed: April 20, 2020

FAC Filed: July 16, 2020

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 1, 2021, at 1:30 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Patricia M. Lucas, judge presiding, in
4 Department 3 of the above referenced Court located at 191 N. First Street, San Jose, California
5 95113, Plaintiff Menchila Villarubia Woodall ("Plaintiff") will seek an Order approving the
6 concurrently filed PAGA Settlement Agreement, pursuant to the procedures set forth in Labor
7 Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Larry W. Lee, Nicholas Rosenthal, William L.
10 Marder, and Menchila Villarubia Woodall, the records and file herein, and on such other
11 evidence as may be presented at the hearing of the motion.

12
13 DATED: August 6, 2021

DIVERSITY LAW GROUP, P.C.

14
15 By: 
16 Larry W. Lee
17 Nicholas Rosenthal
18 Attorneys for Plaintiff and the Class
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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, *et*
4 *seq.*, Plaintiff Menchila Villarubia Woodall (“Plaintiff”) hereby moves the Court for an order
5 approving the non-reversionary PAGA settlement as set forth in the concurrently filed Joint
6 Stipulation of Settlement and Release Under the Private Attorneys General Act (the “Settlement
7 Agreement” or “Settlement”)¹. The Complaint in this case alleges that Defendant Vasona
8 Management, Inc. (“Defendant”) (Defendant and Plaintiff together, the “Parties”) violated the
9 PAGA arising from Defendant’s alleged failure to provide accurate itemized wage statements
10 pursuant to Labor Code § 226. Specifically, Plaintiff alleges that the wage statements issued by
11 Defendant failed to identify accurate hourly rates of pay when overtime wages were paid.

12 As demonstrated below and in the accompanying declaration of Nicholas Rosenthal, the
13 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
14 investigation and informal discovery, including Defendant’s production of relevant policies and
15 pay period data.

16 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will pay
17 the gross amount of \$130,000.00 (the “Settlement Amount”). This amount encompasses a
18 settlement of PAGA claims, a payment to Plaintiff for the release of her individual claims in the
19 amount of \$15,000.00, attorneys’ fees in the amount of \$43,333.33, attorneys’ costs in the
20 amount of \$6,248.39, and settlement administration costs in the amount of \$2,250.00. The
21 PAGA Settlement Payment includes a payment of approximately \$47,188.71 in civil penalties to
22 the Labor and Workforce Development Agency (“LWDA”). The proposed release for Aggrieved
23 Employees is narrowly tailored to release only claims for civil penalties under PAGA predicated
24 on Labor Code § 226.

25 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
26

27 _____
28 ¹ Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in
the Joint Stipulation.

1 behalf of the LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

2 **II. PROCEDURAL HISTORY**

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

4 **1. The History of the Key Pleadings**

5 On or about April 7, 2020, Plaintiff Menchila Villarubia Woodall submitted written
6 notice under Labor Code § 2699.3 (the “PAGA Notice”) to the LWDA and Defendant. As set
7 forth in the PAGA Notice, Plaintiff alleged that Defendant failed to provide wage statements that
8 identified the correct hourly rates of pay for overtime wages and pay period start date in violation
9 of California Labor Code § 226. (Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 3;
10 Exh. A.) Specifically, when overtime wages were paid, the applicable hourly pay rate was
11 identified as the base hourly rate of pay. Also, the wage statements only identified the pay period
12 end date.

13 On April 20, 2020, Plaintiff filed a putative class and representative action complaint
14 against Defendant in the Superior Court of California, County of Santa Clara, alleging causes of
15 action for violation of Labor Code §§ 226 and 2698, *et seq* (the “Action”). (Rosenthal Decl. ¶ 4.)
16 Specifically, the Complaint asserted a claim for based on a failure to list the pay period start date
17 on wage statements under Labor Code § 226(a)(6) and failure to list the overtime rate of pay
18 under Labor Code § 226(a)(9). (Rosenthal Decl. ¶ 4.)

19 On or about May 8, 2020, Defendant submitted written notice to the LWDA and Plaintiff
20 alleging that Defendant corrected the deficiencies in its wage statements as of about May 8,
21 2020. (*Id.* ¶ 5.) Specifically, Defendant stated that it added the pay period start date and
22 applicable pay rates to its wage statements.

23 On or about May 19, 2020, Plaintiff submitted a response to Defendant’s notice asserting
24 that, among other issues, violation of Labor Code § 226(a)(9) cannot be “cured.” (*Id.*) On June 5,
25 2020, the LWDA issued its decision that Defendant cured the violation of Labor Code §
26 226(a)(6) but did not cure the violation of Labor Code § 226(a)(9). (*Id.*; Exh. B.)

27 Subsequently, Defendant informed Plaintiff that it intended to enforce the arbitration
28 agreement entered into by the parties, which would effectively prevent Plaintiff from pursuing

1 any class claims.

2 The Parties then met and conferred regarding the possibility of conducting an early
3 mediation. (*Id.* at ¶ 8). As described in Section II.A.2 below, the Parties ultimately reached a
4 settlement of this matter.

5 On July 22, 2021, the Court granted the Parties' Stipulation to Dismiss Class Action
6 Claims pursuant to California Rule of Court 3.770. The basis for this Stipulation was that the
7 arbitration agreement entered into by Plaintiff prevented any of her class claims from
8 proceeding. As a result of the Order, the only claim remaining was a single cause of action for
9 violation of Labor Code § 2698, *et seq.*, predicated on an underlying violation of Labor Code §
10 226(a)(9). (*Id.* at ¶ 9).

11 **2. The Parties Agree to Mediation and This Settlement**

12 Throughout the course of this litigation, the Parties have been working on informal
13 resolution of this matter. The Parties engaged in robust meet and confer efforts regarding the
14 underlying merits of the case and subsequently agreed to participate in mediation. (*Id.* ¶ 10.)

15 In connection with the Parties' mediation efforts, Defendant provided Plaintiff with the
16 number of Aggrieved Employees and the number of pay periods worked by the Aggrieved
17 Employees in total. (*Id.* ¶ 11.) The data allowed Plaintiff's counsel to perform a comprehensive
18 damage analysis in preparation for the mediation. (*Id.*)

19 On December 1, 2020, the Parties participated in an all-day mediation with mediator
20 Mark C. Peters, Esq. (*Id.* ¶ 12.) During the mediation, the Parties spoke at length about the
21 strengths and weaknesses of each side's claims and defenses, and the scope of Defendant's
22 liability. (*Id.* ¶ 12.) After a full day of negotiation, the Parties were able to reach an agreement in
23 principle and signed a memorandum of understanding. (*Id.*) Following further arm's length
24 negotiations and discussions, the Parties finalized the settlement terms in the concurrently filed
25 Joint Stipulation of PAGA Action Settlement and Release ("Settlement" or "Settlement
26 Agreement"). (*Id.*)

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

28 The material terms of the settlement are described below and set forth in detail in the

1 concurrently filed Settlement Agreement.

2 **A. The Aggrieved Employees (or PAGA Members)**

3 The aggrieved employees affected by this Settlement are defined as “all current and
4 former non-exempt employees of Defendant in California who were paid overtime wages at any
5 time during the PAGA Period.” (“PAGA Group Members” or “PAGA Group”). (Joint
6 Stipulation, ¶ B.2.) The PAGA Period in this matter runs from April 1, 2019 to May 4, 2020.
7 (*Id.*, ¶ B.11.) Based upon Defendant’s records, there are 182 PAGA Group Members during the
8 PAGA Period. (*Id.*, ¶ B.2.)

9 **B. Settlement Sum and Allocation**

10 The Settlement Agreement requires Defendant to pay the gross amount of One Hundred
11 Thirty Thousand Dollars (\$130,000.00) (the “Settlement Amount”). (*Id.* ¶ B.9.) This is an
12 allocation of the PAGA Settlement Amount for the release of PAGA claims by PAGA Group
13 Members and the Individual Settlement Payment to Plaintiff for the general release of his
14 individual claims. (*Id.* ¶¶ E.6., E.8.) The balance of the PAGA Settlement Amount remaining
15 after deduction of the approved Attorneys’ Fees, Attorneys’ Expenses, Enhancement Award to
16 Plaintiff, and Settlement Administration Costs (the “Net PAGA Payment”), will be available for
17 distribution to the LWDA and PAGA Group Members. (*Id.* ¶ C.4.) Seventy-five percent of the
18 Net PAGA Payment, or approximately \$47,188.71 will be paid to the LWDA for PAGA
19 penalties. (*Id.*, ¶ C.4.; Rosenthal Decl., ¶ 14.) The remaining twenty-five percent, or
20 approximately \$15,729.57, will be distributed to PAGA Group Members. (*Id.*)

21 The portion of the Net PAGA Payment distributed to PAGA Group Members (“PAGA
22 Group Recovery”) will be distributed on a pro rata basis, based on the number of pay periods
23 each individual PAGA Group Member earned overtime and/or doubletime compensation during
24 the PAGA Period. (*Id.*, ¶ C.5.)

25 Based on the number of PAGA Group Members, employees will be entitled to recover,
26 on average, \$86.42 each. (Rosenthal Decl. ¶ 16.) The amount any particular PAGA Group
27 Member will be entitled to recover will be greater or lower than this average depending on the
28 number of pay periods during which he or she received overtime and/or doubletime pay. (*Id.*)

1 This is fair, as it directly allocates greater penalties to individual PAGA Group Members who
2 have allegedly suffered greater harm. (*Id.*)

3 As part of the Settlement Agreement, Defendant does not object to Plaintiff's Counsel's
4 request for attorneys' fees of one-third of the PAGA Settlement Amount, *i.e.* Forty Three
5 Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents (\$43,333.33), plus
6 reimbursement of documented litigation costs, subject to the Court approving this Settlement.
7 (Joint Stipulation ¶ C.9.) Also, as part of the Settlement Agreement, Defendant does not object
8 to Plaintiff's request for an Enhancement Award of Fifteen Thousand Dollars (\$15,000.00).
9 (Joint Stipulation ¶ C.7.)

10 Finally, the Settlement Agreement provides for the payment of the fees and expenses
11 reasonably incurred by the Settlement Administrator. (*Id.*, ¶ C.10.) The Parties have agreed to
12 utilize Phoenix Settlement Administrators to administer the Settlement, with the administration
13 costs estimated to be \$2,250.00. (*Id.*)

14 C. Scope of the Released Claims

15 In exchange for the payments described above, Plaintiff, the State of California, and
16 PAGA Group Members will release Defendant and Released Parties from:

17 all claims for penalties under the California Private Attorneys General Act,
18 including costs and attorneys' fees related thereto, predicated on the violation of
19 Labor Code section 226, based on the facts as alleged in the Complaint, that
accrued during the PAGA Period.

20 (*Id.*, ¶ B.15.) The Settlement, however, does not release Defendant from violations of any
21 predicate statutes other than PAGA, and will not affect a waiver of claims by PAGA Group
22 Members against Defendant for any of the underlying Labor Code claims. The release is
23 expressly limited to claims for civil penalties under PAGA. (*Id.*)

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

25 A. PAGA Overview

26 In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the
27 LWDA and other aggrieved employees, to bring suit against their employers for alleged
28 violations of the California labor laws and to obtain penalties that previously could only be

1 obtained by the State. The PAGA was enacted because the Legislature determined that it was “in
2 the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover
3 civil penalties for Labor Code violations,” since the State had not been able to fully or
4 adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal.4th 969, 980 (2009); *Ochoa-*
5 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s
6 declared purpose is to supplement enforcement actions by public agencies, which lack adequate
7 resources to bring all such actions themselves. Unlike class actions, these civil penalties are not
8 meant to compensate unnamed employees because the action is fundamentally a law
9 enforcement action.” [citations omitted].)

10 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
11 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
12 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
13 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
14 employee” means “any person who was employed by the alleged violator and against whom one
15 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
16 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
17 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
18 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(l). If the LWDA
19 decides not to investigate the allegations or issue a citation to the employer, the proposed
20 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
21 2699.3(a)(2).

22 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
23 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
24 PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal.4th at 986. Of the civil penalties
25 recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the “aggrieved
26 employees” for collecting the penalties on behalf of the State. Lab. Code § 2699(i); *Baumann v.*
27 *Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA representative’s recovery
28 is “an incentive to perform a service to the state, not restitution for wrongs done to members of

the class”).

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

In class action cases, the purpose of the Court’s preliminary evaluation of the settlement is to determine whether it is within the “range of reasonableness,” and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.25 *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed. 2004). To make the preliminary fairness determination, courts may consider several relevant factors, including “the strength of the plaintiff’s 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; [and] the experience and views of counsel...” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

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

Notably, unlike the class action settlement approval process, there is also no statutory mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code § 2699(1). In addition, “[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” or “contest a settlement, if any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

1 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

2 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
3 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount
4 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
5 agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i). Here, the
6 Settlement represents an extraordinary recovery for the Aggrieved Employees and the State, and
7 thus the Settlement certainly effectuates PAGA’s purpose.

8 Here, the Settlement accomplishes PAGA’s primary objective to enforce the Labor Code.
9 *See O’Connor v. Uber Techs, Inc.*, 2016 WL 4398271, at *18 (N.D. Cal. August 18, 2016)
10 (noting that deterring noncompliance with the Labor Code is one of PAGA’s objectives). As a
11 result of the lawsuit and Plaintiff’s PAGA Notice, Defendant revised its payroll system on May
12 5, 2020 such that the defect at issue in this case no longer exists. (Rosenthal Decl. ¶ 24.)

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

20 **D. The Scope of the Release is Appropriately Limited**

21 If approved, the Settlement would release Defendant and Released Parties from PAGA
22 claims predicated on the violation of Labor Code § 226 during the PAGA Period, and nothing
23 more. The Settlement would not impact any other aggrieved employees’ ability to pursue PAGA
24 claims predicated on other Labor Code violations or any Labor Claims not predicated on PAGA.
25 Therefore, the limited scope of the release also supports approval. Because an aggrieved
26 employee’s PAGA action is a substitute for an action brought by the government, “judgment in
27 [a PAGA] action is binding not only on the named employee plaintiff but also on government
28 agencies and any aggrieved employee not a party to the proceeding.” *Arias*, 46 Cal.4th at 986.

1 However, “the nonparty employees, because they were not given notice of the action or afforded
2 any opportunity to be heard, would not be bound by the judgment as to remedies other than civil
3 penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all
4 rights “to pursue or recover other remedies available under state or federal law, either separately
5 or concurrently with an action taken under this part”).

6 Accordingly, the PAGA Group Members will be subject to only a limited release strictly
7 confined to the statutory penalties available under PAGA for violation of Labor Code § 226.
8 (Joint Stipulation ¶ E.6.) The release is therefore appropriately tailored.

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

11 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
12 litigation entails significant risk on the underlying merits of Plaintiff’s theory, in addition to the
13 still-developing law under PAGA. (Rosenthal Decl. ¶ 23; Lee Decl. ¶ 3; Declaration of William
14 L. Marder (“Marder Decl.”) ¶ 2.)

15 **1. Plaintiff’s Claims are Contested**

16 Plaintiff asserts that her representative PAGA claim is based on the allegation that
17 Defendant failed to provide accurate itemized wage statements that identified the correct hourly
18 rate of pay and/or number of hours worked when overtime wages were paid. (Rosenthal Decl. ¶
19 20.) Defendant has denied violation of any applicable laws and liability for any claims asserted
20 in the Action. (*Id.* ¶ 20.) Defendant also argued that even if the Court ultimately found the wage
21 statements violative of Labor Code § 226, the alleged violation is a technical one and the Court
22 has discretion under PAGA to reduce the maximum allowable PAGA penalties at its discretion.
23 (*Id.* ¶ 20.) Defendant may have sought summary judgment on this issue or proceeded to trial.
24 (*Id.* ¶20.) Should Defendant have prevailed, the State of California and aggrieved employees
25 would have been left with zero recovery. (*Id.*)

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

27 Defendant has indicated that there were 182 individuals who received overtime or
28 doubletime wages and 2,365 pay periods at issue during the PAGA Period. Therefore, pursuant

1 to the PAGA, Plaintiff has calculated total exposure at \$591,250 (\$250 x 2,365, pursuant to
2 Labor Code § 226.3). (Rosenthal Decl. ¶ 19.) However, even if Plaintiff were to prevail on the
3 merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code §
4 2699(f)(2), the Court can decline to award the full amount of PAGA penalties where “if, based
5 on the facts and circumstances of the particular case, to do otherwise, would result in an award
6 that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of
7 Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA
8 claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
9 employer’s good faith attempt at complying with the law. 30 Cal.App.5th 504, 517 (2018). Upon
10 review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O’Connor*, 2016
11 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award
12 “could well be reduced, as a court may reduce the penalty when to do otherwise would result in
13 an award that is unjust, arbitrary and oppressive, or confiscatory”).

14 Courts routinely award far less than the statutory maximum amount of civil penalties,
15 even where an underlying violation of the Labor Code is found. Indeed, just very recently, in the
16 matter of *Magadia v. Wal-Mart Assocs. et al.*, while the trial court imposed substantial PAGA
17 penalties upon the defendant, such amount still represented reductions of 67% and 80% of the
18 potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100. Moreover, this was
19 only after the plaintiff in *Magadia* had prevailed after trial.

20 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
21 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
22 contrary. Firstly, Defendant has maintained throughout this litigation that the wage statements
23 were compliant with the law. (Rosenthal Decl. ¶ 20.) If Defendant were able to persuade the
24 Court that its wage statements were legally compliant in this regard, there would be no finding of
25 liability. (*Id.*) Second, even if there were a finding of liability, Defendant has characterized the
26 legal violation at issue as being “technical” to the extent that there is no allegation of actual
27 unpaid wages. (*Id.* ¶ 21.) As such, the Court may be disinclined to award full PAGA penalties.
28 On this basis, the Court again may find there is reason to significantly reduce the PAGA

1 penalties awarded.

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

10 The proposed settlement exceeds PAGA settlements that courts have approved in other
11 cases, when considered as a percentage of the overall settlement value of the case. The proposed
12 settlement amounts to 21.9% of the total possible liability in this matter, which far exceeds other
13 PAGA settlements approved by courts—including those that provide for less than the one
14 percent allocation to PAGA penalties. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133,
15 *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was 0.49% of \$408,420.32
16 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015)
17 (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v.*
18 *Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was
19 0.67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged
20 that drivers who use Lyft were misclassified as independent contractors. 2016 WL 3561742,
21 (N.D. Cal. June 23, 2016). The parties’ settled all Labor Code and PAGA claims for \$27 million,
22 with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting
23 preliminary approval to the proposed settlement in *Cotter*, the court noted that the PAGA
24 allocation “might seem low when compared to the maximum PAGA penalties,” but
25 acknowledged that it was in fact “quite high compared to the typical amount apportioned to
26 claims for PAGA penalties in wage and hour settlements.” *Id.* at *5

27 A PAGA allocation need not represent any particular percentage of the overall settlement
28 value in order to secure court approval, and courts routinely approve PAGA settlements

1 representing only a tiny fraction of the overall settlement value. The proposed settlement sum in
2 this case vastly exceeds, both in terms of the total dollar amount and as a percentage of overall
3 settlement value, the typical PAGA settlement.

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

5 Labor Code § 2699(g)(1) provides for the recovery of attorneys' fees and costs in any
6 successful action brought under PAGA. Although this is not a class action, in class actions
7 California state and federal courts have recognized that an appropriate method for determining
8 award of attorneys' fees is based on a percentage of the total value of benefits to class members
9 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v.*
10 *Priest*, 20 Cal.3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
11 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this
12 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
13 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
14 burden alone." *Vincent*, 557 F.2d at 769.

15 The common fund doctrine is predicated on the principle of preventing unjust
16 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
17 he may require the passive beneficiaries to compensate those who created the fund. Both
18 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal.3d at 35;
19 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.4th
20 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
21 been applied "consistently in California when an action brought by one party creates a fund in
22 which other persons are entitled to share." The reasons for applying the common fund doctrine
23 include: "...fairness to the successful litigant, who might otherwise receive no benefit because
24 his recovery might be consumed by the expenses; correlative prevention of an unfair advantage
25 to the others who are entitled to share in the fund and who should bear their share of the burden
26 of its recovery; encouragement of the attorney for the successful litigant who will be more
27 willing to undertake and diligently prosecute proper litigation for the protection or recovery of
28 the fund if he is assured that he will be properly and directly compensated should his efforts be

1 successful.” *Id.*

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

9 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
10 percent of the fund. *Laffitte*, 1 Cal.5th at 506. And this was based on a lodestar amount that
11 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
12 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
13 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

14 As a secondary support for the percentage of the fund method, when fees are allocated by
15 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
16 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in
17 this manner, does not override the trial court’s primary determination of the fee as a percentage
18 of the common fund and thus does not impose an absolute maximum or minimum on the
19 potential fee award.” *Laffitte*, 1 Cal.5th at 505 (emphasis added); *In re Rite Aid Corp. Secs.*
20 *Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the
21 primary reliance on the percentage of common fund method”).

22 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
23 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
24 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
25 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is
26 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
27 performing a cross-check “undermines” one of the primary reasons for using the percentage
28 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging

1 protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar
2 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* 108 F.R.D.
3 237, 258 (1985); *Lealao*, 82 Cal.App.4th 19, 29-30 (citing the recommendations of the Third
4 Circuit Task Force with approval and observing that “[t]he criticisms of the lodestar approach set
5 forth in this Report are now echoed by many authorities, who have been most vocal about the
6 manner in which it exacerbates the problem of ‘cheap settlements’ and burdens already
7 overworked trial judge”).

8 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
9 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see also*,
10 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009) (applying a 2.52
11 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60 (applying
12 a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d
13 78 (1988) (affirming a 2.34 multiplier without remand).

14 With respect to Class Counsel’s lodestar, to date, approximately 59.1 hours have been
15 expended by Class Counsel this matter. (Declaration of Larry W. Lee (“Lee Decl.”) ¶ 8, Ex. A;
16 Rosenthal Decl. ¶ 28, Exh. D; Declaration of William L. Marder (“Marder Decl.”) ¶ 9, Ex. A.)
17 Moreover, Class Counsel expects to incur approximately 5 additional hours of attorney time in
18 finalizing this settlement. (Rosenthal Decl. ¶ 28) Mr. Lee requests hourly rates of \$750.00 per
19 hour. (Lee Decl. ¶ 9.) Mr. Rosenthal requests hourly rates of \$650.00 per hour. (Rosenthal Decl.
20 ¶ 29.) Mr. Marder requests hourly rates of \$750.00 per hour. (Marder Decl. ¶ 10.) The courts are
21 quite liberal in the evidence required to prove an attorney’s hours. Detailed time records are not
22 required. An attorney’s testimony alone may suffice: “Testimony of an attorney as to the number
23 of hours worked on a particular case is sufficient evidence to support an award of attorney fees,
24 even in the absence of detailed time records.” *Martino v. Denevi*, 182 Cal.App.3d 553, 559
25 (1986).

26 Reasonable hours include, in addition to time spent during litigation, the time spent
27 before the action is filed, including time spent interviewing the clients, investigating the facts and
28 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,

62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Unruh*, 32 Cal.3d 621, 639 (1982) [*Serrano IV*].

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

Class Counsel's skill and experience justify the requested rate. As shown in the supporting declarations, Class Counsel have significant experience in the area of employment and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing employees in employment matters, particularly wage and hour cases. (Lee Decl. ¶¶ 5-7; Rosenthal Decl. ¶¶ 26-27; Marder Decl. ¶¶ 3-8.) As such, based on the hours and applicable rate, the total lodestar to be expended by Class Counsel through finalizing this settlement will be approximately \$44,255. (Lee Decl. ¶ 8, Ex. A; Rosenthal Decl. ¶ 28, Ex. C; Marder Decl. ¶ 9, Ex. A.)

Once the court establishes the lodestar amount, it may enhance the fee award by a multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. The pertinent factors include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Id.*, *Lealao*, 82 Cal.App.4th at 49. However, this list is not exhaustive and the court can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal.4th 1122, 1139 (2001).

Lealao contains several factors justifying an enhancement based on the percentage-of-the-benefit, namely, no objections by Class Members, commendable conduct by counsel, and significant recoveries by Class Members, all of which were previously detailed above. *Lealao*, 82 Cal.App.4th at 51-53. As in *Lealao*, the Class was notified of the settlement and attorneys' fee

1 with no objections. The extreme effort undertaken by counsel, as shown by their hours and the
2 significantly high amount of claims being paid out, shows commendable conduct.

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

8 Here based upon Plaintiff’s counsel’s lodestar of \$44,255, Plaintiff’s request for a fee
9 award of \$43,333.33 is reasonable and fair, particularly based on the factors described above.
10 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224 (Ct. App. 2001) (noting that courts using
11 the lodestar method to calculate attorney fees awards in class actions typically apply multipliers
12 in the range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880 (C.D. Cal.
13 Nov. 18, 2014) (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and
14 hour class action settlement); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp.3d 1200, 1210 (C.D.
15 Cal. 2014) (awarding 33% of the common fund, based on a multiplier of 2.52). Here, as the
16 Court can see, Plaintiff’s counsel is actually requesting a negative multiplier of .98.

17 As such, the requested fee award is fair and reasonable, and should be awarded in its
18 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
19 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
20 Class Counsel’s request for attorneys’ fees in the amount of \$43,333.33 is fair, reasonable, and
21 adequate.

22 **G. The Costs are Reasonable**

23 Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of
24 \$6,248.39 is also reasonable. (Lee Decl. ¶ 10, Ex. B.) The costs were all directly incurred in the
25 prosecution of this action, including filing fees, mediation fees, postage, and copying. (*Id.*) As
26 such, the requested costs should be awarded as fair and reasonable.

27 **H. The Settlement Administrator’s Fees Should be Approved**

28 The Parties have agreed to pay actual costs of administration, which will not exceed

1 \$2,250.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
2 this settlement. (Joint Stipulation ¶ C.10.) The Parties believe that the administration fee is
3 reasonable and should be approved.

4 **I. Plaintiff's Enhancement Payment Should Be Approved**

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

11 Here, Plaintiff seeks \$15,000.00 for the service award, which is intended to compensate
12 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
13 retaliation, and for executing a general release, including for all known and unknown claims
14 under Civil Code § 1542. (Declaration of Menchila Villarubia Woodall (“Woodall Decl.”) ¶¶ 5-
15 6.) This requested enhancement is consistent with awards approved in other common fund cases.
16 *See Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (incentive
17 award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374
18 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000);
19 *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000
20 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240,
21 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
22 *Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)
23 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142
24 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
25 ERISA case).

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

27 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the
28 LWDA's website. (Rosenthal Decl. ¶ 30., Exh. E)

1 **V. CONCLUSION**

2 Based on the above, Plaintiff requests that the Court approve the current PAGA
3 settlement.

4
5 DATED: August 6, 2021

DIVERSITY LAW GROUP, P.C.

6
7 By: 
8 Larry W. Lee
9 Nicholas Rosenthal
10 Attorneys for Plaintiff and the Class