

Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

Attorneys for Plaintiff and the Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

STELLA ASONG, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

ST. JOHN OF GOD RETIREMENT AND
CARE CENTER, a California corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: 20STCV26677

[Assigned for all purposes to the Honorable Daniel
J. Buckley, Dept. 1]

**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: August 10, 2021

Time: 1:45 p.m.

Dept.: 1

Complaint Filed: July 10, 2020

Trial Date: None Set

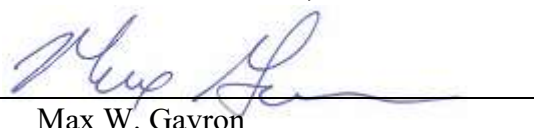
1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 10, 2021, at 1:45 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Daniel J. Buckley, judge presiding, in
4 Department 1 of the above referenced Court located at 312 N. Spring Street, Los Angeles,
5 California 90012, Plaintiff Stella Asong (“Plaintiff”) will seek an Order approving the
6 concurrently filed Private Attorneys General Act Settlement Agreement and Release of Claims
7 (“Settlement Agreement” or “Settlement”), pursuant to the procedures set forth in Labor Code
8 § 2698, *et seq.*

9 This motion will be based on this notice of motion, the attached memorandum of points
10 and authorities, the accompanying declarations of Max W. Gavron and Plaintiff Stella Asong,
11 upon the oral arguments of counsel (should there be any), and on the complete records and file
12 herein.

13
14 DATED: July 19, 2021

DIVERSITY LAW GROUP, P.C.

15
16 By: 

Max W. Gavron

17 Attorneys for Plaintiff and Aggrieved Employees
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	6
II. PROCEDURAL HISTORY	7
A. Summary of the Litigation and Settlement	7
1. The History of the Key Pleadings	7
2. The Parties Agree to Mediation and This Settlement	7
III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	8
A. The Aggrieved Employees.....	8
B. Settlement Sum and Allocation.....	9
C. Scope of the Released Claims.....	10
IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED	10
A. PAGA Overview.....	10
B. Class Action Settlement Standards Do Not Govern the Settlement Approval Process for PAGA Claims	11
C. The Settlement is Reasonable and Effectuates PAGA’s Objectives.....	12
D. The Scope of the Release is Appropriately Limited.....	13
E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation.....	14
1. Plaintiff’s Claims are Contested	14
2. Recovery of Penalties After Trial	14
F. The Attorneys’ Fees and Costs are Reasonable	16
G. The Claims Administrator’s Fees Should be Approved.....	18
H. Notice to the LWDA Has Been Provided.....	18
V. CONCLUSION	19

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 980 (2009)	10, 11, 12, 13
<i>Carrington v. Starbucks Corp.</i> , 30 Cal.App.5th 504 (2018)	15
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	17
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46, 62-63 (2006)	13
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	17, 18
<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal. 4th 273, 277- 278 (1992).....	13
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	17

Statutes

Business and Professions Code § 17200, <i>et seq.</i>	7
Labor Code § 226.....	6, 7, 10, 13
Labor Code § 226(a)	7
Labor Code § 226.7.....	6, 7, 10, 13
Labor Code § 512.....	6, 7, 10, 13
Labor Code §§ 201-203	6, 7, 13
Labor Code § 201.....	10
Labor Code § 202.....	10
Labor Code § 203.....	10
Labor Code § 2698, <i>et seq.</i>	passim
Labor Code § 2699(a)	11
Labor Code § 2699(c)	11
Labor Code § 2699(e)(2)	14
Labor Code § 2699(f)(2).....	14

1	Labor Code § 2699(g)(l)	13, 16
2	Labor Code § 2699(i).....	11, 12
3	Labor Code § 2699(1).....	12
4	Labor Code § 2699.3.....	7
5	Labor Code § 2699.3(a)(2)	11
6	Labor Code § 2699.3(a)(l)	11
7		
8	Other Authorities	
9	4 Herbert B. Newberg, Newberg on Class Actions § 11.25 et seq., and § 13.64 (4th ed. 2002 and Supp. 2004).....	11
10	<i>Manual for Complex Litigation</i> , § 21.632 (4th ed. 2004).....	12
11	Federal Cases	
12	<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F. 3d 1117, 1123 (9th Cir. 2014)	11
13	<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	17
14	<i>Cotter v. Lyft, Inc.</i> , 2016 WL 3561742, (N.D. Cal. June 23, 2016).....	16
15	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1026 (9th Cir. 1998)	12
16	<i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009)	16
17	<i>Lusby v. Gamestop Inc.</i> , 97 F.R.D. 400, 407 (N.D. Cal. 2013)	16
18	<i>Magadia v. Wal-Mart Assocs. et al.</i> , 2019 U.S. Dist. Lexis 91792	15
19	<i>Moore v. PetSmart, Inc.</i> , 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015).....	16
20	<i>O'Connor v. Uber Techs, Inc.</i> , 2016 WL 4398271, at *18 (N.D. Cal. August 18, 2016)	13, 15
21	<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010)	
22		10, 12
23	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	17
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et*
3 *seq.*, Plaintiff Stella Asong (“Plaintiff”) hereby moves the Court for an order approving the non-
4 reversionary PAGA settlement as set forth in the concurrently filed Private Attorneys General
5 Act Settlement Agreement and Release of Claims (the “Settlement Agreement” or
6 “Settlement”)¹. The operative Complaint in this case alleges that Defendant St. John of God
7 Retirement and Care Center, Inc. (“Defendant”) (Defendant and Plaintiff together, the “Parties”)
8 violated the PAGA arising from Defendants’ alleged failure to provide off-duty meal and rest
9 periods or pay premium compensation in lieu thereof, failure to pay all wages owed upon
10 separation of employment, and failure to provide accurate itemized wage statements. These
11 claims all derive from Plaintiff’s allegation that she was required to maintain an electronic
12 communication device during her meal and rest periods, which resulted in her inability to enjoy
13 duty-free meal and rest periods.

14 As demonstrated below and in the accompanying declaration of Max W. Gavron, the
15 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
16 investigation and informal discovery, including Defendants’ production of relevant policies, and
17 a full-day mediation with respected mediator, Kelly Knight, Esq.

18 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will pay
19 the gross amount of \$24,500.00 (the “Settlement Sum”). This amount encompasses a settlement
20 of PAGA claims, attorneys’ fees to Plaintiff’s Counsel in the amount of \$8,166.67, Plaintiff’s
21 Counsel’s costs in the amount of \$4,429.26, and claims administration costs in the amount of
22 \$500.00. The Net Settlement Amount totals \$11,404.07, and includes \$8,553.06 in civil penalties
23 to the Labor and Workforce Development Agency (“LWDA”). The proposed release for
24 Aggrieved Employees is narrowly tailored to release only claims for civil penalties under PAGA
25 predicated on Labor Code §§ 201-203, 226, 226.7, and 512.

26
27
28 ¹ Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in
the Settlement Agreement.

1 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
2 behalf of the LWDA and Aggrieved Employees and accomplishes the goals of PAGA.

3 **II. PROCEDURAL HISTORY**

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

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

6 On or about June 26, 2020, Plaintiff submitted written notice under Labor Code § 2699.3
7 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA Notice, Plaintiff
8 alleged that Defendant failure to provide off-duty meal and rest periods or pay premium
9 compensation in lieu thereof, pay all wages owed upon separation of employment, and provide
10 accurate itemized wage statements, in violation of California Labor Code §§ 201-203, 226,
11 226.7, and 512. (Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 3.)

12 On July 10, 2020, Plaintiff filed a class and representative action complaint against
13 Defendant in the Superior Court of California, County of Los Angeles, alleging causes of action
14 for: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 226.7; (3)
15 violation of Labor Code § 226(a); (4) violation of Business and Professions Code § 17200, *et*
16 *seq.*; and (5) violation of Labor Code § 2698, *et seq.* (the “Action”). (Gavron Decl. ¶ 4.) The
17 Complaint asserted class action claims for damages and penalties for Defendant’s failure to
18 provide off-duty meal and rest breaks or pay premium compensation, failure to pay all wages
19 owed upon separation of employment, and failure to provide accurate itemized wage statements,
20 claims for restitution, and claims for penalties under PAGA predicated on the underlying Labor
21 Code violations. (*Id.* ¶ 4); *see also* Declaration of Stella Asong.

22 On July 28, 2020, the Court deemed this case complex and issued a temporary stay of the
23 Action. (*Id.* ¶ 5.)

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

25 Shortly thereafter, Defendant produced an arbitration agreement containing a class action
26 waiver for Plaintiff’s counsel’s review and evaluation. The Parties also met and conferred
27 regarding the possibility of conducting mediation. (*Id.* ¶ 6.)

28 After further discussion regarding mediator selection, the Parties agreed to engage the

1 services of Kelly A. Knight, Esq. for a private mediation on March 11, 2021. (*Id.* ¶ 7.)

2 In connection with the Parties' mediation efforts, Defendant provided Plaintiff with
3 Plaintiff's personnel file, Defendant's policies and procedures regarding meal and rest periods
4 and electronic communication devices, as well as and the number of Aggrieved Employees and
5 the number of pay periods worked by the Aggrieved Employees in total. (*Id.* ¶ 8.) The data
6 allowed Plaintiff's counsel to perform a comprehensive damage analysis in preparation for the
7 mediation. (*Id.*)

8 Following arm's-length negotiations and discussions between the Parties with the
9 assistance of Kelly Knight, during which the Parties spoke at length about the strengths and
10 weaknesses of each side's claims and defenses, and the scope of Defendant's liability, the Parties
11 finalized the settlement terms in the concurrently filed Settlement Agreement. (*Id.* ¶ 9.) The
12 Settlement encompasses the Parties' agreement to dismiss Plaintiff's individual claims with
13 prejudice and Plaintiff's putative class claims *without* prejudice in light of the enforceable
14 arbitration agreement. (*Id.*)

15 On July 6, 2021, the Parties filed a stipulation seeking leave for Plaintiff to file a First
16 Amended Complaint, which asserts a single cause of action for violation of the PAGA. (*Id.* ¶ 10.)
17 On July 9, 2021, the Court approved the Parties' stipulation, and, on July 15, 2021, Plaintiff
18 submitted the First Amended Complaint for filing ("Complaint"). (*Id.*)

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

20 The material terms of the settlement are described below and set forth in detail in the
21 concurrently filed Settlement Agreement.

22 **A. The Aggrieved Employees**

23 The aggrieved employees affected by this Settlement are defined as "all current and
24 former hourly or non-exempt RN Supervisors of Defendant in California, at any time from July
25 10, 2019 through the date the court approves this Agreement, or July 31, 2021, whichever date is
26 sooner" ("Aggrieved Employees"). (Settlement Agreement § 1(c).) The Covered Time Period in
27 this matter runs from July 10, 2019, through the date the Court approves the Settlement, or July
28 31, 2021, whichever is earlier. (*Id.* § 1(x).) Based upon Defendant's records, there are 13

1 Aggrieved Employees and 358 pay periods during the Covered Time Period. (*Id.* § 2(i).)

2 **B. Settlement Sum and Allocation**

3 The Settlement Agreement requires Defendant to pay the gross amount of Twenty-Four
4 Thousand Five Hundred Dollars (\$24,500.00) (the “Settlement Sum”). (*Id.* § 1(z).) This is an
5 allocation of the civil penalties for the release of PAGA claims by Aggrieved Employees. (*Id.* §§
6 7 and 12.) The balance of the Settlement Sum remaining after deduction of the approved
7 Plaintiff’s Counsel’s fees and costs and claims administration fees (the “Net Settlement
8 Amount”), will be available for distribution to the LWDA and Aggrieved Employees. (*Id.* §§
9 1(q) and 7.) Seventy-five percent of the Net Settlement Amount, or approximately \$8,553.06 will
10 be paid to the LWDA for PAGA penalties (“LWDA Net Settlement Amount”). (*Id.* §§ 3(d) and
11 7; Gavron Decl. ¶ 12.) The remaining twenty-five percent, or approximately \$2,851.02, will be
12 distributed to Aggrieved Employees (“Employee Net Settlement Amount”). (Settlement
13 Agreement §§ 3(e) and 7.)

14 The Employee Net Settlement Amount distributed to Aggrieved Employees will be
15 distributed on a pro rata basis, based on the number of pay periods each individual Aggrieved
16 Employee worked during the Covered Time Period. (*Id.* § 7(b).)

17 Based on the number of Aggrieved Employees, employees will be entitled to recover, on
18 average, \$219.31 each. (Gavron Decl. ¶ 14.) The amount any particular Aggrieved Employee
19 will be entitled to recover will be greater or lower than this average depending on the number of
20 pay periods he or she worked. (*Id.*) This is fair, as it directly allocates greater penalties to
21 individual Aggrieved Employees who have allegedly suffered greater harm. (*Id.*)

22 As part of the Settlement Agreement, Defendant does not object to Plaintiff’s Counsel’s
23 request for attorneys’ fees of approximately thirty-three and one-third percent of the Settlement
24 Sum, *i.e.* Eight Thousand One Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$8,166.67),
25 plus reimbursement of documented litigation costs, subject to the Court approving this
26 Settlement. (Settlement Agreement §§ 3(a) and (b).)

27 Finally, the Settlement Agreement provides for the payment of the fees and expenses
28 reasonably incurred by the Claims Administrator. (*Id.* § 3(c).) The Parties have agreed to

1 allocate the amount of \$500.00 for the settlement administration costs. (*Id.*) Further, the Parties
2 have agreed to utilize Phoenix Settlement Administrators to administer the Settlement. (*Id.* §
3 1(e).)

4 **C. Scope of the Released Claims**

5 In exchange for the payments described above, Plaintiff, the State of California, and
6 Aggrieved Employees will release the Released Parties from:

7 any and all claims, demands, rights, liabilities, and/or causes of action for
8 penalties under the California Private Attorneys' General Act ("PAGA") that
9 accrued during the Covered Time Period and that were asserted in Plaintiff's
10 LWDA notice letter or the Action as well as those that could have been alleged in
the Action based on the facts contained therein, including, without limitation,
Labor Code sections 201, 202, 203, 226, 226.7, 512, and 2698, et seq.

11 (Settlement Agreement § 12.) The Settlement, however, does not release Defendant from
12 violations of any predicate statutes other than PAGA, and will not affect a waiver of individual
13 claims by Aggrieved Employees against Defendant for any of the underlying Labor Code claims.
14 The release is expressly limited to claims for civil penalties under PAGA. (*Id.*)

15 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE** 16 **APPROVED**

17 **A. PAGA Overview**

18 In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the
19 LWDA and other aggrieved employees, to bring suit against their employers for alleged
20 violations of the California labor laws and to obtain penalties that previously could only be
21 obtained by the State. The PAGA was enacted because the Legislature determined that it was "in
22 the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover
23 civil penalties for Labor Code violations," since the State had not been able to fully or
24 adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal.4th 969, 980 (2009); *Ochoa-*
25 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) ("The act's
26 declared purpose is to supplement enforcement actions by public agencies, which lack adequate
27 resources to bring all such actions themselves. Unlike class actions, these civil penalties are not
28 meant to compensate unnamed employees because the action is fundamentally a law

1 enforcement action.” [citations omitted].)

2 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
3 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
4 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
5 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
6 employee” means “any person who was employed by the alleged violator and against whom one
7 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
8 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
9 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
10 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
11 decides not to investigate the allegations or issue a citation to the employer, the proposed
12 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
13 2699.3(a)(2).

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

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

24 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
25 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
26 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
27 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* §
28 11.25 *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a

1 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
2 and must direct the preparation of notice of the certification, proposed settlement, and date of the
3 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
4 2004). To make the preliminary fairness determination, courts may consider several relevant
5 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
6 duration of further litigation; the risk of maintaining class action status through trial; the amount
7 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
8 the experience and views of counsel...” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
9 Cir. 1998).

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

16 Notably, unlike the class action settlement approval process, there is also no statutory
17 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
18 2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
19 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
20 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

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

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

28 Here, the Settlement accomplishes PAGA’s primary objective to enforce the Labor Code.

1 *See O'Connor v. Uber Techs, Inc.*, 2016 WL 4398271, at *18 (N.D. Cal. August 18, 2016)
2 (noting that deterring noncompliance with the Labor Code is one of PAGA's objectives).

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

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

11 If approved, the Settlement would release the Released Parties from PAGA claims
12 predicated on the violation of Labor Code §§ 201-203, 226, 226.7, and 512, during the Covered
13 Time Period, and nothing more. The Settlement would not impact any other aggrieved
14 employees' ability to pursue PAGA claims predicated on other Labor Code violations or any
15 Labor Code claims not predicated on PAGA. Therefore, the limited scope of the release also
16 supports approval. Because an aggrieved employee's PAGA action is a substitute for an action
17 brought by the government, "judgment in [a PAGA] action is binding not only on the named
18 employee plaintiff but also on government agencies and any aggrieved employee not a party to
19 the proceeding." *Arias*, 46 Cal.4th at 986. However, "the nonparty employees, because they were
20 not given notice of the action or afforded any opportunity to be heard, would not be bound by the
21 judgment as to remedies other than civil penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(l)
22 (non-party aggrieved employees retain all rights "to pursue or recover other remedies available
23 under state or federal law, either separately or concurrently with an action taken under this
24 part").

25 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
26 confined to the statutory penalties available under PAGA for violation of Labor Code §§ 201-
27 203, 226, 226.7, and 512. (Settlement Agreement § 12.) The release is therefore appropriately
28 tailored.

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

3 Although Plaintiff is reasonably confident that she would prevail at trial, proceeding in
4 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to the
5 still-developing law under PAGA. (Gavron Decl. ¶ 22.)

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

7 Plaintiff asserts that her representative PAGA claim is based on the allegation that
8 Defendant failed to provide off-duty meal and rest periods or pay premium compensation in lieu
9 thereof, failed to pay all wages owed upon separation of employment, and failed to provide
10 accurate itemized wage statements. (Gavron Decl. ¶ 18.) Defendant has denied violation of any
11 applicable laws and liability for any claims asserted in the Action. (*Id.*) Defendant also argued
12 that even if the Court ultimately found their employment practices violative of the Labor Code,
13 the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its
14 discretion. (*Id.* ¶ 19.) Defendant may have sought summary judgment on this issue or proceeded
15 to trial. (*Id.*) Should Defendant have prevailed, the State of California and Aggrieved Employees
16 would have been left with zero recovery. (*Id.*) Even if Plaintiff prevailed at trial, Defendant
17 would have appealed, which would have continued litigation in this action for several years thus
18 depriving the State and Aggrieved Employees of any recovery for the foreseeable future.

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

20 Defendant has represented that there were 13 RN Supervisors who comprise the
21 Aggrieved Employees and 358 pay periods at issue during the Covered Time Period. Therefore,
22 pursuant to the PAGA, Plaintiff has calculated total exposure at \$35,800.00 (\$100 x 358),
23 pursuant to Labor Code § 2699(f)(2). (Gavron Decl. ¶ 17.) However, even if Plaintiff were to
24 prevail on the merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor
25 Code § 2699(f)(2), the Court can decline to award the full amount of PAGA penalties where "if,
26 based on the facts and circumstances of the particular case, to do otherwise, would result in an
27 award that is unjust, arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of
28 Appeal's decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA

1 claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
2 employer's good faith attempt at complying with the law. 30 Cal.App.5th 504, 517 (2018). Upon
3 review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O'Connor*, 2016
4 WL 4398271, at *17 (noting that even if PAGA penalties amounted to \$1 billion, such award
5 "could well be reduced, as a court may reduce the penalty when to do otherwise would result in
6 an award that is unjust, arbitrary and oppressive, or confiscatory").

7 Courts routinely award far less than the statutory maximum amount of civil penalties,
8 even where an underlying violation of the Labor Code is found. Indeed, just very recently, in the
9 matter of *Magadia v. Wal-Mart Assocs. et al.*, while the trial court imposed substantial PAGA
10 penalties upon the defendant, such amount still represented reductions of 67% and 80% of the
11 potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100. Moreover, this was
12 only after the plaintiff in *Magadia* had prevailed after trial. Thereafter, the Ninth Circuit
13 reversed the district court and vacated its award, which resulted in no PAGA recovery at all.
14 *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668, 678 (9th Cir. 2021).

15 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
16 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
17 contrary. Even if there were a finding of liability, Defendant has argued that these violations
18 were not intentional violations of the law, did not occur every pay period or apply to all
19 employees, and that full penalties would not be merited considering that Defendant is not-for-
20 profit institution and is focused on assisting the underserved. (*Id.* ¶ 21.) As such, the Court may
21 be disinclined to award full PAGA penalties. On this basis, the Court again may find there is
22 reason to significantly reduce the PAGA penalties awarded.

23 The Court's assessment of the proposed Settlement must take into account that any
24 penalties awarded may be subject to substantial reduction. When this is considered, in
25 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
26 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced value
27 allows for the distribution of penalties in an amount which accounts for the risk of continued
28 litigation, and Defendant's likely arguments that higher penalties would have been confiscatory.

1 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
2 of the primary goals of PAGA.

3 The proposed settlement significantly exceeds PAGA settlements that courts have
4 approved in other cases, when considered as a percentage of the overall settlement value of the
5 case. The proposed settlement amounts to 68% of the total possible liability in this matter, which
6 far exceeds other PAGA settlements approved by courts—including those that provide for less
7 than the one percent allocation to PAGA penalties. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009
8 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was 0.49% of
9 \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug.
10 4, 2015) (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement);
11 *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation
12 that was 0.67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff
13 alleged that drivers who use Lyft were misclassified as independent contractors. 2016 WL
14 3561742, (N.D. Cal. June 23, 2016). The parties’ settled all Labor Code and PAGA claims for
15 \$27 million, with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In
16 granting preliminary approval to the proposed settlement in *Cotter*, the court noted that the
17 PAGA allocation “might seem low when compared to the maximum PAGA penalties,” but
18 acknowledged that it was in fact “quite high compared to the typical amount apportioned to
19 claims for PAGA penalties in wage and hour settlements.” *Id.* at *5

20 A PAGA allocation need not represent any particular percentage of the overall settlement
21 value in order to secure court approval, and courts routinely approve PAGA settlements
22 representing only a tiny fraction of the overall settlement value. The proposed settlement sum in
23 this case vastly exceeds, both in terms of the total dollar amount and as a percentage of overall
24 settlement value, the typical PAGA settlement.

25 **F. The Attorneys’ Fees and Costs are Reasonable**

26 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
27 successful action brought under PAGA. Although this is not a class action, in class actions
28 California state and federal courts have recognized that an appropriate method for determining

award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

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

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

1 of a reasonable fee by choosing an appropriate percentage of the fund created.”).

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

7 Here, as set forth in the Gavron Declaration, Plaintiff’s Counsel will spend over
8 approximately 45.2 hours litigating this current action. (Gavron Decl. ¶ 31, Ex. B.) Based
9 thereon, and based on Mr. Gavron’s hourly rate, the lodestar equates to \$24,860.00, which far
10 exceeds the \$8,166.67 fee request. (*Id.*) Thus, the requested fee amount of \$8,166.67 is fair and
11 reasonable.

12 Additionally, the Settlement allows Plaintiff’s Counsel to seek reimbursement of
13 litigation costs in an amount not to exceed \$ 7,000.00. To date, Plaintiff’s Counsel has incurred
14 \$4,429.26 in litigation-related costs. (Gavron Decl. ¶ 33; Ex. C.) The costs were all directly
15 incurred in the prosecution of this action, including, but not limited to, filing/service fees and
16 mediation costs. (*Id.*) As such, the requested costs are appropriate. The difference between the
17 maximum of \$7,000.00 allocated to costs in the Settlement Agreement and the amount of the
18 costs actually incurred will be distributed to the LWDA and Aggrieved Employees as set forth in
19 the Settlement Agreement.

20 **G. The Claims Administrator’s Fees Should be Approved**

21 The Parties have agreed to pay actual costs of administration, which will not exceed
22 \$500.00, to the Claims Administrator, Phoenix Settlement Administrators, to administer this
23 Settlement. (Settlement Agreement § 3(c).) The Parties believe that the administration fee is
24 reasonable and should be approved.

25 **H. Notice to the LWDA Has Been Provided**

26 Pursuant to California Labor Code § 2699(1), on July 19, 2021, Plaintiff uploaded the
27 instant motion, Settlement Agreement, and proposed order to the LWDA’s website. (Gavron
28 Decl. ¶ 34.) In addition, Plaintiff shall submit to the LWDA a copy of the Court’s judgment and

1 order approving the Settlement Agreement within ten (10) days after entry of judgment or order.
2 (*Id.*)

3 **V. CONCLUSION**

4 Based on the above, Plaintiff requests that the Court approve the current PAGA
5 settlement.

6
7 DATED: July 19, 2021

DIVERSITY LAW GROUP, P.C.

8
9 By: 
Max W. Gavron

10 Attorneys for Plaintiff and Aggrieved Employees
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On July 19, 2021, I served the following document(s) described as: **PLAINTIFF'S**
11 **NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AGREEMENT**
12 **PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT; MEMORANDUM OF**
13 **POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action as
14 follows:

15 Beth A. Kahn
16 bkahn@clarkhill.com
17 Ryan C. McKim
18 rmckim@clarkhill.com
19 CLARK HILL LLP
20 1055 West Seventh Street, 24th Floor
21 Los Angeles, California 90017
22 *Attorneys for Defendant*
23 *ST. JOHN OF GOD RETIREMENT AND CARE CENTER*

24 X BY ELECTRONIC MAIL: by personally sending a true and correct copy
25 of the above-described document(s) to the party(ies) listed above or on the attached mailing list
26 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
27 indicated above or on the attached mailing list. I certify that said electronic transmission was
28 completed and that all pages were received by the party(ies) identified herein or on the attached
mailing list.

I declare under penalty of perjury under the laws of the State of California that the
above is true and correct. Executed on July 19, 2021, at Los Angeles, California.

25 
26 _____
27 Erika Mejia
28