

Larry W. Lee (State Bar No. 228175)
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 Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

LOLITA BUCKMASTER, as an individual
and on behalf of all others similarly
situated,

Plaintiffs,

vs.

PEPPERBUSH HOLDINGS, LLC, a
Delaware limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 37-2020-00023125-CU-OE-CTL

(Assigned to the Honorable Carolyn Caietti, Dept.
C-70)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE THE PARTIES'
SETTLEMENT AGREEMENT PURSUANT
TO THE LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Reservation No. 2843611

Date: December 2, 2022
Time: 10:30 a.m.
Dept.: C-70

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

2 PLEASE TAKE NOTICE that on December 2, 2022, at 10:30 a.m., or as soon thereafter
3 as the matter be heard in Department C-70 of the Superior Court of the State of California for the
4 County of San Diego located at 330 West Broadway, San Diego, CA 92101, Plaintiff Lolita
5 Buckmaster (“Plaintiff”) will, and hereby does, move the Court for entry of an order approving
6 the proposed Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and Release
7 Agreement (“Settlement Agreement”) entered into in the above-captioned civil action between
8 Plaintiff and Defendant PEPPERBUSH HOLDINGS, LLC (“Defendant”) (Plaintiff and
9 Defendant shall collectively be referred to as the “Parties”) under the Labor Code Private
10 Attorneys General Act of 2004 (the “PAGA”).

11 This motion is made pursuant to California Labor Code section 2699(l)(2), which requires
12 trial courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],”
13 *see* Cal. Lab. Code § 2699(l)(2), and on the grounds that the parties’ settlement is fundamentally
14 fair, adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
15 concurrently filed declaration of Max Gavron, a copy of the Parties’ proposed Settlement
16 Agreement and this Motion was electronically submitted to the Labor and Workforce
17 Development Agency in accordance with California Labor Code sections 2699(l)(2) and
18 2699(l)(4) concurrent with the filing of this motion.

19 This motion is based on this notice of motion and motion for approval of the Parties’
20 Settlement Agreement attached to the Declaration of Max Gavron and the Settlement Agreement
21 attached thereto as **Exhibit A**, concurrently filed herewith; the attached memorandum of points
22 and authorities in support of this motion; the concurrently filed declarations of Max Gavron (and
23 any exhibits attached thereto), Larry Lee, and Plaintiff in support of this motion; all pleadings,
24 records, and files in this action; and upon such other matters as may be properly presented to, or
25 received by, the Court at or before the hearing on this motion.

1 DATED: June 23, 2022

DIVERSITY LAW GROUP, P.C.



2 By: _____

3 Larry W. Lee

4 Max W. Gavron

5 Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. FACTUAL AND PROCEDURAL BACKGROUND	7
III. STANDARD OF REVIEW	9
IV. ARGUMENT	10
A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant to Labor Code section 2699(l)(2)	10
B. The Court Should Approve the Settlement Agreement.....	10
1. The Settlement Agreement Is Entitled to a Presumption of Fairness.....	10
2. The Scope of the Settlement Agreement is Fair, Adequate, and Reasonable	11
3. The Settlement Agreement Apportions Civil Penalties between the LWDA and the Settlement Group as Required by PAGA.....	14
4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys' Fees	15
5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Litigation Costs	16
6. Plaintiff's Service Award Should Be Approved.....	16
7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Settlement Administration Costs.....	17
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157, 1209	13
<i>Arias v. Superior Court</i> , 46 Cal. 4th at 986 (2009)	11, 12
<i>Atempa v. Pedrazzani</i> , 27 Cal.App.5th 809(2018)	14
<i>Carrington v. Starbucks Corporation</i> No. D072392 (Cal. Ct. App. Nov. 27, 2018)	13, 14
<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43, 66, fn. 11 (2008)	15
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1800–01 (1996)	10, 11
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> , 59 Cal. 4th 348, 383 (2014)	12, 13
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130 (2008)	12
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	15
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 250 (2001)	12

Statutes

Business and Professions Code § 17200, <i>et seq.</i>	8
Labor Code § 2699 (l)(2)	7, 9, 10, 17
Labor Code § 2699(g)	15, 16
Labor Code § 2699(i)	14
Civil Code § 1542	9, 16
Lab. Code § 2699 (e)(2)	10
Lab. Code § 2699(l)(4)	10
Labor Code § 1194	8
Labor Code § 201	8
Labor Code § 202	8
Labor Code § 203	8
Labor Code § 226(a)	8
Labor Code § 226.7	8
Labor Code § 2698, <i>et seq.</i>	7
Labor Code § 510	8
Labor Code § 512	8

Other Authorities

2003 Cal. Stat. ch. 906 § 1	12
2003 Cal. Stat. ch. 906 § 1(d)	10

Federal Cases

<i>Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.</i> (S.D. Cal. Aug. 10, 2009) 2009 WL 2448430, at *9	13
<i>Bernstein v. Virgin Am., Inc.</i> , 3 F.4th 1127, 1144 (9th Cir. 2021).....	13
<i>Ceja-Corona v. CVS Pharmacy, Inc.</i> , No. 1:12-cv-01868, 2014 WL 4472691, at *9 (E.D. Cal. Sept. 11, 2014)	11
<i>Haralson v. U.S. Aviation Servs. Corp.</i> , 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019)	9, 10
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990)...	16
<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811, 819 (9th Cir. 2012)	12
<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016)	9, 11, 12
<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948, 958–59 (9th Cir. 2009)	16
<i>Sakkab v. Luxottica Retail North America, Inc.</i> , 803 F.3d 425, 435 (9th Cir. 2015).....	11
<i>Smith v. H.F.D. No. 55, Inc.</i> , No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018)	9, 10, 12
<i>Torrise v. Tucson Elec. Power Co.</i> , 8 F.3d 1370, 1376 (9th Cir. 1993)	14
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	16
<i>Viking River Cruises, Inc. v. Moriana</i> , No. 20-1573, 2022 WL 2135491, at *10 (U.S. June 15, 2022)	13

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Lolita Buckmaster (“Plaintiff”) respectfully requests the
4 Court’s approval of the Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement
5 and Release Agreement (the “Settlement Agreement”). After this lawsuit was commenced, the
6 Parties engaged in written discovery, multiple informal discovery conferences, and litigated the
7 case. Ultimately, the Parties participated in a mediation effort. As part of their privileged
8 settlement negotiations, Defendant produced a data regarding the aggrieved employees and a
9 sampling of time and pay records, from which Plaintiff’s counsel calculated the maximum PAGA
10 penalty exposure. (Declaration of Max Gavron (“Gavron Decl.”) ¶ 8). Based on this information
11 and evidence of Defendant’s deteriorating financial condition discussed at mediation, and
12 arbitration agreements signed by aggrieved employees potentially impacting the viability of this
13 lawsuit, the Parties have settled this case on a representative PAGA basis for \$500,000.00, or
14 approximately 20% of the originally calculated maximum exposure. (*Id.*)

15 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
16 attorneys’ fees, or \$166,666.67, up to \$25,000.00 in litigation costs incurred by Plaintiffs’
17 counsel, \$10,000.00 to Plaintiff for a service award, and up to \$5,500.00 for settlement
18 administration costs. (*Id.* at §§ III.2(a)-(d)). The remainder, or the “PAGA Penalty Fund,” is
19 allocated to the payment of civil penalties under PAGA, 75 percent of the civil penalties for
20 distribution to the Labor and Workforce Development Agency (the “LWDA”) and 25 percent of
21 the civil penalties for distribution to the “aggrieved employees” on whose behalf Plaintiff filed
22 this action as required by PAGA. (*Id.* at § III.2(e)).

23 Under PAGA, the Court must review and approve the proposed settlement. *See* Cal. Lab.
24 Code § 2699 (1)(2). Accordingly, Plaintiff brings this motion to request approval of the Settlement
25 Agreement on the grounds it is fundamentally fair, adequate, and reasonable in light of PAGA’s
26 policies and purposes and the facts and circumstances discussed in detail below.

27 **II. FACTUAL AND PROCEDURAL BACKGROUND**

28 On June 19, 2020, Plaintiff sent notice to the Labor and Workforce Development Agency

1 (“LWDA”) giving notice of her intent to pursue a representative PAGA action, on behalf of
2 herself and the State of California as well as on behalf of other aggrieved employees (the “PAGA
3 Notice”).

4 On July 6, 2020, Plaintiff filed the Action against Defendant asserting class action claims
5 under Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 512, 1194, as well as a representative
6 action claim under PAGA, and a claim under Business and Professions Code § 17200, *et seq.*

7 On August 26, 2020, Plaintiff filed a First Amended Complaint, alleging a single claim for
8 violation of the PAGA, after having dismissed without prejudice her putative class claims
9 considering an arbitration agreement that included a purported class waiver.

10 The Parties exchanged written discovery and engaged in several meet and confer efforts.
11 The Court ultimately granted Plaintiff leave to file a motion to compel, which Plaintiff did on
12 September 15, 2021. Thereafter, the Parties agreed to participate in a private mediation with
13 respected mediator, Todd Smith, Esq. The Parties mediated on April 13, 2022, and with the help
14 of Mr. Smith and his mediator’s proposal were able to arrive at a proposed resolution. (Gavron
15 Decl. ¶ 6)

16 Given Defendant’s financial condition, the Parties have agreed that Defendant will fund
17 the first payment of the Gross Settlement Amount in the amount of \$250,000.00 within thirty
18 calendar days of the Effective Date, and the second payment in the amount of \$250,000.00 on or
19 before January 31, 2023. (Settlement Agreement at § V.2). The Settlement Agreement allocates
20 one-third of the Gross Settlement Amount for attorneys’ fees, or \$166,666.67, up to \$25,000.00 in
21 litigation costs incurred by Plaintiffs’ counsel, \$10,000.00 to Plaintiff for a service award, and up
22 to \$5,500.00 for settlement administration costs. (*Id.* at §§ III.2(a)-(d)). The remainder, or the
23 “PAGA Penalty Fund,” is allocated to the payment of civil penalties under PAGA, 75 percent of
24 the civil penalties for distribution to the Labor and Workforce Development Agency (the
25 “LWDA”) and 25 percent of the civil penalties for distribution to the “aggrieved employees” on
26 whose behalf Plaintiffs filed this action as required by PAGA. (*Id.* at § III.2(e)).

27 The Settlement Agreement provides the following release:

28 Upon the approval by the Court of this Agreement and funding of

1 the GSA by Defendant, each of the PAGA Members, including
2 Plaintiff, shall, for the Covered Period, fully release and forever
3 discharge the Released Parties, subject to the terms and conditions
4 hereof and the approval of the Court, from the Covered Claims and
any other form of relief or remedy in law, equity, or whatever kind
or nature that were asserted or could have been asserted based on
the facts alleged in the Action.

5 (*Id.* at § IV.1). The Settlement Agreement defines “Covered Claims” as

6 [A]ny and all claims, demands, rights, liabilities, and/or causes of
7 action under the PAGA for civil penalties, which are premised on
8 alleged violation of Labor Code §§ 201, 202, 203, 212-213, 226,
226.7, 510, 512, 1194, as well as any other claims which could have
9 been brought based on the facts alleged in the Action within the
Covered Period.

10 (*Id.* at § II.9). Plaintiff also executed a general release as part of the Settlement Agreement,
11 including a waiver of Civil Code § 1542. (*Id.* at § IV.2).

12 Each PAGA Member will receive an individual payment proportionate to the number of
13 Eligible Pay Periods worked. (*See id.* § III.3). Each Individual Settlement Payments will be
14 considered the payment of a civil penalty and treated as IRS Form 1099 income. (*See id.*)

15 **III. STANDARD OF REVIEW**

16 Although PAGA requires courts to “review and approve” the settlement of any civil action
17 filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California
18 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
19 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959,
20 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA
21 settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2
22 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA
23 settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark” and stated
24 only that the relief provided under PAGA must be “genuine and meaningful,” “consistent with the
25 underlying purpose of the statute to benefit the public” and, in the context of a class action,
26 “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to
27 the public policies underlying the PAGA.” *See* California Labor and Workforce Development
28 Agency’s Comments on Proposed PAGA Settlement at 2–3, *O’Connor v. Uber Techs.*, No. 3:13-

1 CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

2 Left to develop their own standards, federal district courts have typically followed the
3 LWDA's limited guidance by requiring settlements to be "fundamentally fair, adequate, and
4 reasonable in light of PAGA's policies and purposes." *See Haralson*, 383 F. Supp. 3d at 972
5 (collecting cases). When applying this test, federal district courts often consider factors such as
6 strength of a Plaintiffs' case; the risk, expense, complexity, and likely duration of further
7 litigation; the amount offered in settlement; the extent of discovery completed; and the expertise
8 and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been
9 mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that
10 are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab.
11 Code § 2699 (e)(2).

12 **IV. ARGUMENT**

13 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 14 **to Labor Code section 2699(l)(2)**

15 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
16 "primacy" over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
17 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the proposed
18 settlement to the LWDA online "at the same time that it is submitted to the court," to give LWDA
19 an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§ 2699 (l)(2),
20 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement
21 Agreement and this Motion to the LWDA through the LWDA's online filing system on June 23,
22 2022. (See Gavron Decl. ¶ 23, Exh. B).

23 **B. The Court Should Approve the Settlement Agreement**

24 **1. The Settlement Agreement Is Entitled to a Presumption of Fairness**

25 In class actions, judicial review of a settlement's fairness is designed to protect class
26 members who had no say in the negotiation of the settlement by ensuring that the settlement is not
27 the product of "fraud," "overreaching," or "collusion" by the negotiating parties and that "due
28 regard" was given to the rights and interests of absent class members subject to the settlement.

1 *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800–01 (1996). Although PAGA actions
2 and class action have certain “fundamental” differences, *see Sakkab v. Luxottica Retail North*
3 *America, Inc.*, 803 F.3d 425, 435 (9th Cir. 2015), PAGA settlements are also subject to Court
4 approval. *See Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing the scope of a
5 judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134 (N.D.
6 Cal. 2016).

7 Against this backdrop, California courts have identified a set of circumstances entitling
8 class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In
9 particular, a presumption of fairness arise where “(1) the settlement is reached through arm’s-
10 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
11 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
12 objectors is small.” *See id.*

13 All of the factors that would give rise to a presumption of fairness in the context of a class
14 action settlement are present in this PAGA action. After this lawsuit was commenced, the Parties
15 agreed to engage in arms’ length negotiations between highly experienced counsel. As part of
16 their privileged settlement negotiations, Defendant produced data regarding the aggrieved
17 employees, from which Plaintiff’s counsel calculated the maximum PAGA penalties and
18 analyzed Defendant’s potential liability. (Gavron Decl. ¶ 8). Both Plaintiff’s and Defendant’s
19 counsel has significant experience in litigating wage and hour class and PAGA actions, which
20 further supports the reasonableness of the settlement. (Gavron Decl. ¶¶ 15-21; Declaration of
21 Larry W. Lee (“Lee Decl.”) ¶¶ 6-7). Therefore, the Settlement Agreement is entitled to a
22 presumption of fairness.

23 **2. The Scope of the Settlement Agreement is Fair, Adequate, and** 24 **Reasonable**

25 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
26 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to
27 sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted
28 PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement

1 capability of the LWDA with private enforcement actions by “aggrieved employees” acting as
2 private attorneys general. See 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS*
3 *Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of
4 in the nature of an enforcement action, where the named plaintiff acts as a proxy of the LWDA to
5 collect penalties otherwise recoverable only by the LWDA. *See Arias*, 46 Cal. 4th at 986; *see also*
6 *Iskanian*, 59 Cal. 4th at 381–82. In that role, the named plaintiff “take[s] on a special
7 responsibility to their fellow aggrieved workers who are effectively bound by any judgment.” *See*
8 *O'Connor*, 201 F. Supp. 3d at 1134.

9 Plaintiff’s claims in this action are based on alleged violations of Labor Code sections
10 201-203, 212-213, 226, 226.7, 510, 512, 1194, and 2698, *et seq.* *See generally* Pl.’s Am. Cmplt.
11 When reviewing a settlement agreement, “the test is not the maximum amount plaintiffs might
12 have obtained at trial on the complaint,” *see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
13 224, 250 (2001), nor is it “whether the settlement agreement is perfect in the estimation the
14 reviewing court.” *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is
15 “whether the settlement is reasonable under all of the circumstances.” *See Wershba*, 91 Cal.
16 App. 4th at 250. Relevant considerations include the strength of a Plaintiffs’ case and the risk,
17 expense, complexity, and likely duration of further litigation. *See Kullar v. Foot Locker Retail,*
18 *Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see also Smith*, 2018 WL 1899912 at *2. In PAGA
19 settlements, courts also consider their authority to award less than the maximum penalty
20 authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2); *see also Smith*, 2018 WL 1899912 at *3.

21 Here, Defendant produced a sampling of time and pay records for the aggrieved
22 employees, which permitted Plaintiff to analyze Defendant’s potential exposure and liability.
23 (Gavron Decl. ¶ 8). As detailed in the Settlement Agreement, § II.12, there were approximately
24 25,000 pay periods at issue during the time encompassed by this settlement. PAGA’s penalty
25 structure is based on the number of violations of the Labor Code committed during a given pay
26 period. *See* Cal. Lab. Code § 2699(f). Defendant’s potential exposure could be as high as \$2.5
27 million if the Court were to award a \$100 penalty for each pay period encompassed by the
28 proposed settlement. (Gavron Decl. ¶ 8). However, Defendant argued that its exposure was

1 significantly less because it maintained legally compliant policies, complied with the law at all
2 times, the sampling of time and pay records produced for evaluation demonstrated an extremely
3 low facial violation rate regarding Plaintiff's claims, and that it maintained arbitration agreements
4 applicable to its employees, which it contended precluded Plaintiff's PAGA claims. (Gavron
5 Decl. ¶ 8). On June 15, 2022, the United States Supreme Court issued its decision in *Viking River*
6 *Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL 2135491, at *10 (U.S. June 15, 2022), which
7 Defendant would have argued precludes Plaintiff's PAGA claim. *Id.* (holding that Federal
8 Arbitration Act ("FAA") preempted portion of California Supreme Court's holding in *Iskanian v.*
9 *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) and that PAGA claims may be arbitrable
10 under the FAA).

11 While the PAGA does provide for a potentially heightened penalty of \$200 for
12 "subsequent" violations, many courts do not award that penalty unless there has been a prior
13 citation by the LWDA or court ruling demonstrating that the employer previously violated the
14 Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209; *accord*
15 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* (S.D. Cal. Aug. 10,
16 2009) 2009 WL 2448430, at *9 ("[u]nder California law, courts have held that employers are
17 not subject to heightened penalties for subsequent violations unless and until a court or
18 commissioner notifies the employer that it is in violation of the Labor Code"); *see also*
19 *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
20 penalty unless prior citation or court ruling). Thus, Defendant argued that even if Plaintiff was
21 able to establish any violation of the Labor Code, the PAGA penalties assessed for these
22 violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at
23 maximum, and there is a likelihood that a further reduction of the penalty would be appropriate
24 given its good faith efforts to comply with the Labor Code and its contentions that it complied
25 with the Labor Code at all times. (Gavron Dec. ¶ 9.)

26 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
27 PAGA are minimal. Indeed, courts to consider the issue have refused to "stack" PAGA
28 penalties and often significantly reduce the penalties awarded. *See Carrington v. Starbucks*

1 *Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving
2 PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani* (2018) 27
3 Cal.App.5th 809. If the Court in this case were to reduce penalties to \$5 a pay period, as was
4 approved in *Carrington*, the potential exposure amounts to approximately \$125,000 (25,000
5 pay periods x \$5.00).

6 Under the circumstances of this case, the payment of \$500,000.00 in civil penalties is fair,
7 adequate, and reasonable. The payment of \$500,000.00 in exchange for a release of only those
8 claims for civil penalties that are pleaded in the action or that could have been pleaded based on
9 the facts alleged in the PAGA Notice or the Complaint will have a substantial deterrent effect on
10 Defendant and other California employers and will confer benefits on the approximately 555
11 PAGA Members, whom will each receive a portion of the settlement.

12 Finally, Defendant's financial condition was a significant factor in evaluating the
13 reasonableness of this settlement. The \$500,000.00 Gross Settlement Amount is the highest
14 Defendant could pay while remaining in business. For this reason, Defendant needs to make
15 installment payments. Settlement Agreement ¶ V.1-2. This heavily favors approval of the
16 settlement. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (holding that
17 lower court properly approved class action settlement because of the defendant's financial
18 condition; "Here one factor predominates to make clear that the district court acted within its
19 discretion. That factor is Tucson's financial condition.")).

20 In sum, this settlement is fair, reasonable, and consistent with PAGA's policies and
21 purposes under these circumstances.

22 **3. The Settlement Agreement Apportions Civil Penalties between the**
23 **LWDA and the Settlement Group as Required by PAGA**

24 Except when civil penalties are recovered from a defendant who did not have any
25 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
26 distributed so that 75 percent of the civil penalties are paid to the to LWDA and 25 percent are
27 paid to the "aggrieved employees" on whose behalf the PAGA action was brought. *See* Cal. Lab.
28 Code § 2699(i). In full compliance with that rule, the Settlement Agreement requires the PAGA

1 Penalty Fund to be paid to the LWDA and 25 percent of the PAGA Penalty Fund to be paid
2 Settlement Group. (Settlement Agreement at § III.3). The Settlement Group will receive
3 penalties based on the number of pay periods they worked during the applicable period using a
4 pro rata distribution formula. (*Id.*)

5 **4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
6 **Amount to the Payment of Attorneys' Fees**

7 PAGA allows a prevailing Plaintiff to recover reasonable attorneys' fees. *See* Cal. Lab.
8 Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff's counsel to
9 request up to \$166,666.67, in attorneys' fees. (*See* Settlement Agreement at §§ III.2(a), III.4).

10 In class actions, state and federal courts have held that when a class action establishes a
11 monetary fund for the benefit of the class members out of which attorneys' fees may be paid,
12 courts may determine the amount of a reasonable fee by "choosing an appropriate percentage of
13 the fund created." *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee
14 award representing 33 1/3 percent of the fund and joining "the overwhelming majority of federal
15 and state courts" in approving the "percentage method" as a reasonable means for determining
16 attorney fee awards in class actions). While different from class action settlements in important
17 ways, PAGA settlements also involve the establishment of a common fund for the benefit of
18 persons other than the named Plaintiff, so the reasons for utilizing the percentage method are the same.
19 *See id.* (noting that the percentage method provides "ease of calculation," "alignment of
20 incentives between counsel and the class," "a better approximation of market conditions in a
21 contingency case," and the "encouragement . . . to seek an early settlement"). The \$166,666.67
22 requested by Plaintiff's counsel represents one-third of the Gross Settlement Amount, which is
23 consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162
24 Cal.App.4th 43, 66, fn. 11 (2008) ("[F]ee awards in class actions average around one-third of the
25 recovery"); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to
26 one-third of the total settlement amount).

1 **5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
2 **Amount to the Payment of Litigation Costs**

3 PAGA also allows a prevailing Plaintiff to recover litigation costs. *See* Cal. Lab. Code §
4 2699(g). Accordingly, the Settlement Agreement allows Plaintiff's counsel to request up to
5 \$25,000.00 in litigation costs. (Settlement Agreement at §§ III.2(b), III.4).

6 Plaintiff's counsel requests \$10,186.84 for the reimbursement of litigation costs. As set
7 forth in accompanying declarations of Plaintiff's counsel, these costs were all directly incurred in
8 the prosecution of this action, including, but not limited to, filing fees, service fees, and mediation
9 fees. (Lee Decl. ¶ 8, Exh. A). As such, Plaintiff's counsel's request for costs in the amount of
10 \$10,186.84 is fair, adequate, reasonable, and consistent with PAGA's policies. Because this
11 amount is less than what was provided in the Settlement Agreement, the difference will be
12 distributed to the LWDA and Aggrieved Employees.

13 **6. Plaintiff's Service Award Should Be Approved**

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

20 Here, Plaintiff respectfully requests \$10,000.00 for her service award, which is intended to
21 compensate Plaintiff for the time spent on this case and for executing a general release, including
22 of Civil Code § 1542, which was not required by aggrieved employees. (Declaration of Lolita
23 Buckmaster ¶¶ 3-5). This requested enhancement is consistent with awards approved in other
24 common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D.
25 Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*,
26 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive
27 awards of \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a matter of
28 public record. Future employers may be less likely to hire an employee who has previously filed

1 an action against an employer. This in conjunction with Plaintiff's agreement to provide a general
2 release supports the requested award.

3 **7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable**
4 **Amount to the Payment of Settlement Administration Costs**

5 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
6 Counsel, and the LWDA, but also to as many as 555 of Defendant's current and former
7 employees, significant time and effort will be required to administer the Settlement Agreement if
8 it is approved by this Court. Among other things, calculate each PAGA Member's shares;
9 appropriate tax forms must be issued to all parties who receive payments under the Settlement
10 Agreement; payments must be mailed to Plaintiff, Plaintiff's Counsel, the LWDA, and each
11 Settlement Group Member; and any checks not cashed by Settlement Group Members must be
12 voided so that the unclaimed amount can be forwarded to the State of California Controller's
13 Office Unclaimed Property Fund in the name of the PAGA Members who did not cash their
14 respective PAGA Member Shares. (See Settlement Agreement § V.6.)

15 In contemplation of these expenses, the parties will engage Phoenix Settlement
16 Administrators to act as a third-party settlement administrator and have allocated up to \$5,500.00
17 to cover the cost of settlement administration. (Settlement Agreement §§ II.8, III.2(d), V.3(d)).

18 **V. CONCLUSION**

19 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
20 Agreement pursuant to Labor Code section 2699(1)(2).

21
22 DATED: June 23, 2022

DIVERSITY LAW GROUP, P.C.

23 
24 By: _____
25 Larry W. Lee
26 Max W. Gavron
27 Attorneys for Plaintiff and the Class
28