

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
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff and the Aggrieved Employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

STEPHANIE AGUIRRE, as an individual
and on behalf of all others similarly situated,

Plaintiffs,

vs.

PINNACLE CLAIMS MANAGEMENT,
INC., a California corporation; WESTERN
GROWERS ASSOCIATION, a California
corporation; WESTERN GROWERS
INSURANCE SERVICES, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 30-2020-01161977-CU-OE-CXC

[Assigned for all purposes to the Hon. William
Claster, Dept. CX101]

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

Date: September 6, 2024

Time: 9:00 a.m.

Dept.: CX101

Reservation No.: 74354274

Action Filed: September 24, 2020

Trial Date: September 30, 2024

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

2 **PLEASE TAKE NOTICE** that on September 6, 2024, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard before the Honorable William Claster, in Department CX101, of the
4 Superior Court of the State of California for the County of Orange, located at 751 W. Santa Ana
5 Blvd., Santa Ana, California 92701, Plaintiff Stephanie Aguirre (“Plaintiff”) will and hereby
6 does move the Court for entry of an order approving the proposed PAGA Settlement Agreement
7 (“Agreement,” “Settlement,” or “Settlement Agreement”) entered into in the above-captioned
8 civil action between Plaintiff and Defendants Pinnacle Claims Management, Inc. and Western
9 Growers Association (“Defendants”) (Plaintiff and Defendants shall collectively be referred to
10 as the “Parties”) under the Labor Code Private Attorneys General Act of 2004 (the “PAGA”).

11 This motion is based on this notice of motion, the attached memorandum of points and
12 authorities, the accompanying declarations of Larry W. Lee, Max W. Gavron, and Plaintiff
13 Stephanie Aguirre, the records and file herein, and on such other evidence as may be presented at
14 the hearing of the motion.

15
16 DATED: August 5, 2024

DIVERSITY LAW GROUP, P.C.

17 By: 
18 Larry W. Lee
19 Max W. Gavron
20 Attorneys for Plaintiff and the Aggrieved
21 Employees
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	6
II. PROCEDURAL HISTORY	7
III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	8
A. The Aggrieved Employees.....	8
B. Gross Settlement Amount 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	12
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	15
3. Settlement is Reasonable When Compared to the Value of the Underlying Labor Code Claim.....	16
F. The Attorneys’ Fees are Reasonable	17
G. The Settlement Administration Procedure & Costs Should be Approved.....	19
H. Plaintiff’s Incentive Payment Should be Approved.....	20
I. Notice to the LWDA Has Been Provided.....	21
V. CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009)	11, 12, 13
<i>Brinker Rest. Corp. v. Superior Ct.</i> , 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012)	14
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	16
<i>City and County of San Francisco v. Sweet</i> , 12 Cal. 4th 105 (1995).....	18
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46 (2006).....	13
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal. 5th 480 (2016).....	18, 19
<i>Serrano v. Priest</i> , 20 Cal. 3d 25 (1977)	18

Federal Cases

<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F. 3d 1117 (9th Cir. 2014)	11
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	18
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907 (S.D. Ohio 2001).....	20
<i>Chavez v. Converse, Inc.</i> , 2020 WL 1233919, at *1 (N.D. Cal. 2020).....	15
<i>Cook v. Niedert</i> , 142 F.3d 1004 (7th Cir. 1998)	20
<i>Cotter v. Lyft, Inc.</i> , 2016 WL 3561742 (N.D. Cal. June 23, 2016).....	17
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> , 137 F.R.D. 240 (S.D. Ohio 1991)..	20
<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 27, 2007)	20
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	12
<i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133 (N.D. Cal. Apr. 3, 2009)	17
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366 (S.D. Ohio 1990)	20
<i>Lusby v. Gamestop Inc.</i> , 97 F.R.D. 400 (N.D. Cal. 2013)	17
<i>Magadia v. Wal-Mart Assocs., et al.</i> , 2019 U.S. Dist. Lexis 91792	16
<i>Moore v. PetSmart, Inc.</i> , 2015 WL 5439000 (N.D. Cal. Aug. 4, 2015).....	17
<i>Naranjo v. Spectrum Sec. Servs., Inc.</i> , No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024)	15
<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777 (N.D. Cal. April 2, 2010)....	11, 12

1	<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	20
2	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995).....	20
3	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F.2d 759 (9th Cir. 1997)	18
4	Statutes	
5	Civil Code § 1542	20
6	Labor Code § 1194.....	passim
7	Labor Code § 226.....	passim
8	Labor Code § 226.7.....	passim
9	Labor Code § 246.....	passim
10	Labor Code § 2698, <i>et seq.</i>	6, 7
11	Labor Code § 2699(1).....	12
12	Labor Code § 2699(a)	11
13	Labor Code § 2699(c)	11
14	Labor Code § 2699(f)(2)	15
15	Labor Code § 2699(g)(1)	13, 17
16	Labor Code § 2699(i).....	11, 13
17	Labor Code § 2699.3(a)(2)	11
18	Labor Code § 2699.3(a)(1)	11
19	Labor Code § 510.....	passim
20	Labor Code § 512.....	passim
21	Labor Code § 558.....	passim
22	Labor Code §§ 201-203	passim
23	Other Authorities	
24	Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 11.25, <i>et seq.</i> (4th ed. 2002)	
25		12
26	Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 13.64 (Supp. 2004)	12
27	<i>Manual for Complex Litigation, Fourth</i> § 21.632 (Fed. Jud. Ctr., 4th ed. 2004)	12
28		

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 Stephanie Aguirre (“Plaintiff”) hereby moves the Court for an order approving the
5 non-reversionary settlement as set forth in the concurrently filed PAGA Settlement Agreement
6 (“Agreement,” “Settlement,” or “Settlement Agreement”). The operative First Amended
7 Complaint in this case alleges that Defendants Pinnacle Claims Management, Inc. and Western
8 Growers Association (together, “Defendants”) (Defendants and Plaintiff collectively referred to
9 as the “Parties”) violated the Labor Code as a result of Defendants’ alleged failure to properly
10 calculate the regular rate of pay for the purposes of paying overtime, meal period premiums, and
11 sick pay, provide off-duty meal periods, pay all wages owed upon separation of employment,
12 and provide accurate itemized wage statements pursuant to Labor Code §§ 201-203, 226, 226.7,
13 246, 510, 512, 558, and 1194. Specifically, Plaintiff alleges that Defendants failed to incorporate
14 non-discretionary remuneration such as referral bonus incentive wages into the calculation of the
15 regular rate for the purposes of paying overtime, meal period premiums, and sick pay. As a result
16 of the miscalculation, Plaintiff alleged that the wage statements issued by Defendants failed to
17 identify the correct hourly rates of pay and gross and net wages earned.

18 As demonstrated below and in the accompanying declaration of Max W. Gavron, the
19 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
20 investigation, discovery, and litigation, including extensive meet and confer regarding the taking
21 of Defendants’ persons most knowledgeable, reviewing Defendants’ production of documents,
22 including policy documents, and analyzing data regarding the number of allegedly aggrieved
23 employees and pay periods at issue.

24 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendants will
25 pay the total amount of One Hundred Five Thousand Dollars (\$105,000.00) (the “Gross
26 Settlement Amount”), which includes a payment of approximately \$34,500.00 in civil penalties
27 to the California Labor and Workforce Development Agency (“LWDA”) and approximately
28 \$11,500.00 to the allegedly aggrieved employees. The proposed release is narrowly tailored to

1 release only claims for civil penalties under PAGA predicated on Labor Code §§ 201-203, 226,
2 226.7, 246, 510, 512, 558, and 1194.

3 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
4 behalf of the LWDA and allegedly aggrieved employees, and accomplishes the goals of PAGA.

5 **II. PROCEDURAL HISTORY**

6 On September 11, 2020, Plaintiff provided written notice to the LWDA and Defendants
7 of her intent to pursue a representative PAGA action on behalf of herself and the State of
8 California, as well as on behalf of other aggrieved employees (the “PAGA Letter”). Declaration
9 of Max W. Gavron (“Gavron Decl.”) ¶ 3, Ex. B. Plaintiff’s PAGA Letter alleged claims for
10 violation of Labor Code §§ 201-203, 226, 226.7, 246, 510, 512, 558, and 1194. *Id.* ¶ 3.

11 On September 24, 2020, Plaintiff filed a class and representative action complaint against
12 Defendants asserting claims for violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 558,
13 1194, and 2698, *et seq.*, and Business and Professions Code § 17200, *et seq.* (the “Action”).
14 Gavron Decl. ¶ 4. The complaint alleged that Defendants failed to properly calculate the regular
15 rate of pay for the purposes of paying overtime, meal period premiums, and sick pay, provide
16 off-duty meal periods, pay all wages owed upon separation of employment, and provide accurate
17 itemized wage statements to employees. Plaintiff subsequently amended the complaint on May
18 19, 2021, dismissing all causes of action, without prejudice, except for violation of Labor Code §
19 2698, *et seq.* *Id.* ¶ 4.

20 After the filing of the initial complaint, the Parties engaged in formal and informal
21 discovery. Plaintiff served Requests for Production of Documents and Special Interrogatories,
22 Sets One and Two. Among other things, the discovery called for Defendants to identify their
23 California employees and produce documents regarding Defendants’ pay, timekeeping, wage
24 statement, meal break, sick pay, and final pay policies. Gavron Decl. ¶ 6. Defendants responded
25 to Plaintiff’s discovery requests and distributed *Belaire-West* notice to the aggrieved employees.
26 *Id.* Plaintiff set the depositions of Defendants’ persons most knowledgeable on several occasions
27 only to have Defendants cancel the deposition or fail to appear. *Id.* ¶ 6. Accordingly, Plaintiff
28 took notices of non-appearance and met and conferred extensively with Defendants’ counsel. *Id.*

¶ 6.

Thereafter, the Parties agreed to engage in mediation before neutral Steve Pearl, Esq. In connection with the mediation, Defendants provided Plaintiff and her counsel with information and data to analyze Defendants' potential liability, including the number of aggrieved employees, number of pay periods at issue, relevant policies, and the time and pay records of the aggrieved employees. Based on this information, the Parties conducted settlement negotiations. Gavron Decl. ¶ 7.

The Parties engaged in mediation on March 7, 2024. Gavron Decl. ¶ 8. The Parties spoke at length about the strengths and weaknesses of each side's claims and defenses and the scope of each Defendant's liability, but did not reach an agreement. *Id.* Plaintiff thereafter filed a demand for arbitration on her individual Labor Code claims.¹ *Id.* After months of post-mediation arm's length negotiations facilitated by Mr. Pearl, with each Party having had the opportunity to consider all known facts and circumstances, the Parties agreed to terms for complete settlement of the Action. *Id.* ¶ 8. The Parties entered into the PAGA Settlement Agreement, a true and correct copy of which is attached to the Declaration of Max W. Gavron as Exhibit A.

III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

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

A. The Aggrieved Employees

The settlement covers "all current and former non-exempt employees of Defendants in California during the PAGA Period who: a. Were paid overtime wages and non-discretionary remuneration during the same pay period; or b. Were paid sick pay wages and non-discretionary remuneration during the same pay period; or c. Worked a shift of five hours or greater" ("Aggrieved Employees"). Agreement ¶ 1.B. Based upon Defendants' records, there are an

¹ Plaintiff's individual arbitration is being resolved through a confidential individual settlement agreement.

1 estimated 223 Aggrieved Employees who worked an estimated 14,325 pay periods during the
2 PAGA Period. *Id.* ¶ 11. The PAGA Period is defined as “the period of April 6, 2019, through
3 March 7, 2024.” *Id.* ¶ 1.R.²

4 **B. Gross Settlement Amount and Allocation**

5 The Settlement Agreement requires Defendants to pay the total amount of One Hundred
6 Five Thousand Dollars (\$105,000.00) (the “Gross Settlement Amount”). Agreement ¶ 1.J. The
7 balance of the Gross Settlement Amount remaining after deduction of the approved Incentive
8 Payment to Plaintiff, Attorneys’ Fees and Costs, and Settlement Administration Costs, or Net
9 Settlement Amount, will be available for distribution to the LWDA (“LWDA Payment”) and
10 Aggrieved Employees (“Employees’ Portion”). *Id.* ¶¶ 1.I, 1.L, 1.M, 12-14. Seventy-five percent
11 (75%) of the Net Settlement Amount, or approximately \$34,500.00, will be paid to the LWDA.
12 *Id.* ¶ 1.L. The remaining twenty-five percent (25%), or approximately \$11,500.00, will be
13 distributed to the Aggrieved Employees. *Id.* ¶ 1.I.

14 Aggrieved Employees will receive an average payment of \$51.57. Gavron Decl. ¶ 15.
15 The amount any particular Aggrieved Employee will receive will be greater or lower than this
16 average depending on the number of pay periods he or she worked during the PAGA Period,
17 with some entitled to receive more, and others less. *Id.* This is fair, as it directly allocates greater
18 payments to individual Aggrieved Employees who worked for Defendants for a longer period of
19 time and therefore who have allegedly suffered greater harm. *Id.*

20 As part of the Settlement Agreement, Defendants do not object to Plaintiff’s Counsel’s
21 request for attorneys’ fees of approximately one-third of the Gross Settlement Amount, *i.e.*,
22 Thirty-Five Thousand Dollars (\$35,000.00), plus up to Fifteen Thousand Dollars (\$15,000.00)
23 for reimbursement of litigation costs, subject to the Court finally approving this settlement.³
24

25 _____
26 ² Pursuant to the Agreement, Defendants will confirm the number of pay periods during the
27 PAGA Period and if the final number of pay periods is more than 10% above 14,325, the PAGA
28 Period will cut off at the date this 10% threshold is met. Agreement ¶ 11.

³ As set forth below, Plaintiff’s Counsel seeks reimbursement of its actual litigation costs in the
amount of \$14,301.60.

Agreement ¶ 12. Also, as part of the Settlement Agreement, Defendants do not object to Plaintiff's request for an Incentive Payment of Five Thousand Dollars (\$5,000.00). *Id.* ¶ 13.

Finally, the Settlement Agreement provides for the payment of the costs reasonably incurred by the Settlement Administrator. *Id.* ¶ 14. The Parties have agreed to utilize Phoenix Settlement Administrators to administer the Settlement, with the administration costs estimated to be \$4,000.00. *Id.* ¶¶ 1.X, 14.

C. Scope of the Released Claims

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

any and all claims for civil penalties under California Labor Code § 2698, *et seq.* arising during the PAGA Period, that were pled or could have reasonably been pled based on the factual allegations contained in the Operative Complaint and PAGA Letter, including, but not limited to, claims for violation of Labor Code §§ 201-203, 226, 226.7, 246, 510, 512, 558, and 1194, and all applicable IWC Wage Orders, as well as any attorney's fees and costs available under PAGA ("Released Claims").

Agreement ¶¶ 1.V, 26. The Released Parties are "(i) Pinnacle Claims Management, Inc., (ii) Western Growers Association, and (iii) their respective parent companies, affiliates, subsidiaries, divisions, partners, joint venture partners, predecessors, insurers, representatives, agents, successors and assigns, and their current and former employees, attorneys, officers, directors, members, shareholders, and agents thereof, both individually and in their business capacities, and their insurers." *Id.* ¶ 1.W. The Settlement does not release Defendants from any of the underlying Labor Code claims. The release is expressly limited to claims, rights, demands, liabilities, and causes of action for civil penalties under PAGA. *Id.*

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the LWDA and other aggrieved employees, to bring suit against their employers for alleged violations of the California labor laws and to obtain penalties that previously could only be obtained by the State. The PAGA was enacted because the Legislature determined that it was "in

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

9 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
10 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
11 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
12 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
13 employee” means “any person who was employed by the alleged violator and against whom one
14 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
15 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
16 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
17 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
18 decides not to investigate the allegations or issue a citation to the employer, the proposed
19 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
20 2699.3(a)(2).

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

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

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

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

23 Notably, unlike the class action settlement approval process, there is also no statutory
24 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
25 2699(1). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
26 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
27 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

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

 The Court’s focus in a PAGA case is not the amount that aggrieved employees will

ultimately receive as a result of a settlement, but instead, on whether the total settlement amount achieves PAGA's objectives. Under PAGA, the penalties recovered are meant to supplement agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i). Here, the settlement represents an extraordinary recovery for the Aggrieved Employees and the State, and thus the settlement certainly effectuates PAGA's purpose.

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

D. The Scope of the Release is Appropriately Limited

If approved, the settlement would release Defendants and other releasees from all PAGA claims predicated on the violation of Labor Code §§ 201-203, 226, 226.7, 246, 510, 512, 558, and 1194, and nothing more. The settlement would not impact Aggrieved Employees' ability to pursue PAGA claims predicated on other Labor Code violations or any Labor Claims not predicated on PAGA. Therefore, the limited scope of the release also supports approval. Because an aggrieved employee's PAGA action is a substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias*, 46 Cal. 4th at 986. However, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part").

Accordingly, the Aggrieved Employees will be subject to only a limited release strictly confined to the statutory penalties, attorneys' fees, and costs available under PAGA for violation

of Labor Code §§ 201-203, 226, 226.7, 246, 510, 512, 558, and 1194. **Error! Bookmark not defined.** The release is therefore appropriately tailored.

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

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

1. Plaintiff's Claims are Contested

Plaintiff asserts that her representative PAGA claim is based on the allegation that Defendants failed to properly calculate the regular rate of pay for the purposes of paying overtime, meal period premiums, and sick pay, provide off-duty meal periods, pay all wages owed upon separation of employment, and provide accurate itemized wage statements that identify the correct hourly rates of pay and gross and net wages earned. Gavron Decl. ¶ 18.

Defendants disputed Plaintiff's claims wholeheartedly. For one, Defendants argued that the allegations of regular rate violations only applied to the pay periods where an employee was provided some form of non-discretionary remuneration and also earned sick pay, overtime, and/or meal period premium wages. *Id.* ¶ 19. This necessarily limited the potential exposure on this claim because the number of pay periods applicable to this theory of liability was limited to, at most, 13% of the applicable pay periods, according to Plaintiff's analysis of the records. Thus, for these claims, if the Court were to award \$100 per pay period with a violation, the exposure could be as high as \$186,225 ((14,325 * 13%) x \$100). This, of course, does not contemplate any defenses regarding whether the remuneration actually should have been included in the regular rate of pay, or the Court's discretion to reduce penalties, as discussed below.

Defendants argued that Plaintiff's claims for meal and rest periods more broadly failed for a number of reasons. First, Defendants argued that they had facially compliant policies. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) ("On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed."). Defendants argued that they had legally compliant written policies, which satisfied *Brinker* and that any failure to take a legally compliant meal or rest period by

employees was the result of individual choice and thus not capable of resolution through a representative action. Defendants also disputed that they controlled employees during meal or rest periods. Moreover, analysis of the time records produced by Defendants demonstrated a very high level of compliance and low meal period facial violation rate, which further limited the potential chances for success on these claims.

Defendants also would have argued that the waiting time penalties are subject to a complete defense. Defendants would have argued that a good faith dispute exists as to whether the allegedly underpaid wages were due to Plaintiff and the aggrieved employees considering Defendants' legally compliant policies. If Defendants were successful on the good faith defense, the Court may not have awarded waiting time penalties at all. *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024); *Chavez v. Converse, Inc.*, 2020 WL 1233919, at *1 (N.D. Cal. 2020) (holding that an employer's failure to pay is not willful where there is uncertainty in the law or a "good faith mistaken belief that wages are not owed"). The California Supreme Court also recently approved a good faith defense to the imposition of Section 226 penalties, which further undermines the certainty of recovering these damages even if Plaintiff prevailed on liability. *Id.*

If Plaintiff was successful in demonstrating at least one Labor Code violation per pay period, the maximum exposure could be as high as approximately \$1.4 million. *Id.* ¶ 22. However, the likelihood of this is low given the difficulties faced above and the Court's inherent discretion to reduce penalties awarded even where there is a proven violation. *Id.*

2. Recovery of Penalties After Trial

Defendants have indicated that there were approximately 14,325 pay periods at issue during the time encompassed by this settlement. Agreement ¶ 11. Therefore, pursuant to the PAGA, Plaintiff has calculated maximum exposure at \$1.4 million if the Court were to award a \$100 penalty for each pay period encompassed by a violation. Gavron Decl. ¶ 23. However, even if Plaintiff was to prevail on the merits of the PAGA claim, the potential recovery is uncertain. Pursuant to Labor Code § 2699(f)(2) the Court can decline to award the full amount of PAGA penalties where "if, based on the facts and circumstances of the particular case, to do otherwise,

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

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

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

3. Settlement is Reasonable When Compared to the Value of the Underlying Labor Code Claim

The Court’s assessment of the proposed settlement must take into account that any penalties awarded may be subject to substantial reduction. When this is considered, in conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover nothing, the proposed settlement is patently reasonable. Indeed, the Gross Settlement Amount is approximately 13% of the maximum amount of penalties at issue (\$1,400,000 ÷ \$105,000.00). Gavron Decl. ¶ 26. Settlement for this reduced value allows for the distribution of penalties in an amount which accounts for the risk of continued litigation, and Defendants’ likely arguments that higher penalties would have been confiscatory. It also sufficiently deters Defendants from engaging in similar conduct in the future, which is one of the primary goals of PAGA.

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

18 A PAGA allocation need not represent any particular percentage of the overall settlement
19 value in order to secure court approval, and courts routinely approve PAGA settlements
20 representing only a tiny fraction of the overall settlement value. Here, on the other hand, the
21 settlement proposes a payment of approximately \$34,500.00 in penalties to the LWDA and
22 approximately \$11,500.00 in penalties to the Aggrieved Employees, which is an outstanding
23 result in a PAGA only case. The proposed settlement sum in this case vastly exceeds, both in
24 terms of the total dollar amount and as a percentage of overall settlement value, the typical
25 PAGA settlement.

26 **F. The Attorneys’ Fees are Reasonable**

27 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
28 successful action brought under PAGA. Although this is not a class action, in class actions

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

9 The common fund doctrine is predicated on the principle of preventing unjust
10 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
11 he may require the passive beneficiaries to compensate those who created the fund. Both
12 California state and federal courts have embraced this doctrine. *Serrano*, 20 Cal. 3d at 35;
13 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
14 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
15 been applied "consistently in California when an action brought by one party creates a fund in
16 which other persons are entitled to share." The reasons for applying the common fund doctrine
17 include: "fairness to the successful litigant, who might otherwise receive no benefit because his
18 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
19 the others who are entitled to share in the fund and who should bear their share of the burden of
20 its recovery; encouragement of the attorney for the successful litigant who will be more willing
21 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
22 if he is assured that he will be properly and directly compensated should his efforts be
23 successful." *Id.*

24 Indeed, most recently, the California Supreme Court has also held that the award of
25 attorneys' fees in common fund wage and hour class action settlements should start with the
26 percentage method. See *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
27 overwhelming majority of federal and state courts in holding that when class action litigation
28 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 of a reasonable fee by choosing an appropriate percentage of the fund created.”).

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

Here, as set forth in their declarations and their respective lodestars, Plaintiff’s attorneys will have spent approximately 103.3 hours litigating this current action. Based thereon, and based on Plaintiff’s Counsel’s hourly rate, the lodestar equates to \$67,145.00, which is almost double the \$35,000.00 fee requested. Gavron Decl. ¶ 36, Ex. C. A. Thus, the requested fee amount of \$35,000.00 is fair and reasonable and requires a negative multiplier.

Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of \$14,301.60 is also reasonable. Gavron Decl. ¶ 39, Ex. D. The costs were all directly incurred in the prosecution of this action, including filing fees, mediation fees, service of process costs, postage, copy costs, and court reporter fees. *Id.* ¶ 39, Ex. D. As such, the requested costs should be awarded as fair and reasonable.

G. The Settlement Administration Procedure & Costs Should be Approved

The Parties have agreed to pay actual costs of administration, or \$4,000.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer this settlement. Agreement ¶¶ 1.X, 14. The Parties believe that the administration fee is reasonable and should be approved. The Settlement Administrator will distribute the monies to the appropriate stakeholders as set forth in the Agreement. Agreement ¶¶ 14-19, 23. The Settlement Administrator will distribute a letter, attached as Exhibit A to the Agreement, to Aggrieved Employees and use reasonable efforts to remail notices that are returned. *Id.* ¶ 23. Any checks distributed to Aggrieved Employees that are not cashed within 180 days shall be sent to the California State Controller’s Office Unclaimed Property Fund in the name of the Aggrieved Employee. *Id.* ¶ 25.

H. Plaintiff's Incentive Payment Should be Approved

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

Here, Plaintiff seeks the total amount of \$5,000.00 for the incentive award, which is intended to compensate Plaintiff for the time spent assisting in the litigation of this case, including conferring with her attorneys, providing documents, and reviewing filings. Declaration of Stephanie Aguirre ¶ 6. Plaintiff has spent numerous hours assisting her attorneys to litigate this case, which has been pending for nearly four years. She has conferred with them on many occasions, assisted with the review of documents and provided invaluable information that led to the proposed settlement in this case, including connecting my attorneys with other potential witnesses to assist in their investigation. *Id.* ¶ 6. This requested enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award to class representative in ERISA case). Plaintiff also took on the potential reputational impact of filing a lawsuit in the public domain, which may impact her ability to obtain future employment. On balance, a \$5,000 enhancement award is reasonable given the factors discussed above.

1 **I. Notice to the LWDA Has Been Provided**

2 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the
3 LWDA's website. Gavron Decl. ¶ 40.

4 **V. CONCLUSION**

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

6
7 DATED: August 5, 2024

DIVERSITY LAW GROUP, P.C.

8
9 By: 
10 Larry W. Lee
11 Max W. Gavron
12 Attorneys for Plaintiff and the Aggrieved
13 Employees