

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 Aggrieved Employees

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

LEIGH ANNE LOPEZ, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

TRI COUNTIES BANK, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: CV2100094

**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**

Date: October 7, 2022

Time: 10:30 a.m.

Dept.: 4

Complaint Filed: January 25, 2021

FAC Filed: March 1, 2021

SAC Filed: June 6, 2022

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

2 **PLEASE TAKE NOTICE** that on October 7, 2022, at 10:30 a.m., or as soon thereafter
3 as the matter be heard in Department 4 of the Superior Court of the State of California for the
4 County of Humboldt, located at 421 I Street, Eureka, California 95501, Plaintiff Leigh Anne
5 Lopez (“Plaintiff”) will, and hereby does, move the Court for entry of an order approving the
6 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 Tri Counties Bank (“Defendant”) (Plaintiff and Defendant shall
9 collectively be referred to as the “Parties”) under the Labor Code Private Attorneys General Act
10 of 2004 (the “PAGA”).

11 This motion is made pursuant to California Labor Code § 2699(1)(2), which requires trial
12 courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],” and
13 on the grounds that the parties’ settlement is fundamentally fair, adequate, and reasonable in light
14 of the PAGA’s policies and purposes. *See* Cal. Lab. Code § 2699(1)(2). As set forth in the
15 concurrently filed declaration of Max W. Gavron, a copy of the Parties’ proposed Settlement
16 Agreement and this Motion was electronically submitted to the Labor and Workforce
17 Development Agency (“LWDA”) in accordance with California Labor Code §§ 2699(1)(2) and
18 2699(1)(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 W. Gavron as **Exhibit A**); the
21 declarations of Max W. Gavron, Larry W. Lee, and Plaintiff Leigh Anne Lopez; all pleadings,
22 records, and files in this action; and upon such other matters as may be properly presented to, or
23 received by, the Court at or before the hearing on this motion.

24 DATED: September 6, 2022

DIVERSITY LAW GROUP, P.C.

25
26 By: 
27 Larry W. Lee
28 Max W. Gavron
Attorneys for Plaintiff and the Aggrieved
Employees

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	6
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 Aggrieved Employees Required by PAGA.....	14
4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys' Fees.....	14
5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Litigation Costs	15
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> , 163 Cal.App.4th 1157, 1209 (2008)	13
<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 985 (2009)	10, 11
<i>Atempa v. Pedrazzani</i> 27 Cal.App.5th 809 (2018).....	13
<i>Carrington v. Starbucks Corporation</i> (Cal. Ct. App. Nov. 27, 2018) No. D072392.....	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).....	11, 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

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>Haralson v. U.S. Aviation Servs. Corp.</i> , 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019).....	9
<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)	10, 12
<i>O’Connor v. Uber Techs.</i> , No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).....	9
<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)	10
<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>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

Statutes

Business and Professions Code § 17200, <i>et seq.</i>	7
Civil Code § 1542	9, 16
Labor Code § 1194.....	7, 8, 12
Labor Code § 1197.....	7, 8, 12
Labor Code § 1197.1.....	7, 8, 12
Labor Code §§ 201-203	12
Labor Code § 201.....	7, 8
Labor Code § 202.....	7, 8

1	Labor Code § 203.....	7, 8
2	Labor Code § 204.....	8, 12
3	Labor Code § 226.....	8, 12
4	Labor Code § 226(a)	7
5	Labor Code § 226.7.....	7, 8, 12
6	Labor Code § 246.....	8, 12
7	Labor Code § 510.....	7, 8, 12
8	Labor Code § 512.....	7
9	Labor Code § 558.....	8, 12
10	Labor Code § 2698, <i>et seq.</i>	passim
11	Labor Code § 2699(l)(2)	6, 9, 10, 17
12	Labor Code § 2699(e)(2)	10
13	Labor Code § 2699(l)(4)	10
14	Labor Code § 2699(f).....	12
15	Labor Code § 2699(g).....	14, 15
16	Labor Code § 2699(i).....	14

Other Authorities

2003 Cal. Stat. ch. 906 § 1	11
2003 Cal. Stat. ch. 906 § 1(d)	10
Eisenberg & Miller, Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010)	15
Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award, 7 J. Empirical Leg. Stud. 811, 833 (2010).....	15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this motion, Plaintiff Leigh Anne Lopez (“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 formal and informal discovery, including the production and review of
7 documents. Thereafter, the Parties engaged in mediation. As part of their privileged settlement
8 negotiations, Defendant produced data regarding the aggrieved employees and a sampling of
9 time and pay records, from which Plaintiff’s counsel calculated Defendant’s maximum PAGA
10 penalty exposure and evaluated liability. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 7.
11 Based on this information and arbitration agreements signed by aggrieved employees potentially
12 impacting the viability of this lawsuit, the Parties have settled this case on a representative
13 PAGA basis for \$400,000.00, or approximately 24% of the originally calculated maximum
14 exposure. *Id.*

15 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
16 attorneys’ fees, or \$133,333.33, up to \$20,000.00 in litigation costs incurred by Plaintiff’s
17 counsel, \$10,000.00 to Plaintiff for a service award, and up to \$8,750.00 for settlement
18 administration costs. Settlement Agreement §§ III.2(a)-(d).¹ The remainder, or the “PAGA
19 Penalty Fund,” is allocated to the payment of civil penalties under PAGA, with 75% of the civil
20 penalties for distribution to the Labor and Workforce Development Agency and 25% of the civil
21 penalties for distribution to the aggrieved employees, or “PAGA Members,” on whose behalf
22 Plaintiff filed this action as required by PAGA. *Id.* § 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
25 Settlement Agreement on the grounds it is fundamentally fair, adequate, and reasonable in light
26

27
28 ¹ Section II.12 of the Settlement Agreement provides that the Settlement Administrator’s costs
are not to exceed \$9,000.00, so the estimate of \$8,750.00 falls below this threshold.

of PAGA’s policies and purposes, and the facts and circumstances discussed in detail below.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2021, Plaintiff sent notice to the Labor and Workforce Development Agency (“LWDA”) giving notice of her intent to pursue a representative PAGA action on behalf of herself and the State of California as well as on behalf of other aggrieved employees (the “PAGA Notice”). Gavron Decl. ¶ 3.

On January 25, 2021, Plaintiff filed the action against Defendant asserting class action claims under Labor Code §§ 201, 202, 203, 204, 226, 226.7, 246, 510, 558, 1194, 1197, and 1197.1, as well as a representative action claim under PAGA, and a claim under Business and Professions Code § 17200, *et seq.* Gavron Decl. ¶ 4.

On March 1, 2021, Plaintiff filed a First Amended Complaint, alleging a single claim for violation of the PAGA, after considering an arbitration agreement that included a purported class waiver. Gavron Decl. ¶ 5.

The Parties exchanged written discovery, including responding to interrogatories and producing documents. Thereafter, the Parties agreed to participate in a private mediation with respected mediator, Michael J. Loeb, Esq. Gavron Decl. ¶ 6. In advance of the mediation, Defendant produced a sampling of time and pay records that permitted Plaintiff to evaluate the claims, including Defendant’s potential liability and damages. *Id.*

The Parties attended mediation on April 21, 2022. During the mediation, the Parties spoke at length about the strengths and weaknesses of each side’s claims and defenses, and the scope of Defendant’s potential liability. Although the Parties did not reach an agreement at the mediation, the Parties continued to negotiate with the assistance of Mr. Loeb and ultimately were able to reach a settlement in principle. Gavron Decl. ¶ 10. The Parties executed a memorandum of understanding and thereafter worked to memorialize and finalize the terms of the settlement in a long-form settlement agreement. *Id.*

As a condition of the settlement, the Parties agreed to the filing of a Second Amended Complaint to add claims regarding Defendant’s failure to correctly calculate the regular rate of pay for the purposes of paying meal and rest period premiums. *Id.* ¶ 12. Consequently, on May

31, 2022, Plaintiff filed a supplemental written notice with the LWDA regarding these claims (“Supplemental PAGA Notice”); and on June 6, 2022, Plaintiff filed the Second Amended Complaint. *Id.* ¶ 13. The Second Amended Complaint is the operative Complaint (“Complaint”).

The Parties have agreed that Defendant will fund the Gross Settlement Amount of \$400,000.00 within thirty calendar days of the Effective Date. Settlement Agreement § V.2. The Settlement Agreement allocates one-third of the Gross Settlement Amount for attorneys’ fees (or \$133,333.33), up to \$20,000.00 in litigation costs incurred by Plaintiff’s counsel, \$10,000.00 to Plaintiff for a service and general release payment, and \$8,750.00 for settlement administration costs. *Id.* §§ III.2(a)-(d). The remainder, or the “PAGA Penalty Fund,” is allocated to the payment of civil penalties under PAGA, 75% of the civil penalties for distribution to the LWDA and 25% of the civil penalties for distribution to the PAGA Members on whose behalf Plaintiff filed this action, as required by PAGA. *Id.* § III.2(e).

The Settlement Agreement provides the following release:

Upon the approval by the Court of this Agreement and funding of the GSA by Defendant, each of the PAGA Members, including Plaintiff, shall, for the Covered Period, fully release and forever discharge the Released Parties, subject to the terms and conditions hereof and the approval of the Court, from the Covered Claims.

Id. § IV.1. The Settlement Agreement defines “Covered Claims” or “Released Claims” as:

[A]ll claims for civil penalties under the PAGA that were asserted or could have been asserted based on the facts alleged in Plaintiff’s LWDA Notices and the Action for the entire PAGA Period, including but not limited to claims for failing to properly calculate the regular rate of pay for purposes of paying overtime, sick pay and meal and rest period premium payments, failing to pay all minimum and overtime wages for hours worked, failure to pay all wages owed upon separation of employment, and failing to provide accurate itemized wage statements which are premised on the alleged violation of Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 558, 1194, 1197, 1197.1, and 2698 and the applicable IWC Wage Orders.

Id. § II.9. The “Covered Period” or “PAGA Period” means January 15, 2020, through March 31, 2022. *Id.* § II.4. “PAGA Members” are limited to “(1) all non-exempt branch employees

1 who utilized an alarm code to open a branch during the PAGA period (“Branch Employee(s)”);
2 and (2) all non-exempt employees who received non-discretionary income in addition to their
3 base hourly wage during the PAGA period (“Regular Rate Employee(s)”).” *Id.* § II.5.

4 Plaintiff also executed a general release as part of the Settlement Agreement, including a
5 waiver of Civil Code § 1542. *Id.* § IV.2.

6 Each PAGA Member will receive an individual payment proportionate to the number of
7 Eligible Pay Periods worked during the Covered Period. *See id.* § III.3. Each individual
8 settlement payment will be treated as IRS Form 1099 income. *See id.*

9 **III. STANDARD OF REVIEW**

10 Although PAGA requires courts to “review and approve” the settlement of any civil
11 action filed under PAGA, neither the Legislature, California Supreme Court, California Courts of
12 Appeal, nor the LWDA has identified the standard PAGA settlements must satisfy. Cal. Lab.
13 Code § 2699 (1)(2); *see also Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971
14 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA
15 settlement); *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D.
16 Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA settlements.”).
17 The LWDA itself has acknowledged the lack of a “specific benchmark” and stated only that the
18 relief provided under PAGA must be “genuine and meaningful,” “consistent with the underlying
19 purpose of the statute to benefit the public” and, in the context of a class action, “meet[] the
20 standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to the public
21 policies underlying the PAGA.” California Labor and Workforce Development Agency’s
22 Comments on Proposed PAGA Settlement at 2-3; *see also O’Connor v. Uber Techs.*, No. 3:13-
23 CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

24 Left to develop their own standards, federal district courts have typically followed the
25 LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and
26 reasonable in light of PAGA’s policies and purposes.” *Haralson*, 383 F. Supp. 3d at 972
27 (collecting cases). When applying this test, federal district courts often consider factors such as
28 strength of a Plaintiffs’ case; the risk, expense, complexity, and likely duration of further

1 litigation; the amount offered in settlement; the extent of discovery completed; and the expertise
2 and views of counsel. *Smith*, 2018 WL 1899912 at *3. Federal district courts have also been
3 mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that
4 are less than the maximum amounts authorized by PAGA. *See e.g., id.* at *3; *see also* Cal. Lab.
5 Code § 2699 (e)(2).

6 **IV. ARGUMENT**

7 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 8 **to Labor Code Section 2699(l)(2)**

9 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
10 “primacy” over private enforcement actions. 2003 Cal. Stat. ch. 906 § 1(d). To that end, PAGA
11 requires parties who seek approval of a proposed PAGA settlement to submit the proposed
12 settlement to the LWDA online “at the same time that it is submitted to the court,” to give
13 LWDA an opportunity to comment on the proposed settlement. Cal. Lab. Code §§ 2699 (l)(2),
14 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement
15 Agreement and this Motion to the LWDA through the LWDA’s online filing system in
16 conjunction with the filing of this Motion. *See* Gavron Decl. ¶ 29, Ex. B.

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

18 **1. The Settlement Agreement is Entitled to a Presumption of Fairness**

19 In class actions, judicial review of a settlement’s fairness is designed to protect class
20 members who had no say in the negotiation of the settlement by ensuring that the settlement is
21 not the product of “fraud,” “overreaching,” or “collusion” by the negotiating parties and that
22 “due regard” was given to the rights and interests of absent class members subject to the
23 settlement. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Although PAGA
24 actions and class action have certain “fundamental” differences, PAGA settlements are also
25 subject to Court approval. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 435
26 (9th Cir. 2015); *see also Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing the
27 scope of a judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110,
28 1134 (N.D. Cal. 2016).

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

7 All of the factors that would give rise to a presumption of fairness in the context of a
8 class action settlement are present in this PAGA action. After this lawsuit was commenced, the
9 Parties agreed to engage in arm’s length negotiations between highly experienced counsel. As
10 part of their privileged settlement negotiations, Defendant produced data regarding the aggrieved
11 employees, from which Plaintiff’s counsel calculated the maximum PAGA penalties and
12 analyzed Defendant’s potential liability. Gavron Decl. ¶ 7. Both Plaintiff’s and Defendant’s
13 counsel has significant experience in litigating wage and hour class and PAGA actions, which
14 further supports the reasonableness of the settlement. Gavron Decl. ¶¶ 21-27; Declaration of
15 Larry W. Lee (“Lee Decl.”) ¶¶ 7-8. Therefore, the Settlement Agreement is entitled to a
16 presumption of fairness.

17 **2. The Scope of the Settlement Agreement is Fair, Adequate, and** 18 **Reasonable**

19 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
20 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to
21 sometimes be “the only meaningful deterrent to unlawful conduct,” the Legislature enacted
22 PAGA in 2003 to deter violations of the Labor Code by augmenting the limited enforcement
23 capability of the LWDA with private enforcement actions by “aggrieved employees” acting as
24 private attorneys general. 2003 Cal. Stat. ch. 906 § 1; *see also Iskanian v. CLS Transportation*
25 *Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014). Thus, a PAGA is in the nature of in the nature of
26 an enforcement action, where the named plaintiff acts as a proxy of the LWDA to collect
27 penalties otherwise recoverable only by the LWDA. *Arias*, 46 Cal. 4th at 986; *see also Iskanian*,
28 59 Cal. 4th at 381-82. In that role, the named plaintiff “take[s] on a special responsibility to their

1 fellow aggrieved workers who are effectively bound by any judgment.” *O’Connor*, 201 F. Supp.
2 3d at 1134.

3 Plaintiff’s claims in this action are based on alleged violations of Labor Code sections
4 201-203, 204, 226, 226.7, 246, 510, 558, 1194, 1197, 1197.1, and 2698, *et seq.* See generally
5 SAC. When reviewing a settlement agreement, “the test is not the maximum amount plaintiffs
6 might have obtained at trial on the complaint,” nor is it “whether the settlement agreement is
7 perfect in the estimation the reviewing court.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App.
8 4th 224, 250 (2001); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The
9 test is “whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91 Cal.
10 App. 4th at 250. Relevant considerations include the strength of a plaintiff’s case and the risk,
11 expense, complexity, and likely duration of further litigation. *Kullar v. Foot Locker Retail, Inc.*,
12 168 Cal. App. 4th 116, 130 (2008); *see also Smith*, 2018 WL 1899912 at *2. In PAGA
13 settlements, courts also consider their authority to award less than the maximum penalty
14 authorized by PAGA. Cal. Lab. Code § 2699(e)(2); *see also Smith*, 2018 WL 1899912 at *3.

15 Here, Defendant produced a sampling of time and pay records for the aggrieved
16 employees, which permitted Plaintiff to analyze Defendant’s potential exposure and liability.
17 Gavron Decl. ¶ 7. As detailed in the Settlement Agreement, there were approximately 16,728 pay
18 periods at issue during the time encompassed by this settlement. Settlement Agreement § II.13.
19 PAGA’s penalty structure is based on the number of violations of the Labor Code committed
20 during a given pay period. *See* Cal. Lab. Code § 2699(f). Defendant’s potential exposure could
21 be as high as \$1,672,800.00 if the Court were to award a \$100 penalty for each pay period
22 encompassed by the proposed settlement and did not “stack” violations. Gavron Decl. ¶ 7.

23 Defendant argued that its exposure was significantly less because it maintained legally
24 compliant policies, complied with the law at all times, the sampling of time and pay records
25 produced for evaluation demonstrated an extremely low facial violation rate regarding Plaintiff’s
26 claims, and that it maintained arbitration agreements applicable to its employees, which it
27 contended precluded Plaintiff’s PAGA claims. *Id.*

1 On June 15, 2022, the United States Supreme Court issued its decision in *Viking River*
2 *Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL 2135491, at *10 (U.S. June 15, 2022), which
3 Defendant would have argued totally precludes Plaintiff's PAGA claim to be litigated in court.
4 *Id.* (holding that the Federal Arbitration Act ("FAA") preempted portion of California Supreme
5 Court's holding in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and that
6 PAGA claims may be arbitrable under the FAA).

7 While the PAGA does provide for a potentially heightened penalty of \$200 for
8 "subsequent" violations, many courts do not award that penalty unless there has been a prior
9 citation by the LWDA or court ruling demonstrating that the employer previously violated the
10 Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008); *accord*
11 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.*, 2009 WL 2448430,
12 at *9 (S.D. Cal. Aug. 10, 2009) ("[u]nder California law, courts have held that employers are
13 not subject to heightened penalties for subsequent violations unless and until a court or
14 commissioner notifies the employer that it is in violation of the Labor Code"); *see also*
15 *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
16 penalty unless prior citation or court ruling). Thus, Defendant argued that even if Plaintiff was
17 able to establish any violation of the Labor Code, the PAGA penalties assessed for these
18 violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at
19 maximum, and there is a likelihood that a further reduction of the penalty would be appropriate
20 given Defendant's good faith efforts to comply with the Labor Code and its contentions that it
21 complied with the Labor Code at all times. Gavron Dec. ¶ 8.

22 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
23 PAGA are minimal. Indeed, courts to consider the issue have refused to "stack" PAGA
24 penalties and often significantly reduce the penalties awarded. *See Carrington v. Starbucks*
25 *Corporation*, No. D072392 (Cal. Ct. App. Nov. 27, 2018) (published Dec. 19, 2018)
26 (approving PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27
27 Cal. App. 5th 809 (2018). If the Court in this case were to reduce penalties to \$5 a pay period,
28

as was approved in *Carrington*, the potential exposure amounts to approximately \$83,640 (16,728 pay periods x \$5.00).

Under the circumstances of this case, the payment of \$400,000.00 in civil penalties is fair, adequate, and reasonable. The payment of \$400,000.00 in exchange for a release of only those claims for civil penalties that are pleaded in the action or that could have been pleaded based on the facts alleged in the PAGA Notice, Supplemental PAGA Notice, or the Complaint will have a substantial deterrent effect on Defendant and other California employers and will confer benefits on the LWDA and PAGA Members, each of whom will receive a portion of the settlement. The proposed Settlement amounts to approximately 24% of the estimated exposure, which is a good result.

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

3. The Settlement Agreement Apportions Civil Penalties Between the LWDA and Aggrieved Employees Required by PAGA

Except when civil penalties are recovered from a defendant who did not have any employees at the time of an alleged violation, civil penalties recovered under PAGA must be distributed so that 75% of the civil penalties are paid to the LWDA and 25% are paid to the aggrieved employees on whose behalf the PAGA action was brought. *See* Cal. Lab. Code § 2699(i). In full compliance with that rule, the Settlement Agreement requires that 75% of the PAGA Penalty Fund be paid to the LWDA and 25% of the PAGA Penalty Fund be paid to the PAGA Members. Settlement Agreement § III.3. The PAGA Members will receive penalties based on the number of Eligible Pay Periods they worked during the applicable period using a pro rata distribution formula. *Id.*

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

PAGA allows a prevailing plaintiff to recover reasonable attorneys' fees. *See* Cal. Lab. Code § 2699(g). In recognition of this, the Settlement Agreement allows Plaintiff's counsel to request up to \$133,333.33, in attorneys' fees. *See* Settlement Agreement §§ III.2(a), III.4.

1 In class actions, state and federal courts have held that when a class action establishes a
2 monetary fund for the benefit of the class members out of which attorneys' fees may be paid,
3 courts may determine the amount of a reasonable fee by "choosing an appropriate percentage of
4 the fund created." *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee
5 award representing 33 1/3 percent of the fund and joining "the overwhelming majority of federal
6 and state courts" in approving the "percentage method" as a reasonable means for determining
7 attorney fee awards in class actions). While different from class action settlements in important
8 ways, PAGA settlements also involve the establishment of a common fund for the benefit of
9 persons other than the named plaintiff, so the reasons for utilizing the percentage method are the
10 same. *See id.* (noting that the percentage method provides "ease of calculation," "alignment of
11 incentives between counsel and the class," "a better approximation of market conditions in a
12 contingency case," and the "encouragement...to seek an early settlement"). The \$133,333.33
13 requested by Plaintiff's counsel represents one-third of the Gross Settlement Amount, which is
14 consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162 Cal.
15 App. 4th 43, 66, fn. 11 (2008) ("[F]ee awards in class actions average around one-third of the
16 recovery"); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to
17 one-third of the total settlement amount); *see Fitzpatrick, An Empirical Study of Class Action*
18 *Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444
19 cases between 2006-2007 and concluding that "[m]ost fee awards were between 25 percent and
20 35 percent"); *Eisenberg & Miller, Attorney Fees in Class Action Settlements: An Empirical*
21 *Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of
22 class action litigation nationwide conclude that fees representing one-third of the total recovery
23 is consistent with market rates).

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

26 PAGA also allows a prevailing plaintiff to recover litigation costs. *See Cal. Lab. Code* §
27 2699(g). Accordingly, the Settlement Agreement allows Plaintiff's counsel to request up to
28 \$20,000.00 in litigation costs. Settlement Agreement §§ III.2(b), III.4.

1 Plaintiff's counsel requests \$10,692.92 for the reimbursement of litigation costs. As set
2 forth in accompanying declaration of Plaintiff's counsel, these costs were all directly incurred in
3 the prosecution of this action, including, but not limited to, filing fees, service fees, and
4 mediation fees. Lee Decl. ¶ 9, Ex. A. As such, Plaintiff's counsel's request for costs in the
5 amount of \$10,692.92 is fair, adequate, reasonable, and consistent with PAGA's policies.
6 Because this amount is less than what was provided in the Settlement Agreement, the difference
7 will be distributed to the LWDA and PAGA Members.

8 **6. Plaintiff's Service Award Should be Approved**

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

15 Here, Plaintiff respectfully requests \$10,000.00 for her service award, which is intended
16 to compensate Plaintiff for the time spent on this case and for executing a general release,
17 including of Civil Code § 1542, which was not required by aggrieved employees. Declaration of
18 Leigh Anne Lopez ¶¶ 7-9. This requested enhancement is consistent with awards approved in
19 other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300
20 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer*
21 *Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three
22 incentive awards of \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a
23 matter of public record. Future employers may be less likely to hire an employee who has
24 previously filed an action against an employer. This, in conjunction with Plaintiff's agreement to
25 provide a general release, supports the requested award.

26 //

27 //

28 //

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

4 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
5 Counsel, and the LWDA, but also Defendant's current and former employees, significant time
6 and effort will be required to administer the Settlement Agreement if it is approved by this Court.
7 Among other things, this work by the Settlement Administrator includes calculating each PAGA
8 Member's shares; issuing appropriate tax forms to all parties who receive payments under the
9 Settlement Agreement; mailing payments to Plaintiff, Plaintiff's Counsel, the LWDA, and each
10 PAGA Member; and voiding any checks not cashed by PAGA Members so that the unclaimed
11 amount can be forwarded to Legal Aid at Work, the designated *cy pres* recipient. *See* Settlement
12 Agreement § V.6. Plaintiff and PAGA Counsel do not have any relationship with or connection
13 to said organization. Lee Decl. ¶ 6; Gavron Decl. ¶ 20.

14 In contemplation of these expenses, the Parties will engage Phoenix Settlement
15 Administrators to act as a third-party settlement administrator and have allocated up to \$8,750.00
16 to cover the cost of administration. Settlement Agreement §§ II.8, III.2(d), V.3(d).

17 **V. CONCLUSION**

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

20
21 DATED: September 6, 2022

DIVERSITY LAW GROUP, P.C.

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

1 **PROOF OF SERVICE**

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

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

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 September 7, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE THE**
12 **PARTIES' SETTLEMENT AGREEMENT PURSUANT TO THE LABOR CODE**
13 **PRIVATE ATTORNEYS GENERAL ACT OF 2004; AND MEMORANDUM OF**
14 **POINTS AND AUTHORITIES IN SUPPORT**
15 **2. DECLARATION OF MAX W. GAVRON IN SUPPORT OF PLAINTIFF'S**
16 **MOTION TO APPROVE THE PARTIES' SETTLEMENT AGREEMENT**
17 **PURSUANT TO THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT**
18 **OF 2004**
19 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
20 **TO APPROVE THE PARTIES' SETTLEMENT AGREEMENT PURSUANT TO**
21 **THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004**
22 **4. DECLARATION OF PLAINTIFF LEIGH ANNE LOPEZ IN SUPPORT OF**
23 **PLAINTIFF'S MOTION TO APPROVE THE PARTIES' SETTLEMENT**
24 **AGREEMENT PURSUANT TO THE LABOR CODE PRIVATE ATTORNEYS**
25 **GENERAL ACT OF 2004**
26 **5. [PROPOSED] ORDER GRANTING MOTION TO APPROVE SETTLEMENT**
27 **AGREEMENT PURSUANT TO THE PAGA; AND JUDGMENT**

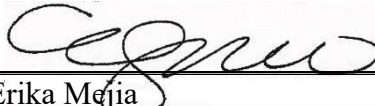
28 on the interested parties in this action as follows:

Carrie Bushman
cbushman@cookbrown.com
Alexis Gabrielson
agabrielson@cookbrown.com
Linda Johnston
ljohnston@cookbrown.com
COOK BROWN LLP
2407 J Street, Second Floor
Sacramento, CA 95816
Attorneys for Defendant Tri Counties Bank

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

7 I declare under penalty of perjury under the laws of the State of California that the above is
8 true and correct. Executed on September 7, 2022, at Los Angeles, California.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Erika Mejia