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

MARY JANE HINKLE, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

ALAMEDA HEALTHCARE &
WELLNESS CENTER, LLC, a California
limited liability company; and DOES 1
through 50, inclusive,

Defendants.

Case No.: RG21090402

(Assigned to the Honorable Noël Wise, Dept. 21)

**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 10, 2024
Time: 1:30 P.M.
Dept.: 21

Reservation ID: 679065050734

Action Filed: March 2, 2021
Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 10, 2024, at 1:30 P.M., or as soon
thereafter as the matter may be heard before the Honorable Noël Wise, in Department 21, of the
Superior Court of the State of California for the County of Alameda, located at 1221 Oak Street,
Oakland, California 94612, Plaintiff Mary Jane Hinkle ("Plaintiff") will and hereby does move

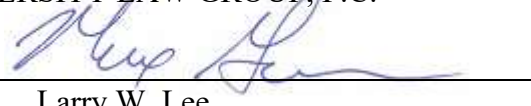
1 the Court for entry of an order approving the proposed Joint Stipulation of Settlement
2 (“Settlement Agreement,” “Agreement,” or “Settlement”) entered into in the above-captioned
3 civil action between Plaintiff and Defendant Alameda Healthcare & Wellness Center, LLC
4 (“Defendant”) (Plaintiff and Defendant shall collectively be referred to as the “Parties”) under
5 the Labor Code Private Attorneys General Act of 2004 (the “PAGA”).

6 This motion is made pursuant to California Labor Code § 2699(1)(2), which requires trial
7 courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],” *see*
8 Cal. Lab. Code § 2699(1)(2), and on the grounds that the parties’ settlement is fundamentally fair,
9 adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
10 concurrently filed declaration of Max W. Gavron, a copy of the Parties’ proposed Agreement and
11 this motion was electronically submitted to the Labor and Workforce Development Agency in
12 accordance with California Labor Code §§ 2699(1)(2) and 2699(1)(4) concurrent with the filing
13 of this motion.

14 This motion is based on this notice of motion and motion for approval of the Parties’
15 Agreement concurrently filed herewith; the attached memorandum of points and authorities in
16 support of this motion; the concurrently filed declarations of Larry W. Lee, Max W. Gavron (and
17 any exhibits attached thereto), and Plaintiff Mary Jane Hinkle in support of this motion; all
18 pleadings, records, and files in this action; and upon such other matters as may be properly
19 presented to, or received by, the Court at or before the hearing on this motion.

20
21 DATED: August 16, 2024

DIVERSITY LAW GROUP, P.C.

22 By: 

Larry W. Lee

Max W. Gavron

23
24 Attorneys for Plaintiff and the Aggrieved
25 Employees
26
27
28

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3 2003 Cal. Stat. ch. 906 § 1 15

4 *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* 108 F.R.D. 237 (1985). 21

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Mary Jane Hinkle (“Plaintiff”) respectfully requests the
4 Court’s approval of the Joint Stipulation of Settlement (“Settlement Agreement,” “Agreement,”
5 or “Settlement”) with Defendant Alameda Healthcare & Wellness Center, LLC (“Defendant”)
6 (together with Plaintiff, the “Parties”). After this lawsuit commenced, the Parties engaged in
7 written discovery, meet and confer efforts, and mediation on two separate occasions. As part of
8 their privileged settlement negotiations, Defendant produced data regarding the PAGA Members,
9 from which Plaintiff’s Counsel calculated the maximum PAGA penalty exposure. Declaration of
10 Max W. Gavron (“Gavron Decl.”) ¶¶ 13, 14. Based on this information and evidence, the Parties
11 have settled this case on a representative PAGA basis for \$237,500.00, or approximately 19% of
12 the originally calculated maximum exposure. *Id.*

13 The Settlement Agreement allocates approximately one-third of the Gross Fund Value for
14 attorneys’ fees, or \$79,166.67, up to \$23,500.00 in litigation costs incurred by Plaintiff’s
15 Counsel,¹ \$5,000.00 to Plaintiff for an enhancement payment, and up to \$5,500.00 for settlement
16 administration costs. Agreement ¶¶ 7(k), 11-13. The remainder, or the “PAGA Fund,” is
17 allocated to the payment of civil penalties under the Private Attorneys General Act (“PAGA”),
18 75%² of which is for distribution to the California Labor and Workforce Development Agency
19 and 25% of which is for distribution to the “PAGA Group Members” (or the “PAGA Group”),
20 the aggrieved employees on whose behalf Plaintiff filed this action, as required by PAGA. *Id.* ¶
21 15. Based on these amounts, Plaintiff estimates that the Labor and Workforce Development
22 Agency (“LWDA”) will receive approximately \$93,250.00, and the aggrieved employees will
23

24 ¹ Plaintiff’s Counsel actually incurred \$21,060.84 in costs. Gavron Decl. ¶ 37; Ex. C (Cost
25 Report). Accordingly, the difference between what the agreement allocates and the costs actually
26 incurred will be distributed to the LWDA and PAGA Group Members.

27 ² California recently passed an amended version of the PAGA statute, which allocates less to the
28 state and more to the aggrieved employees. However, by its terms, this new version of the
statute only applies to cases where the PAGA Notice was served on or after June 19, 2024.
Accordingly, Plaintiff analyzes this settlement pursuant to the terms of the prior version of the
statute.

1 receive approximately \$31,083.33.³ Gavron Decl. ¶ 19.

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

6 **II. FACTUAL AND PROCEDURAL BACKGROUND**

7 On February 3, 2021, Plaintiff sent notice to the Labor and Workforce Development
8 Agency giving notice of her intent to pursue a representative PAGA action, on behalf of herself
9 and the State of California, as well as on behalf of other PAGA Members (the “PAGA Letter”).
10 Gavron Decl. ¶ 2. Plaintiff’s PAGA Letter alleged claims for violation of Labor Code §§ 201-
11 203, 226(a), 226.7, 510, 512, 558, and 1194. *Id.* ¶ 2.

12 On March 2, 2021, Plaintiff filed a class and representative action complaint against
13 Defendant asserting claims for violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 558,
14 1194, and 2698, *et seq.*, and Business and Professions Code § 17200, *et seq.* (the “Action”). *Id.* ¶
15 3. Plaintiff subsequently amended the complaint on June 9, 2021, dismissing all causes of action,
16 without prejudice, except for violation of Labor Code § 2698, *et seq.* because of an arbitration
17 agreement that included a class action waiver. *Id.* ¶ 3.

18 After the filing of the initial complaint, the Parties engaged in formal and informal
19 discovery and engaged in several meet and confer efforts. Gavron Decl. ¶ 4. Plaintiff propounded
20 discovery requests upon Defendant, including requests for production of documents and
21 interrogatories. *Id.* ¶ 4. Thereafter, the Parties agreed to engage in mediation before neutral
22 Michael J. Loeb, Esq. In connection with the mediation, Defendant provided Plaintiff and her
23 counsel with information and data to analyze Defendant’s potential liability, including the
24 number of aggrieved employees, number of pay periods at issue, relevant policies, and a
25 sampling of time and pay records. Based on this information, the Parties conducted settlement
26

27 ³ The amount allocated to the LWDA will actually be \$95,079.37 and the amount allocated to the
28 PAGA Group Members will be \$31,693.12 because the costs requested (\$21,060.84) are less
than those allocated in the Agreement (\$23,500.00).

1 negotiations. Gavron Decl. ¶ 5.

2 The Parties engaged in mediation on May 16, 2022. Gavron Decl. ¶ 6. Despite vigorous
3 arm's length negotiations, the Parties were unable to reach an agreement and resumed litigation
4 of the Action. *Id.* ¶ 6.

5 On September 26, 2022, Plaintiff filed a demand for arbitration before the American
6 Arbitration Association, alleging individual claims against Defendant for violation of Labor
7 Code §§ 201-203, 226, 226.7, 510, 512, 558, and 1194. *Id.* ¶ 7. The Parties then conducted
8 discovery in the arbitration. *Id.*

9 In or about October 2023, the Parties agreed to reattempt mediation of Plaintiff's claims.
10 Gavron Decl. ¶ 8. In connection with the second mediation, Defendant provided updated
11 information to Plaintiff and her counsel regarding the number of aggrieved employees, the
12 number of pay periods at issue, and other data to analyze Defendant's potential liability. *Id.* ¶ 8.

13 The Parties engaged in a second mediation on January 11, 2024, before neutral Michael J.
14 Loeb, Esq. *Id.* ¶ 9. After continued arm's length negotiations facilitated by Mr. Loeb following
15 the mediation, with each Party having had the opportunity to consider all known facts and
16 circumstances, the Parties agreed to terms for complete settlement of the Action. *Id.* ¶ 9. The
17 Parties entered into the Joint Stipulation of Settlement, a true and correct copy of which is
18 attached to the Declaration of Max W. Gavron as Exhibit A.

19 As a condition of the settlement, the Parties agreed to the filing of a second amended
20 complaint, which includes a single cause of action under the PAGA premised on allegations that
21 Defendant violated Labor Code §§ 204, 210, 218.5, 226(a), 551, 552, 1197, 1197.1, 1198, 2800,
22 and 2802 to the Action. *Id.* ¶ 10. On July 8, 2024, Plaintiff filed a supplemental notice with the
23 LWDA, alleging claims for violation of Labor Code §§ 204, 210, 218.5, 226(a), 551, 552, 1197,
24 1197.1, 1198, 2800, and 2802 ("Amended LWDA Letter"). *Id.* ¶ 10.

25 On July 11, 2024, the Court signed a stipulation and order allowing Plaintiff to file a
26 Second Amended Complaint (the "Operative Complaint"). *Id.* ¶ 12. Plaintiff filed the Second
27 Amended Complaint on July 12, 2024. *Id.* ¶ 12.

28 The Second Amended Complaint alleges a single cause of action for violation of Labor

Code § 2698, *et seq.*, predicated on underlying violations of Labor Code §§ 201-204, 210, 218.5, 226, 226(a), 226.7, 510, 512, 551, 552, 558, 1174, 1194, 1197, 1197.1, 1198, 2800, and 2802. **Error! Bookmark not defined..** *Id.* ¶ 12.

The Parties have agreed that Defendant will fund the Gross Fund Value of \$237,500.00. Agreement ¶ 7(k). The Settlement Agreement allocates approximately one-third of the Gross Fund Value for attorneys' fees, or \$79,166.67, up to \$23,500.00 in litigation costs incurred by Plaintiff's Counsel, \$5,000.00 to Plaintiff for an enhancement payment, and up to \$5,500.00 for settlement administration costs. *Id.* ¶¶ 11-13. The remainder (or PAGA Fund) is allocated to the payment of civil penalties under PAGA, 75% of which is for distribution to the LWDA ("LWDA Payment") and 25% of which is for distribution to the PAGA Group Members on whose behalf Plaintiff filed this action ("PAGA Settlement Fund"), as required by PAGA. *Id.* ¶ 15.

The Settlement Agreement provides the following release:

Upon the date Defendant fully funds the entire Gross Fund Value, Plaintiff, all PAGA Group Members and the State of California will be deemed to have fully, finally and forever released, settled, compromised, relinquished, and discharged the Released Parties of all Released PAGA Claims during the PAGA Period, except as to the right to enforce the terms and conditions of this settlement.

Agreement ¶ 24. The Released PAGA Claims are as follows:

all claims under the California Private Attorneys General Act of 2004 ("PAGA") alleged in the LWDA Letter, Amended LWDA Letter and the Operative Complaint or claims that could have been reasonably alleged based on the facts pertaining to Plaintiff and the PAGA Group Members, arising during the PAGA Period. This includes, but is not limited to PAGA claims for (1) failure to provide legally compliant meal periods or pay legally mandated premiums in lieu thereof; (2) failure to provide legally compliant rest periods or pay legally mandated premiums in lieu thereof; (3) failure to pay overtime wages and double time wages; (4) failure to furnish accurate itemized wage statements by failing to set forth all hours worked and corresponding rates of pay; (5) failure to pay all wages owed at time of termination of employment; (6) failure to timely pay wages; (7) failure to provide one day of rest in seven; (8) failure to reimburse necessary business expenses; (9) failure to maintain timekeeping and payroll records; and (10) failure to pay minimum wages as well as all claims arising under the listed Labor Code statutes and Industrial Welfare Commission Wage Orders based on

the primary rights of those statutes, irrespective of the theory of recovery alleged. (*See* California Labor Code sections 201-204, 210, 218.5, 226, 226(a) 226.7, 510, 512, 551, 552, 558, 1174, 1194, 1197, 1197.1, 1198, 2800, 2802, and the applicable IWC Wage Order(s)), as well as all claims arising under the listed Labor Code statutes based on the primary rights of those statutes, irrespective of the theory of recovery alleged.

Id. ¶ 7(x). These claims are defined as the Released PAGA Claims. The Released Parties are “Defendant and all of its present and former parent companies, subsidiaries, affiliates and joint ventures (including but not limited to Rockport Administrative Services), and all of their officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, successors and assigns, and any other persons acting by through, under or in concert with any of them.” *Id.* ¶ 7(y).

Each PAGA Group Member will receive a payment proportionate to the number of pay periods worked during the PAGA Period (“Individual PAGA Payment”). *See* Agreement ¶ 16. Each Individual PAGA Payment will be considered the payment of penalties and treated as IRS Form 1099 income. *See id.* ¶ 10. Finally, any checks not cashed by PAGA Group Members will be voided and the unclaimed amount will be forwarded to the State of California Controller’s Unclaimed Property Division in the name of the respective PAGA Group Members. *See id.* ¶ 18.

III. STANDARD OF REVIEW

Although PAGA requires courts to “review and approve” the settlement of any civil action filed under PAGA, *see* Cal. Lab. Code § 2699(l)(2), neither the Legislature, the California Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark” and stated only that the relief provided under PAGA must be “genuine and meaningful,” “consistent with the underlying purpose of the statute to benefit the public” and, in the context of

1 a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’
2 with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce
3 Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber*
4 *Techs.*, No. 3:13-CV-03826, ECF No. 736 (N.D. Cal. July 29, 2016).

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

15 **IV. ARGUMENT**

16 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 17 **to Labor Code § 2699(l)(2)**

18 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
19 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
20 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the
21 proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to
22 give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§
23 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the
24 Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system
25 in conjunction with filing this motion. *See* Gavron Decl. ¶ 38, Ex. D.

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

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

28 In class actions, judicial review of a settlement’s fairness is designed to protect class

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

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

16 All of the factors that would give rise to a presumption of fairness in the context of a
17 class action settlement are present in this PAGA action. After this lawsuit was commenced, the
18 Parties agreed to engage in arm’s-length negotiations between highly experienced counsel. As
19 part of their privileged settlement negotiations, Defendant produced data regarding the PAGA
20 Group Members, from which Plaintiff’s Counsel calculated the maximum PAGA penalties and
21 analyzed Defendant’s potential liability. Gavron Decl. ¶ 9. Plaintiff’s Counsel have significant
22 experience in litigating wage and hour class and PAGA actions, which further supports the
23 reasonableness of the settlement. Gavron Decl. ¶¶ 27-33; Declaration of Larry W. Lee (“Lee
24 Decl.”) ¶¶ 6, 7. Therefore, the Settlement is entitled to a presumption of fairness.

25 **2. The Scope of the Settlement Agreement is Fair, Adequate, and** 26 **Reasonable**

27 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the
28 “vigorous assessment and collection of civil penalties as provided in the Labor Code” to

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

11 Plaintiff’s claims in this action are based on alleged violations of Labor Code §§ 201-
12 203, 204, 210, 218.5, 226, 226(a), 226.7, 510, 512, 551, 552, 558, 1174, 1194, 1197, 1197.1,
13 1198, 2800, and 2802, as enforced through the PAGA, Cal. Lab. Code §§ 2698, *et seq.* *See*
14 *generally*, Second Amended Complaint. When reviewing a settlement agreement, “the test is
15 not the maximum amount plaintiffs might have obtained at trial on the complaint,” *see*
16 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the
17 settlement agreement is perfect in the estimation of the reviewing court.” *See Lane v.*
18 *Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is “whether the settlement is
19 reasonable under all of the circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant
20 considerations include the strength of a plaintiff’s case and the risk, expense, complexity, and
21 likely duration of further litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116,
22 130 (2008); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL 1899912 at *2
23 (E.D. Cal. Apr. 20, 2018). In PAGA settlements, courts also consider their authority to award
24 less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2); *see also*
25 *Smith*, 2018 WL 1899912 at *3.

26 Here, Defendant produced data for the PAGA Group Members, which permitted Plaintiff
27 to analyze Defendant’s potential exposure and liability. Gavron Decl. ¶ 13. As detailed in the
28 Settlement Agreement, there are approximately 495 PAGA Group Members and approximately

12,000 pay periods at issue during the time encompassed by this settlement. Agreement ¶ 31.

The PAGA’s default penalty structure provides \$100 for the initial violation and \$200 for subsequent violations. Cal. Labor Code § 2699(f). Defendant’s potential exposure could be as high as \$1,200,000 (12,000 pay periods x \$100 per pay period) if the Court were to award a \$100 penalty for each pay period encompassed by the proposed settlement. If the Court opted to award the \$250 penalty for wage statement violations under the PAGA, then the exposure could be even higher. *Compare Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667 (2018) (holding that \$250 is the appropriate penalty under the PAGA for violations of Labor Code § 226(a)) *with Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 355 (2021) (holding \$100 is the appropriate penalty). If the Court were to “stack” multiple penalties for each distinct labor code violation proven during a pay period, the potential maximum exposure could be even higher. However, courts have generally been reluctant to stack penalties for multiple violations occurring during the same pay period, and even if it did, the Court retains discretion to reduce the penalties, as discussed below. Accordingly, a more realistic maximum exposure model is approximately \$1.2 million. Gavron Decl. ¶ 14.

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

1 given Defendant’s good faith efforts to comply with the Labor Code and their contentions that
2 they complied with the Labor Code at all times.

3 For example, Defendant argued that it maintained facially compliant meal, rest, and
4 overtime policies and procedures. Gavron Decl. ¶ 16. Defendant argued that it had legally
5 compliant written policies, which satisfied *Brinker* and that any failure to take a legally
6 compliant meal or rest period by employees was isolated and/or infrequent. *See Brinker Rest.*
7 *Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand,
8 the employer is not obligated to police meal breaks and ensure no work thereafter is
9 performed.”). Defendant also argued that Plaintiff’s overtime claim was the result of a lawful
10 and evenly applied rounding policy that did not detriment the employees when viewed in the
11 aggregate. Finally, with respect to Plaintiff’s reimbursement claim, Defendant argued that it
12 maintained legally compliant policies, and that any alleged failure to reimburse for business
13 expenses was the result of either: 1) employees not requesting reimbursement; or 2) the
14 expenses not being a necessary and reasonable business expense. *See Andersen v. United*
15 *Parcel Serv., Inc.*, 2024 WL 2104496, at *11 (C.D. Cal. Apr. 11, 2024) (granting the
16 defendant’s motion for summary judgment on the plaintiff’s Section 2802 claim because “[the
17 plaintiff] did not inform [the defendant] that he had unreimbursed [mileage] expenses.”).
18 Plaintiff’s failure to timely pay wages and failure to provide one day of rest in seven claims
19 suffered from similar difficulties. For example, Defendant argued that only a small number of
20 aggrieved employees, if any, ever worked more than seven days in a row, which would limit
21 the exposure on this theory of liability significantly. Gavron Decl. ¶ 16. Similarly, Plaintiff’s
22 failure to pay final wages and wage statement claims would be subject to a good faith defense,
23 which could potentially extinguish the possibility of these penalties altogether. *Hill v.*
24 *Walmart, Inc.*, 32 F. 4th 811 (9th Cir. 2022) (upholding good faith defense because defendant
25 reasonably believed wages were not due and owing at time of separation of employment);
26 *Naranjo v. Spectrum Sec. Servs., Inc.*, 15 Cal. 5th 1056, 1087 (2024) (upholding good faith
27 defense to imposition of Section 226 penalties).

28 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under

1 PAGA are minimal. *Id.* ¶ 17. Indeed, courts often significantly reduce the penalties awarded.
2 *See Carrington v. Starbucks Corporation*, 30 Cal. App. 5th 504, 517 (2018) (approving PAGA
3 penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27 Cal. App. 5th 809
4 (2018). If the Court in this case were to reduce penalties as was approved in *Carrington*, the
5 potential exposure would be significantly less, falling somewhere close to \$60,000.00 (12,000
6 pay periods x \$5).

7 Under the circumstances of this case, the payment of \$237,500.00 in civil penalties is
8 fair, adequate, and reasonable. The payment of \$237,500.00 in exchange for a release of only
9 those claims for civil penalties that are pleaded or that could have been pleaded based on the
10 facts alleged in the LWDA Letter, Amended LWDA Letter, and Operative Complaint will have a
11 substantial deterrent effect on Defendant and other California employers and will confer benefits
12 on the PAGA Group Members, who will each receive a portion of the settlement, and the
13 LWDA. This is approximately 19% of the calculated maximum exposure ($\$237,500.00 \div$
14 $\$1,200,000$), and a significantly higher percentage if the Court were to reduce the PAGA
15 penalties, as done in *Carrington*. Gavron Decl. ¶ 18. Based on a raw average, each aggrieved
16 employee stands to receive approximately \$64.03 ($\$31,693.12 / 495$ aggrieved employees).
17 Gavron Decl. ¶ 18.

18 Numerous courts have held that **gross** settlements approximating between only 8% and
19 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
20 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement
21 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
22 settlement amounting to only a fraction of the potential recovery does not per se render the
23 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
24 assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
25 settlement is fair and adequate depends on the “the difficulties in proving the case”);
26 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
27 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
28 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.

Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of continued litigation) *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, No. 10-cv-02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24% was reasonable). 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 the Aggrieved Employees as 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 75% of the PAGA penalties to be paid to the LWDA and 25% to be paid to the PAGA Group Members. Agreement ¶ 15. The PAGA Group Members will receive penalties based on the number of pay periods they worked during the applicable period using a pro rata distribution formula. *Id.* ¶ 16.

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

a. Percentage of the Fund

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 \$79,166.67, in attorneys’ fees. *See* Agreement ¶ 11. For two reasons, this amount is fair, adequate, and reasonable in light of PAGA’s policy and purpose.

First, in class actions, state and federal courts have held that when a class action establishes a monetary fund for the benefit of the class members out of which attorneys’ fees may be paid, courts may determine the amount of a reasonable fee by “choosing an appropriate

percentage of the fund created.” *See Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee award representing 33 1/3 percent of the fund and joining “the overwhelming majority of federal and state courts” in approving the “percentage method” as a reasonable means for determining attorney fee awards in class actions). While different from class action settlements in important ways, PAGA settlements also involve the establishment of a common fund for the benefit of persons other than the named plaintiff, so the reasons for utilizing the percentage method are the same. *See id.* (noting that the percentage method provides “ease of calculation,” “alignment of incentives between counsel and the class,” “a better approximation of market conditions in a contingency case,” and the “encouragement...to seek an early settlement”). The \$79,166.67 requested by Plaintiff’s Counsel represents approximately one-third of the Gross Fund Value, which is consistent with awards usually approved in class actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) (“[F]ee awards in class actions average around one-third of the recovery”); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to one-third of the Gross Fund Value).

b. Lodestar Cross-Check

When the primary method employed to determine fees is the percentage method, courts have discretion to use the lodestar method to “cross-check” the amount of fees calculated by way of percentage. The *Laffitte* Court emphasized, however, that “the lodestar calculation, when used in this manner, does not override the trial court’s primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the primary reliance on the percentage of common fund method”).

Nonetheless, the Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment.” *Id.* (emphasis added). Thus, a lodestar cross-check seeks to uncover astronomical multipliers. Indeed, cross-

1 checks are not required; in many cases, performing a cross-check “undermines” one of the
2 primary reasons for using the percentage method: aligning counsel’s incentives with the benefits
3 delivered to the class and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain
4 the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
5 *Awarded Attorney Fees* 108 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82
6 Cal. App. 4th 19, 29-30 (2000) (citing the recommendations of the Third Circuit Task Force with
7 approval and observing that “[t]he criticisms of the lodestar approach set forth in this Report are
8 now echoed by many authorities, who have been most vocal about the manner in which it
9 exacerbates the problem of ‘cheap settlements’ and burdens already overworked trial judge.”).

10 Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or
11 even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also, e.g.*,
12 *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
13 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
14 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
15 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
16 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
17 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was
18 affirmed in full by the California Supreme Court in its decision guiding lower courts on
19 assessing fees.

20 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
21 awarded by the percentage method showing that the majority of multipliers awarded are “in the
22 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
23 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
24 over 30 cases). Federal district courts applying California law have likewise routinely approved
25 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
26 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a
27 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
28 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in lodestar

multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code violations). Other courts have found even higher multipliers to be reasonable by comparison to other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal. 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases affirming a higher multiplier).

With respect to Plaintiff's Counsel's lodestar, Plaintiff's Counsel will have expended approximately 128.8 hours litigating this case, which does not include approximately 5 hours of anticipated time spent after approval responding to correspondence and phone calls from PAGA Members, the settlement administrator, and defense counsel. Gavron Decl. ¶ 34; Ex. B; Lee Decl. ¶ 8, Ex. A. Plaintiff's Counsel request hourly rates ranging from \$650.00 to \$850.00, which have been approved by numerous courts. *See* Gavron Decl. ¶ 35; Lee Decl. ¶ 9. The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are not required. An attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

Reasonable hours include, in addition to time spent during litigation, the time spent before the action is filed, including time spent interviewing the clients, investigating the facts and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62 (1980). The fee award should also include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which Plaintiff's Counsel seeks compensation involve only these types of tasks. Thus, the number of hours for which fees are sought is reasonable.

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise

1 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
2 4th 629, 632-33 (1998).

3 Plaintiff's Counsel's skill and experience justify the requested rates. As shown in the
4 supporting declarations, Plaintiff's Counsel have significant experience in the area of
5 employment and wage and hour class and representative actions. Plaintiff's Counsel's practice
6 focuses on representing employees in employment matters, particularly wage and hour cases on a
7 contingency basis. Gavron Decl. ¶¶ 27-33. As such, based on the hours and applicable rates,
8 Plaintiff's Counsel's lodestar amount through the finalization of this settlement – without a
9 multiplier – will be approximately \$91,750.00, which results in a negative multiplier of 0.86.
10 Gavron Decl. ¶ 34, Ex B; Lee Decl. ¶ 9, Ex A. This is well within the range approved by the
11 California Supreme Court in *Laffitte* and significantly lower than the multiplier of 2.13 approved
12 in that case. Accordingly, the cross-check supports the fee requested.

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

15 PAGA also allows a prevailing plaintiff to recover litigation costs. *See* Cal. Lab. Code §
16 2699(g). Accordingly, the Settlement Agreement allows Plaintiff's Counsel to request up to
17 \$23,500.00 in litigation costs. Agreement ¶ 11.

18 Plaintiff's Counsel requests \$21,060.84 for the reimbursement of litigation costs. As set
19 forth in the accompanying declaration of Max W. Gavron, these costs were all directly incurred
20 in the prosecution of this action, including, but not limited to, filing fees, service of process fees,
21 and mediation costs. Gavron Decl. ¶ 37, Ex. C (Cost Report). As such, Plaintiff's Counsel's
22 request for costs in the amount of \$21,060.84 is fair, adequate, reasonable, and consistent with
23 PAGA's policies. Because this amount is less than what was provided in the Settlement
24 Agreement, the difference will be distributed to the LWDA and PAGA Group Members.

25 **6. Plaintiff's Enhancement Payment Should be Approved**

26 Courts have held that named plaintiffs in class, or private attorney general actions can
27 request a service award. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)
28 (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 respectfully requests \$5,000.00 for her service award, which is intended to compensate Plaintiff for the time spent on this case. Declaration of Mary Jane Hinkle ¶ 8. Plaintiff estimates that she spent approximately 40-45 hours assisting in the litigation of this case, including conferring with his attorneys, providing documents, and reviewing filings. Hinkle Decl. ¶ 10. Plaintiff has assisted in the prosecution of this action for nearly four years. Plaintiff has assisted in providing information and discovery in this action and played a pivotal role in the successful resolution of this action. 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). Plaintiff also took the risk of bringing the lawsuit, which was a matter of public record. Future employers may be less likely to hire an employee who has previously filed an action against an employer. This supports the requested award.

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

Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's Counsel, and the LWDA, but also to Defendant's current and former employees, significant time and effort will be required to administer the settlement if it is approved by this Court. Among other things, the Settlement Administrator will calculate each PAGA Group Member's settlement shares; appropriate tax forms must be issued to all parties who receive payments under the Settlement Agreement; payments must be mailed to Plaintiff, Plaintiff's Counsel, the LWDA, and each PAGA Group Member; and any checks not cashed by PAGA Group Members must be voided so that the unclaimed amount can be forwarded to the State of California Controller Office's Unclaimed Property Division in the name of the PAGA Group Members who

1 did not cash their respective Individual PAGA Payments. *See* Agreement ¶¶ 13-18. The
2 Settlement Administrator will also distribute a short letter to PAGA Group Members explaining
3 the release of claims and settlement. Agreement, Ex. A (Explanatory Letter).

4 In contemplation of these expenses, the Parties will engage Phoenix Settlement
5 Administrators to act as a third-party settlement administrator and have allocated up to \$5,500.00
6 to cover the cost of settlement administration. Agreement ¶¶ 10, 13; Gavron Decl. ¶ 40; Ex. E
7 (Phoenix Bid).

8 **V. CONCLUSION**

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

11
12 DATED: August 16, 2024

DIVERSITY LAW GROUP, P.C.

13 By:  _____

14 Larry W. Lee

Max W. Gavron

15 Attorneys for Plaintiff and the Aggrieved
16 Employees