

DIVERSITY LAW GROUP, P.C.
Larry W. Lee (State Bar No. 228175)
lwlee@diversitylaw.com
Simon L. Yang (State Bar No. 260286)
sly@diversitylaw.com
515 South Figueroa Street, Suite 1250
Los Angeles, California 90071
Telephone: (213) 488-6555
Facsimile (213) 488-6554

POLARIS LAW GROUP
William L. Marder (State Bar No. 170131)
bill@polarislawgroup.com
501 San Benito Street, Suite 200
Hollister, California 95023
Telephone: (831) 531-4214
Facsimile (831) 634-0333

Attorneys for Plaintiff

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

CHRIS ALVARADO, as an individual and
on behalf of all others similarly situated, and
as a private attorney general,

Plaintiff,

vs.

MISSION BAY MANAGEMENT, LLC, a
Delaware limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 37-2021-00035853-CU-OE-CTL

[Assigned for all purposes to the Honorable
Eddie C. Sturgeon, Dept. C-67]

**NOTICE OF PLAINTIFF'S UNOPPOSED EX
PARTE APPLICATION RE: PRIVATE
ATTORNEYS GENERAL ACT
SETTLEMENT APPROVAL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: September 21, 2021

Time: 8:30 a.m.

Dept.: C-67

Complaint Filed: August 20, 2021

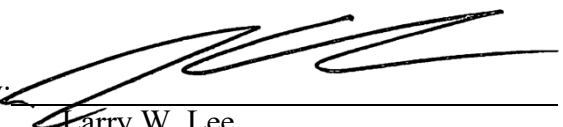
1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 21, 2021, at 8:30 a.m., or as soon
3 thereafter as the matter may be heard by the Honorable Eddie C. Sturgeon in Department C-67,
4 of the above referenced Court located at 330 W. Broadway, San Diego, California 92101,
5 Plaintiff Chris Alvarado (“Plaintiff”) seeks the Court’s Approval of the concurrently filed PAGA
6 Settlement Agreement, pursuant to the procedures set forth in Labor Code § 2698, *et seq.*

7 Therefore, this application is based on this notice, the attached memorandum of points
8 and authorities, the accompanying declarations of Larry W. Lee, Simon L. Yang, William L.
9 Marder, and Chris Alvarado, the records and file herein, and on such other evidence as may be
10 presented at the hearing. This Request is **Unopposed**. The LWDA was timely notified of this
11 proposal and does **not object**.

12 DATED: September 16, 2021

DIVERSITY LAW GROUP, P.C.

13
14 By: 

Larry W. Lee

Simon L. Yang

Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	6
II. PROCEDURAL HISTORY	7
A. The History of the Key Pleadings.....	7
B. The Parties Agree to This Settlement	7
III. BASIS FOR THE <i>EX PARTE</i> REQUEST	8
IV. SUMMARY OF THE PROPOSED PAGA SETTLEMENT	8
A. The Aggrieved Employees (or Aggrieved Employees).....	8
B. Settlement Sum and Allocation	9
C. Scope of the Released Claims	10
V. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED...10	
A. PAGA Overview.....	10
B. Class Action Settlement Standards Do Not Govern the Settlement Approval Process for PAGA Claims.....	11
C. The Settlement Achieves PAGA’s Objectives	12
D. The Scope of the Release is Appropriately Limited.....	13
E. The Settlement Is Reasonable in Light of the Inherent Risk of Litigation.....	13
1. The Claims are Contested.....	14
2. Recovery of Penalties After Trial.....	14
F. The Attorneys’ Fees are Reasonable	16
G. The Settlement Administrator’s Fees Should be Approved	17
H. Plaintiff’s Enhancement Payment Should Be Approved.....	17
I. Notice to the LWDA Has Been Provided.....	18
VI. CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009)	12, 13, 14, 15
<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)	19
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46 (2006)	14
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal. 5th 480 (2016).....	19
<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal. 4th 273 (1992).....	14
<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).....	13
<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>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)	18
<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> , 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).....	13
<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, 17
<i>Moore v. PetSmart, Inc.</i> , 2015 WL 5439000 (N.D. Cal. Aug. 4, 2015).....	17
<i>O'Connor v. Uber Techs, Inc.</i> , 2016 WL 4398271 (N.D. Cal. Aug. 18, 2016)	14, 16
<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777 (N.D. Cal. Apr. 2, 2010)	12, 14
<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948 (9th Cir. 2009).....	20
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294 (N.D. Cal. 1995)	20

1	<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759 (9th Cir. 1997).....	18, 19
2	Statutes	
3	Civil Code § 1542.....	7, 20
4	Labor Code § 226	7, 8, 9, 15
5	Labor Code § 226.3	16
6	Labor Code § 2699(a).....	12
7	Labor Code § 2699(c).....	12
8	Labor Code § 2699(f)(2).....	16
9	Labor Code § 2699(g)(l).....	15, 18
10	Labor Code § 2699(i)	13, 14
11	Labor Code § 2699(1).....	13, 14
12	Labor Code § 2699.3(a).....	12
13	Labor Code § 2699.3	8, 12

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698 *et*
3 *seq.* (“PAGA”), Plaintiff, Chris Alvarado, hereby submits this *Ex Parte* Application for approval
4 of the non-reversionary PAGA settlement set forth in the concurrently filed Settlement
5 Agreement (the “Agreement” or “Settlement”).¹ The operative Complaint alleges that Defendant,
6 Mission Bay Management, LLC, fails to pay Plaintiff and other Aggrieved Employees their
7 earned wages in a timely manner in violation of the California Labor Code. Specifically, Plaintiff
8 alleges that Defendant failed to pay Plaintiff and other Aggrieved Employees their earned wages
9 within seven days of the last day of the pay period in violation of Section 204.²

10 The proposed settlement of the alleged claims warrants the Court’s approval. Pursuant to
11 the terms of the Settlement, Defendant will pay the gross amount of \$125,000.00 (the
12 “Settlement Amount”). The Settlement was reached after extensive investigation, including
13 Defendant’s production of relevant policies and pay period data in informal discovery, and
14 numerous discussions about the applicable law.

15 The Settlement would establish a PAGA Penalty Fund of \$62,250.00 to resolve the
16 PAGA claims alleged in the operative Complaint. Pursuant to PAGA, 75% of the PAGA Penalty
17 Fund, or \$46,687.50, would be distributed to the Labor and Workforce Development Agency
18 (“LWDA”). The remaining 25% of the PAGA Penalty Fund would be distributed to Aggrieved
19 Employees.

20 Except for Plaintiff, all other Aggrieved Employees would not release any individual
21 claims that they may have. The Settlement would release their PAGA claims only. The proposed
22 release for Aggrieved Employees is narrowly tailored to release PAGA claims for violations of
23 Labor Code § 204. For Plaintiff, the Settlement also would provide for an Individual Settlement
24 Payment in the amount of \$10,000.00 in consideration for Plaintiff’s release of individual claims
25 and waiver of Civil Code § 1542.

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

² Except as otherwise stated, “Section” refers to the California Labor Code.

1 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
2 behalf of the LWDA and accomplishes the goals of PAGA. Importantly, Defendant has changed
3 its practices. The alleged violation of the Labor Code has been remedied.

4 **II. PROCEDURAL HISTORY**

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

6 On or about June 1, 2021, Plaintiff Chris Alvarado submitted written notice under Labor
7 Code § 2699.3 (the “PAGA Notice”) to the LWDA and Defendant. As set forth in the PAGA
8 Notice, Plaintiff alleged that Defendant failed to pay all similarly situated aggrieved employees
9 their earned wages in a timely manner in violation of California Labor Code § 204. (Declaration
10 of Simon L. Yang (“Yang Decl.”) ¶ 2.) Specifically, Defendant failed to pay Plaintiff and other
11 employees their earned wages within seven days of the last day of the pay period. (*Id.*)

12 Shortly after Plaintiff submitted the PAGA Notice to Defendant, the Parties met and
13 conferred regarding the possibility of an early informal resolution. (Yang Decl. ¶ 4.) The Parties
14 agreed to explore the possibility of an informal resolution or schedule a mediation before
15 expending resources on litigation. (*Id.*) Ultimately, the Parties agreed that Plaintiff would file the
16 Complaint after mutual execution of the Settlement Agreement, which is attached to the
17 concurrently filed Declaration of Simon L. Yang as **Exhibit A** (the “Settlement”). (*Id.* ¶ 5, Ex.
18 A)

19 On August 20, 2021, Plaintiff filed a PAGA complaint in the Superior Court of
20 California, County of San Diego (the “Action”). (Yang Decl. ¶ 5.) The Complaint alleges a
21 single cause of action under PAGA for alleged violations of Labor Code § 204 violation. (*Id.*)

22 **B. The Parties Agree to This Settlement**

23 Since before this litigation commenced, the Parties have been working on informal
24 resolution of this matter. (Yang Decl. ¶ 3.) The Parties engaged in robust meet and confer efforts
25 regarding the underlying merits of the case and subsequently agreed to this Settlement. (*Id.* ¶¶ 3-
26 5.)

27 In connection with the Parties’ meet and confer efforts, Defendant asserted defenses to
28 the alleged Labor Code violation, and Plaintiff responded about the applicable law. (Yang Decl.

¶ 4.) Defendant provided Plaintiff’s Counsel with information and documents pertaining to Plaintiff and other Aggrieved Employees and the claims in the Action in order for Plaintiff’s Counsel to evaluate Plaintiff’s allegations and the potential value the PAGA claim. (*Id.*)

Following further arm’s length negotiations and discussions, the Parties agreed to this Settlement. (Yang Decl. ¶ 5.) The Settlement is based on the material representation that 345 Aggrieved Employees were paid wages in 4,429 pay periods during the PAGA Period. (*Id.*)

III. BASIS FOR THE *EX PARTE* REQUEST

The instant *Ex Parte* request is warranted because an expedient approval of this Settlement will provide a direct benefit to the impacted employees at issue. (Yang Decl. ¶ 7). The “fixes” provided by the Settlement guarantee future Labor Code compliance and an immediate monetary recovery. (*Id.*) An expedient approval also allows Defendant—who quickly “stepped up” to address these issues and ensure Labor Code compliance as PAGA seeks—the opportunity to move on, and focus on future business. (*Id.*) Moreover, the ability for some former employees to receive their monetary recovery may be adversely impacted by delay (e.g., employees who may move or change their mailing address without a “forwarding address”). (*Id.*)³

IV. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

The material terms of the concurrently filed Settlement are summarized below.

A. The Aggrieved Employees (or Aggrieved Employees)

The Aggrieved Employees affected by this Settlement are defined as “all current and former employees who were paid wages in at least one pay period in California for Defendant at any time between May 28, 2020 and May 30, 2021.” (Settlement Agreement ¶ I.2.) Based upon Defendant’s records, there are 345 Aggrieved Employees during the PAGA Period. (Settlement Agreement ¶ II.5.)

³ The *Ex Parte* request is also based on direction from judges of the Court, who have advised that PAGA settlement approvals need not be delayed by motion hearing date availability and also need not take motion hearing dates from other matters requiring noticed motion. (Yang Decl. ¶ 8.)

1 **B. Settlement Sum and Allocation**

2 The Settlement requires Defendant to pay the gross Settlement Amount of \$125,000.00.
3 (Settlement Agreement ¶¶ I.9, III.2.) The Settlement Amount is non-reversionary and is allocated
4 entirely to fund a PAGA Penalty Fund of \$62,250.00 and to pay agreed-upon Attorneys' Fees,
5 Attorneys' Expenses, an Enhancement Award to Plaintiff, and Settlement Administration Costs.

6 The PAGA Penalty Fund will be distributed to the LWDA and Aggrieved Employees.
7 (Settlement Agreement ¶¶ I.10, III.3.) 75% of the PAGA Penalty Fund, or approximately
8 \$46,687.50, will be distributed to the LWDA. (*Id.*; Yang Decl. ¶ 10.) The remaining 25%, or
9 approximately \$15,562.50, will be distributed to Aggrieved Employees. (Settlement Agreement ¶
10 III.4.b.; Yang Decl. ¶ 10.) The portion of the PAGA Penalty Fund distributed to Aggrieved
11 Employees will be distributed on a pro rata basis, based on the number of pay periods each
12 individual Aggrieved Employee earned wages during the PAGA Period. (*Id.*)

13 Based on the 4,429 pay periods at issue, the Settlement requires Defendant to pay more
14 than \$28 per pay period. (Yang Decl. ¶ 11.) As discussed above, Aggrieved Employees will be
15 allocated payments from the PAGA Penalty Fund in accordance with the PAGA statute, and
16 Aggrieved Employees, on average, would each receive \$45.11. (*Id.*) The amount any particular
17 Aggrieved Employee would receive will depend on the number of relevant pay periods for the
18 Aggrieved Employee. (*Id.*) This is fair, as it directly allocates greater penalties to Aggrieved
19 Employees who have allegedly suffered more Labor Code violations. (*Id.*)

20 As part of the Settlement, Defendant does not object to the Court's approval of
21 attorneys' fees of approximately 35% of the Settlement Amount, or \$43,750.00, plus
22 reimbursement of documented litigation costs.⁴ (Settlement Agreement ¶ III.3.a.; Yang Decl. ¶
23 12.) Also, as part of the Settlement, Defendant does not object to the Court's approval of an
24 Enhancement Award of \$10,000.00, for Plaintiff's additional general release of claims and
25 waiver of Civil Code § 1542. (Settlement Agreement ¶ III.3.b.; Yang Decl. ¶ 12.)
26
27

28 ⁴ As set forth below, Plaintiff's Counsel seeks reimbursement for litigation costs of \$5,000.00.
(Declaration of Larry W. Lee ("Lee Decl.") ¶ 7.)

1 Finally, the Settlement provides for the payment of the fees and expenses reasonably
2 incurred by the Settlement Administrator. (Settlement Agreement ¶¶ III.3.c.; Yang Decl. ¶ 13.)
3 The Parties have agreed to utilize Phoenix Settlement Administrator to administer the
4 Settlement, with the administration costs not to exceed \$4,000.00. (*Id.*)

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

6 In exchange for the payments described above, Plaintiff, the State of California, and
7 Aggrieved Employees will release Defendant and Released Parties from “any and all claims,
8 rights, demands, liabilities and causes of action for civil penalties under the PAGA pled in the
9 Complaint in the Action, or that could be brought based on the factual allegations that are pled in
10 the Complaint in the Action, that arose during the PAGA Period, including any PAGA-based
11 claims for violation of Labor Code § 204, any related claims for attorneys’ fees, costs, or interest
12 resulting therefrom.” (Settlement Agreement ¶ I.14.)

13 The Settlement does not release Defendant from violations of any predicate statutes other
14 than PAGA, and will not affect a waiver of claims by Aggrieved Employees against Defendant
15 for any of the underlying Labor Code claims. (Settlement Agreement ¶ III.6.) The release is
16 expressly limited to claims for civil penalties under PAGA. (*Id.*)

17 **V. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

18 **A. PAGA Overview**

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

enforcement action.” [citations omitted].)

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

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

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

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

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

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

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

21 **C. The Settlement Achieves PAGA’s Objectives**

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

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

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

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

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

11 If approved, the Settlement would release Defendant and Released Parties from PAGA
12 claims predicated on the violation of Labor Code § 204 during the PAGA Period, and nothing
13 more. The Settlement would not impact any other aggrieved employees' ability to pursue PAGA
14 claims predicated on other Labor Code violations or any Labor Claims not predicated on PAGA.
15 Therefore, the limited scope of the release also supports approval. Because an aggrieved
16 employee's PAGA action is a substitute for an action brought by the government, "judgment in
17 [a PAGA] action is binding not only on the named employee plaintiff but also on government
18 agencies and any aggrieved employee not a party to the proceeding." *Arias*, 46 Cal.4th at 986.
19 However, "the nonparty employees, because they were not given notice of the action or afforded
20 any opportunity to be heard, would not be bound by the judgment as to remedies other than civil
21 penalties." *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all
22 rights "to pursue or recover other remedies available under state or federal law, either separately
23 or concurrently with an action taken under this part").

24 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
25 confined to the statutory penalties available under PAGA for violation of Labor Code § 204.
26 (Settlement Agreement ¶ III.6.) The release is therefore appropriately tailored.

27 **E. The Settlement Is Reasonable in Light of the Inherent Risk of Litigation**

28 Although Plaintiff is reasonably confident that he 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. (Yang Decl. ¶¶ 15; Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 3-4; Declaration of William L. Marder ("Marder Decl.") ¶¶ 2-3.)

1. The Claims are Contested

Plaintiff asserts that his representative PAGA claim is based on the allegation that Defendant failed to pay all similarly situated employees their earned wages in a timely manner. Defendant has denied violation of any applicable laws and liability for any claims asserted in the Action. (Yang Decl. ¶ 15.) Defendant claimed it would seek summary judgment on liability or proceed to trial. (*Id.*) Should Defendant have prevailed, the State and Aggrieved Employees would have been left with zero recovery.

Defendant also argued that even if the Court ultimately found the Defendant violated Labor Code § 204, the alleged violation is a technical one and the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties at its discretion. (Yang Decl. ¶ 16.) Defendant also argued that the COVID-19 pandemic and related shutdown orders severely impacted its finances. (*Id.*) Considering the risk of Defendant's potential inability to pay further supports the fairness of the proposed settlement. (*Id.*) Even if Plaintiff were to prevail, the State and Aggrieved Employees could be awarded less than the maximum potential recovery.

2. Recovery of Penalties After Trial

Defendant states that there are 345 Aggrieved Employees and 4,429 pay periods at issue during the PAGA Period. Therefore, pursuant to the PAGA, Plaintiff has calculated total exposure at \$442,900 (\$100 x 4,429 pursuant to Labor Code § 210). (Yang Decl. ¶ 14.)

As discussed above, Defendant argued that, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential recovery is uncertain. (Yang Decl. ¶¶ 15-16.) 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."

While Plaintiff maintains that there does not exist any reason for reducing PAGA penalties, Plaintiff recognizes that courts have awarded less than the statutory maximum amount

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

10 In sum, Defendant has maintained throughout this litigation that Defendant was
11 compliant with the law. (Yang Decl. ¶ 15.) If Defendant were able to persuade the Court that
12 Defendant legally complied with the law in this regard, there would be no finding of liability.
13 Even if there were a finding of liability, Defendant could argue the violation was “technical,”
14 plead poverty, or make other arguments to reduce penalties. (*Id.* ¶ 16.)

15 Nonetheless, the proposed Settlement achieves an excellent result for the State. The
16 proposed Settlement Amount exceeds 28% of the maximum potential penalties, not considering
17 any reduction by the Court. (Yang Decl. ¶ 17.) It exceeds PAGA settlements that courts have
18 approved in other cases, when considered as a percentage of the overall settlement value of the
19 case—including those that provide for less than the one percent allocation to PAGA penalties.
20 *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009)
21 (approving total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v.*
22 *PetSmart, Inc.*, 2015 WL 5439000, at *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA
23 allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D.
24 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross
25 settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft
26 were misclassified as independent contractors. 2016 WL 3561742, (N.D. Cal. June 23, 2016).
27 The parties’ settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of
28 \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the

1 proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low when
2 compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite high
3 compared to the typical amount apportioned to claims for PAGA penalties in wage and hour
4 settlements.” *Id.* at *5.

5 The proposed Settlement exceeds, both in terms of the total dollar amount and as a
6 percentage of overall settlement value, the typical PAGA settlement. (Yang Decl. ¶ 17.) When
7 this is considered, in conjunction with the history of PAGA case law and settlements, and the
8 fact that Plaintiff may recover nothing, the proposed settlement is patently reasonable. The
9 Settlement Amount permits for the distribution of penalties in an amount which accounts for the
10 risk of continued litigation while deterring Defendant from engaging in similar conduct in the
11 future, which is PAGA’s primary objective.

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

13 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
14 successful action brought under PAGA. Although this is not a class action, California state and
15 federal courts have recognized that an appropriate method for determining award of attorneys’
16 fees is based on a percentage of the total value of settlement benefits to class members. *E.g.*,
17 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Wershba*, 91 Cal. App. 4th at 254; *Boeing Co. v. Van*
18 *Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.
19 1997). The purpose of the equitable doctrine is to “spread litigation costs proportionally among
20 all the beneficiaries so that the active beneficiary does not bear the entire burden alone” so as to
21 avoid unjust enrichment. *Vincent*, 557 F. 2d at 769.

22 Under California law, the award of attorneys’ fees in common fund wage and hour class
23 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1
24 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of federal and state courts in
25 holding that when class action litigation establishes a monetary fund for the benefit of the class
26 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
27 the court may determine the amount of a reasonable fee by choosing an appropriate percentage
28 of the fund created”). Under the percentage of the fund method, a court’s objective remains to

1 “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th
2 Cir. 1998) (Posner, J.) (“When a fee is set by a court rather than by contract, the object is to set it
3 at a level that will approximate what the market will set The judge, in other words, is trying
4 to mimic the market in legal services.”).

5 Attorneys’ fees awards of 35% of the fund are within the expected range in the “market
6 in legal services. *See Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee*
7 *Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and
8 concluding that “[m]ost fee awards were between 25 percent and 35 percent”). An attorneys’
9 fees award of 35% of the fund mimics the market and “is supported by the fact that typical
10 contingency fee agreements provide that class counsel will recover 33% if the case is resolved
11 before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores LLC*, 2008 WL
12 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly Rates of*
13 *Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81 Wash U.
14 L. Q. 653, 659 n. 11). Indeed, an attorneys’ fees award of 35% of the fund is consistent with
15 “empirical studies [that] show that ... fee awards in class actions average around one-third of the
16 recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

17 The Parties have agreed to a maximum attorneys’ fees award within the range of
18 reasonableness for the market in legal services of 35% of the Settlement Amount. The Parties’
19 agreement should be presumed to be fair. Further, the Parties have agreed to reimbursement of
20 Plaintiff’s Counsel’s litigation costs. Plaintiff’s Counsel has incurred costs at their own risk, for
21 example, for filing the lawsuit, service of process, and payment of other litigation related costs.
22 (Lee Decl. ¶ 7.)

23 **G. The Settlement Administrator’s Fees Should be Approved**

24 The Parties have agreed to pay actual costs of administration not to exceed \$4,000.00 to
25 the Settlement Administrator to administer this settlement. (Settlement Agreement ¶ III.3.c.). The
26 Parties believe that the administration fee is reasonable and should be approved.

27 **H. Plaintiff’s Enhancement Payment Should Be Approved**

28 Courts have held that named Plaintiff in class, or private attorneys general actions can

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

6 Moreover, Plaintiff must receive consideration for providing a general release of claims
7 and waiver of Civil Code § 1542. Here, Plaintiff seeks \$10,000.00 as an Enhancement Award,
8 which is intended to compensate Plaintiff for the time spent on this case, including reviewing
9 pleadings, assuming the potential for retaliation, and serving as the representative who brought
10 this action. (Declaration of Chris Alvarado ¶¶ 5-8.) This requested enhancement is consistent
11 with awards approved in other common fund cases—and separately justified in light of
12 Plaintiff’s additional general release. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.
13 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit*
14 *Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000,
15 and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14
16 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
17 *Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class
18 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-
19 52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class
20 action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive
21 award to class representative in ERISA case).

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

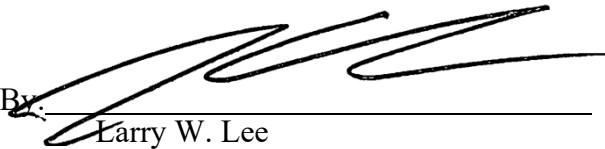
23 Concurrent with the filing of this *Ex Parte* Application, Plaintiff uploaded the instant *Ex*
24 *Parte* Application to the LWDA’s website. (Yang Decl. ¶ 24.)

25 **VI. CONCLUSION**

26 Based on the above, Plaintiff respectfully requests that the Court approve the current
27 PAGA settlement. In the alternative, should the Court prefer a noticed motion, Plaintiff asks for
28 an order shortening time to have the motion heard based on these unopposed moving papers.

1
2 DATED: September 16, 2021

DIVERSITY LAW GROUP, P.C.

3
4 By: 

Larry W. Lee

5 Simon L. Yang

6 Attorneys for Plaintiff and Aggrieved Employees
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28