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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

AIREEN BONWELL, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

SILVERADO SENIOR LIVING
MANAGEMENT, INC., A Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 21CV384595

[Assigned for all purposes to the Hon. Charles F.
Adams, Dept. 7]

**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: March 14, 2024
Time: 1:30 pm
Dept.: 7

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

2 **PLEASE TAKE NOTICE** that on March 14, 2024, at 1:30 p.m., or as soon thereafter as
3 the matter be heard in Department 7 of the Superior Court of the State of California for the County
4 of Santa Clara located at 191 N. First Street, San Jose, CA 95113, Plaintiff Aireen Bonwell
5 (“Plaintiff”) will, and hereby does, move the Court for entry of an order approving the Private
6 Attorney General Act Settlement Agreement (“Settlement Agreement” or “Settlement”) entered
7 into in the above-captioned civil action between Plaintiff and Defendant SILVERADO SENIOR
8 LIVING MANAGEMENT, INC. (“Defendant”) (Plaintiff and Defendant shall collectively be
9 referred to as the “Parties”) under the Labor Code Private Attorneys General Act of 2004 (the
10 “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],” *see*
13 Cal. Lab. Code § 2699(1)(2), and on the grounds that the parties’ settlement is fundamentally fair,
14 adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
15 concurrently filed declaration of Larry W. Lee, a copy of the Parties’ proposed Settlement
16 Agreement and this motion was electronically submitted to the Labor and Workforce
17 Development Agency in accordance with California Labor Code §§ 2699(1)(2) and 2699(1)(4)
18 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 concurrently filed herewith; the attached memorandum of points and
21 authorities in support of this motion; the concurrently filed declarations of Larry W. Lee, Edward
22 W. Choi, Plaintiff Aireen Bonwell, and Kevin Lee in support of this motion; all pleadings,
23 records, and files in this action; and upon such other matters as may be properly presented to, or
24 received by, the Court at or before the hearing on this motion.

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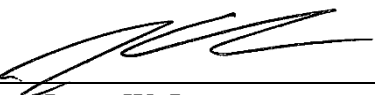
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1 Dated: February 8, 2024

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Attorneys for Plaintiff Aireen Bonwell and the
5 Aggrieved Employees
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. PROCEDURAL BACKGROUND	1
III. FACTUAL BACKGROUND	2
IV. STANDARD OF REVIEW	3
V. ARGUMENT	4
A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant to Labor Code § 2699(l)(2).....	4
B. The Court Should Approve the Settlement Agreement.....	5
1. The Settlement Agreement is Entitled to a Presumption of Fairness.....	5
2. The Scope of the Settlement Agreement is Fair, Adequate, and Reasonable	6
3. The Settlement Agreement Apportions Civil Penalties Between the LWDA and the Aggrieved Employees as Required by PAGA	9
4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys' Fees.....	10
a. Percentage of the Fund.....	10
b. Lodestar Cross-Check.....	10
5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Litigation Costs	13
6. The Payments to Plaintiff Should Be Approved	14
7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Settlement Administration Costs.....	14
VI. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 985 (2009)	5, 6
<i>Atempa v. Pedrazzani</i> (2018) 27 Cal.App.5th 809	8
<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....	9
<i>Carrington v. Starbucks Corporation</i> (Cal. Ct. App. Nov. 27, 2018) No. D072392	8
<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43, 66, fn. 11 (2008).....	10
<i>City of Oakland v. Oakland Raiders</i> , 203 Cal. App. 3d 78 (1988).....	11
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1800–01 (1996)	5
<i>Ferra v. Loews Hollywood Hotel, LLC</i> , 11 Cal. 5th 858 (2021)	7
<i>Flannery v. California Highway Patrol</i> , 61 Cal. App. 4th 629, 632-33 (1998)	13
<i>Greko v. Diesel U.S.A., Inc.</i> , No. 10–cv–02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013)	9
<i>Gunther v. Alaska Airlines, Inc.</i> 72 Cal. App. 5th 334, 353-354.....	8
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> , 59 Cal. 4th 348, 383 (2014)	6
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130 (2008).....	6
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	10, 11
<i>Lealao</i> , 82 Cal. App. 4th 19, 29–30.....	11
<i>Maldonado v. Epsilon Plastics, Inc.</i> , 22 Cal. App. 5th 1308, 1337 (2018).....	7
<i>Martino v. Denevi</i> , 182 Cal. App. 3d 553, 559 (1986)	12
<i>PLCM Group, Inc. v. Drexler</i> , 22 Cal. 4th 1084, 1095 (2000).....	13
<i>Serrano v. Unruh</i> , 32 Cal. 3d 621, 639 (1982) [<i>Serrano IV</i>].....	13
<i>Sutter Health Uninsured Pricing Cases</i> , 171 Cal App.4th 495, 512 (2009).....	11
<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012).....	9
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 250 (2001).....	6, 11

Federal Cases

<i>Ceja-Corona v. CVS Pharmacy, Inc.</i> , No. 1:12-cv-01868, 2014 WL 4472691, at *9 (E.D. Cal. Sept. 11, 2014)	5
<i>Craft v. County of San Bernardino</i> , 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal. 2008).....	12
<i>Dyer v. Wells Fargo Bank, N.A.</i> , 303 F.R.D. 326, 334 (N.D. Cal. 2014).....	12
<i>Hopkins v. Stryker Sales Corp.</i> , No. 11-CV-02786-LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013)	12
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990) ...	14
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000)	8
<i>In re Rite Aid Corp. Secs. Litig.</i> , 396 F.3d 294, 306-307 (3d Cir. 2005).....	11
<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811, 819 (9th Cir. 2012).....	6
<i>New York Gaslight Club, Inc. v. Carey</i> , 447 U.S. 54, 62 (1980).....	13
<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016)	4, 5, 6
<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948, 958–59 (9th Cir. 2009)	14
<i>Sakkab v. Luxottica Retail North America, Inc.</i> , 803 F.3d 425, 435 (9th Cir. 2015)	5
<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)	3, 4, 6
<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)	9
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	14
<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043, 1051 (9th Cir. 2002).....	12
<i>Willner v. Manpower Inc.</i> , No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015)	12

Statutes

Bus. & Prof. Code § 17200, <i>et seq.</i>	2
Civil Code § 1542	3, 14
Labor Code § 203	7
Labor Code § 226.....	2, 8

1	Labor Code § 226.7.....	2
2	Labor Code § 2699 (e)(2)	4
3	Labor Code § 2699 (g).....	10, 13
4	Labor Code § 2699 (l)(4)	4
5	Labor Code § 2699(e)(2)	6
6	Labor Code § 2699(i).....	9
7	Labor Code § 512.....	2
8	Other Authorities	
9	2003 Cal. Stat. ch. 906 § 1	6
10	2003 Cal. Stat. ch. 906 § 1(d)	4
11	Business and Professions Code § 17200, <i>et seq.</i>	6
12	<i>Report of the Third Circuit Task Force, Court Awarded Attorney Fees</i> 108 F.R.D. 237, 258	
13	(1985).....	11

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this motion Plaintiff Aireen Bonwell respectfully requests the Court's approval
4 of the Private Attorney General Act Settlement Agreement¹ (the "Settlement Agreement" or
5 "Settlement") with Defendant SILVERADO SENIOR LIVING MANAGEMENT, INC.
6 ("Defendant"). The settlement was reached after an informal exchange of discovery and data and
7 mediation. As part of the privileged settlement negotiations, Defendant produced data regarding
8 the Aggrieved Employees and the number of pay periods at issue for each of Plaintiff's claims
9 from which Plaintiff's counsel calculated the maximum PAGA penalty exposure. Declaration of
10 Larry W. Lee ("Lee Decl.") ¶¶9-10. Based on this information, the Parties have settled this case
11 on a representative PAGA basis for \$250,000.00. *Id.* at ¶¶8-10, Ex. C.

12 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
13 attorneys' fees, or \$83,333.33, up to \$11,003.18 in litigation costs incurred by Plaintiff's
14 Counsel, \$5,000.00 to Plaintiff in exchange for a general release, and up to \$10,000.00 for
15 settlement administration costs. Settlement Agreement ¶III.4-6. The remainder, or the "PAGA
16 Payment," is allocated to the payment of civil penalties under PAGA, of which 75% is to be
17 distributed to the Labor and Workforce Development Agency (the "LWDA") and 25% of which
18 is to be distributed to the "Aggrieved Employees" on whose behalf Plaintiff filed this action as
19 required by PAGA. *Id.* ¶ III.3.

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

24 **II. PROCEDURAL BACKGROUND**

25 On July 15, 2021, Plaintiff AIREEN BONWELL sent notice to the LWDA giving notice
26 of her intent to pursue a representative PAGA action, on behalf of herself and the State of
27 _____

28 ¹ A true and correct copy of the fully executed Settlement Agreement is attached as Exhibit C to the Lee Decl.

1 California as well as on behalf of other aggrieved employees (the “PAGA Notice”). Lee Decl. ¶
2 2, Ex. A.

3 On July 23, 2021, Plaintiff filed an amendment to her written notice. *Id.* ¶ 3, Ex. B.

4 On July 22, 2021, Plaintiff filed a Class Action Complaint against Defendant in the
5 Superior Court of California, County of Santa Clara, asserting class action claims under Labor
6 Code § 226. *Id.* ¶ 4.

7 On July 27, 2021, Plaintiff filed a First Amended Class Action Complaint asserting
8 violation of Labor Code §§ 226, 226.7 and 512 and Bus. & Prof. Code § 17200, *et seq.* *Id.* ¶ 5.

9 On August 11, 2022, Plaintiff filed a Second Amended Complaint adding an additional
10 cause of action for violation of Labor Code § 2698, *et seq.* (the “Action”). *Id.* ¶ 6.

11 On October 17, 2022, the Court issued an Order Concerning Defendant’s Motion to
12 Compel Arbitration, Strike Putative Class Action and Representative PAGA Claims and Stay
13 Proceedings. *Id.* ¶7.

14 On September 19, 2023, the Parties engaged in private mediation with Christopher
15 Panetta, Esq. *Id.* ¶8. The case did not settle on the date of mediation, but after further post-
16 mediation negotiations through Mr. Panetta, the Parties ultimately reached a settlement of all
17 claims. *Id.*

18 **III. FACTUAL BACKGROUND**

19 In connection with the mediation, Defendant’s Counsel provided Plaintiff’s Counsel with
20 information regarding the number of pay periods where meal and rest break premium wages and
21 non-discretionary remuneration were paid during the same pay period and wage statements that
22 included the foregoing payments. Lee Decl. ¶9. Based on this information, the Parties conducted
23 settlement negotiations. *Id.* The Parties subsequently executed the Settlement Agreement. *Id.*

24 The Gross Settlement Amount is \$250,000.00. Settlement Agreement ¶¶ I.12 and III.2.
25 Settlement Agreement allocates one-third of the Gross Settlement Amount for attorneys’ fees, or
26 \$83,333.33, up to \$11,003.18 in litigation costs incurred by Plaintiff’s Counsel, \$5,000.00 to
27 Plaintiff in exchange for a general release, and up to \$10,000.00 for settlement administration
28 costs. *Id.* ¶ III.4-6. The remainder, or the Net PAGA Settlement Amount, is allocated to the

1 payment of civil penalties under PAGA, of which 75% (\$105,497.62) is to be distributed to the
2 LWDA and 25% (\$35,165.87) of which is to be distributed to the Aggrieved Employees on
3 whose behalf Plaintiff filed this action as required by PAGA. *Id.* at ¶ III.3

4 The Settlement Agreement provides the following PAGA Released Claims:

5 “any and all claims under the PAGA alleged in the Complaint or
6 could have been alleged based on the facts pertaining to Plaintiff and
7 the Aggrieved Employees. This includes PAGA claims predicated
8 on alleged violations of the California Labor Code sections 201,
202, 203, 226, 226.7, 512, and the applicable California Industrial
Welfare Commission Wage Orders.”

9 *Id.* ¶ I.27. The Released Claims is effective during the PAGA Period (July 15, 2020, to April 10,
10 2022). *Id.* ¶¶ I.23 and III.7. The Released Claims only cover those civil penalties which are
11 recoverable under PAGA, and do not otherwise cover individual, underlying claims or causes of
12 action that Aggrieved Employees may have under the law against Released Parties for violations
13 of the California Labor Code. *Id.* ¶III.7.

14
15 Each PAGA Settlement Employee will receive an Individual PAGA Payment proportionate
16 to the number of pay periods worked in which one of the alleged issues in this matter occurred. *See*
17 *Id.* ¶ I.11. Each Individual PAGA Payment will be treated as nonwage income with no tax
18 withholdings to be made, and will be reported, if required, by applicable tax laws, by the
19 Settlement Administrator on IRS Form 1099s. *Id.* ¶ III.3.b.

20 21 **IV. STANDARD OF REVIEW**

22 Although PAGA requires courts to “review and approve” the settlement of any civil
23 action filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California
24 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
25 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d
26 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a
27 PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL
28 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating

1 PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark”
2 and stated only that the relief provided under PAGA must be “genuine and meaningful,”
3 “consistent with the underlying purpose of the statute to benefit the public” and, in the context of
4 a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’
5 with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce
6 Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber*
7 *Techs. Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016).

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

18 **V. ARGUMENT**

19 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 20 **to Labor Code § 2699(l)(2)**

21 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
22 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
23 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the
24 proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to
25 give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§
26 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the
27 Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system
28 in conjunction with filing this motion. *See* Lee Decl. ¶ 21, Ex. F.

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

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

3 In class actions, judicial review of a settlement’s fairness is designed to protect class
4 members who had no say in the negotiation of the settlement by ensuring that the settlement is
5 not the product of “fraud,” “overreaching,” or “collusion” by the negotiating parties and that
6 “due regard” was given to the rights and interests of absent class members subject to the
7 settlement. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). Although
8 PAGA actions and class action have certain “fundamental” differences (*see Sakrab v. Luxottica*
9 *Retail North America, Inc.*, 803 F.3d 425, 435 (9th Cir. 2015)), PAGA settlements are also
10 subject to Court approval. *See Arias v. Superior Court*, 46 Cal. 4th 969, 985 (2009) (discussing
11 the scope of a judgment in a PAGA action); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d
12 1110, 1134 (N.D. Cal. 2016).

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

19 All of the factors that would give rise to a presumption of fairness in the context of a
20 class action settlement are present in this PAGA action. After this lawsuit was commenced, the
21 Parties agreed to engage in arm’s length negotiations between highly experienced counsel. As
22 part of their privileged settlement negotiations, Defendant produced data regarding the number
23 of pay periods at issue for each of the claims, from which Plaintiff’s Counsel calculated the
24 maximum PAGA penalties and analyzed Defendant’s potential liability. Lee Decl. ¶¶ 9-11. Both
25 Plaintiff’s and Defendant’s counsel have significant experience in litigating wage and hour class
26 and PAGA actions, which further supports the reasonableness of the settlement. Lee Decl. ¶¶ 18-
27 20; Declaration of Edward W. Choi (“Choi Decl.”) ¶¶ 4-5. Therefore, the Settlement Agreement
28 is entitled to a presumption of fairness.

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

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

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

26 Here, Defendant produced data for each of Plaintiff’s claims, which permitted Plaintiff to
27 analyze Defendant’s potential exposure and liability. Lee Decl. ¶¶9-10. Defendant’s potential
28 exposure could be as high as \$4,281,650.00 if the Court were to award a \$100 penalty for each

1 pay period encompassed by the proposed settlement for violations based on failure to pay meal
2 and rest break premiums at the regular rate and \$250 penalty for each pay period a wage
3 statement was issued that included incentive payments that did not state the rate of pay or
4 corresponding hours worked. *Id.* ¶ 10. Specifically, there were approximately 6,057 pay periods
5 wherein meal and rest break premiums and non-discretionary remuneration were paid during the
6 same pay period, which amounts to a maximum exposure of \$605,700. *Id.* There were 14,473
7 wage statements issued to aggrieved employees that contained incentive payments that did not
8 state the rate of pay or corresponding hours worked, which amounts to a maximum exposure of
9 \$3,618,250.00. *Id.* Finally, there were 577 formerly employee aggrieved employees which
10 amounts to a maximum exposure of \$57,700.00 for PAGA penalties predicated on waiting time
11 penalties. *Id.*

12 Defendant argued that even if Plaintiff prevailed, the recoverable penalties under
13 PAGA are minimal. *Id.* ¶11. Defendant also argued that its failure to pay meal breaks at the
14 regular rate of pay were in “good faith” given that the law prior to the Supreme Court’s
15 reversal of the court of appeal in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858
16 (2021), provided that meal and rest break premium wages could be paid at the base rate of pay,
17 instead of the regular rate of pay. *Id.* Moreover, Defendant argued that it acted in good faith by
18 taking immediate action to change its pay practices after *Ferra* was issued by the Supreme
19 Court. *Id.* Thus, Defendant argued that the Court would likely not impose any PAGA
20 penalties for its failure to pay meal and rest break premium wages at the regular rate of pay.
21 *Id.* While Plaintiff disagrees with this position, there is a 50% chance that Defendant’s “good
22 faith” arguments would have been persuasive and that the Court could have awarded nothing
23 for the *Ferra* claims and derivative Labor Code §203 penalties. *Id.* Based on the 50% potential
24 reduction, the realistic value of these claims amounts to \$331,700.00 (\$302,850 for Labor
25 Code §226.7 and \$28,850 for Labor Code §203 claims). *Id.*

26 With respect to the wage statement claim, Defendant argued that wage statement
27 penalties are not available for rate violations. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.
28 App. 5th 1308, 1337 (2018). Further, even if the wage statement penalties were to be assessed,

1 Defendant argued that the appropriate maximum penalty for Labor Code §226 violations
2 should be \$100 per wage statement instead of \$250 per wage statement under *Gunther v.*
3 *Alaska Airlines, Inc.* 72 Cal. App. 5th 334, 353-354. *Id.* Even if the \$250 per wage statement
4 standard was utilized, in a recent trial in front of Judge Sunil Kulkarni, the Court awarded
5 PAGA penalties for Labor Code §226 at \$50 per wage statement. *Id.* If the same award is made
6 in this case, the realistic value of the Labor Code §226 claim would be \$732,650.00. Based on
7 the foregoing, the total realistic exposure amounts to \$1,055,350.

8 Further, courts have discretion to reduce PAGA penalties. *See Carrington v. Starbucks*
9 *Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving
10 PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27 Cal. App. 5th
11 809 (2018). If the Court in this case were to reduce penalties to \$5 a pay period, as was
12 approved in *Carrington*, the potential exposure amounts to approximately \$214,082.50 (5% of
13 \$4,281,650). *Id.*

14 Under the circumstances of this case, the payment of \$250,000.00 in civil penalties is
15 fair, adequate, and reasonable. The payment of \$250,000.00 in exchange for a release of only
16 those claims for civil penalties that are pleaded in the Action or that could have been pleaded
17 based on the facts alleged in the PAGA Notice and the PAGA cause of action pleaded in the
18 Action will have a substantial deterrent effect on Defendant and other California employers and
19 will confer benefits on the Aggrieved Employees, who will each receive a portion of the
20 settlement.

21 Numerous courts have held that **gross** settlements approximating between only 8 and
22 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
23 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
24 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
25 settlement amounting to only a fraction of the potential recovery does not per se render the
26 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
27 be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
28 settlement is fair and adequate depends on the “the difficulties in proving the case”);

1 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
2 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
3 the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
4 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
5 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
6 litigation) *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
7 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
8 approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A.*,
9 *Inc.*, No. 10–cv–02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was
10 reasonable).

11 In the present case, the Gross Settlement Amount is approximately 24% of the realistic
12 exposure (\$250,000/\$1,055,350), which is a very reasonable settlement amount. In sum, this
13 settlement is fair, reasonable, and consistent with PAGA’s policies and purposes under these
14 circumstances.

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

17 Except when civil penalties are recovered from a defendant who did not have any
18 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
19 distributed so that 75% of the civil penalties are paid to the to LWDA and 25% are paid to the
20 “aggrieved employees” on whose behalf the PAGA action was brought. *See* Cal. Lab. Code §
21 2699(i). In full compliance with that rule, the Settlement Agreement requires 75% of the Net
22 PAGA Payment to be paid to the LWDA and 25% of the PAGA Payment to be paid to the
23 Aggrieved Employees. Settlement Agreement ¶ III.3. The Aggrieved Employees will receive
24 penalties based on the number of pay periods they worked during the applicable period using a
25 pro rata distribution formula. *Id.* ¶ III.3.a.

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

3 **a. Percentage of the Fund**

4 PAGA allows a prevailing plaintiff to recover reasonable attorneys' fees. *See* Cal. Lab.
5 Code § 2699 (g). In recognition of this, the Settlement Agreement allows Plaintiff's Counsel to
6 request up to 33 and 1/3 percent (\$83,333.33) in attorneys' fees. *See* Settlement Agreement ¶
7 III.4. This amount is fair, adequate, and reasonable for two reasons.

8 First, in class actions, state and federal courts have held that when a class action
9 establishes a monetary fund for the benefit of the class members out of which attorneys' fees
10 may be paid, courts may determine the amount of a reasonable fee by "choosing an appropriate
11 percentage of the fund created." *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016)
12 (affirming a fee award representing 33 1/3 percent of the fund and joining "the overwhelming
13 majority of federal and state courts" in approving the "percentage method" as a reasonable
14 means for determining attorney fee awards in class actions). While different from class action
15 settlements in important ways, PAGA settlements also involve the establishment of a common
16 fund for the benefit of persons other the named plaintiff, so the reasons for utilizing the
17 percentage method are the same. *See id.* (noting that the percentage method provides "ease of
18 calculation," "alignment of incentives between counsel and the class," "a better approximation of
19 market conditions in a contingency case," and the "encouragement...to seek an early
20 settlement"). The \$83,333.33 requested by Plaintiff's Counsel represents one-third of the Gross
21 Settlement Amount, which is consistent with awards usually approved in class actions. *See*
22 *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) ("[F]ee awards in class actions
23 average around one-third of the recovery"); *see also Laffitte*, 1 Cal. 5th at 506 (upholding the
24 approval of a fee award equal to one-third of the total settlement amount).

25 **b. Lodestar Cross-Check**

26 When the primary method employed to determine fees is the percentage method, courts
27 have discretion to use the lodestar method to "cross-check" the amount of fees calculated by way
28 of percentage. The *Laffitte* Court emphasized, however, that "the lodestar calculation, when used

1 in this manner, does not override the trial court’s primary determination of the fee as a
2 percentage of the common fund and thus does not impose an absolute maximum or minimum on
3 the potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs.*
4 *Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the
5 primary reliance on the percentage of common fund method”).

6 Nonetheless, the Supreme Court in *Laffitte* stated: “If the multiplier calculated by means
7 of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether
8 the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
9 range, but the court is not necessarily required to make such an adjustment.” *Id.* (emphasis
10 added). Thus, a lodestar cross-check seeks to uncover astronomical multipliers. Indeed, cross-
11 checks are not required; in many cases, performing a cross-check “undermines” one of the
12 primary reasons for using the percentage method: aligning counsel’s incentives with the benefits
13 delivered to the class and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain
14 the discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
15 *Awarded Attorney Fees* 108 F.R.D. 237, 258 (1985); *Lealao*, 82 Cal. App. 4th 19, 29-30 (citing
16 the recommendations of the Third Circuit Task Force with approval and observing that “[t]he
17 criticisms of the lodestar approach set forth in this Report are now echoed by many authorities,
18 who have been most vocal about the manner in which it exacerbates the problem of ‘cheap
19 settlements’ and burdens already overworked trial judge.”).

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

1 assessing fees.

2 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
3 awarded by the percentage method showing that the majority of multipliers awarded are “in the
4 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
5 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
6 over 30 cases). Federal district courts applying California law have likewise routinely approved
7 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
8 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a
9 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
10 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in lodestar
11 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,
12 at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code
13 violations). Other courts have found even higher multipliers to be reasonable by comparison to
14 other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal.
15 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases
16 affirming a higher multiplier).

17 With respect to Plaintiff’s Counsel’s lodestar, Plaintiff’s Counsel will have expended
18 approximately 128.50 hours litigating this case, which includes approximately 20 hours of
19 anticipated time spent after approval responding to correspondence and phone calls from
20 Aggrieved Employees, the Settlement Administrator, and Defendant’s Counsel. Lee Decl. ¶ 15;
21 Choi Decl. ¶ 7. Plaintiff’s Counsel request hourly rate of \$900.00 per hour. Lee Decl. ¶ 16; Choi
22 Decl. ¶ 6. The courts are quite liberal in the evidence required to prove an attorney’s hours.
23 Detailed time records are not required. An attorney’s testimony alone may suffice: “Testimony
24 of an attorney as to the number of hours worked on a particular case is sufficient evidence to
25 support an award of attorney fees, even in the absence of detailed time records.” *Martino v.*
26 *Denevi*, 182 Cal. App. 3d 553, 559 (1986) .

27 Reasonable hours include, in addition to time spent during litigation, the time spent
28 before the action is filed, including time spent interviewing the clients, investigating the facts and

1 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
2 62 (1980). The fee award should also include fees incurred to establish and defend the attorneys’
3 fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which Plaintiff’s Counsel
4 seek compensation involve only these types of tasks. Thus, the number of hours for which fees
5 are sought is reasonable.

6 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
7 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
8 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
9 attorney’s skill and experience, the nature of the work performed, the relevant area of expertise
10 and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
11 4th 629, 632-33 (1998).

12 Plaintiff’s Counsel’s skill and experience justify the requested rates. As shown in the
13 supporting declarations, Plaintiff’s Counsel have significant experience in the area of
14 employment and wage and hour class and representative actions. Their practices focus on
15 representing employees in employment matters, particularly wage and hour cases on a
16 contingency basis. Lee Decl. ¶ 19; Choi Decl. ¶ 5; As such, based on the hours and applicable
17 rate, Plaintiff’s Counsel’s lodestar amount through the finalization of this settlement – without a
18 multiplier – will be approximately \$133,650.00, which **exceeds the fee requested** by Plaintiff
19 here and results in a negative lodestar multiplier. Lee Decl. ¶16; Choi Decl. ¶ 7. Accordingly, the
20 cross-check supports the fee requested.

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

23 PAGA also allows a prevailing plaintiff to recover litigation costs. *See* Cal. Lab. Code §
24 2699(g). Accordingly, the Settlement Agreement allows Plaintiff’s Counsel to request up to
25 \$11,003.18 in litigation costs. Settlement Agreement ¶ III.4.

26 Plaintiff’s Counsel request \$11,003.18 for the reimbursement of litigation costs. As set
27 forth in accompanying declarations of Plaintiff’s Counsel, these costs were all directly incurred in
28 the prosecution of this action, including, but not limited to, filing fees, service fees, and

1 mediation fees. Lee Decl. ¶ 17, Ex. E; Choi Decl. ¶ 8, Ex. B. As such, Plaintiff's Counsel's
2 request for costs in the amount of \$11,003.18 is fair, adequate, reasonable, and consistent with
3 PAGA's policies.

4 **6. The Payments to Plaintiff Should Be Approved**

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

11 Here, Plaintiff respectfully requests \$5,000.00, which is intended to compensate Plaintiff
12 for the time spent on this case and for executing a general release, including of Civil Code §
13 1542, which was not required by Aggrieved Employees. Declaration of Aileen Bonwell
14 ("Bonwell Decl.") ¶¶6-7. This requested enhancement is consistent with awards approved in
15 other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300
16 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer*
17 *Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three
18 incentive awards of \$35,000). Plaintiff also took the risk of bringing the lawsuit, which was a
19 matter of public record. Future employers may be less likely to hire an employee who has
20 previously filed an action against an employer. This in conjunction with Plaintiff's agreement to
21 provide a general release supports the requested award.

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

24 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
25 Counsel, and the LWDA, but also to Defendant's current and former employees, significant time
26 and effort will be required to administer the Settlement if it is approved by this Court. Among
27 other things, the Settlement Administrator will calculate each PAGA Settlement Employee
28 Individual PAGA Payment; issue appropriate tax forms to all parties who receive payments

1 under the Settlement Agreement; mail payments to Plaintiff, Plaintiff's Counsel, the LWDA, and
2 each Aggrieved Employee; and void any checks not cashed by Aggrieved Employees so that the
3 unclaimed amount can be forwarded to the State of California Controller's Office Unclaimed
4 Property Law in the name of the PAGA Settlement Employees who did not cash their respective
5 Individual PAGA Payment. *See* Settlement Agreement ¶ IV.

6 In contemplation of these expenses, the parties will engage Phoenix Settlement
7 Administrators to act as a third-party settlement administrator and have allocated up to
8 \$10,000.00 to cover the cost of settlement administration. Settlement Agreement ¶ III.6;
9 Declaration of Kevin Lee ¶ 8, Ex. B).

10 **VI. CONCLUSION**

11 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
12 Agreement pursuant to Labor Code § 2699(1)(2).
13

14 Dated: February 8, 2024

DIVERSITY LAW GROUP, P.C.

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16 By: 
Larry W. Lee
17 Attorneys for Plaintiff Aireen Bonwell and the
18 Aggrieved Employees
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