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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

PORSCHA LE AI, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

PROGRESSIVE CASUALTY
INSURANCE COMPANY, an Ohio
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 34-2021-00308276-CU-OE-GDS

(Assigned to the Honorable Lauri A. Damrell, Dept.
28)

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

Date: February 17, 2023

Time: 9:00 a.m.

Dept.: 28

Reservation No.: 2697723

Complaint Filed: September 20, 2021

FAC Filed: January 7, 2022

SAC Filed: December 15, 2022

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on February 17, 2023, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Lauri A. Damrell, judge presiding, in
4 Department 28 of the above referenced Court located at 720 9th Street, Sacramento, CA 95814,
5 Plaintiff Porscha Le Ai (“Plaintiff”) will seek an Order approving the PAGA Settlement
6 Agreement under the Private Attorneys General Act, pursuant to the procedures set forth in
7 Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Larry W. Lee, Max W. Gavron, William L.
10 Marder, and Plaintiff Porscha Le Ai, the records and file herein, and on such other evidence as
11 may be presented at the hearing of the motion.

12
13 DATED: January 20, 2023

DIVERSITY LAW GROUP, P.C.

14
15 By: _____

Howard L. Magee

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff Porscha Le Ai
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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), California Labor Code
3 § 2698, *et seq.*, Plaintiff Porscha Le Ai (“Plaintiff”) hereby moves the Court for an order
4 approving a non-reversionary PAGA settlement. The operative complaint filed by Plaintiff in
5 this case seeks civil penalties against Defendant Progressive Casualty Insurance Company
6 (“Defendant”) for alleged violations of the Labor Code pursuant to the Private Attorneys General
7 Act of 2004, California Labor Code § 2698, *et seq.* As set forth in the operative Complaint,
8 Plaintiff brings claims under the PAGA predicated on allegations that Defendant failed to
9 properly calculate the regular rate of pay for purposes of paying sick pay, in violation of Labor
10 Code §§ 201-203 and 246; failed to provide accurate itemized wage statements, in violation of
11 Labor Code § 226; failed to pay all minimum and overtime wages as a result of off-the-clock
12 work, in violation of Labor Code §§ 510, 558, 1194, and 1197; failed to provide off-duty meal
13 and rest periods and/or pay all meal and rest period premiums at the correct regular rate of pay
14 that included all non-discretionary remuneration, in violation of Labor Code §§ 226.7 and 512;
15 failed to pay reporting time pay for scheduled shifts where no work was provided; failed to
16 provide required rest days for each seven continuous days of work, in violation of Labor Code §§
17 551, 552, and 556; failed to reimburse business expenses, in violation of Labor Code § 2802;
18 failed to pay wages in a timely manner, in violation of Labor Code § 204; failed to properly pay
19 time off or vacation pay at time of separation from employment, in violation of Labor Code §
20 227.3; and failed to pay all wages owed upon separation of employment in violation of Labor
21 Code §§ 201-203.

22 As will be explained in further detail below, based on the California Supreme Court’s
23 opinion in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) and *Iskanian v. CLS Transportation*
24 *Los Angeles, LLC*, 59 Cal. 4th 348 (2014), Plaintiff may seek civil penalties as called for under
25 PAGA on behalf of the State of California and other similarly situated aggrieved employees
26 without seeking class certification or meeting the requirements of class certification (*i.e.*,
27 numerosity, typicality, commonality and adequacy). As such, while the PAGA settlement
28 reached herein is on behalf of the State of California and other aggrieved employees, the usual

two-step preliminary and final approval process is not required. Rather, as called for under Labor Code § 2699(*l*), all that is required is an approval by this Court of any settlement of the PAGA claim by the Plaintiff and Defendant (collectively, the “Parties”).

The Parties have reached such an agreement, and thus now seek this Court’s approval of the proposed PAGA settlement that provides for the payment of PAGA civil penalties. The settlement was reached after the exchange of information through informal discovery, including information regarding the number of pay periods worked by Aggrieved Employees and Defendant’s relevant policies, practices, and anticipated defenses. Importantly, leading up to mediation Defendant asserted that an arbitration agreement would preclude Plaintiff’s PAGA claims entirely given that the United States Supreme Court had yet to issue its seminal decision in *Viking River Cruises, Inc. v. Moriana*. 142 S. Ct. 1906 (2022). Ironically, the Supreme Court issued its decision on the date of the Parties’ mediation. Pursuant to the terms of the Parties’ proposed settlement agreement, Defendant will pay the Gross Settlement Amount of \$950,000.00, which includes a Net Settlement Amount of approximately \$582,833.33 to be split amongst the Labor and Workforce Development Agency (“LWDA”) and the aggrieved employees, as required by PAGA. The proposed settlement also has a limited and tailored release for the Aggrieved Employees that does not release any of their direct claims under the Labor Code. Specifically, the Aggrieved Employees are releasing only their rights to bring PAGA claims based on the facts alleged in Plaintiff’s notice to the LWDA and/or operative complaint. Agreement ¶ 5.2. Accordingly, the Court should approve the settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Allegations

On August 19, 2021, Plaintiff submitted her written notice under Labor Code § 2699.3 (the “PAGA Notice”) to the Labor and Workforce Development Agency and Defendant. Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. As set forth in the PAGA Notice, Plaintiff alleged that Defendant: (1) failed to provide accurate and complete wage statements in violation of Labor Code § 226; and (2) failed to pay sick pay at the regular rate of pay in violation of Labor Code §§ 201-204 and 246. *Id.*

1 On September 20, 2021, Plaintiff filed a class and individual action complaint against
2 Defendant in the Superior Court of California, County of Sacramento (the “Action”). *Id.* ¶ 3.
3 The complaint alleged causes of action for: (1) violation of Labor Code §§ 201-203; (2) violation
4 of Labor Code § 226(a); (3) disability discrimination in violation of the Fair Employment and
5 Housing Act (“FEHA”); (4) retaliation in violation of the FEHA; (5) failure to accommodate in
6 violation of the FEHA; (6) wrongful constructive termination in violation of public policy; (7)
7 intentional infliction of emotional distress; and (8) negligent infliction of emotional distress. *Id.*
8 On January 7, 2022, Plaintiff filed a first amended complaint, adding a cause of action for
9 violation of Labor Code § 2698, *et seq.* *Id.* ¶ 4.

10 On July 12, 2022, Plaintiff submitted a supplemental notice to the LWDA and Defendant
11 (the “Supplemental PAGA Notice”). *Id.* ¶ 5. The Supplemental PAGA Notice alleged that
12 Defendant: (1) failed to pay all minimum and overtime wages owed in violation of Labor Code
13 §§ 200, 223, 510, 558, 1182.12, 1194, 1197, and 1198; (2) failed to pay meal and rest period
14 premiums at the regular rate of pay in violation of Labor Code §§ 226.7, 512, and 516; (3) failed
15 to pay reporting time pay; (4) failed to provide one day of rest in seven days in violation of
16 Labor Code §§ 551, 552, and 556; (5) failed to reimburse business expenses in violation of Labor
17 Code § 2802; (6) failed to timely pay wages in violation of Labor Code § 204; (7) failed to pay
18 paid time off or vacation pay upon separation of employment in violation of Labor Code § 227.3;
19 (8) failed to maintain accurate records and provide accurate itemized wage statements in
20 violation of Labor Code §§ 226, 226.3, 1174, 1174.5, and 1198.5; and (9) failed to pay all wages
21 due at termination in violation of Labor Code §§ 201-203 and 256. *Id.* ¶ 5.

22 On December 15, 2022, the Court granted the Parties’ request to allow Plaintiff file a
23 second amended complaint and requesting that the Court dismiss Plaintiff’s putative class claims
24 without prejudice. Gavron Decl. ¶ 7. The second amended complaint (“Complaint”) is the
25 operative complaint. The Complaint alleges only a single violation of the PAGA. Now, the
26 Parties seek approval of the proposed settlement, which will resolve the claims alleged in the
27 Complaint. Gavron Decl. ¶ 7.

28 //

1 **B. The Parties Participated in Private Mediation**

2 After the filing of the initial complaint, the Parties met and conferred to discuss the
3 enforceability of an arbitration agreement signed by Plaintiff. In connection with the meet and
4 confer discussions, the Parties agreed to participate in mediation with wage-and-hour neutral
5 Michael J. Loeb, Esq. Gavron Decl. ¶ 8. Prior to the mediation, the Parties engaged in informal
6 discovery. *Id.* ¶ 9. As part of informal discovery, Defendant produced data relevant to the
7 potential value of the claims, including information pertaining to the Aggrieved Employees, the
8 number pay periods at issue, relevant documents pertaining to Defendant’s policies and practices
9 regarding the claims alleged, and information regarding its anticipated defenses. *Id.* The data
10 allowed Plaintiff to perform a comprehensive damages and liability analysis. *Id.*

11 On June 15, 2022, the Parties engaged in an all-day mediation session with Michael J.
12 Loeb, a respected and experienced mediator in wage and hour class and PAGA actions. *Id.* ¶ 10.
13 The Parties conducted lengthy settlement negotiations facilitated by Mr. Loeb and subsequently
14 agreed to a proposed settlement. *Id.* The Parties have agreed to settle the Action pursuant to the
15 terms and conditions of the Private Attorneys General Act Settlement Agreement and Release
16 (“Agreement” or “Settlement Agreement”), which is attached to the Declaration of Max W.
17 Gavron as **Exhibit A**. Gavron Decl. ¶ 11. The Parties signed an Amendment to the Settlement
18 Agreement in December 2022, which replaced the exhibit to the Settlement Agreement due to a
19 clerical error. Gavron Decl. ¶ 11. The Amendment is also included in Exhibit A.

20 Based on their own independent investigation and evaluation, Plaintiff’s Counsel is of the
21 opinion that the settlement with Defendant for the consideration and on the terms set forth in the
22 Settlement Agreement is fair, reasonable, and adequate and is in the best interests of Plaintiff, the
23 State of California, and Aggrieved Employees, in light of all known facts and circumstances,
24 including the risk of significant delay, the uncertainty associated with litigation, the various
25 defenses asserted by Defendant, and the numerous potential appellate issues. *Id.* ¶ 12.

26 **III. THE SETTLEMENT TERMS AND ACTUAL AMOUNTS REQUESTED**

27 The material terms of the settlement are described below and set forth in detail in the
28 Settlement Agreement. *See* Gavron Decl., Ex. A.

1 **A. The Aggrieved Employees**

2 Pursuant to the Agreement, the “Aggrieved Employees” consist of any and all individuals
3 currently or formerly employed in hourly or non-exempt positions in California at any time from
4 September 21, 2020 through August 31, 2022 (the “PAGA Period”). Settlement Agreement
5 § 1.4. Based upon Defendant’s records, there are approximately 2,356 Aggrieved Employees
6 during the PAGA Period. Gavron Decl. ¶ 13.

7 **B. The Gross Settlement Amount**

8 The Settlement Agreement calls for a “Gross Settlement Amount” in the amount of
9 \$950,000.00 for resolution of the Action. Settlement Agreement § 3.1. The balance of the Gross
10 Settlement Amount remaining after deduction of approved attorneys’ fees and litigation costs,
11 final costs of the settlement administration, and approved Enhancement Award to Plaintiff (“Net
12 Settlement Amount”), will be available for distribution to the LWDA and Aggrieved Employees
13 pursuant to the PAGA. Settlement Agreement §§ 1.17, 3.2.4.

14 **C. Allocation of the Net Settlement Amount**

15 The Parties estimate that the Net Settlement Amount will be \$582,833.33. Gavron Decl.
16 ¶ 14. Seventy-five percent (75%) of the Net Settlement Amount, or approximately \$437,125.00,
17 will be paid to the LWDA. Settlement Agreement § 3.2.4; Gavron Decl. ¶ 15. The remaining
18 twenty-five percent (25%) of the Net Settlement Amount, or approximately \$145,708.33, will be
19 paid to the Aggrieved Employees. Settlement Agreement § 3.2.4; Gavron Decl. ¶ 15. This
20 75/25 allocation is required by Labor Code § 2699, as explained by *ZB, N.A. v. Superior Court*, 8
21 Cal. 5th 175 (2019).

22 The Individual PAGA Payments to Aggrieved Employees will be allocated
23 proportionally based on the number of applicable pay periods each Aggrieved Employee worked
24 for Defendant during the PAGA Period. Settlement Agreement § 3.2.4.1. The amount any
25 particular Aggrieved Employee will be entitled to recover will vary depending on the number of
26 pay periods he or she worked, with some entitled to receive more, and others less. Gavron Decl.
27 ¶ 16. This is fair, as it directly allocates greater penalties to individual Aggrieved Employees
28 who allegedly experienced a higher number of alleged violations. *Id.* Based on the estimated

1 number of Aggrieved Employees, on a raw average, each Aggrieved Employee will receive
2 approximately \$61.85 as a result of the Settlement. *Id.* ¶ 17. While this is not insubstantial, the
3 focus in a PAGA settlement is whether the settlement achieves the purposes of the PAGA given
4 that the lion's share of penalties goes directly to the State's coffers. For purposes of computing
5 taxes, the Individual PAGA Payments shall be reported on IRS Form 1099, and as such, shall not
6 be subject to withholdings. Settlement Agreement § 3.2.4.2.

7 **D. Enhancement Award to Plaintiff**

8 Pursuant to the terms of the Settlement Agreement, and without opposition from
9 Defendant, the Settlement contemplates an Enhancement Award to Plaintiff in the amount of
10 \$10,000.00. Settlement Agreement § 3.2.3. This amount is to compensate Plaintiff for her efforts
11 and work in prosecuting this case as the PAGA representative, which includes discussing the
12 lawsuit with counsel on a number of occasions, searching for and providing documents in this
13 case, and reviewing the pleadings in this case, including the PAGA letters, complaints, and
14 Settlement Agreement. Declaration of Porscha Le Ai ("Le Ai Decl.") ¶ 4. Any portion of the
15 Enhancement Award not used or approved by the Court shall be added to the Net Settlement
16 Amount for distribution to the LWDA and Aggrieved Employees.

17 **E. Attorneys' Fees and Costs**

18 The Settlement Agreement specifies up to one-third (1/3) of the Gross Settlement
19 Amount, or \$316,666.67, to be paid as attorneys' fees to Plaintiff's Counsel, as well as declared
20 litigation costs not to exceed \$20,000.00. Settlement Agreement § 3.2.1. Here, with respect to
21 litigation costs, Plaintiff seeks reimbursement of the actual costs in the amount of \$9,961.42,
22 which is well short of the maximum contemplated by the Agreement. Gavron Decl. ¶ 47. Any
23 portion of the attorneys' fees and litigation costs not approved by the Court shall be added to the
24 Net Settlement Amount for distribution to the LWDA and Aggrieved Employees.

25 **F. Settlement Administration Costs**

26 The Parties have selected Phoenix Settlement Administrators as the Settlement
27 Administrator. Settlement Agreement § 1.2. The anticipated costs for the settlement
28 administration are not to exceed \$20,500.00. Settlement Agreement § 3.2.2. Plaintiff's Counsel

believes that this amount is reasonable in relation to the value of the settlement. Gavron Decl. ¶ 47. The settlement administration costs will be deducted from the Gross Settlement Amount. Settlement Agreement § 3.2.2. Any portion of the settlement administration costs not used or approved by the Court shall be added to the Net Settlement Amount for distribution to the LWDA and Aggrieved Employees.

G. Scope of Release by Aggrieved Employees

The release provides that upon funding of the Gross Settlement Amount and approval by the Court, Plaintiff and the Aggrieved Employees will release Defendant and the Released Parties from the following claims:

any and all claims under the California Private Attorneys' General Act ("PAGA") for civil penalties against PCIC or the Released Parties during the PAGA Period, that have been asserted or that could have been asserted based on the facts alleged in the Action and/or in the PAGA Notice, including, but not limited to, the nonpayment or under payment of minimum and overtime wages, failure to pay or under payment of wages, overtime, sick leave, meal and rest period premiums at the regular rate of pay, meal and rest periods, nonpayment or under payment of premiums for meal or rest period violations, failure to pay reporting time pay, failure to timely pay wages, failure to pay all wages due at termination, failure to maintain accurate records, failure to provide and/or maintain accurate and itemized wage statements, failure to reimburse business expenses, failure to provide required rest days, nonpayment or under payment of paid sick leave under state or local statutes, laws, regulations or ordinances, nonpayment of paid time off or vacation pay, and claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations, and/or other provisions of law (the "Released Claims").

Settlement Agreement § 5.2. Thus, the release is appropriately tailored because it is limited to the claims alleged.

IV. PAGA REQUIREMENTS

PAGA was enacted to allow such enforcement and recovery by private individuals who have been aggrieved by their employers. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009). Moreover, 75% of any penalties recovered under PAGA by an aggrieved employee is to be paid to California's LWDA and the remaining 25% is to be shared amongst the aggrieved employees.

1 Cal. Lab. Code § 2699(i). In order to enforce and seek penalties under PAGA in a civil action, an
2 aggrieved employee must first provide written notice to the LWDA and the employer of the
3 particular Labor Code violation the aggrieved employee alleges the employer has violated. *See*
4 Cal. Labor Code § 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does
5 not intend to investigate the alleged violations or the time for the LWDA to investigate the
6 claims passes, the aggrieved employee is allowed to proceed in a civil action against the
7 employer on the alleged violations on behalf of all other similarly situated employees. *See* Cal.
8 Labor Code § 2699.3(a)(2)(A).

9 In 2009, the California Supreme Court held that an aggrieved employee's representative
10 action brought on behalf of other similarly situated employees against an employer for PAGA
11 violations do not need to meet all of the requirements for class certification. *Arias*, 46 Cal. 4th at
12 975; 980-88. As the California Supreme Court held, a plaintiff bringing suit under PAGA does
13 so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986. Because an
14 employee's PAGA action functions as a substitute for an action brought by the government
15 itself, a judgment in the PAGA action binds all those who would be bound by a judgment in an
16 action brought by the government. *Id.* Finally, in a settlement of a PAGA action brought by an
17 aggrieved employee, the Superior Court must "review and approve any settlement of any civil
18 action filed pursuant to" PAGA. Labor Code § 2699(l)(2). As the Parties to this current PAGA
19 action have reached such an agreement, the Parties now seek this Court's approval as to the
20 settlement of the penalties amount.

21 **V. THE SETTLEMENT VALUE IS REASONABLE CONSIDERING THE**
22 **ATTENDANT RISKS OF CONTINUING LITIGATION**

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

26 **1. Strengths and Weaknesses**

27 At the time the Parties agreed to participate in mediation the state of the law regarding the
28 impact of arbitration agreements on the ability of a plaintiff to bring a PAGA action in court was

1 uncertain. The United States Supreme Court had granted review in *Viking River* and ultimately
2 issued its decision on the date of the Parties' mediation. As this Court is likely aware, *Viking*
3 *River* held that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA
4 actions into individual and non-individual claims through an agreement to arbitrate," meaning
5 parties are "entitled to enforce [arbitration] agreement[s] insofar as [they] mandate[] arbitration
6 of . . . individual PAGA claim[s]." *Viking River*, 142 S. Ct. at 1924-1925. Since *Viking River*,
7 employers have argued that individual PAGA claims must be compelled to arbitration, and that
8 non-individual PAGA claims must be dismissed. *See Viking River*, 142 S. Ct. at 1925 (providing
9 that "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no
10 different from a member of the general public, and PAGA does not allow such persons to
11 maintain suit"). Thus, Defendant argued that if the Court compelled arbitration of Plaintiff's
12 individual PAGA claim, no claims or issues would remain and dismissal of the non-individual
13 PAGA claim would be required. *See Viking River*, 142 S. Ct. at 1925 (providing that once a
14 plaintiff's individual PAGA claim has been committed to arbitration, the plaintiff "lacks
15 statutory standing to continue to maintain her non-individual claims in court, and the correct
16 course is to dismiss her remaining claims"). If Defendant were successful in this argument, the
17 Court might have dismissed Plaintiff's non-individual PAGA claim altogether. While Plaintiff
18 disputes these legal contentions, she evaluated the proposed settlement with these risks in mind.
19 Gavron Decl. ¶ 24.

20 Substantively, Plaintiff alleged various theories of liability. Plaintiff claimed that
21 Defendant failed to pay sick pay wages at the regular rate of pay because employees regularly
22 earned non-discretionary pay such as shift differentials, bonuses, and commissions in addition to
23 their base hourly rate of pay. However, whenever employees took sick leave during the same
24 pay period Defendant paid employees at their base rate of pay. Plaintiff also alleged claims for
25 the nonpayment or under payment of minimum and overtime wages, failure to pay or under
26 payment of wages, overtime, sick leave, meal and rest period premiums at the regular rate of pay,
27 meal and rest periods, nonpayment or under payment of premiums for meal or rest period
28 violations, failure to pay reporting time pay, failure to timely pay wages, failure to pay all wages

1 due at termination, failure to maintain accurate records, failure to provide and/or maintain
2 accurate and itemized wage statements, failure to reimburse business expenses, and failure to
3 provide required rest days.

4 Each of these claims faced unique challenges if brought to trial. For example, Defendant
5 argued that Plaintiff cannot recover derivative waiting time penalties or assert a claim for sick
6 pay wages because there is no private right of action. *See* Cal. Lab. Code § 248.5 (providing only
7 that “the Labor Commissioner or the Attorney General may bring a civil action in a court of
8 competent jurisdiction against the employer or other person violating this article”); *see also, e.g.,*
9 *Titus v. McLane Foodservices, Inc.*, 2016 WL 4797297, at *4 (E.D. Cal. Sept. 14, 2016) (the sick
10 pay “statute provides that only the LWDA may recover civil penalties for a violation”);
11 *Schroeder v. Envoy Air, Inc.*, 2016 WL 11520388, at *11 (C.D. Cal. Sept. 27, 2016) (“because
12 the legislature did not clearly and unambiguously create a private right of action to enforce
13 section 246(h), the Court concludes that there is none available”). Regarding Plaintiffs’ claim for
14 waiting time penalties, some courts have held that sick pay is not “wages” entitling employees to
15 Section 203 penalties even if underpaid. *See McPherson v. EF Intercultural Found., Inc.*, 47
16 Cal. App. 5th 243, 263, 260 Cal. Rptr. 3d 640, 654 (2020), review denied (July 22, 2020)
17 (“because paid sick leave is not considered a form of “wages,” employers are not required to pay
18 employees their unused sick leave on termination—accrued or not. (§ 246, subd. (g)(1).)”).

19 Defendant also would have argued that, even if there were a private right of action and
20 any underpayment could be proven (which Defendant disputes), its payments to employees were
21 made pursuant to a good faith belief that it was paying sick pay correctly, and as a result,
22 Plaintiffs cannot establish that Defendant willfully failed to pay the sick pay wages at separation
23 of employment and/or that a good faith dispute exists as to whether the allegedly underpaid sick
24 pay amounts to wages due. *Id.* This is a legal defense that, if successful, could potentially defeat
25 Plaintiffs’ Section 203 claim. *Chavez v. Converse, Inc.*, 2020 WL 1233919, at *1 (N.D. Cal.
26 2020) (holding that an employer’s failure to pay is not willful where there is uncertainty in the
27 law or a “good faith mistaken belief that wages are not owed”).

28 Similarly, on Plaintiff’s wage statement claim, Plaintiff would face the additional burden

1 of demonstrating that any alleged omission of information from the wage statements was a
2 “knowing and intentional failure” by Defendant to comply with Labor Code § 226(a). *See Harris*
3 *v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary
4 judgment in favor of employer and finding its conduct was not “knowing and intentional”);
5 Defendant also would have argued that penalties under Section 226 are subject to a similar “good
6 faith” defense as articulated above in the context of Plaintiffs’ claims for waiting time penalties.
7 *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014)
8 (“Where an employer has a good faith belief that it is not in violation of Section 226, any
9 violation is not knowing and intentional.”); *Wright v. Adventures Rolling Cross Country, Inc.*,
10 2013 WL 1758815, at *9 (N.D. Cal. Apr. 24, 2013) (same); *Ricaldai v. U.S. Investigations*
11 *Servs., LLC*, 878 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) (same); *Dalton v. Lee Publ'ns, Inc.*,
12 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011) (same).

13 Defendant also would have argued that even if Plaintiff’s could demonstrate that
14 Defendant paid meal and/or rest periods at the incorrect rate of pay, Plaintiff would still be
15 required to demonstrate an underlying violation of the Labor Code. *See Brinker Rest. Corp. v.*
16 *Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the
17 employer is not obligated to police meal breaks and ensure no work thereafter is performed.”).

18 From a broader perspective, Defendant also would have argued that the PAGA claims
19 were unmanageable, which presented significant risk especially considering the Court of
20 Appeal’s recent holding in, *Wesson v. Staples the Off. Superstore, LLC*, 68 Cal. App. 5th 746,
21 283 Cal. Rptr. 3d 846 (2021), reh’g denied (Sept. 27, 2021), review filed (Oct. 19, 2021)
22 (upholding trial court’s order striking PAGA claim as unmanageable). These defenses present a
23 risk to the PAGA claim and the potential that some or all of the PAGA penalties sought may not
24 be awarded. *Id.*

25 Finally, pursuant to Labor Code section 2699(f)(2) the Court can decline to award PAGA
26 penalties where “if, based on the facts and circumstances of the particular case, to do otherwise,
27 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” In other
28 words, were this matter to go to trial, any award granted would be at the discretion of the Court.

1 Plaintiff further recognizes that there may be reasons that the Court would be unwilling to issue
2 an award in this matter even if Plaintiff were able to prove the PAGA violation at trial.

3 Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*,
4 while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum
5 PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying with the
6 law. 30 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction
7 to be proper. *Id.* at 539. Courts have also suggested that a reduction of civil penalties may be
8 appropriate where the alleged violation is a technical one. *Raines v. Coastal Pacific*, 23 Cal.
9 App. 5th 667, 681 (2018) (“[A] trial court has discretion in awarding civil penalties and may
10 reduce the award for technical violations that cause no injury”). Defendant argued that if a court
11 were to find it liable for the violations alleged, any penalties awarded should be reduced under
12 this other similar line of reasoning that would render any such award of penalties as unjust,
13 arbitrary, and oppressive, and/or confiscatory.

14 *Carrington* is not the only cautionary tale. In *Magadia v. Wal-Mart Assocs. et al.*, while
15 the trial court imposed substantial PAGA penalties upon the defendant, such amount still
16 represented reductions of 67% and 80% of the potential PAGA penalties at issue. 2019 U.S.
17 Dist. Lexis 91792 at *87-*100. Moreover, this was only after the plaintiff in *Magadia* had
18 prevailed after trial. Thereafter, the Ninth Circuit reversed a substantial judgment in favor of the
19 plaintiff and the aggrieved employees. *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 682
20 (9th Cir. 2021).

21 While Plaintiff maintains that there does not exist any reason for reducing PAGA
22 penalties here, Plaintiff is aware that Defendant’s defenses could be persuasive to the Court.
23 Accordingly, Plaintiff factored in those evaluations into the proposed settlement amount.

24 **2. Potential Exposure**

25 At the time of mediation, Defendant estimated there were approximately 72,000 pay
26 periods at issue during the PAGA Period. Gavron Decl. ¶ 34. From this, Plaintiff calculated a
27 maximum exposure of approximately \$7.2 million. *Id.* ¶ 34 (\$100 x 72,000 pay periods). This
28 assumes complete victory at trial and that the Court would award the maximum penalty of \$100

1 per pay period, which is far from certain as discussed above. Further, while the PAGA provides
2 for a heightened penalty for a “subsequent violation,” courts are hesitant to award the heightened
3 penalty absent a showing of a prior violation. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th
4 1157, 1209 (2008); *accord Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service,*
5 *Inc.* 2009 WL 2448430, at *9 (S.D. Cal. Aug. 10, 2009) (“[u]nder California law, courts have
6 held that employers are not subject to heightened penalties for subsequent violations unless and
7 until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *see*
8 *also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent
9 penalty unless prior citation or court ruling).

10 Here, the Gross Settlement Amount is \$950,000.00, which is approximately 13% of the
11 total estimated exposure. Gavron Decl. ¶ 35. The proposed settlement exceeds PAGA
12 settlements that courts have approved in other cases, when considered as a percentage of the
13 overall settlement value of the case. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133,
14 *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was 0.49% of \$408,420.32
15 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015)
16 (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v.*
17 *Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was
18 0.67% of \$750,000 gross settlement). A PAGA allocation need not represent any particular
19 percentage of the overall settlement value in order to secure court approval, and courts routinely
20 approve PAGA settlements representing only a tiny fraction of the overall settlement value.

21 **VI. ATTORNEYS’ FEES, COSTS, AND PLAINTIFF’S ENHANCEMENT**

22 PAGA allows a prevailing plaintiff to obtain attorneys’ fees and costs. Cal. Lab. Code §
23 2699, subd. (g). Similar to awarding fees in a class action, California state and federal courts
24 have recognized that an appropriate method for determining award of attorneys’ fees for
25 representative actions is to use a percentage of the total value of benefits to class members by the
26 settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v.*
27 *Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
28 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of

1 this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation costs
2 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
3 burden alone.” *Vincent*, 557 F. 2d at p. 769.

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

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

26 Here, Plaintiff’s counsel seeks one-third (1/3) of the Gross Settlement Amount in
27 attorneys’ fees, or \$316,666.67, which is reasonable. *Martin v. AmeriPride Servs., Inc.*, 2011
28 WL 231604, at *8 (S.D. Cal. June 9, 2011) (“More particularly, courts may award attorneys’ fees

1 in the 30-40% range in wage and hour class actions that result in recovery of a common fund
2 under \$10 million.”); *Singer v. Becton Dickinson and Co.*, 2010 U.S. Dist. LEXIS 53416, 2010
3 WL 2196104, * 8 (S.D. Cal. June 1, 2010) (approving attorney fee award and finding that award
4 was similar to awards in three other wage and hour class action cases where fees ranged from
5 30.3% to 40%); *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007
6 WL 3492841 (E.D. Cal. Nov. 14, 2007).

7 Plaintiff’s counsel’s reimbursement request in the amount of \$9,961.42 is also
8 reasonable, especially in light of the fact that the Parties agreed that Plaintiff’s counsel may seek
9 up to \$20,000.00 in litigation costs under the Settlement Agreement. Gavron Decl. ¶ 47. As set
10 forth in Plaintiff’s counsel’s declaration, the costs were all directly incurred in the prosecution of
11 this action. Gavron Decl. ¶ 47, Exhibit B. As such, the requested costs should be awarded as
12 fair and reasonable. The difference in what was allocated in the Settlement Agreement and the
13 costs actually incurred will be allocated to the Net Settlement Amount. Settlement Agreement §
14 3.2.1.

15 Plaintiff requests and enhancement of \$10,000 and submits a declaration detailing the
16 work she has done to assist in the prosecution of this case. *See generally* Le Ai Decl. Courts
17 routinely approve requests for enhancement in these circumstances given the risk of bringing the
18 lawsuit, which was a matter of public record. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948,
19 958–59 (9th Cir. 2009) (explaining that service awards “are intended to compensate class
20 representatives for work done on behalf of the class, to make up for financial or reputational risk
21 undertaken in bringing the action, and, sometimes, to recognize their **willingness to act as a**
22 **private attorney general**”); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294,
23 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs.*
24 *Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and
25 three incentive awards of \$35,000) Future employers may be less likely to hire an employee
26 who has previously filed an action against an employer.

27 **VII. NOTICE TO THE LWDA HAS BEEN PROVIDED**

28 Pursuant to California Labor Code § 2699(1), concurrently with the filing of this Motion

1 Plaintiff uploaded the instant motion, Settlement Agreement, and proposed order to the LWDA's
2 website. Gavron Decl. ¶ 49. In addition, Plaintiff shall submit to the LWDA a copy of the
3 Court's judgment and order approving the Settlement Agreement within ten (10) days after entry
4 of judgment or order. *Id.*

5 **VIII. CONCLUSION**

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

7
8 DATED: January 20, 2023

DIVERSITY LAW GROUP, P.C.

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10 By: 

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 20, 2023, at Los Angeles, California.


Erika Mejia