

Larry W. Lee (State Bar No. 228175)
lwlee@diversitylaw.com
Christine S. Lee (State Bar No. 339947)
christine@diversitylaw.com
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
Tel: (213) 488-6555
Fax: (213) 488-6554

William L. Marder (SBN 170131)
POLARIS LAW GROUP
501 San Benito Street, Suite 200
Hollister, CA 95023
Tel: (831) 531-4214
Fax: (831) 634-0333
Email: bill@polarislawgroup.com

Edward W. Choi, Esq. SBN 211334
LAW OFFICES OF CHOI & ASSOCIATES
515 S. Figueroa St., Suite 1250
Los Angeles, CA 90071
Tel: (213) 381-1515
Fax: (213) 465-4885
Email: edward.choi@choiandassociates.com

Attorneys for Plaintiff and the Aggrieved Employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

LAKESHIA COOK-FARRAR, as an individual
and on behalf of all others similarly situated,

Plaintiff,

vs.

THE REALREAL, INC., a Delaware
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. CGC-22-599036

[Assigned for all purposes to the Hon. Ethan P.
Schulman, Dept. 304]

**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: August 19, 2024
Time: 9:00 a.m.
Dept.: 304

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

2 **PLEASE TAKE NOTICE** that on August 19, 2024, at 9:00 a.m., or as soon thereafter as
3 the matter be heard in Department 304 of the Superior Court of the State of California for the
4 County of San Francisco located at 400 McAllister Street, San Francisco, CA 94102, Plaintiff
5 LAKESHIA COOK-FARRAR (“Plaintiff”) will, and hereby does, move the Court for entry of an
6 order approving the Private Attorneys General Act Settlement Agreement (“Settlement Agreement”
7 or “Settlement”) entered into in the above-captioned civil action between Plaintiff and Defendant
8 THE REALREAL, INC. (“Defendant”) (Plaintiff and Defendant shall collectively be referred to as
9 the “Parties”) under the Labor Code Private Attorneys General Act of 2004 (the “PAGA”).

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

18 This motion is based on this notice of motion and motion for approval of the Parties’
19 Settlement Agreement concurrently filed herewith; the attached memorandum of points and
20 authorities in support of this motion; the concurrently filed declarations of Larry W. Lee, Edward
21 W. Choi, Christine S. Lee, William L. Marder, Plaintiff Lakeshia Cook-Farrar, and Jodey
22 Lawrence in support of this motion; all pleadings, records, and files in this action; and upon such
23 other matters as may be properly presented to, or received by, the Court at or before the hearing
24 on this motion.

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1 Dated: July 23, 2024

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Attorneys for Plaintiff Lakeshia Cook-Farrar
5 and the Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this motion Plaintiff LAKESHIA COOK-FARRAR respectfully requests the
4 Court's approval of the Private Attorneys General Act Settlement Agreement¹ (the "Settlement
5 Agreement" or "Settlement") with Defendant THE REALREAL, INC. ("Defendant"). The
6 settlement was reached after an informal exchange of discovery, including Aggrieved Employee
7 data, and a full-day mediation with Mediator Jeffrey Fuchsman. As part of the privileged
8 settlement negotiations, Defendant produced data regarding the Aggrieved Employees and the
9 number of pay periods at issue for each of Plaintiff's claims from which Plaintiff's counsel
10 calculated the maximum PAGA penalty exposure. Declaration of Larry W. Lee ("Lee Decl.")
11 ¶¶8, 15. Based on this information, the Parties have settled this case on a representative PAGA
12 basis for \$230,000.00. *Id.* at ¶¶9-10, Ex. B.

13 The Settlement Agreement allocates one-third of the Gross Settlement Amount for
14 attorneys' fees, or \$76,666.67, up to \$20,000.00 in litigation costs incurred by Plaintiff's
15 Counsel, \$5,000.00 to Plaintiff in exchange for a general release, and up to \$6,650.00 for
16 settlement administration costs. Settlement Agreement ¶III.4-6. For the remainder, the "PAGA
17 Payment" is allocated to the payment of civil penalties under PAGA, of which 75% is to be
18 distributed to the Labor and Workforce Development Agency (the "LWDA") and 25% of which
19 is to be distributed to the "Aggrieved Employees" on whose behalf Plaintiff filed this action as
20 required by PAGA. *Id.* ¶ III.3.

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

25 ///

26 ///

27 _____

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

1 **II. PROCEDURAL BACKGROUND**

2 On January 31, 2022, Plaintiff LAKESHIA COOK-FARRAR sent notice to the LWDA
3 giving notice of her intent to pursue a representative PAGA action, on behalf of herself and the
4 State of California as well as on behalf of other aggrieved employees (the “PAGA Notice”). Lee
5 Decl. ¶ 2, Ex. A.

6 On February 3, 2022, Plaintiff filed a Class Action Complaint against Defendant in the
7 Superior Court of California, County of San Francisco, asserting claims for: (1) Violation of
8 Labor Code §§226.7 and 512; (2) Violation of Labor Code §§201-204 and 246; (3) Violation of
9 Labor Code § 226; and (4) Violation of Business & Professions Code §17200, *et seq.* (“Class
10 Action”) *Id.* ¶ 3.

11 On April 6, 2022, Plaintiff filed a Representative Action Complaint under the Private
12 Attorney General Act of 2004 against Defendant in the Superior Court of California, County of
13 San Francisco, seeking penalties pursuant to the Private Attorneys General Act (“PAGA”) for:
14 (1) Violation of Labor Code §§226.7 and 512; (2) Violation of Labor Code §§201-204 and 246;
15 (3) Violation of Labor Code § 226 (the “PAGA Action”). *Id.* ¶ 4.

16 On May 27, 2022, the Parties submitted a stipulation in the Class Action to dismiss
17 Plaintiff’s putative class action claims without prejudice, submit Plaintiff’s individual Labor
18 Code claims to arbitration, and stay the class claims pending arbitration which was granted on
19 May 31, 2022. *Id.* ¶ 5.

20 On October 11, 2022, the Court in the PAGA Action granted Defendant’s motion to
21 compel Plaintiff’s individual Labor Code claims to arbitration and stayed Plaintiff’s
22 representative claims pending arbitration. *Id.* ¶ 6.

23 On January 24, 2024, the Parties participated in a mediation before mediator Jeffrey P.
24 Fuchsman after undertaking an investigation and exchange of information and documents
25 pertaining to Plaintiff and the Aggrieved Employees. *Id.* ¶ 7. The Parties did not resolve their
26 dispute that day and continued to engage in resolution discussions. *Id.* The Parties ultimately
27 agreed to fully and finally resolve the Action and the Released Claims as to Plaintiff, the State of
28 California, and the Aggrieved Employees by accepting the mediator’s proposal. *Id.*

1 **III. FACTUAL BACKGROUND**

2 In connection with the mediation, Defendant's Counsel provided Plaintiff's Counsel with
3 information regarding the number of pay periods where meal and rest break premium wages and
4 non-discretionary remuneration were paid during the same pay period and wage statements that
5 included the foregoing payments. Lee Decl. ¶8. Based on this information, the Parties conducted
6 settlement negotiations. *Id.* The Parties subsequently executed the Settlement Agreement. *Id.*

7 The Gross Settlement Amount is \$230,000.00. Settlement Agreement ¶¶ I.14 and III.2.
8 Settlement Agreement allocates one-third of the Gross Settlement Amount for attorneys' fees, or
9 \$76,666.67, up to \$20,000.00 in litigation costs incurred by Plaintiff's Counsel, \$5,000.00 to
10 Plaintiff in exchange for a general release, and up to \$6,650.00 for settlement administration
11 costs. *Id.* ¶ III.4-6. The remainder, or the Net PAGA Settlement Amount, is allocated to the
12 payment of civil penalties under PAGA, of which 75% (\$99,924.86) is to be distributed to the
13 LWDA and 25% (\$33,308.29) of which is to be distributed to the Aggrieved Employees on
14 whose behalf Plaintiff filed this action as required by PAGA. *Id.* at ¶ III.3

15 The Settlement Agreement provides the following PAGA Released Claims:

16 "all claims for Civil Penalties pursuant to Labor Code section 2698,
17 *et seq.* (PAGA), based on the factual allegations in operative
18 Complaint in the Action and the January 31, 2022 LWDA letter,
19 including specifically, claims for PAGA penalties arising out of or
20 based on alleged failure to pay compliant rest and meal period
21 premiums, failure to provide timely wages, failure to provide timely
22 wages upon separation, failure to provide accurate itemized wage
statements, failure to pay compliant paid sick leave, and/or failure
to maintain accurate payroll records. This released includes all
claims for civil penalties arising under the PAGA, including but not
limited to Labor Code sections 201, 202, 203, 204, 226, 226.7, 246,
512, 1174, 1174(3), 1174.5, 1199, and 1199.5, and the applicable
Wage Orders of the Industrial Welfare Commission."

23 *Id.* ¶ I.26. The Released Claims are effective during the PAGA Period (January 31, 2021 to the
24 date that the Court enters an order approving the settlement). *Id.* ¶¶ I.23 and III.7. The Released
25 Claims only cover those civil penalties which are recoverable under PAGA, and do not otherwise
26 cover individual, underlying claims or causes of action that Aggrieved Employees may have
27 under the law against Released Parties for violations of the California Labor Code. *Id.* ¶III.7.
28

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

6 **IV. STANDARD OF REVIEW**

7 Although PAGA requires courts to “review and approve” the settlement of any civil
8 action filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California
9 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
10 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d
11 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a
12 PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL
13 1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating
14 PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark”
15 and stated only that the relief provided under PAGA must be “genuine and meaningful,”
16 “consistent with the underlying purpose of the statute to benefit the public” and, in the context of
17 a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’
18 with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce
19 Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber*
20 *Techs. Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016).

21 Left to develop their own standards, federal district courts have typically followed the
22 LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and
23 reasonable in light of PAGA’s policies and purposes.” *See Haralson*, 383 F. Supp. 3d at 972
24 (collecting cases). When applying this test, federal district courts often consider factors such as
25 strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further
26 litigation; the amount offered in settlement; the extent of discovery completed; and the expertise
27 and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been
28 mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that

are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab. Code § 2699 (e)(2).

V. ARGUMENT

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

When enacting PAGA, the Legislature intended to ensure that the LWDA retained “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end, PAGA requires parties who seek approval of a proposed PAGA settlement to submit the proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§ 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system in conjunction with filing this motion. *See* Lee Decl. ¶ 40, Ex. E.

B. The Court Should Approve the Settlement Agreement

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

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

Against this backdrop, California courts have identified a set of circumstances entitling class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In particular, a presumption of fairness arises where “(1) the settlement is reached through arm’s-

length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *See Id.*

All of the factors that would give rise to a presumption of fairness in the context of a class action settlement are present in this PAGA action. After this lawsuit was commenced, the Parties agreed to engage in arm’s length negotiations between highly experienced counsel. The Parties also participated in a full-day mediation with mediator, Jeffrey P. Fucshman, Esq. Lee Decl. ¶ 7. As part of their privileged settlement negotiations, Defendant produced data regarding the number of pay periods at issue for each of the claims, from which Plaintiff’s Counsel calculated the maximum PAGA penalties and analyzed Defendant’s potential liability. Lee Decl. ¶¶ 15-20. Both Plaintiff’s and Defendant’s counsel have significant experience in litigating wage and hour class and PAGA actions, which further supports the reasonableness of the settlement. Lee Decl. ¶¶ 37-39; Declaration of Edward W. Choi (“Choi Decl.”) ¶¶ 4-5; Declaration of Christine S. Lee (“C. Lee Decl.”) ¶¶ 5-7; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 4-10. Therefore, the Settlement Agreement is entitled to a presumption of fairness.

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

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

1 Plaintiff's claims in this action are based on alleged violations of Labor Code §§ 226,
2 226.7, 512, and 2698, *et seq.* See generally Plaintiff's Complaint and PAGA notice. When
3 reviewing a settlement agreement, "the test is not the maximum amount plaintiffs might have
4 obtained at trial on the complaint," see *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
5 224, 250 (2001), nor is it "whether the settlement agreement is perfect in the estimation the
6 reviewing court." See *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is
7 "whether the settlement is reasonable under all of the circumstances." See *Wershba*, 91 Cal.
8 App. 4th at 250. Relevant considerations include the strength of a plaintiff's case and the risk,
9 expense, complexity, and likely duration of further litigation. See *Kullar v. Foot Locker Retail,*
10 *Inc.*, 168 Cal. App. 4th 116, 130 (2008); see also *Smith*, 2018 WL 1899912 at *2. In PAGA
11 settlements, courts also consider their authority to award less than the maximum penalty
12 authorized by PAGA. See Cal. Lab. Code § 2699(e)(2); see also *Smith*, 2018 WL 1899912 at *3.

13 Here, Defendant produced data for each of Plaintiff's claims, which permitted Plaintiff to
14 analyze Defendant's potential exposure and liability. Lee Decl. ¶15. Defendant's potential
15 exposure could be as high as \$1,852,550.00 if the Court were to award a \$100 penalty for each
16 pay period encompassed by the proposed settlement for violations based on failure to pay meal
17 and rest break premiums at the regular rate and \$250 penalty for each pay period a wage
18 statement was issued that included incentive payments that did not state the rate of pay or
19 corresponding hours worked. *Id.* Specifically, there were approximately 3,704 pay periods
20 wherein meal and rest break premiums and non-discretionary remuneration were paid during the
21 same pay period, which amounts to a maximum exposure of \$370,370. *Id.* There were 1,703
22 pay periods wherein sick pay wages and non-discretionary remuneration were paid during the
23 same pay period, which amounts to a maximum exposure of \$170,280.00. There were 5,010
24 unique wage statements issued to aggrieved employees that contained either meal and rest break
25 premiums or sick pay wages along with non-discretionary remuneration, which amounts to a
26 maximum exposure of \$1,252,500.00. *Id.* Finally, there were 594 former aggrieved employees
27 that were owed derivative waiting time penalties which amounts to a maximum exposure of
28 \$59,400.00 for PAGA penalties predicated on waiting time penalties. *Id.*

1 Defendant argued that even if Plaintiff prevailed, the recoverable penalties under
2 PAGA are minimal. *Id.* ¶16. Defendant also argued that its failure to pay meal breaks at the
3 regular rate of pay were in “good faith” given that the law prior to the Supreme Court’s
4 reversal of the court of appeal in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858
5 (2021), provided that meal and rest break premium wages could be paid at the base rate of pay,
6 instead of the regular rate of pay. *Id.* Moreover, Defendant argued that it acted in good faith by
7 taking immediate action to change its pay practices after *Ferra* was issued by the Supreme
8 Court. *Id.* Thus, Defendant argued that the Court would likely not impose any PAGA
9 penalties for its failure to pay meal and rest break premium wages at the regular rate of pay.
10 *Id.* While Plaintiff disagrees with this position, there is a 50% chance that Defendant’s “good
11 faith” arguments would have been persuasive and that the Court could have awarded nothing
12 for the *Ferra* claims and derivative Labor Code §203 penalties. *Id.* Based on the 50% potential
13 reduction, the realistic value of these claims amounts to \$185,185.00. *Id.*

14 Defendant argued that failure to pay sick pay wages at the regular rate was uncertain
15 given the allegations pertaining to non-discretionary bonuses and that there are no published
16 cases addressing the types of bonus pay at issue in this case, thus Defendant has a “good faith”
17 argument that it should not be imposed PAGA penalties. *Id.* ¶17. While Plaintiff disagrees
18 with the Defendant, based on a 50% potential reduction, the realistic exposure is \$85,140.00.
19 *Id.*

20 With respect to the wage statement claim, Defendant argued that wage statement
21 penalties are not available for rate violations. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.
22 App. 5th 1308, 1337 (2018). Further, even if the wage statement penalties were to be assessed,
23 Defendant argued that the appropriate maximum penalty for Labor Code §226 violations
24 should be \$100 per wage statement instead of \$250 per wage statement under *Gunther v.*
25 *Alaska Airlines, Inc.* 72 Cal. App. 5th 334, 353-354. Lee Decl. at ¶18. In a recent trial
26 involving the same Plaintiff’s attorneys, even when the \$250 per wage statement standard was
27 utilized, the Court awarded PAGA penalties for Labor Code §226 at \$50 per wage statement.
28 *Id.* If the same award is made in this case, the realistic value of the Labor Code §226 claim

1 would be \$250,500.00. *Id.* Based on the foregoing, the total realistic exposure amounts to
2 \$250,500.00. *Id.*

3 Finally, PAGA penalties for waiting time penalties also are subject to “good faith”
4 defenses and utilizing a 50% reduction, the realistic exposure amounts to \$29,700.00. Lee
5 Decl. at ¶19.

6 Further, courts have discretion to reduce PAGA penalties. *See Carrington v. Starbucks*
7 *Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving
8 PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27 Cal. App. 5th
9 809 (2018). If the Court in this case were to reduce penalties to \$5 a pay period, as was
10 approved in *Carrington*, the potential exposure amounts to approximately \$92,627.50 (5% of
11 \$1,852,550). Lee Decl. at ¶20.

12 Under the circumstances of this case, the payment of \$230,000.00 in civil penalties is
13 fair, adequate, and reasonable. The payment of \$230,000.00 in exchange for a release of only
14 those claims for civil penalties that are pleaded in the Action or that could have been pleaded
15 based on the facts alleged in the PAGA Notice and the PAGA cause of action pleaded in the
16 Action will have a substantial deterrent effect on Defendant and other California employers and
17 will confer benefits on the Aggrieved Employees, who will each receive a portion of the
18 settlement.

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

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

In the present case, the Gross Settlement Amount is approximately 42% of the realistic exposure (\$230,000/\$550,525), which is a very reasonable settlement amount. Lee Decl. ¶23. In sum, this settlement is fair, reasonable, and consistent with PAGA’s policies and purposes under these circumstances.

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

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

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

a. Percentage of the Fund

PAGA allows a prevailing plaintiff to recover reasonable attorneys’ fees. *See* Cal. Lab. Code § 2699 (g). In recognition of this, the Settlement Agreement allows Plaintiff’s Counsel to

request up to 33 and 1/3 percent (\$76,666.67) in attorneys' fees. See Settlement Agreement ¶ III.4. This amount is fair, adequate, and reasonable for two reasons.

First, in class actions, state and federal courts have held that when a class action establishes a monetary fund for the benefit of the class members out of which attorneys' fees may be paid, courts may determine the amount of a reasonable fee by "choosing an appropriate percentage of the fund created." See *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (affirming a fee award representing 33 1/3 percent of the fund and joining "the overwhelming majority of federal and state courts" in approving the "percentage method" as a reasonable means for determining attorney fee awards in class actions). While different from class action settlements in important ways, PAGA settlements also involve the establishment of a common fund for the benefit of persons other than the named plaintiff, so the reasons for utilizing the percentage method are the same. See *id.* (noting that the percentage method provides "ease of calculation," "alignment of incentives between counsel and the class," "a better approximation of market conditions in a contingency case," and the "encouragement...to seek an early settlement"). The \$76,666.67 requested by Plaintiff's Counsel represents one-third of the Gross Settlement Amount, which is consistent with awards usually approved in class actions. See *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) ("[F]ee awards in class actions average around one-third of the recovery"); see also *Laffitte*, 1 Cal. 5th at 506 (upholding the approval of a fee award equal to one-third of the total settlement amount).

b. Lodestar Cross-Check

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

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

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

25 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
26 awarded by the percentage method showing that the majority of multipliers awarded are “in the
27 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
28 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in

over 30 cases). Federal district courts applying California law have likewise routinely approved cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys' fees that resulted in lodestar multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code violations). Other courts have found even higher multipliers to be reasonable by comparison to other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal. 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases affirming a higher multiplier).

With respect to Plaintiff's Counsel's lodestar, Plaintiff's Counsel will have expended approximately 247.80 hours litigating this case, which includes approximately 15 hours of anticipated time spent after approval responding to correspondence and phone calls from Aggrieved Employees, the Settlement Administrator, and Defendant's Counsel. Lee Decl. ¶ 34; Choi Decl. ¶ 7; C. Lee Decl. ¶ 9; Marder Decl. ¶12. Plaintiff's Counsel Larry W. Lee, William L. Marder, and Edward W. Choi request an hourly rate of \$900.00 per hour. Lee Decl. ¶ 33; Choi Decl. ¶ 6 Marder Decl. ¶ 11. Plaintiff's Counsel Christine S. Lee requests an hourly rate of \$400.00 per hour. C. Lee Decl. ¶ 8. The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are not required. An attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986) .

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

1 seek compensation involve only these types of tasks. Thus, the number of hours for which fees
2 are sought is reasonable.

3 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
4 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
5 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
6 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
7 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
8 4th 629, 632-33 (1998).

9 Plaintiff's Counsel's skill and experience justify the requested rates. As shown in the
10 supporting declarations, Plaintiff's Counsel have significant experience in the area of
11 employment and wage and hour class and representative actions. Their practices focus on
12 representing employees in employment matters, particularly wage and hour cases on a
13 contingency basis. Lee Decl. ¶¶ 37-39; Choi Decl. ¶ 5; C. Lee Decl. ¶¶ 7-8; Marder Decl. ¶ 7-10.
14 As such, based on the hours and applicable rate, Plaintiff's Counsel's lodestar amount through
15 the finalization of this settlement – without a multiplier – will be approximately \$170,760.00,
16 which **exceeds the fee requested** by Plaintiff here and results in a negative lodestar multiplier.
17 Lee Decl. ¶35; Choi Decl. ¶ 7; C. Lee Decl. ¶ 9; Marder Decl. ¶ 10. Accordingly, the cross-check
18 supports the fee requested.

19 Further, the result achieved here is favorable because it amounts to a significant
20 percentage of the maximum penalties available under law, while also accounting for the risks
21 associated with moving forward with litigation and possible appeals. Lee Decl. at ¶ 30. The
22 proposed settlement of \$230,000.00 is an exceptional result when compared to the realistic
23 exposure of \$550,525.00. Court. *Id.* Courts routinely award far less than the statutory
24 maximum amount of civil penalties, even where an underlying violation of the Labor Code is
25 found. In the matter of *Magadia v. Wal-Mart Assocs., et al.*, while the trial court imposed
26 substantial PAGA penalties upon the defendant, such amount still represented reductions of 67%
27 and 80% of the potential PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100
28 (N.D. Cal. May 31, 2019). *Id.* Moreover, this was only after the plaintiff in *Magadia* had

1 prevailed after trial. *Id.* Thereafter, the Ninth Circuit reversed the trial court's ruling, which
2 demonstrates the significant risk presented in moving forward with litigation. *Magadia v. Wal-*
3 *Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th Cir. 2021). *Id.*

4 This matter was filed on a contingency basis without any sort of fixed or guaranteed fees
5 for counsel. Lee Decl. ¶ 28. Indeed, no fees or costs would have been received unless Plaintiff's
6 counsel were successful in this litigation. *Id.* This contingent representation demonstrates the
7 risk Plaintiff's counsel takes in bringing cases like this one. *Id.* As noted above, in *Magadia v.*
8 *Wal-Mart*, Plaintiff's counsel litigated the case for several years through appellate proceedings
9 expending significant attorney time and costs, only to have the appellate court reverse a
10 significant judgment achieved at the trial court. *Id.*

11 Plaintiff opposed Defendant's Motion to Compel Arbitration and litigated this case to
12 achieve the best result possible for Plaintiff and the State of California. *Id.* at ¶ 29. Plaintiff's
13 counsel later engaged in mediation and although the Parties were unable to resolve their dispute
14 that day, continued to engage in settlement negotiations. *Id.* Thus, with regard to the time and
15 labor required to resolve this action, Plaintiff's counsel has achieved an exceptional result when
16 considering the maximum potentially available penalties and have concluded that the settlement
17 on the terms set forth in the Settlement Agreement is fair, adequate, and reasonable.

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

20 PAGA also allows a prevailing plaintiff to recover litigation costs. See Cal. Lab. Code §
21 2699(g). Accordingly, the Settlement Agreement allows Plaintiff's Counsel to request up to
22 \$20,000.00 in litigation costs. Settlement Agreement ¶ III.4.

23 Plaintiff's Counsel request \$8,408.80 for the reimbursement of litigation costs. As set
24 forth in accompanying declarations of Plaintiff's Counsel, these costs were all directly incurred
25 in the prosecution of this action, including, but not limited to, filing fees, service fees, and
26 mediation fees. Lee Decl. ¶ 36, Ex. D; Choi Decl. ¶ 8, Ex. B. As such, Plaintiff's Counsel's
27 request for costs in the amount of \$8,408.80 is fair, adequate, reasonable, and consistent with
28 PAGA's policies.

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

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

8 Here, Plaintiff respectfully requests \$5,000.00, which is intended to compensate Plaintiff
9 for the time spent on this case. Declaration of Lakeshia Cook-Farrar (“Cook-Farrar Decl.”) ¶ 13.
10 Plaintiff estimates she spent over 40 hours litigating this action. *Id.* ¶¶ 7, 13. In particular,
11 Plaintiff spoke with her attorneys on several occasions to discuss the facts supporting the theories
12 of liability in this action, and continually apprised her attorneys of her understanding of
13 Defendant’s policies and practices as it related to the payment of meal/rest period premium and
14 sick pay wages. *Id.* Plaintiff also provided documents to her attorneys to evaluate the claims in
15 the case, including, but not limited to, wage statements she received throughout her employment
16 with Defendant. *Id.* Plaintiff also conferred with her attorneys regarding the terms of the
17 proposed settlement, reviewed the proposed settlement agreement, and assisted in reviewing,
18 drafting, and revising her declaration in support of the PAGA Approval. *Id.* This requested
19 enhancement is consistent with awards approved in other common fund cases. *See Van Vranken*
20 *v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of
21 \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio
22 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000).

23 Plaintiff also took the risk of bringing the lawsuit, which was a matter of public record.
24 Cook-Farrar Decl. ¶¶ 8-13. Given that future employers are less likely to hire individuals who
25 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
26 prejudice in the future from other potential employers. *Id.* Plaintiff took this risk upon herself
27 and the Aggrieved Employees benefited from these risks taken by Plaintiff. *Id.* Aggrieved
28 Employees did not have to file individual lawsuits and bear the risks of payment of costs if they

1 did not prevail, nor did they have to face the potential retaliation and not getting future
2 employment had they filed a public lawsuit. *Id.* Indeed, Plaintiff has diligently sought
3 employment but has been unable to obtain new employment. *Id.* Furthermore, Plaintiff
4 experienced personal difficulties during the pendency of this lawsuit and expended valuable time
5 attending to the needs of this lawsuit. *Id.* In light of Plaintiff's efforts, the service award should
6 be awarded to Plaintiff for her commitment, dedication, and risks taken for this litigation.

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

10 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
11 Counsel, and the LWDA, but also to Defendant's current and former employees, significant time
12 and effort will be required to administer the Settlement if it is approved by this Court. Among
13 other things, the Settlement Administrator will calculate each PAGA Settlement Employee
14 Individual PAGA Payment; issue appropriate tax forms to all parties who receive payments
15 under the Settlement Agreement; mail payments to Plaintiff, Plaintiff's Counsel, the LWDA, and
16 each Aggrieved Employee; and void any checks not cashed by Aggrieved Employees so that the
17 unclaimed amount can be forwarded to the Legal Aid at Work. *See* Settlement Agreement ¶ IV.

18 In contemplation of these expenses, the parties will engage Phoenix Settlement
19 Administrators to act as a third-party settlement administrator and have allocated up to \$6,650.00
20 to cover the cost of settlement administration. Settlement Agreement ¶ III.6; Declaration of
21 Jodey Lawrence ¶ 16, Ex. B).

22 **8. Legal Aid Should be Approved as the Cy Pres Recipient**

23 The Parties have selected Legal Aid at Work as the *Cy Pres* recipient to receive the
24 uncashed funds. Settlement Agreement ¶IV.2.d.iii. Legal Aid at Work is a nonprofit legal
25 services organization that has been assisting working families with low-incomes for more than
26 100 years. Lee Decl. ¶26. Thus, pursuant to C.C.P. §384, Legal Aid at Work is a proper
27 recipient of the uncashed funds. Plaintiff and her counsel do not have any type of relationship
28 with Legal Aid at Work. (Lee Decl. ¶ 26; Choi Decl. ¶ 9; Marder Decl. ¶ 13; C. Lee Decl. ¶ 10).

1 **VI. CONCLUSION**

2 For all of the foregoing reasons, Plaintiff requests that the Court approve the Settlement
3 Agreement pursuant to Labor Code § 2699(1)(2).
4

5 Dated: July 23, 2024

DIVERSITY LAW GROUP, P.C.

6
7 By: _____

Larry W. Lee

8 Attorneys for Plaintiff Lakeshia Cook-Farrar
9 and the Aggrieved Employees
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