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

ALICIA FERRELL, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

CORESITE, L.L.C., a Delaware limited liability
company; and DOES 1 through 50, inclusive,

Defendants.

Case No. 22CV396904

(Assigned to the Honorable Sunil R. Kulkarni,
Department 1)

**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: September 21, 2023

Time: 1:30 P.M.

Dept.: 1

Complaint Filed: April 14, 2022

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

2 **PLEASE TAKE NOTICE** that on September 21, 2023, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, before the Honorable Sunil R. Kulkarni, judge presiding,
4 in Department 1 of the above referenced Court located at 191 N. First Street, San Jose, California
5 95113, Plaintiff Alicia Ferrell ("Plaintiff") will seek an Order approving the concurrently filed
6 Settlement Agreement ("Settlement Agreement"), pursuant to the procedures set forth in Labor
7 Code § 2698, *et seq.*, the Private Attorneys General Act of 2004 ("PAGA").

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Max W. Gavron, Mai Tulyathan, and Plaintiff
10 Alicia Ferrell, the records and file herein, and on such other evidence as may be presented at the
11 hearing of the motion.

12
13 DATED: August 28, 2023

DIVERSITY LAW GROUP, B.C.

14 By: 

15 Larry W. Lee

16 Max W. Gavron

17 Mai Tulyathan

18 Attorneys for Plaintiff Alicia Ferrell
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I. INTRODUCTION

Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et seq.*, Plaintiff Alicia Ferrell (“Plaintiff”) hereby moves the Court for an order approving the non-reversionary PAGA settlement as set forth in the concurrently filed Settlement Agreement (the “Settlement Agreement” or “Settlement”).

As will be explained in further detail below, based on the California Supreme Court’s opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as called for under the PAGA on behalf of the State of California and other similarly situated aggrieved employees, without seeking class certification or meeting the requirements of class certification (*i.e.*, numerosity, typicality, commonality, and adequacy). As such, while the PAGA settlement 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 claims by the Parties. The Parties have reached such a PAGA settlement, and now seek this Court’s approval of their settlement which provides for the payment of civil PAGA penalties.

NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO PAGA

Amount”). This amount encompasses a settlement of PAGA claims asserted in this lawsuit, an enhancement award to Plaintiff in the amount of \$5,000.00, attorneys’ fees to Plaintiff’s counsel in the amount of \$47,500.00, Plaintiff’s counsel’s actual litigation costs of \$16,382.86, and settlement administration costs in an amount not to exceed \$2,950.00.

Based on the amounts above, the Net PAGA Payment is \$70,667.14. (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 14.) Pursuant to the PAGA, this amount includes approximately \$53,000.35 to be distributed to the California Labor and Workforce Development Agency (“LWDA”), and approximately \$17,666.79 to be distributed to aggrieved employees who are part of the “PAGA Group.” (*Id.* at ¶ 15.) The proposed settlement, moreover, does not release any substantive claims of members of the PAGA Group, merely their rights to bring PAGA actions predicated on violations of Labor Code § 226.

In light of the above, the proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the State of California and PAGA Group Members and accomplishes the goals of PAGA.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Litigation and Settlement

On February 11, 2022, Plaintiff provided written notice to the LWDA and Defendant asserting claims for civil penalties pursuant to PAGA predicated on violations of Labor Code § 226(a). (Tulyathan Decl. at ¶ 2.) Thereafter, on April 14, 2022, Plaintiff filed a complaint in the Superior Court of California, County of Santa Clara, asserting a single cause of action for violation of Labor Code § 2698, *et seq.*, predicated on violations of Labor Code § 226(a). (*Id.* at ¶ 3.) Specifically, Plaintiff alleges that whenever overtime wages were paid to Plaintiff and aggrieved employees, Defendant issued inaccurate wage statements that failed to identify the applicable hourly rate of pay for overtime wages. Based on that, Plaintiff alleges a violation of Labor Code § 226(a) under the PAGA. (*Id.* at ¶ 4.)

After commencement of the lawsuit, the Parties met and conferred regarding potential settlement and agreed to participate in private mediation. (*Id.* at ¶ 5.) In connection with mediation, the Parties engaged in informal discovery. Defendant provided Plaintiff with

1 information and data pertaining to the PAGA Group, including the number of wage statements
2 and pay periods at issue, as well as Defendant's policies pertaining to the issuance of wage
3 statements. (*Id.* at ¶ 6.) Defendant also provided wage statement exemplars showing that
4 Defendant cured the wage statement violation as of February 25, 2022. (*Id.*) The data provided
5 allowed Plaintiff's counsel to analyze liability and exposure in preparation for the mediation.
6 (*Id.*)

7 On October 19, 2022, the Parties participated in private mediation with wage-and-hour
8 mediator Steve Serratore, Esq. (*Id.* at ¶ 7.) The Parties spoke at length about the strengths and
9 weaknesses of each side's claims and defenses. The Parties continued settlement negotiations
10 following the mediation, facilitated by Mr. Serratore, and reached the current settlement of
11 Plaintiff's PAGA claims. (*Id.*) In resolution of Plaintiff's PAGA claims, the Parties entered into
12 the Settlement Agreement, a true and correct copy of which is attached as **Exhibit B** to the
13 Declaration of Mai Tulyathan.

14 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

15 The material terms of the Settlement are described below and set forth in detail in the
16 Settlement Agreement.

17 **A. The Aggrieved Employees or "PAGA Group"**

18 The aggrieved employees affected by this Settlement include "all individuals who are or
19 previously were employed by Defendant in California as non-exempt employees who earned
20 overtime during the PAGA Period" ("PAGA Group" or "PAGA Group Members"). (Settlement
21 Agreement at ¶ I.2.) The PAGA Period is defined as any time from February 11, 2021, through
22 February 25, 2022. (*Id.* at ¶ I.13.) The Parties agreed to the end date of the PAGA Period of
23 February 25, 2022, as Defendant revised its wage statement practices as of February 26, 2022, to
24 identify the rate of pay for overtime wages. (Tulyathan Decl. at ¶ 12.)

25 Based upon Defendant's records, the number of pay periods during which overtime
26 wages were paid to PAGA Group Members during the PAGA Period is approximately 2,972.
27 (Settlement Agreement at ¶ III.2.a.)

28 ///

1 **B. Settlement Sum and Allocation**

2 The Settlement Agreement requires Defendant to pay the Gross Settlement Amount of
3 One Hundred Forty-Two Thousand Five Hundred Dollars (\$142,500.00). (Settlement
4 Agreement at ¶ III.2.) The terms of the Settlement Agreement provide for an award of attorneys'
5 fees not to exceed \$47,500.00, and reimbursement of litigation costs of up to \$17,000.00 to
6 Plaintiff's counsel¹; enhancement payment to Plaintiff in the amount of \$5,000.00 for serving as
7 the PAGA representative; and settlement administration costs of up to \$2,950.00. (*Id.* at ¶ III.3.)

8 The balance of the Gross Settlement Amount remaining after deduction of the amounts
9 above will be available for distribution to the LWDA and PAGA Group (the balance of the Gross
10 Settlement Amount remaining after the above deductions shall be referred to as the "Net PAGA
11 Payment"). (*Id.* at ¶ I.10.) Pursuant to the PAGA, seventy-five percent (75%) of the Net PAGA
12 Payment, or approximately \$53,000.35, will be distributed to the LWDA for PAGA penalties.
13 (*Id.* at ¶ III.4; Tulyathan Decl. at ¶ 15.) The remaining twenty-five percent (25%) of the Net
14 PAGA Payment, or approximately \$17,666.79, will be distributed to the PAGA Group.
15 (Settlement Agreement at ¶ III.4; Tulyathan Decl. at ¶ 15.)

16 The portion of the Net PAGA Payment distributed to the PAGA Group will be distributed
17 on a *pro rata* basis, based on the number of pay periods that PAGA Group Members received
18 overtime compensation during the PAGA Period. (Settlement Agreement at ¶ III.4.a; Tulyathan
19 Decl. at ¶ 16.)

20 Defendant has represented that there are 141 PAGA Group Members. (Tulyathan Decl.
21 at ¶ 17.) Based thereon, on a raw average, each PAGA Group Member may potentially recover
22 approximately \$125.30 from the portion of the Net PAGA Payment attributable to the PAGA
23 Group. (*Id.*) The amount any particular PAGA Group Member will be entitled to recover will
24 fluctuate depending on the number of pay periods he or she was paid overtime wages during the
25 PAGA Period. This is fair, as it directly allocates greater penalties to individual PAGA Group
26 Members who have allegedly suffered greater harm. (*Id.*)

27 As part of the Settlement Agreement, Defendant does not object to Plaintiff's counsel's

28 ¹ As explained below, Plaintiff's counsel seeks reimbursement of actual litigation costs in the
amount of \$16,382.86.

request for attorneys' fees of approximately one-third (1/3) of the Gross Settlement Amount, *i.e.*, Forty-Seven Thousand Five Hundred Dollars (\$47,500.00), plus reimbursement of litigation costs in an amount of Sixteen Thousand Three Hundred Eighty-Two Dollars and Eighty-Six Cents (\$16,382.86), subject to the Court approving this Settlement. (Settlement Agreement at ¶ III.3.a.) Any portion of the attorneys' fees and costs not approved by the Court will be added to the Net PAGA Payment. (*Id.*) Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's request for an Enhancement Payment of Five Thousand Dollars (\$5,000.00). (*Id.* at ¶ III.3.b.)

Finally, the Settlement Agreement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. (*Id.* at ¶ III.3.c.) The Parties have agreed to retain Phoenix Settlement Administrators to administer the Settlement, with the administration costs estimated not to exceed \$2,950.00. (*Id.* at ¶¶ I.18, III.3.c; Tulyathan Decl. at ¶ 19.)

C. Scope of the Released Claims

In exchange for the payments described above, Plaintiff and the PAGA Group will release the Released Parties from the following limited release:

[A]ll claims under California Labor Code § 2698, *et seq.* (the Private Attorney General Act), based on the facts and theories alleged in Plaintiff's LWDA Letter and the Complaint, for violations of Labor Code § 226 arising within the PAGA Period.

(*Id.* at ¶¶ I.16, I.17, III.5.) The Settlement does not release Defendant from violations of any predicate statutes other than PAGA and will not affect a waiver of individual claims by PAGA Group Members against Defendant for any of the underlying Labor Code claims. (*Id.* at ¶¶ I.16, III.5.) The release is expressly limited to claims for civil penalties and attorneys' fees and costs under the PAGA pertaining to the PAGA allegations raised in the lawsuit that accrued during the PAGA Period. (*Id.*) The release applicable to PAGA Group Members expressly excludes claims outside of the PAGA Period, and excludes non-PAGA claims or any individual claims. (*Id.*)

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

Prior to the enactment of PAGA, many of the penalties provided against employers for

1 violations of certain Labor Code provisions were solely within the province of the California
2 Department of Labor to seek, enforce, and assess. (*Arias v. Superior Court* (2009) 46 Cal. 4th
3 969, 980.) However, due to the lack of financing to California's agencies and the potential
4 number of Labor Code violations by California employers, the California Legislature found that
5 it was in the public interest to allow aggrieved employees to act as private attorneys general and
6 to enforce and recover penalties on behalf of other similarly situated aggrieved employees for
7 Labor Code violations committed by their employers. (*Id.*) As such, PAGA was enacted to
8 allow such enforcement and recovery by private individuals who have been aggrieved by their
9 employers. Under the PAGA, 75% of any penalties recovered under PAGA by an aggrieved
10 employee is to be paid to the state agency, the LWDA, and the remaining 25% is to be shared
11 amongst the aggrieved employees. (Cal. Lab. Code § 2699, subd. (i).)

12 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
13 employee must first provide written notice to the LWDA and the employer of the particular
14 Labor Code violation(s) alleged to have been violated by the employer. (*See* Cal. Labor Code §
15 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not intend to
16 investigate the alleged violations or the time for the LWDA to investigate the violations passes,
17 the aggrieved employee is allowed to proceed in a civil action against the employer on behalf of
18 all other similarly aggrieved employees. (*See* Cal. Labor Code § 2699.3, subd. (a)(2)(A).)

19 In 2009, the California Supreme Court considered the issue of whether an aggrieved
20 employee who brings a PAGA claim needs to meet class certification requirements. (*Arias*, 46
21 Cal. 4th at p. 976.) After a substantial review of the legislative history of PAGA, the California
22 Supreme Court held that an aggrieved employee's representative action brought on behalf of
23 other similarly aggrieved employees against an employer for PAGA violations do not need to
24 meet the requirements for class certification. (*Id.* at pp. 975, 980-88.) As held by the California
25 Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or agent of
26 California's labor law enforcement agencies. (*Id.* at p. 986.) Because an employee's PAGA
27 action functions as a substitute for an action brought by the government itself, a judgment in the
28 PAGA action binds all those who would be bound by a judgment in an action brought by the

1 government. (*Id.*)

2 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
3 Superior Court must “review and approve any settlement of any civil action filed pursuant to”
4 PAGA. (Cal. Lab. Code § 2699, subd. (l)(2).) As the Parties to this current PAGA action have
5 reached such an agreement, the Parties now seek this Court’s approval as to the settlement of the
6 penalties amount.

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

9 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
10 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
11 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
12 hearing, are worthwhile. (*See* Alba Conte & Herbert B. Newberg (4th ed. 2002 and Supp. 2004)
13 *4 Newberg on Class Actions* § 11.25 *et seq.* and § 13.64 (“*Newberg*”).) The “judge must make a
14 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
15 and must direct the preparation of notice of the certification, proposed settlement, and date of the
16 final fairness hearing.” (*Manual for Complex Litigation, Fourth* (Fed. Jud. Ctr., 4th ed. 2004) §
17 21.632.) To make the preliminary fairness determination, courts may consider several relevant
18 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
19 duration of further litigation; the risk of maintaining class action status through trial; the amount
20 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
21 the experience and views of counsel...” (*See Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d
22 1011, 1026.)

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

1 Notably, unlike the class action settlement approval process, there is also no statutory
2 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
3 2699, subd. (1).) In addition, “[u]nnamed employees need not be given notice of the PAGA
4 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
5 settlement, if any, reached between the parties.” (*Ochoa-Hernandez v. Cjaders Foods, Inc.*
6 (N.D. Cal. 2010) 2010 WL 1340777, p. *13.)

7 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

8 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
9 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount
10 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
11 agency funding for purposes of education of employers and employees and enforcement of labor
12 laws and rights. (*See* Cal. Lab. Code § 2699, subd. (i).) Here, the settlement provides monetary
13 recovery for the aggrieved employees and the State and accomplishes PAGA’s primary objective
14 to enforce the Labor Code, and thus the Settlement certainly effectuates PAGA’s purpose. (*See*
15 *O’Connor v. Uber Techs, Inc.* (N.D. Cal. August 18, 2016) 2016 WL 4398271, at p. *18 (noting
16 that deterring noncompliance with the Labor Code is one of PAGA’s objectives).)

17 The Settlement is also consistent with the State’s public policy favoring resolution of
18 disputes. “California law favors the settlement of disputes as our high court clarified in *Neary*[].
19 Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The
20 parties are best positioned to understand their interests and resolve a dispute in a mutually
21 beneficial manner without court intervention into the settlement.” (*Consumer Advocacy Group,*
22 *Inc. v. Kintetsu* (2006) 141 Cal. App. 4th 46, 62-63 (citing *Neary v. Regents of Univ. of Cal.*
23 (1992) 3 Cal. 4th 273, 277- 278).)

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

25 The limited scope of the release supports approval of this PAGA settlement. If approved,
26 the Settlement would release the Released Parties from PAGA claims predicated on the
27 underlying violations of Labor Code § 226, that accrued during the PAGA Period, and nothing
28 more. (Settlement Agreement at ¶¶ I.16, III.5.) The Settlement would **not** impact any other

aggrieved employees' ability to pursue PAGA claims predicated on other allegations aside from those raised in this lawsuit or any Labor Code claims not predicated on the PAGA.

Because an aggrieved employee's PAGA action is a substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." (*Arias*, 46 Cal. 4th at p. 986.) However, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." (*Id.* at p. 987; *see also*, Cal. Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part").)

Accordingly, the aggrieved employees (or PAGA Group) will be subject to only a limited release strictly confined to the civil penalties available under PAGA, and attorneys' fees and costs, for violation of Labor Code § 226. (Settlement Agreement at ¶¶ I.16, III.5.) The release is therefore appropriately tailored and the settlement should be approved.

E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation

Although Plaintiff is reasonably confident that she would prevail at trial, proceeding in litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to the still-developing law under PAGA. (Tulyathan Decl. at ¶ 24.)

1. Plaintiff's Claims are Contested

Plaintiff asserts that her representative PAGA claims are based on the allegations that Defendant failed to provide accurate itemized wage statements whenever overtime wages are paid. (Tulyathan Decl. at ¶ 23.)

Defendant has denied violations of any applicable laws and denied liability for any claims asserted in the Action. (*Id.* at ¶ 25.) In this regard, Defendant argued that the alleged violation is a technical one and the Court has discretion under PAGA to reduce the maximum allowable PAGA penalties, or to decide not to award PAGA penalties at all. Should Defendant

1 have prevailed on its arguments or defenses above, the State of California and aggrieved
2 employees would have been left with minimal or zero recovery. (*Id.*) Moreover, Defendant has
3 represented that it has revised its wage statement practices as of February 26, 2022, which limits
4 any potentially recoverable PAGA penalties to the State of California and aggrieved employees.
5 (*Id.*)

6 2. Recovery of Penalties After Trial

7 Defendant represents that there were a total of approximately 2,972 wage statements with
8 payment for overtime wages between February 11, 2021, and February 25, 2022. Therefore,
9 pursuant to the PAGA, Plaintiff calculated total exposure to be as high as \$743,000.00 (2,972
10 pay periods x \$250 per pay period, pursuant to Labor Code § 226.3). (Tulyathan Decl. at ¶ 21;
11 *see Raines v. Coastal Pac. Food Dist.* (2018) 23 Cal. App. 5th 667.)

12 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
13 recovery is uncertain. Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the
14 full amount of PAGA penalties where “if, based on the facts and circumstances of the particular
15 case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or
16 confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*
17 *Corp.* (2018) 30 Cal. App. 5th 504, 517, while the plaintiff prevailed on his PAGA claim upon
18 trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s
19 good faith attempt at complying with the law. Upon review, the Court of Appeal found such a
20 reduction to be proper. (*Id.* at p. 539; *see O’Connor*, 2016 WL 4398271, at p. *17 (noting that
21 even if PAGA penalties amounted to \$1 billion, such award “could well be reduced, as a court
22 may reduce the penalty when to do otherwise would result in an award that is unjust, arbitrary
23 and oppressive, or confiscatory”).)

24 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
25 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
26 contrary.

27 The Court’s assessment of the proposed Settlement must take into account that any
28 penalties awarded may be subject to substantial reduction. When this is considered, in

1 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
2 recover nothing, the proposed settlement is patently reasonable. Settlement for a reduced value
3 allows for the distribution of penalties in an amount which accounts for the risk of continued
4 litigation, and Defendant's likely arguments that higher penalties would have been confiscatory.
5 It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one
6 of the primary goals of PAGA.

7 The proposed settlement for \$142,500.00 exceeds PAGA settlements that courts have
8 approved in other cases, when considered as a percentage of the overall settlement value of the
9 case. Here, the proposed settlement amounts to **19.2%** of the total possible liability in this
10 matter, which exceeds other PAGA settlements approved by courts. (Tulyathan Decl. at ¶ 27;
11 *see, e.g., Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133, *9 (approving
12 total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*
13 (N.D. Cal. Aug. 4, 2015) 2015 WL 5439000, *8 (approving total PAGA allocation that was 0.5%
14 of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407
15 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement).)

16 A PAGA allocation need not represent any particular percentage of the overall settlement
17 value in order to secure court approval, and courts routinely approve PAGA settlements
18 representing only a tiny fraction of the overall settlement value. The proposed settlement sum in
19 this case significantly exceeds the percentage of overall settlement value of other PAGA
20 settlements and should be approved by the Court.

21 **F. The Attorneys' Fees are Reasonable**

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.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v.*
27 *Priest* (1977) 20 Cal. 3d 25, 34 ("*Serrano III*"); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472,
28 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose of this

1 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 benefits,
6 he may require the passive beneficiaries to compensate those who created the fund. Both
7 California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at p. 35;
8 *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12
9 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund doctrine has
10 been applied “consistently in California when an action brought by one party creates a fund in
11 which other persons are entitled to share.” The reasons for applying the common fund doctrine
12 include: “fairness to the successful litigant, who might otherwise receive no benefit because his
13 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
14 the others who are entitled to share in the fund and who should bear their share of the burden of
15 its recovery; encouragement of the attorney for the successful litigant who will be more willing
16 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
17 if he is assured that he will be properly and directly compensated should his efforts be
18 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* (2016) 1 Cal. 5th 480, 503 (“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 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
27 percent of the fund. (*Laffitte*, 1 Cal.5th at p. 506.) And this was based on a lodestar amount that
28 required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier is

1 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
2 should be adjusted so as to bring the imputed multiplier within a justifiable range.” (*Id.* at p.
3 505.)

4 As a secondary support for the percentage of the fund method, when fees are allocated by
5 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
6 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in
7 this manner, does not override the trial court’s primary determination of the fee as a percentage
8 of the common fund and thus does not impose an absolute maximum or minimum on the
9 potential fee award.” (*Laffitte*, 1 Cal. 5th at p. 505 (emphasis added); *In re Rite Aid Corp. Secs.*
10 *Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check does not trump the
11 primary reliance on the percentage of common fund method”).)

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

26 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
27 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also*,
28 *e.g.*, *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying a 2.52

multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders* (1988) 203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).)

With respect to Plaintiff's counsel's lodestar, to date, approximately 93.5 hours have been expended to date by Plaintiff's counsel this matter. (Tulyathan Decl. at ¶ 35, Ex. E; Declaration of Max W. Gavron ("Gavron Decl.") at ¶ 11, Ex. A.) Plaintiff's counsel expects to incur approximately 12 additional hours of attorney time in handling post-approval matters and any settlement issues. (Tulyathan Decl. at ¶ 36.) Mr. Gavron and Ms. Tulyathan request an hourly rate of \$600.00 per hour. (Tulyathan Decl. at ¶ 37; Gavron Decl. at ¶ 12.) 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* (1986) 182 Cal. App. 3d 553, 559.)

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* (1980) 447 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. (*Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 [*Serrano IV*].)

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

Plaintiff's counsel's skill and experience justify the requested rate. As shown in the supporting declarations, Plaintiff's counsel have significant experience in the area of employment and wage and hour class actions. Specifically, Plaintiff's counsel's practice focuses

1 on representing employees in employment matters, particularly wage and hour cases. (Gavron
2 Decl. at ¶¶ 8-10; Tulyathan Decl. at ¶¶ 31-34.) As such, based on the hours and applicable rate,
3 the total lodestar to be expended by Plaintiff's counsel through finalizing this Settlement will be
4 approximately \$63,300.00, based on 105.5 total hours. (Gavron Decl. at ¶¶ 11-12, Ex. A;
5 Tulyathan Decl. at ¶¶ 35-37, Ex. E.)

6 Once the court establishes the lodestar amount, it may enhance the fee award by a
7 multiplier in order to make an appropriate fee award. (*Serrano III*, 20 Cal. 3d at p. 48.) The
8 pertinent factors include the difficulty of the questions involved and the skill in presenting them,
9 the contingent nature of the fee award, the extent to which the litigation precluded other
10 employment, and the percentage-of-the-fund the attorney would have received on the fair
11 market. (*Id.*; *Lealao*, 82 Cal. App. 4th at p. 49.) However, this list is not exhaustive and the
12 court can consider other factors it deems important in setting the multiplier. (*Ketchum v. Moses*
13 (2001) 24 Cal. 4th 1122, 1139.)

14 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
15 the-benefit, namely, no objections by class members, commendable conduct by counsel, and
16 significant recoveries by class members, all of which were previously detailed above. (*Lealao*,
17 82 Cal. App. 4th at 51-53.) The extreme effort undertaken by counsel, as shown by their hours
18 and the significantly high amount of each claim being paid out, shows commendable conduct.

19 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
20 enhancement based on a percentage-of-the-fund. (*Lealao*, 82 Cal. App. 4th at p. 52 (the
21 promptness of settlement "cannot be used to justify the refusal to apply a multiplier").)
22 According to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel
23 should be rewarded, not punished, for achieving this goal in a timely fashion. (*Id.*)

24 Here, based upon Plaintiff's counsel's lodestar of \$63,300.00, Plaintiff's request for a fee
25 award of \$47,500.00 is more than reasonable and fair. As the Court can see, the lodestar well
26 exceeds the requested fee amount, such that it would result in a *negative* multiplier.

27 As such, the requested fee award in the amount of \$47,500.00 is fair and reasonable, and
28 should be awarded in its entirety.

1 **G. The Costs are Reasonable**

2 Additionally, Plaintiff's counsel's request for reimbursement of actual litigation costs in
3 the amount of \$16,382.86 is also reasonable, given that the Settlement Agreement allows for
4 reimbursement of litigation costs of up to \$17,000.00. As set forth in Plaintiff's counsel's
5 declaration, Plaintiff's counsel incurred actual litigation costs in the amount of \$16,382.86,
6 which are costs that were directly incurred in the prosecution of this action, including filing fees,
7 service of process fees, mediation fees, and postage. (Tulyathan Decl. at ¶ 38, Ex. F.) As such,
8 the requested costs should be awarded as fair and reasonable.

9 **H. The Settlement Administrator's Fees Should be Approved**

10 The Parties have agreed to pay actual costs of administration, which will not exceed
11 \$2,950.00, to the Settlement Administrator – Phoenix Settlement Administrators, to administer
12 this Settlement. (Settlement Agreement at ¶¶ I.18, III.3.c; Tulyathan Decl. at ¶ 19, Ex. D.) The
13 Parties believe that the administration fee is reasonable and should be approved.

14 **I. Plaintiff's Enhancement Payment Should be Approved**

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

21 Here, Plaintiff seeks \$5,000.00 for the Enhancement Payment, which is intended to
22 compensate Plaintiff for the efforts in prosecuting the case and her time spent on this case,
23 including reviewing the various pleadings and documents in connection with this lawsuit.
24 (Declaration of Alicia Ferrell ("Ferrell Decl.") at ¶¶ 5-6.) As Plaintiff's requested service award
25 is a modest amount, the Court should approve this service award as requested.

26 **J. Notice to the LWDA Has Been Provided**

27 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion, the
28 Settlement Agreement, and Proposed Order to the LWDA's website. (Tulyathan Decl. at ¶ 39,

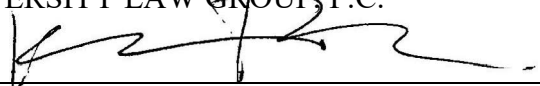
1 Ex. G.)

2 **V. CONCLUSION**

3 Based on the above, Plaintiff requests that the Court approve the current PAGA
4 settlement.

5
6 DATED: August 28, 2023

DIVERSITY LAW GROUP, P.C.

7 By: 

8 Larry W. Lee

9 Max W. Gavron

Mai Tulyathan

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