

Larry W. Lee (State Bar No. 228175)
Kristen M. Agnew (State Bar No. 247656)
Nicholas Rosenthal (State Bar No. 268297)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554s facsimile
lwlee@diversitylaw.com
kagnew@diversitylaw.com
nrosenthal@diversitylaw.com

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

Attorneys for Plaintiff and Aggrieved Employees

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

CAROLYN SCHMIDT-GUNTHNER, as
an individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

THE HIGH DESERT 'PARTNERSHIP
IN ACADEMIC EXCELLENCE'
FOUNDATION, INCORPORATED, a
California nonprofit corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: CIVSB2213906

[Assigned for all purposes to the Hon. David Cohn,
Dept. S-26]

**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: August 31, 2023
Time: 9:00 a.m.
Dept: S-26

Complaint Filed: July 6, 2022
Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on August 31, 2023, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable David Cohn, Judge presiding in Department S-26
4 of the above-referenced Court located at 247 West 3rd Street, San Bernardino, California 92415,
5 Plaintiff Carolyn Schmidt-Gunthner (“Plaintiff”) will seek an Order approving the concurrently
6 filed PAGA Settlement Agreement (the “Settlement Agreement” or “Agreement”), pursuant to
7 the procedures set forth in 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 Kristen M. Agnew and Nicholas Rosenthal,
10 and Plaintiff Carolyn Schmidt-Gunthner, the records and file herein, and on such other evidence
11 as may be presented at the hearing of the motion.

12
13 DATED: August 9, 2023

DIVERSITY LAW GROUP, P.C.

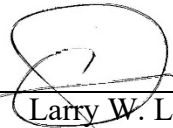
14
15 By: 
16 Larry W. Lee
17 Kristen M. Agnew
18 Nicholas Rosenthal
19 Attorneys for Plaintiff and the Aggrieved
20 Employees
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION.....	6
II.	PROCEDURAL HISTORY	6
A.	Summary of the Litigation and Settlement	6
1.	The Operative Complaint.....	6
2.	The Parties Engage in Written Discovery.....	7
3.	The Parties Participate in Arms-Length Settlement Negotiations	7
III.	SUMMARY OF THE PROPOSED PAGA SETTLEMENT.....	7
A.	The Aggrieved Employees.....	8
B.	Settlement Sum and Allocation.....	8
C.	Scope of the Released Claims.....	9
IV.	THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED	10
A.	PAGA Overview.....	10
B.	Class Action Settlement Standards Do Not Govern the Settlement Approval Process for PAGA Claims	11
C.	The Settlement is Reasonable and Effectuates PAGA’s Objectives.....	12
D.	The Scope of the Release is Appropriately Limited.....	12
E.	The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of Litigation.....	13
1.	Plaintiff’s Claims are Contested	13
2.	Recovery of Penalties After Trial	14
3.	Settlement is Reasonable When Compared to the Value of the Underlying Labor Code Claim	15
F.	The Attorneys’ Fees are Reasonable	16
G.	Plaintiff’s Release Payment Should be Approved.....	18
H.	The Settlement Administrator’s Costs Should be Approved.....	19
I.	Notice to the LWDA Has Been Provided.....	19
V.	CONCLUSION	19

TABLE OF AUTHORITIES

Other Authorities

Alba Conte & Herbert B. Newberg, <i>4 Newberg on Class Actions</i> § 11.25, <i>et seq.</i> and § 13.64 (4th ed. 2002 and Supp. 2004)	11
<i>Manual for Complex Litigation, Fourth</i> § 21.632 (Fed. Jud. Ctr., 4th ed. 2004)	11

Federal Cases

<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F.3d 1117, 1123 (9th Cir. 2014)	11
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	17
<i>Brotherton v. Cleveland</i> , 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001)	19
<i>Cook v. Niedert</i> , 142 F.3d 1004, 1016 (7th Cir. 1998)	19
<i>Cotter v. Lyft, Inc.</i> , 2016 WL 3561742 (N.D. Cal. June 23, 2016).....	16
<i>Enter. Energy Corp. v. Columbia Gas Transmission Corp.</i> , 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)	19
<i>Glass v. UBS Fin. Servs.</i> , No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)	19
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1026 (9th Cir. 1998)	11
<i>Hopson v. Hanesbrands Inc.</i> , 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009)	15
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990) .	19
<i>Lusby v. Gamestop Inc.</i> , 97 F.R.D. 400, 407 (N.D. Cal. 2013)	16
<i>Magadia v. Wal-Mart Assocs. et al.</i> , 2019 U.S. Dist. Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019)	15
<i>Moore v. PetSmart, Inc.</i> , 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015)	16
<i>Ochoa- Hernandez v. Cjaders Foods, Inc.</i> , 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010)...	10,
12	
<i>O'Connor</i> , 201 F.Supp.3d 1110 at 1133	15
<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948, 958-59 (9th Cir. 2009)	18
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	19
<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	17

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 980 (2009)	10, 11, 12
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504, 517 (2018)	14
<i>City and County of San Francisco v. Sweet</i> , 12 Cal. 4th 105, 110 (1995).....	17
<i>Consumer Advocacy Group, Inc. v. Kintetsu</i> , 141 Cal. App. 4th 46, 62-63 (2006)	12
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	17, 18
<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal. 4th 273, 277- 278 (1992).....	12
<i>Raines v. Coastal Pac. Food Distributors, Inc.</i> , 23 Cal. App. 5th 667, 681 (2018).....	14
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	17
<i>Thurman v. Bayshore Transit Management, Inc.</i> , 203 Cal. App. 4th 1112, 1136 (2012).	13, 14
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 254 (2001).....	17

Statutes

Cal. Lab. Code § 2699(i).....	12
Cal. Lab. Code § 2699(c)	10
Cal. Lab. Code § 2699(g)(l).....	12
Cal. Lab. Code § 2699.3(a)(2)	10
Cal. Lab. Code § 2699.3(a)(l)	10

1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
3 2698, *et seq.*, Plaintiff Carolyn Schmidt-Gunthner (“Plaintiff”) hereby moves the Court for an
4 order approving the non-reversionary settlement with Defendant The High Desert ‘Partnership in
5 Academic Excellence’ Foundation, Incorporated (“Defendant”), as set forth in the concurrently
6 filed PAGA Settlement Agreement (the “Settlement Agreement” or “Agreement”).

7 As demonstrated below and in the accompanying declaration of Kristen M. Agnew, the
8 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
9 investigation and both formal and informal discovery, including Defendant’s production of payroll
10 data, as well as information pertaining to Defendant’s payroll policies and procedures.
11 Furthermore, pursuant to the terms of the Settlement Agreement, Defendant will pay the gross
12 amount of \$97,500.00 (the “Total Settlement Amount”), which includes an estimated payment of
13 approximately \$39,016.03 in civil penalties to the California Labor and Workforce Development
14 Agency (“LWDA”). The proposed release is narrowly tailored to release only claims for civil
15 penalties under PAGA predicated on Labor Code section 204.

16 The proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf
17 of the LWDA and aggrieved employees, and accomplishes the goals of the PAGA.

18 **II. PROCEDURAL HISTORY**

19 **A. Summary of the Litigation and Settlement**

20 **1. The Operative Complaint**

21 On May 2, 2022, Plaintiff filed a written notice pursuant to Labor Code section 2699 with
22 the LWDA, alleging that Defendant failed to pay wages in a timely manner (“PAGA Notice”). *See*
23 Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 3, Ex. 1. Thereafter, on July 6, 2022, Plaintiff
24 filed a Complaint against Defendant in the Superior Court of the State of California, County of
25 San Bernardino. *See id.* at ¶ 4. Plaintiff asserts a single cause of action for violation of PAGA,
26 predicated on Defendant’s alleged violation of Labor Code section 204. *See id.*

27 Plaintiff’s representative action claims arise from Defendant’s failure to pay wages in a
28 timely manner. *See* Agnew Decl. ¶ 3. Specifically, Plaintiff contends that Defendant paid wages

1 more than ten days after the close of the payroll period, in violation of Labor Code section 204.
2 *See id.* As a result of the alleged violations, Plaintiff seeks civil penalties under PAGA, as well as
3 attorneys' fees, and costs. *See id.* at ¶ 4. Defendant disputes and denies Plaintiff's allegations and
4 claims asserted in the operative Complaint. *See id.* at ¶ 5.

5 **2. The Parties Engage in Written Discovery**

6 On November 18, 2022, Plaintiffs propounded written discovery, including Special
7 Interrogatories (Set One) and Requests for Production of Documents (Set One). *See Agnew*
8 Decl. ¶ 6. The discovery required Defendants to provide documents and information relevant to
9 the number of alleged aggrieved employees, the number of pay periods in which wages were
10 paid more than seven days after the close of the pay period, and Defendant's policies pertaining
11 to its payroll calendar. *See id.* Defendant provided fulsome and substantive responses to the
12 discovery requests. *See id.* at ¶ 7. As part of the discovery responses, Defendant confirmed that it
13 altered its payroll practices relative to the entirety of Plaintiff's allegations on or before June 29,
14 2022. *See id.*

15 **3. The Parties Participate in Arms-Length Settlement Negotiations**

16 Following the initial round of written discovery, the Parties agreed to explore the
17 possibility of settlement through direct negotiations. *See Agnew Decl.* ¶ 8. In connection with the
18 Parties' negotiations, Defendant provided the number of potential Aggrieved Employees and the
19 aggregate number of pay periods in which wages were paid during the period of July 6, 2021, to
20 June 30, 2022 ("PAGA Period"). *See id.* at ¶ 9. In total, 217 Aggrieved Employees received the
21 payment of wages in 3,261 pay periods during the PAGA Period. *See id.* This information allowed
22 Plaintiff's Counsel to perform a comprehensive penalty analysis. *See id.*

23 On or about July 7, 2023, the Parties reached a settlement in principle of the entire action.
24 *See Agnew Decl.* ¶ 10. The Parties thereafter worked to memorialize the terms of the settlement
25 in a long-form settlement agreement. *See id.* On or about August 8, 2023, the Parties fully executed
26 the PAGA Settlement Agreement. *See id.* at ¶ 11.

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

28 The material terms of the Settlement are described below and set forth in detail in the

1 concurrently filed PAGA Settlement Agreement, a true and correct copy of which is attached as
2 **Exhibit 2** to the Declaration of Kristen M. Agnew.

3 **A. The Aggrieved Employees**

4 The Settlement includes all current and former California employees of Defendant who
5 were paid wages by Defendant any time during July 6, 2021, through June 30, 2022 (“Aggrieved
6 Employees”). *See* Settlement Agreement (“SA”) §§ I-A, I-N. Based on Defendant’s records, there
7 are 217 Aggrieved Employees. *See* Agnew Decl. ¶ 12. These individuals received the payment of
8 wages in 3,261 pay periods during the PAGA Period. *See* SA §§ SA II-E.

9 **B. Settlement Sum and Allocation**

10 The Settlement Agreement requires Defendant to pay the gross amount of Ninety-Seven
11 Thousand and Five Hundred Dollars (\$97,500.00) (the “Total Settlement Amount”). *See* SA § II-
12 A. Based on the Total Settlement Amount, Defendant will pay approximately \$29.89 per pay
13 period to resolve the claims in this case. *See* Agnew Decl. ¶ 14.

14 The balance of the Total Settlement Amount remaining after deduction of the approved
15 attorneys’ fees and litigation costs to Plaintiff’s counsel, Settlement Administrator’s costs, and
16 Plaintiff’s Release Payment (the “Net Settlement Amount”), will be available for distribution to
17 the LWDA and Aggrieved Employees. *See* SA § I-J. The Net Settlement Amount will total
18 approximately \$52,021.38. *See* Agnew Decl. ¶ 14. Seventy-five percent (75%) of the Net
19 Settlement Amount, or approximately \$39,016.03, will be paid to the LWDA for PAGA penalties
20 (“LWDA Payment”). *See* SA § III-E; Agnew Decl. ¶ 19. The remaining twenty-five percent (25%),
21 or approximately \$13,005.35, will be distributed to Aggrieved Employees. *See* SA § III-E; Agnew
22 Decl. ¶ 19.

23 The amount any particular Aggrieved Employee will be entitled to recover will depend on
24 the number of pay periods in which he or she received the payment of wages during the PAGA
25 Period, with some entitled to receive more and others less. *See* SA §§ III-E, III-F. This is fair, as
26 it directly allocates greater penalties to individuals who have allegedly suffered greater harm. *See*
27 Agnew Decl. ¶ 20. Any uncashed checks will be paid out pursuant to California Code of Civil
28 Procedure section 384 to the *cy pres* recipient, Millionaire Minds. *See* SA § III-O. Millionaire

Minds is a 501(c)(3) non-profit organization that operates STEM camps and other outreach for underserved students within the High Desert community. *See id.* The Parties warrant and represent that they do not have a relationship, financial or otherwise, with the cy pres recipient. *See id.*

As part of the Settlement, Defendant does not object to Plaintiff's Counsel's request for attorneys' fees of approximately one-third of the Total Settlement Amount, *i.e.*, Thirty-Two Thousand Five Hundred Dollars (\$32,500.00), and reimbursement for litigation costs in an amount up to Five Thousand Dollars (\$5,000.00), subject to the Court finally approving this Settlement. *See SA § III-C.* Any partition of the requested attorneys' fees and/or costs not approved by the Court shall be added to the Net Settlement Amount. *See id.*

Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's request for a Release Payment to Plaintiff in an amount not to exceed Seven Thousand Dollars (\$7,000.00). *See SA § III-D.* Any portion of the Release Payment to Plaintiff that is not approved by the Court shall become part of the Net Settlement Amount. *See id.*

Finally, the Settlement Agreement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. *See SA § III-G.* The Parties have agreed to utilize Phoenix Settlement Administrators to administer the settlement, with the administration costs estimated to be Three Thousand Two Hundred Fifty Dollars (\$3,250.00). *See id.* at §§ I-V, III-G.

C. Scope of the Released Claims

In exchange for the payments described above, Plaintiff and Aggrieved Employees will release Defendant and Released Parties from:

All claims for penalties under PAGA, including costs and attorneys' fees related thereto, predicated on the violation of Labor Code section 204 arising from or reasonably related to the facts alleged in the Complaint and PAGA Notice that accrued during the PAGA Period.

See SA § I-P. The Settlement is not intended to release, nor does it extend to, violations of any predicate statutes other than PAGA. *See id.* The Settlement also does not effect a waiver of claims by Aggrieved Employees against the Released Parties for any individual wage and hour claims. *See id.*

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the LWDA and other aggrieved employees, to bring suit against their employers for alleged violations of the California labor laws and to obtain penalties that previously could only be obtained by the State. The PAGA was enacted because the Legislature determined that it was “in the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover civil penalties for Labor Code violations,” since the State had not been able to fully or adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” [citations omitted].)

Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved employee” means “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an action, the allegedly aggrieved employee must provide notice to the LWDA and the employer setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA decides not to investigate the allegations or issue a citation to the employer, the proposed representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code § 2699.3(a)(2).

The California Supreme Court has explained that a plaintiff who brings a PAGA claim “represents the same legal right and interest as state labor law enforcement agencies,” and brings

PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA representative’s recovery is “an incentive to perform a service to the state, not restitution for wrongs done to members of the class”).

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

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

By contrast, court approval of PAGA settlements is governed by section 2699(1) of the Labor Code, which provides, in relevant part: “The court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.” The parties are not obligated to “satisfy class action requirements,” including the standards for class action settlement approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that “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(i). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
4 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
5 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

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

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

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

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

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

1 part”).

2 Here, if approved, the Settlement would release Defendant and Released Parties from all
3 claims for civil PAGA penalties predicated on Labor Code section 204—and nothing more. *See*
4 SA § I-P. The Settlement would not impact any Aggrieved Employee’s ability to pursue PAGA
5 claims predicated on other Labor Code violations. *See id.* Nor does the Settlement release
6 individual wage and hour claims that Aggrieved Employees may have against Defendant. *See id.*
7 Therefore, the limited scope of the release also supports approval.

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

10 Though Plaintiff is reasonably confident that she would prevail at trial, proceeding in
11 litigation entails significant risk on the underlying merits of Plaintiff’s theories, in addition to the
12 still-developing law under PAGA.

13 **1. Plaintiff’s Claims are Contested**

14 Plaintiff asserts that her representative PAGA claim is based on the allegation that
15 Defendant had a consistent policy of paying wages to Aggrieved Employees more than ten days
16 following the close of the pay period, in violation of Labor Code section 204. *See Agnew Decl.*
17 ¶¶ 3, 24. The Parties dispute whether wages were timely paid. *See id.* at ¶ 24. Defendant,
18 moreover, argues that even if the Court ultimately found a violation of Labor Code section 204,
19 the alleged violation is a technical one, which did not result in the underpayment of wages to
20 Aggrieved Employees. *See id.* at ¶ 25.

21 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
22 recovery is uncertain. Defendant contends that it made a good faith effort to comply with the
23 law. *See Agnew Decl.* ¶ 25. As argued by Defendant, in deciding whether to award the maximum
24 penalty amount, courts may focus on whether the employer made a good faith effort to follow
25 the law. For example, in *Thurman v. Bayshore Transit Management, Inc.*, the Court of Appeal
26 upheld the trial court’s significant reduction of PAGA penalties by 30% because the employer
27 was not initially on notice that it was in violation of the law and because it would have been
28 unfair to award penalties where the employer was unaware of the violations. 203 Cal. App. 4th

1 1112, 1136 (2012). When the employer made aware of the violations, it timely took steps to
2 come into compliance. *Id.* By contrast, the imposition of full penalties was justified when an
3 employer took a “cavalier approach to fulfilling its contractual and statutory obligations” and
4 demonstrated “reckless disregard.” *Id.* Furthermore, as the California Court of Appeal has
5 affirmed, trial courts are well within their discretion to reduce PAGA penalties “for technical
6 violations that cause no injury,” especially where the “violation was inadvertent.” *Raines v.*
7 *Coastal Pac. Food Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018).

8 In this case, Defendant asserted that a substantial reduction in potential PAGA penalties
9 was warranted because: (1) the alleged violations were inadvertent; (2) after Defendant received
10 Plaintiff’s pre-filing LWDA notice, it changed its payroll system to pay wages within seven days
11 of the close of the pay periods; and (3) Aggrieved Employees did not suffer any economic harm
12 as a result of the alleged violations of Labor Code section 204. *See Agnew Decl.* ¶ 27. Thus,
13 Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its
14 inadvertent behavior, much less to deter it from committing any future violations that were
15 completely foreclosed by its new payroll practices. *See id.*

16 **2. Recovery of Penalties After Trial**

17 Defendant has indicated that there are approximately 3,261 pay periods in which
18 Aggrieved Employees received the payment of wages during the PAGA Period. *See Agnew*
19 *Decl.* ¶ 23; SA § II-E, III-B. Therefore, pursuant to the PAGA, Plaintiff has calculated total
20 exposure, if the Court were to award penalties for each violation alleged, could total as high as
21 \$326,100. *See Agnew Decl.* ¶ 23. Even then, pursuant to Labor Code § 2699(f)(2) the Court can
22 decline to award the full amount of PAGA penalties “if, based on the facts and circumstances of
23 the particular case, to do otherwise, would result in an award that is unjust, arbitrary and
24 oppressive, or confiscatory.” Courts routinely award far less than the statutory maximum amount
25 of civil penalties, even where an underlying violation of the Labor Code is found. Indeed, as
26 shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff
27 prevailed on his PAGA claim at trial, the trial court reduced the maximum PAGA penalty
28 amount by 90%, citing the employer’s good faith attempt at complying with the law. 30 Cal.

1 App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be proper.
2 *Id.* at 539; *see O'Connor*, 201 F.Supp.3d 1110 at 1133 (noting that even if PAGA penalties
3 amounted to \$1 billion, such award “could well be reduced, as a court may reduce the penalty
4 when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
5 confiscatory”); *Magadia v. Wal-Mart Assocs. et al.*, 2019 U.S. Dist. Lexis 91792 at *87-*100
6 (N.D. Cal. May 31, 2019) (while the trial court imposed substantial PAGA penalties upon the
7 defendant, such amount still represented reductions of 67% and 80% of the potential PAGA
8 penalties at issue).

9 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
10 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
11 contrary. *See Agnew Decl.* ¶¶ 26, 27.

12 **3. Settlement is Reasonable When Compared to the Value of the**
13 **Underlying Labor Code Claim**

14 The Court’s assessment of the proposed settlement must take into account that any
15 penalties awarded may be subject to substantial reduction. When this is considered, in
16 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
17 nothing, the proposed settlement is patently reasonable. Indeed, the Total Settlement Amount is
18 approximately 29.89% of the maximum amount of penalties at issue, if the Court awarded \$100
19 per pay period in which wages were untimely paid. *See Agnew Decl.* ¶ 28. Settlement for this
20 reduced value allows for the distribution of penalties in an amount which accounts for the risk of
21 continued litigation and Defendant’s likely arguments that higher penalties would have been
22 confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the future,
23 which is one of the primary goals of PAGA.

24 The proposed settlement exceeds PAGA settlements that courts have approved in other
25 cases, when considered as a percentage of the overall settlement value of the case. The proposed
26 settlement, in fact, far exceeds other PAGA settlements approved by courts—including those
27 that provide for less than the one percent allocation to PAGA penalties. *See, e.g., Hopson v.*
28 *Hanesbrands Inc.*, 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA

1 allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL
2 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of
3 \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013)
4 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in
5 *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as
6 independent contractors. 2016 WL 3561742 (N.D. Cal. June 23, 2016). The parties settled all
7 Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7%
8 of the total settlement. *Id.* at *2. In granting preliminary approval to the proposed settlement in
9 *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the
10 maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the
11 typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at
12 *5.

13 Given Defendant’s potential defenses to the alleged violations at issue, the risks and costs
14 of continued litigation, Plaintiff and her attorneys believe that the Settlement is fair and
15 reasonable. *See* Agnew Decl. ¶ 29; Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 3.
16 The Settlement proposes a payment of approximately \$39,016.03 in penalties to the LWDA and
17 approximately \$13,005.35 in penalties to the Aggrieved Employees, which is an outstanding
18 result in a PAGA-only case. *See* Agnew Decl. ¶19. Plaintiff’s Counsel has significant experience
19 litigating wage and hour claims including claims for PAGA penalties, and the Settlement here is
20 similar to or greater than similar settlements that courts have approved. *See* Agnew Decl. ¶¶30-
21 36. Furthermore, as set forth in the accompanying Kristen M. Agnew Declaration, the LWDA
22 has been provided notice of this motion and the PAGA settlement. *See id.* ¶ 41. The decision of
23 the LWDA to accept the Settlement and not oppose the motion should be given considerable
24 weight.

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

26 Labor Code § 2699(g)(1) provides for the recovery of attorneys’ fees and costs in any
27 successful action brought under PAGA. Although this is not a class action, in class actions
28 California state and federal courts have recognized that an appropriate method for determining

award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F. 2d at 769.

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

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

1 of a reasonable fee by choosing an appropriate percentage of the fund created.”).

2 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
3 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
4 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
5 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
6 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

7 Here, as set forth in the Agnew and Rosenthal Declarations, Plaintiff’s attorneys estimate
8 that they have spent at least 52 hours litigating this current action. *See* Agnew Decl. ¶¶ 39,
9 Exhibit 4; Rosenthal Decl. ¶ 6, Exhibit 1. Counsel anticipates spending an additional two hours
10 preparing for the hearing on this motion, corresponding with the Settlement Administrator and
11 Defendant’s counsel regarding administration of the settlement. *See* Agnew Decl. ¶ 39. Based
12 thereon and based on counsel’s hourly rate of \$700, the lodestar equates to \$37,800 ([52 hours +
13 2 hours] x 700), which exceeds the amount of the requested fees. *See* Agnew Decl. ¶ 40, Exhibit
14 4; Rosenthal Decl. ¶7, Exhibit 1. Thus, the requested fee amount of \$32,500.00 is fair and
15 reasonable.

16 Additionally, Plaintiff’s Counsel’s cost reimbursement request in the amount of
17 \$2,728.62 is also reasonable. *See* Agnew Decl. ¶ 38, Exhibit 3. The costs were all directly
18 incurred in the prosecution of this action, including filing fees, postage, copying, and service of
19 process fees. *See id.* As such, the requested costs should be awarded as fair and reasonable.

20 **G. Plaintiff’s Release Payment Should be Approved**

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

27 Here, Plaintiff seeks \$7,000 for her service award, which is intended to compensate
28 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for

hesitation from later prospective employers that might find out he brought this claim, and for executing a general release, including for all known and unknown claims under Civil Code § 1542. *See* SA §§ III-D, III-S; Declaration of Carolyn Schmidt-Gunthner ¶ 8. This requested enhancement is consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in ERISA case).

H. The Settlement Administrator's Costs Should be Approved

The Parties have agreed to pay actual costs of administration, or \$3,250, to the Settlement Administrator, Phoenix Settlement Administrators, to administer this Settlement. *See* SA §§ I-V, III-G. The Parties believe that the administration fee is reasonable and should be approved.

I. Notice to the LWDA Has Been Provided

As discussed above, and concurrent with the filing of this Motion, Plaintiff uploaded the instant motion to the LWDA's website. Agnew Decl. ¶ 41.

V. CONCLUSION

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

DATED: August 9, 2023

DIVERSITY LAW GROUP, P.C.

By: 
Larry W. Lee
Kristen M. Agnew
Nicholas Rosenthal
Attorneys for Plaintiff and the Aggrieved
Employees