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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER**

STEPHANIE KARABINUS, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

CIRCLE PIZZA, LLC, a Delaware
Limited Liability Company; and DOES 1
through 50, inclusive,
Defendants.

Case No.: S-CV-0048669

**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: December 5, 2023
Time: 8:25 a.m.
Dept: 42

Complaint Filed: June 27, 2022
Trial Date: None

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

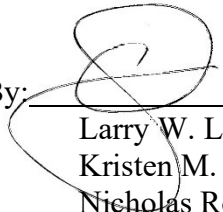
2 **PLEASE TAKE NOTICE** that on December 5, 2023, at 8:25 a.m., or as soon thereafter
3 as the matter may be heard, in Department 42 of the above-referenced Court located at 10820
4 Justice Center Drive, Roseville, California 95678, Plaintiff Stephanie Karabinus (“Plaintiff”) will
5 seek an Order approving the concurrently filed Joint Stipulation of Settlement and Release Under
6 the Private Attorneys General Act (“Agreement” or “Settlement”), pursuant to the procedures set
7 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 Plaintiff Stephanie
10 Karabinus, the records and file herein, and on such other evidence as may be presented at the
11 hearing of the motion.

12 Pursuant to Local Rule 20.2.3, the court will issue a tentative ruling for this matter on the
13 court day before the hearing. The tentative ruling will be available after 12:00 noon as an audio
14 recording accessible at (916) 408-6480; the tentative ruling will also be available at the court’s
15 website, www.placer.courts.ca.gov. The tentative ruling shall become the final ruling on the
16 matter and no hearing will be held unless oral argument is timely requested or the tentative ruling
17 indicates otherwise. Requests for oral argument must be made by calling (916) 408-6481 no later
18 than 4:00 p.m. on the court day prior to the hearing.

19
20 DATED: October 2, 2023

DIVERSITY LAW GROUP, P.C.

21
22 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

23
24 Attorneys for Plaintiff and the Aggrieved
25 Employees
26
27
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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section
3 2698, *et seq.*, Plaintiff Stephanie Karabinus (“Plaintiff”) hereby moves the Court for an order
4 approving the non-reversionary settlement with Defendant Circle Pizza, LLC (“Defendant” or
5 “Circle Pizza”), as set forth in the concurrently filed Joint Stipulation of Settlement and Release
6 Under the Private Attorneys General Act (“Agreement” or “Settlement”).

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, Defendant will pay the gross amount of
12 \$350,000.00 (the “Gross Settlement Amount”), which includes an estimated payment of
13 approximately \$153,931.90 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 the specific Labor Code violations alleged in the Complaint.

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. The PAGA Notice**

20 On June 13, 2022, Plaintiff submitted written notice under Labor Code section 2699.3 to
21 the California Labor and Workforce Development Agency (“LWDA”) and Defendant, alleging
22 that Defendant violated Labor Code sections 201, 202, 203, 204, 226, 226.7, 246, 510, 512, 558,
23 1194, 1197, and 1197.1 (the “PAGA Notice”). *See* Declaration of Kristen M. Agnew (“Agnew
24 Decl.”) ¶ 3, Exhibit 1.

25 As set forth in the PAGA Notice, Plaintiff contends that, as matter of policy and practice,
26 Defendant: (1) failed to properly pay minimum, regular, and overtime wages for all hours worked,
27 in violation of Labor Code sections 201, 202, 203, 204, 510, 558, 1194, 1197, and 1197.1; (2)
28 failed to provide duty free meal and rest periods and/or pay premium compensation in lieu thereof

1 at the regular rate of pay, in violation of Labor Code sections 226.7 and 512; (3) failed to provide
2 accurate itemized wage statements, in violation of Labor Code section 226; and (4) failed to pay
3 sick pay at the correct regular rate of pay, in violation of Labor Code sections 201, 202, 203, 204
4 and 246. *See* Agnew Decl. ¶ 4.

5 **B. The Operative Complaint**

6 On June 27, 2022, Plaintiff filed a Class Action Complaint in the Action. Due to the
7 existence of an arbitration agreement with a class action waiver, Plaintiff dismissed the class
8 claims and opted to proceed on a representative basis only. *See* Agnew Decl. at ¶ 5. On August 8,
9 2022, Plaintiff filed the operative First Amended Representative Action Complaint. *See id.* at ¶ 6.
10 As set forth in the Complaint, Plaintiff asserts a single cause of action for violation of PAGA
11 predicated on the alleged Labor Code violations set forth in the PAGA Notice. *See id.* Plaintiff
12 seeks civil penalties under PAGA, as well as attorneys' fees, and costs. *See id.* Defendant disputes
13 and denies Plaintiff's allegations and claims asserted in the operative Complaint. *See id.* at ¶ 7.

14 **C. The Parties Engage in Formal and Informal Discovery**

15 On August 26, 2022, Plaintiff propounded Special Interrogatories (Set One) and Requests
16 for Production of Documents (Set One). *See* Agnew Decl. ¶ 8. The discovery required Defendant
17 to produce Plaintiff's time and payroll records, Defendant's non-discretionary bonus plans, meal
18 and rest period policy, store opening and closing procedures, as well as Circle Pizza's policies
19 relating to the calculation of hours worked (including whether time spent arming and disarming
20 the alarm is compensable), the calculation of the regular rate of pay for the purpose of paying
21 meal/rest period premiums and/or overtime wages, and the calculation of sick pay wages. *See id.*
22 The discovery further required Defendant to provide information relevant to the number of
23 alleged aggrieved employees, the aggregate number of pay periods worked by aggrieved
24 employees, the number of pay periods in which aggrieved employees worked at least one
25 workweek in which he or she earned both non-discretionary incentive pay and overtime wages,
26 the number of pay periods in which aggrieved employees worked at least one workweek in which
27 he or she earned both non-discretionary incentive pay and sick pay wages, the number of pay
28 periods in which aggrieved employees worked at least one workweek in which he or she earned

1 both non-discretionary incentive pay and meal/rest period premiums, and the number of
2 aggrieved employees who separated employment. *See id.* at ¶ 9. Defendant provided substantive
3 responses to the Requests for Production of Documents and Special Interrogatories. *See id.* at ¶
4 10.

5 The Parties further stipulated to the production of the contact information of aggrieved
6 employees through the *Belaire-West* process. *See Agnew Decl.* ¶ 11. Through the *Belaire-West*
7 process, Plaintiff received the contact information of approximately 900 alleged aggrieved
8 employees. Plaintiff's Counsel interviewed several employees regarding their experience with
9 Circle Pizza. *See id.*

10 **D. The Parties Participate in Private Mediation**

11 Shortly after the completion of the initial round of written discovery, the Parties agreed to
12 redirect their efforts towards an early resolution of the Action and agreed to participate in private
13 mediation. *See Agnew Decl.* ¶ 12. In connection with the Parties' negotiations, Defendant
14 produced updated data points relating to: (1) the number of aggrieved employees; (2) the number
15 of aggrieved employees who earned non-discretionary incentive pay; (3) the number of pay
16 periods worked by aggrieved employees; (4) the number of pay periods in which aggrieved
17 employees earned non-discretionary incentive pay and meal/rest period premiums, overtime
18 and/or sick pay during the same workweek; (5) the number of pay periods in which aggrieved
19 employees worked at least one meal/rest period eligible shift; and (6) the number of aggrieved
20 employees who separated employment. *See id.* at ¶ 13.

21 Based on the information provided by Defendant, Plaintiff's Counsel conducted a full
22 penalties analysis as to the value of the PAGA claims. *See Agnew Decl.* ¶ 14. Plaintiff's Counsel
23 also investigated the applicable law as applied to the facts discovered regarding Plaintiff's
24 alleged claims and potential defenses thereto. *See id.* Thus, Plaintiff's Counsel entered mediation
25 with a clear understanding of Defendant's maximum exposure. *See id.*

26 On June 29, 2023, the Parties engaged in a full-day mediation with the Honorable Brian C.
27 Walsh (Ret). *See Agnew Decl.* ¶ 15. As a result of the mediation, Plaintiff and Defendant reached
28 the present settlement, memorialized by a written Memorandum of Understanding ("MOU"). *See*

1 *id.* The Parties subsequently negotiated the terms of the Joint Stipulation of Settlement and Release
2 Under the Private Attorneys General Act. *See id.* at ¶ 16. The settlement discussions were
3 conducted at arm’s length. *See id.*

4 The Parties recognize the risk, expense, and delay in continuing litigation with the class
5 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. *See Agnew*
6 Decl. ¶ 45. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and
7 claims arising from or relating to the afore-referenced claims and allegations.

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

9 The material terms of the Settlement are described below and set forth in detail in the
10 concurrently filed PAGA Settlement Agreement, a true and correct copy of which is attached as
11 **Exhibit 2** to the Declaration of Kristen M. Agnew.

12 **A. The Aggrieved Employees**

13 The current Action is being settled on behalf of the following employees: all current and
14 former California non-exempt employees who worked at least one pay period for Circle Pizza in
15 California at any time during the period of June 13, 2021, to June 29, 2023 (“PAGA Period”)
16 (“Aggrieved Employees”). *See* Settlement Agreement (“SA”) §§ B-2, B-14. Based on Defendant’s
17 records, there are approximately 1,400 Aggrieved Employees. *See Agnew Decl.* ¶17. These
18 individuals worked in approximately 11,933 pay periods during the PAGA Period. *See SA* § C-2.

19 **B. Gross Settlement Amount and Allocation**

20 The Settlement Agreement requires Defendant to pay the gross amount of Three Hundred
21 Fifty Thousand Dollars (\$350,000.00) (the “Gross Settlement Amount”). *See SA* § B-11. Based
22 on the Gross Settlement Amount, Defendant will pay approximately \$29.33 per pay period to
23 resolve the claims in this case. *See Agnew Decl.* ¶ 18.

24 The balance of the Gross Settlement Amount remaining after deduction of the approved
25 attorneys’ fees and litigation costs, Settlement Administration Costs, and Plaintiff’s Enhancement
26 Payment (the “PAGA Penalties Fund”), will be available for distribution to the LWDA and
27 Aggrieved Employees. *See SA* §§ B-13, C-4. The PAGA Penalties Fund will total approximately
28 \$205,242.54. *See Agnew Decl.* ¶ 24. Seventy-five percent (75%) of the PAGA Penalties Fund, or

1 approximately \$153,931.90, will be paid to the LWDA for PAGA penalties (“LWDA Payment”).
2 See SA § C-4; Agnew Decl. ¶ 24. The remaining twenty-five percent (25%), or approximately
3 \$51,310.64, will be distributed to Aggrieved Employees. See SA § C-4; Agnew Decl. ¶ 24.

4 The amount any particular Aggrieved Employee will be entitled to recover will depend on
5 the number of pay checks in which he or she received the payment of wages during the PAGA
6 Period, with some entitled to receive more and others less. See SA § C-5. This is fair, as it directly
7 allocates greater penalties to individuals who have allegedly suffered greater harm. See Agnew
8 Decl. ¶ 25. Any uncashed checks will be paid out pursuant to California Code of Civil Procedure
9 section 384 to the *cy pres* recipient, Legal Aid at Work. See SA § D-5. Legal Aid At Work is a
10 501(c)(3) non-profit organization that provides legal services to low-income families. See Agnew
11 Decl. ¶ 26. The Parties warrant and represent that they do not have a relationship, financial or
12 otherwise, with the *cy pres* recipient. See *id.*

13 As part of the Settlement, Defendant does not object to Plaintiff’s Counsel’s request for
14 attorneys’ fees of approximately one-third of the Gross Settlement Amount, *i.e.*, One Hundred
15 Sixteen Thousand Six Hundred Sixty Six Dollars and Sixty-Six Cents (\$116,666.66), and
16 reimbursement for litigation costs in an amount up to Fifteen Thousand Dollars (\$15,000.00),
17 subject to the Court finally approving this Settlement. See SA § C-9.¹ Any partition of the requested
18 attorneys’ fees and/or costs not approved by the Court shall be added to the PAGA Penalties Fund.
19 See *id.*

20 Also, as part of the Settlement, Defendant does not object to Plaintiff’s request for an
21 Enhancement Payment to Plaintiff in an amount not to exceed Ten Thousand Dollars (\$10,000.00).
22 See SA §§ B-10, C-8. Any portion of the Enhancement Payment to Plaintiff that is not approved
23 by the Court shall become part of the PAGA Penalties Fund. See *id.*

24 Finally, the Settlement provides for the payment of the fees and expenses reasonably
25

26
27 ¹ At the time the Parties negotiated the Settlement Agreement, Plaintiff’s Counsel did not have a
28 final tally of the litigation costs incurred to date. As such, the Parties included a maximum
amount that could be attributed to costs under the settlement. Plaintiff’s Counsel requests
reimbursement of \$7,590.80 for litigation related expenses. See Agnew Decl. ¶55.

1 incurred by the Settlement Administrator. *See* SA § C-10. The Parties have agreed to utilize
2 Phoenix Settlement Administrators to administer the settlement, with the administration costs
3 estimated to be Ten Thousand Five Hundred Dollars and Zero Cents (\$10,500.00). *See* SA §§ B-
4 19, C-10.

5 **C. Scope of the Released Claims**

6 In exchange for the payments described above, Plaintiff and Aggrieved Employees will
7 release Defendant and Released Parties from all Released Claims that that arose during the PAGA
8 Period. *See* SA § E-6. As defined in the Agreement, the term “Released Claims” means:

9 all claims for civil PAGA penalties predicated on Labor Code
10 sections 201, 202, 203, 204, 226, 226.7, 246, 510, 512, 558, 1194,
11 1197, 1197.1, including but not limited to costs and attorneys’ fees
12 related thereto, that were alleged in the operative First Amended
Complaint filed in the Action and accrued during the PAGA
Period.

13 *See* SA § B-17. The Settlement is not intended to release does not extend to violations of any
14 predicate statutes other than PAGA. *See* SA § E-6. The Settlement also does not affect a waiver of
15 claims by Aggrieved Employees against the Released Parties for any individual wage and hour
16 claims. *See* SA § E-6.

17 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

18 **A. PAGA Overview**

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

1 meant to compensate unnamed employees because the action is fundamentally a law
2 enforcement action.” [citations omitted].)

3 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
4 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
5 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
6 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
7 employee” means “any person who was employed by the alleged violator and against whom one
8 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
9 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
10 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
11 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
12 decides not to investigate the allegations or issue a citation to the employer, the proposed
13 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
14 2699.3(a)(2).

15 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
16 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
17 PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil
18 penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the
19 “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i);
20 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA
21 representative’s recovery is “an incentive to perform a service to the state, not restitution for
22 wrongs done to members of the class”).

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

25 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
26 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
27 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
28 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).

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

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

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

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

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

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

18 Here, if approved, the Settlement would release Defendant and Released Parties from all
19 claims for civil PAGA penalties predicated on Labor Code sections 201, 202, 203, 204, 226,
20 226.7, 246, 510, 512, 558, 1194, 1197, 1197.1—and nothing more. *See* SA § B-17. The
21 Settlement would not impact any Aggrieved Employee’s ability to pursue PAGA claims
22 predicated on other Labor Code violations. *See* SA § E-6. Nor does the Settlement release
23 individual wage and hour claims that Aggrieved Employees may have against Defendant. *See* SA
24 § E-6. Therefore, the limited scope of the release also supports approval.

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

27 Though Plaintiff is reasonably confident that he would prevail at trial, proceeding in
28 litigation entails significant risk on the underlying merits of Plaintiff’s theories, in addition to the

1 still-developing law under PAGA.

2 **1. Plaintiff's Claims are Contested**

3 **a. Unpaid Minimum and Overtime Wages**

4 Plaintiff contends that Defendant required Aggrieved Employees to perform opening and
5 closing procedures, including disarming/arming the store alarm and unlocking/locking doors,
6 without the payment of wages for such time. *See* Agnew Decl. ¶ 30. Upon arriving at the store
7 for the opening shift, Aggreived Employees spent between approximately three to five minutes
8 unlocking the main entrance, walking to the security pad in the kitchen and entering the code to
9 turn off the alarm. *See id.* Only after disarming the alarm, were employees able to clock in using
10 Defendant's computer. *See id.* Similarly, in the evenings, after clocking out, Aggrieved
11 Employees spent approximately three to five minutes setting the alarm and locking the main
12 door. *See id.*

13 Defendant argues that the minimum wage and overtime claims are not suitable to be
14 adjudicated on a representative basis because its policies and training materials required accurate
15 recording of time and prohibited off-the-clock work. *See* Agnew Decl. ¶ 31. As articulated in the
16 employee handbook, Defendant's written policy strictly prohibits non-exempt employees from
17 working off the clock for any reason. *See id.* Furthermore, all time spent working must be
18 reported, including any work activity performed pre-shift and post-shift. *See id.* Defendant
19 contends that during the on-boarding process, employees are provided with a copy of the
20 employee handbook and sign an acknowledgement that they have read and understood the
21 handbook. Citing to *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) and its
22 progeny, Defendant argues that its liability is contingent on proof that Defendant knew or should
23 have known that off-the-clock work was occurring. *See id.* In the absence of a uniform policy,
24 Defendant contends that Plaintiff will not be able to establish the requisite knowledge through
25 common proof. *See id.*

26 **b. Failure to Provide Meal and Rest Periods**

27 Plaintiff contends that Defendant failed to provide proper duty-free meal and rest
28 periods. *See* Agnew Decl. ¶ 32. Specifically, Defendant scheduled Aggrieved Employees to work

1 solo shifts without any relief for breaks. *See id.* By way of example, Plaintiff was scheduled to
2 open the store at 6:00 a.m. *See id.* Due to Defendant's concerns regarding labor expenses, the
3 next employee was not scheduled to work until between 2:00 p.m. and 4:00 p.m. *See id.* Since
4 Plaintiff was the only employee, the demands of work frequently required her to interrupt and/or
5 shorten her breaks. *See id.* Arguably, Defendant's written policies also contemplate that
6 employees may be required to work during their meal and rest breaks. *See id.*

7 Defendant maintains that it complied with the law, had lawful and compliant practices,
8 and provided Aggrieved Employees with duty-free meal and rest periods. *See Agnew Decl.* ¶ 33.
9 According to Defendant, an adjudication of the alleged meal and rest period violation would
10 require individualized assessments as to the circumstances of each missed, delayed or interrupted
11 break. *See id.* Defendant argues that, even if Plaintiff was able to establish that some Aggrieved
12 Employees experienced a meal and/or rest period violation, such a claim would not be
13 manageable. *See id.*

14 **c. Meal and Rest Period Regular Rate Violation**

15 As a separate meal and rest period violation, Plaintiff contends that Defendant did not
16 pay meal and rest period premiums at the regular rate of pay to Aggrieved Employees. *See*
17 *Agnew Decl.* ¶ 34. Aggrieved Employees earned non-discretionary bonuses. *See id.* As these
18 items are non-discretionary forms of remuneration, they should have been include in the regular
19 rate of pay for purposes of paying meal and rest period premium compensation. *See id.* However,
20 during workweeks when Aggrieved Employees earned non-discretionary incentives and
21 meal/rest period premiums, Defendant paid the premiums at the employee's base rate of pay. *See*
22 *id.* Plaintiff's wage statements do not reflect the payment of a meal or rest period penalties paid
23 at the regular rate of pay. *See id.*

24 Defendant denies that Aggrieved Employees received non-discretionary bonus payments.
25 *See Agnew Decl.* ¶ 35. Defendant further maintains that a limited number of employees received
26 discretionary bonus payments based on the performance of their store location. *See id.* As alleged
27 by Defendant, management would review how each store performed and if there was extra
28 money, a bonus would be paid to eligible employees. *See id.* However, the bonus was not

1 guaranteed. *See id.*

2 **d. Overtime Regular Rate Violation**

3 Similarly, Plaintiff contends that Defendant failed to incorporate the incentive wages in
4 the calculation of the regular rate used to pay overtime. *See* Agnew Decl. ¶ 36. During
5 workweeks where employees earned both overtime and a “BONUS” payment, the overtime was
6 paid at a rate below 1.5x the regular rate of pay. *See id.* Again, Defendant denies that Aggrieved
7 Employees received non-discretionary bonus payments. *See id* at ¶ 37.

8 **e. Sick Pay Regular Rate Violation**

9 Plaintiff contends that Defendant did not pay sick pay wages at the regular rate of pay, as
10 required by the Healthy Workplaces, Healthy Families Act of 2014, Cal. Lab. Code section 245
11 *et seq.* (“HWHFA”). *See* Agnew Decl. ¶ 38. Pursuant to the HWHFA, “[p]aid sick time for
12 nonexempt employees shall be calculated in the **same manner as the regular rate of pay** for the
13 workweek in which the employee uses paid sick time, whether or not the employee actually
14 works overtime in that workweek.” Cal. Lab. Code § 226(l)(1) (emphasis added). Here, Plaintiff
15 alleges that during workweeks where an Aggrieved Employees earned incentive wages and sick
16 pay earnings, Defendant paid the sick pay at the employee’s base hourly rate. *See* Agnew Decl. ¶
17 37. Plaintiff contends that the sick pay should have been paid at the employee’s regular rate of
18 pay, which includes all non-discretionary pay, such as incentive wages. *See id.*

19 Defendant contests the sick pay claim on a number of grounds. Defendant maintains that
20 there is no private right of action to bring a paid sick pay claim. *See* Agnew Decl. ¶ 39. This
21 argument presents novel legal issues and there is substantial ground for difference of opinion as
22 to the remedies, if any, available to employees who have experienced a violation of the HWHFA.
23 *See Phoung v. Winco Holdings, Inc.*, 2022 WL 3636369, at *6 (E.D. Cal. Aug. 23, 2022)
24 (dismissing stand-alone section 246 claim for unpaid wages); *Rudolph v. Herc Rentals, Inc.*,
25 2021 WL 5994514, at *2–3 (C.D. Cal. Aug. 27, 2021) (dismissing section 246 claim for failure
26 to provide sick leave at all); *Titus v. McLane Foodservice, Inc.*, 2016 WL 4797497, at *4 (E.D.
27 Cal. Sept. 14, 2016) (dismissing plaintiff’s claim for individual damages for “not provid[ing] him
28 with written notice of the paid sick time he had available”). Even had Plaintiff ultimately

1 prevailed on the merits, given the novelty of the legal questions it raised, Defendant may have
2 sought immediate appellate review through a writ or appeal. *See* Agnew Decl. 39.

3 **f. Derivative Wage Statement Violation**

4 Plaintiff alleges a derivative wage statement violation. *See* Agnew Decl. ¶ 40. As a result
5 of the alleged underpayment and/or non-payment of wages to Aggrieved Employees, Plaintiff
6 contends that the wage statements omit information required by Labor Code 226, including all
7 applicable hourly rates and the total hours worked. *See id.* As argued by Defendant, Plaintiff's
8 derivative wage statement violation is vulnerable to a motion for summary judgment based on
9 the weaknesses of the underlying primary claims. *See Maldonado v. Epsilon Plastics, Inc.*, 22
10 Cal. App. 5th 1308 (2018) (finding that the employees did not suffer a violation under 226(a)
11 where their wage statement cause of action was derived from an underlying wage and hour
12 violation for overtime).

13 **2. Recovery of Civil PAGA Penalties Is Uncertain**

14 However, even if Plaintiff were to prevail on the merits of the PAGA claim, the potential
15 recovery is uncertain. Defendant contends that it made a good faith effort to comply with the
16 law. *See* Agnew Decl. ¶¶ 31, 33, 34, 35, 39, 43. As argued by Defendant, in deciding whether to
17 award the maximum penalty amount, courts may focus on whether the employer made a good
18 faith effort to follow the law. For example, in *Thurman v. Bayshore Transit Management, Inc.*,
19 the Court of Appeal upheld the trial court's significant reduction of PAGA penalties by 30%
20 because the employer was not initially on notice that it was in violation of the law and because it
21 would have been unfair to award penalties where the employer was unaware of the violations.
22 203 Cal. App. 4th 1112, 1136 (2012). When the employer made aware of the violations, it timely
23 took steps to come into compliance. *Id.* By contrast, the imposition of full penalties was justified
24 when an employer took a "cavalier approach to fulfilling its contractual and statutory
25 obligations" and demonstrated "reckless disregard." *Id.* Furthermore, as the California Court of
26 Appeal has affirmed, trial courts are well within their discretion to reduce PAGA penalties "for
27 technical violations that cause no injury," especially where the "violation was inadvertent."
28 *Raines v. Coastal Pac. Food Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018).

1 In this case, Defendant asserted that a substantial reduction in potential PAGA penalties
2 was warranted because: (1) even assuming that Plaintiff could establish the predicate violations,
3 the alleged violations were inadvertent; and (2) Aggrieved Employees did not suffer substantial
4 economic harm as a result of the alleged violations of Labor Code. *See* Agnew Decl. ¶ 43. Thus,
5 Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its
6 inadvertent behavior, much less to deter it from committing any future violations that were
7 completely foreclosed by its new payroll practices. *See id.*

8 **3. Maximum PAGA Civil Penalties Recoverable After Trial**

9 Defendant has indicated that Aggrieved Employees received the payment of wages in
10 approximately 11,933 pay checks issued during the PAGA Period. *See* SA § C-2; *see* Agnew
11 Decl. ¶ 27. Assuming that Plaintiff was to prevail on the merits of the PAGA claim, applying the
12 standard penalty of \$100 per pay period yields \$1,193,300 in potential liability. *See id.*

13 Even then, pursuant to Labor Code § 2699(f)(2) the Court can decline to award the full
14 amount of PAGA penalties “if, based on the facts and circumstances of the particular case, to do
15 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
16 Courts routinely award far less than the statutory maximum amount of civil penalties, even
17 where an underlying violation of the Labor Code is found. Indeed, as shown in the Court of
18 Appeal’s decision in *Carrington v. Starbucks Corp.*, while the plaintiff prevailed on his PAGA
19 claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
20 employer’s good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018).
21 Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539; *see O’Connor v.*
22 *Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal., 2016). Thus, assuming that the
23 Court uses *Carrington* as a benchmark and assesses PAGA penalties of approximately 10% of
24 the total maximum, a more realistic estimate of the maximum PAGA penalties at issue is
25 \$119,330. *See id.* Agnew Decl. ¶ 44.

26 **4. Settlement is Reasonable When Compared to the Realistic Amount of** 27 **PAGA Civil Penalties At Issue**

28 The Court’s assessment of the proposed settlement must take into account that any

penalties awarded may be subject to substantial reduction. When this is considered, in conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover nothing, the proposed settlement is patently reasonable. Indeed, the Gross Settlement Amount is approximately 29.33% of the amount of penalties at issue, if the Court awarded \$100 per pay period in which wages were untimely paid. *See* Agnew Decl. ¶ 29. Settlement for this reduced value allows for the distribution of penalties in an amount which accounts for the risk of continued litigation and Defendant’s likely arguments that higher penalties would have been confiscatory. It also sufficiently deters Defendant from engaging in similar conduct in the future, which is one of the primary goals of PAGA.

The proposed settlement exceeds PAGA settlements that courts have approved in other cases, when considered as a percentage of the overall settlement value of the case. The proposed settlement, in fact, far exceeds other PAGA settlements approved by courts—including those that provide for less than the one percent allocation to PAGA penalties. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug. 4, 2015) (approving total PAGA allocation that was 0.5% of \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged that drivers who use Lyft were misclassified as independent contractors. 2016 WL 3561742 (N.D. Cal. June 23, 2016). The parties settled all Labor Code and PAGA claims for \$27 million, with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting preliminary approval to the proposed settlement in *Cotter*, the court noted that the PAGA allocation “might seem low when compared to the maximum PAGA penalties,” but acknowledged that it was in fact “quite high compared to the typical amount apportioned to claims for PAGA penalties in wage and hour settlements.” *Id.* at *5.

Given Defendant’s potential defenses to the alleged violations at issue, the risks and costs of continued litigation, Plaintiff and his attorneys believe that the Settlement is fair and

1 reasonable. *See* Agnew Decl. ¶ 44. The Settlement proposes a payment of approximately
2 \$153,931.90 in penalties to the LWDA and approximately \$51,310.64 in penalties to the
3 Aggrieved Employees, which is an outstanding result in a PAGA-only case. *See* Agnew Decl. ¶
4 24. Plaintiff's Counsel has significant experience litigating wage and hour claims including
5 claims for PAGA penalties, and the Settlement here is similar to or greater than similar
6 settlements that courts have approved. Furthermore, as set forth in the accompanying Kristen M.
7 Agnew Declaration, the LWDA has been provided notice of this motion and the PAGA
8 settlement. *See id.* at ¶ 54. The decision of the LWDA to accept the Settlement and not oppose
9 the motion should be given considerable weight.

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

11 Labor Code § 2699(g)(1) provides for the recovery of attorneys' fees and costs in any
12 successful action brought under PAGA. Although this is not a class action, in class actions
13 California state and federal courts have recognized that an appropriate method for determining
14 award of attorneys' fees is based on a percentage of the total value of benefits to class members
15 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano*
16 *v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
17 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this
18 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
19 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
20 burden alone." *Vincent*, 557 F. 2d at 769.

21 The common fund doctrine is predicated on the principle of preventing unjust
22 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
23 he may require the passive beneficiaries to compensate those who created the fund. Both
24 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
25 *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
26 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
27 been applied "consistently in California when an action brought by one party creates a fund in
28 which other persons are entitled to share." The reasons for applying the common fund doctrine

1 include: “fairness to the successful litigant, who might otherwise receive no benefit because his
2 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
3 the others who are entitled to share in the fund and who should bear their share of the burden of
4 its recovery; encouragement of the attorney for the successful litigant who will be more willing
5 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
6 if he is assured that he will be properly and directly compensated should his efforts be
7 successful.” *Id.*

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

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

20 Here, as set forth in the Settlement Agreement, Plaintiff’s Counsel seek an award of
21 attorneys in amount that represents 33.33% of the Gross Settlement Amount. Thus, the requested
22 fee amount of \$116,666.66 is fair and reasonable. Additionally, Plaintiff’s Counsel’s cost
23 reimbursement request in the amount of \$7,590.80 is also reasonable. *See Agnew Decl.* ¶ 53,
24 Exhibit 3. The costs were all directly incurred in the prosecution of this action, including filing
25 fees, postage, copying, and mediation. *See id.* As such, the requested costs should be awarded as
26 fair and reasonable.

27 **G. Plaintiff’s Enhancement Payment Should be Approved**

28 Courts have held that named plaintiffs in class, or private attorney general actions can

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

6 Here, Plaintiff seeks \$10,000 for her service award, which is intended to compensate
7 Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
8 hesitation from later prospective employers that might find out he brought this claim, and for
9 executing a general release, including for all known and unknown claims under Civil Code §
10 1542. See SA §§ C-8, E-8; Declaration of Stephanie Karabinus ¶¶ 3-6. This requested
11 enhancement is consistent with awards approved in other common fund cases. See *Van Vranken*
12 *v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of
13 \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio
14 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000); *Brotherton v.*
15 *Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award);
16 *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio
17 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068,
18 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive
19 award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.
20 1998) (affirming \$25,000 Incentive award to class representative in ERISA case).

21 **H. The Settlement Administrator’s Costs Should be Approved**

22 The Parties have agreed to pay actual costs of administration, or Ten Thousand Five
23 Hundred Dollars and Zero Cents (\$10,500.00), to the Settlement Administrator, Phoenix
24 Settlement Administrators, to administer this Settlement. See SA §§ B-19, C-10. The Parties
25 believe that the administration fee is reasonable and should be approved.

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

27 As discussed above, and concurrent with the filing of this Motion, Plaintiff uploaded the
28 instant motion to the LWDA’s website. Agnew Decl. ¶ 54.

1 **V. CONCLUSION**

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

3
4 DATED: October 2, 2023

DIVERSITY LAW GROUP, P.C.

5
6 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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8 Attorneys for Plaintiff and the Aggrieved
9 Employees

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PROOF OF SERVICE

(Code of Civil Procedure Sections 1013a, 2015.5)

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los Angeles, California 90071.

On October 2, 2023, I served the following document(s) described as:

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**
2. **DECLARATION OF PLAINTIFF STEPHANIE KARABINUS IN SUPPORT OF PLAINTIFF’S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT**
3. **DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF’S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT**
4. **[PROPOSED] ORDER APPROVING SETTLEMENT AND JUDGMENT THEREON**

on the interested parties in this action as follows:

Ellen Arabian-Lee Arabian-Lee Law Corporation 2999 Douglas Boulevard, Suite 180 Roseville, California 95661	<i>Attorneys for Defendant Circle Pizza, LLC</i> ellen@arabian-leelaw.com
Scott T. Shibayama Vision Law Corporation 1380 Lead Hill Boulevard, Suite 106 Roseville, California 95661	<i>Attorneys for Defendant Circle Pizza, LLC</i> scott@visionlaw.com
Kelsey A. Webber Shaelyn Stewart Webber & Egbert Employment Law, P.C. 1610 R. Street, Suite 300 Sacramento, California 95811	<i>Attorneys for Plaintiff</i> Kelsey.Webber@webberlawgroup.com Shaelyn.Stewart@webberlawgroup.com

X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the ACE Attorney Service E-Filing System at the website www.efile.acelegal.com, addressed to all parties appearing on this proof of service for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 2, 2023, at Los Angeles, California.


Erika Mejia