

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

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

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

Attorneys for Plaintiff and the Aggrieved Employees

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

FIONA MARSH, as an individual and on behalf
of all others similarly situated,

Plaintiffs,

v.

BURBERRY LIMITED., a New York
corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 22CV016122

[Assigned for all purposes to the Hon. Tara
Desautels in Department 16]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE THE PARTIES'
SETTLEMENT AGREEMENT PURSUANT
TO THE LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004;
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: September 27, 2023
Time: 2:30 pm
Dept.: 16

Reservation ID: 588432662990

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

2 **PLEASE TAKE NOTICE** that on September 27, 2023, at 2:30 p.m., or as soon thereafter
3 as the matter be heard in Department 16 of the Superior Court of the State of California for the
4 County of Alameda, Rene C. Davidson Courthouse, Administration Building located at 1221 Oak
5 Street, Oakland, CA 94612, Plaintiff Fiona Marsh will, and hereby do, move the Court for entry of
6 an order approving the Private Attorney General Act Settlement Agreement and Release
7 (“Settlement Agreement” or “Settlement”) entered into in the above-captioned civil action between
8 Plaintiff and Defendant Burberry Limited. (“Defendant”) (Plaintiff and Defendant shall collectively
9 be referred to as the “Parties”) under the Labor Code Private Attorneys General Act of 2004 (the
10 “PAGA”).

11 This motion is made pursuant to California Labor Code § 2699(1)(2), which requires trial
12 courts to “review and approve any settlement of any civil action filed pursuant to [PAGA],” *see*
13 Cal. Lab. Code § 2699(1)(2), and on the grounds that the parties’ settlement is fundamentally fair,
14 adequate, and reasonable in light of the PAGA’s policies and purposes. As set forth in the
15 concurrently filed declaration of Larry W. Lee, a copy of the Parties’ proposed Settlement
16 Agreement and this motion was electronically submitted to the Labor and Workforce
17 Development Agency in accordance with California Labor Code §§ 2699(1)(2) and 2699(1)(4)
18 concurrent with the filing of this motion.

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

25 ///

26 ///

27 ///

28 ///

1 Dated: August 30, 2023

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Attorneys for Plaintiff Fiona Marsh and the
5 Aggrieved Employees
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL AND PROCEDURAL BACKGROUND	1
III. STANDARD OF REVIEW	3
IV. ARGUMENT.....	4
A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant to Labor Code § 2699(l)(2).....	4
B. The Court Should Approve the Settlement Agreement.....	4
1. The Settlement Agreement is Entitled to a Presumption of Fairness	4
2. The Scope of the Settlement Agreement is Fair, Adequate, and Reasonable	5
3. The Settlement Agreement Apportions Civil Penalties Between the LWDA and the Aggrieved Employees as Required by PAGA	8
4. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Attorneys' Fees.....	9
a. Percentage of the Fund.....	9
b. Lodestar Cross-Check.....	10
5. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Litigation Costs	12
6. The Payments to Plaintiff Should Be Approved	13
7. The Settlement Agreement Allocates a Fair, Adequate, and Reasonable Amount to the Payment of Settlement Administration Costs.....	14
V. CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969, 985 (2009)	5, 6
<i>Atempa v. Pedrazzani</i> (2018) 27 Cal.App.5th 809	7
<i>Carrington v. Starbucks Corporation</i> (Cal. Ct. App. Nov. 27, 2018) No. D072392	7
<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43, 66, fn. 11 (2008)	9
<i>City of Oakland v. Oakland Raiders</i> , 203 Cal. App. 3d 78 (1988)	11
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1800–01 (1996)	5
<i>Flannery v. California Highway Patrol</i> , 61 Cal. App. 4th 629, 632-33 (1998)	12
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> , 59 Cal. 4th 348, 383 (2014)	6
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal. App. 4th 116, 130 (2008)	6
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	9, 10
<i>Lealao</i> , 82 Cal. App. 4th 19, 29–30	10
<i>Martino v. Denevi</i> , 182 Cal. App. 3d 553, 559 (1986)	12
<i>PLCM Group, Inc. v. Drexler</i> , 22 Cal. 4th 1084, 1095 (2000)	12
<i>Serrano v. Unruh</i> , 32 Cal. 3d 621, 639 (1982) [<i>Serrano IV</i>]	12
<i>Sutter Health Uninsured Pricing Cases</i> , 171 Cal App.4th 495, 512 (2009)	10
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 250 (2001)	6, 10

Federal Cases

<i>Ceja-Corona v. CVS Pharmacy, Inc.</i> , No. 1:12-cv-01868, 2014 WL 4472691, at *9 (E.D. Cal. Sept. 11, 2014)	5
<i>Craft v. County of San Bernardino</i> , 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal. 2008)	11
<i>Dyer v. Wells Fargo Bank, N.A.</i> , 303 F.R.D. 326, 334 (N.D. Cal. 2014)	11
<i>Hopkins v. Stryker Sales Corp.</i> , No. 11-CV-02786-LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013)	11
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990) ...	13
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000)	8

1	<i>In re Rite Aid Corp. Secs. Litig.</i> , 396 F.3d 294, 306-307 (3d Cir. 2005).....	10
2	<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811, 819 (9th Cir. 2012)	6
3	<i>New York Gaslight Club, Inc. v. Carey</i> , 447 U.S. 54, 62 (1980).....	12
4	<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016)	4, 5, 6
5	<i>Rodriguez v. W. Publ'g Corp.</i> , 563 F.3d 948, 958–59 (9th Cir. 2009)	13
6	<i>Sakkab v. Luxottica Retail North America, Inc.</i> , 803 F.3d 425, 435 (9th Cir. 2015)	5
7	<i>Smith v. H.F.D. No. 55, Inc.</i> , No. 2:15-cv-01293, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20,	
8	2018)	3, 4, 6
9	<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)	8
10	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	13
11	<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043, 1051 (9th Cir. 2002).....	11
12	<i>Willner v. Manpower Inc.</i> , No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22,	
13	2015)	11
14	Statutes	
15	Civil Code § 1542	3, 13
16	Labor Code § 1194.....	2, 6
17	Labor Code § 1197.....	2, 6
18	Labor Code § 1197.1.....	2, 6
19	Labor Code § 201.....	2, 6
20	Labor Code § 202.....	2, 6
21	Labor Code § 203.....	2, 6
22	Labor Code § 204.....	2, 6
23	Labor Code § 226.....	2, 6
24	Labor Code § 226.7.....	2, 6
25	Labor Code § 246.....	2, 6
26	Labor Code § 2698, <i>et seq</i>	2, 6
27	Labor Code § 2699 (e)(2)	4
28	Labor Code § 2699 (g).....	9, 13

1	Labor Code § 2699 (l)(4)	4
2	Labor Code § 2699(e)(2)	6
3	Labor Code § 2699(i).....	9
4	Labor Code § 510.....	2, 6
5	Labor Code § 512.....	2, 6
6	Labor Code § 558.....	2, 6
7	Other Authorities	
8	2003 Cal. Stat. ch. 906 § 1	6
9	2003 Cal. Stat. ch. 906 § 1(d)	4
10	Business and Professions Code § 17200, <i>et seq.</i>	2, 6
11	<i>Report of the Third Circuit Task Force, Court Awarded Attorney Fees</i> 108 F.R.D. 237, 258	
12	(1985).....	10

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

I. INTRODUCTION

Through this motion Plaintiff Fiona Marsh respectfully request the Court’s approval of the Private Attorney General Act Settlement Agreement and Release¹ (the “Settlement Agreement” or “Settlement”) with Defendant Burberry Limited. (“Defendant”). The settlement was reached after propounding written discovery and then agreeing to mediation and production of documents and data on an informal basis. As part of the privileged settlement negotiations, Defendant produced data regarding the Aggrieved Employees and the number of pay periods at issue for each of Plaintiff’s claims from which Plaintiff’s counsel calculated the maximum PAGA penalty exposure. Declaration of Larry W. Lee (“Lee Decl.”) ¶¶6-7. Based on this information, the Parties have settled this case on a representative PAGA basis for \$370,000.00. *Id.* at ¶¶6-10, Ex. B.

The Settlement Agreement allocates one-third of the Maximum Settlement Amount for attorneys' fees, or \$123,333.33, up to \$15,000.00 in litigation costs incurred by Plaintiff's Counsel, \$10,000.00 to Plaintiff in exchange for a general release, and up to \$3,250.00 for settlement administration costs. Settlement Agreement ¶4.1. The remainder, or the "PAGA Payment," is allocated to the payment of civil penalties under PAGA, of which 75% is to be distributed to the Labor and Workforce Development Agency (the "LWDA") and 25% of which is to be distributed to the "Aggrieved Employees" on whose behalf Plaintiff filed this action as required by PAGA. *Id.* ¶ 2.12.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2022, Plaintiff Fiona Marsh (“Marsh”) sent notice to the LWDA giving notice

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

1 of his intent to pursue a representative PAGA action, on behalf of herself and the State of
2 California as well as on behalf of other aggrieved employees (the “PAGA Notice”). Lee Decl. ¶
3 2, Ex. A.

4 On August 12, 2022, Marsh filed a complaint against Defendant in the Superior Court of
5 California, County of Alameda, asserting class action claims under Labor Code §§ 201, 202,
6 203, 204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, 1197.1, 2698, *et seq.* (the “Action”). Lee
7 Decl. ¶ 3.

8 Plaintiff propounded interrogatories and request for production of documents on
9 Defendant. *Id.* ¶4. After service of written discovery, the Parties agreed to engage in mediation
10 before neutral Christopher Panetta, Esq. Lee Decl. ¶ 5. In connection with the mediation,
11 Defendant’s Counsel provided Plaintiff’s Counsel with information regarding the number of pay
12 periods where (1) overtime and non-discretionary remuneration was paid during the same pay
13 period; (2) sick pay wages and non-discretionary remuneration was paid during the same pay
14 period; (3) meal and rest break premium wages and non-discretionary remuneration was paid
15 during the same pay period; and (4) wage statements that included the foregoing payments. *Id.*
16 ¶6. Based on this information, the Parties conducted settlement negotiations. *Id.*

17 The Parties engaged in a full day of arm’s-length negotiation through the mediator, but
18 were not able to reach a settlement. Lee Decl. ¶ 9. However, through post mediation
19 communications through the mediator, the Parties agreed to the current Settlement. *Id.* The
20 Parties subsequently executed the Settlement Agreement. *Id.* ¶10, Ex. B.

21 The Maximum Settlement Amount is \$370,000.00. Settlement Agreement ¶2.10.
22 Settlement Agreement allocates one-third of the Maximum Settlement Amount for attorneys’
23 fees, or \$123,333.33, up to \$15,000.00 in litigation costs incurred by Plaintiff’s Counsel,
24 \$10,000.00 to Plaintiff in exchange for a general release, and up to \$3,250.00 for settlement
25 administration costs. *Id.* ¶4.1. The remainder, or the Net PAGA Settlement Amount, is allocated
26 to the payment of civil penalties under PAGA, of which 75% is to be distributed to the LWDA
27 and 25% of which is to be distributed to the Aggrieved Employees on whose behalf Plaintiff
28 filed this action as required by PAGA. *Id.* at 2.12

1 The Settlement Agreement provides the following PAGA Released Claims:

2 “any and all claims that Plaintiff, as a proxy and agent for the State
3 of California’s Labor Workplace Development Agency (“LWDA”)
4 has against Releasees that have been asserted under the PAGA in
5 the Complaint based on the facts, claims and/or allegations pled
6 therein including for failing to pay meal and rest premium wages
7 at the regular rate of pay for failing to calculate nondiscretionary
8 remuneration, including, but not limited to commissions and
9 bonuses; failure to pay sick pay wages at the regular rate of pay
10 for failing to calculate nondiscretionary remuneration, including,
11 but not limited to commissions and bonuses; failure to provide
12 proper itemized wage statements including by displaying the
13 employees’ complete social security number, rather than simply the
14 last four digits, and for waiting time penalties.”

15 *Id.* ¶ 2.14 Plaintiff also executed a general release as part of the Settlement Agreement, including
16 a waiver of Civil Code § 1542. *Id.* ¶2.16.

17 Each PAGA Settlement Employee will receive an Individual PAGA Payment
18 proportionate to the number of pay periods worked. *See id.* ¶ 4.3.1(a)-(d). Each Individual PAGA
19 Payment will be treated as nonwage income with no tax withholdings to be made, and will be
20 reported, if required, by applicable tax laws, by the Settlement Administrator on IRS Form
21 1099s. *Id.* ¶4.3.2.

22 **III. STANDARD OF REVIEW**

23 Although PAGA requires courts to “review and approve” the settlement of any civil
24 action filed under PAGA, *see* Cal. Lab. Code § 2699 (l)(2), neither the Legislature, the California
25 Supreme Court, the California Courts of Appeal, nor the LWDA has identified the standard
26 PAGA settlements must satisfy. *See Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d
27 959, 971 (N.D. Cal. 2019) (noting the absence of a “definitive” guidance for approval of a
28 PAGA settlement); *see also Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293, 2018 WL
1899912, at *2 (E.D. Cal. Apr. 20, 2018) (“PAGA does not establish a standard for evaluating
PAGA settlements.”). The LWDA itself has acknowledged the lack of a “specific benchmark”
and stated only that the relief provided under PAGA must be “genuine and meaningful,”
“consistent with the underlying purpose of the statute to benefit the public” and, in the context of

1 a class action, “meet[] the standards of being ‘fundamentally fair, reasonable, and adequate’
2 with reference to the public policies underlying the PAGA.” *See* California Labor and Workforce
3 Development Agency’s Comments on Proposed PAGA Settlement at 2-3, *O’Connor v. Uber*
4 *Techs. Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016).

5 Left to develop their own standards, federal district courts have typically followed the
6 LWDA’s limited guidance by requiring settlements to be “fundamentally fair, adequate, and
7 reasonable in light of PAGA’s policies and purposes.” *See Haralson*, 383 F. Supp. 3d at 972
8 (collecting cases). When applying this test, federal district courts often consider factors such as
9 strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further
10 litigation; the amount offered in settlement; the extent of discovery completed; and the expertise
11 and views of counsel. *See Smith*, 2018 WL 1899912 at *3. Federal district courts have also been
12 mindful of the fact that trial courts have broad discretion to award civil penalties in amounts that
13 are less than the maximum amounts authorized by PAGA. *See, e.g., id.* at *3; *see also* Cal. Lab.
14 Code § 2699 (e)(2).

15 **IV. ARGUMENT**

16 **A. Notice of the Settlement Agreement Has Been Given to the LWDA Pursuant** 17 **to Labor Code § 2699(l)(2)**

18 When enacting PAGA, the Legislature intended to ensure that the LWDA retained
19 “primacy” over private enforcement actions. *See* 2003 Cal. Stat. ch. 906 § 1(d). To that end,
20 PAGA requires parties who seek approval of a proposed PAGA settlement to submit the
21 proposed settlement to the LWDA online “at the same time that it is submitted to the court,” to
22 give LWDA an opportunity to comment on the proposed settlement. *See* Cal. Lab. Code §§
23 2699(l)(2), 2699(l)(4). In satisfaction of that requirement, Plaintiff submitted a copy of the
24 Settlement Agreement and this motion to the LWDA through the LWDA’s online filing system
25 in conjunction with filing this motion. *See* Lee Decl. ¶ 18, Ex. E.

26 **B. The Court Should Approve the Settlement Agreement**

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

28 In class actions, judicial review of a settlement’s fairness is designed to protect class

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

10 Against this backdrop, California courts have identified a set of circumstances entitling
11 class action settlements to a “presumption of fairness.” *See Dunk*, 48 Cal. App. 4th at 1802. In
12 particular, a presumption of fairness arise where “(1) the settlement is reached through arm’s-
13 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
14 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
15 objectors is small.” *See id.*

16 All of the factors that would give rise to a presumption of fairness in the context of a
17 class action settlement are present in this PAGA action. After this lawsuit was commenced, the
18 Parties agreed to engage in arm’s length negotiations between highly experienced counsel. As
19 part of their privileged settlement negotiations, Defendant produced data regarding the number
20 of pay periods at issue for each of the claims, from which Plaintiff’s Counsel calculated the
21 maximum PAGA penalties and analyzed Defendant’s potential liability. Lee Decl. ¶¶ 6-7. Both
22 Plaintiff’s and Defendant’s counsel have significant experience in litigating wage and hour class
23 and PAGA actions, which further supports the reasonableness of the settlement. Lee Decl. ¶¶ 15-
24 17; Declaration of Edward W. Choi (“Choi Decl.”) ¶ 5; Declaration of William L. Marder
25 (“Marder Decl.”) ¶¶ 7-8. Therefore, the Settlement Agreement is entitled to a presumption of
26 fairness.

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

28 Citing a decline in “[s]taffing levels for state labor law enforcement” and finding the

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

12 Plaintiff’s claims in this action are based on alleged violations of Labor Code §§ 201,
13 202, 203, 204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, 1197.1, 2698, *et seq.* *See generally*
14 Plaintiff’s Complaint and PAGA notice. When reviewing a settlement agreement, “the test is
15 not the maximum amount plaintiffs might have obtained at trial on the complaint,” *see*
16 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001), nor is it “whether the
17 settlement agreement is perfect in the estimation the reviewing court.” *See Lane v. Facebook,*
18 *Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). The test is “whether the settlement is reasonable under
19 all of the circumstances.” *See Wershba*, 91 Cal. App. 4th at 250. Relevant considerations
20 include the strength of a plaintiff’s case and the risk, expense, complexity, and likely duration of
21 further litigation. *See Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130 (2008); *see*
22 *also Smith*, 2018 WL 1899912 at *2. In PAGA settlements, courts also consider their authority to
23 award less than the maximum penalty authorized by PAGA. *See* Cal. Lab. Code § 2699(e)(2);
24 *see also Smith*, 2018 WL 1899912 at *3.

25 Here, Defendant produced data for each of Plaintiff’s claims, which permitted Plaintiff to
26 analyze Defendant’s potential exposure and liability. Lee Decl. ¶¶6-7. Defendant’s potential
27 exposure could be as high as \$1,135,000 if the Court were to award a \$100 penalty for each pay
28 period encompassed by the proposed settlement for each of the violations alleged. *Id.* ¶7.

1 Specifically, there were approximately 4,434 pay periods wherein overtime wages and non-
2 discretionary remuneration were paid during the same pay period, which amounts to a maximum
3 exposure of \$443,400. *Id.* Further, there were approximately 1,683 pay periods wherein meal
4 and rest break premiums and non-discretionary remuneration were paid during the same pay
5 period, which amounts to a maximum exposure of \$168,300. *Id.* There were approximately 720
6 pay periods wherein sick pay and non-discretionary remuneration were paid during the same pay
7 period, which amounts to a maximum exposure of \$72,000. *Id.* There were 4,434 wage
8 statements issued to aggrieved employees that contained one of the foregoing payments, which
9 amounts to a maximum exposure of \$443,400. *Id.* Finally, there were 88 formerly employee
10 aggrieved employees which amounts to a maximum exposure of \$8,800 for PAGA penalties
11 predicated on waiting time penalties. *Id.*

12 Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under
13 PAGA are minimal. *Id.* ¶8. Indeed, courts to consider the issue have refused to “stack” PAGA
14 penalties and often significantly reduce the penalties awarded. *Id.* If penalties were not
15 “stacked”, the total amount of exposure would amount to \$443,400.00. *Id.* Further, courts
16 have discretion to reduce PAGA penalties. *See Carrington v. Starbucks Corporation* (Cal. Ct.
17 App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving PAGA penalty
18 reduction to \$5 per pay period); *accord Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018). If
19 the Court in this case were to reduce penalties to \$5 a pay period, as was approved in
20 *Carrington*, the potential exposure amounts to approximately \$56,795.00 (5% of \$1,135,900).
21 *Id.*

22 Under the circumstances of this case, the payment of \$370,000.00 in civil penalties in
23 fair, adequate, and reasonable. The payment of \$370,000.00 in exchange for a release of only
24 those claims for civil penalties that are pleaded in the Action or that could have been pleaded
25 based on the facts alleged in the PAGA Notice and the PAGA cause of action pleaded in the
26 Action will have a substantial deterrent effect on Defendant and other California employers and
27 will confer benefits on the Aggrieved Employees, who will each receive a portion of the
28 settlement.

1 Numerous courts have held that **gross** settlements approximating between only 8 and
2 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
3 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
4 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
5 settlement amounting to only a fraction of the potential recovery does not per se render the
6 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should
7 be assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
8 settlement is fair and adequate depends on the “the difficulties in proving the case”);
9 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
10 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
11 the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct.
12 Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour
13 class settlement which obtained **only 9.1%** of projected damages, given the risks of continued
14 litigation) *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL
15 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of
16 approximately 15% of the potential recovery was fair and reasonable); *Greko v. Diesel U.S.A.,*
17 *Inc.*, No. 10–cv–02576 NC, 2013 WL 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was
18 reasonable).

19 In the present case, the Maximum Settlement Amount is approximately 1/3 of the total
20 maximum “stacked” exposure, which is a very reasonable settlement amount. In sum, this
21 settlement is fair, reasonable, and consistent with PAGA’s policies and purposes under these
22 circumstances.

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

25 Except when civil penalties are recovered from a defendant who did not have any
26 employees at the time of an alleged violation, civil penalties recovered under PAGA must be
27 distributed so that 75% of the civil penalties are paid to the to LWDA and 25% are paid to the
28 “aggrieved employees” on whose behalf the PAGA action was brought. *See* Cal. Lab. Code §

2699(i). In full compliance with that rule, the Settlement Agreement requires 75% of the Net
PAGA Payment to be paid to the LWDA and 25% of the PAGA Payment to be paid to the
Aggrieved Employees. Settlement Agreement ¶ 2.12. The Aggrieved Employees will receive
penalties based on the number of pay periods they worked during the applicable period using a
pro rata distribution formula. *Id.* ¶ 4.3.1 (a)-(c).

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

a. Percentage of the Fund

PAGA allows a prevailing plaintiff to recover reasonable attorneys' fees. *See* Cal. Lab.
Code § 2699 (g). In recognition of this, the Settlement Agreement allows Plaintiff's Counsel to
request up to 33 and 1/3 percent (\$123,333.33) in attorneys' fees. *See* Settlement Agreement ¶
4.7. This amount is fair, adequate, and reasonable for two reasons.

First, in class actions, state and federal courts have held that when a class action
establishes a monetary fund for the benefit of the class members out of which attorneys' fees
may be paid, courts may determine the amount of a reasonable fee by "choosing an appropriate
percentage of the fund created." *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016)
(affirming a fee award representing 33 1/3 percent of the fund and joining "the overwhelming
majority of federal and state courts" in approving the "percentage method" as a reasonable
means for determining attorney fee awards in class actions). While different from class action
settlements in important ways, PAGA settlements also involve the establishment of a common
fund for the benefit of persons other than the named plaintiff, so the reasons for utilizing the
percentage method are the same. *See id.* (noting that the percentage method provides "ease of
calculation," "alignment of incentives between counsel and the class," "a better approximation of
market conditions in a contingency case," and the "encouragement...to seek an early
settlement"). The \$123,333.33 requested by Plaintiff's Counsel represents one-third of the
Maximum Settlement Amount, which is consistent with awards usually approved in class
actions. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008) ("[F]ee awards in
class actions average around one-third of the recovery"); *see also Laffitte*, 1 Cal. 5th at 506

(upholding the approval of a fee award equal to one-third of the total settlement amount).

b. Lodestar Cross-Check

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

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

Courts find reasonable multipliers in a lodestar cross-check can “range from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*, e.g., *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60

1 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
2 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
3 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
4 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was
5 affirmed in full by the California Supreme Court in its decision guiding lower courts on
6 assessing fees.

7 Moreover, the Ninth Circuit has cited with approval a comprehensive study of fees
8 awarded by the percentage method showing that the majority of multipliers awarded are “in the
9 1.5-3.0” range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming
10 a multiplier of 3.65 in an employment class action case and analyzing the multiplier awarded in
11 over 30 cases). Federal district courts applying California law have likewise routinely approved
12 cross-check multipliers between 2 and 3 in employment cases. *See, e.g., Willner v. Manpower*
13 *Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (affirming a
14 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells Fargo Bank,*
15 *N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in lodestar
16 multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,
17 at *5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code
18 violations). Other courts have found even higher multipliers to be reasonable by comparison to
19 other cases. *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125-26 (C.D. Cal.
20 2008) (approving a 5.2 multiplier on a cross-check after surveying a large body of cases
21 affirming a higher multiplier).

22 With respect to Plaintiff’s Counsel’s lodestar, Plaintiff’s Counsel will have expended
23 approximately 156.30 hours litigating this case, which includes approximately 25 hours of
24 anticipated time spent after approval responding to correspondence and phone calls from
25 Aggrieved Employees, the Settlement Administrator, and Defendant’s Counsel. Lee Decl. ¶ 12;
26 Choi Decl. ¶ 7; Marder Decl. ¶ 10. Plaintiff’s Counsel request hourly rate of \$850.00 per hour.
27 Lee Decl. ¶ 13; Choi Decl. ¶ 6; Marder Decl. ¶ 9. The courts are quite liberal in the evidence
28 required to prove an attorney’s hours. Detailed time records are not required. An attorney’s

1 testimony alone may suffice: “Testimony of an attorney as to the number of hours worked on a
2 particular case is sufficient evidence to support an award of attorney fees, even in the absence of
3 detailed time records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

4 Reasonable hours include, in addition to time spent during litigation, the time spent
5 before the action is filed, including time spent interviewing the clients, investigating the facts and
6 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
7 62 (1980). The fee award should also include fees incurred to establish and defend the attorneys’
8 fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982). The hours for which Plaintiff’s Counsel
9 seek compensation involve only these types of tasks. Thus, the number of hours for which fees
10 are sought is reasonable.

11 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
12 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
13 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
14 attorney’s skill and experience, the nature of the work performed, the relevant area of expertise
15 and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
16 4th 629, 632-33 (1998).

17 Plaintiff’s Counsel’s skill and experience justify the requested rates. As shown in the
18 supporting declarations, Plaintiff’s Counsel have significant experience in the area of
19 employment and wage and hour class and representative actions. Their practices focus on
20 representing employees in employment matters, particularly wage and hour cases on a
21 contingency basis. Lee Decl. ¶ 16; Choi Decl. ¶ 5; Marder Decl. ¶ 7. As such, based on the hours
22 and applicable rate, Plaintiff’s Counsel’s lodestar amount through the finalization of this
23 settlement – without a multiplier – will be approximately \$154,105, which **exceeds the fee**
24 **requested** by Plaintiff here and results in a negative lodestar multiplier. Lee Decl. ¶ 13; Choi
25 Decl. ¶ 7; Marder Decl. ¶ 10. Accordingly, the cross-check supports the fee requested.

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

28 PAGA also allows a prevailing plaintiff to recover litigation costs. See Cal. Lab. Code §

2699(g). Accordingly, the Settlement Agreement allows Plaintiff's Counsel to request up to \$15,000.00 in litigation costs. Settlement Agreement ¶ 4.7.

Plaintiff's Counsel request \$4,176.12 for the reimbursement of litigation costs. As set forth in accompanying declarations of Plaintiff's Counsel, these costs were all directly incurred in the prosecution of this action, including, but not limited to, filing fees, service fees, and mediation fees. Lee Decl. ¶ 14, Ex. D; Choi Decl. ¶ 8, Ex. B. As such, Plaintiff's Counsel's request for costs in the amount of \$4,176.12 is fair, adequate, reasonable, and consistent with PAGA's policies. Because this amount is less than the \$15,000.00 that was provided in the Settlement Agreement, the difference will be distributed to the LWDA and Aggrieved Employees.

6. The Payments to Plaintiff Should Be Approved

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

Here, Plaintiff respectfully requests \$10,000.00, which is intended to compensate Plaintiff for the time spent on this case and for executing a general release, including of Civil Code § 1542, which was not required by Aggrieved Employees. Declaration of Fiona Marsh ("Marsh Decl.") ¶¶6-7. 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). Plaintiff also took the risk of bringing the lawsuit, which was a matter of public record. Future employers may be less likely to hire an employee who has previously filed an action against an employer. This in conjunction with Plaintiff's agreement to provide a general release supports the requested award.

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

4 Because the Settlement Agreement requires payments not only to Plaintiff, Plaintiff's
5 Counsel, and the LWDA, but also to Defendant's current and former employees, significant time
6 and effort will be required to administer the Settlement if it is approved by this Court. Among
7 other things, the Settlement Administrator will calculate each PAGA Settlement Employee
8 Individual PAGA Payment; issue appropriate tax forms to all parties who receive payments
9 under the Settlement Agreement; mail payments to Plaintiff, Plaintiff's Counsel, the LWDA, and
10 each Aggrieved Employee; and void any checks not cashed by Aggrieved Employees so that the
11 unclaimed amount can be forwarded to the State of California Controller's Office Unclaimed
12 Property Law in the name of the PAGA Settlement Employees who did not cash their respective
13 Individual PAGA Payment. See Settlement Agreement ¶ 4.6.6.

14 In contemplation of these expenses, the parties will engage Phoenix Settlement
15 Administrators to act as a third-party settlement administrator and have allocated up to \$3,250.00
16 to cover the cost of settlement administration. Settlement Agreement ¶ 2.21; Lawrence Decl. ¶8,
17 Ex. B).

18 **V. CONCLUSION**

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

21 Dated: August 30, 2023

DIVERSITY LAW GROUP, P.C.

22
23 By: 
24 Larry W. Lee
25 Attorneys for Plaintiff Fiona Marsh and the
26 Aggrieved Employees
27
28



Superior Court of Alameda County Public Portal

Make a Reservation

MARSH vs BURBERRY LIMITED

Case Number: 22CV016122 Case Type: Unlimited Civil Category: Other Employment Complaint Case
Date Filed: 2022-08-12 Location: Rene C. Davidson Courthouse - Department 16

Reservation

Case Name: MARSH vs BURBERRY LIMITED	Case Number: 22CV016122
Type: Motion re: (Motion for Approval of PAGA Settlement)	Status: RESERVED
Filing Party: Fiona Marsh (Plaintiff)	Location: Rene C. Davidson Courthouse - Department 16
Date/Time: 09/27/2023 2:30 PM	Number of Motions: 1
Reservation ID: 588432662990	Confirmation Code: CR-8EDMRB8DLAWU6JPS2

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
Court Technology Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount: \$1.00	Type: Visa
Account Number: XXXX6929	Authorization: 06786G
Payment Date: 1969-12-31	

[Print Receipt](#)[+ Reserve Another Hearing](#)[View My Reservations](#)