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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF STANISLAUS**

9 **NICOLE PRIOLA, an individual,**

10 **Plaintiff,**

11 **vs.**

12 **COPPER AND GOLD, LLC, a limited**
13 **liability corporation, PENNY**
14 **NEWMAN GRAIN CO., a corporation;**
15 **and DOES 1-10, inclusive,**

16 **Defendants.**

CASE NO: CV-22-005730

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO APPROVE PAGA SETTLEMENT AND
DISMISS ACTION WITH PREJUDICE

Date: April 5, 2024
Time: 8:30 am
Dept.: 24

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2 **I. INTRODUCTION**

3 Plaintiff Nicole Priola (“Plaintiff”) respectfully moves this Court for an Order granting
4 approval of the proposed PAGA Settlement against Defendants Copper and Gold, LLC and Penny
5 Newman Grain Co. (“Defendants”). Following a full-day mediation with mediator Scott Radovich,
6 Esq., Plaintiff and Defendants reached a resolution of all of Plaintiff’s claims in this Action, both
7 her individual claims and the PAGA claim asserted as Plaintiff’s Eleventh Cause of Action. The
8 PAGA portion of the settlement resolves claims for PAGA penalties involving 19 employees,
9 including Plaintiff (“Aggrieved Employees”) from October 10, 2021, through the present (“PAGA
10 Period”), with an estimated maximum value of \$10,750.

11 The PAGA portion of this case addresses alleged violations of Labor Code Sections 201,
12 202, 204, 226(a), 510, 512, 558, 1194, and 1197. Relevant to that claim, Plaintiff alleges that
13 Defendant failed to incorporate bonuses into its regular rate of pay and failed to always furnish
14 compliant meal periods. Plaintiff asserts these violations, and derivative violations stemming from
15 same, as the basis for her PAGA claim.

16 As set forth herein, the proposed Settlement embodies all of the features of an appropriate
17 settlement as it is the product of (1) arms-length negotiations, (2) negotiated by attorneys
18 experienced in wage and hour issues and with an experienced mediator (Scott Radovich, Esq.), and
19 (3) it reflects a reasoned compromise based directly on the relative strength and value of the PAGA
20 claim, as well as the risks, expense, complexity and likely duration of further litigation.

21 The value achieved by the Settlement Agreement may be gleaned from the fact that the
22 LWDA and the Aggrieved Employees encompassed by the Settlement Agreement will receive a
23 penalty that is well within the range regularly approved by courts for PAGA settlements.

24 It is also important to underscore that all penalty amounts paid to Aggrieved Employees
25 will be an unexpected windfall, as civil penalties are normally collected solely by the Labor
26 Commissioner and are not distributed to employees, serve as a penalty against the employer and
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1 are not designed to compensate employees, and do not impact any Aggrieved Employees' potential
2 individual claims.

3 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
4 Court enter the Order submitted herewith.

5 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

6 **A. Pertinent Facts and Procedural History.**

7 Plaintiff Priola worked as an hourly, non-exempt Weighmaster for Defendant Copper and
8 Gold. Plaintiff alleges that she was jointly employed by Defendant Copper and Gold and
9 Defendant Penny Newman Grain Co, an allegation Defendants deny. During her employment,
10 she, and other employees, were paid bonuses. As to non-exempt employees who also were paid
11 for overtime, or sick time, in a pay period in which a bonus was paid, the amount of the bonus was
12 not included in the applicable regular rate. Defendants contended in this action, and continue to
13 contend, that the bonuses were discretionary Thanksgiving bonuses. Plaintiff Priola also alleges
14 that on several occasions during her employment, her supervisor required her to work through
15 meal periods but punch out to make it appear as though compliant meal periods were taken.

16 Plaintiff Priola filed a notice with the Labor and Workforce Development Agency
17 ("LWDA"), on October 6, 2022. The LWDA Notice included potential PAGA claims under Labor
18 Code sections 201, 202, 204, 226(a), 510, 512, 558, 1194, and 1197. VJK Decl., ¶6. Plaintiff
19 Priola also alleged individual causes of action against Defendants for disability discrimination,
20 failure to accommodate, failure to engage in the interactive process, retaliation, wrongful
21 termination, and various Labor Code violations, in Causes of Action One through Ten of her
22 Complaint.

23 Defendants and Plaintiff informally exchanged discovery and conducted early mediation
24 of this dispute before Scott Radovich, Esq. on November 9, 2023. VJK Decl., ¶¶ 4, & 7.c. This
25 mediation resulted in settlements of Plaintiff's individual claims and the PAGA claim. VJK Decl.,
26 Exhibit 1.

1 Plaintiff submitted a copy of the settlement agreement and these moving papers to the
2 LWDA concurrently with the filing of this motion. VJK Decl., ¶ 5, Exhibit 2.

3 **B. The Proposed Settlement**

4 The Parties jointly prepared and executed the Settlement Agreement. VJK Decl., Exhibit

5 1. The Settlement Agreement sets forth the terms of the Settlement reached by the Parties,
6 including the following key points:

7 1. Defendant agrees to settle the PAGA claim for the payment of one thousand five
8 hundred dollars (\$1,500.00) (hereinafter the “Gross Settlement Amount”). *See* Settlement
9 Agreement, at § 2.b. Plaintiff’s counsel is not seeking attorneys’ fees and costs from the PAGA
10 settlement.

11 2. Seventy-five percent (75%) of this amount, or \$1,125.00, shall be distributed to the
12 LWDA and the remaining twenty-five percent (25%) of this amount, or \$375.00, shall be
13 distributed to the Aggrieved Employees. *See* PAGA Settlement Agreement, at §§ 2.b.i, 2.b.ii.

14 3. All Aggrieved Employees will receive a pro rata share of the \$375 allocated to them,
15 based on the number of pay periods that he or she was employed by Defendant Copper and Gold
16 during the PAGA Period. *See* PAGA Settlement Agreement, at § 2.b.ii.

17 4. In exchange for the above settlement consideration, Defendants shall be entitled to
18 the following release from each Aggrieved Employee, including Plaintiff¹:

19 [A]ll claims seeking civil penalties under the California Labor Code
20 predicated on the facts and theories outlined in the PAGA Notice
21 and/or based on the PAGA Claims asserted in the Action or that
22 could have been asserted in the Action, during the PAGA Period (the
23 “PAGA Released Claims”). The PAGA Released Claims
24 specifically included, but are not limited to, claims for violations of
25 Labor Code sections 201, 202, 204, 226(a), 510, 512, 1194, and 1197
26 based on the same facts and theories outlined in the PAGA Notice
27 and/or asserted in the PAGA Claim.

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¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009) 46 Cal. 4th 969, 986 (concluding that “with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act . . .”).

1 See PAGA Settlement Agreement, § 5.

2 **III. LEGAL ARGUMENT**

3 **A. Standards for Approval of a PAGA Settlement**

4 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
5 statute, which states that the “[t]he superior court shall review and approve any settlement of any
6 civil action filed pursuant to this part.” See *Labor Code* § 2699(l)(2). This involves a review of
7 whether the settlement is “fair, adequate, and reasonable under all the circumstances.” *Moniz v.*
8 *Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77. This is not the same standard in the PAGA
9 context as it is with class actions, because the trial court need not “act as a fiduciary for aggrieved
10 employees.” *Ibid.* However, the Court is to use a standard of review for settlements that “prevents
11 fraud, collusion or unfairness [citation], and protects the interests of the public and the LWDA in
12 the enforcement of state labor laws.” *Ibid.* (internal quotations and citations omitted).

13 In general, courts have determined that a settlement which serves the deterrent and punitive
14 functions of the PAGA statute is appropriately approved. E.g. *Moniz, supra*, 72 Cal.App.5th at 77;
15 *Hernandez v. Best Buy Stores, LP*, 2017 WL 2445438 *2 (S.D. Cal. 2017); *Gutilla v. Aerotek, Inc.*,
16 2017 WL 2729864 * 3 (E.D. Cal. 2017). Here, the purposes of the PAGA are being well-served
17 by the resolution.

18 As with any settlement, the Court must be mindful in conducting its inquiry that
19 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
20 litigating further.” See *In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
21 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
22 absolutes and an abandoning of highest hopes’” [*Officers for Justice v. Civil Service Com.*, 688
23 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
24 of wasteful and expensive litigation that induce consensual settlements.” *Id.*, at 625. As such, “the
25 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or
26 “judged against a hypothetical or speculative measure of what might have been achieved by the
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1 negotiators.” *Id.*

2 When evaluating the fairness, adequacy, and reasonableness of a PAGA penalty, courts
3 compare the potential penalty amount (its verdict value, as some courts refer to it) with the actual
4 recovery under the settlement. [Citations]. There is no express or even baseline percentage of
5 recovery required. Under the express terms of the PAGA, a verdict value is not guaranteed even if
6 the plaintiff prevails, as courts have discretion to lower the amount of penalties based on the
7 circumstances of a particular case. Citation.] *Manzo v. McDonald’s Restaurants of California, Inc.*
8 (E.D. Cal., Sep. 29, 2022) 2022 WL 4586236, *6 (approving settlement of less than 1% of “verdict
9 value” of PAGA claims). Further, while “[a PAGA] action is ... designed to protect the public
10 and penalize the employer for past illegal conduct” [*Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
11 LEXIS 66454 (E.D. Cal. June 30, 2010), at 11], a reviewing Court must take into account the fact
12 that settlement of a PAGA claim – like any settlement – involves a “compromise” that stops short
13 of rendering findings of liability and damages. Moreover, the Court must not lose sight of the fact
14 that “[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose
15 of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise
16 may not have been assessed and collected by overburdened state enforcement agencies.” *See*
17 *Ochoa-Hernandez v. CAJDER Foods, Inc.* (N.D. Cal. Apr. 2, 2010) 2010 U.S. Dist. LEXIS 32774,
18 at 12.

19 **B. The Settlement Meets the Criteria for Approval**

20 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

21 In conducting a review of a settlement, it is generally recognized that an “agreement ...
22 reached through arms-length negotiation between experienced parties . . . is entitled to a
23 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
24 44 (C.D. Cal. Apr. 12, 2010). A presumption of fairness exists here, as the proposed Settlement
25 (1) is the product of arms-length negotiations [VJK Decl., ¶ 5], (2) that was negotiated by Counsel
26 with significant experience in similar wage and hour litigation [*Id.*, ¶¶ 9-11], (3) which occurred
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1 after Counsel had conducted sufficient investigation to evaluate the strength and potential value of
2 the PAGA claims, as well as evaluating the risks of litigating this claim through trial, and with the
3 assistance of an experienced mediator. *Id.*, at ¶¶ 4, 7. Based thereon, the court should give
4 considerable weight to the competency and integrity of counsel in assuring itself that the Settlement
5 Agreement represents an arm's-length transaction entered without self-dealing or other potential
6 misconduct.

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8 **2. The Proposed Settlement Furthers the Purposes of the PAGA, Taking into**
9 **Consideration Defendant's Defenses and Mitigating Factors, and Should Be**
10 **Approved.**

11 i. Overtime Claims

12 Plaintiff's overtime claims are premised on the allegation that Defendant issued allegedly
13 non-discretionary bonuses to non-exempt employees that had to be included in the regular rate of
14 pay, but were not included in overtime pay paid to these employees during the same pay period in
15 which they earned the bonus. Defendants contended throughout that these bonuses were, in fact,
16 discretionary, small Thanksgiving bonuses paid to employees on an annual basis. If the court
17 ultimately determined that these bonuses were discretionary, then all of Plaintiff's PAGA claims
18 based on her regular rate theory fail—including her overtime claims, wage statement claims, and
19 waiting time penalty claims.

20 Through informal discovery and the mediation process, Plaintiff learned that 19
21 employees, including Plaintiff, were issued at least 1 annual bonus during the PAGA Period.
22 During the PAGA Period, there were a maximum of 3 pay periods in which a bonus was paid,
23 resulting in a maximum of 57 overtime violations. VJK Decl., ¶7.c.ii.

24 The civil penalty for failure to pay overtime, sick pay, or meal/rest period premiums at the
25 legally required rate is found at Labor Code section 558(a) but is exclusive of the underpaid wage
26 portion of the penalty. *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 193-194. Thus, Defendant
27 was potentially liable for \$50 per employee per pay period in which a violation occurred. For the
28 57 potential violations, Defendant faced \$2,850 in maximum possible penalties (57 x \$50).

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ii. Waiting Time Penalty Claim

Under Labor Code sections 201 and 202, Defendant was required to pay employees for all wages earned and unpaid at termination or within 72 hours of resignation. As set forth above, this claim is predicated on the allegation that former employees who did not have bonuses incorporated into their rates of pay for overtime, sick pay, and/or meal/rest premium penalties left employment with earned but unpaid wages. The civil penalty for violation of Labor Code sections 201 and/or 202 is found at Labor Code section 2699(f), and is \$100 per employee per pay period, as there is no civil penalty defined for violations of these code sections². Based on the data provided to Plaintiff in discovery, Plaintiff determined that there were 7 former employees who may have suffered violations. VJK Decl., ¶ 7.c.iv. Accordingly, Defendant faced a maximum potential penalty liability of \$700 (7 * \$100).

iii. Meal Period/Minimum Wage Claim

Plaintiff's meal period and minimum wage claims derive from the same allegations. Plaintiff alleges that, on approximately five occasions during her employment, she was prevented from taking meal periods by her supervisor but instructed to clock in to make it appear that she had taken a compliant meal period. The civil penalty for non-complaint meal periods is found at Labor Code section 558 and is \$50 per employee per pay period. The civil penalty for minimum wage violations is found at Labor Code section 1197.1(a)(1) and is \$100 per employee per pay period. Plaintiff's supervisor supervised her and one other employee. Assuming that Plaintiff and this other employee suffered both meal period violations and the accompanying minimum wage violations all in separate pay periods, the maximum value of these claims is \$1,500 (\$50 x 10 violations) + (\$100 x 10 violations).

iv. Wage Statement Claim

The wage statement allegations in this claim are derivative of the above facts. In short,

² See *Culley v. Lincare, Inc.* (E.D. Cal 2017), 236 F.Supp.3d 1184, 1191 (Holding that Labor Code section 256 does not apply to claims of violations of Labor Code sections 201/202 for employees other than seasonal workers); *Raziano v. Albertsons LLC* (C.D. Cal. Dec. 13, 2019) 2019 WL 9464279, *8 (same).

1 Plaintiff alleged that in every pay period in which an employee was underpaid due to a regular rate
2 issue, that employee's wage statement was also inaccurate in that pay period.

3 With respect to the maximum penalty exposure on this claim, it should first be noted that
4 California courts have not clearly determined whether the applicable penalty for noncompliant
5 wage statements is found under Labor Code section 226.3 or Labor Code section 2699(f). *See*
6 *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 673-674 (indicating
7 the \$250 penalty under Labor Code section 226.3 applies in all instances); *but see, Noori v.*
8 *Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, 971 fn. 13 (indicating civil
9 penalties for noncompliant wage statements are available pursuant to 2699(f)). Given the lack of
10 clarity among the courts, and the explicit language of Labor Code section 226.3 stating that its
11 penalty applies where "the employer fails to provide the employee a wage deduction statement or
12 fails to keep the records required in subdivision (a) of Section 226," the appropriate measure of
13 maximum exposure should be the \$100 "default" penalty set forth in Labor Code section 2699(f).
14 Using that amount, the maximum exposure faced by Defendant was \$5,700 (57 pay periods x \$100).

15 v. Total PAGA Exposure and Settlement Value

16 Based on the facts set forth above, the maximum exposure for the PAGA violations would
17 be \$10,750. VJK Decl., ¶7.c. The PAGA settlement amount of \$1,500 represents approximately
18 14% of the maximum PAGA exposure in this case.

19 Even without examining Defendant's defenses, the settlement amount is well within the
20 range of PAGA settlements approved by courts. Courts have regularly approved PAGA
21 settlements representing less than 5% of the maximum exposure. *See Bowen v. Jea Senior Living*
22 *Health and Welfare Benefit Plan, LLC* (E.D. Cal, Dec. 8, 2023) 2023 WL 8527732 at *9-10
23 (approving PAGA settlement of approximately 3% of maximum liability); *Manzo v. McDonald's*
24 *Restaurants of California, Inc.* (E.D. Cal. Sep. 29, 2022) at *7 (approving PAGA settlement of
25 less than 1% of maximum liability); *Rodriguez v. Danell Custom Harvesting, LLC* (E.D. Cal.
26 2018) 293 F.Supp.3d 1117, 1133 (approving PAGA settlement representing 0.6% of maximum
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1 liability); Indeed, as low as 0.2 percent of total value has been approved. *Carrington v.*
2 *Starbucks* (2018) 30 Cal.App.5th 504, 517 (\$150,000 approved where maximum value was
3 \$75,000,000).

4 vi. Defendant's Defenses

5 As said, Defendants primary defense to the regular rate related claims is that the bonus did
6 not need to be accounted for because it was discretionary. While Plaintiff disagrees with
7 Defendant's contention that the bonuses were discretionary, Plaintiff believes a discounted value
8 is appropriate because Defendant's position could prevail, and, at a minimum, Defendant's
9 conduct was not egregious, and the Court likely would take that into account in exercising its
10 discretion to reduce any award.

11 Second, PAGA claims never carry full value, as the Legislature has empowered courts to
12 reduce PAGA awards while there is no required formula for the discount of PAGA awards that
13 are "unjust, arbitrary, and oppressive, or confiscatory." Labor Code §2699(e)(2). Because the
14 regular rate issue stems from the payment of a bonus, and not some form of "wage theft," it is
15 anticipated that a significant reduction would be imposed. In this regard, significant punishment
16 could provide incentive to end the bonus program, which would not be to the benefit of
17 employees.

18 Third, the claims regarding meal breaks, which commonly are speculative, are further
19 undercut because non-exempt employees were providing the time at work information that was
20 relied upon by Defendants. Further, in the context of compliant written policies and time records
21 evidencing compliance, proving meal violations presents an overwhelming challenge that very
22 well may require obtaining statements or deposition testimony from each non-exempt employee.

23 Fourth, the \$1,500 is worth more to the employees and LWDA as Plaintiff's counsel is not
24 seeking any compensation for fees. VJK Decl., ¶ 7.e.

25 For these reasons, Plaintiff concluded the \$1,500.00 PAGA settlement is fair, reasonable,
26 and just. VJK Decl., ¶ 8.

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3 **3. The Scope of the Release is Appropriately Tailored**

4 The California Supreme Court has concluded that in the context of PAGA “the nonparty
5 employees, because they were not given notice of the action or afforded any opportunity to be
6 heard, would not be bound by the judgment as to remedies other than civil penalties.” *Arias v.*
7 *Superior Court* (2009), 46 Cal. 4th 969, 987. Thus, the scope of the release provided in exchange
8 for the foregoing consideration is limited to the claims for civil penalties that were alleged, or
9 reasonably could have been alleged, based on the facts stated in the Complaint and Plaintiff’s
10 PAGA Notice under Labor Code §§ 2698 *et seq.* See Settlement Agreement, at § 5. This settlement
11 has no impact on any individual claims other nonparty aggrieved employees may have against
12 Defendant.

13 **IV. CONCLUSION**

14 For all the reasons set forth above, Plaintiff respectfully requests that this Court grant the
15 instant motion and approve the PAGA Settlement as fair, reasonable, and adequate.

16 Dated: February 21, 2024

Respectfully submitted,

17 MAYALL HURLEY, P.C.

18 By: 
19 VLADIMIR J. KOZINA
20 Attorneys for Plaintiff