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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALEXIS TRISTAN, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

AMERICAN HOMES 4 RENT, L.P., a
Delaware limited partnership; and DOES 1
through 50, inclusive,

Defendants

Case No. 23STCV17006

**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: March 11, 2024
Time: 10:00 a.m.
Dept: 61

Reservation ID: 570905490120

Complaint Filed: July 20, 2023
Trial Date: None

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

2 **PLEASE TAKE NOTICE** that on March 11, 2024, at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable George Keosian, Judge presiding in Department 61
4 of the above-referenced Court located at 111 North Hill Street, Los Angeles, California 90012,
5 Plaintiff Alexis Tristan (“Plaintiff”) will seek an Order approving the concurrently filed Joint
6 Stipulation of Settlement and Release (“Agreement” or “Settlement”), pursuant to the procedures
7 set forth in Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points and
9 authorities, the accompanying declarations of Kristen M. Agnew, Nicholas Rosenthal, Plaintiff
10 Alexis Tristan, and Kevin Lee of Phoenix Settlement Administrator, the records and file herein, and
11 on such other evidence as may be presented at the hearing of the motion.

12
13 DATED: February 15, 2024

DIVERSITY LAW GROUP, P.C.
POLARIS LAW GROUP

14
15
16 By: _____

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Kristen M. Agnew

Nicholas Rosenthal

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Employees

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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code section 2698,
3 *et seq.*, Plaintiff Alexis Tristan (“Plaintiff”) hereby moves the Court for an order approving the non-
4 reversionary settlement with Defendant American Homes 4 Rent, L.P. (“Defendant”). The settlement
5 was reached after extensive investigation and informal discovery, including Defendant’s production
6 of time and payroll records. Furthermore, pursuant to the terms of Joint Stipulation of Settlement and
7 Release (“Agreement” or “Settlement”), Defendant will pay the gross amount of \$195,000.00, which
8 includes an estimated payment of approximately \$78,616.16 in civil penalties to the California Labor
9 and Workforce Development Agency (“LWDA”). The proposed release is also narrowly tailored to
10 release only claims for civil penalties under PAGA predicated on the specific Labor Code violations
11 alleged in the operative Complaint and Supplemental PAGA Notice. As further demonstrated below
12 and in the accompanying declarations of counsel, the proposed settlement constitutes an adequate,
13 fair, and reasonable settlement on behalf of the LWDA and aggrieved employees, and accomplishes
14 the goals of the PAGA.

15 **II. PROCEDURAL HISTORY**

16 **A. PAGA Notice**

17 On May 15, 2023, Plaintiff submitted written notice under Labor Code section 2699.3 to the
18 California Labor and Workforce Development Agency (“LWDA”) and Defendant, alleging that
19 Defendant violated Labor Code section 226(a) (the “PAGA Notice”). As set forth in the PAGA
20 Notice, Plaintiff alleged that when Defendant paid overtime wages, the corresponding wage statement
21 failed to list the accurate total hours worked. *See* Declaration of Kristen M. Agnew (“Agnew Decl.”)
22 ¶ 3, Exhibit 1.

23 On May 16, 2023, Plaintiff filed a Class Action Complaint in the matter of *Alexis Tristan v.*
24 *American Homes 4 Rent, L.P.*, Los Angeles Superior Court Case No. 23STCV11086 (the “Class
25 Action”). *See* Agnew Decl. ¶ 4. In the Class Action, Plaintiff alleged a single cause of action for
26 violation of Labor Code section 226(a). *See id.* Shortly after the filing of the Class Action Complaint,
27 defense counsel provided a copy of an arbitration agreement signed by Plaintiff. *See id.* The
28 arbitration agreement contains a class action waiver. *See id.* Defendant contends the arbitration

1 agreement and class action waiver language prevents Plaintiff from pursuing any class claims thereby
2 subjecting the Class Action to dismissal. *See id.*¹

3 On July 20, 2023, Plaintiff initiated the instant representative PAGA Action against
4 Defendant. *See* Agnew Decl. ¶ 5. Plaintiff asserted a single cause of action for violation of the PAGA,
5 predicated on Defendant’s alleged violation of Labor Code section 226(a). *See id.* As alleged in the
6 complaint, Plaintiff seeks to recover PAGA penalties on behalf of all current and former non-exempt
7 employees who worked for Defendant in the State of California and earned overtime wages. *See id.*

8 On August 11, 2023, Plaintiff filed a supplemental notice with the LWDA (“Supplemental
9 PAGA Notice”). *See* Agnew Decl. ¶ 6, Exhibit 2. As set forth in the Supplemental PAGA Notice,
10 Plaintiff alleges that Defendant failed to accurately display the correct overtime rate and/or
11 corresponding hours worked on its wage statement, in violation of Labor Code section 226(a). *See*
12 *id.* Plaintiff further alleged that Defendant paid overtime wages at a rate below 1.5x the regular rate
13 of pay, in violation of Labor Code sections 510, 558 and 1194. *See id.*

14 On August 15, 2023, Plaintiff filed the operative First Amended Representative Action
15 Complaint (the “First Amended Complaint” or “FAC”). *See* Agnew Decl. ¶ 7. As set forth in the
16 FAC, Plaintiff seeks civil penalties predicated on Defendant’s alleged violation of Labor Code
17 sections 201, 202, 203, 226, 510, 558, 1194 and 2698. *See id.*

18 **B. The Parties Participate in Mediation**

19 In light of the narrow claims at issue, Plaintiff and Defendant (collectively, the “Parties”)
20 agreed to redirect their resources to exploring the possibility of an early resolution through
21 mediation. *See* Agnew Decl. at ¶ 9. In lieu of the exchange of formal discovery, Defendant provided
22 Plaintiff with information regarding the amount of civil penalties at issue, including Plaintiff’s time
23 and payroll records, the number of non-exempt employees who received the payment of overtime
24 wages during the period of May 15, 2023 through October 13, 2023, and the number of pay periods
25 in which overtime wages were paid during this same period. *See id.* at ¶ 10. The Parties also
26

27
28 ¹ On February 7, 2024, the Parties submitted a joint stipulation requesting the dismissal of the Class
Action *without* prejudice. *See* Agnew Decl. ¶ 8.

1 extensively discussed Plaintiff’s allegations and Defendant’s defenses, including modifications that
2 had been made to the wage statements to bring them into compliance with Section 226 and
3 Defendant’s method of calculating the total hours worked for the purpose of paying overtime
4 wages. *See id.* at ¶¶ 10-12. Based on the information provided by Defendant, Plaintiff’s Counsel
5 conducted a full penalties analysis as to the value of the PAGA claims. *See id.* at ¶ 13. Thus,
6 Plaintiff’s Counsel entered mediation with a clear understanding of Defendant’s maximum
7 exposure. *See id.*

8 On December 12, 2023, the Parties engaged in a full-day mediation with Michael Loeb. *See*
9 Agnew Decl. at ¶ 14. As a result of the mediation, the Parties reached the present settlement,
10 memorialized by a written Memorandum of Understanding (“MOU”). *See id.* The Parties thereafter
11 negotiated the terms of the Joint Stipulation of Settlement and Release. *See id.* at ¶ 15. The settlement
12 discussions were conducted at arm’s length. *See id.*

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

14 The material terms of the Settlement are described below and set forth in detail in the
15 concurrently filed Settlement Agreement, a true and correct copy of which is attached as **Exhibit 3**
16 to the Declaration of Kristen M. Agnew.

17 **A. The Aggrieved Employees**

18 The current Action is being settled on behalf of the following employees: all current and
19 former non-exempt employees in the State of California who received the payment of overtime wages
20 during the period from May 15, 2022, through December 12, 2023. (“Aggrieved Employees”). *See*
21 Settlement Agreement (“SA”) § B-2. The PAGA Period is defined to mean the period of May 15,
22 2022, through December 12, 2023. *See* SA § B-14. Based on Defendant’s records, there are
23 approximately 98 Aggrieved Employees. *See* Agnew Decl. ¶ 16. These individuals worked in
24 approximately 2,693 pay periods during the PAGA Period. *See id.*

25 **B. The Gross Settlement Amount**

26 The Settlement Agreement requires Defendant to pay the gross amount of One Hundred
27 Ninety-Five Thousand Dollars (\$195,000.00) (the “Gross Settlement Amount”). *See* SA § B-11.
28 Based on the Gross Settlement Amount, Defendant will pay approximately \$72.40 per pay period to

1 resolve the claims alleged in the operative FAC.

2 **C. The PAGA Penalties Fund**

3 The balance of the Gross Settlement Amount remaining after deduction of Settlement
4 Administration Costs, Enhancement Payment to Plaintiff, and the Attorneys' Fees and Costs Award,
5 will be available for distribution to the LWDA and Aggrieved Employees (the "PAGA Penalties
6 Fund"). *See* SA § D-4. The PAGA Penalties Fund will total approximately \$104,821.55. *See* Agnew
7 Decl. ¶ 21. Seventy-five percent (75%) of the PAGA Penalties Fund, or approximately \$78,616.16,
8 will be paid to the LWDA for PAGA penalties. *See* SA § D-4; Agnew Decl. ¶ 21. The remaining
9 twenty-five percent (25%), or approximately \$26,205.39, will be distributed to Aggrieved
10 Employees. *See* SA § D-4; Agnew Decl. ¶ 21.

11 Based on the number of Aggrieved Employees, employees will be entitled to recover, on
12 average, up to approximately \$267.40 each. *See* Agnew Decl. ¶ 23. However, the amount any
13 particular Aggrieved Employee will be entitled to recover will depend on the number of pay periods
14 in which he or she received the payment of overtime wages during the PAGA Period, with some
15 entitled to receive more and others less. *See* SA § D-5. This is fair, as it directly allocates greater
16 penalties to individuals who have allegedly suffered greater harm. *See* Agnew Decl. ¶ 22. Any
17 uncashed checks shall be paid out to the *cy pres* recipient, Legal Aid at Work. *See* SA § E-5. Neither
18 Plaintiff nor her counsel have any relationship with Legal Aid at Work. *See* Agnew ¶ 24; Declaration
19 of Nicholas Rosenthal ("Rosenthal Decl.") ¶ 8; Declaration of Alexis Tristan ("Tristan Decl.") ¶ 11.

20 **D. Attorneys' Fees and Litigation Costs**

21 As part of the Settlement, Defendant does not object to Plaintiff's Counsel's request for
22 attorneys' fees of approximately one-third of the Gross Settlement Amount, *i.e.*, Sixty-Five Thousand
23 Dollars (\$65,000.00), and reimbursement for litigation costs, subject to the Court finally approving
24 this Settlement. *See* SA § D-9. ² Plaintiff's Counsel requests reimbursement of \$12,328.45 for
25 litigation related expenses. *See* Agnew Decl. ¶ 18. Any portion of the requested attorneys' fees and/or
26

27 ² 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 Settlement Agreement allows up to
Fifteen Thousand Dollars (\$15,000.00) for reimbursement of litigation costs. *See* Agnew Decl. ¶ 18.

costs not approved by the Court shall be added to the PAGA Penalties Fund. *See* SA § D-9.

E. The Enhancement Payment

As part of the Settlement, Defendant also does not object to Plaintiff's request for an Enhancement Payment in the amount of Ten Thousand Dollars (\$2,850.00). *See* SA § D-8. Any portion of the Enhancement Payment that is not approved by the Court shall become part of the PAGA Penalties Fund. *See id.*

F. Settlement Administration Costs

Finally, the Settlement provides for the payment of the fees and expenses reasonably incurred by the Settlement Administrator. *See* SA § D-10. The Parties have agreed to utilize Phoenix Settlement Administrators to administer the settlement, with the administration costs estimated to be Two Thousand Eight Hundred Fifty Dollars (\$2,850.00). *See id.*; Declaration of Kevin Lee ("Admin. Decl.") ¶ 4, Ex. A.

G. The Scope of the Released Claims Is Appropriately Limited

Upon funding of the Gross Settlement Amount, Plaintiff and Aggrieved Employees will release Defendant and Released Parties from all Released Claims. *See* SA § B-17. As defined in the Agreement, the term "Released Claims" means:

all claims for civil penalties under the California Private Attorneys' General Act, including costs and attorneys' fees related thereto, predicated upon violation of Labor Code sections 201, 202, 203, 226(a), 510, 558 and 1194, based on the facts as alleged in the First Amended Complaint, that accrued during the PAGA Period.

See SA §§ B-17, F-6. The Settlement is not intended to release and does not extend to violations of any predicate statutes other than PAGA. The Settlement also does not affect a waiver of claims by Aggrieved Employees against the Released Parties for any individual wage and hour claims. *See* SA § F-6.³

³ Because an aggrieved employee's PAGA action is a substitute for an action brought by the government, "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Arias*, 46 Cal. 4th at 986. However, "the nonparty employees, because they were not given notice of the

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

2 **A. PAGA Overview**

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

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

25
26
27 action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies
28 other than civil penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved
employees retain all rights “to pursue or recover other remedies available under state or federal law,
either separately or concurrently with an action taken under this part”).

1 2699.3(a)(2).

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

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

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

25 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
26 Labor Code, which provides, in relevant part: “The court shall review and approve any penalties
27 sought as part of a proposed settlement agreement pursuant to this part.” The parties are not
28 obligated to “satisfy class action requirements,” including the standards for class action settlement

1 approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that “plaintiff need not
2 satisfy class action requirements” to assert a PAGA claim).

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

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

9 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
10 ultimately receive as a result of a settlement, but instead, on whether the Gross Settlement Amount
11 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
12 agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i). Here, the
13 Settlement represents an extraordinary recovery for the Aggrieved Employees and the State, and
14 thus the Settlement certainly effectuates PAGA’s purpose. The Settlement is also consistent with
15 the State’s public policy favoring resolution of disputes. “California law favors the settlement of
16 disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces costs, saves
17 resources, and minimizes court congestion. [] The parties are best positioned to understand their
18 interests and resolve a dispute in a mutually beneficial manner without court intervention into the
19 settlement.” *Consumer Advocacy Group, Inc. v. Kintetsu*, 141 Cal. App. 4th 46, 62-63 (2006)
20 (citing *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277- 278 (1992)).

21 **D. The Settlement Recognizes the Inherent Risk of Litigation**

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

25 **1. The Wage Statement Violation Is Contested**

26 As set for the in the Supplemental PAGA Notice and FAC, Plaintiff alleges that Defendant
27 failed to provide accurate itemized wage statements, in violation of Labor Code section 226(a). *See*
28 Agnew Decl. ¶ 28. The wage statement displays overtime on two or more lines — “Overtime

Hours” and “Overtime Premium.” The hours displayed as “Overtime Hours” and “Overtime Premium” hours are incorrect. When the hours are multiplied by the corresponding rate, it does not correlate to the gross amount of overtime wages displayed on the wage statement. Additionally, the wage statement does not display the correct hourly rate used to calculate “Overtime Premium Hours.” The rate for the “Overtime Hours” and “Overtime Premium” equal the employee’s base hourly rate. Thus, an employee reviewing their wage statement would believe their overtime rate of pay is significantly higher than it is in actuality. Additionally, as a result of Defendant’s method of displaying overtime as two separate entries, the wage statement lists redundant overtime hours, but fails to provide a summation of the accurate total hours worked. Thus, if one were to add up the hours on a wage statement, it appears that the employee worked more hours than he or she is being paid.

Defendant raises several defenses and maintains that its wage statements comply with Section 226(a). *See* Agnew ¶ 29. For the purpose of tracking employee time and computing wages, Defendant calculated hours to the third decimal place. *See id.* at ¶¶ 11, 29. Accordingly, payroll considered someone who worked for 1 hour and 8 minutes to have worked for 1.133 hours. *See id.* at ¶ 29. However, on the corresponding wage statement, the hours worked were displayed to the second decimal place (i.e. 1.13 hours). *See id.* Because the hours worked shown on the wage statement only went out to the second decimal place (1.13 hours), employees appeared to be underpaid in some instances, but were not. *See id.* As argued by Defendant, the fact that the hours were only shown out to the second decimal place does not make the information inaccurate or otherwise violate Section 226(a). *See id.* Additionally, the wage statements and payroll records demonstrate the accuracy of the net wages earned by and paid to the employees. *See id.* at ¶¶ 11, 30. Nonetheless, starting with the itemized wage statements issued on November 24, 2023, the calculation discrepancies were corrected. *See id.* at ¶ 30.

As to the total hours worked, Defendant contends an employee’s hours were properly displayed on the wage statement. *See* Agnew ¶ 30. For the duration of the PAGA Period, employees had access to electronic wage statements the included a summation of the total hours worked. *See*

1 *id.* at ¶¶ 12, 30.⁴ However, the wage statements provided concurrent with the payment of wages,
2 omitted the total hours worked. Yet, even taking into consideration the wage statements that
3 omitted the total hours worked, Defendant argues that employees have always been able to
4 determine their total hours worked via “simple math.” *See id.* at ¶ 30. According to Defendant, a
5 reasonable employee would not double count the redundant “Overtime Hours” and “Overtime
6 Premium” hours. *See id.* Nonetheless, beginning with the May 26, 2023 pay date, all itemized wage
7 statements have contained a separate line item showing the total number of hours worked during the
8 pay period by the employee. *See id.* at ¶¶ 12, 30.

9 **2. The Overtime Violation Is Contested**

10 Based on the truncated hours set forth on the wage statement, it appears that Defendant paid
11 overtime wages at a rate below 1.5x the regular rate of pay. *See Agnew Decl.* ¶¶ 28, 31. However,
12 Plaintiff’s wage statements and timekeeping records suggest that she was properly paid overtime.
13 *See id.* at ¶¶ 11, 31. Thus, Defendant may have sought summary adjudication on this issue. *See id.*
14 at ¶ 31. Should Defendant have prevailed, the State of California and Aggrieved Employees would
15 have been left with zero recovery.

16 **3. Recovery of Civil PAGA Penalties Is Uncertain**

17 If Plaintiff was to prevail on the merits of the PAGA claim, the potential recovery remains
18 uncertain. As argued by Defendant, in deciding whether to award the maximum penalty amount,
19 courts may focus on whether the employer made a good faith effort to follow the law. For example,
20 in *Thurman v. Bayshore Transit Management, Inc.*, the Court of Appeal upheld the trial court’s
21 significant reduction of PAGA penalties by 30% because the employer was not initially on notice
22 that it was in violation of the law and because it would have been unfair to award penalties where
23 the employer was unaware of the violations. 203 Cal. App. 4th 1112, 1136 (2012). When the
24 employer made aware of the violations, it timely took steps to come into compliance. *Id.* By
25 contrast, the imposition of full penalties was justified when an employer took a “cavalier approach
26

27
28 ⁴ Plaintiff contends that the electronic wage statements were only available through human
resources and were not provided concurrent with the payment of wages. *See Agnew Decl.* ¶ 12.

1 to fulfilling its contractual and statutory obligations” and demonstrated “reckless disregard.” *Id.*
2 Furthermore, as the California Court of Appeal has affirmed, trial courts are well within their
3 discretion to reduce PAGA penalties “for technical violations that cause no injury,” especially
4 where the “violation was inadvertent.” *Raines v. Coastal Pac. Food Distributors, Inc.*, 23 Cal. App.
5 5th 667, 681 (2018).

6 In this case, Defendant asserted that a substantial reduction in potential PAGA penalties was
7 warranted because: (1) even assuming that Plaintiff could establish the predicate violations, the
8 alleged violations were inadvertent; (2) Defendant revised its wage statements in response to the
9 PAGA Notice and Supplemental PAGA Notice; and (3) Aggrieved Employees did not suffer
10 economic harm as a result of the alleged violations of Labor Code. *See* Agnew Decl. ¶ 33. Thus,
11 Defendant contends that no PAGA penalties were needed to punish or deter Defendant for its
12 inadvertent behavior, much less to deter it from committing any future violations that were
13 completely foreclosed by its new payroll practices. *See id.*

14 **E. The Settlement is Reasonable When Compared to the Realistic Amount of PAGA**
15 **Civil Penalties At Issue**

16 Defendant has indicated that Aggrieved Employees worked approximately 2,693 pay
17 periods during the PAGA Period. *See* SA §§ B-2, B-14. Assuming that Plaintiff was to prevail on
18 the merits of the PAGA claim, applying the standard penalty of \$100 per pay period yields
19 \$269,300 in potential liability. *See* Agnew Decl. ¶ 25. In the alternative, if the Court were to “stack”
20 penalties, (*i.e.*, award multiple PAGA penalties for different Labor Code violations in the same pay
21 period), the potential PAGA penalties could total as high as \$538,600. *See id.* at ¶ 26.

22 However, the Court’s assessment of the proposed settlement must take into account that any
23 penalties awarded may be subject to substantial reduction. Pursuant to Labor Code section
24 2699(f)(2) the Court can decline to award the full amount of PAGA penalties “if, based on the facts
25 and circumstances of the particular case, to do otherwise, would result in an award that is unjust,
26 arbitrary and oppressive, or confiscatory.” Courts routinely award far less than the statutory
27 maximum amount of civil penalties, even where an underlying violation of the Labor Code is
28 found. Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, while

1 the plaintiff prevailed on his PAGA claim at trial, the trial court reduced the maximum PAGA
2 penalty amount by 90%, citing the employer's good faith attempt at complying with the law. 30
3 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be
4 proper. *Id.* at 539; *see O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1133 (N.D. Cal.,
5 2016). Thus, assuming that the Court uses *Carrington* as a benchmark and assesses PAGA penalties
6 of approximately 10% of the total maximum, a more realistic estimate of the maximum PAGA
7 penalties at issue is \$53,860.

8 When the discretionary reduction in penalties is considered, in conjunction with the history
9 of PAGA settlements, and the fact that Plaintiff may recover nothing, the proposed settlement is
10 patently reasonable. Indeed, assuming that the Court applies the standard penalty of \$100 per pay
11 period, the Gross Settlement Amount is approximately 72.40% of the penalties at issue. *See Agnew*
12 *Decl.* ¶ 36.⁵ Settlement for this reduced value allows for the distribution of penalties in an amount
13 which accounts for the risk of continued litigation and Defendant's likely arguments that higher
14 penalties would have been confiscatory. *See id.*

15 Given Defendant's potential defenses to the alleged violations at issue, the risks and costs of
16 continued litigation, Plaintiff's Counsel believes that the Settlement is fair and reasonable. *See*
17 *Agnew Decl.* ¶ 37. The Settlement proposes a payment of approximately \$78,616.16 in penalties to
18 the LWDA and approximately \$26,205.39 penalties to the Aggrieved Employees. *See Agnew Decl.*
19 ¶ 21. Furthermore, the LWDA has been provided notice of this motion and the PAGA settlement.
20 *See Agnew Decl.* ¶ 48, Exhibit 6. The decision of the LWDA to accept the Settlement and not
21 oppose the motion should be given considerable weight.

22 **F. The Request for Attorneys' Fees Is Reasonable and Should Be Approved**

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

27 ⁵ In the alternative, if the Court "stacks" the PAGA penalties— *i.e.* awards full PAGA penalties for
28 each proven violation during a pay period—the Gross Settlement Amount is 36.20% of the
maximum PAGA penalties at issue. *See Agnew Decl.* ¶ 35.

award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F. 2d at 769. Under the percentage of the fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will set.... The judge, in other words, is trying to mimic the market in legal services.").

An award of 33.33% of the Gross Settlement Amount in attorneys' fees mimics the marketplace as it "is supported by the fact that typical contingency fee agreements provide that class counsel will recover 33.33% if the case is resolved before trial and 40% if the case is tried." *Fernandez v. Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008); *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011) (recognizing that "courts may award attorney's fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million"). Indeed, "empirical studies [that] show that...fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

In addition, it is recognized that one of the primary factors justifying an enhanced attorney's fees reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.* 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended"). For Plaintiff's Counsel, the fees here were wholly contingent in nature and the case presented far more risk than the usual contingent fee case. Among the risks was the cost inherent in

1 PAGA litigation, as well as a long battle with a Defendant who had retained a premier and highly
2 experienced defense firm. As such, the requested fee should be awarded.

3 As a secondary support for the percentage of the fund method, when fees are allocated by
4 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
5 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in this
6 manner, does not override the trial court’s primary determination of the fee as a percentage of the
7 common fund and thus does not impose an absolute maximum or minimum on the potential fee
8 award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294,
9 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the primary reliance on the
10 percentage of common fund method”). The Supreme Court in *Laffitte* stated: “If the multiplier
11 calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should
12 consider whether the percentage used should be adjusted so as to bring the imputed multiplier
13 within a justifiable range, but the court is not necessarily required to make such an adjustment.” *Id.*
14 Thus, a lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
15 required; in many cases, performing a cross-check “undermines” one of the primary reasons for
16 using the percentage method: aligning counsel’s incentives with the benefits delivered to the class
17 and discouraging protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo
18 a lodestar cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* 108
19 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000)
20 (citing the recommendations of the Third Circuit Task Force with approval and observing that
21 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
22 authorities, who have been most vocal about the manner in which it exacerbates the problem of
23 ‘cheap settlements’ and burdens already overworked trial judge”).

24 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to 4
25 or even higher.” *Wershba*, 91 Cal. App. 4th at 255; *see also, e.g., Sutter Health Uninsured Pricing*
26 *Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a cross-check in an
27 antitrust class action); *Chavez*, 162 Cal. App. 4th at 60 (applying a 2.5 multiplier on a lodestar
28 cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34

multiplier without remand).

With respect to Plaintiff's Counsel's lodestar, approximately 97.80 hours have been expended by counsel this matter. *See* Agnew Decl. ¶ 46; Rosenthal Decl. ¶ 6. The courts are quite liberal in the evidence required to prove an attorney's hours. Detailed time records are not required. An attorney's testimony alone may suffice: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986). Reasonable hours include, in addition to time spent during litigation, the time spent before the action is filed, including time spent interviewing the clients, investigating the facts and the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*].

For the purpose of the lodestar calculation, Plaintiff's Counsel apply and hourly rate of \$800 per hour. *See* Agnew Decl. ¶ 46; Rosenthal Decl. ¶ 6. The hourly rate is consistent with the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632-33 (1998).

Here, Plaintiff's Counsel's skill and experience justify the requested rate. As shown in the supporting declarations, counsel has significant experience in the area of employment and wage and hour class actions. Specifically, Plaintiff's Counsel's practice focuses on representing employees in employment matters, particularly wage and hour cases. *See* Agnew Decl. ¶ 46; Rosenthal Decl. ¶¶ 4, 5. As such, based on the hours and applicable rate, the total lodestar to be expended by Plaintiff's Counsel through finalizing this settlement will be approximately \$78,240 which is more than the requested attorneys' fee award. *See* Agnew Decl. ¶ 46; Rosenthal Decl. ¶ 6. As such, the requested fee award is fair and reasonable, and should be awarded in its entirety. Plaintiff's Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of

1 this action on behalf of all Aggrieved Employees.

2 **G. The Court Should Approve the Request for Reimbursement of Costs**

3 The request for reimbursement of costs, in the amount of \$12,328.45 is fair and reasonable.
4 The costs are all litigation related costs, which have been detailed in the supporting declarations of
5 Plaintiff's Counsel. *See* Agnew Decl. ¶ 47, Exhibit 5. The authority for the court to award this is the
6 Parties' Settlement Agreement and the California Labor Code. As such, this request should be
7 approved.

8 **H. Plaintiff's Request for an Enhancement Payment Should be Approved**

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

15 Here, Plaintiff seeks \$10,000 for her Enhancement Payment, which is intended to
16 compensate Plaintiff for the time spent on this case, including reviewing pleadings, the potential for
17 hesitation from later prospective employers that might find out they brought this claim, and for
18 executing a general release, including for all known and unknown claims under Civil Code § 1542.
19 *See* SA § B-9; Tristan Decl. ¶¶ 6-9. This requested Enhancement Payment is consistent with awards
20 approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.
21 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs.*
22 *Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and
23 three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D.
24 Ohio 2001) (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
25 *Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class
26 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52
27 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class
28 action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award

1 to class representative in ERISA case).

2 **I. The Settlement Administrator's Costs Should be Approved**

3 The Parties have agreed to pay actual costs of administration, or Two Thousand Eight
4 Hundred Fifty Dollars (\$2,850.00), to the Settlement Administrator, Phoenix Settlement
5 Administrators, to administer this Settlement. *See* SA § B-19; Admin. Decl. ¶ 8, Exhibit B. The
6 Parties believe that the administration fee is reasonable and should be approved.

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

8 As discussed above, and concurrent with the filing of this Motion, Plaintiff uploaded the
9 instant motion to the LWDA's website. *See* Agnew Decl. ¶ 48, Exhibit 6.

10 **V. CONCLUSION**

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

12
13 DATED: February 15, 2024

DIVERSITY LAW GROUP, P.C.
POLARIS LAW GROUP

14
15
16 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

William L. Marder

Attorneys for Plaintiff and the Aggrieved
Employees



Make a Reservation

ALEXIS TRISTAN vs AMERICAN HOMES 4 RENT, L.P.

Case Number: 23STCV17006 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2023-07-20 Location: Stanley Mosk Courthouse - Department 61

Reservation

Case Name: ALEXIS TRISTAN vs AMERICAN HOMES 4 RENT, L.P.	Case Number: 23STCV17006
Type: Motion to Confirm Settlement	Status: RESERVED
Filing Party: Alexis Tristan (Plaintiff)	Location: Stanley Mosk Courthouse - Department 61
Date/Time: 03/11/2024 10:00 AM	Number of Motions: 1
Reservation ID: 570905490120	Confirmation Code: CR-786HSBF2ER2GBGJJ3

Fees

Description	Fee	Qty	Amount
Motion to Confirm Settlement	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount: \$61.65	Type: Visa
Account Number: XXXX3359	Authorization: 06957G
Payment Date: 1969-12-31	

Print Receipt

[Reserve Another Hearing](#)

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

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

10 On February 15, 2024, I served the following document(s) described as:

11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE**
12 **SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
13 **ATTORNEYS GENERAL ACT; MEMORANDUM OF POINTS AND**
14 **AUTHORITIES IN SUPPORT**

15 **2. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
16 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO**
17 **THE PRIVATE ATTORNEYS GENERAL ACT**

18 **3. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF**
19 **PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AGREEMENT**
20 **PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT**

21 **4. DECLARATION OF ALEXIS TRISTAN IN SUPPORT OF PLAINTIFF'S TO**
22 **APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
23 **ATTORNEYS GENERAL ACT**

24 **5. DECLARATION OF KEVIN LEE REGARDING PLAINTIFF'S MOTION TO**
25 **APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
26 **ATTORNEYS GENERAL ACT**

27 **6. PROPOSED] ORDER AND JUDGMENT GRANTING PLAINTIFF'S**
28 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO**
THE PRIVATE ATTORNEYS GENERAL ACT

on the interested parties in this action as follows:

Mark D. Kruthers
Fennemore Dowling Aaron
8080 N. Palm Avenue, 3rd Floor
Fresno, California 93711

*Attorneys for Defendant American Homes 4
Rent, L.P.*

mkruthers@fennemorelaw.com

X BY ELECTRONIC SERVICE: 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.


Erika Mejia