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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF STANISLAUS**  
12 **(UNLIMITED JURISDICTION)**

13 TINA CALDERON, on behalf of herself and as  
14 an “aggrieved employee” on behalf of other  
15 “aggrieved employees” under the Labor Code  
Private Attorneys General Act of 2004,

16 *Plaintiff,*

17 vs.

18 DAVIS GUEST HOME, INC., a California  
19 corporation; LONNY GENE DAVIS; and DOES  
20 1–50, inclusive,

21 *Defendants.*

Case No. CV-20-001500

**PLAINTIFF TINA CALDERON’S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
FIRST AMENDED MOTION FOR  
APPROVAL OF PAGA SETTLEMENT**

Hearing Date: October 12, 2022  
Hearing Time: 8:30 a.m.  
Hearing Dept.: 21, The Honorable John  
R. Mayne

Action filed: March 05, 2020  
Trial Date: Not Set



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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**  
2 **APPROVAL OF PAGA SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Tina Calderon (“Plaintiff” or “Calderon”) submits this memorandum of points  
5 and authorities in support of her first amended motion for approval of the PAGA Settlement  
6 Agreement (the “Agreement” or “PAGA Settlement” or “Settlement”)<sup>2</sup> for the civil penalties  
7 claim she brought against Defendant Davis Guest Home, Inc. and Lonny Gene Davis (“Davis  
8 Guest Home, Inc.” or “Defendants”) under the Labor Code Private Attorneys General Act of  
9 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code  
10 section 2699(l) of the PAGA requires Court-approval of any civil penalties sought as part of a  
11 proposed settlement agreement. Based on Plaintiff’s and her attorneys’ investigation and  
12 evaluation, Plaintiff is of the opinion that the PAGA Settlement represents a reasonable and  
13 adequate settlement of strongly disputed claims and is in the best interest of the State of  
14 California, the PAGA Members, and Plaintiff. Through this motion, therefore, Plaintiff  
15 respectfully requests for this Court to approve the PAGA Settlement for resolution of the PAGA  
16 claim.

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 Defendants own and operate residential care facility DS, ¶ 3. Defendants employed  
19 Plaintiff as a direct care provider from about August 16, 2018 until December 19, 2019. *Id.* DS,  
20 ¶ 3.

21 **A. Plaintiff’s Written Notice to the State of California**

22 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under  
23 PAGA. By letter dated February 27, 2020, Plaintiff, on behalf of herself and other aggrieved  
24 hourly employees gave written notice by certified mail to the Labor and Workforce Development  
25 Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code  
26 alleged to have been violated, including the facts and theories to support the alleged violations.  
27 DS, ¶ 4, Ex. 3.

28 **B. Plaintiff’s PAGA Claim**

Plaintiff and the PAGA Members are subject to arbitration agreements with Defendants.  
Plaintiff filed her lawsuit in Stanislaus County Superior Court on March 05, 2020. DS, ¶ 5. On  
May 13, 2020, Plaintiff filed a First Amended Complaint (“1AC”). DS, ¶ 5, Ex. 4. Plaintiff’s

<sup>2</sup> The PAGA Settlement is attached as **Exhibit** (“Ex.”) **1** to the Declaration of David Spivak  
 (“DS”), which is submitted herewith under a separate cover.



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operative complaint presents one cause of action for civil penalties under PAGA. *Id.* Shortly after Plaintiff served her first set of discovery requests, the Parties agreed to stay formal discovery and participate in mediation. On June 12, 2020, Defendants filed an answer to Plaintiff's First Amended Complaint. DS, ¶ 5, Ex. 5. Defendants deny all of Plaintiff's allegations and strongly contend that their wage and hour policies, practices and procedures are fully compliant with all applicable laws. DS, ¶ 5.

**C. Mediation**

On February 19, 2021, the Parties participated in mediation with mediator Tripper Ortman in an attempt to resolve the PAGA claim. The Parties engaged in arm's-length negotiations and ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement was reached after exchanges of data, information and documents, and is a result of extensive arms-length negotiations. The Parties conducted informal discovery for purposes of potential resolution through which they ascertained the size of the aggrieved employee group and the number of pay periods worked by them during the PAGA Period to ascertain the total value of Plaintiff's PAGA claim. Now that the parties have finalized the PAGA Settlement, Plaintiff submits it to this Court for approval.

**D. First Motion for Court Approval of Settlement**

The Court denied Plaintiff's initial motion for approval of the Settlement due to the requested amount of the General Release Payment and certain inconsistencies between the supporting documents. With this amended motion, Plaintiff has corrected the supporting documents and is requesting only \$5,000 as General Release Payment. DS, ¶ 6.

**III. OVERVIEW OF SETTLEMENT**

**A. "PAGA Members" Definition**

The PAGA Members are all current and former non-exempt, hourly California employees Defendant Davis Guest Home, Inc. employed any time during the period from February 27, 2019 through January 31, 2022 (the "PAGA Period") (collectively referred to as "PAGA Members"). Agreement, ¶¶ 1-2.

**B. Monetary Terms Of The Settlement**

Defendants will pay Ninety-Nine Thousand Dollars and Zero Cents (\$99,000.00) to settle the PAGA claims in the Action ("Maximum Settlement Amount"). In no event shall Defendants be liable for more than the Gross Settlement Amount as a result of this Settlement. Plaintiff requests that the Gross Settlement Amount be allocated as follows (if approved by the Court):

a. \$8,490.00 to ILYM Group, Inc. for the settlement administration (the Settlement



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1 allocates Third-Party Settlement Administration Fees of up to Ten Thousand Dollars and Zero  
2 Cents (\$10,000.00));

3 b. \$33,000.00 in PAGA Counsel's Fees to PAGA Counsel, subject to Court  
4 approval,

5 b. \$11,772.37 in PAGA Counsel's Costs to PAGA Counsel (the Settlement allocates  
6 up to \$15,000 for PAGA Counsel's Costs in actual costs and expenses incurred by PAGA  
7 Counsel related to the Action as supported by declaration, which are currently estimated to be no  
8 greater than Fifteen Thousand Dollars and Zero Cents (\$15,000.00) ("PAGA Counsel's Costs"));

9 c. \$5,000 to Plaintiff as General Release Payment (the Settlement allocates up to Ten  
10 Thousand Dollars and Zero Cents (\$10,000.00) as "General Release Payment to Plaintiff for (1)  
11 her general release that includes a release of claims pursuant to California Civil Code section  
12 1542 and (2) her service to the State of California and the PAGA Members in prosecuting the  
13 Action); and

14 d. The remaining funds (the Gross Settlement Amount less the Third-Party  
15 Settlement Administration Fees, PAGA Counsel's Fees, PAGA Counsel's Costs, and Plaintiff's  
16 General Release Payment) shall be referred to as the "Net Settlement Amount." Settlement, ¶ 4.

17 With respect to the Settlement, Defendants estimate that they issued approximately  
18 14,000 paychecks to approximately 400 PAGA Members for the period of February 27, 2019  
19 through January 31, 2022. Plaintiff is entering into this Settlement Agreement based on such  
20 representations. In the event it is determined that the actual number of pay periods exceeds 14,000  
21 by more than 10 percent and at Plaintiff's option, the Parties shall agree to engage in a good faith  
22 effort to renegotiate the Gross Settlement Amount. If the renegotiation is unsuccessful, Plaintiff  
23 has the right to declare the settlement null and void. Settlement, ¶ 5.

24 **C. Timing of Payments**

25 Within thirty (30) calendar days after the Effective Date and notice by the Court or  
26 Plaintiff that the Action has been dismissed with prejudice, Defendants shall deposit the Gross  
27 Settlement Amount with the Settlement Administrator, who shall issue payment to PAGA  
28 Counsel and Plaintiff within twenty (20) calendar days of receipt of the Gross Settlement  
Amount. Within ten (10) calendar days after the Effective Date, Defendants shall provide the  
Settlement Administrator with a list of all PAGA Members with each listed employee's full  
name, hiring, and, if applicable, termination dates in connection with the employee's employment



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1 with Defendants during the PAGA Period, last known mailing address, and social security  
2 number. Within twenty (20) calendar days of receipt of the list of all PAGA Members, the  
3 Settlement Administrator shall run all the addresses of PAGA Members through the United States  
4 Postal Service NCOA database to obtain current address information, and issue payments to (a)  
5 PAGA Members; (b) the LWDA; and (c) itself. The Settlement Administrator will skip-trace  
6 return mail and re-mail within five (5) calendar days. The Settlement Administrator will issue the  
7 appropriate tax forms for all payments issued under this Settlement. If the Effective Date falls on  
a holiday or weekend, the Effective Date shall be the next calendar day. Settlement, ¶ 10.

8 The Settlement Administrator will issue each PAGA Member a check for his or her share  
9 of the Net Settlement Amount along with an explanatory letter in the form attached as Exhibit A.  
10 Checks will remain negotiable for one hundred eighty (180) days. Any checks returned as non-  
11 deliverable on or before the check cashing deadline will be sent promptly via regular First-Class  
12 U.S. Mail to the forwarding address affixed thereto. Funds represented by settlement checks  
13 returned as undeliverable and those settlement checks remaining un-cashed for more than 180  
14 days after issuance shall be paid to the California State Controller's Office Unclaimed Property  
15 Fund with an identification of the amount of unclaimed funds attributable to each PAGA  
16 Member. The Parties do not bear any liability for lost or stolen checks, forged signatures on  
17 checks, or unauthorized negotiation of checks. Unless responsible by its own acts of omission or  
18 commission, the same is true for the Settlement Administrator. All settlement payments to PAGA  
Members will be treated as miscellaneous income for which an IRS Form 1099 will be issued by  
the Settlement Administrator if required by law. Settlement, ¶ 11.

19 **D. Calculation of Settlement Shares**

20 The Net Settlement Amount shall be designated as PAGA penalties in full satisfaction of  
21 all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations,  
22 and/or other provisions of law alleged to have been violated in or reasonably related to the  
operative Complaint with respect to PAGA Members, allocated between the LWDA and the  
PAGA Members pursuant to Labor Code Section 2699(i) with 75.0% paid to the LWDA and  
25.0% paid to the PAGA Members on a pro-rata basis ("PAGA Penalties Fund"). The 25.0% of  
the Net Settlement Amount will be paid to all PAGA Members according to the following  
formula: Settlement Payment to each PAGA Member =  $[\$[25.0\% \text{ of Net Settlement Amount}] \times$



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1 [Pay Periods Worked by Individual PAGA Member During PAGA Period ÷ Total Pay Periods  
2 Worked by All PAGA Members during PAGA Period]. Settlement, ¶ 6.

3 **E. Apportionment of Settlement Shares**

4 One hundred percent (100%) of each individual PAGA payment under this Settlement  
5 will be considered penalties and may be subject to local, state, or federal tax withholdings and  
6 will be reported to the IRS and state tax authorities. Settlement Notice, page 2.

6 **F. The Releases**

7 Plaintiff acknowledges the existence of and, with respect to the release given in Paragraph  
8 12 of the Agreement, expressly waives and relinquishes any and all rights and benefits Plaintiff  
9 has or may have under California Civil Code, Section 1542, which provides:

10 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR  
11 OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR  
12 HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF  
13 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR  
14 HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

15 Plaintiff acknowledges that she may hereafter discover facts different from or in addition  
16 to those which she or her attorneys now know or believe to be true with respect to the matters  
17 released in this settlement, and agrees that the release so given in Paragraph 12, shall be and  
18 remain in effect as a full and complete release of all claims, notwithstanding any such different  
19 or additional facts. Settlement, ¶ 12.

20 As of and subject to the occurrence of the Effective Date, and in consideration for the  
21 Gross Settlement Amount, the claims settled, fully released and forever discharged by the LWDA  
22 and the PAGA Members, including Plaintiff, constitute any and all claims for civil penalties  
23 Plaintiff, the PAGA Members, and the State of California may have against the Released Parties  
24 under the California Labor Code, Wage Orders, regulations, and/or any other provisions of state  
25 and federal law arising from allegations that the PAGA Members suffered Labor Code violations  
26 based on based on (1) failure to pay employees minimum, regular, overtime, and double time  
27 wages for all hours worked at the correct rates of pay, (2) failure to provide rest periods, (3)  
28 failure to provide meal periods, (4) failure to provide accurate, written wage statements, (6)  
failure to pay final wages timely, and (7) failure to pay wages timely during employment, and  
any other Labor Code violations that were alleged in the Action, or that could have been alleged



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1 in the Action based on the facts alleged in the Action, which includes, but is not limited to, alleged  
2 violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558,  
3 558.1, 1174, 1174.5, 1194, 1197, 1197.1, and 1198, and 2698 et seq. (“PAGA Released Claims”).  
4 The “Released Parties” are Lonny Gene Davis and Davis Guest Home, Inc. and their present and  
5 former parent companies, subsidiaries, divisions, concepts, related or affiliated companies, and  
6 their shareholders, officers, directors, employees, agents, attorneys, insurers, successors and  
7 assigns, and all persons acting by or through or in concert with any of them, and each of them  
(hereinafter “Released Parties”). Settlement, ¶ 13.

8 **G. Notice Process and Procedures**

9 The PAGA Members will receive the notice letter on approval of the Settlement by the  
10 Court. See draft Notice of PAGA Settlement (Ex. A to the Agreement).

11 **H. Uncashed Checks**

12 All uncashed checks shall be distributed to California State Controller’s Office  
13 Unclaimed Property Fund with an identification of the amount of unclaimed funds attributable to  
14 each PAGA Member. Settlement, ¶ 11, Notice of PAGA Settlement, page 2.

15 **IV. ARGUMENT**

16 **A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT**

17 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The  
18 Court necessarily has broad discretion in making the decision to approve or reject a settlement  
19 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain  
20 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of  
21 penalties based on the facts and circumstances of the particular case. *See id.* At § 2699e(1)-(2),  
22 Although the PAGA does not set forth the particular standards against which a PAGA settlement  
23 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards  
24 for evaluating class action settlements. DS, ¶ 8; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017  
25 U.S. Dist. LEXIS 14971, \*6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA’s guidance,  
26 that approval of PAGA settlements may be had where the statutory requirements of the PAGA  
27 are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The  
28 established standards for evaluating whether class action settlements are fair, reasonable, and  
adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and  
have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205,  
\*5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San*



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1 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S.  
2 Dist. LEXIS 137272, \*8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
3 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, \*7, n.4 (E.D. Cal.  
4 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, \*6 (E.D. Cal. 2018); *Rincon*  
5 *v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, \*6 (S.D. Cal. 2018).

6 PAGA penalties are in the nature of a law enforcement penalty and are designed to  
7 penalize an employer for its failure to comply with California's wage and hour laws and  
8 regulations and are not designed to compensate employees. *Ochoa-Hernandez v. CJADERS*  
9 *Foods, Inc.*, 2010 WL 1340777 \*1, \*5 (E.D. Cal. Apr. 2, 2010). ("Unnamed employees need not  
10 be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative  
11 PAGA claim. There is no indication that the unnamed plaintiffs can contest a settlement, if any,  
12 reached between the parties.").

13 In making the determination whether a settlement taken as a whole is fair, reasonable, and  
14 adequate, the Court should be careful to still give "proper deference to the private consensual  
15 decision of the parties," since "the court's intrusion upon what is otherwise a private consensual  
16 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to  
17 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or  
18 collusion between, the negotiating parties . . . ." *Hanlon*, 150 F.3d at 1027. The law favors  
19 settlement of lawsuits, particularly complex litigation cases where substantial resources can be  
20 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*  
21 *Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,  
22 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

23 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**  
24 **PAGA.**

25 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.  
26 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as  
27 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*  
28 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).  
The Parties' Settlement so provides. Second, the LWDA must be given notice of the settlement  
so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §  
2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of this amended  
motion. DS, ¶ 7, Ex. 7. As a result, Plaintiff has met all procedural statutory requirements for



1 settling a PAGA action.

2 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT**  
3 **BECAUSE IT IS A FAIR, REASONABLE AND ADEQUATE IN VIEW OF**  
4 **PAGA’S PUBLIC POLICY GOALS.**

5 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the  
6 Court may consider several factors, including:

7 the strength of the Plaintiff’s case, the risk, expense, complexity and likely  
8 duration of further litigation, the risk of maintaining class action status through  
9 trial, the amount offered in settlement, the extent of discovery completed and the  
10 stage of the proceedings, and the experience and views of counsel.

11 *Dunk v. Ford Motor Co.*, 48 Cal. App 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS  
12 137205, \*5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, \*8-9; *Gutilla*, 2017 U.S. Dist. LEXIS  
13 41655, \*7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, \*6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,  
14 \*6. However, this Court should begin its analysis with a presumption that the proposed settlement  
15 is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s length  
16 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act  
17 intelligently; (3) counsel is experienced in similar litigation . . .” *Dunk*, 48 Cal. App 4th at 1802.

18 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The  
19 Parties reached the Settlement through arm’s-length bargaining with the aid of a respected  
20 mediator; (2) The Parties conducted sufficient investigation and discovery to allow Counsel and  
21 the Court to act intelligently. Plaintiff requested and Defendants provided the number PAGA  
22 Members, the number of total pay periods during the PAGA Period, and all policies in effect  
23 during the relevant time period; and (3) Counsel for the Parties are experienced with PAGA cases.  
24 DS, ¶ 9. For the reasons discussed below, this Court should approve the PAGA Settlement.

25 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm’s**  
26 **Length Negotiations Between The Parties.**

27 The PAGA Settlement was reached only after litigation and arms’ length negotiations  
28 between experienced attorneys, which included a full day mediation with Tripper Ortman, a  
29 respected mediator. At all times, the negotiations were adversarial and contentious, although still  
30 professional in nature. DS, ¶ 6.

31 **2. The Extent of Investigation and Discovery Completed Provided Ample**  
32 **Information to Enter into an Informed and Reasonable Settlement**

33 Plaintiff considered various sources of information in the lead-up to, during and after the  
34 mediation that enabled her to achieve the PAGA Settlement at issue. Among other things,



Plaintiff considered the following:

- Defendants produced and Plaintiff reviewed her personnel file.
- Defendants produced and Plaintiff reviewed and analyzed time and payroll records for over 64 PAGA Members.
- Plaintiff requested that Defendants produce any and all relevant policies regarding Plaintiff's claims and Defendants produced those policies in effect during the relevant time period.
- Plaintiff interviewed other employees about the claims at issue.
- Plaintiff analyzed the state of caselaw on PAGA claims, claims for unpaid wages, unprovided meal periods, unauthorized rest breaks, and related claims.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded before trial.

DS, ¶ 14.

**3. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff's Case and the Risks and Costs of Further Litigation**

A court has discretion under PAGA to award a lesser amount than the maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App<sup>4</sup>th 1112, 1135 (reducing PAGA award). Defendants have posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant uncertainty. DS, ¶ 15. There is a risk that the Court would consider the maximum civil penalty available to be confiscatory. This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a significant discount for settlement purposes. DS, ¶ 15. For mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately \$6,300,000.00 in civil penalties. This estimate did not take into account any of the risks discussed above and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in controversy for purposes of removal jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does



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1 not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

2 In preparation for mediation and during the settlement negotiations that followed,  
3 Defendants disclosed that there were approximately 400 potentially aggrieved employees and  
4 14,000 pay periods. The maximum possible civil penalties under the PAGA is the total number  
5 of pay periods with one or more violations multiplied by the maximum possible civil penalty  
6 amount per pay period. Unfortunately for the employees concerned, the potential for recovery of  
7 the maximum possible civil penalties depends on circumstances that are extremely unlikely  
8 independently and in combination. It would depend on the Court stacking the maximum  
9 recoverable civil penalties for unpaid overtime wages/unprovided meal periods, unprovided rest  
10 breaks, unpaid minimum wages, inaccurate wage statements and untimely wages per pay period  
11 for all 14,000 pay periods for all 400 potentially aggrieved employees during the PAGA Period.  
12 Plaintiff's counsel is not aware of any California State court decision awarding a plaintiff and the  
13 other aggrieved employees she represents multiple civil penalties for the same pay period under  
14 different Labor Code provisions. Plaintiff's counsel had to substantially discount the value of  
15 these claims in the settlement negotiations for this and a variety of other reasons (outlined below).  
16 DS, ¶ 16.

17 **a. Risks Associated with Plaintiff's Claim That Defendants Failed To**  
18 **Pay All Earned Wages at the Correct Rates of Pay**

19 There is a risk that Plaintiff's claim that Defendants did not pay all wages at the correct  
20 rates of pay would be extremely limited at best, largely because Defendants' written policies  
21 throughout the relevant time period prohibited off-the-clock work. DS, ¶ 17. Off-the-clock claims  
22 are difficult where a defendant requires in its written policies that all work must take place while  
23 clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App<sup>4</sup>th 391 (employer must  
24 have notice of off-the-clock work for it to be compensable). *Id.* In their written employment  
25 policies, Defendants mandate that employees must record all time worked accurately on their  
26 time records and strictly prohibit employees from performing any work off-the-clock. DS, ¶ 17.  
27 Moreover, while Defendants dispute that off-the-clock work occurred, they contend that any time  
28 spent off the clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.*  
(2018) 5 Cal<sup>5</sup>th 829, 835 suggested that irregular and minute periods of time may still be subject  
to a *de minimis* defense even if compensable. (Stating that "We do not decide whether there are  
circumstances where compensable time is so minute or irregular that it is unreasonable to expect  
the time to be recorded."). Following *Troester*, Defendants contend that the *de minimis* doctrine



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1 may apply here because the time spent off the clock were minute and insignificant. Accordingly,  
2 a large award of civil penalties seems unlikely with respect to this claim. *Id.*

3 The difficulty inherent in proving that off-the-clock work occurred poses a significant  
4 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.  
5 Generally, a court will not certify a class unless it can determine an appropriate methodology for  
6 all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here,  
7 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially  
8 given the lack of records indicating when such off-the-clock work may have taken place.  
9 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine  
10 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there  
11 is a significant risk that the Court would consider this evidentiary showing insufficient as a  
12 methodology for all aggrieved employees. DS, ¶ 18.

13 **b. Risks Associated with Plaintiff’s Claim That Defendants Failed To**  
14 **Provide All Meal Periods**

15 There are risks to Plaintiff’s claims that Defendants failed to provide all meal periods.  
16 DS, ¶ 19. Very few shifts were understaffed and consequently there were very few shifts in with  
17 the meal period violation resulting for unavailable cover occurred. Also, Defendants contend that,  
18 to establish a violation of the meal period law, a plaintiff must do more than show that a meal  
19 break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees  
20 with a “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police  
21 meal breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff  
22 must show the employer impeded, discouraged, or prohibited the employee from taking a proper  
23 break, or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with  
24 regard to the meal break claim is the reason that a particular employee may have failed to take a  
25 meal break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

26 Defendants contend they did not impede or discourage Plaintiff, or any other employees,  
27 from taking their meal periods. DS, ¶ 19. Defendants’ policies mandate that employees take at  
28 least a 30-minute, uninterrupted meal periods and record the beginning and ending time of their  
meal breaks each day on their time records. *Id.* The time records that comprise the random sample  
Defendants produced to Plaintiff for purposes of mediation show that meal periods were taken  
the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,  
individualized evidence may be necessary to determine whether they occurred due to conduct of



1 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that  
2 the recoverable amount of civil penalties for unprovided meal periods would be substantially  
3 reduced at trial. *Id.*

4 **c. Risks Associated with Plaintiff's Claim That Defendants Failed To**  
**Authorize or Permit Rest Breaks**

5 There are risks to Plaintiff's claims that Defendants failed to authorize or permit rest  
6 breaks. DS, ¶ 20. Very few shifts were understaffed and consequently there were very few shifts  
7 in with the rest period violation resulting for unavailable cover occurred. Also, employers are  
8 not required to record rest periods and such periods are paid. *Id.* Defendants contend they  
9 provided non-exempt employees the opportunity to take rest periods in accordance with  
10 California law. Further, Defendants' written policies on meal and rest periods are consistent with  
11 the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether  
12 an employee clocked out or not, there is no such evidence to prove a missed rest period or that  
13 the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become  
14 exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove  
15 the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes  
16 such claims risky from a trial management and due process perspective. *Id.*, *See Duran v. U.S.*  
17 *Bank National Assn.*, (2014) 59 Cal 4th 1, 31 (explaining "[I]f sufficient common questions exist  
18 to support class certification, it may be possible to manage individual issues through the use of  
19 surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382;  
20 *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

21 **d. Risks Associated with Plaintiff's Claim That Defendants Failed To**  
**Issue Accurate and Complete Wage Statements**

22 Plaintiff also asserts a claim for wage statement violations. Under Labor Code section  
23 226, wage statements must include various information, including the applicable rates of pay,  
24 corresponding hours worked, and gross pay. DS, ¶ 21.

25 Plaintiff's wage statement claim has the same underlying risks as the above claims, as it  
26 is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply with  
27 the requirements of Labor Code § 226. Further, to the extent that Plaintiff claims Defendants'  
28 wage statements were inaccurate because they did not include premium payments for missed  
meal and rest breaks that Plaintiff contends Defendants should have paid, Plaintiff's claims are  
subject to additional risks, as case law suggests that such premium payments are not to be



1 considered wages, and therefore do not give rise to claims for statutory penalties. *Id.* See *Jones*  
2 *v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at \* 26 (C.D. Cal. Aug. 7, 2012) (no  
3 claim for Labor Code section 203 penalties based on meal period claims because “the underlying  
4 violation that gives rise to a section 226.7 [meal period] claim is not the nonpayment of wages”);  
5 *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at \* 24 (C.D. Cal. Nov. 28,  
6 2011) (holding that Section 226(a) does not even cover meal period premium pay). Accordingly,  
7 the *Jones* and *Nguyen* decisions will likely foreclose this claim. Moreover, the Court of Appeal’s  
8 decision in *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App<sup>5</sup> 444, holding that  
9 a defendant’s failure to pay meal premiums does not give rise to violations of Labor Code sections  
10 226 or 203, was pending before the California Supreme Court when the Parties negotiated the  
11 Settlement. *Naranjo v. Spectrum Security Services, Inc.* 2020 Cal. LEXIS 167. DS, ¶ 21.

12 **e. Risks Associated with Plaintiff’s Claim That Defendants Failed To**  
13 **Timely Pay All Wages**

14 Plaintiff’s claim that Defendants did not timely pay wages is predicated on Labor Code  
15 §§ 201, 202, and 203. Defendants can argue based on the *Jones* and *Nguyen* decisions, *supra*,  
16 that meal or rest premium pay is not a “wage” for purposes of Labor Code section 203 penalties.  
17 Further, in the recent decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App<sup>5</sup> 1239,  
18 the Court of Appeal held that unlawful meal and rest periods under section 226.7 cannot  
19 serve as a basis for recovery of penalties under section 203. *Id.* at 1252 (“We conclude that the  
20 administrative and legislative history of the statute indicates that . . . the Legislature intended  
21 section 226.7 first and foremost to *compensate* employees . . . .Section 226.7’s additional hour  
22 of pay is a premium wage . . . not a penalty.”)(internal citations and quotation marks omitted).  
23 Under the *Loews* decision, it is highly unlikely that the Court will permit untimely wage penalties  
24 for Defendants’ alleged failure to provide meal and rest period penalties. DS, ¶ 22.

25 **f. The Absence of Large Civil Penalty Awards under PAGA**

26 The sole source of money recoverable for the PAGA Members and the State is civil  
27 penalties available under PAGA. It allows employees to seek civil penalties for certain violations  
28 of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory.  
As discussed above, Plaintiff’s maximum estimated liability exposure is based on the theories  
that: (1) Every paycheck that Defendants issued to employees during the PAGA Period represents  
a pay period in which every PAGA Member suffered a minimum wage violation; (2) Every  
paycheck that Defendants issued to employees during the PAGA Period represents a pay period



1 in which every PAGA Member suffered an overtime wage violation; (3) Every paycheck that  
2 Defendants issued to employees during the PAGA Period represents a pay period in which every  
3 PAGA Member suffered a meal period violation; (4) Every paycheck that Defendants issued to  
4 employees during the PAGA Period represents a pay period in which every PAGA Member  
5 suffered a rest period violation; and (5) Every paycheck that Defendants issued to employees  
6 during the PAGA Period represents a pay period in which every PAGA Member suffered an  
7 unreimbursed expense violation. There are no California state court decisions under the PAGA  
8 to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only two  
9 significant awards under the PAGA in a contested proceeding, both issued by federal district  
10 courts, one of which was overturned on May 28, 2021.<sup>3</sup> DS, ¶ 23.

11 Additionally, PAGA states a court has discretion to award a lesser amount than the  
12 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*  
13 (2012) 203 Cal.App<sup>4</sup>th 1112, 1135 (reducing PAGA award). There is a substantial risk that the  
14 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's  
15 evidence of willful and intentional conduct. *Carrington v. Starbucks (2018) 30 Cal.App<sup>5</sup>th 504*  
16 (“*Carrington*”) illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily

17 <sup>3</sup> In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded  
18 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from  
19 the plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of  
20 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*  
21 suffered a particularly sizeable injury – the court found that the defendant's policies caused  
22 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in  
23 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to  
24 train their flight attendants, engaged in glaring violations of the labor code, such as failing to  
25 compensate its flight attendants for work performed outside of “block time” (time during which  
26 the aircraft is moving), including time spent participating in pre-flight briefings, boarding  
27 passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,  
28 1055-1058. Indeed, defendant's liability was so clear in *Bernstein* that the case was resolved on  
the plaintiffs' motion for summary judgment. *Id.*

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court  
awarded approximately \$102 million in damages, primarily based on the Defendant's failures to  
comply with the requirements of California Labor Code section 226. On May 28, 2021, the United  
States Court of appeals for the Ninth Circuit overturned the decision finding that there is no  
technical wage statement violation for a failure to list the rates and hours of pay associated with  
adjustments to overtime pay. *Magadia v. Wal-Mart Assocs.*, No. 19-16184, 2021 U.S. App.  
LEXIS 16070 (9th Cir. May 28, 2021).



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1 discounted award of only \$5 per violation because it was within the Court's discretion to  
2 significantly reduce PAGA penalties even when there is a finding that a violation of the California  
3 Labor Code occurred. Under *Carrington*, assuming one (1) violation for each pay period for all  
4 400 PAGA Members, will result in a recovery of \$70,000.00 (14,000 pay periods x 1 violation  
x \$5 = \$70,000.00). DS, ¶ 24.

5 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In  
6 *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court, case number BC430633, the  
7 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in  
8 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian  
9 awarded \$325,000 in civil penalties under the PAGA. DS, ¶ 25, Exs. 8-10. In a similar PAGA  
10 case before the Los Angeles Superior Court, *Shields v. Security Paving Company, Inc.*, LA  
11 Superior Court case no. BC492828, on October 24, 2017, the court awarded the prevailing PAGA  
plaintiff civil penalties totaling only \$50.00. A similar result could occur here. DS, ¶ 25, Ex. 11.

12 Defendants could also convince the Court to dismiss the claims due to unmanageability  
13 because determining whether each Aggrieved Employee worked off the clock or why each  
14 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*  
15 *CPS Sec. Solutions, Inc.* (2015) 60 Ca<sup>4</sup>th 833. In *Ortiz v. CVS Caremark Corp.*, the court  
16 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at \*3–4 (N.D. Cal.  
17 2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have  
18 required in ordering dismissal. *Id.* at \*4. Several other courts have adopted *Ortiz*, and dismissed  
19 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims  
20 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at \*3  
21 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at \*4 (C.D. Cal. 2015); *see*  
22 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at \*2–4 (E.D. Cal. 2014) (bifurcating  
trial of plaintiff's claim from representative claims: “in light of the number of potential aggrieved  
employees, judicial economy favors deferring the representative portion of the PAGA claim”);  
23 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at \*16 (N.D. Cal. May 13, 2015). Further, on  
24 September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The*  
25 *Office Superstore, LLC*, 68 Cal. App 5th 746 (2021), reh'g denied (Sept. 27, 2021) holding that  
26 trial courts have authority to ensure that claims under PAGA are manageable, and that courts may  
27 limit or strike unmanageable PAGA claims. DS, ¶ 26.



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1 While the evidence gathered through Plaintiff's discovery supports the merits of the  
2 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks  
3 associated with the merits of Plaintiff's claims, the uncertainties of complex litigation, the cost  
4 of pretrial and trial proceedings, the Court's discretion to lower the amount of penalties ultimately  
5 awarded, and the secured benefit to the PAGA Members and the LWDA promoting compliance  
with the Labor Code. DS, ¶ 27.

6 **g. The Risk That PAGA Claims Are Subject To Arbitration Agreements**

7 At the time the Parties settled the case, the United States Supreme Court had announced  
8 that, in the near future, it would hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-  
9 1573, and decide whether or not to overrule the California Supreme Court's decision in *Iskanian*  
10 *v. CLS Transportation* (2014) 59 Cal.4<sup>th</sup> 348 that a private arbitration agreement cannot deprive  
11 an employee of his right to sue under PAGA in a court of law. The Supreme Court in *Moriana*  
12 ultimately held that the employer could enforce the arbitration agreement as to the employee's  
13 individual PAGA claim and that the employee lacked standing to maintain her representative  
14 PAGA claims. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), reh'g denied, No.  
20-1573, 2022 WL 3580311 (U.S. Aug. 22, 2022).<sup>4</sup> DS, ¶ 28.

15 **4. The Gross Settlement Amount Fairly, Reasonably, and Adequately**  
16 **Awards Shares To PAGA Members Because Each PAGA Member**  
17 **Will Be Paid Based on the Potential Extent of His or Her Injury**  
18 **Compared to Other PAGA Members**

19 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis  
20 depending on the number of pay periods Defendants employed them for during the PAGA Period.  
21 Agreement, ¶ 6. With a total of approximately 400 PAGA Members, the average estimated  
22 individual Settlement Payment for each PAGA Member is approximately \$25.46 (\$10,184.41/  
23 400 PAGA Members). DS, ¶29, Ex. 17. Although an average payment of \$25.46 per Aggrieved  
24 Employee is not an enormous sum of money, it is an excellent result given the uncertainties this  
25 lawsuit entails. It is also reasonable given the structure and purpose of the PAGA. The PAGA is  
26 not a restitution statute with a traditional damages provision designed to restore victims to the  
27 position they would have been in had the Labor Code violations not taken place. Rather, it is at  
28

<sup>4</sup> The California Supreme Court recently granted review and ordered briefing in *Adolph v. Uber Technologies, Inc.* (Cal. Sup. Ct. Case No. S274671) on the question whether a plaintiff continues to have standing to pursue the remedies available to the LWDA even if compelled to arbitrate his individual PAGA claim.



1 best a punishment statute designed to reduce future Labor Code violations. It provides for civil  
2 penalties only. DS, ¶29.

3 **5. Plaintiff's Counsel is Experienced in Similar Litigation.**

4 Plaintiff's counsel have considerable experience in class actions and wage and hour  
5 litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving  
6 forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 10-13;  
7 Declaration of Walter L. Haines ("Haines Decl."), ¶¶ 1-3.

8 **6. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and**  
9 **Reasonable and Should Be Approved.**

10 Of the \$99,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$33,000.00 (1/3  
11 of the Gross Settlement Amount) in attorney's fees and up to \$11,772.37 in litigation expenses.  
12 DS, ¶ 31; Agreement, ¶ 4. The written retainer agreement Plaintiff's counsel entered into with  
13 Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded attorney  
14 fees or (b) up to 40% of any recovery. *Id.*

15 It is an accepted practice in wage and hour class action settlements to award attorneys'  
16 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the  
17 parties. California courts have long recognized that an appropriate method for awarding  
18 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*  
19 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific  
20 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation  
21 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the  
22 fund"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*  
23 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

24 California courts have the discretion to employ (or decline to employ) a "lodestar cross-  
25 check" on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)  
26 1 Cal. 5th 480, 505 ("*Laffitte*"). However, the California Supreme Court in *Laffitte* has now made  
27 clear that this cross-check is not required and approved one-third of the class action settlement  
28 fund as reasonable attorney fees as "[t]he percentage of the fund method survives in California  
class action cases." *Id.* at 574. As other courts have acknowledged since *Laffitte*, "California  
courts routinely award attorneys' fees of one-third of the common fund." *Lopez v. Mgmt. &*  
*Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not  
"engage in a full-blown lodestar analysis when the primary basis remains the percentage



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method...” The lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.’”<sup>5</sup> *Id.* (citing *Laffitte*)).

“[R]egardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA settlements. DS, ¶ 34.

Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s fee request of \$33,000.00 (one-third of the Gross Settlement Amount) is fair and reasonable based on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 32, Ex. 12. Plaintiff’s counsel’s previous experience in litigating wage and hour class actions and the caliber of opposing counsel also support the reasonableness of the fee request. DS, ¶¶ 10-13, 35.

In addition, Plaintiff’s Counsel incurred substantial costs, \$11,772.37 to date, including the costs of a mediator to aid in the representation of the PAGA Members.<sup>6</sup> DS, ¶ 33, Ex. 13; Haines Decl. ¶ 10. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. DS, ¶ 33, Ex. 13. Accordingly, they warrant the Court’s approval.

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<sup>5</sup> The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

<sup>6</sup> Plaintiff’s counsel do not seek reimbursement for photocopy costs, Westlaw or LexisNexis costs, or any future costs that they anticipate spending for the filing of this motion or notice of entry of order. They also do not seek reimbursement for the wages they paid to the attorneys, paralegals, and legal assistants to aid in the representation of the PAGA Members and the State. Plaintiff’s Counsel bore these expenses over the lengthy since they began work on this matter without reimbursement.



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1                                **7. Plaintiff's General Release Payment Is Fair, Adequate, and**  
2                                **Reasonable and Should Be Approved.**

3                                Plaintiff's General Release Payment in the amount of \$5,000.00 is being paid to Plaintiff  
4 as PAGA Representative for her general release and service to the State of California and the  
5 PAGA Members in prosecuting the Action. DS, ¶ 36.

6                                There is authority for the General Release Payment to Plaintiff. While the statutory  
7 language of the PAGA is silent on the issue of incentive awards to named Plaintiff, it nonetheless  
8 provides implicit support for incentive payments to named Plaintiff. Moreover, language from  
9 the Ninth Circuit Court of Appeals and recent California district court caselaw indicates that such  
10 awards are permitted. DS, ¶¶ 37-43.

11                              Courts routinely approve incentive awards to compensate named plaintiffs for the  
12 services they provide and the risks they incur during class action litigation, often in much higher  
13 amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th  
14 715, 726 (upholding "service payments" to named plaintiffs for their efforts in bringing the case);  
15 *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal.1995) 901 F.Supp. 294 (approving \$50,000  
16 enhancement award).<sup>7</sup> A lawsuit under the PAGA is a form of representative litigation – one or  
17 more aggrieved employees may file suit on behalf of other aggrieved employees and pursue civil  
18 penalties for such employees and the State. In this regard, it bears some resemblance to class

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19                              <sup>7</sup> Plaintiff contends that an action brought under the Labor Code Private Attorney General Act of  
20 2004, Lab.Code §§ 2698, et seq. ("PAGA") is a type of "qui tam" action. *Iskanian v. CLS Trans.*  
21 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, 382; *see also Cunningham v. Leslie's Poolmart, Inc.*,  
22 No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at \*7 (C.D. Cal. Jun. 25, 2013)  
23 ("Representative PAGA actions therefore are not a sub-species of class actions. Instead,  
24 representative PAGA actions are better characterized as a type of 'qui tam' action."). *See*  
25 *also Amber Echavez v. Abercrombie & Fitch Co., Inc., et al.* (USDC CD Cal. 3/23/17). A qui tam  
26 lawsuit is a lawsuit initiated by a private citizen (popularly called a "whistle blower") against a  
27 person or company who is believed to have violated the law in the performance of a contract with  
28 the government or in violation of a government regulation, when there is a statute which provides  
for a penalty for such violations. Qui tam suits are brought for "the government as well as the  
plaintiff." In a qui tam action the plaintiff (the person bringing the suit) will be entitled to a  
percentage of the recovery of the penalty (which may include large amounts for breach of  
contract) as a reward for exposing the wrongdoing and recovering funds for the government. *See,*  
*e.g., the False Claims Act, 31 U.S.C. § 3730(d)(1)* ("If the Government proceeds with an action  
brought by a person under subsection (b), such person will, subject to the second sentence of this  
paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action  
or settlement of the claim, depending upon the extent to which the person substantially  
contributed to the prosecution of the action.")



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1 actions under Rule 23 of the Federal Rules of Civil Procedure and California Code of Civil  
2 Procedure § 382. In class actions, one or a few class members file suit on behalf of a class of  
3 absent class members and pursue the class’s claims in the aggregate. Like the PAGA, Rule 23  
4 and C.C.P. 382 make no reference to service awards (also referred to as “enhancement  
5 payments,” “case contribution,” or “incentive awards”). “The judiciary has created these awards  
6 out of whole cloth, yet both judges—and Congress—have expressed concerns about them.”  
7 Newberg on Class Actions, § 17.1 (5<sup>th</sup> ed.). Nevertheless, at the conclusion of a class action, the  
8 class representatives are eligible for a special payment in recognition of their service to the class.  
9 The names service awards, enhancement payments and incentive awards capture the sense that  
10 the payments aim to compensate class representatives for their service to the class and  
11 simultaneously serve to incentivize them to perform this function. *Id.* Incentive awards “serve to  
12 compensate plaintiffs for the time and effort expended in assisting in the prosecution of the  
13 litigation, the risks incurred becoming and continuing as a litigant and any other burdens  
14 sustained by the plaintiffs.” *Viafara v. MCIZ Corp.* (S.D.N.Y. 2014) 2014 WL 1777438, \*16.

15 Courts commonly order payment of incentive awards to the plaintiffs who bring hybrid  
16 class/PAGA actions and the PAGA expressly contemplates remedies other than civil penalties,  
17 attorney fees and costs. It states,

18 Any employee who prevails in any action will be entitled to an award of  
19 reasonable attorney's fees and costs. Nothing in this part will operate to limit an  
20 employee’s right to pursue or recover other remedies available under state or  
21 federal law, either separately or concurrently with an action taken under this part.

22 Lab.Code § 2699(g)(1).

23 The incentive award sought in this case is reasonable and rewards the Plaintiff for the  
24 time and effort she has spent on the case. *In re Linerboard Antitrust Litigation*, 2004-1 Trade  
25 Cas. (CCH) ¶ 74458, 2004 WL 1221350, \*18 (E.D. Pa. 2004), order amended, 2004 WL  
26 1240775 (E.D. Pa. 2004) (“Like the attorneys in this case, the class representatives have  
27 conferred benefits on all other class members and they deserve to be compensated  
28 accordingly.”); *In re Plastic Tableware Antitrust Litigation*, 1995-2 Trade Cas. (CCH) ¶ 71192,  
1995 WL 723175, \*2 (E.D. Pa. 1995) (“Payments to class representatives may be considered a



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1 form of restitutionary relief within the discretion of the trial court. They may also be treated as a  
2 reward for public service and for the conferring of a benefit on the entire class.” (citation  
3 omitted)); Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action  
4 Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1313 (2006) (“From a doctrinal  
5 perspective, incentive awards have been justified as a form of restitution for a benefit conferred  
6 on others.” (citing *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 571 (7th  
Cir. 1992), as amended on denial of reh’g, (May 22, 1992))).

7 Plaintiff’s General Release Payment of \$5,000.00 is entirely reasonable given Plaintiff’s  
8 efforts in the Lawsuit and the risks she undertook on behalf of the PAGA Members. *See generally*  
9 Calderon Decl. Plaintiff devoted many hours advancing the interests of the PAGA Members. *Id.*  
10 Plaintiff has done this, by, among other things, retaining experienced counsel, providing them  
11 with information about her work history with Defendants, assisting in contacting absent PAGA  
12 Members to gather information, participating in mediation, and being actively involved in the  
13 settlement process to ensure a fair result for the PAGA Members as a whole. *Id.* In doing this,  
14 Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendants’  
15 attorneys’ fees and costs if this action had been unsuccessful and in bad faith (*See Labor Code*  
16 §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the PAGA Members  
show that the proposed General Release Payment to Plaintiff is fair, adequate, and reasonable,  
and thus warrants approval. *See generally* Calderon Decl. DS, ¶44.

17 **8. The Proposed Third Party Settlement Administration Fees Are Fair**  
18 **and Reasonable and Should Be Approved.**

19 With regard to the Third-Party Settlement Administration Fees provision, it is reasonable.  
20 Before agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable  
21 third-party administrators which provided higher bids. DS, ¶ 45-46, Exs. 14-16. Thus, the  
Settlement Administration Fees provision should be given approval.

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1 **V. CONCLUSION**

2 For the reasons stated above, this Court should grant the Plaintiff' Motion in its entirety  
3 and adopt the proposed order submitted concurrently herewith.

4 Respectfully submitted,

5 THE SPIVAK LAW FIRM

6 Dated: September 09, 2022

By:



7 DAVID G. SPIVAK, Attorneys for  
8 Plaintiff, TINA CALDERON, and all  
9 others similarly situated



21 SPIVAK LAW 23

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