

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

ADDITIONAL ATTORNEYS FOR PLAINTIFF(S)

WALTER L. HAINES (SBN 71075)
walter@uelglaw.com
UNITED EMPLOYEES LAW GROUP
4276 Katella Ave
Suite 301
Los Alamitos, CA 90720
Telephone: (562) 256-1047
Facsimile: (562) 256-1006

Attorneys for Plaintiff(s),
TINA CALDERON, and all others similarly situated



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

TABLE OF CONTENTS

1		
2	TABLE OF AUTHORITIES.....	v
3	I. INTRODUCTION.....	1
4	II. FACTUAL AND PROCEDURAL BACKGROUND.....	1
5	A. PLAINTIFF’S WRITTEN NOTICE TO THE STATE OF CALIFORNIA	1
6	B. PLAINTIFF’S PAGA CLAIM	1
7	C. MEDIATION	2
8	III. OVERVIEW OF SETTLEMENT.....	2
9	A. “PAGA MEMBERS” DEFINITION	2
10	B. MONETARY TERMS OF THE SETTLEMENT	2
11	C. TIMING OF PAYMENTS	3
12	D. CALCULATION OF SETTLEMENT SHARES	4
13	E. APPORTIONMENT OF SETTLEMENT SHARES	4
14	F. THE RELEASES	4
15	G. NOTICE PROCESS AND PROCEDURES	5
16	H. UNCASHED CHECKS	6
17	IV. ARGUMENT	6
18	A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT	6
19	B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF	
20	PAGA.....	7
21	C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE IT	
22	IS A FAIR, REASONABLE AND ADEQUATE IN VIEW OF PAGA’S PUBLIC	
23	POLICY GOALS.....	7
24	1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm’s	
25	Length Negotiations Between The Parties.	8
26	2. The Extent of Investigation and Discovery Completed Provided Ample	
27	Information to Enter into an Informed and Reasonable Settlement	8
28	3. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiff’s	
	Case and the Risks and Costs of Further Litigation	9
	a. Risks Associated with Plaintiff’s Claim That Defendants Failed To Pay	
	All Earned Wages at the Correct Rates of Pay	10
	b. Risks Associated with Plaintiff’s Claim That Defendants Failed To	
	Provide All Meal Periods.....	11
	c. Risks Associated with Plaintiff’s Claim That Defendants Failed To	
	Authorize or Permit Rest Breaks	11
	d. Risks Associated with Plaintiff’s Claim That Defendants Failed To	
	Issue Accurate and Complete Wage Statements.....	12
	e. Risks Associated with Plaintiff’s Claim That Defendants Failed To	
	Timely Pay All Wages	13
	f. The Absence of Large Civil Penalty Awards under PAGA	13
	g. The Risk That PAGA Claims Are Subject To Arbitration Agreements	
		16



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

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

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

5. Plaintiff’s Counsel is Experienced in Similar Litigation. 16

6. The Proposed Attorneys’ Fees and Costs Are Fair, Adequate, and
Reasonable and Should Be Approved..... 17

7. Plaintiff’s General Release Payment Is Fair, Adequate, and Reasonable and
Should Be Approved. 18

8. The Proposed Third Party Settlement Administration Fees Are Fair and
Reasonable and Should Be Approved. 19

V. CONCLUSION 20



SPIVAK LAW
Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

TABLE OF AUTHORITIES

	Cases	Page(s)
1		
2		
3	<i>Amey v. Cinemark USA Inc.</i>	
4	(N.D.Cal. May 13, 2015) 2015 WL 2251504	15
5	<i>Austin v. Foodliner, Inc.</i>	
6	(N.D.Cal. May 10, 2019) 2019 U.S. Dist. LEXIS 79638	17
7	<i>Bernstein v. Virgin Am., Inc.</i>	
8	(N.D.Cal. 2017) 227 F.Supp.3d 1049	14
9	<i>Bowers v. First Student, Inc.</i>	
10	(C.D.Cal. Apr. 23, 2015) 2015 WL 1862914	15
11	<i>Brinker Restaurant Corp. v. Superior Court</i>	
12	(2012) 53 Cal.4th 1004	11
13	<i>Carrington v. Starbucks Corp.</i>	
14	(2018) 30 Cal.App.5th 504	14, 15
15	<i>Chavez v. Netflix, Inc.</i>	
16	(2008) 162 Cal.App.4th 43	18
17	<i>Comcast Corp. v. Behrend</i>	
18	(2013) 133 S.Ct. 1426	12
19	<i>Dunk v. Ford Motor Co.</i>	
20	(1996) 48 Cal.App.4th 1794	7, 8
21	<i>Duran v. U.S. Bank National Assn.</i>	
22	(2014) 59 Cal.4th 1	10, 12
23	<i>EEOC v. Waffle House, Inc.</i>	
24	(2002) 534 U.S. 279	16
25	<i>Farm Raised Salmon Cases</i>	
26	(2008) 42 Cal.4th 1077	17-18
27	<i>Ferra v. Loews Hollywood Hotel, LLC</i>	
28	(2019) 40 Cal.App.5th 1239	13
	<i>Gutilla v. Aerotek, Inc.</i>	
	(E.D.Cal. Mar. 21, 2017) 2017 U.S. Dist. LEXIS 41655	6, 7-8
	<i>Hanlon v. Chrysler Corp.</i>	
	(9th Cir. 1998) 150 F.3d 1011	6, 7
	<i>In re Executive Life Ins. Co.</i>	
	(1995) 32 Cal.App.4th 344	7



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1	<i>In re Pacific Enter. Sec. Litig</i>	
2	(9th Cir. 1995) 47 F.3d 373, 379.....	18
3	<i>In re Synacor ERISA Litigation</i>	
4	516 F.3d 1095, 1101 (9th Cir. 2008).....	7
5	<i>Iskanian v. CLS Transportation Los Angeles, LLC</i>	
6	(2014) 59 Cal.4th 348	16
7	<i>Jones v. Spherion Staffing LLC</i>	
8	(C.D.Cal. Aug. 7, 2012) 2012 U.S. Dist. LEXIS 112396	12, 13
9	<i>Jong v. Kaiser Foundation Health Plan, Inc.</i>	
10	(2014) 226 Cal.App.4th 391	10
11	<i>Juarez v. Villafan</i>	
12	(E.D.Cal. Aug. 24, 2017) 2017 U.S. Dist. LEXIS 137205, footnote 4	6, 7
13	<i>Laffitte v. Robert Half Internat. Inc.</i>	
14	(2016) 1 Cal.5th 480	17
15	<i>Lealao v. Beneficial California, Inc.</i>	
16	(2000) 82 Cal.App.4th 19	17
17	<i>Litty v. Merrill Lynch & Co.</i>	
18	(C.D.Cal. Nov. 10, 2014) 2014 WL 5904904	15
19	<i>Lopez v. Mgmt. & Training Corp.</i>	
20	(S.D.Cal. Apr. 20, 2020) 2020 U.S. Dist. LEXIS 70029	17
21	<i>Magadia v. Wal-Mart Assocs.</i>	
22	(9th Cir. May 28, 2021) 2021 U.S. App. LEXIS 16070	14
23	<i>Magadia v. Wal-Mart Assocs.</i>	
24	(N.D.Cal. 2019) 384 F.Supp.3d 1058	14
25	<i>Mendiola v. CPS Security Solutions, Inc.</i>	
26	(2015) 60 Cal.4th 833	15
27	<i>Moorer v. Noble L.A. Events, Inc.</i>	
28	(2019) 32 Cal.App.5th 736	7
	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
	(2019) 40 Cal.App.5th 444	12, 13
	<i>Neary v. Regents of University of California</i>	
	(1992) 3 Cal.4th 273	7
	<i>Nguyen v. Baxter Healthcare Corp.</i>	
	(C.D.Cal. Nov. 28, 2011) 2011 U.S. Dist. LEXIS 141135	12, 13



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1	<i>Ochoa-Hernandez v. CJADERS Foods, Inc.</i>	
2	(N.D.Cal. Apr. 2, 2010) 2010 WL 1340777	6
3	<i>Officers for Justice v. Civil Service Com.</i>	
4	(9th Cir. 1982) 688 F.2d 615	6
5	<i>Ortiz v. CVS Caremark Corp.</i>	
6	(N.D.Cal. Mar. 18, 2014) 2014 WL 1117614	15
7	<i>Ramirez v. Benito Valley Farms, LLC</i>	
8	(N.D.Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272	6, 8
9	<i>Rincon v. West Coast Tomato Growers, LLC</i>	
10	(S.D.Cal. Feb. 12, 2018) 2018 U.S. Dist. LEXIS 22886	6, 7
11	<i>Salazar v. Sysco Cent. Cal., Inc.</i>	
12	(E.D.Cal. Feb. 2, 2017) 2017 U.S. Dist. LEXIS 14971	6
13	<i>Serrano v. Priest</i>	
14	(1977) 20 Cal.3d 25	17
15	<i>Smith v. H.F.D. No. 55, Inc.</i>	
16	(E.D.Cal. Apr. 19, 2018) 2018 U.S. Dist. LEXIS 67192	6, 8
17	<i>Stafford v. Dollar Tree Stores, Inc.</i>	
18	(E.D.Cal. Nov. 20, 2014) 2014 WL 6633396	15
19	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
20	(2012) 203 Cal.App.4th 1112	9, 14
21	<i>Troester v. Starbucks Corp.</i>	
22	(2018) 5 Cal.5th 829	10
23	<i>Tyson Foods, Inc. v. Bouphakeo</i>	
24	(2015) 136 S.Ct. 382	12
25	<i>Viking River Cruises, Inc. v. Moriana</i>	
26	(Dec. 15, 2021), 2021 U.S. LEXIS 6280	16
27	<i>Washington v. Joe's Crab Shack</i>	
28	(N.D.Cal. 2010) 271 F.R.D. 629	11, 12
	<i>Wershba v. Apple Computer, Inc.</i>	
	(2001) 91 Cal.App.4th 224	17
	<i>Wesson v. Staples The Office Superstore, LLC</i>	
	(2021) 68 Cal.App.5th 746	15
	<i>Western Heritage Ins. Co. v. Frances Todd, Inc.</i>	
	(2019) 33 Cal.App.5th 976	18



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1	<i>Williams v. MGM-Pathe Communs. Co.</i>	
2	(9th Cir. 1997) 129 F.3d 1026	18

Statutes

3	Civ. Code, section 1542	3, 5
4	Lab. Code, section 201	5, 13
5	Lab. Code, section 202	5, 13
6	Lab. Code, section 203	5, 12, 13
7	Lab. Code, section 204	5
8	Lab. Code, section 210	5
9	Lab. Code, section 218.5-218.6	19
10	Lab. Code, section 226	5, 12, 13, 14
11	Lab. Code, section 226.3	5
12	Lab. Code, section 226.7	5, 13
13	Lab. Code, section 510	5
14	Lab. Code, section 512	5
15	Lab. Code, section 558	5
16	Lab. Code, section 558.1	5
17	Lab. Code, section 1174	5
18	Lab. Code, section 1174.5	5
19	Lab. Code, section 1194	5
20	Lab. Code, section 1197	5
21	Lab. Code, section 1197.1	5
22	Lab. Code, section 1198	5
23	Lab. Code, section 2698 et seq.	1, 5
24	Lab. Code, section 2699	<i>passim</i>
25	Lab. Code, section 2699.3	1

Rules

26	California Rules of Court, rule 8.1115	18
----	--	----



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

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 motion for approval of the PAGA Settlement Agreement (the
6 “Agreement” or “PAGA Settlement” or “Settlement”)² for the civil penalties claim she brought
7 against Defendant Davis Guest Home, Inc. and Lonny Gene Davis (“Davis Guest Home, Inc.” or
8 “Defendants”) under the Labor Code Private Attorneys General Act of 2004, Labor Code §§
9 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code section 2699(1) of the
10 PAGA requires Court-approval of any civil penalties sought as part of a proposed settlement
11 agreement. Based on Plaintiff’s and her attorneys’ investigation and evaluation, Plaintiff is of the
12 opinion that the PAGA Settlement represents a reasonable and adequate settlement of strongly
13 disputed claims and is in the best interest of the State of California, the PAGA Members, and
14 Plaintiff. Through this motion, therefore, Plaintiff respectfully requests for this Court to approve
15 the PAGA Settlement for resolution of the PAGA claim.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

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

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

21 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under
22 PAGA. By letter dated February 27, 2020, Plaintiff, on behalf of herself and other aggrieved
23 hourly employees gave written notice by certified mail to the Labor and Workforce Development
24 Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code
25 alleged to have been violated, including the facts and theories to support the alleged violations.
26 DS, ¶ 4, Ex. 2.

27 **B. Plaintiff’s PAGA Claim**

28 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, Ex.
3. On May 13, 2020, Plaintiff filed a First Amended Complaint (“1AC”). DS, ¶ 5, Ex. 4.
Plaintiff’s operative complaint presents one cause of action for civil penalties under PAGA. *Id.*

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



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 Shortly after Plaintiff served her first set of discovery requests, the Parties agreed to stay formal
2 discovery and participate in mediation. On June 12, 2020, Defendants filed an answer to
3 Plaintiff's First Amended Complaint. DS, ¶ 5, Ex. 5. Defendants deny all of Plaintiff's allegations
4 and strongly contend that their wage and hour policies, practices and procedures are fully
5 compliant with all applicable laws. DS, ¶ 5.

6 **C. Mediation**

7 On February 19, 2021, the Parties participated in mediation with mediator Tripper Ortman
8 in an attempt to resolve the PAGA claim. The Parties engaged in arm's-length negotiations and
9 ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement
10 was reached after exchanges of data, information and documents, and is a result of extensive
11 arms-length negotiations. The Parties conducted informal discovery for purposes of potential
12 resolution through which they ascertained the size of the aggrieved employee group and the
13 number of pay periods worked by them during the PAGA Period to ascertain the total value of
14 Plaintiff's PAGA claim. Now that the parties have finalized the PAGA Settlement, Plaintiff
15 submits it to this Court for approval. DS, ¶ 6.

16 **III. OVERVIEW OF SETTLEMENT**

17 **A. "PAGA Members" Definition**

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

22 **B. Monetary Terms Of The Settlement**

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

27 a. Third-Party Settlement Administration Fees of up to Ten Thousand Dollars and
28 Zero Cents (\$10,000.00);

b. Plaintiff's counsel's, David Spivak of The Spivak Law Firm and Walter L. Haines
of United Employees Law Group ("PAGA Counsel"), request for attorneys' fees of up to one-
third (1/3) of the Gross Settlement Amount, or Thirty Three Thousand Dollars and Zero Cents
(\$33,000.00) ("PAGA Counsel's Fees"), subject to Court approval, plus actual costs and



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 expenses incurred by PAGA Counsel related to the Action as supported by declaration, which
2 are currently estimated to be no greater than Fifteen Thousand Dollars and Zero Cents
3 (\$15,000.00) (“PAGA Counsel’s Costs”);

4 c. A payment to Plaintiff in the amount of Ten Thousand Dollars and Zero Cents
5 (\$10,000.00) (“General Release Payment”) for (1) her general release that includes a release of
6 claims pursuant to California Civil Code section 1542 and (2) her service to the State of California
and the PAGA Members in prosecuting the Action; and

7 d. The remaining funds (the Gross Settlement Amount less the Third-Party
8 Settlement Administration Fees, PAGA Counsel’s Fees, PAGA Counsel’s Costs, and Plaintiff’s
9 General Release Payment) shall be referred to as the “Net Settlement Amount.” Settlement, ¶ 4.

10 With respect to the Settlement, Defendants estimate that they issued approximately
11 14,000 paychecks to approximately 400 PAGA Members for the period of February 27, 2019
12 through January 31, 2022. Plaintiff is entering into this Settlement Agreement based on such
13 representations. In the event it is determined that the actual number of pay periods exceeds 14,000
14 by more than 10 percent and at Plaintiff’s option, the Parties shall agree to engage in a good faith
15 effort to renegotiate the Gross Settlement Amount. If the renegotiation is unsuccessful, Plaintiff
has the right to declare the settlement null and void. Settlement, ¶ 5.

16 **C. Timing of Payments**

17 Within thirty (30) calendar days after the Effective Date and notice by the Court or
18 Plaintiff that the Action has been dismissed with prejudice, Defendants shall deposit the Gross
19 Settlement Amount with the Settlement Administrator, who shall issue payment to PAGA
20 Counsel and Plaintiff within twenty (20) calendar days of receipt of the Gross Settlement
21 Amount. Within ten (10) calendar days after the Effective Date, Defendants shall provide the
22 Settlement Administrator with a list of all PAGA Members with each listed employee’s full
23 name, hiring, and, if applicable, termination dates in connection with the employee’s employment
24 with Defendants during the PAGA Period, last known mailing address, and social security
25 number. Within twenty (20) calendar days of receipt of the list of all PAGA Members, the
26 Settlement Administrator shall run all the addresses of PAGA Members through the United States
27 Postal Service NCOA database to obtain current address information, and issue payments to (a)
28 PAGA Members; (b) the LWDA; and (c) itself. The Settlement Administrator will skip-trace
return mail and re-mail within five (5) calendar days. The Settlement Administrator will issue the



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 appropriate tax forms for all payments issued under this Settlement. If the Effective Date falls on
2 a holiday or weekend, the Effective Date shall be the next calendar day. Settlement, ¶ 10.

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

14 **D. Calculation of Settlement Shares**

15 The Net Settlement Amount shall be designated as PAGA penalties in full satisfaction of
16 all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations,
17 and/or other provisions of law alleged to have been violated in or reasonably related to the
18 operative Complaint with respect to PAGA Members, allocated between the LWDA and the
19 PAGA Members pursuant to Labor Code Section 2699(i) with 75.0% paid to the LWDA and
20 25.0% paid to the PAGA Members on a pro-rata basis ("PAGA Penalties Fund"). The 25.0% of
21 the Net Settlement Amount will be paid to all PAGA Members according to the following
22 formula: Settlement Payment to each PAGA Member = $[\$[25.0\% \text{ of Net Settlement Amount}] \times$
23 $[\text{Pay Periods Worked by Individual PAGA Member During PAGA Period} \div \text{Total Pay Periods}$
24 $\text{Worked by All PAGA Members during PAGA Period}].$ Settlement, ¶ 6.

23 **E. Apportionment of Settlement Shares**

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

26 **F. The Releases**

1 Plaintiff acknowledges the existence of and, with respect to the release given in Paragraph
2 12 of the Agreement, expressly waives and relinquishes any and all rights and benefits Plaintiff
3 has or may have under California Civil Code, Section 1542, which provides:

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

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

14 As of and subject to the occurrence of the Effective Date, and in consideration for the
15 Gross Settlement Amount, the claims settled, fully released and forever discharged by the LWDA
16 and the PAGA Members, including Plaintiff, constitute any and all claims for civil penalties
17 Plaintiff, the PAGA Members, and the State of California may have against the Released Parties
18 under the California Labor Code, Wage Orders, regulations, and/or any other provisions of state
19 and federal law arising from allegations that the PAGA Members suffered Labor Code violations
20 based on , and any other Labor Code violations that were alleged in the Action, or that could have
21 been alleged in the Action based on the facts alleged in the Action, which includes, but is not
22 limited to, alleged violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7,
23 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197, 1197.1, and 1198, and 2698 et seq. (“PAGA
24 Released Claims”). The “Released Parties” are Lonny Gene Davis and Davis Guest Home, Inc.
25 and their present and former parent companies, subsidiaries, divisions, concepts, related or
26 affiliated companies, and their shareholders, officers, directors, employees, agents, attorneys,
27 insurers, successors and assigns, and all persons acting by or through or in concert with any of
28 them, and each of them (hereinafter “Released Parties”). Settlement, ¶ 13.

25 **G. Notice Process and Procedures**

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



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 **H. Uncashed Checks**

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

4 **IV. ARGUMENT**

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

6 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The
7 Court necessarily has broad discretion in making the decision to approve or reject a settlement
8 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
9 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
10 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2).
11 Although the PAGA does not set forth the particular standards against which a PAGA settlement
12 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
13 for evaluating class action settlements. DS, ¶ 8; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017
14 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's guidance,
15 that approval of PAGA settlements may be had where the statutory requirements of the PAGA
16 are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The
17 established standards for evaluating whether class action settlements are fair, reasonable, and
18 adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and
19 have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205,
20 *5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San*
21 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S.
22 Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
23 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal.
24 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon*
25 *v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

26 PAGA penalties are in the nature of a law enforcement penalty and are designed to
27 penalize an employer for its failure to comply with California's wage and hour laws and
28 regulations and are not designed to compensate employees. *Ochoa-Hernandez v. CJADERS*
29 *Foods, Inc.*, 2010 WL 1340777 *1, *5 (E.D. Cal. Apr. 2, 2010). ("Unnamed employees need not
30 be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 PAGA claim. There is no indication that the unnamed plaintiffs can contest a settlement, if any,
2 reached between the parties.”).

3 In making the determination whether a settlement taken as a whole is fair, reasonable, and
4 adequate, the Court should be careful to still give “proper deference to the private consensual
5 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
6 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
7 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
8 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at, 1027. The law favors
9 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
10 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
Univ. of Cal., 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
11 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

12 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
PAGA.

13 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
14 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
15 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*
Moorer v. Noble L.A. Events, Inc. (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
16 The Parties’ Settlement so provides. Second, the LWDA must be given notice of the settlement
17 so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §
18 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion.
19 DS, ¶ 7, Ex. 6. As a result, Plaintiff has met all procedural statutory requirements for settling a
PAGA action.

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

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

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

27 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
28 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
2 *6. However, this Court should begin its analysis with a presumption that the proposed settlement
3 is fair. “A presumption of fairness exists where: (1) the settlement is reached through arm’s length
4 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
5 intelligently; (3) counsel is experienced in similar litigation . . .” *Dunk*, 48 Cal. App. 4th at 1802.

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

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

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

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

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

- 25 • Defendants produced and Plaintiff reviewed her personnel file.
- 26 • Defendants produced and Plaintiff reviewed and analyzed time and payroll
27 records for over 64 PAGA Members.
- 28 • 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 , and
related claims.



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

- 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.4th 1112, 1135 (reducing PAGA award). As set forth above, 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 not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

In preparation for mediation and during the settlement negotiations that followed, Defendants disclosed that there were approximately 400 potentially aggrieved employees and 14,000 pay periods. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period. Unfortunately for the employees concerned, the potential for recovery of the maximum possible civil penalties depends on circumstances that are extremely unlikely independently and in combination. It would depend on the Court stacking the maximum recoverable civil penalties for unpaid overtime wages/unprovided meal periods, unprovided rest breaks, unpaid minimum wages, inaccurate wage statements and untimely wages per pay period for all 14,000 pay periods for all 400 potentially aggrieved employees during the PAGA Period.



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 Plaintiff's counsel is not aware of any California State court decision awarding a plaintiff and the
2 other aggrieved employees she represents multiple civil penalties for the same pay period under
3 different Labor Code provisions. Plaintiff's counsel had to substantially discount the value of
4 these claims in the settlement negotiations for this and a variety of other reasons (outlined below).
DS, ¶ 16.

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

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

23 The difficulty inherent in proving that off-the-clock work occurred poses a significant
24 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
25 Generally, a court will not certify a class unless it can determine an appropriate methodology for
26 all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here,
27 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially
28 given the lack of records indicating when such off-the-clock work may have taken place.
Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine
if an individual in fact worked "minutes" off-the-clock on a "regular" basis. Accordingly, there



Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 is a significant risk that the Court would consider this evidentiary showing insufficient as a
2 methodology for all aggrieved employees. DS, ¶ 18.

3 **b. Risks Associated with Plaintiff's Claim That Defendants Failed To**
4 **Provide All Meal Periods**

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

16 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
17 from taking their meal periods. DS, ¶ 19. Defendants' policies mandate that employees take at
18 least a 30-minute, uninterrupted meal periods and record the beginning and ending time of their
19 meal breaks each day on their time records. *Id.* The time records that comprise the random sample
20 Defendants produced to Plaintiff for purposes of mediation show that meal periods were taken
21 the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch,
22 individualized evidence may be necessary to determine whether they occurred due to conduct of
23 the Defendants or each of the employees concerned. Accordingly, there is a significant risk that
24 the recoverable amount of civil penalties for unprovided meal periods would be substantially
25 reduced at trial. *Id.*

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

28 There are risks to Plaintiff's claims that Defendants failed to authorize or permit rest
breaks. DS, ¶ 20. Very few shifts were understaffed and consequently there were very few shifts
in with the rest period violation resulting for unavailable cover occurred. Also, employers are
not required to record rest periods and such periods are paid. *Id.* Defendants contend they
provided non-exempt employees the opportunity to take rest periods in accordance with



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

California law. Further, Defendants’ written policies on meal and rest periods are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

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

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

Plaintiff’s wage statement claim has the same underlying risks as the above claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply with the requirements of Labor Code § 226. Further, to the extent that Plaintiff claims Defendants’ 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 considered wages, and therefore do not give rise to claims for statutory penalties. *Id. See Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties based on meal period claims because “the underlying violation that gives rise to a section 226.7 [meal period] claim is not the nonpayment of wages”); *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not even cover meal period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely foreclose this claim.³ DS, ¶ 21.

³ Moreover, the Court of Appeal’s decision in *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, holding that a defendant’s failure to pay meal premiums does not give rise to violations of Labor Code sections 226 or 203, is currently pending before the California



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

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

2
3
4
5
6
7
8
9
10
11

12
13
14
15
16
17
18
19
20
21
22
23
24

26

27



1 significant awards under the PAGA in a contested proceeding, both issued by federal district
2 courts, one of which was overturned on May 28, 2021.⁴ DS, ¶ 23.

3 Additionally, PAGA states a court has discretion to award a lesser amount than the
4 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
5 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
6 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
7 evidence of willful and intentional conduct. *Carrington v. Starbucks (2018) 30 Cal.App.5th 504*
8 (*"Carrington"*) illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
9 discounted award of only \$5 per violation because it was within the Court's discretion to
10 significantly reduce PAGA penalties even when there is a finding that a violation of the California
11 Labor Code occurred. Under *Carrington*, assuming one (1) violation for each pay period for all
12 400 PAGA Members, will result in a recovery of \$70,000.00 (14,000 pay periods x 1 violation
13 x \$5 = \$70,000.00). DS, ¶ 24.

14 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
15 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
16 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in

17 ⁴ 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).



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
2 awarded under \$300,000 in civil penalties under the PAGA. DS, ¶ 25, Exs. 7-9. In a similar
3 PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company, Inc.*,
4 LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the prevailing
5 PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here. DS, ¶ 25,
6 Ex. 10.

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

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

///



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

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

2
3
4
5
6
7
8
9
10

11
12

13
14
15
16
17
18
19
20
21

LL

23
24
25

20



15

24

25

26

28

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

3 Of the \$99,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$33,000.00 (1/3
4 of the Gross Settlement Amount) in attorney's fees and up to \$15,000.00 in litigation expenses.
5 DS, ¶ 31; Agreement, ¶ 4. The written retainer agreement Plaintiff's counsel entered into with
6 Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded attorney
7 fees or (b) up to 40% of any recovery. *Id.*

8 It is an accepted practice in wage and hour class action settlements to award attorneys'
9 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
10 parties. California courts have long recognized that an appropriate method for awarding
11 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
12 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific
13 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
14 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
15 fund"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
16 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

17 California courts have the discretion to employ (or decline to employ) a "lodestar cross-
18 check" on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
19 1 Cal. 5th 480, 505 ("*Laffitte*"). However, the California Supreme Court in *Laffitte* has now made
20 clear that this cross-check is not required and approved one-third of the class action settlement
21 fund as reasonable attorney fees as "[t]he percentage of the fund method survives in California
22 class action cases." *Id.* at 574. As other courts have acknowledged since *Laffitte*, "California
23 courts routinely award attorneys' fees of one-third of the common fund." *Lopez v. Mgmt. &*
24 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not
25 "engage in a full-blown lodestar analysis when the primary basis remains the percentage
26 method..." The lodestar calculation is merely a "useful perspective on the reasonableness of a
27 given percentage award." *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638
28 ("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.'" ⁵ *Id.* (citing *Laffitte*)).

⁵ 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*



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

1 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
2 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
3 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
4 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
5 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
6 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
settlements. DS, ¶ 34.

7 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
8 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
9 fee request of \$33,000.00 (one-third of the Gross Settlement Amount) is fair and reasonable based
10 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 32, Ex. 11.
11 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.

12 In addition, Plaintiff’s Counsel incurred substantial costs, \$13,548.65 to date, including
13 the costs of a mediator to aid in the representation of the PAGA Members.⁶ DS, ¶ 33, Ex. 12;
14 Haines Decl. ¶ 10. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$287.98 in
15 costs, which consist of filing fees and attorney service fees for filing this motion and notice of
16 entry of order. Plaintiff’s Counsel anticipate that litigation costs will total approximately
17 \$13,825.50 through final accounting of the Settlement. *Id.* As the evidence submitted herewith
18 shows, all of these costs are documented and reasonably incurred. DS, ¶ 33, Ex. 12. Accordingly,
they warrant the Court’s approval.

19 **7. Plaintiff’s General Release Payment Is Fair, Adequate, and**
20 **Reasonable and Should Be Approved.**

21 Plaintiff’s General Release Payment in the amount of \$10,000.00 is being paid to Plaintiff
as PAGA Representative for her general release and service to the State of California and the

22 _____
23 *Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [“Citing unpublished federal opinions does not violate
24 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*
25 *Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

26 ⁶ Plaintiff’s counsel do not seek reimbursement for the wages they paid to the attorneys,
27 paralegals, and legal assistants to aid in the representation of the PAGA Members and the State.
28 Plaintiff’s Counsel bore these expenses over the lengthy since they began work on this matter
without reimbursement.

1 PAGA Members in prosecuting the Action. DS, ¶ 36.

2 There is authority for the General Release Payment to Plaintiff. While the statutory
3 language of the PAGA is silent on the issue of incentive awards to named Plaintiff, it nonetheless
4 provides implicit support for incentive payments to named Plaintiff. Moreover, language from
5 the Ninth Circuit Court of Appeals and recent California district court caselaw indicates that such
awards are permitted. DS, ¶¶ 37-42.

6 Plaintiff's General Release Payment of \$10,000.00 is entirely reasonable given Plaintiff's
7 efforts in the Lawsuit and the risks she undertook on behalf of the PAGA Members. *See generally*
8 *Calderon Decl.* Plaintiff devoted many hours advancing the interests of the PAGA Members. *Id.*
9 Plaintiff has done this, by, among other things, retaining experienced counsel, providing them
10 with information about her work history with Defendants, assisting in contacting absent PAGA
11 Members to gather information, participating in mediation, and being actively involved in the
12 settlement process to ensure a fair result for the PAGA Members as a whole. *Id.* In doing this,
13 Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendants'
14 attorneys' fees and costs if this action had been unsuccessful and in bad faith (*See Labor Code*
15 *§§ 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, ¶43.

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

18 With regard to the Third-Party Settlement Administration Fees provision, it is reasonable.
19 Before agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable
20 third-party administrators which provided higher bids. DS, ¶ 44-45, Exs. 13-15. Thus, the
Settlement Administration Fees provision should be given approval.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403

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
7 Dated: May 19, 2022

By:



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



SPIVAK LAW

Employee Rights Attorneys

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
15303 Ventura Bl
Ste 900
Sherman Oaks, CA 91403