

1 DAVID G. SPIVAK (SBN 179684)
david@spivaklaw.com
2 MARALLE MESSRELIAN (SBN 316974)
maralle@spivaklaw.com
3 THE SPIVAK LAW FIRM
4 16530 Ventura Blvd., Suite 203
Encino, CA 91436
5 Telephone: (213) 725-9094
Facsimile: (213) 634-2485
6

7 Attorneys for Plaintiff,
8 MIKAYLA HUDDLESTON
(Additional Counsel on Following Page)
9

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

13 MIKAYLA HUDDLESTON, as an
14 “aggrieved employee” on behalf of other
15 similarly situated “aggrieved employees”
under the Labor Code Private Attorney
General Act of 2004,

16
17 *Plaintiff(s),*

18 *v.*

19 EASTER 263, INC., a California
20 corporation; and DOES 1 through 50,
inclusive,

21 *Defendant(s)*
22
23
24
25
26
27
28

Case no.: 34-2021-00295702

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF MIKAYLA HUDDLESTON’S
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

Action filed: 3/4/2021
Hearing Date: February 8, 2022
Hearing Time: 9:00 a.m.
Hearing Dept.: 54, Hon. Christopher E.
Krueger
Reservation ID: 2611118



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

ADDITIONAL ATTORNEYS FOR PLAINTIFF

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

Attorneys for Plaintiff MIKAYLA HUDDLESTON



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Mikayla Huddleston (“Plaintiff” or “Huddleston”) submits this memorandum and supporting papers to approve her Settlement Agreement of Private Attorneys General Act (“PAGA”) Claim (the “Agreement” or “PAGA Settlement”)¹ with Defendant Easter 263, Inc. (“Defendant” or “Easter 263”). Plaintiff brings this motion pursuant to Labor Code section 2699(1), which requires Court approval of any civil penalties sought as part of a proposed settlement agreement. Based on Plaintiff’s and her counsels’ investigation and evaluation, Plaintiff is of the opinion that the PAGA Settlement represents a reasonable and adequate settlement of strongly disputed claims and is in the best interest of the State of California, the PAGA Settlement Employees, and Plaintiff. Through this motion, therefore, Plaintiff respectfully requests for this Court to approve the PAGA Settlement for resolution of the PAGA claim.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Easter 263 operates a Kentucky Fried Chicken restaurant where Plaintiff previously worked. Easter 263 employs persons in several hourly, non-exempt positions, including, but not limited to, crewmembers and comparable employees (hereafter “PAGA Settlement Employees”). DS, ¶¶ 3, 8. From approximately March 14, 2018 through May 24, 2019, Easter 263 employed Plaintiff as an hourly fast food crew member in its KFC restaurant located at 10399 Folsom Blvd. in Rancho Cordova, California. DS, ¶ 3. Defendant’s restaurant is typically staffed with approximately 10-15 employees at any given time. *Id.*

A. Plaintiff’s Contentions

In this lawsuit, Plaintiff contends that Defendant is liable to her and the other approximately 65 PAGA Settlement Employees for alleged violations of the California Labor Code. Specifically, Plaintiff alleges that Defendant required her to arrive before her shift began to wait for deliveries, open the restaurant if the employee scheduled to open did not show up for work, and/or be prepared to open in the event that the employee scheduled to work did not appear. Plaintiff also alleges that Defendant further prohibited Plaintiff and the PAGA Settlement Employees to leave the restaurant during their breaks and therefore, Plaintiff and the PAGA Settlement Employees were often interrupted by their coworkers during their meal periods. Huddleston further alleges that she had to use her personal automobile to transport supplies for

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



1 Defendant without necessary mileage reimbursement. DS, ¶ 4. Based on said alleges, Plaintiff
2 supports her request for PAGA penalties due to Defendant's alleged failure to provide Plaintiff
3 and the aggrieved employees with: (1) all required timely, off-duty, and unrestricted meal and
4 rest periods or pay premium wages; (2) pay all wages for all hours worked; (3) reimburse the
5 PAGA Settlement Employees for gas and mileage expenses; (4) provide accurate written wage
6 statements; (5) timely pay final wages upon termination of employment; and (6) maintain accurate
employment records. DS, ¶ 4.

7 **B. Defendant's Contentions**

8 Defendant denies Plaintiff's allegations. Specifically, Defendant denies that it has any
9 policy or practice in which employees are required or permitted to work off the clock without pay
10 or otherwise are not paid for all hours worked. Easter 263 further denies that Huddleston, nor
11 any of the PAGA Settlement Employees, were not provided the opportunity to take compliant
12 rest and meal periods in accordance with California law. Further, Defendant denies that
13 Huddleston nor any other PAGA Settlement Employees are required to use their personal
14 automobiles to supplies on its behalf and Defendant denies that it operates other restaurants. DS,
15 ¶ 5. At all applicable times, Defendant contends that it has complied with its obligations under
16 the California Labor Code, including those obligations to pay employees all regular and overtime
17 wages due, provide all meal and rest breaks, reimburse all necessary business expenses, issue
18 accurate wage statements, and maintain accurate employment records. DS, ¶ 5; Agreement, ¶
19 III.1. In the event the Court does not approve Plaintiff's motion, Defendant maintains additional
affirmative defenses to Huddleston's allegations and this PAGA action.

20 **C. Procedural History of Plaintiff's PAGA Claim**

21 Plaintiff and the PAGA Settlement Employees are subject to arbitration agreements with
22 Defendant. DS, ¶ 6. Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing
23 suit under PAGA. By letter dated February 4, 2020, Plaintiff, on behalf of herself and other
24 aggrieved hourly employees gave written notice by certified mail to the Labor and Workforce
25 Development Agency ("LWDA"), Defendant, and Harman Management Corporation², of the
26 specific provisions of the California Labor Code alleged to have been violated, including the facts
27 and theories to support the alleged violations. DS, ¶ 6, Ex. 3. Specifically, Plaintiff alleged that
28 Defendant had failed to compensate her and the PAGA Settlement Employees for all hours

² Harman Management Corporation ("Harman") denies any employment relationship with Plaintiff. Agreement, ¶II.1.



1 worked, including regular and overtime hours worked, failed to timely pay wages, failed to
2 provide her and the PAGA Settlement Employees with legally mandated rest periods and meal
3 breaks, failed to reimburse them for business expenses they incurred, and failed to provide the
4 PAGA Settlement Employees with accurate and complete itemized wage statements. *Id.* The
5 LWDA did not inform Plaintiff of any intent to investigate the noticed claims within the sixty-
6 five (65) statutory deadline and, to this day, has not communicated any intent to investigate the
7 claims. DS, ¶ 7. Thus, Plaintiff has become authorized under Labor Code §§ 2698 et seq. to act
8 as a private attorney general for the alleged PAGA claims. *Id.*

9 In September 2020, the Parties attended a full-day mediation, as set forth more fully
10 below, with Mediator Jeffrey Owensby. DS, ¶ 9. Thereafter, and as set forth further herein, the
11 Parties worked to finalize their agreement through a Memorandum of Understanding and later the
12 PAGA Settlement Agreement attached herein. After finalizing said Agreements, the Parties
13 worked to prepare and finalize a joint stipulation approving the PAGA settlement. However, the
14 Parties' respective counsel of record determined through various meet and confer efforts that their
15 request to the Court to approve the settlement should be submitted by way of motion, as opposed
16 to joint stipulation. Accordingly, the Parties then worked diligently to meet and confer and
17 collaborate on the instant motion. *Id.*

18 In connection with the Parties' pending resolution, on March 4, 2021, Plaintiff filed a
19 representative lawsuit, for settlement purposes only, with a single cause of action for civil
20 penalties under PAGA in the Sacramento County Superior Court for alleged violations of
21 California Labor Code sections 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1194, 1197, 1198,
22 and 2802 against Easter 263, Inc. pursuant to PAGA based on the same allegations set forth in
23 her LWDA letter dated February 4, 2020 (the "Action"). DS, ¶ 10, Ex. 4.

24 On May 26, 2021, Defendant filed an Answer to the Complaint and disputed all of
25 Plaintiff's allegations and asserted appropriate affirmative defenses. DS, ¶ 11, Ex. 5.

26 **D. Mediation With Jeffrey Owensby, Esq.**

27 On September 14, 2020, Jeffrey Owensby, Esq., a professional mediator, mediated this
28 dispute and the parties agreed to settle the entire Action. DS, ¶ 9. Prior to participating in
mediation, the Parties, through their respective counsel of record, engaged in informal discovery
and substantive discussions regarding Plaintiff's claims and Defendant's respective defenses. DS,
¶ 12. Prior to mediation, Defendant also provided data to Plaintiff's counsel to evaluate the



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Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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1 potential value of Plaintiff's civil penalty claims. Defendant estimates that during the applicable
2 PAGA period, the 65 PAGA Settlement Employees worked approximately 1,354 workweeks. *Id.*
3 Counsel for the Parties further investigated the applicable law as applied to the facts discovered
4 regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations claimed by
5 Plaintiff. Thereafter, the Parties engaged in extensive, arms-length negotiations and reached a
6 settlement of the Action that are memorialized in the Agreement. Now that the Parties have
7 finalized the PAGA Settlement, Plaintiff submits it to this Court for approval. *Id.*

8 **III. OVERVIEW OF SETTLEMENT**

9 **A. "PAGA Settlement Employees" Definition**

10 The PAGA Settlement Employees are all current and former non-exempt employees who
11 worked for Easter 263, Inc. within the State of California at any time between February 4, 2019
12 and September 14, 2020 (the "PAGA Period"). Agreement, ¶ I.16.

13 **B. Monetary Terms of The Settlement**

14 Defendant has agreed to pay a total of \$42,500.00 ("Gross Settlement Amount" or
15 "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and
16 the PAGA Settlement Employees against Defendant (described more fully below), Defendant
17 agreed to pay \$42,500.00 toward the GSA which will be divided among the Individual PAGA
18 Payments to PAGA Settlement Employees, the Settlement Administrator's costs of
19 administering the settlement, the Attorneys' Fees and Costs to PAGA Counsel, and the PAGA
20 payment to the LWDA. Agreement, ¶ III.2-3. The GSA will be divided as follows:

21 1. Plaintiff's Counsel's (The Spivak Law Firm and United Employees Law
22 Group) attorneys' fees amounting to \$14,166.67 (one third of the GSA), and litigation costs of
23 \$2,925.56 (the Agreement provides up to \$3,000.00) ("Attorneys' Fees and Costs to PAGA
24 Counsel");

25 2. "Administration Costs" of \$5,000 to CPT Group, Inc. ("CPT" or
26 "Settlement Administrator") to administer the Settlement;

27 3. Approximately \$20,592.61 in "PAGA Penalties Fund", divided as follows:
28 a. \$15,444.46 to the LWDA (75%); and
b. \$5,148.15 to the PAGA Settlement Employees (25%) ("Residual
PAGA Fund")

Agreement, ¶ III.3.a-c.

29 **C. Funding and Distribution of the Settlement**

30 Within thirty (30) calendar days after the Effective Date, Easter 263, Inc. shall remit to
the Settlement Administrator the GSA and provide the Settlement Administrator with a list that



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Employee Rights Attorneys
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Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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contains each PAGA Settlement Employee's: (1) name; (2) last known home address and (3) number of pay periods worked in a non-exempt position in California during the PAGA Period. Agreement, ¶ III.7.b.

Within fifteen (15) days after receipt of the full GSA, the Settlement Administrator shall issue payment for the Court approved Attorneys' Fees and Costs to PAGA Counsel, Administration Costs, the PAGA payment to the LWDA, and the Individual PAGA Payments to PAGA Settlement Employees. Agreement, ¶ III.7.c. The Individual PAGA Payment checks will be accompanied by an explanatory letter regarding the basic terms of the Settlement. Agreement, ¶ III.7.c.4, Ex. A.

D. Individual PAGA Payments and Uncashed Checks

Each PAGA Settlement Employee will receive a portion of the civil penalties on a pro-rata basis calculated based on the number of itemized wage statements issued to each PAGA Settlement Employee during the PAGA Period as compared to the total number of itemized wage statements issued to all PAGA Settlement Employees during the PAGA Period. Agreement, ¶ III.7.c. Individual PAGA Payment checks will remain valid and negotiable for one hundred eighty (180) days from the date of their issuance. If an Individual PAGA Payment check remains uncashed or undeliverable after the 180-day period, such check(s) will be voided by the Settlement Administrator, and any funds remaining from such uncashed checks shall be tendered to the California State Controller's Unclaimed Property Fund in the names of the Aggrieved Employees to whom the checks were issued. Agreement, ¶ III.7.d. With regard to the Individual PAGA Payments to the PAGA Settlement Employees, IRS Form 1099s will be issued as legally appropriate. Agreement, ¶ III.3.c.2; DS, ¶ 45.

E. Release of Claims For PAGA Settlement Employees Limited To Those That Could Reasonably Arise From the Facts Alleged In The Action.

The PAGA Settlement will release Easter 263, Inc., Harman, and any restaurant corporation with a consulting agreement with Harman, and their respective present and former parents, subsidiaries, divisions, related or affiliated companies, joint ventures, shareholders, officers, directors, managers, agents, attorneys, insurers, reinsurers, successors and assigns ("the Released Parties") from all PAGA Released Claims. The PAGA Released Claims include:

"all claims for recovery of civil penalties under the Private Attorneys General Act, Labor Code section 2698, et seq., based on the facts pled in the Action, including but not limited to allegations pertaining to failure to pay minimum wage, straight time wages, or overtime wages, failure to provide statutory meal and/or rest



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Employee Rights Attorneys
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Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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1 periods, waiting time penalties, penalties for non-compliant wage statements,
2 failure to keep accurate payroll records, and failure to reimburse employees for
3 reasonably incurred business expenses, and shall include penalties associated with
4 Labor Code sections 201, 202, 203, 204, 206, 210, 225.5, 226, 226.3, 226.7, 510,
5 511, 512, 515, 558, 1174, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and
2802, and any amendments to any of these statutes, and any other California Labor
Code provision which could have been pled based on the factual allegations in the
Complaint and/or LWDA Notice.”

6 Agreement, ¶ I.15, III.4.

7 **IV. ARGUMENT**

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

9 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
10 Court necessarily has broad discretion in making the decision to approve or reject a settlement
11 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
12 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
13 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
14 Although the PAGA does not set forth the particular standards against which a PAGA settlement
15 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
16 for evaluating class action settlements. DS, ¶ 13; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017
17 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA’s guidance,
18 that approval of PAGA settlements may be had where the statutory requirements of the PAGA
19 are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The
20 established standards for evaluating whether class action settlements are fair, reasonable, and
21 adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and
22 have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205,
23 *5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San*
24 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S.
25 Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
26 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal.
2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon*
27 *v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

28 In making the determination whether a settlement taken as a whole is fair, reasonable,
and adequate, the Court should be careful to still give “proper deference to the private consensual
decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual



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Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
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1 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
2 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
3 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
4 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
5 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents*
6 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

7 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
8 **PAGA**

9 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
10 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
11 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*
12 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
13 The parties’ Settlement so provides. DS, ¶ 14, Ex. 1. Second, the LWDA must be given notice of
14 the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
15 Lab. Code § 2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of
16 this motion. DS, ¶¶ 14, 46, Ex. 6. As a result, Plaintiff has met all procedural statutory
17 requirements for settling a PAGA action.

18 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE**
19 **IT IS A FAIR, REASONABLE AND ADEQUATE IN VIEW OF PAGA’S**
20 **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
24 likely duration of further litigation, the risk of maintaining class
25 action status through trial, the amount offered in settlement, the
26 extent of discovery completed and the stage of the proceedings, and
27 the experience and views of counsel.

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



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1 court to act intelligently; (3) counsel is experienced in similar litigation” *Dunk*, 48 Cal.
2 App. 4th at 1802.

3 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
4 Parties reached the Settlement through arm’s-length bargaining with the aid of a respected
5 mediator; (2) The Parties conducted sufficient investigation and discovery to allow Counsel and
6 the Court to act intelligently on the proposed settlement; and (3) Counsel for the Parties are
7 experienced with PAGA cases. DS, ¶ 15. Moreover, neither Plaintiff nor Plaintiff’s Counsel have
8 any conflicts of interest with the absent PAGA Settlement Employees and there are no issues of
9 ascertainability. DS, ¶ 16. For the reasons discussed below, this Court should approve the PAGA
10 Settlement.

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

13 The PAGA Settlement was reached only after litigation and arms’ length negotiations
14 between experienced attorneys, which included a full day mediation with Mr. Jeffrey Owensby,
15 Esq., a respected mediator. At all times, the negotiations were adversarial and contentious,
16 although still professional in nature. DS, ¶ 9.

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

19 Plaintiff considered various sources of information in the lead-up to and during the
20 mediation of September 14, 2020 that enabled her to achieve the PAGA Settlement at issue. DS,
21 ¶ 21. Among other things, Plaintiff considered the following:

- 22 • Plaintiff requested that Defendant produce any and all policies regarding job
23 duties, position descriptions, timekeeping procedures, overtime and double-time
24 wages, meal periods and rest breaks, meal period waivers and agreements, expense
25 reimbursement, compensation plans, incentive pay, bonuses and complaints about
26 working conditions in effect during the PAGA Period beginning in February of
27 2019. Defendant produced those policies.
- 28 • Plaintiff interviewed other employees about the claims at issue.
- Plaintiff analyzed the state of caselaw on PAGA claims and claims for off-the-
clock work, meal and rest violations, and expense reimbursement.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise
concluded before trial.

DS, ¶ 21.



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

3 Before mediation, Defendant provided data regarding the number of employees and
4 number of paychecks issued during the PAGA Period. There were approximately 1,354 total pay
5 periods during the PAGA Period. DS, ¶ 22. Based on this information, Plaintiff's counsel
6 estimated the maximum civil penalties under the PAGA. The maximum possible civil penalties
7 under the PAGA is the total number of pay periods with one or more violations multiplied by the
8 maximum possible civil penalty amount per pay period.

- 9 • The maximum civil penalty for unpaid minimum wage violations is \$100.00 under Labor
10 Code section 1197.1. As such, Plaintiff's counsel estimated that the maximum amount
11 Plaintiff could recover for herself, the State, and the PAGA Settlement Employees is
12 \$135,400.00 (1,354 pay periods x \$100 civil penalty amount) and only if she established
13 that every PAGA Settlement Employee suffered an unpaid minimum wage violation in
14 each pay period.
- 15 • The maximum civil penalty for unpaid overtime wage violations is \$50.00 under Labor
16 Code section 558. As such, Plaintiff's counsel estimated that the maximum amount
17 Plaintiff could recover for herself, the State, and the PAGA Settlement Employees is
18 \$67,700.00 (1,354 pay periods x \$50 civil penalty amount) and only if she established
19 that every PAGA Settlement Employee suffered an unpaid overtime wage violation in
20 each pay period.
- 21 • For rest period violations, the maximum civil penalty is \$100 under Labor Code sec.
22 2699(f)(2). As such, Plaintiff's counsel estimated that the maximum amount Plaintiff
23 could recover for herself, the State, and the PAGA Settlement Employee is \$135,400.00
24 (1,354 pay periods x \$100 civil penalty amount) and only if she established that every
25 PAGA Settlement Employee suffered a rest period violation in each pay period.
- 26 • The maximum civil penalty for meal period violations is \$50 under Labor Code sec. 558.
27 As such, Plaintiff's counsel estimated that the maximum amount Plaintiff could recover
28 for herself, the State, and the PAGA Settlement Employees is \$67,700.00 (1,354 pay
periods x \$50 civil penalty amount) and only if she established that every PAGA
Settlement Employee suffered a meal period violation in each pay period.
- For unreimbursed business expenses violations, the maximum civil penalty is \$100
under Labor Code sec. 2699(f)(2). As such, Plaintiff's counsel estimated that the
maximum amount Plaintiff could recover for herself, the State, and the PAGA
Settlement Employees is \$135,400.00 (1,354 pay periods x \$100 civil penalty amount)
and only if she established that every PAGA Settlement Employee suffered an
unreimbursed expenses violation in each pay period.

DS, ¶ 22.

Stacking each of these maximum recoverable civil penalty estimates yields a total



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1 amount of \$541,600.00. DS, ¶ 23. Unfortunately for the employees concerned, the potential for
2 recovery of over \$500,000 in civil penalties depends on circumstances that are extremely
3 unlikely independently and in combination. *Id.* Plaintiff understands further that Defendant
4 would have strongly opposed Plaintiff's request for stacking of penalties. Further, imposition
5 of such penalties would depend on the Court stacking the maximum recoverable civil penalties
6 for unpaid minimum wage violations, unpaid overtime violations, unprovided meal breaks
7 violations, unprovided rest breaks violations, unreimbursed expenses violations per pay period
8 for all 1,354 pay periods for every PAGA Settlement Employee during the PAGA Period. *Id.*
9 Plaintiff's counsel is not aware of any California State court decision awarding a plaintiff and
10 the other PAGA Settlement Employees she represents multiple civil penalties for the same pay
11 period under different Labor Code provisions. *Id.* Notably, even if Plaintiff proved her case in
12 full, the Court is authorized to reduce penalties where they would "unjust, arbitrary and
13 improper." (See, e.g., *Stuart v. RadioShack Corp.* (N.D. Cal. 2009) 641 F. Supp. 2d 901, 902–
14 03; *Hernandez v. BCI Coca-Cola Bottling Co.* (C.D. Cal. Apr. 12, 2012) 2012 WL 12272348,
15 at *2, *judgment entered*, 2012 WL 12092593 (C.D. Cal. May 9, 2012), and *aff'd*, 554 F. App'x
16 661 (9th Cir. 2014).) Based on Defendant's representations at mediation, Easter 263, Inc.'s
17 restaurant business was adversely affected by the COVID-19 pandemic due to local and state-
18 related closures and other social distancing measures. DS, ¶ 23.

19 With this in mind, Plaintiff reduced the civil penalties by about 75%. Plaintiff's Counsel
20 concluded that \$135,400.00 was more likely the maximum possible recoverable civil penalties.
21 Plaintiff's Counsel applied an additional 70% discount to account for all other risks discussed
22 below. The Settlement of \$42,500.00 involves a total payment of about 26% of the maximum
23 possible recovery. A settlement for approximately 31% of the potential recovery is a proportion
24 substantially in excess of recovery proportions sanctioned by existing case law.³ DS, ¶ 23.

25 There are risks to Plaintiff's claims for off-the-clock work. Defendant's policies expressly
26 prohibit non-exempt employees from working off-the-clock. DS, ¶ 24. Further, many of the

27 ³ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement
28 that secures roughly six to twelve percent of a potential trial recovery . . . seems to be within the targeted range of
reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2019 WL 3943859, at *8 (E.D. Cal. Aug. 21,
2019) (granting preliminary approval where the proposed allocation to settle class claims was at least 9.53 percent);
Bravo v. Gale Triangle, Inc., 2017 WL 708766, at *10 (C.D. Cal. Feb. 16, 2017) ("a settlement for fourteen percent
recovery of plaintiffs' maximum recovery is reasonable"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042
(N.D. Cal. 2008) (approving settlement amount that "is just over 9% of the maximum potential recovery asserted by
either party").



aggrieved employees, such as cashiers or cooks, had different job duties related to opening and closing from Plaintiff, thereby reducing the likelihood that Plaintiff could establish they consistently worked off-the-clock or that her claim may be individualized in nature. *Id.*

There are risks to Plaintiff's meal and rest period claims. DS, ¶ 25. Defendant contends that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by a review of Defendant's time records the exact reasons why a meal period appears to be short or late would be difficult and pinpointing those days in which Plaintiff and the PAGA Settlement Employees worked during their meal periods will be a challenge. Additionally, Defendant provided evidence that they provide employees with the opportunity to take meal and rest breaks. Also, Defendant's Employee Handbook contains legally compliant meal period and rest break policies. DS, ¶ 25.

Defendant contends that it provided the non-exempt employees with the opportunity to take rest periods in accordance with California law, and, accordingly, Plaintiff's rest break claim has no support. DS, ¶ 26. Additionally, there are other risks to Plaintiff's rest period claim. Employers are not required to record rest periods and such periods are paid. 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. Managing such claims at trial has become exceedingly difficult. Plaintiff will depend on sample witness testimony and surveys to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *Id.* Plaintiff also testified that, as a General Relief Manager, she permitted her employees to take their rest and meal breaks when she was at the restaurant.

There are risks to Plaintiff's claim for unreimbursed expenses. Plaintiff alleges that Defendant did not reimburse her or the other PAGA Settlement Employees for use of their



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(213) 725-9094 Tel
(213) 634-2485 Fax
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1 personal automobiles to transport supplies between stores. There is a risk that the Court may
2 consider Plaintiff's claims as to Defendant's alleged failure to indemnify for business expenses
3 to be individual in nature. DS, ¶ 27.

4 The sole source of money recoverable for the PAGA Settlement Employees and the State
5 is civil penalties available under PAGA. DS, ¶ 28. It allows employees to seek civil penalties
6 for certain violations of the Labor Code so long as the penalties are not unjust, arbitrary,
7 oppressive, or confiscatory. As discussed above, Plaintiff's maximum estimated liability
8 exposure is based on the theories that: (1) Every paycheck that Defendant issued to employees
9 during the PAGA Period represents a pay period in which every PAGA Settlement Employee
10 suffered a minimum wage violation; (2) Every paycheck that Defendant issued to employees
11 during the PAGA Period represents a pay period in which every PAGA Settlement Employee
12 suffered an overtime wage violation; (3) Every paycheck that Defendant issued to employees
13 during the PAGA Period represents a pay period in which every PAGA Settlement Employee
14 suffered a meal period violation; (4) Every paycheck that Defendant issued to employees during
15 the PAGA Period represents a pay period in which every PAGA Settlement Employee suffered
16 a rest period violation; and (5) Every paycheck that Defendant issued to employees during the
17 PAGA Period represents a pay period in which every PAGA Settlement Employee suffered an
18 unreimbursed expense violation. There are no California state court decisions under the PAGA
19 to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only two
20 significant awards under the PAGA in a contested proceeding, both issued by federal district
21 courts, one of which was overturned on May 28, 2021.⁴

22 ⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under
23 the PAGA of approximately \$25 million, representing a 25% reduction from the plaintiff's claim for approximately
24 \$33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably,
25 the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant's policies caused
26 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court
27 noted had received “millions of dollars from the state of California” to train their flight attendants, engaged in glaring
28 violations of the labor code, such as failing to compensate its flight attendants for work performed outside of “block
time” (time during which the aircraft is moving), including time spent participating in pre-flight briefings, boarding
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049, 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 defendants' 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



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1 Additionally, PAGA states a court has discretion to award a lesser amount than the
2 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
3 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
4 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
5 evidence of willful and intentional conduct. DS, ¶ 29. *Carrington v. Starbucks (2018) 30*
6 *Cal.App.5th 504* ("Carrington") illustrates this. In that case, the Court of Appeal affirmed a trial
7 court's heavily discounted award of only \$5 per violation because it was within the Court's
8 discretion to significantly reduce PAGA penalties even when there is a finding that a violation of
the California Labor Code occurred. DS, ¶ 29.

9 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
10 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
11 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
12 civil penalties under the PAGA. *Id.* After a bench trial, the Honorable Judge Ronald M. Sohigian
13 awarded approximately \$325,000 in civil penalties under the PAGA. *Id.* DS, ¶ 30, Exs. 7-8. In a
14 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
15 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
16 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 30.

17 Defendant could also convince the Court to dismiss the claims due to unmanageability.
18 *Wesson v. Staples The Office Superstore, LLC (2021) 68 Cal.App.5th 746* ("Wesson"); *Feltzs v.*
19 *Cox Communs. Cal.* (October 21, 2021) 2021 U.S. Dist. LEXIS 207087. DS, ¶ 31. On September
20 9, 2021, the California Court of Appeal issued the significant decision in *Wesson v. Staples the*
21 *Office Superstore, LLC*, holding that courts have authority to ensure that PAGA claims are
22 manageable, and that courts may limit or strike unmanageable PAGA claims. DS, ¶ 34. Defendant
23 contends that Plaintiff's allegations require a host of individualized inquiries which would
24 arguably devolve into a series of mini-trials based on whether each employee voluntarily elected
25 to unilaterally waive a provided meal period or authorized rest break, based on position titles, job
26 duties and the type of work they perform, whether they worked off-the-clock, and whether their
work involves vehicle travel, among others. (See, e.g., *Brinker*, 53 Cal.4th at 1004.) In *Ortiz v.*

27 _____
28 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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CVS Caremark Corp., the court dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA claims where, as here, there are a large number of allegedly aggrieved individuals whose claims require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see 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”); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015).

While the evidence gathered through Plaintiff’s discovery supports the merits of the claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks associated with the merits of Plaintiff’s claims, the uncertainties of complex litigation, the cost of pretrial and trial proceedings, the Court’s discretion to lower the amount of penalties ultimately awarded, and the secured benefit to the PAGA Settlement Employees and the LWDA promoting compliance with the Labor Code. DS, ¶ 32.

4. The Residual PAGA Fund Fairly, Reasonably, and Adequately Awards Shares To PAGA Settlement Employees Because Each PAGA Settlement Employee Will Be Paid Based on the Potential Extent of His or Her Injury Compared to Other PAGA Settlement Employees

Each PAGA Settlement Employee will receive a portion of the civil penalties on a pro-rata basis depending on the number of itemized wage statements issued to each PAGA Settlement Employee during the PAGA Period. Agreement, III.3(c), III.7(c)(4). With a total of 65 PAGA Settlement Employees, the average estimated Individual PAGA Payment for each PAGA Settlement Employee is approximately \$79.20 (\$5,148.15 (the PAGA Residual Fund)/65 PAGA Settlement Employees). DS, ¶ 33. This is an excellent result given the PAGA framework Plaintiff is bound by and the uncertainties this lawsuit entails. DS, ¶¶ 34-35.

5. Plaintiff’s Counsel is Experienced in Similar Litigation

Plaintiff’s counsel has considerable experience in class actions and wage and hour litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving



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(213) 725-9094 Tel
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forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 18-20, Declaration of Walter Haines (“Haines Decl.”) ¶ 2.

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

Of the \$42,500 allocated towards the GSA, Plaintiff’s counsel requests \$14,166.67 (1/3 of the GSA) in attorney’s fees and \$2,925.56 in litigation expenses. DS, ¶ 36. The written retainer agreement Plaintiff’s counsel entered into with Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded attorney fees or (b) up to 40% of any recovery. *Id.*

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

California courts have the discretion to employ (or decline to employ) a “lodestar cross-check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016) 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made clear that this cross-check is not required and approved one-third of the class action settlement 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 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



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(213) 725-9094 Tel
(213) 634-2485 Fax
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reasonableness of a requested percentage fee.”⁵ *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, ¶ 39. Moreover, Plaintiff’s Counsel will have waited for almost three years to be awarded attorneys’ fees for work performed since December of 2018, compared to Defendant’s counsel who have been paid as they performed work during this case. DS, ¶ 37. Also, Plaintiff’s Counsel have expended time, effort, and money that they could have expended on less risky cases instead. *Id.* 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, ¶¶ 40-42, Exs. 11-12.

In addition, Plaintiff’s Counsel incurred substantial costs, \$2,363.05 to date, including the costs of a mediator, to aid in the representation of the PAGA Settlement Employees.⁶ DS, ¶ 38, Ex. 10; Haines Decl. ¶ 8. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$539.08 in costs, which consist of filing fees and attorney service fees for filing this motion, Notice of Entry and Final Accounting, and estimated future appearance fees regarding the hearing on the PAGA Settlement Approval and Final Accounting. *Id.* Plaintiff’s Counsel anticipate that litigation costs will total approximately \$2,925.56 through final accounting of the Settlement. *Id.* As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. DS, ¶ 38, Ex. 10. Accordingly, they warrant the Court’s approval.

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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 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.)

⁶ Plaintiff’s Counsel do not seek reimbursement for the wages they paid to the attorneys, paralegals, and legal assistants to aid in the representation of the PAGA Settlement Employees and the State. Plaintiff’s Counsel bore these expenses over the two years since they began work on this matter without reimbursement.



1 **7. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
2 **Should Be Approved.**

3 With regard to the settlement administration costs provision, it is reasonable. Before
4 agreeing to CPT Group, Inc., the Parties sought and reviewed bids from other reputable third-
5 party administrators which provided higher bids. DS, ¶¶ 43-44, Exs. 13-15. Thus, the settlement
6 administration costs provision should be given approval.

7 **V. CONCLUSION**

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

10 Respectfully submitted,

THE SPIVAK LAW FIRM

11 Dated: January 12, 2022

By: _____



DAVID SPIVAK
MARALLE MESSRELIAN
Attorneys for Plaintiff,
MIKAYLA HUDDLESTON



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com