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

9 **COUNTY OF LOS ANGELES - VAN NUYS COURTHOUSE EAST**

10
11 JEAN M. HERGER, an individual, on behalf
12 of herself and other aggrieved employees,

13 Plaintiff,

14 v.

15 NVA SOUTH TEMECULA AND
16 MURRIETA OAKS, INC., a California
17 corporation, and DOES 1 through 50,
inclusive,

18 Defendants.

CASE NO. 20VECV01283

Assigned for all purposes to:
Hon. Shirley K. Watkins
Department: T

**NOTICE OF MOTION AND MOTION FOR
APPROVAL OF SETTLEMENT OF ACTION
FILED PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT (LABOR
CODE §§ 2698 *ET SEQ.*)**

RESERVATION # 256728732131

Hearing:

Date: August 9, 2021

Time: 8:30 a.m.

Dept.: T

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

2 **PLEASE TAKE NOTICE** that on August 9, 2021, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard in Department T of the Van Nuys Courthouse East, Van Nuys, California 91401,
4 Plaintiff Jean M. Herger will, and hereby does, move the Court for an order granting approval of a
5 settlement agreement made pursuant to the Private Attorneys General Act, Labor Code §§ 2698, *et*
6 *seq.*

7 The motion shall be based on this notice, the attached Memorandum of Points and Authorities,
8 the Declaration of George Bean, and any exhibits attached thereto, the concurrently filed Stipulation
9 and Order for this Court to Retain Jurisdiction Pursuant to *CCP* § 664.6, all records on file in this
10 matter, and on such other evidence and oral argument as may properly come before the Court at the
11 time of hearing on this motion.

12 Dated: July 13, 2021

GEORGE BEAN LAW

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17 GEORGE H. BEAN, Attorneys for Plaintiff
18 JEAN M. HERGER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jean M. Herger (“Plaintiff”) submits this Memorandum of Points and Authorities in support of her Motion for Approval of Action Filed Pursuant to the Private Attorneys General Act (Labor Code §§ 2698 *et seq.*) (the “Motion”). Plaintiff and Defendant NVA South Temecula and Murrieta Oaks, Inc. (“Defendant”) (together, the “Parties”) have documented the proposed settlement reached in this action in the Private Attorneys General Act Settlement Agreement and Release (“Agreement” or “PAGA Agreement”). (Declaration of George Bean (“Bean Decl.”) ¶ 1, Ex. A.)

The total settlement amount of the PAGA Agreement is Thirty Thousand Dollars (\$30,000.00). After deduction of requested attorney’s fees and costs, the remaining amount to be split between the Labor and Workforce Development Agency (“LWDA”) and the Aggrieved Employees, as required by Labor Code § 2699(i), is Twenty Thousand Dollars (\$20,000.00): Fifteen Thousand Dollars (\$15,000.00) to the LWDA (the “LWDA Payment”) and Five Thousand Dollars (\$5,000.00) to the Aggrieved Employees (the “Individual PAGA Payment”). (*Id.*) As required by Labor Code §2699(l)(2), Plaintiff has submitted the proposed settlement documents to the LWDA.¹

The Parties jointly request that the Court “review and approve any settlement of any civil action filed pursuant to this part.” *See* CAL. Labor Code § 2699(l)(2). If the Court deems the Settlement fair and acceptable, the Parties request that the Court (1) enter an order approving the Settlement and ordering the Parties to carry out the terms of the PAGA Agreement, and (2) enter a Final Judgment thereon.

II. BACKGROUND OF LAWSUIT

A. Litigation Overview and Procedural History.²

On February 4, 2020, Plaintiff sent a letter to the LWDA (“LWDA Letter”) and Defendant giving notice of Plaintiff’s intent to pursue a representative action under PAGA on behalf of her and all current and former hourly-paid or non-exempt employees who worked for Defendant in the State of California (the “Aggrieved Employees”). (Bean Decl. ¶ 4, Ex. B.) Plaintiff alleges that Defendant

¹ The Motion will be concurrently uploaded to the LWDA’s website on the date this Motion is filed as required by statute. (Bean Decl. ¶ 6.) Additionally, Plaintiff will serve the LWDA with the Court’s judgment, once entered. (*Id.* at ¶ 7.)

² There are no cases that are related to this litigation. (*Id.* at ¶ 8.)

1 did not provide Aggrieved Employees compliant rest breaks and/or failed to pay premiums for non-
2 compliant breaks. (*Ibid.*) Plaintiff also alleges that Defendant failed to timely pay Aggrieved
3 Employees for all wages due and failed to provide accurate pay stubs. (*Ibid.*) The LWDA did not
4 respond to Plaintiff within sixty-five (65) days of the postmark date of the LWDA letter. (*Id.* at ¶ 8.)
5 On August 27, 2020, Plaintiff submitted an Amended LWDA Letter, adding a claim for missed meal
6 periods. (Bean Decl. ¶ 10, Ex. D.) The LWDA did not respond to the amended letter either. (*Id.* at
7 ¶ 11.)

8 **B. Following A Thorough Investigation Into Plaintiff's Claims and Extensive**
9 **Negotiations, the Parties Reached A Settlement.**

10 Since Plaintiff's allegations were made known to Defendant, the Parties participated in
11 extensive settlement negotiations, during which, the Parties discussed the relative strengths and
12 weaknesses of the case at length. (*Id.* at ¶ 12.) During these discussions, the Parties exchanged
13 documents and data regarding Plaintiff and the Aggrieved Employees, outlined key facts and law in
14 support of the Parties' respective positions, and discussed key data points relevant to a settlement of a
15 representative claim. (*Id.* at ¶¶ 12-13.)

16 Plaintiff's counsel undertook significant effort to bring this matter to its current anticipated
17 conclusion including: (1) extensive intake and interview conversations with multiple aggrieved
18 employees and preparation of request for employee's files and litigation hold; (2) preparation of a
19 detailed PAGA Notice sent to the LWDA, and preparation of an Amended PAGA Notice; (3)
20 preparation of a PAGA damage chart of likely liability and further analysis of the likelihood of success
21 on those claims; (4) legal research into PAGA fines and their applicability in the case; (5) legal
22 research regarding "subsequent" violations and knowing and intentional violations; (6)
23 correspondences and phone calls with opposing counsel throughout the course of the litigation and
24 settlement process; (7) research of entity Defendant; (8) drafting of PAGA Complaint for filing with
25 Court; (9) review of documents produced by Defendant in response to informal discovery requests;
26 (10) review of documents produced in response to employee request; (11) review of data produced by
27 Defendant's data regarding the aggrieved employee group, such as numbers, positions, dates of
28 employment and rates of pay; (12) negotiations with Defendant's counsel aimed toward settlement;
(13) preparation, review and revising of settlement documents; (14) preparation and review of

1 pleading documents for Stipulation for Approval of the PAGA settlement; (15) preparation of Motion
2 for Court Approval of PAGA Settlement and Declaration in support; (16) appearances at court
3 hearings; and (17) attendant activities. (Bean Decl. ¶ 14.) A detailed time-sheet breakdown of the
4 activities is attached to the Declaration of George H. Bean (¶ 34, Ex. F.)

5 Regarding discovery, Plaintiff's counsel requested, and Defendant's counsel provided payroll
6 documentation, company policy documentation, timekeeping documentation, payroll documentation,
7 witness declaration documents, employee/employer agreements, meal and rest break policy
8 documentation, employee notices documentation, employee/employer correspondences, and company
9 wide data regarding the numbers of employees, positions held, timeframes and rates of pay. Plaintiff's
10 counsel developed facts by interviewing multiple aggrieved employees regarding company policies
11 and company conduct with regard to meal and rest breaks and the violations that stemmed from those
12 alleged violations. Plaintiff's counsel researched and alleged that failure to pay premiums for missed
13 meal and rest breaks constituted a failure to pay all wages earned and due, including at termination or
14 voluntary quit, and constituted a violation of the requirement to provide accurate wage statements.
(Bean Decl. ¶ 15.)

15 Defendant disputes and denies Plaintiff's claims asserted in her Lawsuit, but in numerous
16 "meet and confer" discussions and as memorialized in the Agreement, Defendant recognizes the risks
17 associated with continued litigation and has opted to settle this matter on the terms of the Agreement.
18 (Bean Decl. ¶ 16.)

19 After extensive negotiations in good faith, the Parties agreed in principle, and to avoid further
20 litigation, to compromise and settle Plaintiff's claims alleged in her original and Amended LWDA
21 Letters. The Parties agreed to settle the PAGA claims for a total of \$30,000.00 (the "PAGA Settlement
22 Sum"), which includes (a) Plaintiff's attorneys' fees and costs up to \$10,000.00 and (b) the PAGA
23 Payment in the amount of \$20,000.00. (*Id.* at ¶ 16.) This settlement was reached through arm's length
24 bargaining and thorough investigations into the merits of the Parties' claims and defenses to allow
25 counsel to act intelligently to reach a reasonable settlement, in a manner to best protect the interests of
26 their respective clients. (*Id.*)

27 **C. Plaintiff Files the Lawsuit and Submits the PAGA Agreement for Approval.**

28 On November 6, 2020, Plaintiff filed her Complaint, entitled *Jean Herger v. NVA South*

1 *Temecula and Murrieta Oaks Inc.*, Los Angeles County Superior Court Case No. 20VECV01283,
2 (“Lawsuit” or “Complaint”) asserting a claim for civil penalties for violation of California Labor Code
3 section 2698, *et seq.*, including Labor Code sections 201, 202, 203, 204, 226, 226.7, and 512.

4 After the Parties finalized the terms of and executed the PAGA Agreement, Plaintiff filed a
5 copy of the fully-executed Agreement with the LWDA on April 13, 2021. (Bean Decl. ¶ 5, Ex. C.)
6 Then, on April 26, 2021, the Parties filed a Joint Stipulation for Court Approval of Settlement. In
7 response to the filing of the Joint Stipulation, on April 28, 2021, the Court entered a minute order that
8 approval of the PAGA Agreement be set for Noticed Motion and further requested that Plaintiff’s
9 counsel submit a supplemental declaration answering several questions. In light of the Court’s order,
10 Plaintiff submits this unopposed Motion and accompanying declaration.

11 **III. SUMMARY OF THE PAGA SETTLEMENT TERMS**

12 **A. The PAGA “Aggrieved Employees” Group.**

13 The Aggrieved Employees covered by the Agreement are defined as follows: all current and
14 former hourly-paid or non-exempt employees who worked for Defendant within the State of California
15 at any time from February 4, 2019, to the date of final approval of the Settlement by the Court (the
16 “PAGA Period”). (Bean Decl. ¶ 3, Ex. A at §1(c).) The estimated number of Aggrieved Employees,
17 including Plaintiff, who worked since February 4, 2019, is 85. (*Id.* at ¶ 3, Ex. A at § 3(a).)

18 **B. Distribution of the PAGA Settlement Amount.**

19 The Settlement Agreement provides that Defendant will pay the PAGA Settlement Sum in the
20 gross amount of Thirty Thousand Dollars (\$30,000.00) (*Id.* at ¶ 3, Ex A.) The PAGA Settlement Sum
21 will be fully distributed to the Aggrieved Employees, the LWDA, and Plaintiff’s counsel, as follows:
22 the LWDA Payment in the amount of Fifteen Thousand Dollars (\$15,000.00), the Individual PAGA
23 Payment in the amount of Five Thousand Dollars (\$5,000.00), and the remaining Ten Thousand
24 Dollars (\$10,000.00) will be paid to Plaintiff’s counsel for fees and costs associated with work
performed in relation to Plaintiff’s PAGA claim. (*Id.* at ¶ 18.)

25 No later than fourteen (14) days after the Effective Date³ of the Agreement, Defendant shall
26

27 ³ “Effective Date” means the date this Agreement is approved as provided herein and the Court’s order granting Settlement
28 Approval and entry of Final Judgment becomes final and is no longer appealable. The complete definition of this term is
contained in and adopted from the Agreement. (Bean Decl. ¶ 3, Ex. A at § 1(h).)

1 mail the Notice of PAGA Settlement and each Individual PAGA Payment to all Aggrieved Employees
2 by first-class United States mail postage prepaid, to the last known address of each Aggrieved
3 Employee with directions to the Postmaster to forward the Notice and Individual PAGA Payment and
4 return all undeliverable Notices and Individual PAGA Payments to Defendant.⁴ A true and correct
5 copy of the Notice of PAGA Settlement is attached to the PAGA Agreement, Exhibit A to the
6 Declaration of George H. Bean. For each Notice and Individual PAGA Payment that is returned as
7 undeliverable, Defendant shall promptly attempt to locate the Aggrieved Employee by using an
8 address refresher database. (*Id.* at ¶ 3, Ex. A at 4(c)(i).) Should Defendant not be able to locate an
9 individual or should an Individual PAGA Payment not be cashed within 120 days of the date of the
10 check, said payment shall be forwarded to LWDA. (*Ibid.*)

11 For purposes of distributing each Individual PAGA Payment, all distribution payments will be
12 made according to the number of Pay Periods each Aggrieved Employee was employed by Defendant
13 during the PAGA Period, with each Aggrieved Employee being entitled to a share of the Individual
14 PAGA Payment allocated to the Aggrieved Employees based upon (1) the Aggrieved Employee's
15 number of Pay Periods employed with Defendant during the specified period as a numerator and (2)
16 the total number of Pay Periods all Aggrieved Employees were employed with Defendant during the
17 PAGA Period as the denominator. Bean Decl. ¶ 3, Ex. A at §4(d).

18 Upon payment and distribution of the PAGA Settlement Sum by Defendant, Plaintiff and
19 Defendant will jointly submit a Notice of Satisfaction of Judgment. (*Id.* at §4(f).)

20 **C. The Scope of the Release in the PAGA Agreement.**

21 As defined in the PAGA Agreement, the Aggrieved Employees agree to fully release and
22 discharge the "Released Parties"⁵ from all claims that were alleged or could have been alleged on
23 behalf of the State of California in the Lawsuit. (Bean Decl. ¶ 3, Ex. A at §1(w).) The "Released
24 Claims" encompass any and all claims for PAGA penalties based on the allegations contained in the
25 LWDA Letter, the Amended LWDA Letter, and the Complaint for work performed during the PAGA

26 ⁴ *Id.* at ¶ 3, Ex. A at §4(c). All costs in connection with the mailing of the Notice and administration of the Settlement, in
accordance with the Agreement, shall be borne by Defendant. (*Id.* at ¶ 3, Ex. A at 4(c)(ii).)

27 ⁵ "Released Parties" means National Veterinary Associates, Inc. and its present and former parent companies, present
28 owners, former owners, subsidiaries, including NVA South Temecula and Murrieta Oaks, Inc., shareholders, officers,
directors, employees, agents, attorneys, insurers, successors, and assigns, and any individual or entity which could be
jointly liable with NVA.

1 Period, including any claims for penalties related to failure to provide meal periods, failure to provide
2 rest periods, untimely wage payments both during and at the end of employment, and non-compliant
3 wage statements, or claims which could have been alleged, and claims for interest, penalties or
4 premiums in connection therewith. (*Id.*) The release does not include individual wage claims for the
5 Aggrieved Employees and the Notice of PAGA Settlement, which will be mailed to each Aggrieved
6 Employee will inform them that no such waiver exists. It reads, “No claims for unpaid or underpaid
7 wages have been settled, and this settlement is without prejudice to such claims.” (Bean Decl. ¶ 21,
8 Ex. A (final page).)

9 **D. No Right to Object to or Opt Out of the Agreement.**

10 Under applicable law, Aggrieved Employees cannot opt out of, or object to the Agreement.
11 “[A] PAGA action is a statutory action for penalties brought as a proxy for the state,” as such, “there
12 is no need to protect absent employees’ due process rights[.]” *Williams v. Superior Court*, 3 Cal.
13 5th 531 (2017) (citation omitted). “Unnamed employees need not be given notice of the PAGA claim,
14 nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez v.*
15 *Cjaders Foods, Inc.*, Case No. C 08-2073 MHP, 2010 WK 1340777 (N.D. Cal., Apr. 2, 2010). “PAGA
16 does not make other potentially aggrieved employees parties” to the action and no “due process
17 concerns arise under PAGA because absent employees do not own a personal claim for PAGA civil
18 penalties, and whatever personal claims the absent employees might have for relief are not at stake.”
19 *Williams*, 3 Cal. 5th at 546–47, and n.4 (citing *Amalgamated Transit Union, Local 1756, AFL-CIO v.*
20 *Superior Court*, 46 Cal. 4th 993, 1003 (2009)); *Iskanian v. CLS Transportation Los Angeles,*
21 *LLC*, 59 Cal. 4th 348, 381 (2014). “[A]bsent fellow employees will be bound by the outcome of any
22 PAGA action[.]” *Williams*, 3 Cal. 5th at 548; *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069
23 (2007); *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462 (1981). “[J]udgment in such an action is
24 binding not only on the named employee plaintiffs but also on government agencies and any aggrieved
25 employee not a party to the proceeding” because “the employee plaintiff represents the same legal
26 right and interest as state labor law enforcement agencies[.]” “collateral estoppel applies [. . .] against
27 those for whom the party acted as an agent or proxy[.]” and “[w]hen a government agency is authorized
28 to bring an action on behalf of an individual or in the public interest, and a private person lacks an
independent legal right to bring the action, a person who is not a party but who is represented by the

1 agency is bound by the judgment as though the person were a party.” *Arias v. Sup. Ct.*, 46 Cal. 4th
2 969, 985–86 (2009) (citations omitted).

3 Here, pursuant to applicable California law, the Parties agree that there is no statutory right for
4 any Aggrieved Employee to object, opt-out, or otherwise exclude him/herself from the Agreement.

5 **IV. STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT**

6 It is well-established that PAGA serves to augment the limited enforcement capability of the
7 LWDA by empowering employees to bring actions to enforce California’s labor standards. *Iskanian*
8 *v. CLS Transportation L.A., LLC*, 59 Cal. 4th 348, 383 (2014); *accord Arias v. Sup. Ct.*, 46 Cal. 4th
9 969, 986 (2009) (“The act’s declared purpose is to supplement enforcement actions by public agencies,
10 which lack adequate resources to bring such actions themselves.”). To that end, PAGA allows an
11 “aggrieved employee” to bring a civil action on behalf of himself or herself and on behalf of other
12 aggrieved employees and the State of California to recover civil penalties that, outside of PAGA, only
13 the LWDA can assess and collect from an employer. CAL. Labor Code, § 2699, subd. (a).

14 The settlement of a PAGA action requires court approval. *See* CAL. Labor Code, § 2699,
15 subd. (l)(2) (“The superior court shall review and approve any settlement of any civil action filed
16 pursuant to this part.”). Although Labor Code section 2699, subdivision (1) does not set forth criteria
17 for evaluating PAGA settlements, courts have consistently approved settlements of PAGA claims.
18 *See, e.g., Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 589 (2010); *Resendez v. Bridgestone Retail*
19 *Operations, LLC*, Los Angeles County Superior Court, No. BC596892 (June 2016), *DCH Auto Wage*
20 *and Hour Cases*, Los Angeles County Superior Court, No. JCCP4833 (May 2017); *Garcia v. Gordon*
21 *Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *3 (E.D. Cal., Oct. 31, 2012);
22 *Schiller v. David's Bridal, Inc.*, No. 1:10-CV-00616-AWI, 2012 WL 2117001, at *14 (E.D. Cal., June
23 11, 2012); *Chu v. Wells Fargo Investments, LLC*, No. C-05-4526-MHP, 2011 WL 672645, at *1 (E.D.
24 Cal., June 11, 2012); *Franco v. Ruiz Food Products, Inc.*, No. 1:10-CV-02354-SKO, 2012 WL
5941801, at *14 (E.D. Cal., Nov. 27, 2012).

25 In the similar context of wage and hour class actions, courts review settlements to determine
26 *whether the proposed settlement is within the range of reasonableness considering the strength of*
27 *the claims against the proposed settlement, the risk, expense, complexity and likely duration of*
28 *further litigation, the extent of discovery completed and the stage of the proceedings, and the*

1 *experience and views of counsel. Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996).
2 Furthermore, courts must give “proper deference to the private consensual decision of the parties”
3 because “the court’s intrusion upon what is otherwise a private consensual agreement negotiated
4 between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
5 that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
6 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
7 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

8 The purpose of PAGA is “to incentivize private parties to recover civil penalties for the
9 government that otherwise may not have been assessed and collected by overburdened state
10 enforcement agencies.” See *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C 08-
11 2073 MHP, 2010 WL 1340777, at *4 (N.D. Cal., Apr. 2, 2010) (citing *Arias, supra*, 46 Cal.
12 4th at 986). Penalties recovered under PAGA are, in part, to “be distributed to the [LWDA] for
13 enforcement of labor laws and for education of employers and employees about their rights and
14 responsibilities under this code, to be continuously appropriated to supplement and not supplant the
15 funding to the agency for those purposes.” CAL. Labor Code § 2699, subd. (j). The recovery of
16 penalties on behalf of the State, by way of a PAGA claim, is essentially a law enforcement action. See
17 *Amalgamated Transit Union, Local 1756, AFL-CIO, supra*, 46 Cal. 4th at 1003 (stating that the
18 PAGA is a mechanism for “an aggrieved employee to recover civil penalties—for Labor Code
19 violations—that otherwise would be sought by state labor law enforcement agencies”); see also
20 *Iskanian, supra*, 59 Cal. 4th at 381. “Unnamed employees need not be given notice of the PAGA
21 claim, nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-*
22 *Hernandez*, 2010 WL 1340777 at *5. This renders the approval process of a PAGA settlement distinct
23 from a class action settlement.

24 “The remedy sought in a PAGA suit consists of civil penalties, not individual or class damages.”
25 *Mendez v. Tween Brands, Inc.*, No. 2:10-CV-00072-MCE, 2010 WL 2650571, at *4 (E.D. Cal., June
26 1, 2010). Therefore, when evaluating the adequacy of a PAGA settlement, courts focus ***not on the***
27 ***amount paid to allegedly “aggrieved employees,” but instead on whether the total settlement***
28 ***advances PAGA’s objectives.*** “Unlike class actions, these civil penalties are not meant to compensate
unnamed employees because the action is fundamentally a law enforcement action.” *Ochoa-*

1 *Hernandez, supra*, 2010 WL 1340777 at *4 (emphasis added). “Unlike a class action seeking damages
2 or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to
3 recover civil penalties for the government that otherwise may not have been assessed and collected by
4 overburdened state enforcement agencies.” *Id.* Moreover, a reviewing court must take into account the
5 fact that settlement of a PAGA claim – like any settlement – involves a compromise that reflects the
6 risks faced by both parties.

7 **V. THE PAGA AGREEMENT IS FAIR AND SHOULD BE APPROVED**

8 This PAGA Agreement was reached in good faith following active negotiations between the
9 Parties and the Agreement takes into account all relevant factors, present and potential. It fulfills the
10 objectives of the PAGA statute, is fair, and meets all of the criteria for approval for the reasons
11 discussed below.

12 **A. The Factors Giving Rise to a Presumption of Fairness Exist.**

13 “[A] presumption of fairness exists where: (1) the settlement [was] reached through arm’s-
14 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
15 intelligently; [and] (3) counsel is experienced in similar litigation.” (*Dunk v. Ford Motor Co.* (1996)
16 48 Cal.App.4th 1794, 1802.) In this case, the Settlement detailed in the Agreement is presumptively
17 fair because it is the product of non-collusive negotiations; (2) it was negotiated by counsel with
18 experience in similar complex labor and employment matters; and (3) it occurred after counsel for the
19 Parties engaged in significant investigation to evaluate the strength and potential value of the PAGA
20 claims, including the risks of litigating these claims through trial.

21 As discussed in detail above, the Parties engaged in extensive negotiations after thoroughly
22 investigating the Lawsuit, including exchanging informal discovery, and fully evaluating the factual
23 strengths and weaknesses of this case, to support the settlement. Plaintiff’s counsel interviewed
24 multiple aggrieved employees, received and analyzed payroll, timekeeping, and policy documentation
25 from Defendant and was able to thus evaluate the scope of potential liability. (Bean Decl. ¶¶ 12-15.)
26 In sum, the Parties evaluated all aspects of the cases, including the risks and delays of further litigation,
27 the risks to the Parties of proceeding with trial, the law relating to representative PAGA actions, wage-
28 and-hour enforcement, the evidence produced and analyzed, and the risks of trial and appeals. (Bean
Decl., ¶ 16.) Accordingly, this litigation, therefore, had reached the stage where “the Parties certainly

1 have a clear view of the strengths and weaknesses of their cases” sufficient to support the PAGA
2 Agreement. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 617 (N.D. Cal. 1979).

3 Based on the information available, the Parties concur that the Agreement is a fair and
4 reasonable compromise, permitting the Parties and the Court to avoid further expense and effort given
5 the strengths and weaknesses of the PAGA claims and the uncertainty in outcomes with further
6 litigation. Plaintiff and Plaintiff’s counsel believe that the Agreement is a fair, adequate, and
7 reasonable resolution of this matter. (Bean Decl. ¶ 17.) By voluntarily entering into the Agreement,
8 Defendant agrees that this settlement is fair and reasonable. Further, the Court may give considerable
9 weight to the competency, experience, and opinion of counsel in assuring that the Agreement was a
10 product of hard-fought, arms-length negotiations that were entered into without collusion. *See Chavez*
11 *v. Netflix, Inc.* 162 Cal.App.4th 43, 53 (2008); *see also Kirkorian v. Borelli*, 695 F. Supp. 446, 451
12 (N.D. Cal. 1988) (in connection with class settlement opinion of experienced counsel is entitled to
13 considerable weight). Here, Plaintiff’s counsel has extensive experience in representative wage-and-
14 hour litigation and the Court should, therefore, give the opinion of Plaintiff’s counsel considerable
15 weight. (Bean Decl., ¶ 17.)

16 In sum, each of the Parties involved here were zealously represented by competent legal
17 counsel who have a combined total of more than 30 years of legal experience and have represented
18 clients in numerous wage-and-hour disputes. Each Party diligently and independently investigated the
19 merits of Plaintiff’s claims and analyzed the key facts and law supporting each Party’s settlement
20 posture. Based on these circumstances, the instant PAGA Agreement is presumptively fair and
21 reasonable.

22 **B. The Relative Strength of the PAGA Claims and Defenses, and the Range of
Possible Outcomes in Litigation, Strongly Favor Approval of the Agreement.**

23 In order for Plaintiff to prevail on the PAGA claims, she would have to prove the underlying
24 Labor Code violations for all Aggrieved Employees and demonstrate that Defendant’s conduct gives
25 rise to penalties. *See e.g., Price v. Starbucks*, 192 Cal. App. 4th 1136, 1147 (“Because the underlying
26 causes of action fail, the derivative ... PAGA Claims also fail.”)(citations omitted). Further, courts
27 and due process require that the adjudication of the PAGA claim meet a “manageability” requirement.
28 *See, e.g., Litty v. Merrill Lynch & Co., Inc.*, No. CV 14-0425 PA PJWX, 2014 WL 5904904, at *3

1 (C.D. Cal., Nov. 10, 2014) (dismissing PAGA claim because a multitude of individualized
2 assessments would be necessary, making the PAGA claim unmanageable); *see also Duran v. U.S.*
3 *Bank Nat. Assn.*, 59 Cal.4th 1, 25, 29, 31, 34-35 (2014).

4 Plaintiff contends in this litigation that Defendant violated the California *Labor Code* by, *inter*
5 *alia*, failing to provide meal periods, failing to provide rest periods, providing untimely wage payments
6 both during and at the end of employment, and providing non-compliant wage statements.
7 Specifically, Plaintiff contends that Defendant did not allow Plaintiff and other Aggrieved Employees
8 to take compliant meal and/or rest breaks, Defendant did not compensate the employees with a
9 premium for the non-compliant breaks, and, due to these violations, Plaintiff and other Aggrieved
10 Employees were not timely paid all wages due to them and they were not provided accurate wage
11 statements. Plaintiff's counsel initially estimated the maximum potential civil penalties at
12 \$469,000.00. (Bean Decl., ¶ 19.) This would be the fines if a Court found that all the Aggrieved
13 Employees suffered all the alleged violations and if a Court agreed that the "subsequent" penalties
14 should be \$200, and not \$100. It also assumes that the Court would award maximum civil penalties
15 on all the alleged violations and all the derivative violations. For example, the claim that the
16 Aggrieved Employees did not get proper wage statements was derivative of the allegation that
17 Defendant did not pay one-hour premiums for missed meal and rest breaks. The low-end range of
18 recovery would be \$0.00. If the Court found that Defendant did not commit any meal and rest break
19 violations, the additive nature of the subsequent penalties, with the attendant failures to pay all wages
20 earned and due, including at termination or voluntary quit, and the attendant wage statement violations,
the civil penalties would be drastically reduced, possible to zero. (*Ibid.*)

21 Defendant denies all of Plaintiff's material allegations and maintains several defenses that have
22 the potential to eliminate or substantially reduce recovery. Notably, Defendant maintained, and
23 continue to maintain, that it had, and continues to have, legally compliant employment policies and
24 practices throughout the time period at issue. (*See* Defendant's Answer.) Further, Defendant maintains
25 that in light of the evidence adduced, Plaintiff does not have standing to maintain a PAGA action. *See*
26 *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal.4th 993, 1001 (2009)
27 (noting that PAGA "require[s] a plaintiff to have suffered an injury resulting from an unlawful
28 action"); *Holak v. K Mart Corp.*, Case No. 1:12-cv-00304-AWI-MJS, 2015 U.S. Dist. LEXIS 65439

1 (E.D. Cal. May 19, 2015) (“Because Plaintiff is not aggrieved by any of the specific Labor Code
2 violations alleged in the PAGA claim, she does not have standing to maintain this PAGA action.”).
3 Defendant denies that it violated **any** provision of the Labor Code.

4 Defendant further denies, and continues to deny, that the PAGA claims could be maintained
5 as a representative action if litigated. Defendant contended that courts have required, and that due
6 process requires, that the adjudication of the PAGA claim meet a “manageability” requirement and
7 that this is a burden Plaintiff cannot meet given the facts of this case. *See, e.g., Litty v. Merrill Lynch*
8 *& Co., Inc.*, No. CV 14-0425 PA PJWX, 2014 WL 5904904, at *3 (C.D. Cal., Nov. 10, 2014)
9 (dismissing PAGA claim because a multitude of individualized assessments would be necessary,
10 making the PAGA claim unmanageable) *see also Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 25, 29,
11 31, 34-35 (2014). Specifically, Defendant argues that Plaintiff cannot maintain a PAGA claim because
12 there is no evidence of a common policy or practice that prevented, inhibited, or discouraged
13 employees from taking their statutory meal and rest breaks, and the allegedly aggrieved employees
14 worked at two separately managed physical locations. *See, e.g., Zhang v. Amgen*, 2015 WL 5752562,
15 at *1 (Cal. Sup. Aug. 13, 2015) (dismissing a plaintiff’s PAGA representative action on the basis that
16 “the variance in what the [alleged “aggrieved employees”] do is sufficiently varied that using
17 [plaintiff], and what he does, is not a valid measure of what the others do”); *Amey v. Cinemark USA,*
18 *Inc.*, No. 13-05669, 2015 U.S. Dist. LEXIS 63524 (N.D. Cal. May 13, 2015) (striking PAGA claim
19 because the evidence showed that numerous individualized determinations would be necessary to
20 determine whether any class member has been injured); *Ortiz v. CVS Caremark Corp.*, No. C-12-
21 05859 EDL, 2014 U.S. Dist. LEXIS 36833 (N.D. Cal. Mar. 19, 2014); *Litty v. Merrill Lynch & Co.,*
22 *Inc.*, No. CV-14-0425 PA (PJWx), 2014 U.S. Dist. LEXIS 160448 (C.D. Cal. Nov. 10, 2014).
23 Although wage-and-hour actions can be amenable to resolution as to a group of employees, courts
24 have also found that, for various reasons, the issues raised by Plaintiffs – including those related to
25 non-compliant meal periods, and non-compliant rest periods – raise individualized issues and/or are
26 unmanageable.

26 While Plaintiff maintains that her PAGA claims have merit, in reaching the Agreement,
27 Plaintiff and her counsel took into account the strengths and weaknesses of each side’s position and
28 the uncertainty of how the case might have concluded as litigation continued, at trial, and/or through

1 appeals.

2 **C. The PAGA Agreement Avoids Risky, Complex, and Lengthy Further Litigation.**

3 Courts favor the voluntary conciliation and settlement of complex litigation.
4 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Generally, “unless the
5 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive
6 litigation with uncertain results.” *National Rural Telecommunications Cooperative v. DIRECTV, Inc.*,
7 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citation omitted).

8 As described above, both sides thoroughly investigated the veracity, strength, and scope of the
9 PAGA claims including informal discovery to exchange the information needed to evaluate Plaintiff’s
10 claims fully and completely. Plaintiffs’ Counsel also invested significant time reviewing and analyzing
11 relevant documents and data to evaluate Plaintiff’s claims, including, but not limited to, calculating
12 the potential monetary recovery under PAGA. (Bean Decl. ¶ 12-15.)

13 Had the Lawsuit not settled, the Parties would have conducted extensive formal discovery,
14 including written discovery as well as multiple depositions of percipient witnesses to prepare the case
15 for trial. Specifically, Plaintiff would have needed to take the depositions of many of the potentially
16 85 employees who worked for Defendant during the relevant time period, as well as the depositions
17 of the various managers and supervisors at the locations where the Aggrieved Employees worked.
18 And even if Plaintiff prevailed on some or all of her claims, litigating a complex PAGA action is
19 inherently expensive, and the litigation could continue far beyond entry of judgment if either party
20 appealed adverse rulings. Avoiding these risks and the likelihood of future contentious litigation,
21 which would involve significant costs, in favor of securing some civil penalties at this juncture, favors
22 settlement.

23 **D. The PAGA Settlement Is Fair.**

24 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning
25 of highest hopes.’” *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*,
26 688 F.2d 615, 624 (9th Cir. 1982) (citations omitted). “The proposed Settlement is not to be judged
27 against a hypothetical or speculative measure of what might have been achieved by the negotiators.”
28 *Id.* at 625.

This settlement provides significant benefits to the State of California and the Aggrieved

1 Employees and falls well within the range of acceptable settlements under all the circumstances. As
2 explained above, Defendant has agreed to pay a total amount of Thirty Thousand Dollars and Zero
3 Cents (\$30,000.00). This amount includes \$10,000 in attorney's fees and costs⁶ and ***no administration***
4 ***costs***. From the remaining Twenty Thousand Dollars, an estimated Five Thousand Dollars (\$5,000.00)
5 will be distributed to the Aggrieved Employees on a *pro rata* basis, in proportion to the number of pay
6 periods that he or she worked for Defendant during the PAGA Period.

7 The PAGA Agreement is a compromise of highly disputed claims. Plaintiff and her counsel
8 recognize the expense and length of continued proceedings necessary to litigate the matter through
9 trial and any possible appeals. (Bean Decl. ¶ 20.) Plaintiff and her counsel have also taken into account
10 the uncertainty and risk of the outcome of further litigation, and the difficulties and delays inherent in
11 such litigation, including the significant risk that a Court could find that Plaintiff and the Aggrieved
12 Employees have no standing to seek PAGA penalties. (*Ibid.*) Plaintiff and her counsel are also aware
13 of the burdens of proof necessary to establish liability, and the difficulties in establishing Defendant's
14 liability for, and the right to recover, penalties on behalf of the State of California and the Aggrieved
15 Employees. (*Ibid.*) Additionally, Plaintiff contends the Agreement confers significant relief both to
16 the Aggrieved Employees and to the LWDA which will use the recovery to benefit additional
17 California employees. (*Ibid.*)

18 Considering all of the facts in this case, Plaintiff and her counsel have determined that the
19 Agreement represents a fair, adequate, and reasonable resolution of the PAGA claims, and that it is in
20 the best interests of the Aggrieved Employees and the State of California. (Bean Decl. ¶ 21.) PAGA
21 provides for a penalty of \$100.00 for each aggrieved employee per pay period for the "initial violation"
22 and \$200.00 for each aggrieved employee per pay period for each "subsequent violation". CAL.
23 LAB. CODE § 2699, subd. (f)(2). Generally, an employer must first be put on notice of the violations
24 from "either the commissioner or the court" before the "subsequent violation" amount will be assessed.
25 *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05CV1 199-
26 IEG-CAB, 2009 WL 2448430, at *9 (S.D. Cal., Aug. 10, 2009); *Amaral v. Cintas Corp. No. 2*, 163
27 Cal. App. 4th 1157, 1209 (2008). Accordingly, employers frequently argue that "subsequent violation"

28 ⁶ Plaintiff's counsel, George H. Bean, accrued attorney's fees and costs of \$20,971.33, but has agreed to reduce that amount to \$10,000.00 to facilitate court approval of the PAGA Settlement. (Bean Decl. ¶ 30.) Plaintiff's counsel's requested fees are only for work performed in relation to Plaintiff's PAGA claim. (*Id.* at ¶¶ 28, 34.)

1 penalty of two hundred dollars (\$200.00) can only be assessed after the employer has been cited by
2 the LWDA and the conduct continues. If Defendant prevailed on this argument, Plaintiff's estimated
3 penalties would be significantly reduced. Employer defendants also frequently argue that civil
4 penalties cannot be "stacked" or, in other words, no more than one penalty can be assessed in the same
5 pay period for the same employee. *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th
6 1112, 1131 (2012); *Renda v. Nevarez*, 223 Cal. App. 4th 1231, 1236-37 (2014) (prohibiting double
7 recovery for same harm).

8 Moreover, the Court has discretion to award less than the maximum penalty if based on the
9 facts and circumstances of a particular case to do otherwise would result in an award that is unjust,
10 arbitrary and oppressive or confiscatory. CAL. Labor Code § 2699, subdivision (e)(2). Key factors
11 considered by the court in determining whether the penalty is appropriate is whether employees
12 suffered real injury due to violations, whether employer acted in bad faith, whether there are good
13 faith disputes of law and fact, and the employer's financial condition. *Thurman v. Bayshore Transit*
14 *Management, Inc.*, 203 Cal. App. 4th 1112, 1135-1136 (2012) (approving the reduction of PAGA
15 penalties by 30% finding that awarding the full penalties would have been "unjust" because "the
16 evidence showed . . . defendants took their obligations . . . seriously and attempted to comply with the
17 law," and that the defendants' financial condition "rendered them unable to pay penalties from ongoing
18 revenues."); *Flemming v. Covidien, Inc.*, 2011 WL 756304718, at *4 (C.D. Cal., Aug. 12, 2011);
19 *Serrano v. Swissport North America, Inc.*, No. CV 13-2108-GW(PLAX), 2013 WL 12145614, at *6
20 (C.D. Cal., June 3, 2013); *Aguirre v. Genesis Logistics*, No. SACV1200687JVSANX, 2013 WL
21 10936035, at *3 (C.D. Cal., Dec. 30, 2013). As discussed above, Defendant contends any award of
22 penalties would be unjust, arbitrary, oppressive and confiscatory. Realistically, even if Plaintiff were
23 successful after a lengthy and expensive trial, it is very possible Defendant's argument for reduction
24 could persuade the Court to substantially reduce the amount of penalties awarded. Plaintiff considered
25 all of these risks and uncertainties in the law when evaluating the realistic value of the PAGA claims.

26 After assessing the risks of continued litigation, contested legal issues, and uncertainty at trial
27 and after trial during the penalty assessment phase, Plaintiff estimates a realistic potential civil penalty
28 exposure in this case would be in the mid-five figures for an aggrieved employee group of this size.
(Bean Decl. ¶ 22.) Therefore, this Settlement of thirty thousand dollars (\$30,000.00) is solidly in the

1 range of acceptable settlements in Plaintiff's view. (*Id.* at ¶¶ 21-22.) Defendant, however, denies that
2 any violations occurred. (*See* Defendant's Answer.)

3 The result achieved in this case, and the monetary recovery provided by the PAGA Agreement,
4 are well-within the range of an acceptable settlement under the circumstances, especially when
5 compared to the settlement of PAGA claims in other cases. *See, e.g., DCH Auto Wage and Hour*
6 *Cases*, Los Angeles County Superior Court, No. JCCP4833 (May 2017) (**approving \$15,000 out of**
7 **\$4 million toward settlement of PAGA claims**); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-
8 0324 AWI SKO, 2012 WL 5364575, at *3 (E.D. Cal., Oct. 31, 2012) (**approving \$10,000.00 out of**
9 **\$3.7 million toward settlement of PAGA claims**); *Schiller, supra*, 2012 WL at *14 (**approving**
10 **\$7,500.00 out of \$518,245.00 toward settlement of PAGA claims**); *Chu, supra*, 2011 WL at p. at *1
11 (**approving \$10,000.00 out of \$6.9 million toward settlement of PAGA claims**); *Franco, supra*,
12 2012 WL at p. at *14 (**approving the amount of \$10,000 out of \$2.5 million toward settlement of**
13 **PAGA claims**); *Nordstrom Com. Cases, supra*, 186 Cal. App. 4th at 589 (**finding no abuse of**
14 **discretion by the trial court in approving a settlement that allocates \$0 toward the settlement of**
15 **PAGA claims that were at issue in the lawsuit**). Here, the value obtained for settlement of the
16 PAGA claims is reasonable – especially in light of the trial results in these cases over the years, and it
17 will be distributed in accordance with and in fulfillment of the objectives of the PAGA statute.

18 **E. The Experience of Plaintiff's Counsel Favor Approval of the PAGA Settlement.**

19 Plaintiff's counsel is experienced in complex representative wage-and-hour litigation. (Bean
20 Decl. ¶ 17.) In Plaintiff's counsel's view, the benefit conferred by the Agreement is eminently fair
21 and reasonable and is in the best interests of the State and the Aggrieved Employees in light of the
22 risk, delay, and uncertainty of continued litigation and the monetary benefits provided for by the
23 Agreement. (*Id.* at ¶¶ 20-22.) Furthermore, courts have acknowledged that “the interests of plaintiff,
24 counsel, and other potentially aggrieved employees are largely aligned. All stand to gain from proving
25 as convincingly as possible as many Labor Code violations as the evidence will sustain[.]”
Williams, supra, 3 Cal. 5th at p. 548–49 (*citing* CAL. Labor Code, § 2699, subd. (g)(1)(i)).

26 **F. The Parties Will Request That The Court Retain Jurisdiction Over the Parties to**
27 **Enforce Settlement Until Performance in Full of the Terms of Settlement**

28 The Parties have executed and concurrently filed a Stipulation and Order for this Court to

1 retain jurisdiction over the matter and the parties until full performance of all the terms of the
2 Agreement.

3 **VI. CONCLUSION**

4 The PAGA Agreement is fair, adequate, and reasonable, as it represents a reasoned
5 compromise of disputed claims that has been reached through hard-fought negotiations in good faith,
6 and considers the risks, complexity, and expense of further litigation. The Parties therefore respectfully
7 request that the Court approve the PAGA Agreement, including the plan of allocation and distribution
8 of the PAGA Settlement Sum for payments to the LWDA and the Aggrieved Employees.

9
10 Dated: July 13, 2021

Respectfully Submitted,

GEORGE BEAN LAW



13 _____
14 GEORGE H. BEAN, Attorneys for Plaintiff
15 JEAN M. HERGER
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Make a Reservation

JEAN M. HERGER vs NVA SOUTH TEMECULA AND MURRIETA OAKS, INC., A CALIFORNIA CORPORATION

Case Number: 20VECV01283 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2020-11-06 Location: Van Nuys Courthouse East - Department T

Reservation

Case Name:

JEAN M. HERGER vs NVA SOUTH TEMECULA AND
MURRIETA OAKS, INC., A CALIFORNIA
CORPORATION

Case Number:

20VECV01283

Type:

Motion re: (Approval of PAGA Settlement)

Status:

RESERVED

Filing Party:

Jean M. Herger (Plaintiff)

Location:

Van Nuys Courthouse East - Department T

Date/Time:

08/09/2021 8:30 AM

Number of Motions:

1

Reservation ID:

256728732131

Confirmation Code:

CR-Z8USLCAXMZUCSCCU9

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			\$61.65

Payment

Amount:

\$61.65

Type:

AmericanExpress

Account Number:

XXXX1002

Authorization:

203768

Print Receipt

[Reserve Another Hearing](#)

