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KRYSTAL THOMAS

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF SAN BERNARDINO**

15 **(UNLIMITED JURISDICTION)**

16 KRYSTAL THOMAS, on behalf of herself,
17 and as an “aggrieved employee” on behalf of
18 other similarly situated “aggrieved
19 employees” under the Labor Code Private
Attorney General Act of 2004,

20 *Plaintiff(s),*

21 *v.*

22 CHOICE PHYSICIANS NETWORK, INC.,
23 a California corporation; DESERT
24 PHYSICIANS MANAGEMENT, LLC, a
25 California corporation, and DOES 1 through
50, inclusive,

26 *Defendant(s)*

Case no.: CIVDS2013964

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF KRYSTAL THOMAS’
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

Action filed: June 25, 2020

Hearing Date: October 20, 2021

Hearing Time: 10:00 a.m.

Dept.: S-26, Hon. David
Cohn

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Krystal Thomas (“Plaintiff” or “Thomas”) submits this memorandum of points
4 and authorities in support of her motion for approval of the PAGA Settlement Agreement and
5 Release (the “Agreement” or “PAGA Settlement”)¹ for the civil penalties claim she brought
6 against Defendants Desert Physicians Management, LLC (“DPM”) and Choice Physicians
7 Network, Inc. (“Choice”) (collectively “Defendants”) under the Labor Code Private Attorneys
8 General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because
9 Labor Code section 2699(l) of the PAGA requires Court-approval of any civil penalties sought as
10 part of a proposed settlement agreement. Based on Plaintiff’s and her counsels’ investigation and
11 evaluation, Plaintiff is of the opinion that the PAGA Settlement represents a reasonable and
12 adequate settlement of strongly disputed claims and is in the best interest of the State of
13 California, the PAGA Members, and Plaintiff. Through this motion, therefore, Plaintiff
14 respectfully requests for this Court to approve the PAGA Settlement for resolution of the PAGA
15 claim.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

17 DPM is a medical practice located in Apple Valley, California. Choice, a DPM affiliate,
18 is a network of contracted physicians. DPM employs persons in several hourly, non-exempt
19 positions, including, but not limited to, case managers, and comparable employees (hereafter
20 “PAGA Members”). DS, ¶ 3.

21 **A. Plaintiff’s Relationship With Defendants**

22 DPM first employed Plaintiff on or around April 8, 2019 as a Licensed Vocational Nurse
23 (LVN) Case Manager in DPM’s Case Management Department. Plaintiff continuously worked
24 for DPM from the time of her hire until approximately July 3, 2019 when DPM terminated her
25 employment. DS, ¶ 4.

26 **B. Plaintiff’s Contentions**

27 In this lawsuit, Plaintiff contends that Defendants are liable to her and the other
28 approximately 109 PAGA Members for their failures to: (1) provide all required timely, off-duty,
and unrestricted meal and rest periods or pay premium wages; (2) pay all wages for all hours
worked; (3) reimburse the PAGA Members for gas, mileage, and use of their personal mobile

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.



phones; (4) provide accurate written wage statements and facially compliant paychecks; (5) timely pay final wages upon termination of employment; (6) maintain accurate employment records; and (7) maintain temperature providing reasonable comfort at the workplace. DS, ¶ 5.

C. Defendants' Contentions

Defendants deny Plaintiff's allegations. Defendants contend that they have complied at all times with their obligations to pay all wages due, provide all meal and rest breaks, reimburse all necessary business expenses, issue facially compliant paychecks and accurate wage statements, maintain accurate employment records, and maintain temperature providing reasonable comfort throughout their facility. DS, ¶ 6; Agreement, ¶ 36.

D. Plaintiff's Written Notice to the State of California

Plaintiff and the PAGA Members are subject to arbitration agreements with Defendants. DS, ¶ 7. Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under PAGA. By letter dated June 5, 2020, Plaintiff, on behalf of herself and other aggrieved hourly employees gave written notice by certified mail to the Labor and Workforce Development Agency ("LWDA") and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. DS, ¶ 7, Ex. 3.

E. Plaintiff's PAGA Claim

On June 20, 2020, Plaintiff filed a Class Action Complaint in the San Bernardino Superior Court, Case No. CIVDS2013964, against Choice Physicians Network, Inc., Desert Physicians Management, LLC, and Manmohan Nayyar, on behalf of herself and others similarly situated, alleging causes of action on a class-wide basis for (1) Failure to Provide Rest Breaks; (2) Failure to Provide Meal Periods; (3) Failure to Pay All Wages Earned for All Hours Worked; (4) Failure to Indemnify; (5) Failure to Provide Accurate Written Wage Statements; (6) Waiting Time Penalties; and (7) Unfair Competition. DS, ¶ 8, Ex. 4. On September 22, 2020, the Court dismissed Manmohan Nayyar without prejudice based on the parties' stipulated request. DS, ¶ 9, Ex. 5.

Plaintiff chose to dismiss without prejudice her class action lawsuit based on an arbitration agreement with a class action waiver signed by Plaintiff on April 8, 2019. DS, ¶ 10. On October 7, 2020, Plaintiff filed a representative action Complaint as an "aggrieved employee" with a single cause of action for civil penalties under the PAGA against Defendants Choice and DPM in the San Bernardino Superior Court. DS, ¶ 11, Ex. 6. On October 7, 2020, and by stipulation of the



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Parties, the Court dismissed Plaintiff's class action lawsuit without prejudice. DS, ¶ 12.

On September 22, 2021, per the PAGA Settlement and by stipulation of the parties, Plaintiff sent a supplemental letter to the LWDA and Defendants of her facts and theories. DS, ¶ 14, Ex. 7. On September 27, 2021, Plaintiff submitted for filing a Second Amended Complaint with a single cause of action for civil penalties under the PAGA against Defendants Choice and DPM adding alleged violations of Labor Code sections 212, 226.3, 511, 1194.2, 1197.1, and 6720. DS, ¶ 14, Ex 8.

F. Mediation With Glenn Lerman, Esq.

On April 20, 2021, Glenn Lerman, a professional mediator, mediated this dispute and the parties agreed to settle the entire Action. DS, ¶ 13. This PAGA Settlement was reached after substantial exchanges of data, information and documents before and during the mediation, and is a result of extensive arms-length negotiations. In advance of the mediation, and before agreeing to the terms of the Settlement, the parties engaged in informal discovery. Through informal discovery, Defendants produced Plaintiff's personnel file, copies of their relevant company written policies, and time records for a random sample of PAGA Members randomly selected by Plaintiff. Counsel for the parties further investigated the applicable law as applied to the facts discovered regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations claimed by Plaintiff. Now that the parties have finalized the PAGA Settlement, Plaintiff submits it to this Court for approval. DS, ¶ 15.

III. OVERVIEW OF SETTLEMENT

A. "PAGA Members" Definition

The PAGA Members are all persons employed by Defendants in California as non-exempt hourly employees during the Covered Period. Agreement, ¶ 13. The Covered Period means the period of time from June 5, 2019, through the date of settlement, April 20, 2021. Agreement, ¶ 17.

B. Monetary Terms Of The Settlement

Defendants have agreed to pay a total of \$149,000.00 ("Settlement Fund") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and the PAGA Members against Defendants (described more fully below), Defendants agreed to pay \$149,000.00 toward the Settlement Fund which will be divided among the Individual PAGA Payments to PAGA Members, the Settlement Administrator's costs of administering the settlement, the PAGA Counsel Fees and Costs, a General Release Payment for the named Plaintiff, and the PAGA



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1 payment to the LWDA. Agreement, ¶ 33. Each PAGA Member will receive a portion of the civil
2 penalties on a pro-rata basis calculated based on the total number of Eligible Pay Periods each
3 PAGA Member worked as a non-exempt hourly employee in California during the Covered
4 Period. Agreement, ¶ 42. The Settlement Fund will be divided as follows:

5 1. Plaintiff's Counsel's (The Spivak Law Firm and United Employees Law
6 Group) attorneys' fees amounting to \$49,666.67 (one third of the Settlement Fund), and litigation
7 costs of \$8,485.73 (the Agreement provides up to \$15,000) ("Plaintiff's Counsel's Fees and
8 Costs");

9 2. A "General Release Payment" to Plaintiff in the amount of \$15,000.00 for
10 her release of any and all individual claims;

11 3. "Settlement Administration Costs" of up to \$6,000 to CPT Group, Inc.
12 ("CPT" or "Settlement Administrator") to administer the Settlement;

13 4. Approximately \$70,847.60 in "PAGA Penalties", divided as follows:
14 a. \$53,135.70 to the LWDA (75%); and
15 b. \$17,711.90 to the PAGA Members (25%) ("PAGA Member
16 Fund")

17 Agreement, ¶ 41.

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

19 Within five (5) business days after the Effective Date, Defendants shall pay the Settlement
20 Fund to the Settlement Administrator. Within ten (10) business days of the Effective Date, the
21 Settlement Administrator shall issue payment for the Court approved Plaintiff's Counsel's Fees
22 and Costs, General Release Payment to Plaintiff, Settlement Administration Costs, and the
23 PAGA Penalties to the LWDA. Agreement, ¶¶ 43,45,54,56.

24 Within fifteen (15) calendar days after the Effective Date, Defendants will send the
25 PAGA Member List to the Settlement Administrator, which contains each PAGA Member's: (1)
26 name; (2) last known home address and telephone number; (3) number of Eligible Pay Periods
27 during the Covered Period; and (4) Social Security number. Agreement, ¶¶ 31,53.

28 Within seven (7) calendar days after the Defendants provide the PAGA Member List to
the Settlement Administrator, the Settlement Administrator shall run all the addresses of PAGA
Members through the United States Postal Service's National Change of Address database to
obtain updated address information and mail the Individual PAGA Payment checks to the PAGA



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Members. Agreement, ¶ 55. The Individual PAGA Payment checks shall be sent to each PAGA Member by U.S. First Class mail to the PAGA Member's address with directions to the Postmaster to forward the payment checks and return all undeliverable payment checks to the Settlement Administrator. Checks for the Individual PAGA Payments shall be mailed to PAGA Members within thirty (30) business days of the Effective Date. Agreement, ¶ 42. The Individual PAGA Payment checks will be accompanied by an Information Sheet explaining the basic terms of the Settlement. Agreement, ¶ 55.

D. Individual PAGA Payments and Uncashed Checks

Each PAGA Member's Individual PAGA Payment shall be calculated by multiplying the amount of the PAGA Member Fund by the ratio of (a) the PAGA Member's individual number of Eligible Pay Periods ("Individual Pay Periods"), to (b) the aggregate number of Eligible Pay Periods worked by all PAGA Members ("Aggregate Pay Periods"), as follows: Individual PAGA Payment = PAGA Member Fund x [Individual Pay Periods ÷ Aggregate Pay Periods]. Agreement, ¶ 42.

Individual PAGA Payment checks will remain valid and negotiable for one hundred twenty (120) calendar days from the date of their issuance. If an Individual PAGA Payment check remains uncashed or undeliverable after the 120-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, ¶ 57. With regard to the Individual PAGA Payments to the PAGA Members, IRS Form 1099s will be issued as legally appropriate. Agreement, ¶ 44; DS, ¶ 51.

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

The PAGA Settlement will release Defendants and their present and former parent companies, subsidiaries, divisions, shareholders, officers, directors, employees, attorneys, insurers, successors, assigns of Defendants, including, but not limited to Dr. Manmohan Nayyar (collectively, the "Releasees"), for any of the Covered Claims. The Covered Claims include:

"all claims, causes of action, damages, wages, benefits, expenses, penalties, interest, debts, liabilities, demands, obligations, attorneys' fees, costs, and any other form of relief or remedy in law, equity, or whatever kind or nature, that were pleaded or could arise out of the factual allegations set forth in the operative complaints in the Action and arising at any time during the Covered Period for



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civil penalties pursuant to Labor Code Section 2699 for violations of Labor Code sections 201-204, 212, 226, 226.3, 226.7, 510-512, 1174, 1194, 1194.2, 1197, 1197.1, 1198, 2802, 6720, and the IWC Wage Orders.”

Agreement, ¶ 49. In addition to the release set forth above with respect to the Covered Claims, in exchange for a General Release Payment, Plaintiff expressly waives the rights and benefits of California Civil Code section 1542. Agreement, ¶ 50.

IV. ARGUMENT

A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT

The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The Court necessarily has broad discretion in making the decision to approve or reject a settlement for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain circumstances, penalties should be assessed and, if so assessed, the appropriate amount of penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2). Although the PAGA does not set forth the particular standards against which a PAGA settlement should be evaluated, the LWDA has provided guidance for approval that mirrors the standards for evaluating class action settlements. DS, ¶ 16; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA’s guidance, that approval of PAGA settlements may be had where the statutory requirements of the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The established standards for evaluating whether class action settlements are fair, reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 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 v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

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 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to



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1 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
2 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at, 1027. The law favors
3 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
4 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents*
5 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
6 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, ¶ 17, 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(l)(2). Here, notice is being given to the LWDA concurrently with the filing of
16 this motion. DS, ¶¶ 17, 52, Ex. 9. 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. Plaintiff requested and Defendants provided the number PAGA
7 Members, the number of total paychecks issued during the Covered Period, all policies in effect
8 during the Covered Period, and a sampling of time records; and (3) Counsel for the Parties are
9 experienced with PAGA cases. DS, ¶ 18. Moreover, neither Plaintiff nor Plaintiff’s Counsel have
10 any conflicts of interest with the absent PAGA Members and there are no issues of
11 ascertainability. DS, ¶ 19. For the reasons discussed below, this Court should approve the PAGA
12 Settlement.

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

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

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

21 Plaintiff considered various sources of information in the lead-up to and during the
22 mediation of April 20, 2021 that enabled her to achieve the PAGA Settlement at issue. DS, ¶ 23.
23 Among other things, Plaintiff considered the following:

- 24 • Defendants produced and Plaintiff reviewed her personnel file.
- 25 • Plaintiff requested that Defendants produce any and all policies regarding job duties,
26 position descriptions, timekeeping procedures, overtime and double-time wages, meal
27 periods and rest breaks, meal period waivers and agreements, expense reimbursement,
28 compensation plans, incentive pay, bonuses and complaints about working conditions in
effect during the Covered Period beginning in June of 2019. Defendant produced those
policies.
- Prior to mediation, Defendants disclosed that there were 109 PAGA Members during the
Covered Period. Based on this information, Plaintiff requested sample time and payroll
records for 22 randomly chosen employees. This represents 20% of the total employees
that Defendants employed during this time period. Defendants sent a list of all the
anonymous employee identification numbers for this time period. Plaintiff chose 22



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employee identification numbers by using a random number generator in Microsoft Excel. Defendants then produced the time records of such employees to Plaintiff in excel format. Plaintiff then retained a professional data analyst to examine the records and to determine the frequency of workdays with presumptive meal periods violations, i.e., workdays with meal periods that were absent, short, or late.

- 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, ¶ 23.

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

Before mediation, Defendants disclosed that as of October 10, 2020, there were approximately 1,982 total pay periods and 109 PAGA Members. DS, ¶ 24. Agreement, ¶ 60. Based on this information, Plaintiff's Counsel prepared an estimate of the maximum civil penalties under the PAGA. DS, ¶ 24, Ex. 10. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period. *Id.*

- The maximum civil penalty for unpaid minimum wage violations is \$100.00 under Labor Code section 1197.1. As such, Plaintiff's counsel estimated that the maximum amount Plaintiff could recover for herself, the State, and the Aggrieved Employees is \$198,200.00 (1,982 pay periods x \$100 civil penalty amount) and only if she established that every PAGA Member suffered an unpaid minimum wage violation in each pay period.
- The maximum civil penalty for unpaid overtime wage violations is \$50.00 under Labor Code section 558. As such, Plaintiff's counsel estimated that the maximum amount Plaintiff could recover for herself, the State, and the Aggrieved Employees is \$99,100.00 (1,982 pay periods x \$50 civil penalty amount) and only if she established that every PAGA Member suffered an unpaid overtime wage violation in each pay period.
- For rest period 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 Aggrieved Employees is \$198,200.00 (1,982 pay periods x \$100 civil penalty amount) and only if she established that every PAGA Member suffered a rest period violation in each pay period.
- The maximum civil penalty for meal period violations is \$50 under Labor Code sec. 558. As such, Plaintiff's counsel estimated that the maximum amount Plaintiff could recover



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for herself, the State, and the Aggrieved Employees is \$99,100.00 (1,982 pay periods x \$100 civil penalty amount) and only if she established that every PAGA Member 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 Aggrieved Employees is \$198,200.00 (1,982 pay periods x \$100 civil penalty amount) and only if she established that every PAGA Member suffered an unreimbursed expenses violation in each pay period.
- For untimely wages, the maximum civil penalty is \$100 under Labor Code sec. 210. Plaintiff's counsel determined that the most Plaintiff could recover for herself, the State, and the Aggrieved Employees in civil penalties for untimely wages is about \$198,200 (1,982 pay periods x \$100 civil penalty amount).
- For faulty wage statements, the maximum civil penalty is \$100 under Labor Code sec. 2699(f)(2). Plaintiff's counsel determined that the most Plaintiff could recover for herself, the State, and the Aggrieved Employees in civil penalties for wage statement violations is approximately \$198,200.00 (1,982 pay periods x \$100 civil penalty amount).

DS, ¶ 24, Ex. 10. Stacking each of these maximum recoverable civil penalty estimates yields a total amount of \$1,189,200.00. DS, ¶ 25.

Unfortunately for the employees concerned, the potential for recovery of over \$1 million in civil penalties depends on circumstances that are extremely unlikely independently and in combination. DS, ¶ 25. It would depend on the Court stacking the maximum recoverable civil penalties for unpaid minimum wage violations, unpaid overtime violations, unprovided meal breaks violations, unprovided rest breaks violations, unreimbursed expenses violations, untimely final wages violations, and faulty wage statement violations per pay period for all 1,982 pay periods for all 109 PAGA Members during the Covered Period. *Id.* Plaintiff's counsel is not aware of any California State court decision awarding a plaintiff and the other PAGA Members she represents multiple civil penalties for the same pay period under different Labor Code provisions. *Id.* With this in mind, Plaintiff' reduced the civil penalties by about 70%. Plaintiff's Counsel concluded that \$386,490.00 was more likely the maximum possible recoverable civil penalties. Plaintiff's Counsel applied an additional 60% discount to account for all other risks discussed below. The Settlement of \$149,000.00 involves a total payment of about 39% of the maximum possible recovery. A settlement for approximately 39% of the



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1 potential recovery is a proportion substantially in excess of recovery proportions sanctioned by
2 existing case law.² DS, ¶ 25.

3 There are risks to Plaintiff's claims for off-the-clock work. DPM's Timekeeping
4 Procedure Policy expressly prohibits non-exempt employees from working off-the-clock. An
5 acknowledgment form is attached to the "Timekeeping Procedures Policy," and all employees
6 are required to sign this acknowledgment prior to starting work. DS, ¶ 26.

7 There are risks to Plaintiff's meal and rest period claims. DS, ¶ 27. Out of the 3,759 total
8 shifts recorded in the sample, 0.27% of the shifts had no meal periods, 3.80% of the shifts had
9 a late meal period and 0.19% of the shifts had meal periods that were short. This is a presumptive
10 meal period violation rate of only 4.26% and required a significant discount during settlement
11 negotiations.

12 Moreover, Defendants contend that, to establish a violation for missed meal periods, a
13 plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v.*
14 *Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a
15 "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal
16 breaks and ensure no work thereafter is performed." *Id.* at 1040-41. Instead, a plaintiff must
17 show the employer impeded, discouraged, or prohibited the employee from taking a proper
18 break, or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with
19 regard to the meal break claim is the reason that a particular employee may have failed to take
20 a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641.
21 Determining by a review of Defendants' time records the exact reasons why a meal period
22 appears to be short or late would be difficult and pinpointing those days in which Plaintiff and
23 the PAGA Members worked during their meal periods will be a challenge. Additionally,
24 Defendants provided evidence that they provide employees with the opportunity to take meal
25 and rest breaks. DS, ¶ 27. DPM's Employee Handbook contains legally compliant meal period
26 and rest break policies. *Id.* According to Defendants, management regularly reminds employees

25 ² See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement
26 that secures roughly six to twelve percent of a potential trial recovery . . . seems to be within the targeted range of
27 reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2019 WL 3943859, at *8 (E.D. Cal. Aug. 21,
28 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").



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1 to take their meal periods and rest breaks and employees often take meal and rest breaks in
2 excess of that required by law, both in quantity and length. Defendants also represented that
3 most PAGA Members signed meal period waivers for shifts between five (5) and six (6) hours
4 as permitted by Wage Order 5-2001. Finally, beginning in July 2020, Defendants began paying
5 a premium where meal or rest period violations are indicated on time records and where an
employee or supervisor notifies payroll of a non-compliant meal or rest break. *Id.*

6 Defendants contend they provided their non-exempt employees with the opportunity to
7 take rest periods in accordance with California law, and, accordingly, Plaintiff's rest break claim
8 has no support. DS, ¶ 28. Additionally, there are other risks to Plaintiff's rest period claim.
9 Employers are not required to record rest periods and such periods are paid. Unlike meal periods,
10 where there are often records showing whether an employee clocked out or not, there is no such
11 evidence to prove a missed rest period or that the employer refused to authorize and permit one.
12 Managing such claims at trial has become exceedingly difficult. Plaintiff will depend on sample
13 witness testimony and surveys to prove the claims. While a victory with such evidence is
14 certainly possible, relevant caselaw makes such claims risky from a trial management and due
process perspective. DS, ¶ 28.

15 There is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged
16 failure to indemnify for business expenses to be individual in nature. DS, ¶ 29. Plaintiff alleges
17 that Defendants did not reimburse her or the other PAGA Members for use of their personal cell
18 phones, gas, and mileage expenses. Defendants provided evidence at mediation that all case
19 managers, like Plaintiff, are issued cell phones. Moreover, Defendants represented that the
20 PAGA Members, including Plaintiff, received reimbursements for their mileage expenses and
that Defendants have a reimbursement request form, which expressly includes mileage. *Id.*

21 The sole source of money recoverable for the PAGA Members and the State is civil
22 penalties available under PAGA. DS, ¶ 30. It allows employees to seek civil penalties for certain
23 violations of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or
24 confiscatory. As discussed above, Plaintiff's maximum estimated liability exposure is based on
25 the theories that: (1) Every paycheck that Defendants issued to employees during the Covered
26 Period represents a pay period in which every PAGA Member suffered a minimum wage
violation; (2) Every paycheck that Defendants issued to employees during the Covered Period
27 represents a pay period in which every PAGA Member suffered an overtime wage violation; (3)
28



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1 Every paycheck that Defendants issued to employees during the Covered Period represents a
2 pay period in which every PAGA Member suffered a meal period violation; (4) Every paycheck
3 that Defendants issued to employees during the Covered Period represents a pay period in which
4 every PAGA Member suffered a rest period violation; and (5) Every paycheck that Defendants
5 issued to employees during the Covered Period represents a pay period in which every PAGA
6 Member suffered an unreimbursed expense violation. *Id.* There are no California state court
7 decisions under the PAGA to date with substantial awards of civil penalties. Plaintiff's counsel
8 is aware of only two significant awards under the PAGA in a contested proceeding, both issued
9 by federal district courts, one of which was overturned on May 28, 2021.³

10 Additionally, PAGA states a court has discretion to award a lesser amount than the
11 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
12 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
13 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
14 evidence of willful and intentional conduct. DS, ¶ 31. *Carrington v. Starbucks (2018) 30*
15 *Cal.App.5th 504* ("Carrington") illustrates this. In that case, the Court of Appeal affirmed a trial
16 court's heavily discounted award of only \$5 per violation because it was within the Court's
17 discretion to significantly reduce PAGA penalties even when there is a finding that a violation of
18 the California Labor Code occurred. DS, ¶ 31.

19 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
20 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the

21 ³ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under
22 the PAGA of approximately \$25 million, representing a 25% reduction from the plaintiff's claim for approximately
23 \$33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably,
24 the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant's policies caused
25 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court
26 noted had received "millions of dollars from the state of California" to train their flight attendants, engaged in glaring
27 violations of the labor code, such as failing to compensate its flight attendants for work performed outside of "block
28 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
associated with adjustments to overtime pay. *Magadia v. Wal-Mart Assocs.*, No. 19-16184, 2021 U.S. App. LEXIS
16070 (9th Cir. May 28, 2021).



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1 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
2 civil penalties under the PAGA. *Id.* After a bench trial, the Honorable Judge Ronald M. Sohigian
3 awarded approximately \$325,000 in civil penalties under the PAGA. *Id.* DS, ¶ 32, Exs. 11-12. In
4 a similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
5 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
6 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 32.

7 Defendants could also convince the Court to dismiss the claims due to unmanageability
8 given that DPM has approximately 45 different positions or job titles across 13 departments and
9 their procedures are individualized. DS, ¶ 33. Defendants contend that Plaintiff's allegations
10 require a host of individualized inquiries which would arguably devolve into a series of mini-
11 trials based on whether each employee voluntarily elected to unilaterally waive a provided meal
12 period or authorized rest break, based on position titles, job duties and the type of work they
13 perform, whether they worked off-the-clock, whether their work involves vehicle travel, whether
14 they are issued company phones, among others. (See, e.g., *Brinker*, 53 Cal.4th at 1004.)
15 Defendants contend that the claims for overtime, meal and rest periods, and expense
16 reimbursements are largely job-specific and dependent upon the job title and shift, since the
17 PAGA Members report to different managers, and there are different procedures, requirements,
18 and practices depending on the position and department. *Id.* In *Ortiz v. CVS Caremark Corp.*, the
19 court dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3-4 (N.D.
20 Cal. 2014). The *Ortiz* court cited the "multitude of individualized assessments" that case would
21 have required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and
22 dismissed PAGA claims where, as here, there are a large number of allegedly aggrieved
23 individuals whose claims require individual assessments. See, e.g., *Litty v. Merrill Lynch & Co.*,
24 2014 WL 5904904, at *3 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at
25 *4 (C.D. Cal. 2015); see also *Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2-4
26 (E.D. Cal. 2014) (bifurcating trial of plaintiff's claim from representative claims: "in light of the
27 number of potential aggrieved employees, judicial economy favors deferring the representative
28 portion of the PAGA claim"); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal.
May 13, 2015).

Furthermore, on September 9, 2021, the California Court of Appeal issued a significant



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1 decision in *Wesson v. Staples the Office Superstore, LLC*, No. B302988, 2021 Cal. App. LEXIS
2 743 (Ct. App. Sep. 9, 2021) (“Wesson”), holding that courts have authority to ensure that PAGA
3 claims are manageable, and that courts may limit or strike unmanageable PAGA claims.⁴ DS, ¶
4 34.

5 While the evidence gathered through Plaintiff’s discovery supports the merits of the
6 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks
7 associated with the merits of Plaintiff’s claims, the uncertainties of complex litigation, the cost of
8 pretrial and trial proceedings, the Court’s discretion to lower the amount of penalties ultimately
9 awarded, and the secured benefit to the PAGA Members and the LWDA promoting compliance
10 with the Labor Code. DS, ¶ 35.

11 **4. The PAGA Member Fund Fairly, Reasonably, and Adequately Awards Shares**
12 **To PAGA Members Because Each PAGA Member Will Be Paid Based on the**
13 **Potential Extent of His or Her Injury Compared to Other PAGA Members**

14 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis
15 depending on the number of Eligible Pay Periods Defendants employed them for during the
16 Covered Period. Agreement, ¶ 5. With a total of 109 PAGA Members, the average estimated
17 Individual PAGA Payment for each PAGA Member is approximately \$162.49 (\$17,711.90 (25%
18 of the estimated PAGA Penalties of \$70,847.60)/109 PAGA Members). DS, ¶ 36. This is an
19 excellent result given the PAGA framework Plaintiff is bound by and the uncertainties this lawsuit
20 entails. DS, ¶¶ 37-38.

21 **5. Plaintiff’s Counsel is Experienced in Similar Litigation**

22 Plaintiff’s counsel has considerable experience in class actions and wage and hour
23 litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving
24 forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 20-22,
25 Declaration of Walter Haines (“Haines Decl.”) ¶ 2.

26 **6. The Proposed PAGA Counsel’s Fees and Costs Are Fair, Adequate, and**
27 **Reasonable and Should Be Approved.**

28 Of the \$149,000 allocated towards the Settlement Fund, Plaintiff’s counsel requests
\$49,666.67 (1/3 of the Settlement Fund) in attorney’s fees and \$8,485.73 in litigation expenses.

⁴ The *Wesson* decision marks the first time an appellate court has weighed in on whether PAGA claims must be manageable.



1 DS, ¶ 39. The written retainer agreement Plaintiff’s counsel entered into with Plaintiff provided
2 that her counsel may elect to recover either (a) statutorily awarded attorney fees or (b) up to 40%
3 of any recovery. *Id.*

4 It is an accepted practice in wage and hour class action settlements to award attorneys’
5 fees to Plaintiff’s counsel based on a percentage of the total settlement value agreed upon by the
6 parties. California courts have long recognized that an appropriate method for awarding
7 attorneys’ fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
8 (1977) 20 Cal.3d 25, 48-49 [“when a number of persons are entitled in common to a specific
9 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
10 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
11 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.)

12 California courts have the discretion to employ (or decline to employ) a “lodestar cross-
13 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
14 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
15 clear that this cross-check is not required and approved one-third of the class action settlement
16 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
17 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
18 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
19 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
20 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
21 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
22 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
23 reasonableness of a requested percentage fee.’”⁵ *Id.* (citing *Laffitte*)).

24 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
25 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)

26
27 ⁵ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to
28 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.)



1 162 Cal.App.4th 43, 66, fn.11 (“Chavez”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
2 373, 379 (“Pacific”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
3 (9th Cir. 1997) 129 F.3d 1026, 1027 (“MGM”) (awarding 33% of total fund amount).) This is
4 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
5 settlements. DS, ¶ 42.

6 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
7 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
8 fee request of \$49,666.67 (one-third of the Settlement Fund) is fair and reasonable based on their
9 lodestar as cross-checked against the percentage of the recovery. DS, ¶ 40, Ex. 14. Plaintiff’s
10 counsel’s previous experience in litigating wage and hour class actions and the caliber of
11 opposing counsel also support the reasonableness of the fee request. DS, ¶¶ 43-45, Exs. 16-17.

12 In addition, Plaintiff’s Counsel incurred substantial costs, \$7,799.80 to date, including the
13 costs of a mediator, to aid in the representation of the PAGA Members.⁶ DS, ¶ 41, Ex. 15; Haines
14 Decl. ¶ 11. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$685.93 in costs,
15 which consist of filing fees and attorney service fees for filing this motion, Notice of Entry and
16 Final Accounting, and estimated future appearance fees regarding the hearing on the PAGA
17 Settlement Approval and Final Accounting. Plaintiff’s Counsel anticipate that litigation costs will
18 total approximately \$8,485.73 through final accounting of the Settlement. *Id.* As the evidence
19 submitted herewith shows, all of these costs are documented and reasonably incurred. DS, ¶ 41,
20 Ex. 15. Accordingly, they warrant the Court’s approval.

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

23 Plaintiff’s General Release Payment in the amount of \$15,000.00 is being paid to Plaintiff
24 for her general release that includes a release of claims pursuant to California Civil Code section
25 1542. DS, ¶ 46.

26 Here, by agreeing to settle the case in the best interests of the PAGA Members and the
27 State, Plaintiff has given up the right to pursue her individual claims and recover substantially
28 more in unpaid wages, interest, waiting time penalties, and pay stub penalties that she will release
as part of the Settlement. DS, ¶ 47. Plaintiff did not seek an individual settlement for her claims

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 Members and the State. Plaintiff’s Counsel bore these expenses over the two years since they began work on this matter without reimbursement.



1 at all, instead choosing to prosecute this suit on behalf of the PAGA Members and the State. *Id.*

2 Moreover, Plaintiff's General Release Payment of \$15,000 is entirely reasonable given
3 Plaintiff's efforts in the Lawsuit and the risks she undertook on behalf of the PAGA Members.
4 *See generally* Thomas Decl. DS, ¶ 48. Plaintiff devoted many hours advancing the interests of the
5 PAGA Members. *Id.* Plaintiff has done this, by, among other things, retaining experienced
6 counsel, providing them with information about her work history with Defendants, assisting in
7 contacting absent PAGA Members to gather information, participating in mediation, and being
8 actively involved in the settlement process to ensure a fair result for the PAGA Members as a
9 whole. *Id.* In doing this, Plaintiff has been exposed to significant risks, including the risk of an
10 order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful and in bad
11 faith (*See* Labor Code §§ 218.5-218.6). Lastly, here, Plaintiff signed a general release of all claims
12 against Defendants, not only PAGA claims. Based on this legal authority, the public policy
13 considerations, and the extent of Plaintiff's involvement in this action, and the fact that Plaintiff
14 signed a general release of all claims, the proposed General Release Payment to Plaintiff is fair,
adequate, and reasonable, and thus warrants approval. *See generally* Thomas Decl. DS, ¶ 48.

15 **8. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
16 **Should Be Approved.**

17 With regard to the settlement administration costs provision, it is reasonable. Before
18 agreeing to CPT Group, Inc., the Parties sought and reviewed bids from other reputable third-
19 party administrators which provided higher bids. DS, ¶¶ 49-50, Exs. 18-20. Thus, the settlement
administration costs provision should be given approval.

20 **V. CONCLUSION**

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

23 Respectfully submitted,

24
25 Dated: September 27, 2021

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