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8 MARIA VELEZ and CLAUDIA TORREZ, and all others similarly situated

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

12 MARIA VELEZ and CLAUDIA TORREZ, on
13 behalf of themselves and as “aggrieved
14 employees” on behalf of other “aggrieved
Attorneys General Act of 2004,

15 *Plaintiff(s),*

16 vs.

17 RENAISSANCE FOOD GROUP, LLC, a
18 Delaware limited liability company; GH FOODS,
19 CA, LLC, a California limited liability company;
20 CALAVO GROWERS, INC., a California
corporation; and DOES 1–50, inclusive,

21 *Defendants.*

Case No. 34-2019-00250841

**PLAINTIFFS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Action filed: February 19, 2019
Hearing Date: August 5, 2022
Hearing Time: 9:00 a.m.
Hearing Dept.: 25, The Honorable Jill H.
Talley



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

3 **I. INTRODUCTION**

4 Plaintiffs Maria Velez (“Velez”) and Claudia Torrez (“Torrez”) (collectively Velez and
5 Torres are referred to as “Plaintiffs”) submit this memorandum of points and authorities in
6 support of their motion for approval of the PAGA Settlement Agreement (the “Agreement” or
7 “PAGA Settlement” or “Settlement”)² for the civil penalties claim they brought against
8 Defendant Renaissance Food Group, LLC (“Renaissance Food Group, LLC” or “Defendant
9 Renaissance”), Defendant GH Foods, CA, LLC (“GH Foods, CA, LLC” or “Defendant GH
10 Foods”), and Defendant Calavo Growers, Inc. (“Calavo Growers, Inc.” or “Defendant Calavo”) under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*
11 (“PAGA”). Plaintiffs bring this motion because Labor Code section 2699(l) of the PAGA
12 requires Court-approval of any civil penalties sought as part of a proposed settlement agreement.
13 Based on Plaintiffs’ and their attorneys’ investigation and evaluation, Plaintiffs are of the opinion
14 that the PAGA Settlement represents a reasonable and adequate settlement of strongly disputed
15 claims and is in the best interest of the State of California, the PAGA Collective Members, and
16 Plaintiffs. Through this motion, therefore, Plaintiffs respectfully request for this Court to approve
17 the PAGA Settlement for resolution of the PAGA claim.

18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 Defendants are manufacturers and distributors of prepared food products. Declaration of
20 David Spivak (“DS”), ¶ 3. Defendants employed both Plaintiffs as production leads. *Id.*
21 Defendants employed Velez from about September 25, 2017, to February 23, 2018. Defendants
22 employed Torrez from about May 5, 2017, to January 2, 2020. *Id.*

23 **A. Plaintiffs’ Written Notices to the State of California**

24 Plaintiffs complied with the procedures of Labor Code § 2699.3 for bringing suit under
25 PAGA. DS, ¶ 4. By letter dated December 14, 2018, Velez, on behalf of herself and other
26 aggrieved hourly employees, gave written notice by certified mail to the Labor and Workforce
27 Development Agency (“LWDA”) and Defendants of the specific provisions of the California

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



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1 Labor Code alleged to have been violated, including the facts and theories to support the alleged
2 violations. *Id.*, DS, ¶ 4 Ex. 1.

3 Torrez also complied with the procedures of Labor Code § 2699.3 for bringing suit under
4 PAGA. *Id.* By letter dated July 29, 2020, Torrez, on behalf of herself and other aggrieved hourly
5 employees, also gave written notice by certified mail to the LWDA and Defendants of the specific
6 provisions of the California Labor Code alleged to have been violated, including the facts and
7 theories to support the alleged violations. *Id.*, DS, ¶ 4.

8 **B. Plaintiffs' PAGA Claim**

9 Velez filed her lawsuit in Sacramento County Superior Court on February 19, 2019. DS,
10 ¶ 5 & Exhibit 4. Defendant G&M filed its answer to Velez's complaint on April 15, 2019. *Id.* &
11 Exhibit 5. Also on April 15, 2019, G&M filed a cross-complaint against Defendants Renaissance,
12 GH Foods, Kenneth J. Catchot ("Defendant Catchot"), and Calavo. *Id.* On April 23, 2019, Velez
13 and Defendants Renaissance, GH Foods, Catchot, and Calavo stipulated to the dismissal of
14 Velez's class and individual claims without prejudice, pursuant to the arbitration agreement
15 entered into between Velez and Defendant Renaissance. *Id.*, Exhibits 6 and 7. Defendants
16 Renaissance, GH Foods, Catchot, and Calavo filed their answer to Velez's complaint on May 7,
17 2019. *Id.*, Exhibit 9. On May 8, 2019, the Court issued an order dismissing Velez's class and
18 individual claims without prejudice. *Id.*, Exhibit 7.

19 On June 25, 2019, Velez, Defendants Renaissance, GH Foods, Catchot, and Calavo, and
20 Defendant/cross-complainant G&M stipulated to (1) the dismissal of G&M without prejudice;
21 and (2) the dismissal of G&M's cross-complaint, also without prejudice. *Id.*, Exhibit 10. On July
22 5, 2019, the Court issued an order dismissing G&M without prejudice and dismissing G&M's
23 cross-complaint without prejudice. *Id.*, Exhibit 10. On October 17, 2019, Velez and Defendants
24 Renaissance, GH Foods, Catchot, and Calavo stipulated to the dismissal of Catchot without
25 prejudice. *Id.*, Exhibit 11. The Court issued an order dismissing Catchot without prejudice on
26 October 21, 2019. *Id.*, Exhibit 11. Shortly after Velez served her first set of discovery requests,
27 the Parties agreed to stay formal discovery and participate in mediation. *Id.*

28 On April 11, 2022, Velez filed a First Amended Complaint ("1AC") adding Claudia



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1 Torrez as a co-plaintiff. DS, ¶ 6, Exhibit 12. Plaintiffs’ 1AC presents one cause of action for civil
2 penalties under PAGA. *Id.* On April 20, 2022, Defendants filed an answer to this 1AC. *Id.*,
3 Exhibit 13. Defendants deny all of Plaintiffs’ allegations and strongly contend that their wage
4 and hour policies, practices and procedures are fully compliant with all applicable laws. *Id.*

5 **C. Mediation**

6 On April 23, 2020, the Parties participated in mediation with mediator Marc Feder in an
7 attempt to resolve the PAGA claim. DS, ¶ 7. The Parties engaged in arm’s-length negotiations
8 and ultimately reached a resolution of the PAGA claims asserted in the Action. *Id.* The PAGA
9 Settlement was reached after exchanges of data, information and documents, and is a result of
10 extensive arms-length negotiations. *Id.* The Parties conducted informal discovery for purposes of
11 potential resolution through which they ascertained the size of the aggrieved employee group and
12 the number of pay periods worked by them during the PAGA Period to ascertain the total value
13 of Plaintiffs’ PAGA claim. *Id.* Now that the parties have finalized the PAGA Settlement,
14 Plaintiffs submit it to this Court for approval. *Id.* Notice is being given to the LWDA concurrently
15 with the filing of this motion. *Id.*

16 **III. OVERVIEW OF SETTLEMENT**

17 **A. “PAGA Collective Members” Definition**

18 The PAGA Collective Members are all persons who are employed or have been employed
19 by Defendants as an hourly, non-exempt employee in the State of California between December
20 16, 2017 and November 5, 2020 for the Riverside plant and between February 2, 2018 and
21 November 5, 2020 for the Sacramento plant. Agreement, ¶ 7(a). The “PAGA Period” is defined
22 as the time period of December 16, 2017, through November 5, 2020 for the Riverside Plant and
23 the time period of February 2, 2018 and November 5, 2020 for the Sacramento Plant. Agreement
24 ¶ 7(a).

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

26 In consideration for the releases as described in Paragraphs 3 and 4 of the Agreement,
27 and subject to Court approval of the Agreement, Defendants agree to pay a gross amount of Two-
28 Hundred and Seventy-Five Thousand Dollars and Zero Cents (\$275,000.00) (the “Settlement
Sum”) to PAGA Collective Members (as defined in Paragraph 6 below) subject to the following
terms and conditions:



1 a. The Parties agree that of the Settlement Sum, Ten Thousand Dollars and Zero
2 Cents (\$10,000.00) will be designated to Velez, without deductions, and another Ten Thousand
3 Dollars and Zero Cents (\$10,000.00) will be designated to Torrez, also without deductions, as
4 enhancement awards. These enhancement awards are in addition to any amount the Plaintiffs
5 may be entitled to under the distribution formula as identified in the Agreement for their time,
6 effort, expense, and risks associated with being named representatives, a broader, general waiver
7 of their rights including their individual claims, and participating in the PAGA Litigation as
8 PAGA Collective Representatives. These payments will be reported as 1099 income. Defendants
9 will not oppose any such application for enhancement awards described so long as it is consistent
10 with the amount stated in the agreement. This amount shall come from, and shall not be in
11 addition to, the Settlement Sum. Plaintiffs acknowledge their responsibilities for any and all taxes
12 for these sums pursuant to the Agreement;

13 b. The Parties agree that up to Six Thousand and Zero Cents (\$6,000.00) of the
14 Settlement Sum will be for the payment of settlement administration fees of a third-party
15 administrator. The costs of the Administrator shall be paid from, and shall not be in addition to,
16 the Settlement Sum;

17 c. The Parties agree that the entire Net Settlement Sum will be allocated to Plaintiffs'
18 claims under the Private Attorneys General Act ("PAGA") and will be distributed in accordance
19 with the percentages identified within the Act, twenty-five percent (25%) of the PAGA allocation
20 will be distributed to the PAGA Collective, and seventy-five percent (75%) will be distributed to
21 the California Labor and Workforce Development Agency ("LWDA"). These amounts shall
22 come from, and shall not be in addition to, the Settlement Sum;

23 d. The Parties agree that up to one third (1/3) of the Settlement Sum (i.e. \$91,666.67)
24 will be allocated to the payment of attorneys' fees incurred in the PAGA Litigation. Defendants
25 will not oppose any request for attorneys' fees so long as it does not exceed this threshold.
26 Plaintiffs will also be entitled to the actual litigation costs from the Settlement Sum as approved
27 by the Court in an amount not to exceed Twelve Thousand Dollars and Zero Cents (\$12,000.00).
28 These amounts shall come from, and shall not be in addition to, the Settlement Sum;



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1 e. The Parties agree that all payroll taxes associated with payment to PAGA
2 Collective Members from the Settlement Sum, if any, shall paid out of the gross Settlement Sum,
3 paid by Defendants. The representative Plaintiffs and PAGA Collective Members shall be
4 responsible for any and all tax obligations, other than payroll taxes, associated with any payments
5 they receive as part of the Settlement Sum;

6 f. The Net Settlement sum shall be distributed to PAGA Collective Members in
7 accordance with the allocations set forth within the Agreement. The Net Settlement Sum shall
8 consist of the Settlement Sum less the amounts identified above as attorneys' fees and costs, costs
9 of administration, the PAGA allocation, and enhancement awards. All PAGA Collective
10 Members, including Velez and Torrez, will receive a portion of the Net Settlement Sum on a pro
11 rata basis based on the number of pay periods they worked. Specifically, the final settlement
12 payments will be determined by the Administrator by taking the number of pay periods each
13 individual Collective Member worked during the PAGA Period and dividing that by the total
14 number of pay periods Collective Members worked during the PAGA Period and multiplying
15 that fraction by the Net Settlement Amount. Settlement ¶¶ 2(a) through (f).

16 **C. Timing of Payments**

17 Within fourteen (14) calendar days after the Court grants approval of the Agreement,
18 Defendants shall deposit the Settlement Sum (\$275,000.00 plus applicable payroll taxes) in a
19 QSF account established by the Administrator. For purposes of counting the fourteen (14) day
20 deadline established by the Agreement, Court approval may be by way of minute order, order
21 from the bench, or by signing a submitted approval order, whichever is earlier. The Administrator
22 is to provide Defendants advance notice within seven (7) calendar days after the Court grants
23 approval of the Agreement regarding the total monies Defendants must deposit. Settlement ¶
24 2(g).

25 Within twenty-one (21) calendar days from the date the Court approves the Agreement,
26 the Administrator will perform an NCOA check for PAGA Collective Members' most current
27 addresses based on the information provided by Defendants and will mail disbursement forms to
28 the PAGA Collective Members. For any disbursements returned as undeliverable, the



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1 Administrator shall perform a skip-trace on that individual and re-mail the PAGA disbursement
2 within three (3) business days of receiving information that the mailing was undeliverable or the
3 PAGA Collective Member was no longer at the address to the new address found in under the
4 skip-trace. Settlement ¶ 7(g).

5 **D. Calculation of Settlement Shares**

6 All PAGA Collective Members will receive a portion of the Net Settlement Sum on a pro
7 rata basis based on a reasonable estimate of the total number of pay periods worked by all
8 members of the PAGA Collective Members during the applicable period. The estimated share of
9 the Net Settlement Sum for each individual within the PAGA Collective will be determined as
10 follows: 1) A Total Value Per Pay Period will be derived by dividing the Net Settlement Sum by
11 the total number of pay periods that all PAGA Collective Members worked within the PAGA
12 Period (i.e. any pay period in which a PAGA Collective Member worked at least one (1) day);
13 and 2) each PAGA Collective Member will have their respective number of pay periods
14 multiplied by the Total Value Per Pay Period to derive their respective share of the Net Settlement
15 Sum. Settlement ¶ 7(b).

16 **E. Apportionment of Settlement Shares**

17 One Hundred percent (100%) of the payment of the Net Settlement Sum to eligible PAGA
18 Collective Members will consist of 1099 income representing payment for statutory and civil
19 penalties. Settlement ¶ 7(c).

20 **F. The Releases**

21 In exchange for the mutual promises and consideration set forth in the Agreement, the
22 parties agree to a release of liability. This release is as follows:

23 a. “Released Parties” as referenced herein and as released in the Agreement shall
24 collectively mean Renaissance Food Group, LLC, GH Foods, CA, LLC, and Calavo Growers,
25 Inc., and each of their respective past, present and future parent companies, subsidiaries,
26 affiliates, the past, present and future shareholders, directors, officers, agents, employees,
27 attorneys, insurers, predecessors, and successors and assigns of any of the foregoing principals
28 and any other person, corporation, entity, association or partnership responsible or potentially
responsible for any claims made or that could have been made in the PAGA Litigation.



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1 b. Velez and Torrez on behalf of themselves and on behalf of all who claim by and
2 through them, or their stead and each and every member of the PAGA Collective (which includes
3 any legal heirs and/or successors in interest of each and every member of the PAGA collective)
4 and the LWDA, hereby and forever mutually and fully releases, acquits, and discharges, and
5 covenants not to sue Defendants, including past, present, and future divisions, affiliates, parents,
6 subsidiaries, predecessors, successors, assigns, shareholders, owners, officers, directors,
7 employees, agents, trustees, attorneys, representatives, administrators, fiduciaries, beneficiaries,
8 subrogees, executors, partners, and privies (collectively the “Released Parties” and each a
9 “Released Party” or “Releasee”) for any and all penalties, costs, expenses, attorneys’ fees, or
10 interest based on any and all PAGA claims seeking civil penalties under California Labor Code
11 sections 558, 1198 and/or 2698 et seq. predicated on claims that are alleged against Defendants
12 in the PAGA Litigation that occurred during the PAGA Period, including allegations of meal and
13 rest break violations, unpaid wages, minimum wage violations, overtime violations, wage
14 statement violations, the failure to pay employees during employment, and the failure to pay final
15 wages.

16 c. As a condition of participating in this PAGA settlement, the PAGA Collective
17 Members, hereby and forever mutually and fully release, acquit, and discharge, and covenant not
18 to sue the Released Parties for any and all penalties, costs, expenses, attorneys’ fees, or interest
19 based on any and all PAGA claims seeking civil penalties under California Labor Code sections
20 558, 1198 and/or 2698 et seq. predicated on claims that are alleged against Defendants in the
21 PAGA Litigation that occurred during the PAGA Period, including allegations of meal and rest
22 break violations, unpaid wages, minimum wage violations, overtime violations, wage statement
23 violations, failure to pay employees during employment, and failure to pay final wages.

24 d. As a condition of receiving the enhancement awards described in Paragraph 2(a)
25 of the Agreement, Velez and Torrez hereby irrevocably and unconditionally release, acquit and
26 forever discharge the Released Parties from any and all charges, complaints, claims, liabilities,
27 obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights,
28 demands, costs, losses, debts and expenses (including attorney's fees and costs actually incurred)



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1 of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not
2 limited to, all claims alleged at any point in time in the PAGA Litigation, all claims dismissed by
3 the Court in the PAGA Litigation, all claims arising from or relating to Velez's and Torrez's
4 relationships with any of the Released Parties, all claims for alleged violations of any contracts,
5 express or implied, any covenant of good faith and fair dealing, express or implied, or any tort
6 including defamation, or any legal restrictions on Defendants' right to hire, refuse to hire or
7 terminate its employees, or any federal, state or local court of law or equity or other governmental
8 statute, regulation or ordinance, including, without limitation: (1) the Civil Rights Act of 1964,
9 as amended; (2) 42 U.S.C. § 1981; (3) the California Fair Employment and Housing Act (which
10 Acts prohibit discrimination based upon race, religion, sex, sexual orientation, age, color,
11 national origin, disability, medical condition and marital status); (4) Section 503 of the
12 Rehabilitation Act of 1973; (5) the Americans with Disabilities Act; (6) the Fair Labor Standards
13 Act (including the Equal Pay Act); (7) the California and the United States Constitution; (8) the
14 California Labor Code (including any and all provisions authorizing Plaintiffs to seek civil
15 penalties against the Released Parties for wage-hour violations); (9) the Family and Medical
16 Leave Act; (10) the California Family Rights Act; (11) the Worker Adjustment and Retraining
17 Notification Act; (12) the Claimant Retirement Income Security Act; (13) the Immigration
18 Reform and Control Act; (14) California Business and Professions Code Section 17200, et. seq.;
19 (15) the California Government Code; and (16) The California Wage Orders, which Velez and
20 Torrez now have, own or hold, or claim to have, own or hold, or which either Plaintiff at any
21 time heretofore had, owned or held, or claimed to have, own or hold against any of the Released
22 Parties up to and including the date of Plaintiffs' inspection of the Riverside facility, which took
23 place on November 5, 2020. Nothing in this release shall be construed to mean that Velez or
24 Torrez are releasing or waiving claims to enforce this Agreement, claims arising after November
25 5, 2020 (including claims for retaliation for having achieved this agreement or for having asserted
26 her underlying claims), workers' compensation claims, claims for unemployment insurance
27 benefits, claims for indemnification pursuant to Labor Code section 2802, claims for any vested
28 compensation and benefits (including, but not limited to, retirement benefits) attorney fees for all



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1 such claims, when available, the opportunity to pursue the claims mentioned in this sentence, or
2 claims that, by law, cannot be waived.

3 California Civil Code Section 1542. Velez and Torrez hereby agree that all rights under
4 section 1542 of the Civil Code of the State of California are hereby waived as to the individuals
5 or other claims they may have against Defendants. Section 1542 has been explained to Velez and
6 Torrez by their counsel and provides as follows:

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

10 Settlement ¶ 3(a)-(d) and ¶ 4.

11 **G. Uncashed Checks**

12 Within one hundred thirty (180) calendar days after the Administrator mails the PAGA
13 collective Members their pro-rata share of the Net Settlement Sum, any unclaimed funds,
14 including funds from uncashed settlement checks will be paid out to the California State
15 Controller's Unclaimed Property Fund. No amount of the Settlement Sum will revert to
16 Defendants for any reason. Settlement ¶ 7(h).

17 **IV. ARGUMENT**

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

19 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The
20 Court necessarily has broad discretion in making the decision to approve or reject a settlement
21 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
22 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
23 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
24 Although the PAGA does not set forth the particular standards against which a PAGA settlement
25 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
26 for evaluating class action settlements. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist.
27 LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's guidance, that approval
28 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



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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).

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

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

B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA.

PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.



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1 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
2 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. See
3 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
4 The Parties' Settlement so provides. Second, the LWDA must be given notice of the settlement
5 so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §
6 2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion.
7 DS, ¶ 7. As a result, Plaintiffs have met all procedural statutory requirements for settling a PAGA
8 action.

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

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

14 the strength of the Plaintiff's case, the risk, expense, complexity and likely duration of
15 further litigation, the risk of maintaining class action status through trial, the amount
16 offered in settlement, the extent of discovery completed and the stage of the proceedings,
17 and the experience and views of counsel.

18 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
19 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
20 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
21 *6. However, this Court should begin its analysis with a presumption that the proposed settlement
22 is fair. "A presumption of fairness exists where: (1) the settlement is reached through arm's length
23 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
24 intelligently; (3) counsel is experienced in similar litigation" *Dunk*, 48 Cal. App. 4th at 1802.

25 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
26 Parties reached the Settlement through arm's-length bargaining with the aid of a respected
27 mediator; (2) The Parties conducted sufficient investigation and discovery to allow Counsel and
28 the Court to act intelligently. Plaintiffs requested and Defendants provided the number PAGA
Collective Members, the number of total pay periods during the PAGA Period, and all policies
in effect during the relevant time period; and (3) Counsel for the Parties are experienced with



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1 PAGA cases. DS, ¶ 8. For the reasons discussed below, this Court should approve the PAGA
2 Settlement.

3 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive**
4 **Arm's Length Negotiations Between The Parties.**

5 The PAGA Settlement was reached only after litigation and arms' length negotiations
6 between experienced attorneys, which included a full day mediation with Marc Feder, a respected
7 mediator. At all times, the negotiations were adversarial and contentious, although still
8 professional in nature. DS, ¶ 7.

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

12 Plaintiffs considered various sources of information in the lead-up to, during and after the
13 mediation that enabled them to achieve the PAGA Settlement at issue. Among other things,
14 Plaintiffs considered the following:

- 15 • Defendants produced and Velez reviewed her personnel file.
- 16 • Defendants produced and Plaintiffs reviewed and analyzed time and
17 payroll records for the PAGA Collective Members.
- 18 • Plaintiffs requested that Defendants produce any and all relevant policies
19 regarding their claims and Defendants produced those policies in effect
20 during the relevant time period.
- 21 • Plaintiffs interviewed other employees about the claims at issue.
- 22 • Plaintiffs analyzed the state of caselaw on PAGA claims, claims for, and
23 related claims.
- 24 • Plaintiffs surveyed the outcomes of PAGA cases that went to trial or
25 otherwise concluded before trial.
- 26 • Counsel for Plaintiffs conducted a site inspection of Defendants'
27 Riverside, California facility, where Plaintiffs were employed.

28 DS, ¶ 13.

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

A court has discretion under PAGA to award a lesser amount than the maximum penalty.



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1 Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th
2 1112, 1135 (reducing PAGA award). Defendants have posed valid defenses to the Labor Code
3 claims underlying Plaintiffs’ PAGA allegations. DS, ¶ 14. Thus, the PAGA claims likewise face
4 significant uncertainty. *Id.* There is a risk that the Court would consider the maximum civil
5 penalty available to be confiscatory. *Id.* This uncertainty increases Plaintiffs’ risk of pursuing the
6 PAGA claims and required a significant discount for settlement purposes. *Id.* For mediation
7 purposes, Plaintiffs’ counsel estimated a maximum exposure of approximately \$4,873,400.00 in
8 civil penalties. *Id.* This estimate did not take into account any of the risks discussed above and
9 assumed a violation for every single pay period. *Id.* Plaintiffs’ counsel also assessed multiple
10 penalties for the same pay period for the same alleged violations of different Labor Code
11 provisions and derivative violations. *Id.* Although two federal district court decisions held that
12 “stacking” PAGA penalties in this fashion may be appropriate to determine the amount in
13 controversy for purposes of removal jurisdiction, Plaintiffs’ counsel are not aware of any
14 California state courts awarding plaintiffs multiple PAGA penalties for the same violation for the
15 same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does
16 not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

17 In preparation for mediation and during the settlement negotiations that followed,
18 Defendants disclosed that there were approximately 819 potentially aggrieved employees and
19 13,924 pay periods. DS, ¶ 15. The maximum possible civil penalties under the PAGA is
20 \$4,873,400.00 and it is calculated by the total number of pay periods with one or more violations
21 multiplied by the maximum possible civil penalty amount per pay period. *Id.* Unfortunately for
22 the employees concerned, the potential for recovery of the maximum possible civil penalties
23 depends on circumstances that are extremely unlikely independently and in combination. *Id.* It
24 would depend on the Court stacking the maximum recoverable civil penalties for per pay period
25 for all pay periods for all potentially aggrieved employees during the PAGA Period. *Id.* Plaintiffs’
26 counsel are not aware of any California State court decision awarding a plaintiff and the other
27 aggrieved employees she represents multiple civil penalties for the same pay period under
28 different Labor Code provisions. *Id.* Plaintiffs’ counsel had to substantially discount the value of



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1 these claims in the settlement negotiations for this and a variety of other reasons (outlined below).
2 *Id.*

3 **a. Risks Associated with Plaintiffs' Claim That Defendants**
4 **Failed To Pay All Earned Wages at the Correct Rates of Pay**

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

21 The difficulty inherent in proving that off-the-clock work occurred poses a significant
22 hurdle to Plaintiffs. DS, ¶ 18. Plaintiffs will rely on declarations and witness statements to prove
23 this claim. *Id.* Generally, a court will not certify a class unless it can determine an appropriate
24 methodology for all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014)
25 59 Cal. 4th 1. Here, Plaintiffs may rely heavily on anecdotal evidence to prove the off-the-clock
26 work claim, especially given the lack of records indicating when such off-the-clock work may
27 have taken place. *Id.* Individualized inquiries would need to be conducted person-by-person, day-
28 by-day, to determine if an individual in fact worked "minutes" off-the-clock on a "regular" basis.
Id. In preparation for mediation and during the settlement negotiations that followed, Plaintiffs'



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Counsel conducted a site inspection on November 5, 2020, where approximately 16 time clocks were counted, significantly more than the two to four working clocks that were on site while Plaintiffs were employed by Defendants. This has reduced the average amount of time that employees must wait to clock in to under one minute. Based on this site inspection Plaintiffs also recognize that proving which employees waited to use time clocks and for how long is challenging. DS, ¶ 17. Accordingly, there is a significant risk that the Court would consider this evidentiary showing insufficient as a methodology for all aggrieved employees.

b. Risks Associated with Plaintiffs' Claim That Defendants Failed To Provide All Meal Periods

There are risks to Plaintiffs' claims that defendant filed to provide all meal periods. DS, ¶ 19. Employees spent very small periods of time waiting to record time and recording time at Defendants' time clocks. *Id.* Therefore, the impact on time spent in meal periods is not large. *Id.* Defendants contend that, to establish a violation of the meal period law, a plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641.

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



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1 that the recoverable amount of civil penalties for unprovided meal periods would be substantially
2 reduced at trial. *Id.*

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

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

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

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

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



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1 subject to additional risks, as case law suggests that such premium payments are not to be
2 considered wages, and therefore do not give rise to claims for statutory penalties. *Id. See Jones*
3 *v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no
4 claim for Labor Code section 203 penalties based on meal period claims because “the underlying
5 violation that gives rise to a section 226.7 [meal period] claim is not the nonpayment of wages”);
6 *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28,
7 2011) (holding that Section 226(a) does not even cover meal period premium pay). Accordingly,
8 the *Jones* and *Nguyen* decisions will likely foreclose this claim.³

9 **e. Risks Associated with Plaintiffs’ Claim That Defendants**
10 **Failed To Timely Pay All Wages**

11 Plaintiffs’ claim that Defendants did not timely pay wages is predicated on Labor Code
12 §§ 201, 202, and 203. DS, ¶ 23. Defendants can argue based on the *Jones* and *Nguyen* decisions,
13 *supra*, that meal or rest premium pay is not a “wage” for purposes of Labor Code section 203
14 penalties. *Id.* Further, in the recent decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40
15 Cal.App. 5th 1239, the Court of Appeal held that unlawful meal and rest periods under section
16 226.7 cannot serve as a basis for recovery of penalties under section 203. *Id.* at 1252 (“We
17 conclude that the administrative and legislative history of the statute indicates that . . . the
18 Legislature intended section 226.7 first and foremost to *compensate* employeesSection
19 226.7’s additional hour of pay is a premium wage . . .not a penalty.”)(internal citations and
20 quotation marks omitted). Under the *Loews* decision, it is highly unlikely that the Court will
21 permit untimely wage penalties for Defendants’ alleged failure to provide meal and rest period
22 penalties.

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

24 The sole source of money recoverable for the PAGA Collective Members and the State
25 is civil penalties available under PAGA. DS, ¶ 24. It allows employees to seek civil penalties for

26 ³ Moreover, the Court of Appeal’s decision in *Naranjo v. Spectrum Security Services, Inc.* (2019)
27 40 Cal.App.5th 444, holding that a defendant’s failure to pay meal premiums does not give rise
28 to violations of Labor Code sections 226 or 203, is currently pending before the California
Supreme Court. *Naranjo v. Spectrum Security Services, Inc.* 2020 Cal. LEXIS 167. Tellingly, the
California Supreme Court chose not to de-publish the Court of Appeal’s decision in advance of
its ruling. *Id.*



certain violations of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory. *Id.* Plaintiffs’ maximum estimated liability exposure is based on the theories that: (1) Every paycheck that Defendants issued to employees during the PAGA Period represents a pay period in which every PAGA Collective Member suffered a minimum wage violation; (2) Every paycheck that Defendants issued to employees during the PAGA Period represents a pay period in which every PAGA Collective Member suffered a meal period violation; and (3) Every paycheck that Defendants issued to employees during the PAGA Period represents a pay period in which every PAGA Collective Member suffered a rest period violation. *Id.* There are no California state court decisions under the PAGA to date with substantial awards of civil penalties. *Id.* Plaintiffs’ counsel is aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts, one of which was overturned on May 28, 2021.⁴

Additionally, PAGA states a court has discretion to award a lesser amount than the maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the

⁴ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from the plaintiff’s claim for approximately \$33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant’s policies caused damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court noted had received “millions of dollars from the state of California” to train their flight attendants, engaged in glaring violations of the labor code, such as failing to compensate its flight attendants for work performed outside of “block time” (time during which the aircraft is moving), including time spent participating in pre-flight briefings, boarding passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049, 1055-1058. Indeed, defendant’s liability was so clear in *Bernstein* that the case was resolved on the plaintiffs’ motion for summary judgment. *Id.*

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



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1 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiffs’
2 evidence of willful and intentional conduct. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
3 (“*Carrington*”) illustrates this. In that case, the Court of Appeal affirmed a trial court’s heavily
4 discounted award of only \$5 per violation because it was within the Court’s discretion to
5 significantly reduce PAGA penalties even when there is a finding that a violation of the California
6 Labor Code occurred. Under *Carrington*, assuming 4 violations for each pay period for all PAGA
7 Collective Members, will result in a recovery of \$278,480.00 (13,924 x 4 x \$5 = \$278,480.00).
8 DS, ¶ 25.

9 Moreover, judges have awarded extremely small sums to PAGA claimants in the past.
10 DS, ¶ 26. In *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number
11 BC430633, the employer underpaid commission overtime wages. The plaintiff sought in excess
12 of \$9 million in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald
13 M. Sohigian awarded approximately \$275,000.00 in civil penalties under the PAGA. In a similar
14 PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company, Inc.*,
15 LA Superior Court Case No. BC492828, on October 24, 2017, the court awarded the prevailing
16 PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.

17 Defendants could also convince the Court to dismiss the claims due to unmanageability
18 because determining whether each Aggrieved Employee worked off the clock or why each
19 employee missed a meal or rest period would require separate mini-trials. DS, ¶ 27. *See, Mendiola*
20 *v. CPS ¶ Solutions, Inc.* (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court
21 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal.
22 2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have
23 required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed
24 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims
25 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
26 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
27 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating
28 trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved



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employees, judicial economy favors deferring the representative portion of the PAGA claim”); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), reh'g denied (Sept. 27, 2021) holding that trial courts have authority to ensure that claims under PAGA are manageable, and that courts may limit or strike unmanageable PAGA claims.

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

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

The United States Supreme Court announced on December 15, 2021 that, in the near future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide (likely no later than the end of summer 2022) whether or not to overrule the California Supreme Court’s decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private arbitration agreement cannot deprive an employee of his right to sue under PAGA in a court of law. If the Supreme Court sides with the Petitioner, Plaintiffs’ PAGA claim may be subject to an arbitration agreement allowing only bilateral arbitration and, consequently, inhibiting the claim altogether. While such an outcome would conflict squarely with *EEOC v. Waffle House* (2002) 534 US 279 (private settlement agreements do not preclude government prosecutions on behalf of employee signatories to such agreements), this potential outcome is a risk. DS, ¶ 29.

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

Each PAGA Collective Member will receive a portion of the civil penalties on a pro-rata basis depending on the number of pay periods Defendants employed them for during the PAGA



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1 Period. Agreement, ¶ 7(b). With a total of approximately PAGA Collective Members, the average
2 estimated individual Settlement Payment for each PAGA Collective Member is approximately
3 \$38.56 (\$31,583.33 / 819 PAGA Collective Members). DS, ¶ 30. Although an average payment
4 of \$38.56 per Aggrieved Employee is not an enormous sum of money, it is an excellent result
5 given the uncertainties this lawsuit entails. *Id.* It is also reasonable given the structure and purpose
6 of the PAGA. *Id.* The PAGA is not a restitution statute with a traditional damages provision
7 designed to restore victims to the position they would have been in had the Labor Code violations
8 not taken place. *Id.* Rather, it is at best a punishment statute designed to reduce future Labor Code
9 violations. It provides for civil penalties only. *Id.*

10 **5. Plaintiffs' Counsel is Experienced in Similar Litigation.**

11 Plaintiffs' counsel have considerable experience in class actions and wage and hour
12 litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving
13 forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 10 - 12.

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

15 Of the \$275,000.00 Gross Settlement Amount, Plaintiffs' counsel requests \$91,666.67
16 (1/3 of the Gross Settlement Amount) in attorney's fees and up to \$12,000.00 in litigation
17 expenses. DS, ¶ 32; Agreement, ¶ 2(d). The written retainer agreement Plaintiffs' counsel entered
18 into with Plaintiffs provided that their counsel may elect to recover either (a) statutorily awarded
19 attorney fees or (b) up to 40% of any recovery. *Id.*

20 It is an accepted practice in wage and hour class action settlements to award attorneys'
21 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
22 parties. California courts have long recognized that an appropriate method for awarding
23 attorneys' fees in class actions is to award a percentage of the common fund. *Serrano v. Priest*
24 (1977) 20 Cal.3d 25, 48-49 ("when a number of persons are entitled in common to a specific
25 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
26 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
27 fund"); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
28 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.



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1 California courts have the discretion to employ (or decline to employ) a “lodestar cross-
2 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
3 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
4 clear that this cross-check is not required and approved one-third of the class action settlement
5 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
6 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
7 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
8 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not
9 “engage in a full-blown lodestar analysis when the primary basis remains the percentage
10 method...” The lodestar calculation is merely a “useful perspective on the reasonableness of a
11 given percentage award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638
12 (“Trial courts ‘also retain the discretion to forgo a lodestar cross-check and use other means to
13 evaluate the reasonableness of a requested percentage fee.’”⁵ *Id.* (citing *Laffitte*)).

14 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
15 in class actions average around one-third of the recovery.” See *Chavez v. Netflix, Inc.* (2008) 162
16 Cal.App.4th 43, 66, fn.11 (“*Chavez*”); *In re Pacific Enter. Litig.* (9th Cir. 1995) 47 F.3d 373, 379
17 (“*Pacific*”) (affirming 33% fee award); *Williams v. MGM-Pathe Communications Co.* (9th Cir.
18 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount). This is also
19 consistent with Plaintiffs’ counsel’s experience in wage and hour class and PAGA settlements.
20 DS, ¶¶ 10-12.

21 Should the Court elect to use Plaintiffs’ counsel’s lodestar as the method for awarding
22 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiffs’ counsel’s fee
23 request of \$91,666.67 (one-third of the Gross Settlement Amount) is fair and reasonable based
24 _____

25 ⁵ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a))
26 does not apply to unpublished decisions from the lower federal courts. *Farm Raised Salmon*
27 *Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 (“Citing unpublished federal opinions does not violate
28 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 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶¶ 33 and 35.
2 Plaintiffs' counsel's previous experience in litigating wage and hour class actions and the caliber
3 of opposing counsel also support the reasonableness of the fee request. DS, ¶¶ 34.

4 In addition, Plaintiffs' Counsel incurred substantial costs, \$11,636.12 to date, including
5 the costs of a mediator to aid in the representation of the PAGA Collective Members.⁶ DS, ¶ 34.
6 Plaintiffs' Counsel anticipate that Plaintiffs will incur an additional \$818.72 in costs, which
7 include filing fees and attorney service fees for filing this motion, notice of entry of order, and
8 final accounting declarations. Plaintiffs' Counsel anticipate that litigation costs through final
9 accounting of the Settlement will exceed the \$12,000.00 amount provided for in the Agreement.
10 *Id.* As the evidence submitted herewith shows, all of these costs are documented and reasonably
11 incurred. Accordingly, \$12,000 in costs to Plaintiffs' Counsel warrants the Court's approval.

12 **7. Plaintiffs' General Release Payment Is Fair, Adequate, and**
13 **Reasonable and Should Be Approved.**

14 Plaintiffs' General Release Payment in the amount of \$10,000.00 is being paid to
15 Plaintiffs as PAGA Representatives for their general release and service to the State of California
16 and the PAGA Collective Members in prosecuting the Action. DS, ¶ 36.

17 Plaintiffs' General Release Payment of \$10,000.00 is entirely reasonable given Plaintiffs'
18 efforts in the Lawsuit and the risks they undertook on behalf of the PAGA Collective Members.
19 *See generally* Velez Decl. and Torrez Decl. DS, ¶ 36. Plaintiffs devoted many hours advancing
20 the interests of the PAGA Collective Members. *Id.* Plaintiffs have done this, by, among other
21 things, retaining experienced counsel, providing them with information about their work history
22 with Defendants, assisting in contacting absent PAGA Collective Members to gather information,
23 participating in mediation, and being actively involved in the settlement process to ensure a fair
24 result for the PAGA Collective Members as a whole. *Id.* In doing this, Plaintiffs have been
25 exposed to significant risks, including the risk of an order to pay Defendants' attorneys' fees and
26 costs if this action had been unsuccessful and in bad faith *See* Labor Code §§ 218.5-218.6. The

27 ⁶ Plaintiffs' counsel does not seek reimbursement for the wages they paid to the attorneys,
28 paralegals, and legal assistants to aid in the representation of the PAGA Collective Members and
the State. Plaintiffs' counsel bore these expenses over the lengthy since they began work on this
matter without reimbursement.



1 efforts and risks that Plaintiffs undertook on behalf of the PAGA Collective Members show that
2 the proposed General Release Payment to Plaintiffs is fair, adequate, and reasonable, and thus
3 warrants approval. *Id.*

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

6 With regard to the Third-Party Settlement Administration Fees provision, it is reasonable.
7 Before agreeing to Phoenix Class Action Administration Solutions, the Parties sought and
8 reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶
9 38, Exhibits 22-24. Thus, the Settlement Administration Fees provision should be given approval.

10 **V. CONCLUSION**

11 For the reasons stated above, this Court should grant the Plaintiffs' Motion in its entirety
12 and adopt the proposed order submitted concurrently herewith.

13 Respectfully submitted,

14 THE SPIVAK LAW FIRM

15 Dated: June 3, 2022

16 By:



17 DAVID G. SPIVAK
18 CHRISTINA PREJEAN
19 Attorneys for Plaintiffs, MARIA
20 VELEZ, CLAUDIA TORREZ, and all
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