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

13 TUAN HOANG, on behalf of himself and as an
14 “aggrieved employee” on behalf of other
15 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

16 *Plaintiff,*

17 vs.

18 MDC VACUUM PRODUCTS LLC, a Delaware
19 limited liability company; and DOES 1–50,
inclusive,

20 *Defendants.*
21
22

Case No. 21CV376678

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

Hearing Date: April 26, 2022
Hearing Time: 1:30 p.m.
Hearing Dept.: 19, The Honorable
Theodore C. Zayner

Action filed: March 01, 2021



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

3 **I. INTRODUCTION**

4 Plaintiff Tuan Hoang (“Plaintiff” or “Hoang”) submits this memorandum of points and
5 authorities in support of his motion for approval of the PAGA Settlement Agreement (the
6 “Agreement” or “PAGA Settlement” or “Settlement”)² for the civil penalties claim he brought
7 against Defendant MDC Vacuum Products LLC (“Defendant”) under the Labor Code Private
8 Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this
9 motion because Labor Code section 2699(l) of the PAGA requires Court-approval of any civil
10 penalties sought as part of a proposed settlement agreement. Based on Plaintiff’s and his
11 attorneys’ investigation and evaluation, Plaintiff is of the opinion that the PAGA Settlement
12 represents a reasonable and adequate settlement of strongly disputed claims and is in the best
13 interest of the State of California, the PAGA Members, and Plaintiff. Through this motion,
14 therefore, Plaintiff respectfully requests for this Court to approve the PAGA Settlement for
15 resolution of the PAGA claim.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

17 Defendant delivers high quality products and comprehensive design and manufacturing
18 solutions to the research, semiconductor, aerospace, life sciences and food processing sectors.
19 DS, ¶ 3. Defendants employed Plaintiff as an expeditor from about January 9, 2017 until
20 September 01, 2020. *Id.*

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

22 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under
23 PAGA. By letter dated December 23, 2020, Plaintiff, on behalf of himself and other aggrieved
24 hourly employees gave written notice by certified mail to the Labor and Workforce Development
25 Agency (“LWDA”) and Defendant of the specific provisions of the California Labor Code
26 alleged to have been violated, including the facts and theories to support the alleged violations.
27 DS, ¶ 4, Ex. 3.

28 **B. Plaintiff’s PAGA Claim**

Plaintiff and the PAGA Members are subject to arbitration agreements with Defendant.

On March 1, 2021, Plaintiff filed a Class Action Complaint in the Santa Clara County
Superior Court, Case No. 21CV376678, against Defendant on behalf of himself and others

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 similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Provide Meal
2 and Rest Periods (Lab. Code §§226.7, 512 and 1198); (2) Failure to Pay All Wages Earned for
3 All Hours Worked at the Correct Rates of Pay (Lab. Code §§ 510, 1194, 1197, and 1198); (3)
4 Failure to Indemnify (Lab. Code §§ 1198 and 2802); (4) Wage Statement Penalties (Lab. Code §
5 226); (5) Waiting Time Penalties (Lab. Code §§ 201-203); and (6) Failure to Maintain Accurate
6 Employment Records (Lab. Code §§ 1174, 1174.5, and 1198); (7) Unfair Competition (Bus. &
7 Prof. Code §§ 17200, et seq.); and (8) Civil Penalties under PAGA (Lab. Code §§ 2698, et seq.).
8 DS, ¶ 5, Ex. 4. After Plaintiff filed his Class Action Complaint, Defendant produced a Mutual
9 Arbitration Agreement signed by Plaintiff on August 26, 2020, which includes a class action
10 waiver which Defendant contends is enforceable. As a result, on June 22, 2021, Plaintiff filed a
11 Request to Dismiss Class Allegations and File First Amended Complaint. DS, ¶ 5, Ex. 5. On June
12 22, 2021, the Court granted Plaintiff's request for dismissal of the class action allegations from
13 Plaintiff's operation Complaint without prejudice, and allowed Plaintiff to file a First Amended
14 Complaint which pleads a representative action for civil penalties under the PAGA. DS, ¶ 5, Ex.
15 6. On June 23, 2021, Plaintiff filed his First Amended Complaint which presents one cause of
16 action for civil penalties under PAGA. DS, ¶ 5, Ex. 7.

17 **C. Mediation**

18 On January 14, 2022, the Parties participated in mediation with mediator Louis Marlin in
19 an attempt to resolve the PAGA claim. The Parties engaged in arm's-length negotiations and
20 ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement
21 was reached after exchanges of data, information and documents, and is a result of extensive
22 arms-length negotiations. The Parties conducted informal discovery for purposes of potential
23 resolution through which they ascertained the size of the aggrieved employee group and the
24 number of pay periods worked by them during the PAGA Period to ascertain the total value of
25 Plaintiff's PAGA claim. Now that the parties have finalized the PAGA Settlement, Plaintiff
26 submits it to this Court for approval. DS, ¶ 6.

27 **III. OVERVIEW OF SETTLEMENT**

28 **A. "PAGA Members" Definition**

The PAGA Members are all current and former hourly or non-exempt employees of
Defendant who worked in California at any time during the period from December 26, 2019
through Court-approval date (the "PAGA Period") (collectively referred to as "PAGA



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Members”). Settlement, ¶¶ 1-2.

B. Monetary Terms Of The Settlement

Defendant will pay Four Hundred and Eighty Thousand Dollars and Zero Cents (\$480,000.00) to settle the PAGA claims in the Action (“Maximum Settlement Amount”). In no event shall Defendant be liable for more than the Maximum Settlement Amount of Four Hundred and Eighty Thousand Dollars and Zero Cents (\$480,000.00) as a result of this Settlement. The Maximum Settlement Amount will be allocated as follows:

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

b. Plaintiff’s counsel’s, The Spivak Law Firm and United Employees Law Group (“PAGA Counsel”), request for attorneys’ fees of up to one-third (1/3) of the Maximum Settlement Amount, or One Hundred and Sixty Thousand Dollars and Zero Cents (\$160,000.00) (“PAGA Counsel’s Fees”), subject to Court approval, plus actual costs and expenses incurred by PAGA Counsel related to the Action as supported by declaration, which are currently estimated to be no greater than Fifteen Thousand Dollars and Zero Cents (\$15,000.00) (“PAGA Counsel’s Costs”);

c. A payment to Plaintiff in the amount of Fifteen Thousand Dollars and Zero Cents (\$15,000.00) (“Enhancement Award”) for (1) his general release that includes a release of claims pursuant to California Civil Code section 1542 and (2) his service to the State of California and the Aggrieved Employees in prosecuting the Action; and

d. The remaining funds (the Maximum Settlement Amount less the Third-Party Settlement Administration Fees, PAGA Counsel’s Fees, PAGA Counsel’s Costs, and Plaintiff’s Enhancement Award) shall be referred to as the “Net Settlement Amount.” Settlement, ¶ 4.

C. Timing of Payments

Within thirty (30) calendar days after the Effective Date and notice by the Court or Plaintiff that the Action has been dismissed with prejudice, Defendant shall deposit the Maximum Settlement Amount with the Settlement Administrator, who shall issue payment to PAGA Counsel and Plaintiff within twenty (20) calendar days of receipt of the Maximum Settlement Amount. Within thirty (30) calendar days after the Effective Date, Defendant shall provide the Settlement Administrator with the list of all Aggrieved Employees, with each listed employee’s full name, hiring, and, if applicable, termination dates in connection with the employee’s employment with Defendant during the PAGA Period, last known mailing address, and social



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1 security number. Within twenty (20) calendar days of receipt of the list of all Aggrieved
2 Employees, the Settlement Administrator shall run all the addresses of Aggrieved Employees
3 through the United States Postal Service NCOA database to obtain current address information,
4 and issue payments to (a) Aggrieved Employees; (b) the LWDA; and (c) itself. The Settlement
5 Administrator will skip-trace return mail and re-mail within five (5) calendar days. The
6 Settlement Administrator will issue the appropriate tax forms for all payments issued under this
7 Settlement. If the Effective Date falls on a holiday or weekend, the Effective Date shall be the
8 next calendar day. Settlement, ¶ 9.

9 **D. Calculation of Settlement Shares**

10 The Net Settlement Amount shall be designated as PAGA penalties in full satisfaction of
11 all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations,
12 and/or other provisions of law alleged to have been violated in or reasonably related to the
13 operative First Amended Complaint with respect to the Aggrieved Employees, allocated between
14 the LWDA and the Aggrieved Employees pursuant to Labor Code section 2699(i) with 75.0%
15 paid to the LWDA and 25.0% paid to the Aggrieved Employees on a pro-rata basis (“PAGA
16 Penalties Fund”). The 25.0% of the Net Settlement Amount will be paid to all Aggrieved
17 Employees according to the following formula: Settlement Payment to each Aggrieved
18 Employee = $[\$[25.0\% \text{ of Net Settlement Amount}] \times [\text{Pay Periods Worked by Individual Aggrieved Employee During PAGA Period} \div \text{Total Pay Periods Worked by All Aggrieved Employees during PAGA Period}]]$. Settlement, ¶ 5.

19 **E. Apportionment of Settlement Shares**

20 The Net Settlement Amount shall be designated as PAGA penalties in full satisfaction of
21 all claims for PAGA civil penalties.

22 **F. The Releases**

23 As of and subject to the occurrence of the Effective Date, and in consideration for the
24 Maximum Settlement Amount, the claims settled, fully released and forever discharged by the
25 LWDA and the Aggrieved Employees, including Plaintiff, constitute any and all claims under
26 the Private Attorneys General Act, inclusive of all civil penalties, attorneys’ fees, interest,
27 liquidated damages, injunctive relief, and costs, for alleged violations of California Labor Code
28 §§ 201-204, 221, 226, 226.7, 246, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1198, 2802 and 2698
et seq. and the applicable Wage Order(s) during the PAGA Period arising from (1) any allegation
in the Action and (2) any allegation that could have been pleaded in the Action, whether known



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1 or unknown, that relates to the (a) failure to pay all wages earned for all hours worked or amounts
2 otherwise due under the Labor Code at the correct regular rate of pay, (b) failure to provide
3 compliant rest breaks and meal periods, (c) failure to reimburse necessary business expenses, (d)
4 failure to provide timely and accurate wage statements, (e) failure to timely pay wages during
5 employment and upon separation, and (f) failure to maintain accurate employment records
6 (“PAGA Released Claims”) against the Released Parties. The “Released Parties” are MDC
7 Vacuum Products, LLC; MDC Precision, LLC; MDC Precision, Inc; and their present and former
8 parent companies, subsidiaries, divisions, concepts, related or affiliated companies, and its
9 shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns,
10 and any other individual or entity that could be liable for any of the PAGA Released Claims
(hereinafter “Released Parties”). Settlement, ¶ 13.

11 **G. Uncashed Checks**

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

25 **IV. ARGUMENT**

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

27 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The
28 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



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

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

24 In making the determination whether a settlement taken as a whole is fair, reasonable, and
25 adequate, the Court should be careful to still give “proper deference to the private consensual
26 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
27 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
28 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*



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

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

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

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

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

The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The Parties reached the Settlement through arm's-length bargaining with the aid of a respected mediator; (2) The Parties conducted sufficient investigation and discovery to allow Counsel and the Court to act intelligently. Plaintiff requested and Defendant provided the number PAGA Members, the number of total pay periods during the PAGA Period, and all policies in effect



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1 during the relevant time period; and (3) Counsel for the Parties are experienced with PAGA cases.
2 DS, ¶ 8. For the reasons discussed below, this Court should approve the PAGA Settlement.

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

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

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

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

- 16 • Defendant produced and Plaintiff reviewed his personnel file.
- 17 • Defendant produced and Plaintiff reviewed and analyzed time and payroll
18 records for over 329 PAGA Members.
- 19 • Plaintiff requested that Defendant produce any and all relevant policies
20 regarding Plaintiff's claims and Defendant produced those policies in
21 effect during the relevant time period.
- 22 • Plaintiff interviewed other employees about the claims at issue.
- 23 • Plaintiff analyzed the state of caselaw on PAGA claims, claims for failure
24 to pay employees all earned wages, failure to provide meal periods, failure
25 to authorize and permit rest periods, failure to indemnify for business
26 expenses, failure to issue proper wage statements, failure to timely pay
27 wages, and related claims.
- 28 • Plaintiff surveyed the outcomes of PAGA cases that went to trial or
otherwise concluded before trial.

DS, ¶ 13.

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

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



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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). As set forth above, Defendants have posed valid defenses
3 to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims
4 likewise face significant uncertainty. DS, ¶ 14. There is a risk that the Court would consider the
5 maximum civil penalty available to be confiscatory. This uncertainty increases Plaintiff's risk of
6 pursuing the PAGA claims and required a significant discount for settlement purposes. *Id.* For
7 mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately
8 \$8,143,000.00 in civil penalties. This estimate did not take into account any of the risks discussed
9 below and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed
10 multiple 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, Plaintiff's counsel is 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 Defendant disclosed that there were approximately 329 potentially aggrieved employees and
19 9,580 pay periods. The maximum possible civil penalties under the PAGA is the total number of
20 pay periods with one or more violations multiplied by the maximum possible civil penalty amount
21 per pay period. Unfortunately for the employees concerned, the potential for recovery of the
22 maximum possible civil penalties depends on circumstances that are extremely unlikely
23 independently and in combination. It would depend on the Court stacking the maximum
24 recoverable civil penalties for failure to pay employees all earned wages, failure to provide meal
25 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
26 failure to issue proper wage statements, failure to timely pay wages per pay period for all 9,580
27 pay periods for all 329 potentially aggrieved employees during the PAGA Period. Plaintiff's
28 counsel is not aware of any California State court decision awarding a plaintiff and the other
aggrieved employees he represents multiple civil penalties for the same pay period under
different Labor Code provisions. Plaintiff's counsel had to substantially discount the value of
these claims in the settlement negotiations for this and a variety of other reasons (outlined below).



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DS, ¶ 15.

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

There is a risk that Plaintiff's claim that Defendant did not pay all wages at the correct rates of pay would be extremely limited at best. The predicate for Plaintiff's unpaid wage claim is Defendant's failure to pay overtime wages on bonuses it paid to the Class Members. However, Defendant presented evidence that its bonuses were discretionary. As such, Defendant would have no obligation to pay overtime wages on the bonuses. DS, ¶ 16.

b. Risks Associated with Plaintiff's Claim That Defendant Failed To Provide All Meal Periods

There are risks to Plaintiff's claims that defendant failed to provide all meal periods. DS, ¶ 17. Defendant presented evidence that Class Members were free to take meal periods when they wanted and that records of late meal periods were the result of Class Members choosing to postpone their meal periods. Defendant contends 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. *Id.*

Defendant contends it did not impede or discourage Plaintiff, or any other employees, from taking their meal periods. DS, ¶ 17. Defendant's 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 Defendant produced to Plaintiff 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 Defendant or each of the employees concerned. Accordingly, there is a significant risk that the recoverable amount of civil penalties for unprovided meal periods would be substantially reduced at trial. *Id.*

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1 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
2 DS, ¶ 20.

3 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
4 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
5 with the requirements of Labor Code § 226.

6 **f. Risks Associated with Plaintiff's Claim That Defendant Failed**
7 **To Timely Pay All Wages**

8 Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 203. Like
9 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
10 The evidence of good faith Defendants put forth will defeat this claim. DS, ¶ 21.

11 **g. The Absence of Large Civil Penalty Awards under PAGA**

12 The sole source of money recoverable for the PAGA Members and the State is civil
13 penalties available under PAGA. It allows employees to seek civil penalties for certain violations
14 of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory.
15 As discussed above, Plaintiff's maximum estimated liability exposure is based on the theories
16 that: (1) Every paycheck that Defendant issued to employees during the PAGA Period represents
17 a pay period in which every PAGA Member suffered a minimum wage violation; (2) Every
18 paycheck that Defendant issued to employees during the PAGA Period represents a pay period
19 in which every PAGA Member suffered an overtime wage violation; (3) Every paycheck that
20 Defendant issued to employees during the PAGA Period represents a pay period in which every
21 PAGA Member suffered a meal period violation; (4) Every paycheck that Defendant issued to
22 employees during the PAGA Period represents a pay period in which every PAGA Member
23 suffered a rest period violation; and (5) Every paycheck that Defendant issued to employees
24 during the PAGA Period represents a pay period in which every PAGA Member suffered an
25 unreimbursed expense violation. There are no California state court decisions under the PAGA
26 to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only two
27 significant awards under the PAGA in a contested proceeding, both issued by federal district
28 courts, one of which was overturned on May 28, 2021.³ DS, ¶ 22.

³ 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*



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1 Additionally, PAGA states a court has discretion to award a lesser amount than the
2 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
3 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
4 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
5 evidence of willful and intentional conduct. *Carrington v. Starbucks (2018) 30 Cal.App.5th 504*
6 (*"Carrington"*) illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
7 discounted award of only \$5 per violation because it was within the Court's discretion to
8 significantly reduce PAGA penalties even when there is a finding that a violation of the California
9 Labor Code occurred. Under *Carrington*, assuming violations for each pay period for all 329
PAGA Members, will result in a recovery of \$47,900 (9,580 x 1 x \$5 = \$47,900). DS, ¶ 23.

10 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
11 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
12 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
13 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
14 awarded approximately \$325,000.00 in civil penalties under the PAGA. DS, ¶ 24, Exs. 9-11. In
15 a similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving*
16 *Company, Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded
17 the prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur
18 here. DS, ¶ 24, Ex. 12.

19 _____
20 suffered a particularly sizeable injury – the court found that the defendant's policies caused
21 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
22 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to
23 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
24 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.*

25 In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
26 awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
27 comply with the requirements of California Labor Code section 226. On May 28, 2021, the United
28 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 Defendant could also convince the Court to dismiss the claims due to unmanageability
2 because determining whether each Aggrieved Employee worked off the clock or why each
3 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*
4 *CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court
5 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal.
6 2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have
7 required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed
8 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims
9 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
10 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
11 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating
12 trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved
13 employees, judicial economy favors deferring the representative portion of the PAGA claim”);
14 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on
15 September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The*
16 *Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), reh’g denied (Sept. 27, 2021) holding that
17 trial courts have authority to ensure that claims under PAGA are manageable, and that courts may
18 limit or strike unmanageable PAGA claims. DS, ¶ 25.

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

25 **h. The Risk That PAGA Claims Are Subject To Arbitration**
26 **Agreements**

27 The arbitration agreements entered into between Defendant on the one hand, and the
28 Plaintiff and comparable workers, on the other, present a significant risk to the success of
Plaintiff’s representative litigation. DS, ¶ 26. According to Defendant, the majority of the
workers entered into arbitration agreements with Defendants. *Id.* Recently, with *Viking River*
Cruises, Inc. v. Moriana (2022) 142 S.Ct. 1906, the Supreme Court was to decide whether to
overrule the California Supreme Court’s decision in *Iskanian v. CLS Transportation* (2014) 59



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Cal.4th 348 that a private arbitration agreement cannot deprive an employee of his right to sue under PAGA in a court of law. The Supreme Court in *Viking* ultimately held that the employer could enforce the arbitration agreement as to the employee’s individual PAGA claim, and that the employee lacked standing to maintain her representative PAGA claims. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), reh’g denied, No. 20-1573, 2022 WL 3580311 (U.S. Aug. 22, 2022). Therefore, Plaintiff would effectively run the risk of the Court compelling his representative PAGA claim to individual arbitration. Also, because different defenses would apply to some workers and not others – i.e., the existence of signed arbitration agreements – there is a risk that the Court could determine that Plaintiff’s claims present too many individualized inquiries to allow for manageable PAGA trial. *Id.*

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

Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis depending on the number of pay periods Defendant employed them for during the PAGA Period. Agreement, ¶ 5. With a total of approximately 329 PAGA Members, the average estimated individual Settlement Payment for each PAGA Member is approximately \$224.16 (\$73,750.00 / 329 PAGA Members). Although an average payment of \$224.16 per Aggrieved Employee is not an enormous sum of money, it is an excellent result given the uncertainties this lawsuit entails. It is also reasonable given the structure and purpose of the PAGA. The PAGA is not a restitution statute with a traditional damages provision designed to restore victims to the position they would have been in had the Labor Code violations not taken place. Rather, it is at best a punishment statute designed to reduce future Labor Code violations. It provides for civil penalties only. DS, ¶¶ 28-29.

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

Plaintiff’s counsel have considerable experience in class actions and wage and hour litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 10 – 12; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 2.

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

3 Of the \$480,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$160,000.00
4 (1/3 of the Gross Settlement Amount) in attorney's fees and up to \$15,000.00 in litigation
5 expenses. DS, ¶ 30; Agreement, ¶ 4. The written retainer agreement Plaintiff's counsel entered
6 into with Plaintiff provided that his counsel may elect to recover either (a) statutorily awarded
7 attorney fees or (b) up to 40% of any recovery. *Id.*

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

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



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1 evaluate the reasonableness of a requested percentage fee.’”⁴ *Id.* (citing *Laffitte*)).

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

9 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
10 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
11 fee request of \$160,000.00 (one-third of the Gross Settlement Amount) is fair and reasonable
12 based on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 31, Ex. 13.
13 Plaintiff’s counsel’s previous experience in litigating wage and hour class actions and the caliber
14 of opposing counsel also support the reasonableness of the fee request. DS, ¶ 30.

15 In addition, Plaintiff’s Counsel incurred substantial costs, \$10,488.22 to date, including
16 the costs of a mediator to aid in the representation of the PAGA Members.⁵ DS, ¶ 32, Ex. 14.
17 Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$1,000 in costs, which consist
18 of filing fees and attorney service fees for filing this motion and notice of entry of order.
19 Plaintiff’s Counsel anticipate that litigation costs will total approximately \$12,000 through final
20 accounting of the Settlement. *Id.* As the evidence submitted herewith shows, all of these costs
21 are documented and reasonably incurred. DS, ¶ 32 Ex. 14. Accordingly, they warrant the Court’s
22 approval.

23 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a))
24 does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon*
25 *Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [“Citing unpublished federal opinions does not violate
26 our rules.”].) Like published decisions of the lower federal courts, unpublished decisions are not
27 binding on us even on questions of federal law, but they are persuasive authority. (*Western*
28 *Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

⁵ 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 lengthy since they began work on this matter
without reimbursement.



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1 **7. Plaintiff's General Release Payment Is Fair, Adequate,**
2 **and Reasonable and Should Be Approved.**

3 Plaintiff's General Release Payment in the amount of \$15,000.00 is being paid to Plaintiff
4 as PAGA Representative for his general release and service to the State of California and the
5 PAGA Members in prosecuting the Action. DS, ¶ 35.

6 Plaintiff's General Release Payment of \$15,000.00 is entirely reasonable given Plaintiff's
7 efforts in the Lawsuit and the risks he undertook on behalf of the PAGA Members. *See generally*
8 Hoang Decl. Plaintiff devoted many hours advancing the interests of the PAGA Members. *Id.*
9 Plaintiff has done this, by, among other things, retaining experienced counsel, providing them
10 with information about his work history with Defendant, assisting in contacting absent PAGA
11 Members to gather information, participating in mediation, and being actively involved in the
12 settlement process to ensure a fair result for the PAGA Members as a whole. *Id.* In doing this,
13 Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendant's
14 attorneys' fees and costs if this action had been unsuccessful and in bad faith (*See* Labor Code
15 §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the PAGA Members
16 show that the proposed General Release Payment to Plaintiff is fair, adequate, and reasonable,
17 and thus warrants approval. *See generally* Hoang Decl. DS, ¶36.

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

21 With regard to the Third-Party Settlement Administration Fees provision, it is reasonable.
22 Before agreeing to CPT Group, Inc., the Parties sought and reviewed bids from other reputable
23 third-party administrators which provided higher bids. DS, ¶¶ 37 – 38, Exs. 15 - 20. Thus, the
24 Settlement Administration Fees provision should be given approval.

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1 **V. CONCLUSION**

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

4 Respectfully submitted,

5 THE SPIVAK LAW FIRM

6 Dated: January 23, 2023

7 By: David Spivak
8 DAVID G. SPIVAK
9 MAYA CHEAITANI
10 Attorneys for Plaintiff, TUAN
11 HOANG, and all others similarly
12 situated
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