

1 DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

2 MAYA CHEAITANI (SBN 335777)

maya@spivaklaw.com

3 THE SPIVAK LAW FIRM

8605 Santa Monica Bl

4 PMB 42554

5 West Hollywood, CA 90069

Telephone: (213) 725-9094

6 Facsimile: (213) 634-2485

7 WALTER HAINES (SBN 71075)

whaines@uelglaw.com

8 UNITED EMPLOYEES LAW GROUP

9 4276 Katella Ave, #301

10 Los Alamitos, CA 90720

Telephone: (562) 256-1047

11 Facsimile: (562) 256-1006

12 Attorneys for Plaintiff,

13 THERESEA RIVES, and all others similarly situated

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **FOR THE COUNTY OF MARIN**
16 **(UNLIMITED JURISDICTION)**

17
18 THERESEA RIVES, as an “aggrieved
19 employee” on behalf of other “PAGA
20 Members” under the Labor Code Private
21 Attorneys General Act of 2004,

22 *Plaintiff,*

23 *vs.*

24 CF SAN RAFAEL, LLC , a California
25 limited liability company; CAMBRIDGE
26 HEALTHCARE SERVICES, LLC, a
27 California limited liability company; and
28 DOES 1–50, inclusive,

Defendant(s).

Case no.: CIV2100671

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

Hearing Date:

Hearing Time: 1:30 p.m.

Hearing Dept.: Courtroom B, Hon. James
Chou



SPIVAK LAW

Employee Rights Attorneys
8605 Santa Monica Blvd.
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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Employee Rights Attorneys
8605 Santa Monica Blvd.
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
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8605 Santa Monica Blvd.
PMB 42554
West Hollywood, CA 90069
((213) 725-9094 Tel
(213) 634-2485 Fax
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8605 Santa Monica Blvd.
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West Hollywood, CA 90069
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(213) 634-2485 Fax
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SPIVAK LAW

Employee Rights Attorneys
8605 Santa Monica Blvd.
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff THERESEA RIVES (“Plaintiff” or “Rives”) submits this memorandum of points and authorities in support of her motion for approval of the PAGA Settlement Agreement (the “Agreement” or “PAGA Settlement” or “Settlement”)¹ for the civil penalties claim she brought against Defendant CF San Rafael, LLC (“Defendant”) under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code section 2699(l) of the PAGA requires Court-approval of any civil penalties sought as part of a proposed settlement agreement. Based on Plaintiff’s and her counsels’ investigation and evaluation, the PAGA Settlement represents a reasonable and adequate settlement of strongly disputed claims and is in the best interest of the State of California, the PAGA Members, and Plaintiff. Through this motion, therefore, Plaintiff respectfully requests for this Court to approve the PAGA Settlement for resolution of the PAGA claim.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant CF San Rafael is a California limited liability company. CF San Rafael operates Professional Post-Acute Center, a 99-bed skilled nursing facility located in San Rafael, California. The private facility provides rehabilitation, care, skilled nursing and other services to short and long-term residents. Defendant began to employ Rives on or about September 9, 2019 to work as a medical records supervisor (though she and the other PAGA Members with “supervisor” in their title did not hold any supervisory duties), and continuously employed her in this capacity until October 2, 2020 when her employment ended. DS, ¶ 3.

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

Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under PAGA. By letter dated December 7, 2020 Plaintiff, on behalf of herself and other aggrieved hourly employees, gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendant of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. DS, ¶ 4,

¹ The PAGA Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of David Spivak (“DS”), which is submitted herewith under a separate cover. In addition to the PAGA Settlement, the Parties entered into an individual confidential settlement agreement, pursuant to which, Plaintiff provided Defendant with a release of any and all of her individual claims, suits, causes of action, known or unknown, which Plaintiff may have or holds against Defendant in exchange for the consideration provided. DS, ¶ 6.



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Employee Rights Attorneys

8605 Santa Monica Blvd.

PMB 42554

West Hollywood, CA 90069 (213)

725-9094 Tel

(213) 634-2485 Fax

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Ex. 3.

B. Plaintiff's PAGA Claim

Plaintiff and the PAGA Members are subject to arbitration agreements with Defendant. Plaintiff filed her lawsuit in Marin County Superior Court on February 18, 2021. DS, ¶ 5, Ex. 4. Plaintiff's complaint presents one cause of action for civil penalties under PAGA. *Id.* On May 11, 2021, Plaintiff filed a request for dismissal of Defendant Cambridge Healthcare Services, LLC, based on a tolling agreement executed by the Parties. DS, ¶ 5, Ex. 5.

C. Mediation

On December 2, 2021, the Parties participated in mediation with mediator Glenn E. Lerman, an experienced and well-respected mediator, in an attempt to resolve the PAGA claim. The Parties engaged in arm's-length negotiations and ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement was reached after exchanges of data, information and documents, and is a result of extensive arms-length negotiations. The Parties conducted informal discovery for purposes of potential resolution through which they ascertained the size of the aggrieved employee group and the number of pay periods worked by them during the PAGA Period to ascertain the total value of Plaintiff's PAGA claim. Now that the parties have finalized the PAGA Settlement, Plaintiff submits it to this Court for approval. DS, ¶ 6.

III. OVERVIEW OF SETTLEMENT

A. "PAGA Members" Definition

The PAGA Members are all current and former non-exempt, hourly California employees Defendant employed any time during the PAGA Period. The PAGA Period is December 8, 2019 through the date the Court grants final approval of the Agreement or April 1, 2022, whichever is the earlier. Agreement, ¶ 1-2.

B. Monetary Terms Of The Settlement

Defendant has agreed to pay the Gross Settlement Amount ("GSA") of Two Hundred and Fifteen Thousand Dollars (\$215,000.00), which is the total and all-inclusive amount Defendant will pay under this Agreement for settlement and release of the representative claims that were asserted in the Action, in addition to the representative claims that could have been asserted in the Action based on the allegations therein, inclusive of PAGA penalties to the State of California, including the California Labor and Workforce Development Agency ("LWDA"), PAGA penalties to PAGA Members, Plaintiff's attorneys' fees and costs, and the Settlement Administrator's fees and costs. No portion of the Gross Settlement Amount will be retained by, or revert to, Defendant. Agreement, ¶ 4.



1 Within forty-five (45) calendar days after the Effective Date and notice by the Court or
2 Plaintiff that the Action has been dismissed with prejudice, Defendant shall deposit the GSA with
3 the Settlement Administrator, who shall issue payment to PAGA Counsel and Plaintiff within
4 (30) calendar days of receipt of the Gross Settlement Amount. Agreement, ¶ 10.

5 The GSA will be allocated as follows:

6 1. **Attorneys' Fees and Costs.** Plaintiff's Counsel's, The Spivak Law Firm
7 and United Employees Law Group ("PAGA Counsel") attorneys' fees amounting to \$66,666.00
8 (one third of the GSA exclusive of the payment to Plaintiff for her General Release Payment) and
9 litigation costs of no more than \$15,000²;

10 2. **Settlement Administrator's Fees and Costs.** Settlement Administrator's
11 Fees and Costs to CPT Group, Inc. ("CPT" or "Settlement Administrator") to administer the
12 Settlement. These costs are expected not to exceed \$5,000.

13 3. **General Release Payment.** A payment to Plaintiff in the amount of
14 \$15,000.00 for her (1) general release that includes a release of claims pursuant to California Civil
15 Code section 1542, and (2) her services to the State of California and the PAGA members in
16 prosecuting the Action.

17 4. **Net Settlement Amount.** The remainder of the GSA, after payment of the
18 Attorneys' Fees and Costs, and Settlement Administrator's Fees and Costs, to the extent they are
19 granted and/or approved by the Court, as set forth herein, shall be allocated to the payment of
20 civil penalties pursuant to the PAGA ("Net Settlement Amount").

21 i. **Civil Penalty Payment to the LWDA.** Pursuant to Labor Code
22 Section 2699(i), seventy five percent (75%) of the Civil Penalties Fund will be paid to the LWDA.

23 ii. **Civil Penalty Payments to PAGA Members.** Pursuant to Labor
24 Code Section 2699(i), twenty five percent (25%) of the Civil Penalties Fund will be paid to all
25 PAGA Members. PAGA Members are not required to submit a claim for their Civil Penalty
26 Payment. Each PAGA Member's Civil Penalty Payment from the Civil Penalties Fund shall be
27 based on the PAGA Member's Individual Pay Periods as a pro rata share of the Total Pay Periods
28 for all PAGA Members during the PAGA Period. "Total Pay Periods" will be the total number of
pay periods for all PAGA Members during the PAGA Period, according to Defendant's records.
"Individual Pay Periods" will be the total number of pay periods worked by an individual PAGA

² Plaintiff Counsel's estimated current costs are \$7,656.44. DS, ¶ 28.



1 Member during the PAGA Period, according to Defendants' records. The Settlement
2 Administrator shall issue an IRS Form 1099 for each PAGA Member's Civil Penalty Payment.
3 Agreement, ¶¶ 4, 6, 11.

4 **B. PAGA Members Contact and Pay Period Information.**

5 No later than thirty (30) calendar days after the Court's entry of the order granting final
6 approval of the Agreement and dismissing the Action with prejudice, Defendant shall provide the
7 Settlement Administrator with a list of all PAGA Members. The PAGA Members List shall state
8 each listed employee's full name, hiring, and, if applicable, termination dates in connection with
9 the employee's employment with Defendant during the PAGA Period, last known mailing
10 address, and social security number. Within twenty (20) calendar days after receiving the list of
11 all PAGA Members from Defendant, the Settlement Administrator shall run all the addresses of
12 PAGA Members through the United States Postal Service NCOA database to obtain current
13 address information, and issue payments to (a) PAGA Members; (b) the LWDA; and (c) itself.
14 Agreement, ¶ 10.

15 **C. Mailing of Settlement Payments to PAGA Members and Notice Letters**

16 Within thirty (30) calendar days of receipt of the GSA, the Settlement Administrator shall
17 issue each PAGA Member a check for his or her share of the Net Settlement Amount along with
18 an explanatory letter in the form attached as Exhibit A to the Settlement Agreement ("Notice
19 Letter"). Agreement, ¶ 11. The Settlement Administrator will skip-trace return mail and re-mail
20 within five (5) calendar days. Agreement, ¶ 10.

21 **D. Uncashed Checks**

22 The settlement checks constituting PAGA Members' Civil Penalty Payments shall remain
23 negotiable for one hundred eighty (180) days. Any checks returned as non-deliverable on or
24 before the check cashing deadline will be sent promptly via regular First-Class U.S. Mail to the
25 forwarding address affixed thereto. Funds represented by settlement checks returned as
26 undeliverable and those settlement checks remaining un-cashed for more than 180 days after
27 issuance shall be paid to the California State Controller's Office Unclaimed Property Fund with
28 an identification of the amount of unclaimed funds attributable to each PAGA Member.
Agreement, ¶ 11.

**E. Release of Claims Limited To Those That Could Reasonably Arise From the
Facts Alleged In The Lawsuit.**



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Employee Rights Attorneys

8605 Santa Monica Blvd.

PMB 42554

West Hollywood, CA 90069 (213)

725-9094 Tel

(213) 634-2485 Fax

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1 As of and subject to the occurrence of the Effective Date, and in consideration for the
2 Gross Settlement Amount, the claims settled, fully released and forever discharged by the LWDA
3 and the PAGA Members, including Plaintiff, constitute any and all claims for civil penalties
4 Plaintiff, the PAGA Members, and the State of California may have against the Released Parties
5 under the California Labor Code, Wage Orders, regulations, and/or any other provisions of state
6 and federal law arising from allegations that the PAGA Members suffered Labor Code violations
7 based on Failure to pay employees all earned wages, Failure to provide meal periods, Failure to
8 authorize and permit rest periods, Failure to indemnify for business expenses, Failure to issue
9 proper wage statements, Failure to timely pay wages, and any other Labor Code violations that
10 were alleged in the Action, or that could have been alleged in the Action based on the facts
11 alleged in the Action, which includes, but is not limited to, alleged violations of Labor Code
12 sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1197,
13 1197.1, 1198, 2802, and 2698 et seq. ("PAGA Released Claims"). The "Released Parties" are
14 CF San Rafael, LLC and its present and former parent companies, subsidiaries, divisions,
15 concepts, related or affiliated companies, and its shareholders, officers, directors, employees,
16 agents, attorneys, insurers, successors and assigns, and all persons acting by or through or in
17 concert with any of them, and each of them (hereinafter "Released Parties"). Agreement, ¶ 13.

18 **F. Escalator Clause**

19 With respect to the Joint Stipulation re PAGA Settlement, Defendant estimated for
20 purposes of mediation that Defendant had issued 4,400 pay periods for the period of December
21 08, 2019 through the date of Court approval or April 1, 2022, whichever is earlier. These numbers
22 would be expected to increase proportionately for the passage of time between that date and the
23 time of court approval. Before the Parties seek or a Party seeks court approval of the Settlement,
24 the Settlement Administrator will advise Plaintiff's counsel of Defendant's report of the total
25 number of pay periods. If the pay periods as of the date the Court approves the settlement exceeds
26 the referenced 4,400 pay periods by more than 10%, the Gross Settlement Amount will increase
27 proportionally according to the number of additional pay periods. Agreement, ¶ 5.

28 **IV. ARGUMENT**

A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT



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

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

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



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8605 Santa Monica Blvd.

PMB 42554

West Hollywood, CA 90069 (213)

725-9094 Tel

(213) 634-2485 Fax

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

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

9 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
10 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
11 follows: 75 percent to the LWDA, and the remaining 25 percent to the PAGA Members. *See*
12 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
13 The Parties’ Settlement so provides. Second, the LWDA must be given notice of the settlement
14 so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §
15 2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion.
16 DS, ¶ 8, Ex. 6. As a result, Plaintiff has met all procedural statutory requirements for settling a
17 PAGA action.

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

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

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

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



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

3 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
4 Parties reached the Settlement through arm’s-length bargaining with the aid of a respected
5 mediator; (2) The Parties conducted sufficient investigation and discovery to allow Counsel and
6 the Court to act intelligently. Plaintiff requested and Defendant provided the number PAGA
7 Members, the number of total pay periods during the PAGA Period, and all policies in effect
8 during the relevant time period; and (3) Counsel for the Parties are experienced with PAGA cases.
9 DS, ¶ 9. For the reasons discussed below, this Court should approve the PAGA Settlement.

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

12 The PAGA Settlement was reached only after litigation and arms’ length negotiations
13 between experienced attorneys, which included a full day mediation with Mr. Glenn E. Lerman,
14 a respected mediator. At all times, the negotiations were adversarial and contentious, although
15 still professional in nature. DS, ¶ 6.

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

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

- 22 • Defendant produced and Plaintiff reviewed Plaintiff’s and other PAGA Members’
23 personnel files.
- 24 • Defendant produced and Plaintiff reviewed and analyzed time and payroll records for
25 approximately 16 PAGA Members.
- 26 • Plaintiff requested that Defendant produce any and all relevant policies regarding
27 Plaintiff’s claims and Defendant produced those policies including its employee
28 handbooks in effect during the relevant time period.
- Plaintiff interviewed other employees about the claims at issue.
- Plaintiff analyzed the state of caselaw on PAGA.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded
before trial.

DS, ¶ 14.



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

3 In preparation for mediation and during the settlement negotiations that followed,
4 Defendant disclosed that there were approximately 183 potentially PAGA Members and 4,400
5 pay periods/paychecks. The maximum possible civil penalties under the PAGA is the total
6 number of pay periods with one or more violations multiplied by the maximum possible civil
7 penalty amount per pay period. Unfortunately for the employees concerned, the potential for
8 recovery of the maximum possible civil penalties depends on circumstances that are extremely
9 unlikely independently and in combination. It would depend on the Court stacking the maximum
10 recoverable civil penalties for unpaid minimum wage violations, unpaid overtime violations,
11 unprovided meal breaks violations, unprovided rest breaks violations, unreimbursed expenses
12 violations, untimely, and faulty wage statement violations per pay period for all 4,400 pay
13 periods for all 183 potentially PAGA Members during the PAGA Period.³ Plaintiff's counsel is
14 not aware of any California State court decision awarding a plaintiff and the other PAGA
15 Members he represents multiple civil penalties for the same pay period under different Labor
16 Code provisions. Plaintiff's counsel had to substantially discount the value of these claims in
17 the settlement negotiations for this and a variety of other reasons (outlined below). DS, ¶ 15.

18 There are risks to Plaintiff's claims for off-the-clock work as Defendant's policies
19 expressly prohibits non-exempt employees from performing work off the clock. There are also
20 risks to Plaintiff's meal and rest period claims. Defendant's employee handbook that was in effect
21 for the majority of the PAGA Period contained meal period and rest break policies. A Court could
22 find that these policies were compliant with California law. Defendant further contends that, to
23 establish a violation for missed meal periods, a plaintiff must do more than show that a meal
24 break was not taken. *Brinker*, 53 Cal.4th at 1004. So long as an employer provides employees
25 with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police
26 meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. Instead, a plaintiff must
27 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
28 or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard
to the meal break claim is the reason that a particular employee may have failed to take a meal
break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining, by

³ If the Court were to stack the maximum recoverable civil penalties for each Labor Code violation, the recoverable civil penalties would be over \$2.6 million. DS, ¶ 15, Ex. 7.



1 a review of Defendant's time records, the exact reasons why a meal period appears to be missed,
2 short or late would be difficult and pinpointing those days in which Plaintiff and the PAGA
3 Members worked during their meal periods will be a challenge. DS, ¶ 16.

4 Further, Defendant contends it provided its non-exempt employees the opportunity to
5 take rest periods in accordance with California law, and, accordingly, Plaintiff's rest break claim
6 has no support. Additionally, there are other risks to Plaintiff's rest period claim. Employers are
7 not required to record rest periods and such periods are paid. Unlike meal periods, where there
8 are often records showing whether an employee clocked out or not, there is no such evidence to
9 prove a missed rest period or that the employer refused to authorize and permit one. Managing
10 such claims at trial has become exceedingly difficult. Plaintiff will depend on sample witness
11 testimony and surveys to prove the claims. While a victory with such evidence is certainly
12 possible, relevant caselaw makes such claims risky from a trial management and due process
13 perspective. DS, ¶ 17.

14 Plaintiff alleges that Defendant did not reimburse her or the other PAGA Members for
15 the cost of tools. There is a risk that the Court may consider Plaintiff's claims as to Defendant's
16 alleged failure to indemnify for business expenses to be individual in nature. DS, ¶ 18.

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



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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 DS, ¶ 19.

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 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence of willful and intentional conduct. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504 ("Carrington") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily discounted award of only \$5 per violation because it was within the Court's discretion to significantly reduce PAGA penalties even when there is a finding that a violation of the California Labor Code occurred. Under *Carrington*, assuming at least one violation for each pay period for all 183 PAGA Members, Plaintiff could expect to recover \$22,000 (4,400 x \$5= \$22,000). Under *Carrington*, assuming 3 violations for each pay period for all 183 PAGA Members, will result in a recovery of \$66,000 (4,400 x 3 x \$5= \$66,000). The GSA is more than three times the amount Plaintiff could expect to recover under *Carrington*. DS, ¶ 20.

Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court, case number BC430633, the employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under the PAGA., In a similar PAGA case

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 defendants' failures to comply with the requirements of California Labor Code section 226. On May 28, 2021, the United States Court of appeals for the Ninth Circuit overturned the decision finding that there is no technical wage statement violation for a failure to list the rates and hours of pay associated with adjustments to overtime pay. *Magadia v. Wal-Mart Assocs.*, No. 19-16184, 2021 U.S. App. LEXIS 16070 (9th Cir. May 28, 2021).



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1 before the Los Angeles Superior Court, *Shields v. Security Paving Company, Inc.*, LA Superior
2 Court case no. BC492828, on October 24, 2017, the court awarded the prevailing PAGA plaintiff
3 civil penalties totaling only \$50.00. A similar result could occur here. DS, ¶ 21.

4 Defendant could also convince the Court to dismiss the claims due to unmanageability
5 because determining whether each PAGA Member worked off the clock or why each employee
6 missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v. CPS Sec.*
7 *Solutions, Inc.* (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a
8 PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The
9 *Ortiz* court cited the “multitude of individualized assessments” that case would have required in
10 ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA claims
11 where, there are a large number of allegedly aggrieved individuals whose claims require
12 individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D.
13 Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see also*
14 *Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating trial
15 of plaintiff’s claim from representative claims: “in light of the number of potential PAGA
16 Members, judicial economy favors deferring the representative portion of the PAGA claim”);
17 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on
18 September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The*
19 *Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), reh'g denied (Sept. 27, 2021) holding that
20 trial courts have authority to ensure that claims under PAGA are manageable, and that courts may
21 limit or strike unmanageable PAGA claims. DS, ¶ 22.

22 The United States Supreme Court announced on December 15, 2021 that, in the near
23 future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide
24 (likely no later than the end of summer 2022) whether or not to overrule the California Supreme
25 Court’s decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private arbitration
26 agreement cannot deprive an employee of his right to sue under PAGA in a court of law. If the
27 Supreme Court sides with the Petitioner, Plaintiff’s PAGA claim may be subject to an arbitration
28 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, ¶ 23.



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1 While the evidence gathered through Plaintiff's discovery supports the merits of the
2 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks
3 associated with the merits of Plaintiff's claims, the uncertainties of complex litigation, the cost of
4 pretrial and trial proceedings, the Court's discretion to lower the amount of penalties ultimately
5 awarded, and the secured benefit to the PAGA Members and the LWDA promoting compliance
6 with the Labor Code. *Id.*

7 **4. The Civil Penalties Fund Fairly, Reasonably, and Adequately Awards**
8 **Shares To PAGA Members Because Each Aggrieved Employee Will**
9 **Be Paid Based on the Potential Extent of His or Her Injury Compared**
10 **to Other PAGA Members.**

11 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis
12 depending on the number of pay periods Defendant employed them for during the PAGA Period.
13 Agreement, ¶ 6. With a total of approximately 183 PAGA Members, the average estimated
14 individual Settlement Payment for each PAGA Member is approximately \$386.55 (\$32,083/83
15 PAGA Members). Although an average payment of \$386.55 per PAGA Member is not an
16 enormous sum of money, it is an excellent result given the uncertainties this lawsuit entails. It is
17 also reasonable given the structure and purpose of the PAGA. The PAGA is not a restitution
18 statute with a traditional damages provision designed to restore victims to the position they would
19 have been in had the Labor Code violations not taken place. Rather, it is at best a punishment
20 statute designed to reduce future Labor Code violations. It provides for civil penalties only. DS,
21 ¶¶ 24-25.

22 **5. Plaintiff's Counsel Are Experienced in Similar Litigation.**

23 Plaintiff's counsel have considerable experience in class and PAGA representative
24 actions and wage and hour litigation and are qualified to evaluate the PAGA claims, the value of
25 settlement versus moving forward with litigation, and viability of possible affirmative defenses.
26 See DS, ¶¶ 11-13; Declaration of Walter Haines ("Haines Decl.") ¶ 2.

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

Of the \$200,000 allocated towards the Gross Settlement Amount exclusive of the payment
to Plaintiff for her General Release Payment, Plaintiff's counsel requests \$66,666.00 (1/3 of the
Gross Settlement Amount) in attorney's fees and up to \$15,000 in litigation expenses. Agreement,
¶ 4; DS, ¶ 26. The written retainer agreement Plaintiff's counsel entered into with Plaintiff
provided that her counsel may elect to recover either (a) statutorily awarded attorney fees or (b)



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up to 40% of any recovery. *Id.*

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

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

"[R]egardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11 ("*Chavez*")); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 ("*Pacific*") [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*

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



(9th Cir. 1997) 129 F.3d 1026, 1027 (“MGM”) (awarding 33% of total fund amount).) This is also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA settlements. DS, ¶¶ 29-30.

In addition, Plaintiff’s Counsel incurred substantial costs, \$7,656.44 to date, including the costs of a mediator to aid in the representation of the PAGA Members.⁶ DS, ¶ 28, Ex. 11; Haines Decl. ¶ 11. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$1,130.14 in costs, which consist of filing fees and attorney service fees for filing this motion and notice of entry of order. Plaintiff’s Counsel anticipate that litigation costs will total approximately \$8,794.58 through final accounting of the Settlement. *Id.* As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. DS, ¶ 28, Ex. 11. Accordingly, they warrant the Court’s approval.

7. The Proposed Third Party Settlement Administration Fees Are Fair and Reasonable and Should Be Approved.

With regard to the Settlement Administrator’s Fees and Costs provision, it is reasonable. Before agreeing to CPT, the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶ 31-32, Exs. 12-14. Thus, the Settlement Administrator’s Fees and Costs provision should be given approval.

V. CONCLUSION

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: May 12, 2022

By: David Spivak

DAVID SPIVAK,
MAYA CHEAITANI,
Attorneys for Plaintiff,
THERESEA RIVES

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

