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8 SIMONETTE VILLENA, and all others similarly situated

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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF SAN DIEGO**
12 **(UNLIMITED JURISDICTION)**

13 SIMONETTE VILLENA, on behalf of herself
14 and as an “aggrieved employee” on behalf of
15 other “aggrieved employees” under the Labor
16 Code Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.

19 MIDWAY VENTURE LLC, a California
20 limited liability company; PETER BALOV, an
21 individual; and DOES 1–50, inclusive,

22 *Defendant(s).*

Case No. 37-2021-00005970-CU-OE-CTL

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

Hearing Date: April 14, 2023

Hearing Time: 1:30 p.m.

Hearing Dept.: C-72, The Honorable
Timothy Taylor

Action filed: February 09, 2021

Trial Date: Not Set



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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 Simonette Villena (“Plaintiff” or “Villena”) submits this memorandum of points
5 and authorities in support of her motion for approval of the First Amended Settlement and Release
6 Agreement (the “Agreement” or “PAGA Settlement” or “Settlement”)² for the civil penalties
7 claim she brought against Defendant Midway Venture LLC (“Midway Venture LLC” or
8 “Defendant”) under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698,
9 *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code section 2699(l) of the PAGA
10 requires Court-approval of any civil penalties sought as part of a proposed settlement agreement.
11 Based on Plaintiff’s and her attorneys’ investigation and evaluation, Plaintiff is of the opinion that
12 the First Amended Settlement and Release Agreement represents a reasonable and adequate
13 settlement of strongly disputed claims and is in the best interest of the State of California, the
14 Aggrieved Employees, and Plaintiff. Through this motion, therefore, Plaintiff respectfully
15 requests for this Court to approve the First Amended Settlement and Release Agreement for
16 resolution of the PAGA claim. The Plaintiff seeks division of the \$74,000.00 Gross Settlement
17 Amount as follows:

Item	Amount
PAGA Settlement Members Counsel Fees	\$24,666.67
PAGA Settlement Members Counsel Costs	10,000.00
Settlement Administration Expenses	\$4,700.00
PAGA civil penalties (Net Settlement Amount)	\$34,633.33
25% to Aggrieved Employees	\$8,658.34 \$
75% to LWDA	\$25,974.99
Gross Settlement Amount	\$74,000.00

21
22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

23 Defendants operate a nude entertainment establishment DS, ¶ 3. Plaintiff performed as an
24 adult entertainer at Defendants’ nude entertainment establishment from about July 01, 2018 until
25 December 01, 2019. *Id.* DS, ¶3.

26
27 ² The First Amended Settlement and Release Agreement is attached as **Exhibit** (“Ex.”) **1** to the
28 Declaration of David Spivak (“DS”), which is submitted herewith under a separate cover.



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1 **A. Plaintiff's Written Notice to the State of California**

2 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under
3 PAGA. By letter dated December 03, 2020, Plaintiff, on behalf of herself and other aggrieved
4 hourly employees gave written notice by certified mail to the Labor and Workforce Development
5 Agency ("LWDA") and Defendant of the specific provisions of the California Labor Code alleged
6 to have been violated, including the facts and theories to support the alleged violations. DS, ¶ 4,
7 Ex. 3.

8 **B. Plaintiff's PAGA Claim**

9 Plaintiff and the Aggrieved Employees are subject to arbitration agreements with
10 Defendant. Plaintiff filed her lawsuit in San Diego County Superior Court on February 09, 2021.
11 DS, ¶ 5, Ex. 4. On February 9, 2021, Plaintiff filed Complaint ("Complaint"). DS, ¶ 5, Ex. 4.
12 Plaintiff's complaint presents one cause of action for civil penalties under PAGA. *Id.* Shortly after
13 Plaintiff served her first set of discovery requests, the Parties agreed to stay formal discovery and
14 participate in mediation. On May 06, 2021, Defendants filed an answer to Plaintiff's Complaint.
15 DS, ¶ 5, Ex. 5. Defendants deny all of Plaintiff's allegations and strongly contends that their wage
16 and hour policies, practices and procedures are fully compliant with all applicable laws. DS, ¶ 5.

17 **C. Mediation and First Motion for Approval of Settlement**

18 On May 22, 2022, the Parties participated in mediation with mediator Michael Young 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 First Amended
21 Settlement and Release Agreement was reached after exchanges of data, information and
22 documents, and is a result of extensive arms-length negotiations. The Parties conducted informal
23 discovery for purposes of potential resolution through which they ascertained the size of the
24 aggrieved employee group and the number of pay periods worked by them during the PAGA
25 Period to ascertain the total value of Plaintiff's PAGA claim. Now that the parties have finalized
26 the First Amended Settlement and Release Agreement, Plaintiff submits it to this Court for
27 approval. DS, ¶ 6. It eliminates the problems the Court had with the original motion to approve
28 PAGA settlement.

III. OVERVIEW OF SETTLEMENT

A. "PAGA Members" Definition

 The PAGA Members are all current and former all current and former Adult Entertainers
misclassified as independent contractors and who performed at Defendant's venue in California
from December 03, 2019 through the date of Court-approval of the Settlement (the "PAGA



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Period”) (collectively referred to as “PAGA Members”). Agreement, ¶ 2.

B. Monetary Terms Of The Settlement

Defendants agree to pay, on an all-in and non-reversionary basis, a total of \$74,000.00 inclusive of all amounts to be paid to PAGA Settlement Members, attorney fees, costs, individual payment to the named Plaintiff, PAGA penalties to both the California Labor and Workforce Development Agency (“LWDA”), and Settlement Administration expenses. With the exception of the operation of the Escalator Clause below, under no circumstances will Defendants’ settlement payment exceed the Gross Settlement Amount. Agreement, ¶¶ 4, 5, 10, 11, 12, 13.

Defendants estimated for purposes of mediation that it had business relationships with 50 dancers during the period of December 3, 2019 through May 20, 2022. If the PAGA Settlement Members as of the date the Court approves the settlement exceeds the referenced 50 PAGA Settlement Members by more than 10.00% (56 or more), the Gross Settlement Amount will increase proportionally by \$1,980.00 per additional PAGA Settlement Member. Agreement, ¶ 5.

The Net Settlement Amount will be calculated by deducting all attorneys' fees, costs, the individual payment to the named Plaintiff, and Settlement Administration expenses from the Gross Settlement Amount. Agreement, ¶ 9.

From the Gross Settlement Amount a total payment amount of \$34,633.33 shall be allocated for penalties under PAGA (Labor Code§ 2698, *et seq.*), seventy-five percent (75%) of which is to be paid to the L WDA (“LWDA Payment”). Agreement, ¶ 10.

The Parties do not expect Defendants to have employer-side payroll taxes. Agreement ¶ 11.

C. Timing of Payments

The PAGA Settlement Members must receive or cash his or her settlement payment within 180 calendar days after it is mailed to him or her. If a check is returned to the Settlement Administrator, the Settlement Administrator will make all reasonable efforts to re-mail it to the PAGA Settlement Member at his or her correct address. If a PAGA Settlement Member cannot be located or if a PAGA Settlement Member fails to cash the check for his or her settlement Share within 180 days after it is mailed to him or her, the Settlement Administrator will distribute the funds represented by the uncashed check to the California State Controllers’ Office Unclaimed Property Fund. Agreement, ¶ 19.

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1 **D. Calculation of Settlement Shares**

2 The Settlement Administrator will calculate the business relationships of the PAGA
3 Settlement Members with the Defendants during the PAGA Settlement Period, the amount to paid
4 pro rata, and the individual settlement payments to eligible PAGA Settlement Members.
Defendants' data will be presumed to be correct. Settlement para. 16.

5 **E. Apportionment of Settlement Shares**

6 One hundred percent (100%) of the individual settlement awards from the Net Settlement
7 Amount payable to eligible PAGA Settlement Members will be allocated to civil penalties. IRS
Forms 1099 will be issued for individual settlement awards. Settlement para. 13.

8 **F. The Releases**

9 The claims to be released by Plaintiff, acting in a representative capacity on behalf of the
10 LWDA and the PAGA Settlement Members are limited to any and all claims under PAGA arising
11 out of the allegations expressly pleaded the Action or that could have been pleaded based on the
12 facts pleaded in the Action. The Parties agree and acknowledge all civil penalties for any and all
13 alleged Labor Code violations during the PAGA Settlement Period shall be conclusively deemed
14 adjudicated and extinguished and subject to res judicata by virtue of this Agreement and the entry
of a court order approving it. Agreement, ¶ 6.

15 Released Parties as referenced herein and as released in this Settlement are Defendants,
16 Defendant Releases, and any of their present and former parent companies, subsidiaries,
17 divisions, concepts, related or affiliated companies and its shareholders, officers, directors,
18 employees, agents, attorneys, insurers, successors and assigns, and any individual or entity that
19 could be liable for any of the Released Claims, and Defendants' counsel of record in the Action.
Agreement, ¶7.

20 **G. Notice Process and Procedures**

21 There will not be a claims process requirement, and as such, PAGA Settlement Members
22 will not be required to submit a claim form to receive their individual settlements. Settlement
para. 17.

23 **H. Uncashed Checks**

24 The expiration date on the settlement checks will be one hundred and eighty (180) days
25 from the date the settlement checks are issued. Defendant will pay those funds represented by
26 uncashed checks to the California Unclaimed Property Fund in the name of the PAGA Settlement
27 Members concerned. Settlement para. 19.

28 ///



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1 **IV. ARGUMENT**

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

3 In 2003, the California Legislature, concerned that state labor laws were not being
4 adequately enforced, enacted PAGA to deputize “aggrieved employees” to pursue civil penalties.
5 *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81. An aggrieved employee is a
6 person who was employed by the defendant employer and who suffered one or more of the alleged
7 Labor Code violations. Lab. Code § 2699I.

8 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
9 Court necessarily has broad discretion in making the decision to approve or reject a settlement
10 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
11 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
12 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
13 Although the PAGA does not set forth the particular standards against which a PAGA settlement
14 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
15 for evaluating class action settlements. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist.
16 LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA’s guidance, that approval
17 of PAGA settlements may be had where the statutory requirements of the PAGA are met and the
18 terms of the settlement are fundamentally fair, reasonable, and adequate). The established
19 standards for evaluating whether class action settlements are fair, reasonable, and adequate
20 provide a familiar, useful framework for the Court to evaluate PAGA settlements and have been
21 adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n.4 (E.D.
22 Cal. 2017) (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688
23 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS
24 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
25 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v.*
26 *H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast*
27 *Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

28 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



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1 PAGA claim. There is no indication that the unnamed plaintiffs can contest a settlement, if any,
2 reached between the parties.”).

3 PAGA settlements are subject to trial court review and approval. Lab. Code § 2699(1)(2).
4 “[A] trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable,
5 and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future
6 ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.* (2021) 72
7 Cal.App.5th 56, 77. Many of the same factors used to evaluate the fairness of a class action
8 settlement can be “useful” in evaluating the fairness of a PAGA settlement. *Id.* These include:

- 9 1. Strength of plaintiff’s case. This is the most important factor.
- 10 2. Expense associated with taking the case to trial, *i.e.*, the avoided cost of further
11 litigation.
- 12 3. Amount or value offered in settlement.
- 13 4. Extent of discovery completed and state of proceedings.
- 14 5. Experience and views of counsel.
- 15 6. Presence of a governmental participant.
- 16 7. Reaction of class members to proposed settlement.

17 *Moniz* suggests items 1-6 from this list may provide guidance in the PAGA setting; obviously
18 item 7 does not apply, because the non-party aggrieved workers in a PAGA case are entitled to
19 no notice and have no opt out rights. *Arias v. Superior Court* (2009) 46 Cal.4th 969.

20 In making the determination whether a settlement taken as a whole is fair, reasonable, and
21 adequate, the Court should be careful to still give “proper deference to the private consensual
22 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
23 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
24 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
25 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
26 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
27 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
28 *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). Under the Settlement, notice is being given to the LWDA concurrently with the filing
7 of this motion. DS, ¶ 7, Ex. 5. As a result, Plaintiff has met all procedural statutory requirements
8 for settling a PAGA action.

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

11 To make its determination that the First Amended Settlement and Release Agreement is
12 fair, reasonable, and adequate, the Court may consider several factors, including:

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

16 *Dunk v. Ford Motor Co.*, 48 Cal. App 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
17 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
18 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
19 *6. However, this Court should begin its analysis with a presumption that the proposed settlement
20 is fair. "A presumption of fairness exists where: (1) the settlement is reached through arm's length
21 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
22 intelligently; (3) counsel is experienced in similar litigation" *Dunk*, 48 Cal. App 4th at 1802.

23 The First Amended Settlement and Release Agreement warrants a presumption of fairness
24 for several reasons: (1) The Parties reached the Settlement through arm's-length bargaining with
25 the aid of a respected mediator; (2) The Parties conducted sufficient investigation and discovery
26 to allow Counsel and the Court to act intelligently. Plaintiff requested and Defendant provided
27 the number Aggrieved Employees, the number of total pay periods during the PAGA Period, and
28 all policies in effect during the relevant time period; and (3) Counsel for the Parties are
experienced with PAGA cases. DS, ¶ 8. For the reasons discussed below, this Court should
approve the First Amended Settlement and Release Agreement.



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1 penalty amount per pay period. Unfortunately for the employees concerned, the potential for
2 recovery of the maximum possible civil penalties depends on circumstances that are extremely
3 unlikely independently and in combination. It would depend on the Court stacking the maximum
4 recoverable civil penalties for failure to pay employees all earned wages, failure to provide meal
5 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
6 failure to issue proper wage statements, failure to timely pay wages per pay period for all 50 pay
7 periods for all 50 potentially aggrieved employees during the PAGA Period. Plaintiff's counsel
8 is not aware of any California State court decision awarding a plaintiff and aggrieved employees
9 she represents multiple civil penalties for the same pay period under different Labor Code
10 provisions. Plaintiff's counsel had to substantially discount the value of these claims in the
11 settlement negotiations for this and a variety of other reasons (outlined below). DS, ¶ 15.

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

14 There is a risk that Plaintiff's claim that Defendant did not pay all wages at the correct
15 rates of pay would be extremely limited at best, largely because Defendant's written policies
16 throughout the relevant time period prohibited off-the-clock work. DS, ¶ 17. Off-the-clock claims
17 are difficult where a defendant requires in its written policies that all work must take place while
18 clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer must
19 have notice of off-the-clock work for it to be compensable). *Id.* In its written employment policies,
20 Defendant mandates that employees must record all time worked accurately on its time records
21 and strictly prohibit employees from performing any work off-the-clock. DS, ¶ 17. Moreover,
22 while Defendant disputes that off-the-clock work occurred, it contends that any time spent off the
23 clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal.
24 5th 829, 835 suggested that irregular and minute periods of time may still be subject to a *de*
25 *minimis* defense even if compensable. (Stating that "We do not decide whether there are
26 circumstances where compensable time is so minute or irregular that it is unreasonable to expect
27 the time to be recorded."). Following *Troester*, Defendants contend that the *de minimis* doctrine
28 may apply here because the time spent off the clock were minute and insignificant. Accordingly,
a large award of civil penalties seems unlikely with respect to this claim. *Id.*

The difficulty inherent in proving that off-the-clock work occurred poses a significant
hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.



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1 Generally, a court will not certify a class unless it can determine an appropriate methodology for
2 all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1.
3 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially
4 given the lack of records indicating when such off-the-clock work may have taken place.
5 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine
6 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there
7 is a significant risk that the Court would consider this evidentiary showing insufficient as a
methodology for all aggrieved employees. DS, ¶ 18.

8 **b. Risks Associated with Plaintiff’s Claim That Defendant Failed**
9 **To Provide All Meal Periods**

10 There are risks to Plaintiff’s claims that Defendants filed to provide all meal periods. DS,
11 ¶ 19. If the Defendants properly classified the Plaintiff and the other performers as exempt
12 independent contractors instead of employees, there will be civil penalties owed for meal period
13 violations. DS para. 19. Defendant contends that, to establish a violation of the meal period law,
14 a plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004.
15 So long as an employer provides employees with a “reasonable opportunity” to take a duty-free
16 meal period, it has no further duty to “police meal breaks and ensure no work thereafter is
17 performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged,
18 or prohibited the employee from taking a proper break, or otherwise failed to release the employee
19 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.*

20 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
21 from taking their meal periods. DS, ¶ 19. Defendant’s policies mandate that employees take at
22 least a 30-minute, uninterrupted meal periods and record the beginning and ending time of their
23 meal breaks each day on their time records. *Id.* The time records that comprise the random sample
24 Defendant produced to Plaintiff for purposes of mediation show that meal periods were taken the
25 vast majority of the time. *Id.* Of the time records that show a late, short or no lunch, individualized
26 evidence may be necessary to determine whether they occurred due to conduct of the Defendant
27 or each of the employees concerned. Accordingly, there is a significant risk that the recoverable
28 amount of civil penalties for unprovided meal periods would be substantially reduced at trial. *Id.*



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1 **e. Risks Associated with Plaintiff's Claim That Defendant Failed**
2 **To Issue Accurate and Complete Wage Statements**

3 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
4 PAGA penalties. If the Defendants properly classified the Plaintiff and the other performers as
5 exempt independent contractors instead of employees, there will be civil penalties owed for pay
6 stub violations. DS para. 22. Under Labor Code section 226, wage statements must include
7 various information, including the applicable rates of pay, corresponding hours worked, and gross
8 pay. DS, ¶ 22.

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

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

14 Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 203. Like
15 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
16 The evidence of good faith Defendants put forth will defeat this claim. If the Defendants properly
17 classified the Plaintiff and the other performers as exempt independent contractors instead of
18 employees, there will be civil penalties owed for untimely final wages. DS para. 23.

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

20 The sole source of money recoverable for the Aggrieved Employees and the State is civil
21 penalties available under PAGA. It allows employees to seek civil penalties for certain violations
22 of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory.
23 As discussed above, Plaintiff's maximum estimated liability exposure is based on the theories
24 that: (1) Every paycheck that Defendant issued to employees during the PAGA Period represents
25 a pay period in which every Aggrieved Employee suffered a minimum wage violation; (2) Every
26 paycheck that Defendant issued to employees during the PAGA Period represents a pay period in
27 which every Aggrieved Employee suffered an overtime wage violation; (3) Every paycheck that
28 Defendant issued to employees during the PAGA Period represents a pay period in which every
Aggrieved Employee suffered a meal period violation; (4) Every paycheck that Defendant issued
to employees during the PAGA Period represents a pay period in which every Aggrieved
Employee 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 Aggrieved Employee



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1 suffered an unreimbursed expense violation. There are no California state court decisions under
2 the PAGA to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only
3 two significant awards under the PAGA in a contested proceeding, both issued by federal district
4 courts, one of which was overturned on May 28, 2021.³ DS, ¶ 24.

5 Additionally, PAGA states a court has discretion to award a lesser amount than the
6 maximum penalty. Labor CI § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
7 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
8 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
9 evidence of willful and intentional conduct. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
10 ("Carrington") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
11 discounted award of only \$5 per violation because it was within the Court's discretion to
12 significantly reduce PAGA penalties even when there is a finding that a violation of the California

13 ³ In *Bernstein v. Virgin Am., Inc* (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
14 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were \$18,695,692.58.
15 In this regard, the district court stated,

16 The plain language of PAGA provides that "a court may award a lesser amount than the
17 maximum civil penalty amount specified by this part if, *based on the facts and*
18 *circumstances of the particular case*, to do otherwise would result in an award that is
19 unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code section
20 2699(e)(2) (emphasis added). The relationship between the amount of total damages and
21 the amount of maximum PAGA penalties is certainly a "circumstance" of the case under
22 the term's ordinary meaning. The weight given to that circumstance is greater in this case
23 because Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of
24 Plaintiffs' individual claims except for one. As a general matter, it would be excessively
25 punitive for the penalty imposed as a consequence of a discrete injury or set of injuries to
26 exceed the damages caused by that injury or set of injuries.

27 *Id.*, fnnt. 9. The district court further stated, "Virgin "has not presented any evidence that the full
28 penalty would be excessive in relation to its ability to pay," the weight of this factor is lessened."
29 *Id.*

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



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1 Labor Code occurred.

2 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
3 *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court, case number BC430633, the
4 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
5 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
6 awarded approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 26, Exs. 7-9. In a
7 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
8 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
9 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 26.

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

28 While the evidence gathered through Plaintiff’s 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 Plaintiff’s claims, the uncertainties of complex litigation, the cost of



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1 pretrial and trial proceedings, the Court's discretion to lower the amount of penalties ultimately
2 awarded, and the secured benefit to the Aggrieved Employees and the LWDA promoting
3 compliance with the Labor Code. DS, ¶ 31.

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

5 The arbitration agreements entered into between Defendants on the one hand, and the
6 Plaintiff and comparable workers, on the other, present a significant risk to the success of
7 Plaintiff's representative litigation. DS ¶ 28. According to Defendants, the majority of the workers
8 entered into arbitration agreements with Defendants. *Id.* As the arbitration agreements in question
9 restrict potential litigants from bringing PAGA actions against Defendants, Plaintiff would be
10 effectively barred from pursuing claims on behalf of the Class in Court. *Id.* As such, by continuing
11 to trial on representative claims, Plaintiff would run the high risk of suffering defeat due to the
12 existence of the arbitration agreements. Also, because different defenses would apply to some
13 workers and not others – i.e., the existence of signed arbitration agreements – there is a risk that
14 the Court could determine that Plaintiff's claims present too many individualized inquiries to
15 allow for manageable PAGA trial. *Id.*

16 **2. Plaintiff's Counsel's Estimate of the Expense of Taking This Case To Trial Also Favors This Settlement**

17 Plaintiff's counsel estimates that the cost of taking this case to trial will exceed \$500,000
18 in attorney fees and costs alone. DS, ¶ 29.

19 **3. Amount or Value Offered in Settlement.**

20 As stated above, Defendants offer \$74,000.00. The Parties have also agreed to a separate
21 payment to Plaintiff of \$25,000.00 for a general release of her individual (non-PAGA) claims
22 pursuant to a separate confidential settlement agreement. DS, ¶ 30. Plaintiff will present the
23 confidential agreement to the Court if requested. *Id.*

24 **4. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter into an Informed and Reasonable Settlement**

25 Plaintiff considered various sources of information in the lead-up to, during and after the
26 mediation that enabled her to achieve the First Amended Settlement and Release Agreement at
27 issue. Among other things, Plaintiff considered the following:

- 28 • Defendant produced and Plaintiff reviewed her personnel file.
- Plaintiff interviewed other employees about the claims at issue.
- Plaintiff analyzed the state of caselaw on PAGA claims, claims for failure



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to pay employees all earned wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, and related claims.

- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded before trial.

DS, ¶ 13.

5. The Experience and Views of Counsel Favor This Settlement

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, ¶¶ 34-36; Declaration of Walter L. Haines ("Haines Decl.") ¶ 2-5. As Plaintiff's counsel explains in his declaration, this settlement makes good sense based on his experience litigating wage and hour actions, including claims seeking civil penalties under PAGA. DS, generally.

6. The Presence of a Governmental Participant Favors This Settlement.

Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under PAGA. By letters dated December 03, 2020, Plaintiff, on behalf of herself and other "aggrieved 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, **Exhibit 2**. Plaintiff also notified this LWDA of this settlement. DS ¶ 7, **Exhibit 5**.

7. The First Amended Settlement and Release Agreement Is A Result of Extensive, Non-Collusive Arm's Length Negotiations Between The Parties.

The First Amended Settlement and Release Agreement was reached only after litigation and arms' length negotiations between experienced attorneys, which included a full day mediation with Michael Young, a respected mediator. At all times, the negotiations were adversarial and contentious, although still professional in nature. DS, ¶ 8.

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

If the Defendants properly classified the Plaintiff and the other performers as exempt independent contractors instead of employees, there will be civil penalties owed. Plaintiff contends she and the other performers were misclassified as independent contractors under



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1 *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. Defendant contends that
2 the holding in that decision, i.e., the ABC Test, has since been codified at Labor Code section
3 2775. The rest of Article 1.5 of that particular Chapter of the Labor Code sets forth a number of
4 exceptions to the ABC Test. These exceptions include business-to-business contracting
5 relationships and performance artists. (See Lab. Code, §§ 2776; 2780, subd. (c).) Defendants
6 contend that the Plaintiff and the other performers are covered by these exceptions to the ABC
7 test and were not misclassified. A court has discretion under PAGA to award a lesser amount than
8 the maximum penalty. Lab. Code “ 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
9 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants
10 have posed valid defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations.
11 Thus, the PAGA claims likewise face significant uncertainty. DS, ¶ 14. There is a risk that the
12 Court would consider the maximum civil penalty available to be confiscatory. This uncertainty
13 increases Plaintiff’s risk of pursuing the PAGA claims and required a significant discount for
14 settlement purposes. DS, ¶ 14. For mediation purposes, Plaintiff’s counsel estimated a maximum
15 exposure of approximately \$1,250,000.00 in civil penalties. This estimate did not take into
16 account any of the risks discussed above and assumed a violation for every single pay period. *Id.*
17 Plaintiff’s counsel also assessed multiple penalties for the same pay period for the same alleged
18 violations of different Labor Code provisions and derivative violations. *Id.* Although two federal
19 district court decisions held that “stacking” PAGA penalties in this fashion may be appropriate to
20 determine the amount in controversy for purposes of removal jurisdiction, Plaintiff’s counsel is
21 not aware of any California state courts awarding plaintiffs multiple PAGA penalties for the same
22 violation for the same pay period under different Labor Code provisions. *Id.* This may be because
23 the PAGA does not provide for what many employers characterize as claim splitting and not
24 merely stacking. *Id.*

25 In preparation for mediation and during the settlement negotiations that followed,
26 Defendant disclosed that there were approximately 50 potentially aggrieved employees and 50
27 pay periods. The maximum possible civil penalties under the PAGA is the total number of pay
28 periods with one or more violations multiplied by the maximum possible civil penalty amount
per pay period. Unfortunately for the employees concerned, the potential for recovery of the
maximum possible civil penalties depends on circumstances that are extremely unlikely
independently and in combination. It would depend on the Court stacking the maximum



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1 recoverable civil penalties for failure to pay employees all earned wages, failure to provide meal
2 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
3 failure to issue proper wage statements, failure to timely pay wages per pay period for all 50 pay
4 periods for all 50 potentially aggrieved employees during the PAGA Period. Plaintiff's counsel
5 is not aware of any California State court decision awarding a plaintiff and the other aggrieved
6 employees she represents multiple civil penalties for the same pay period under different Labor
7 Code provisions. Plaintiff's counsel had to substantially discount the value of these claims in the
8 settlement negotiations for this and a variety of other reasons (outlined below). DS, ¶ 15.

9 **9. The Gross Settlement Amount Fairly, Reasonably, and Adequately**
10 **Awards Shares To Aggrieved Employees Because Each Aggrieved**
11 **Employee Will Be Paid Based on the Potential Extent of His or Her**
12 **Injury Compared to Other Aggrieved Employees**

13 Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis
14 depending on the number of pay periods Defendant employed them for during the PAGA Period.
15 Agreement, ¶ 16. With a total of approximately 50 Aggrieved Employees, the average estimated
16 individual Settlement Payment for each Aggrieved Employee is approximately \$173.17
17 (\$8,658.34/ 50 Aggrieved Employees). Although an average payment of \$173.17 per Aggrieved
18 Employee is not an enormous sum of money, it is an excellent result given the uncertainties this
19 lawsuit entails. It is also reasonable given the structure and purpose of the PAGA. The PAGA is
20 not a restitution statute with a traditional damages provision designed to restore victims to the
21 position they would have been in had the Labor Code violations not taken place. Rather, it is at
22 best a punishment statute designed to reduce future Labor Code violations. It provides for civil
23 penalties only. DS, ¶32.

24 **10. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and**
25 **Reasonable and Should Be Approved.**

26 "The law empowers the court to set the amount of fees independently without
27 disapproving the entire settlement." *Garabedian v. Los Angeles Cellular Telephone Co.* (2004)
28 118 Cal.App.4th 123, 129. The benchmark for determining attorney fees is reasonableness.
118 Cal.App.4th 123, 129. The benchmark for determining attorney fees is reasonableness.
Karton v. Ari Design & Construction, Inc. (2021) 61 Cal.App.5th 734, 744. The determination
of what constitutes a reasonable fee generally begins with the lodestar, i.e., the number of hours
reasonably expended multiplied by the reasonable hourly rate. *Graciano v. Robinson Ford Sales,*
Inc. (2006) 144 Cal.App.4th 140, 154. The lodestar figure may then be adjusted, based on factors
specific to the case, to fix the fee at the fair market value for the legal services provided. *PLCM*



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1 *Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.

2 Of the \$74,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$24,666.67 (1/3
3 of the Gross Settlement Amount) in attorney's fees and up to \$10,000.00 in litigation expenses.
4 DS, ¶ 34; Agreement, ¶ 22. The written retainer agreement Plaintiff's counsel entered into with
5 Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded attorney fees
6 or (b) up to 40% of any recovery. *Id.*

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

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



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⁴ 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*

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

6 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
7 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
8 fee request of \$24,666.67 (one-third of the Gross Settlement Amount) is fair and reasonable based
9 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 35, Ex. 11.

10 In addition, Plaintiff’s Counsel incurred substantial costs, \$9,810.73 to date, including the
11 costs of a mediator to aid in the representation of the Aggrieved Employees.⁵ DS, ¶36, Ex. 12;
12 Haines Decl. ¶10. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$117.41 in
13 costs, which consist of filing fees and attorney service fees for filing this motion and notice of
14 entry of order. Plaintiff’s Counsel anticipate that litigation costs will total approximately
15 \$9,943.64 through final accounting of the Settlement (the Settlement allocates up to \$10,000.00
16 in litigation costs). *Id.* As the evidence submitted herewith shows, all of these costs are
17 documented and reasonably incurred. DS, ¶ 36, Ex. 12. Accordingly, they warrant the Court’s
18 approval.

19 **11. The Proposed Settlement Administration Expenses Are Fair and**
20 **Reasonable and Should Be Approved.**

21 With regard to the Settlement Administration Expenses provision, it is reasonable. Before
22 agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable third-
23 party administrators which provided bids. DS, ¶ 39 – 40, Exs. 13 - 15. Thus, the Settlement
24 Administration Expenses provision should be given approval.

25 _____
26 *Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [“Citing unpublished federal opinions does not violate
27 our rules.”].) Like published decisions of the lower federal courts, unpublished decisions are not
28 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.)

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 Aggrieved Employees 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 **V. CONCLUSION**

2 For the reasons stated above, this Court should grant the Plaintiff' Motion in its entirety
3 and adopt the proposed order submitted concurrently herewith.
4

5 Respectfully submitted,

6 THE SPIVAK LAW FIRM

7
8 Dated: March 21, 2023

9 By: 
10 DAVID G. SPIVAK, Attorneys for
11 Plaintiff, SIMONETTE VILLENA, and
12 all others similarly situated
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