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

16 *Plaintiff,*

17 vs.

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

21 *Defendants.*

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**

**RESERVATION: 2883081**

Hearing Date: January 6, 2023  
Hearing Time: 1:30 p.m.  
Hearing Dept.: C-72, The Honorable  
Timothy Taylor

Action filed: February 09, 2021  
Trial Date: October 14, 2022



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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 PAGA Settlement Agreement (the  
6 “Agreement” or “PAGA Settlement” or “Settlement”)<sup>2</sup> for the civil penalties claim she brought  
7 against Defendant Midway Venture LLC (“Midway Venture LLC” or “Defendant”) under the  
8 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”).  
9 Plaintiff brings this motion because Labor Code section 2699(l) of the PAGA requires Court-  
10 approval of any civil penalties sought as part of a proposed settlement agreement. Based on  
11 Plaintiff’s and her attorneys’ investigation and evaluation, Plaintiff is of the opinion that the  
12 PAGA Settlement represents a reasonable and adequate settlement of strongly disputed claims  
13 and is in the best interest of the State of California, the PAGA Members, and Plaintiff.<sup>3</sup> Through  
14 this motion, therefore, Plaintiff respectfully requests for this Court to approve the PAGA  
Settlement for resolution of the PAGA claim.

15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 Midway Venture LLC is a licensed adult entertainment establishment. DS, ¶ 3. Plaintiff  
17 alleged she performed as an adult entertainer at Defendant’s adult entertainment establishment  
18 from about July 01, 2018 until December 01, 2019. *Id.* DS, ¶ 3.

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

20 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under  
21 PAGA. By letter dated December 03, 2020, Plaintiff, on behalf of herself and other aggrieved  
22 hourly employees gave written notice by certified mail to the Labor and Workforce Development  
23 Agency (“LWDA”) and Defendant of the specific provisions of the California Labor Code  
24 alleged to have been violated, including the facts and theories to support the alleged violations.

25 <sup>2</sup> The PAGA Settlement is attached as **Exhibit** (“Ex.”) **1** to the Declaration of David Spivak  
26 (“DS”), which is submitted herewith under a separate cover.

27 <sup>3</sup> In addition to Midway’s substantive challenges to Plaintiff’s claims, Plaintiff has also  
28 challenged the viability of Plaintiff’s representative claims in light of the recent decision of the  
United States Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906.



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1 DS, ¶ 4, Ex. 3.

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

3 Plaintiff and the PAGA Members are subject to arbitration agreements with Defendant.  
4 Plaintiff filed her lawsuit in San Diego County Superior Court on February 09, 2021. DS, ¶ 5,  
5 Ex. 4. Plaintiff's complaint presents one cause of action for civil penalties under PAGA. *Id.*  
6 Shortly after Plaintiff served her first set of discovery requests, the Parties agreed to stay formal  
7 discovery and participate in mediation. On May 06, 2021, Defendant filed an answer to Plaintiff's  
8 First Amended Complaint. DS, ¶ 5 Ex. 5. Defendant denies all of Plaintiff's allegations and  
9 strongly contends that its wage and hour policies, practices and procedures are fully compliant  
10 with all applicable laws. DS, ¶ 5.

11 **C. Mediation**

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

21 **III. OVERVIEW OF SETTLEMENT**

22 **A. "PAGA Members" Definition**

23 The PAGA Members are all current and former all current and former Adult Entertainers  
24 allegedly misclassified as independent contractors and who performed at Defendant's venue in  
25 California from December 03, 2019 through the date of Court-approval of the Settlement (the  
26 "PAGA Period") (collectively referred to as "PAGA Members"). Agreement, ¶ 2.

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

28 Defendants agree to pay, on an all-in and non-reversionary basis, a total of \$99,000.00  
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



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1 Development Agency ("LWDA"), and Settlement Administration expenses. With the exception  
2 of the operation of the Escalator Clause below, under no circumstances will Defendants'  
3 settlement payment exceed the Gross Settlement Amount. Agreement, ¶¶ 4, 5, 10, 11, 12, 13.

4 Defendants estimated for purposes of mediation that it had business relationships with 50  
5 allegedly misclassified adult entertainers during the period of December 3, 2019 through May  
6 20, 2022. If the PAGA Settlement Members as of the date the Court approves the settlement  
7 exceeds the referenced 50 PAGA Settlement Members by more than 10.00% (56 or more), the  
8 Gross Settlement Amount will increase proportionally by \$1,980.00 per additional PAGA  
9 Settlement Member. Agreement, ¶ 5.

10 The Net Settlement Amount will be calculated by deducting all attorneys' fees, costs,  
11 the individual payment to the named Plaintiff, and Settlement Administration expenses from  
12 the Gross Settlement Amount. Agreement, ¶ 10.

13 From the Gross Settlement Amount a total payment amount of \$33,000.00 shall be  
14 allocated for penalties under PAGA (Labor Code § 2698, *et seq.*), seventy-five percent (75%)  
15 of which is to be paid to the L WDA ("L WDA Payment"). Agreement, ¶ 11.

16 The Parties do not expect Defendants to have employer-side payroll taxes.  
17 Agreement ¶ 14.

18 **C. Timing of Payments**

19 The PAGA Settlement Members must receive or cash his or her settlement payment  
20 within 180 calendar days after it is mailed to him or her. If a check is returned to the Settlement  
21 Administrator, the Settlement Administrator will make all reasonable efforts to re-mail it to the  
22 PAGA Settlement Member at his or her correct address. If a PAGA Settlement Member cannot  
23 be located or if a PAGA Settlement Member fails to cash the check for his or her settlement Share  
24 within 180 days after it is mailed to him or her, the Settlement Administrator will distribute the  
25 funds represented by the uncashed check to the California State Controllers' Office Unclaimed  
26 Property Fund. Agreement, ¶ 8.

27 **D. Calculation of Settlement Shares**

28 The Settlement Administrator will calculate the business relationships of the PAGA  
Settlement Members with the Defendants during the PAGA Settlement Period, the amount to



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1 paid pro rata, and the individual settlement payments to eligible PAGA Settlement Members.  
2 Defendants' data will be presumed to be correct. Agreement, ¶ 17.

3 **E. Apportionment of Settlement Shares**

4 One hundred percent (100%) of the individual settlement awards from the Net Settlement  
5 Amount payable to eligible PAGA Settlement Members will be allocated to civil penalties. IRS  
6 Forms 1099 will be issued for individual settlement awards. Agreement, ¶ 14.

7 **F. The Releases**

8 The claims to be released by Plaintiff, acting individually and in a representative  
9 capacity on behalf of the LWDA and the PAGA Settlement Members are limited to any and  
10 all claims under PAGA arising out of the allegations expressly pleaded the Action or that  
11 could have been pleaded based on the facts pleaded in the Action. The Parties agree and  
12 acknowledge all civil penalties for any and all alleged Labor Code violations during the  
13 PAGA Settlement Period shall be conclusively deemed adjudicated and extinguished and  
14 subject to res judicata by virtue of this Agreement and the entry of a court order approving it.  
Agreement, ¶ 6, 7.

15 Plaintiff, individually, on behalf of her respective successors and assigns,  
16 representatives, heirs, and attorneys, releases Defendants and each of their predecessors,  
17 successors, and assigns, and each of its respective present or former officers, owners,  
18 representatives, joint venturers, members, shareholders, executives, directors, employees,  
19 partners, agents, insurers, claims administrators, representatives, attorneys, parents,  
20 subsidiaries, divisions, related entities, and affiliated entities (collectively, the "Defendant  
21 Releasees") from all claims, demands, actions or other legal responsibilities of any kind,  
22 known or unknown, which Plaintiff has or may have prior to the Effective Date of this  
23 Agreement, including but not limited to those which are in any way based on, or pertaining  
24 to Plaintiffs legal, contractual, or common law relationship with Defendant or the termination  
25 of that relationship. In the broadest possible manner and construction, this release also  
26 includes, but is not limited to, any claims Plaintiff may have arising under any foreign,  
27 federal, state or local constitution, statute, ordinance, regulation, or common law, including,  
28 but not limited to, misrepresentation, fraud, deceit, concealment, invasion of privacy, breach



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1 of contract, breach of quasi-contract, breach of implied contract, breach of the covenant of  
2 good faith and fair dealing, libel, slander, negligent or intentional infliction of emotional  
3 distress, violation of public policy, negligence, bad faith, unfair business practices, fraud,  
4 concealment or interference with business opportunity or with contracts, contractual  
5 indemnity, or equitable or implied indemnity. For the sake of clarity, this release expressly  
6 includes, but is not limited to, any and all claims for costs, attorney's fees, sanctions or any  
7 other relief sought under Cal. Code of Civ. Proc., Section 128.7 or the like. Agreement, ¶6.

8 Released Parties as referenced herein and as released in this Settlement are Defendants,  
9 Defendant Releases, and any of their present and former parent companies, subsidiaries,  
10 divisions, concepts, related or affiliated companies and its shareholders, officers, directors,  
11 employees, agents, attorneys, insurers, successors and assigns, and any individual or entity that  
12 could be liable for any of the Released Claims, and Defendants' counsel of record in the Action.  
Agreement, ¶ 6-7.

13 **G. Notice Process and Procedures**

14 There will not be a claims process requirement, and as such, PAGA Settlement Members  
15 will not be required to submit a claim form to receive their individual settlements. Agreement, ¶  
16 18.

17 **H. Uncashed Checks**

18 The expiration date on the settlement checks will be one hundred and eighty (180) days  
19 from the date the settlement checks are issued. Defendant will pay those funds represented by  
20 uncashed checks to the California Unclaimed Property Fund in the name of the PAGA Settlement  
21 Members concerned. Agreement, ¶ 20.

22 **IV. ARGUMENT**

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

24 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The  
25 Court necessarily has broad discretion in making the decision to approve or reject a settlement  
26 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain  
27 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of  
28 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),



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

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

23 In making the determination whether a settlement taken as a whole is fair, reasonable, and  
24 adequate, the Court should be careful to still give “proper deference to the private consensual  
25 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual  
26 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to  
27 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or  
28 collusion between, the negotiating parties . . . .” *Hanlon*, 150 F.3d at, 1027. The law favors



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1 settlement of lawsuits, particularly complex litigation cases where substantial resources can be  
2 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*  
3 *Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,  
4 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

5 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**  
6 **PAGA.**

7 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.  
8 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as  
9 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*  
10 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).  
11 The Parties' Settlement so provides. Second, the LWDA must be given notice of the settlement  
12 so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §  
13 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion.  
14 DS, ¶ 7, Ex. 6. As a result, Plaintiff has met all procedural statutory requirements for settling a  
15 PAGA action.

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

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

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

25 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS  
26 137205, \*5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, \*8-9; *Gutilla*, 2017 U.S. Dist. LEXIS  
27 41655, \*7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, \*6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,  
28 \*6. However, this Court should begin its analysis with a presumption that the proposed settlement  
is fair. "A presumption of fairness exists where: (1) the settlement is reached through arm's length  
bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act



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

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

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

The PAGA Settlement 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.

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

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

- Defendant produced and Plaintiff reviewed her personnel file.
- Defendant produced and Plaintiff reviewed and analyzed work day records for PAGA Members.
- Plaintiff requested that Defendant produce any and all relevant policies regarding Plaintiff’s claims and Defendant produced those policies in effect during the relevant time period.
- Plaintiff analyzed the state of caselaw on PAGA claims, claims for misclassification and failure 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.



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

DS, ¶ 13.

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

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



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1 penalties for the same violation for the same pay period under different Labor Code provisions.  
2 *Id.* This may be because the PAGA does not provide for what many employers characterize as  
3 claim splitting and not merely stacking. *Id.*

4 In preparation for mediation and during the settlement negotiations that followed,  
5 Defendant disclosed that there were approximately 50 potentially aggrieved employees and 50  
6 pay periods. The maximum possible civil penalties under the PAGA is the total number of pay  
7 periods with one or more violations multiplied by the maximum possible civil penalty amount  
8 per pay period.<sup>4</sup> Unfortunately for the employees concerned, the potential for recovery of the  
9 maximum possible civil penalties depends on circumstances that are extremely unlikely  
10 independently and in combination. It would depend on the Court stacking the maximum  
11 recoverable civil penalties of \$25,000 per pay period for all 50 potentially aggrieved employees  
12 during the PAGA Period. Plaintiff's counsel is not aware of any California State court decision  
13 awarding a plaintiff and the other aggrieved employees she represents multiple civil penalties for  
14 the same pay period under different Labor Code provisions. Plaintiff's counsel had to  
15 substantially discount the value of these claims in the settlement negotiations for this and a variety  
16 of other reasons (outlined below). DS, ¶ 16.

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

19 There is a risk that Plaintiff's claim that Defendant did not pay all wages at the correct  
20 rates of pay would be extremely limited at best, largely because Defendant's written policies  
21 throughout the relevant time period prohibited off-the-clock work. DS, ¶ 17. Off-the-clock claims  
22 are difficult where a defendant requires in its written policies that all work must take place while  
23 clocked in. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4<sup>th</sup> 391 (employer must  
24 have notice of off-the-clock work for it to be compensable). *Id.* In its written employment  
25 policies, Defendant mandates that employees must record all time worked accurately on its time  
26 records and strictly prohibit employees from performing any work off-the-clock. DS, ¶ 17.  
27 Moreover, while Defendant disputes that off-the-clock work occurred, it contends that any time  
28 spent off the clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.*

<sup>4</sup> Due to Covid-19, Defendant was closed for most of the period in question.



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1 (2018) 5 Cal. 5<sup>th</sup> 829, 835 suggested that irregular and minute periods of time may still be subject  
2 to a *de minimis* defense even if compensable. (Stating that “We do not decide whether there are  
3 circumstances where compensable time is so minute or irregular that it is unreasonable to expect  
4 the time to be recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine  
5 may apply here because the time spent off the clock were minute and insignificant. Accordingly,  
6 a large award of civil penalties seems unlikely with respect to this claim. *Id.*

7 The difficulty inherent in proving that off-the-clock work occurred poses a significant  
8 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.  
9 Generally, a court will not certify a class unless it can determine an appropriate methodology for  
10 all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4<sup>th</sup> 1. Here,  
11 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially  
12 given the lack of records indicating when such off-the-clock work may have taken place.  
13 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine  
14 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there  
15 is a significant risk that the Court would consider this evidentiary showing insufficient as a  
16 methodology for all aggrieved employees. DS, ¶ 18.

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

19 There are risks to Plaintiff’s claims that defendant filed to provide all meal periods. DS,  
20 ¶ 19. If the Defendants properly classified the Plaintiff and the other performers as exempt  
21 independent contractors instead of employees, there will be civil penalties owed for meal period  
22 violations. DS, ¶ 19. Defendant contends that, to establish a violation of the meal period law, a  
23 plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4<sup>th</sup> at 1004.  
24 So long as an employer provides employees with a “reasonable opportunity” to take a duty-free  
25 meal period, it has no further duty to “police meal breaks and ensure no work thereafter is  
26 performed.” *Id.* At 1040-41. *Id.* Instead, a plaintiff must show the employer impeded,  
27 discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release  
28 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*



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1 *Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

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

11 **c. Risks Associated with Plaintiff's Claim That Defendant**  
12 **Failed To Authorize or Permit Rest Breaks**

13 There are risks to Plaintiff's claims that Defendant failed to authorize or permit rest  
14 breaks. DS, ¶ 20. If the Defendants properly classified the Plaintiff and the other performers as  
15 exempt independent contractors instead of employees, there will be civil penalties owed for rest  
16 period violations. *Id.* Employers are not required to record rest periods and such periods are paid.  
17 *Id.* Defendant contends it provided non-exempt employees the opportunity to take rest periods in  
18 accordance with California law. Further, Defendant's written policies on meal and rest periods  
19 are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records  
20 showing whether an employee clocked out or not, there is no such evidence to prove a missed  
21 rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims  
22 at trial has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony  
23 and surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible,  
24 relevant caselaw makes such claims risky from a trial management and due process perspective.  
25 *Id.*, See *Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4<sup>th</sup> 1, 31 (explaining "[I]f sufficient  
26 common questions exist to support class certification, it may be possible to manage individual  
27 issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo*  
28 (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

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1  
2 **g. The Absence of Large Civil Penalty Awards under PAGA**

3 The sole source of money recoverable for the PAGA Members and the State is civil  
4 penalties available under PAGA. It allows employees to seek civil penalties for certain violations  
5 of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory.  
6 As discussed above, Plaintiff's maximum estimated liability exposure is based on the theories  
7 that: (1) Every paycheck that Defendant issued to employees during the PAGA Period represents  
8 a pay period in which every PAGA Member suffered a minimum wage violation; (2) Every  
9 paycheck that Defendant issued to employees during the PAGA Period represents a pay period  
10 in which every PAGA Member suffered an overtime wage violation; (3) Every paycheck that  
11 Defendant issued to employees during the PAGA Period represents a pay period in which every  
12 PAGA Member suffered a meal period violation; (4) Every paycheck that Defendant issued to  
13 employees during the PAGA Period represents a pay period in which every PAGA Member  
14 suffered a rest period violation; and (5) Every paycheck that Defendant issued to employees  
15 during the PAGA Period represents a pay period in which every PAGA Member suffered an  
16 unreimbursed expense violation. There are no California state court decisions under the PAGA  
17 to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only two  
18 significant awards under the PAGA in a contested proceeding, both issued by federal district  
19 courts, one of which was overturned on May 28, 2021.<sup>5</sup> DS, ¶ 24.

20 <sup>5</sup> In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded  
21 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from  
22 the plaintiff's claim for approximately \$33 million. *Bernstein* represents a unique set of  
23 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*  
24 suffered a particularly sizeable injury – the court found that the defendant's policies caused  
25 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in  
26 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to  
27 train their flight attendants, engaged in glaring violations of the labor code, such as failing to  
28 compensate its flight attendants for work performed outside of "block time" (time during which  
the aircraft is moving), including time spent participating in pre-flight briefings, boarding  
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,  
1055-1058. Indeed, defendant's liability was so clear in *Bernstein* that the case was resolved on  
the plaintiffs' motion for summary judgment. *Id.*

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court  
awarded approximately \$102 million in damages, primarily based on the Defendant's failures to



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

10           Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In  
11 *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court, case number BC430633, the  
12 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in  
13 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian  
14 awarded approximately \$325,000.00 in civil penalties under the PAGA. DS, ¶ 26, Exs. 7-9. In a  
15 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*  
16 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the  
17 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.  
18 DS, ¶ 26.

19           Defendant could also convince the Court to dismiss the claims due to unmanageability  
20 because determining whether each Aggrieved Employee worked off the clock or why each  
21 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*  
22 *CPS Sec. Solutions, Inc.* (2015) 60 Cal<sup>4th</sup> 833. In *Ortiz v. CVS Caremark Corp.*, the court  
23 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at \*3-4 (N.D. Cal.  
24 2014). The *Ortiz* court cited the "multitude of individualized assessments" that case would have

25           comply with the requirements of California Labor Code section 226. On May 28, 2021, the United  
26 States Court of appeals for the Ninth Circuit overturned the decision finding that there is no  
27 technical wage statement violation for a failure to list the rates and hours of pay associated with  
28 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 required in ordering dismissal. *Id.* At \*4. Several other courts have adopted *Ortiz*, and dismissed  
2 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims  
3 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at \*3  
4 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at \*4 (C.D. Cal. 2015); *see*  
5 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at \*2–4 (E.D. Cal. 2014) (bifurcating  
6 trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved  
7 employees, judicial economy favors deferring the representative portion of the PAGA claim”);  
8 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at \*16 (N.D. Cal. May 13, 2015). Further, on  
9 September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The*  
10 *Office Superstore, LLC*, 68 Cal. App 5<sup>th</sup> 746 (2021), ’eh’g denied (Sept. 27, 2021) holding that  
11 trial courts have authority to ensure that claims under PAGA are manageable, and that courts may  
12 limit or strike unmanageable PAGA claims. DS, ¶ 27.

13 While the evidence gathered through Plaintiff’s discovery supports the merits of the  
14 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks  
15 associated with the merits of Plaintiff’s claims, the uncertainties of complex litigation, the cost  
16 of pretrial and trial proceedings, the Court’s discretion to lower the amount of penalties ultimately  
17 awarded, and the secured benefit to the PAGA Members and the LWDA promoting compliance  
18 with the Labor Code. DS, ¶ 29.

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

21 The arbitration agreements entered into between Defendants on the one hand, and the  
22 Plaintiff and comparable workers, on the other, present a significant risk to the success of  
23 Plaintiff’s representative litigation. DS, ¶ 28. According to Defendants, all adult entertainers and  
24 employees entered into arbitration agreements with Defendants, which include class action and  
25 representative waivers that bring these agreements in line with the recent holding of *Viking River*  
26 *Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906. *Id.* As the arbitration agreements in question  
27 restrict potential litigants from bringing PAGA actions against Defendants, Plaintiff would be  
28 effectively barred from pursuing claims on behalf of the Class in Court. *Id.* As such, by continuing  
to trial on representative claims, Plaintiff would run the high risk of suffering defeat due to the



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1 existence of the arbitration agreements. Also, because different defenses would apply to some  
2 workers and not others – i.e., the existence of signed arbitration agreements – there is a risk that  
3 the Court could determine that Plaintiff’s claims present too many individualized inquiries to  
4 allow for manageable PAGA trial. *Id.*

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

9 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis  
10 depending on the number of pay periods Defendant employed them for during the PAGA Period.  
11 Agreement, ¶ 17. With a total of approximately 50 PAGA Members, the average estimated  
12 individual Settlement Payment for each PAGA Member is approximately \$140.00. Although an  
13 average payment of \$140.00. per Aggrieved Employee is not an enormous sum of money, it is  
14 an excellent result given the uncertainties this lawsuit entails. It is also reasonable given the  
15 structure and purpose of the PAGA. The PAGA is not a restitution statute with a traditional  
16 damages provision designed to restore victims to the position they would have been in had the  
17 Labor Code violations not taken place. Rather, it is at best a punishment statute designed to reduce  
18 future Labor Code violations. It provides for civil penalties only. DS, ¶¶ 30.

19 **2. Plaintiff’s Counsel is Experienced in Similar Litigation.**

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

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

26 Of the \$99,000.00 Gross Settlement Amount, Plaintiff’s counsel requests \$33,000.00 (1/3  
27 of the Gross Settlement Amount) in attorney’s fees and up to \$12,000.00 in litigation expenses.  
28 DS, ¶ 32; Agreement, ¶ 23. 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) up to 40% of any recovery. *Id.*

It is an accepted practice in wage and hour class action settlements to award attorneys’



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

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

22 "[R]egardless whether the percentage method or the lodestar method is used, fee awards

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23  
24 <sup>6</sup> The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a))  
25 does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon*  
26 *Cases* (2008) 42 Cal.4<sup>th</sup> 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.5<sup>th</sup> 976, 989, fn. 6.)



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

7 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding  
8 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s  
9 fee request of \$33,000.00 (one-third of the Gross Settlement Amount) is fair and reasonable based  
10 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 33, Ex. 10.  
11 Plaintiff’s counsel’s previous experience in litigating wage and hour class actions and the caliber  
12 of opposing counsel also support the reasonableness of the fee request. DS, ¶ 33.

13 In addition, Plaintiff’s Counsel incurred substantial costs, \$9,474.77 to date, including the  
14 costs of a mediator to aid in the representation of the PAGA Members.<sup>7</sup> DS, ¶ 34, Ex. 11; Haines  
15 Decl. ¶ 10. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$100.38 in costs,  
16 which consist of filing fees and attorney service fees for filing this motion and notice of entry of  
17 order. Plaintiff’s Counsel anticipate that litigation costs will total approximately \$9,590.65  
18 through final accounting of the Settlement. *Id.* As the evidence submitted herewith shows, all of  
19 these costs are documented and reasonably incurred. DS, ¶ 34, Ex. 11. Accordingly, they warrant  
20 the Court’s approval.

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

23 Plaintiff’s General Release Payment in the amount of \$25,000.00 is being paid to Plaintiff  
24 as PAGA Representative for her general release and service to the State of California and the  
25 PAGA Members in prosecuting the Action. DS, ¶ 37.

26 There is authority for the General Release Payment to Plaintiff. While the statutory

27 <sup>7</sup> Plaintiff’s counsel do not seek reimbursement for the wages they paid to the attorneys,  
28 paralegals, and legal assistants to aid in the representation of the PAGA Members and the State.  
Plaintiff’s Counsel bore these expenses over the lengthy since they began work on this matter  
without reimbursement.



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1 language of the PAGA is silent on the issue of incentive awards to named Plaintiff, it nonetheless  
2 provides implicit support for incentive payments to named Plaintiff. Moreover, language from  
3 the Ninth Circuit Court of Appeals and recent California district court caselaw indicates that such  
4 awards are permitted. DS, ¶¶ 37 - 38.

5 Plaintiff's General Release Payment of \$25,000.00 is entirely reasonable given Plaintiff's  
6 efforts in the Lawsuit and the risks she undertook on behalf of the PAGA Members. *See generally*  
7 Villena Decl. Plaintiff devoted many hours advancing the interests of the PAGA Members. *Id.*  
8 Plaintiff has done this, by, among other things, retaining experienced counsel, providing them  
9 with information about her work history with Defendant, assisting in contacting absent PAGA  
10 Members to gather information, participating in mediation, and being actively involved in the  
11 settlement process to ensure a fair result for the PAGA Members as a whole. *Id.* In doing this,  
12 Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendant's  
13 attorneys' fees and costs if this action had been unsuccessful and in bad faith (*See* Labor Code  
14 §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the PAGA Members  
15 show that the proposed General Release Payment to Plaintiff is fair, adequate, and reasonable,  
and thus warrants approval. *See generally* Villena Decl. DS, ¶38.

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

18 With regard to the Third-Party Settlement Administration Fees provision, it is reasonable.  
19 Before agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable  
20 third-party administrators which provided higher bids. DS, ¶ 39-40, Exs. 13 - 15. Thus, the  
Settlement Administration Fees provision should be given approval.

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1 **V. CONCLUSION**

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

4 Respectfully submitted,

5 THE SPIVAK LAW FIRM

6  
7 Dated: September 15, 2022

By:

  
\_\_\_\_\_  
DAVID G. SPIVAK, Attorneys for  
Plaintiff, SIMONETTE VILLENA, and  
all others similarly situated



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