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8 AKANKSHA MASSEY, and all others similarly situated

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

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

16 *Plaintiff,*

17 vs.

18 CHILDREN OF THE NIGHT, a California
19 corporation; and DOES 1–50, inclusive,

20 *Defendants.*

Case No. 21STCV30464

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

Hearing Date: December 5, 2022
Hearing Time: 8:30 a.m.
Hearing Dept.: 20, The Honorable Kevin
C. Brazile

Reservation ID: 123818046945

Action filed: August 17, 2021

**Submitted Herewith Under Separate
Cover:**

1. Memorandum of Points and Authorities;
2. Declaration(s) of David Spivak and Akanksha Massey; and
3. [Proposed] Order and Judgment Approving PAGA Settlement



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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 Akanksha Massey (“Plaintiff” or “Massey”) 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”)² for the civil penalties claim she brought
7 against Defendant Children Of The Night (“Children Of The Night” 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. Through
14 this motion, therefore, Plaintiff respectfully requests for this Court to approve the PAGA
15 Settlement for resolution of the PAGA claim.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

17 Defendant is a non-profit organization that provides intervention in the lives of children
18 who are sexually exploited and vulnerable to or involved in prostitution and pornography, which
19 offers tutoring services for certain students DS, ¶ 3. Defendant employed Plaintiff as a tutor from
20 about October 20, 2020, until November 17, 2020. *Id.*

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

22 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under
23 PAGA. By letter dated June 11, 2021, Plaintiff, on behalf of herself and other aggrieved hourly
24 employees, gave written notice by certified mail to the Labor and Workforce Development
25 Agency (“LWDA”) and Defendant of the specific provisions of the California Labor Code
26 alleged to have been violated, including the facts and theories to support the alleged violations.
27 DS, ¶ 4, Ex. 3.

28 **B. Plaintiff’s PAGA Claim**

Plaintiff and the PAGA Members are subject to arbitration agreements with Defendant.
Plaintiff filed her lawsuit in Los Angeles County Superior Court on August 17, 2021. DS, ¶ 5,
Ex. 4. Plaintiff’s complaint presents one cause of action for civil penalties under PAGA. *Id.*

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



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1 Shortly after Plaintiff served her first set of discovery requests, the Parties agreed to stay formal
2 discovery and participate in mediation. On December 03, 2021, Defendant filed an answer to
3 Plaintiff's Complaint. DS, ¶ 5, Ex. 5. Defendant denies all of Plaintiff's allegations and strongly
4 contends that its wage and hour policies, practices and procedures are fully compliant with all
5 applicable laws. DS, ¶ 5.

6 **C. Mediation**

7 On June 02, 2022, the Parties participated in mediation with mediator Kimberly S. Deck
8 in an attempt to resolve the PAGA claim. The Parties engaged in arm's-length negotiations and
9 ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement
10 was reached after exchanges of data, information and documents, and is a result of extensive
11 arms-length negotiations. The Parties conducted informal discovery for purposes of potential
12 resolution through which they ascertained the size of the aggrieved employee group and the
13 number of pay periods worked by them during the PAGA Period to ascertain the total value of
14 Plaintiff's PAGA claim. Now that the parties have finalized the PAGA Settlement, Plaintiff
15 submits it to this Court for approval. DS, ¶ 6.

16 **III. OVERVIEW OF SETTLEMENT**

17 **A. "PAGA Members" Definition**

18 The PAGA Members are all current and former hourly, non-exempt California employees
19 of Defendant employed any time during the period from June 11, 2020 through the date the Court
20 approves the settlement (the "PAGA Period") (collectively referred to as "PAGA Members").
21 Agreement, ¶¶ 1 - 2.

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

23 Defendant will pay \$50,000.00 to settle the PAGA claims in the Action ("Maximum
24 Settlement Amount"). In no event shall Defendant be liable for more than the Gross Settlement
25 Amount of Fifty Thousand Dollars and Zero Cents (\$50,000.00) as a result of this Settlement.
26 The Gross Settlement Amount will be allocated as follows:

27 a. Third-Party Settlement Administration Fees of up to Three Thousand Dollars and Zero
28 Cents (\$3,000.00);

29 b. Plaintiffs counsel's, David Spivak of The Spivak Law Firm and of ("PAGA Counsel"),
30 request for attorneys' fees of up to one-third (1/3) of the Gross Settlement Amount, or Sixteen
31 Thousand Six Hundred and Sixty Dollars and Sixty-Seven Cents (\$16,666.67) ("PAGA Counsel's
32 Fees"), subject to Court approval, plus actual costs and expenses incurred by PAGA Counsel



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1 related to the Action as supported by declaration, which are currently estimated to be no greater
2 than Eleven Thousand Dollars and Zero Cents (\$11,000.00) ("PAGA Counsel's Costs");

3 c. A payment to Plaintiff in the amount of Five Thousand Dollars and Zero Cents
4 (\$5,000.00) ("General Release Payment") for (1) her general release that includes a release of
5 claims pursuant to California Civil Code section 1542 and (2) her service to the State of California
6 and the PAGA Members in prosecuting the Action; This amount will be allocated 10% to wages
7 and 90% to penalties and general damages. IRS Forms W-2 and 1099 shall issue for the two
8 portions of this individual payment; and

9 d. The remaining funds (the Gross Settlement Amount less the Third-Party Settlement
10 Administration Fees, PAGA Counsel's Fees, PAGA Counsel's Costs, and Plaintiffs General
11 Release Payment) shall be referred to as the "Net Settlement Amount."
12 Settlement para. 4.

13 Defendant estimated for purposes of mediation that there are 1,367 pay periods by 49
14 PAGA Members for the period of June 11, 2020 through May 27, 2022. Before the Parties seek
15 or a Party seeks court approval of the Settlement, the Settlement Administrator will advise
16 Plaintiff's counsel of Defendant's report of the total number of pay periods worked and PAGA
17 Members. If the pay periods worked and/or PAGA Members as of June 8, 2022 exceeds the
18 referenced 1,367 pay periods worked and/or 49 PAGA Members by more than 10.00%, the Gross
19 Settlement Amount will increase proportionally according to the number of additional pay
20 periods worked or PAGA Members. Settlement para. 5.

21 **C. Timing of Payments**

22 The Settlement Administrator will issue each PAGA Member a check for his or her share
23 of the Net Settlement Amount along with an explanatory letter in the form attached as Exhibit A.
24 Checks will remain negotiable for one hundred eighty (180) days. Any checks returned as non-
25 deliverable on or before the check cashing deadline will be sent promptly via regular First-Class
26 U.S. Mail to the forwarding address affixed thereto. All settlement payments to PAGA Members
27 will be treated as miscellaneous income for which an IRS Form 1099 will be issued by the
28 Settlement Administrator if required by law. Settlement para. 11.

D. Calculation of Settlement Shares

The Net Settlement Amount shall be designated as PAGA penalties in full satisfaction of
all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations,
and/or other provisions of law alleged to have been violated in or reasonably related to the



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operative Complaint with respect to PAGA Members, allocated between the LWDA and the PAGA Members pursuant to Labor Code Section 2699(i) with 75.0% paid to the LWDA and 25.0% paid to the PAGA Members on a pro rata basis ("PAGA Penalties Fund"). The 25.0% of the Net Settlement Amount will be paid to all PAGA Members according to the following formula: Settlement Payment to each PAGA Member= $[\$25.0\% \text{ of Net Settlement Amount}] \times [\text{Pay Periods Worked by Individual PAGA Member During PAGA Period} \div \text{Total Pay Periods Worked by All PAGA Members during PAGA Period}]$. Settlement para. 6.

E. Apportionment of Settlement Shares

One hundred percent (100%) of each individual PAGA payment under this Settlement will be considered penalties and may be subject to local, state, or federal tax withholdings and will be reported to the IRS and state tax authorities.

F. The Releases

As of and subject to the occurrence of the Effective Date, and in consideration for the Gross Settlement Amount, the claims settled, fully released and forever discharged by the LWDA and the PAGA Members, including Plaintiff, constitute any and all claims for civil penalties Plaintiff, the PAGA Members, and the State of California may have against the Released Parties under the California Labor Code, Wage Orders, regulations, and/or any other provisions of state and federal law arising from allegations that the PAGA Members suffered Labor Code violations based on 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 any other Labor Code violations that were alleged in the Action, or that could have been alleged in the Action based on the facts alleged in the Action, which includes, but is not limited to, alleged violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 2802, and 2698 et seq. ("PAGA Released Claims"). The "Released Parties" are Children Of The Night and its present and former parent companies, subsidiaries, divisions, concepts, related or affiliated companies, and its shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and all persons acting by or through or in concert with any of them, and each of them (hereinafter "Released Parties"). Settlement para. 13.

G. Uncashed Checks

Funds represented by settlement checks returned as undeliverable and those settlement checks remaining un-cashed for more than 180 days after issuance shall be paid to the California



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1 State Controller's Office Unclaimed Property Fund with an identification of the amount of
2 unclaimed funds attributable to each PAGA Member. The Parties do not bear any liability for
3 lost or stolen checks, forged signatures on checks, or unauthorized negotiation of checks. Unless
4 responsible by its own acts of omission or commission, the same is true for the Settlement
5 Administrator. All settlement payments to PAGA Members will be treated as miscellaneous
6 income for which an IRS Form 1099 will be issued by the Settlement Administrator if required
by law. Settlement para. 11.

7 **IV. ARGUMENT**

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

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

24 PAGA penalties are in the nature of a law enforcement penalty and are designed to
25 penalize an employer for its failure to comply with California's wage and hour laws and
26 regulations and are not designed to compensate employees. *Ochoa-Hernandez v. CJADERS*



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1 *Foods, Inc.*, 2010 WL 1340777 *1, *5 (E.D. Cal. Apr. 2, 2010). (“Unnamed employees need not
2 be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative
3 PAGA claim. There is no indication that the unnamed plaintiffs can contest a settlement, if any,
4 reached between the parties.”).

5 In making the determination whether a settlement taken as a whole is fair, reasonable, and
6 adequate, the Court should be careful to still give “proper deference to the private consensual
7 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
8 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
9 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
10 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
11 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
12 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
Univ. of Cal., 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

13 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
14 **PAGA.**

15 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
16 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
17 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*
Moorer v. Noble L.A. Events, Inc. (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
18 The Parties’ Settlement so provides. Second, the LWDA must be given notice of the settlement
19 so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code §
20 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion.
21 DS, ¶ 7, Ex. 6. As a result, Plaintiff has met all procedural statutory requirements for settling a
PAGA action.

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

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

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



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

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

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

17 The PAGA Settlement was reached only after litigation and arms’ length negotiations
18 between experienced attorneys, which included a full day mediation with Kimberly S. Deck, a
19 respected mediator. At all times, the negotiations were adversarial and contentious, although still
20 professional in nature. DS, ¶ 6.

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

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

- 27 • Defendant produced and Plaintiff reviewed her personnel file.
- 28 • Defendant produced and Plaintiff reviewed and analyzed time and payroll records for over 7 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 interviewed other employees about the claims at issue.



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- Plaintiff analyzed the state of caselaw on PAGA claims, claims for 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.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded before trial.

DS, ¶13.

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

A court has discretion under PAGA to award a lesser amount than the maximum penalty. 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, Defendant has posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant uncertainty. DS, ¶ 14. 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, ¶ 14. For mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately \$956,900.00 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 penalties for the same violation for the same pay period under different Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

In preparation for mediation and during the settlement negotiations that followed, Defendant disclosed that there were approximately 49 potentially aggrieved employees and 1,367 pay periods. The maximum possible civil penalties under the PAGA is the total number of pay 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



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1 maximum possible civil penalties depends on circumstances that are extremely unlikely
2 independently and in combination. It would depend on the Court stacking the maximum
3 recoverable civil penalties for failure to pay employees all earned wages, failure to provide meal
4 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
5 failure to issue proper wage statements, failure to timely pay wages per pay period for all 1,367
6 pay periods for all 49 potentially aggrieved employees during the PAGA Period. Plaintiff's
7 counsel is not aware of any California State court decision awarding a plaintiff and the other
8 aggrieved employees she represents multiple civil penalties for the same pay period under
9 different Labor Code provisions. Plaintiff's counsel had to substantially discount the value of
10 these claims in the settlement negotiations for this and a variety of other reasons (outlined below).
DS, ¶ 15.

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

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

29 The difficulty inherent in proving that off-the-clock work occurred poses a significant
30 hurdle to Plaintiff. Plaintiff would have to rely on declarations and witness statements to prove
31 this claim. Generally, a court will not certify a class unless it can determine an appropriate



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1 methodology for all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014)
2 59 Cal. 4th 1. Here, Plaintiff would have to rely heavily on anecdotal evidence to prove the off-
3 the-clock work claim, especially given the lack of records indicating when such off-the-clock
4 work may have taken place. Individualized inquiries would need to be conducted person-by-
5 person, day-by-day, to determine if an individual in fact worked “minutes” off-the-clock on a
6 “regular” basis. Accordingly, there is a significant risk that the Court would consider this
evidentiary showing insufficient as a methodology for all aggrieved employees. DS, ¶ 17.

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

8 There are risks to Plaintiff’s claims that Defendant failed to provide all meal periods. DS,
9 ¶ 18. Defendant contends that, to establish a violation of the meal period law, a plaintiff must do
10 more than show that a meal break was not taken. *Brinker*, 53 Cal.4th at 1004. So long as an
11 employer provides employees with a “reasonable opportunity” to take a duty-free meal period, it
12 has no further duty to “police meal breaks and ensure no work thereafter is performed.” *Id.* at
13 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the
14 employee from taking a proper break, or otherwise failed to release the employee of all control.
15 *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a particular
16 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.*

17 Defendant contends it did not impede or discourage Plaintiff, or any other employees,
18 from taking their meal periods. DS, ¶ 18. Defendant’s policies mandate that employees take at
19 least a 30-minute, uninterrupted meal period and record the beginning and ending time of their
20 meal breaks each day on their time records. *Id.* The time records that comprise the random sample
21 Defendant produced to Plaintiff for purposes of mediation show that meal periods were taken the
22 vast majority of the time. *Id.* Of the time records that show a late, short or no lunch, individualized
23 evidence may be necessary to determine whether they occurred due to conduct of the Defendant
24 or each of the employees concerned. Accordingly, there is a significant risk that the recoverable
25 amount of civil penalties for unprovided meal periods would be substantially reduced at trial. *Id.*

26 c. Risks Associated with Plaintiff’s Claim That Defendant Failed To
Authorize or Permit Rest Breaks

27 There are risks to Plaintiff’s claims that Defendant failed to authorize or permit rest
28 breaks. DS, ¶ 19. Employers are not required to record rest periods and such periods are paid.

1 *Id.* Defendant contends it provided non-exempt employees the opportunity to take rest periods in
2 accordance with California law. Further, Defendant's written policies on meal and rest periods
3 are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records
4 showing whether an employee clocked out or not, there is no such evidence to prove a missed
5 rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims
6 at trial has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony
7 and surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible,
8 relevant caselaw makes such claims risky from a trial management and due process perspective.
9 *Id.*, *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal.4th 1, 31 (explaining "[I]f sufficient
10 common questions exist to support class certification, it may be possible to manage individual
11 issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo*
12 (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

11 d. Risks Associated with Plaintiff's Claim That Defendant Failed To
12 Indemnify for Expenses

13 There is a risk that the Court may consider Plaintiff's claim that Defendant failed to
14 indemnify for business expenses to be individual in nature and thus decline to allow a trial on
15 behalf of all aggrieved employees and the State. DS, ¶ 20. Plaintiff alleges that Defendant
16 required Plaintiff and the Aggrieved Employees to use their personal items for work, including
17 cellular phones, computers and other electronic devices, vehicles, and tools, and failed to
18 indemnify them for these business expenses. *Id.* Defendant presented evidence that they have
19 supplied their employees with tools, equipment, and other supplies and had an expense
20 reimbursement policy. As such, there is a risk that the Court may consider Plaintiff's claims to
21 be individual in nature and unfit for class wide resolution, or otherwise reduce or limit the
22 recoverable amount of civil penalties for this claim. *Id.*

21 e. Risks Associated with Plaintiff's Claim That Defendant Failed To
22 Issue Accurate and Complete Wage Statements

23 Plaintiff also asserts claims for wage statement violations. Under Labor Code section 226,
24 wage statements must include various information, including the applicable rates of pay,
25 corresponding hours worked, and gross pay. DS, ¶ 21.

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



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g. The Absence of Large Civil Penalty Awards under PAGA

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

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



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1 Additionally, PAGA states a court has discretion to award a lesser amount than the
2 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
3 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
4 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
5 evidence of willful and intentional conduct. *Carrington v. Starbucks (2018) 30 Cal.App.5th 504*
6 ("Carrington") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
7 discounted award of only \$5 per violation because it was within the Court's discretion to
8 significantly reduce PAGA penalties even when there is a finding that a violation of the California
Labor Code occurred. DS, ¶ 24.

9 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
10 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
11 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
12 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
13 awarded approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 25, Exs. 7-10. In a
14 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
15 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
16 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 25.

17 Defendant could also convince the Court to dismiss the claims due to unmanageability
18 because determining whether each Aggrieved Employee worked off the clock or why each
19 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*
20 *CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court
21 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3-4 (N.D. Cal.

22 1055-1058. Indeed, defendant's liability was so clear in *Bernstein* that the case was resolved on
23 the plaintiffs' motion for summary judgment. *Id.*

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



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2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA claims where there are a large number of allegedly aggrieved individuals whose claims require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved employees, judicial economy favors deferring the representative portion of the PAGA claim”); *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The Office Superstore, LLC*, 68 Cal.App.5th 746 (2021), reh’g denied (Sept. 27, 2021) holding that trial courts have authority to ensure that claims under PAGA are manageable, and that courts may limit or strike unmanageable PAGA claims. DS, ¶ 26.

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 pretrial and trial proceedings, the Court’s discretion to lower the amount of penalties ultimately awarded, and the secured benefit to the PAGA Members and the LWDA promoting compliance with the Labor Code. DS, ¶ 28.

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

The arbitration agreements entered into between Defendant on the one hand, and the Plaintiff and comparable workers, on the other, present a significant risk to the success of Plaintiff’s representative litigation. DS ¶ 27. According to Defendant, the majority of the workers entered into arbitration agreements with Defendant. *Id.* As the arbitration agreements in question restrict potential litigants from bringing PAGA actions against Defendant, Plaintiff would be 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 existence of the arbitration agreements. Also, because different defenses would apply to some workers and not others – i.e., the existence of signed arbitration agreements – there is a risk that the Court could determine that Plaintiff’s claims present too many individualized inquiries to allow for a manageable PAGA trial. *Id.*



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

5 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis
6 depending on the number of pay periods Defendant employed them for during the PAGA Period.
7 Agreement, ¶ 29. With a total of approximately 49 PAGA Members, the average estimated
8 individual Settlement Payment for each PAGA Member is approximately \$73.13 (\$3,583.33 / 49
9 PAGA Members). Although an average payment of \$73.13 per Aggrieved Employee is not an
10 enormous sum of money, it is an excellent result given the uncertainties this lawsuit entails. It is
11 also reasonable given the structure and purpose of the PAGA. The PAGA is not a restitution
12 statute with a traditional damages provision designed to restore victims to the position they would
13 have been in had the Labor Code violations not taken place. Rather, it is at best a punishment
14 statute designed to reduce future Labor Code violations. It provides for civil penalties only. DS,
15 ¶29.

16 **5. Plaintiff's Counsel is Experienced in Similar Litigation.**

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

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

22 Of the \$50,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$16,666.67 (1/3
23 of the Gross Settlement Amount) in attorney's fees and up to \$11,000.00 in litigation expenses.
24 DS, ¶ 31; Agreement, ¶ 4b. The written retainer agreement Plaintiff's counsel entered into with
25 Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded attorney
26 fees or (b) up to 40% of any recovery. *Id.*

27 It is an accepted practice in wage and hour class action settlements to award attorneys'
28 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
29 parties. California courts have long recognized that an appropriate method for awarding
30 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
31 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific
32 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
33 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the



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fund”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

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

“[R]egardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA settlements. DS, ¶ 34.

Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s fee request of \$16,666.67 (one-third of the Gross Settlement Amount) is fair and reasonable based

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 Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)



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1 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶32, Ex. 11.
2 Plaintiff's counsel's previous experience in litigating wage and hour class actions and the caliber
3 of opposing counsel also support the reasonableness of the fee request. DS, ¶ 35.

4 In addition, Plaintiff's Counsel incurred substantial costs, \$7,264.18 to date, including the
5 costs of a mediator to aid in the representation of the PAGA Members.⁵ DS, ¶ 33, Ex. 12. Counsel
6 anticipate that Plaintiff will incur an additional \$225.68 in costs, which consist of filing fees and
7 attorney service fees for filing this motion and notice of entry of order. Plaintiff's Counsel
8 anticipate that litigation costs will total approximately \$7,489.86 through final accounting of the
9 Settlement. *Id.* As the evidence submitted herewith shows, all of these costs are documented and
reasonably incurred. DS, ¶ 33, Ex. 12. Accordingly, they warrant the Court's approval.

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

11 Plaintiff's General Release Payment in the amount of \$5,000.00 is being paid to Plaintiff
12 as PAGA Representative for her general release and service to the State of California and the
13 PAGA Members in prosecuting the Action. DS, ¶ 36.

14 There is authority for the General Release Payment to Plaintiff. While the statutory
15 language of the PAGA is silent on the issue of incentive awards to a named Plaintiff, it
16 nonetheless provides implicit support for incentive payments to named Plaintiff. Moreover,
17 language from the Ninth Circuit Court of Appeals and recent California district court caselaw
indicates that such awards are permitted. DS, ¶¶ 37- 42.

18 Plaintiff's General Release Payment of \$5,000.00 is entirely reasonable given Plaintiff's
19 efforts in the Lawsuit and the risks she undertook on behalf of the PAGA Members. *See generally*
20 *Massey Decl.* Plaintiff devoted many hours advancing the interests of the PAGA Members. *Id.*
21 Plaintiff has done this, by, among other things, retaining experienced counsel, providing them
22 with information about her work history with Defendant, assisting in contacting absent PAGA
23 Members to gather information, participating in mediation, and being actively involved in the
24 settlement process to ensure a fair result for the PAGA Members as a whole. *Id.* In doing this,
25 Plaintiff has been exposed to significant risks, including the risk of an order to pay Defendant's

26 ⁵ Plaintiff's counsel do not seek reimbursement for the wages they paid to the attorneys,
27 paralegals, and legal assistants to aid in the representation of the PAGA Members and the State.
28 Plaintiff's Counsel bore these expenses over the lengthy since they began work on this matter
without reimbursement.



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attorneys' fees and costs if this action had been unsuccessful and in bad faith (*See* Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the PAGA Members show that the proposed General Release Payment to Plaintiff is fair, adequate, and reasonable, and thus warrants approval. *See generally* Massey Decl. DS, ¶ 43.

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

With regard to the Third-Party Settlement Administration Fees provision, it is reasonable. DS. ¶ 44, Ex. 13. Before agreeing to Phoenix Class Action Settlement Administrators, the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. DS, ¶ 45, Exs. 14 - 15. Thus, the Settlement Administration Fees provision should be given approval.

V. CONCLUSION

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: November 7, 2022

By:



DAVID G. SPIVAK, Attorneys for
Plaintiff, AKANKSHA MASSEY, and
all others similarly situated



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