

1 **LAW OFFICES OF SEVAG NIGOGHOSIAN**

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF LOS ANGELES**
10 **(UNLIMITED JURISDICTION)**

11 NORMA ANGELICA MARTINEZ,

12 Plaintiff,

13 vs.

14 ROBERT CHOW; UNION PLAZA
15 MARKET; and DOES 1 to 25, inclusive,

16 Defendants.

Case No.: 22STCV11902

Hon. Upinder S. Kalra

17 **DECLARATION OF SEVAG**
18 **NIGOGHOSIAN IN SUPPORT OF**
19 **MOTION FOR APPROVAL OF PAGA**
20 **SETTLEMENT AND RELEASE**

Complaint: April 7, 2022
Trial: September 19, 2023
Dept.: 51

21 **DECLARATION OF SEVAG NIGOGHOSIAN IN SUPPORT OF MOTION FOR**

22 **APPROVAL OF SETTLEMENT AND RELEASE**

23 I, SEVAG NIGOGHOSIAN, declare and state as follows:

24 1. I am an attorney duly licensed to practice before all the Courts of the State of
25 California. I am the attorney of record for Plaintiff NORMA ANGELICA MARTINEZ
26 (individually, "Martinez" or "Plaintiff") in her lawsuit against Defendants ROBERT CHOW and
27 UNION PLAZA MARKET (collectively "Defendants").
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2. I am experienced in handling employment law matters and specifically wage and hour cases, including PAGA claims. I have been practicing law since 2003. In my representation of employees, I have handled several individual and representative cases on behalf of employees with claims of minimum wages, overtime violations, as well as other wage claims, including meal breaks and rest breaks.

3. Except as otherwise indicated, I have personal knowledge of all matters set forth herein and, if called as a witness, could and would competently testify thereto under oath.

Factual and Procedural Background

4. Plaintiff had been an employee of Defendants, since 2018. Her employment ended on or around June 28, 2021. Throughout her employment tenure, Plaintiff was classified as an hourly, non-exempt employee.

5. Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On July 31, 2021, Plaintiff, on behalf of herself and Defendants’ other California non-exempt hourly employees (hereafter collectively the “Aggrieved Employees”) gave written notice by electronic service to the California Labor and Workforce Development Agency (“LWDA”) and via certified mail to Defendants of her claims against Defendants. In her notice to the LWDA, Plaintiff asserted on behalf of herself and the Aggrieved Employees that Defendants (1) failed to compensate for all hours worked and to pay minimum wages (Labor Code Sections 1194, 1197, 1197.1); (2) failed to pay overtime compensation (Labor Code Section 510); (3) failed to provide rest breaks (Labor Code Section 226.7); (4) failed to provide meal breaks (Labor Code Sections 512, 226.7); (5) failed to timely pay wages due during employment (Labor Code Section 204); (6) failed to provide accurate itemized wage statements

(Labor Code Section 226); (7) failed to keep accurate and complete payroll records (Labor Code Section 1174/1174.5); (8) failed to pay wages at the end of employment (Labor Code section 203); (9) failed to reimburse business expenses (Labor Code Sections 2800, 2802); and (10) failed to provide sick pay (Labor Code sections 232, 246). Plaintiff updated her PAGA notice on August 17, 2021. Plaintiff filed her initial lawsuit on April 7, 2022 in the Superior Court for the State of California, County of Los Angeles, Case No. 22STCV11902 with 12 causes of action for penalties under the following legal theories: 1) Failure To Compensate For All Hours Worked; 2) Failure To Pay Minimum Wages; 3) Failure To Pay Overtime; 4) Failure To Provide Accurate Itemized Wage Statements; 5) Failure To Pay Wages When Employment Ends; 6) Failure To Pay Wages Owed Every Pay Period; 7) Violation Of Labor Code § 558; 8) Failure To Maintain Accurate Records; 9) Failure To Give Rest Breaks; 10) Failure To Give Meal Breaks; 11) Violation Of Ca B&P Code § 17200; and 12) Private Attorneys General Act (“PAGA”). According to Defendants’ records, it has employed 29 Aggrieved Employees from February 1, 2021 through June 16, 2023, and there are paychecks issued for a total of approximately 2,569 pay periods worked for that same time period.

6. Defendants deny any liability or wrongdoing of any kind whatsoever associated with the lawsuit and the Representative PAGA Claim. It is the desire of the Parties to fully, finally, and forever compromise, and discharge all claims known or unknown related to those alleged in Plaintiff’s lawsuit.

7. On June 16, 2023, the Parties attended a full day mediation session with experienced wage-and-hour mediator Eleanor Barr. At the mediation, the Parties agreed to settle the entire action, including the Representative PAGA claim for violation of Labor Code § 2698, *et seq.* Before agreeing to the terms of the Settlement, the Parties engaged in discovery regarding

1 Defendants' policies, practices, operations, time and payroll information and other topics. In
2 advance of mediation, Defendants produced Plaintiff's personnel file, including time and payroll
3 data for Plaintiff and also produced the time records and payroll records for a 34% representative
4 group of aggrieved employees. Through extensive arm's length negotiations at the mediation
5 and only after discovery and investigation were performed, the Parties agreed to settlement
6 terms.
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8 8. The Parties conducted investigation of the facts and law both before and after
9 the lawsuit was filed. Counsel for the Parties have further investigated the applicable law as
10 applied to the facts discovered regarding Plaintiff's claims, the defenses thereto, and the Labor
11 Code violations claimed by Plaintiff. Based on their own independent investigations and
12 evaluations, the Parties and their respective counsel are of the opinion that the Settlement for
13 the consideration and on the terms set forth in this Stipulation are fair, reasonable and adequate
14 and are in the best interests of Plaintiff, the Aggrieved Employees, and Defendants in light of
15 all known facts and circumstances and the risks inherent in litigation, especially in this pandemic
16 era when most businesses are struggling to remain afloat, much less prosper and make a large
17 profit.
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20 9. The Parties further recognize that the issues presented in the Representative
21 PAGA Claim are likely only to be resolved with extensive and costly pretrial and trial
22 proceedings, and that further litigation will cause inconvenience, distraction, disruption, delay,
23 and expense disproportionate to the maximum potential benefits, especially in light of the
24 pandemic era and the business climate.
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26 10. While this lawsuit is a Representative PAGA Claim, the Parties are not
27 obligated to follow the class action procedural rules for obtaining approval of this settlement.
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1 *Arias v. Superior Court (Angelo Dairy)* (2009) 46 Cal.4th 969.

2 11. Plaintiff alleges that the strongest claims are that Plaintiff and other Aggrieved
3 Employees were not provided timely, uninterrupted meal and rest breaks and were not paid the
4 correct amount of overtime compensation. In terms of Plaintiff's other claims for minimum wage
5 violations and failure to compensate for all hours worked, no rounding issues were observed.
6 Furthermore, any further evidence of "off the clock" work would not appear in any pay
7 documents. The other associated PAGA claims are derivative to the meal/rest break and overtime
8 allegations for which Defendants would not have additional liability for inaccurate pay stubs,
9 failure to pay all wages owed, failure to keep accurate payroll records, and failure to pay wages
10 at the end of employment.
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12 12. Plaintiff contends that the civil penalty statutes applicable to the Representative
13 PAGA Claim are Labor Code §§ 210, 226.3, 558, 1174.5, 1197.1, 2802 and 2699(f)(2). Under
14 these civil penalty statutes, an employee who suffers a Labor Code violation, may be awarded a
15 sum of money for each pay period in which he or she was underpaid. However, under Labor
16 Code § 2699(e)(2), the Court can reduce an award of civil penalties if the award is unjust,
17 arbitrary, oppressive, or confiscatory.
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19 13. Under the civil penalty formulas applicable under PAGA, Plaintiff estimated a
20 maximum exposure of approximately \$140,100 for civil penalties for Plaintiff's strongest
21 disputed claims of failure to provide meal and rest periods and a rounding issue with the work
22 hours. Plaintiff's analysis, which Defendants vehemently disputes, revealed a 26.6% violation
23 rate for either late, short, or interrupted meal periods at shifts of 5 hours or longer (with 89.9%
24 of shifts being greater than 5 hours). As such, with the 26.6% violation rate of 89.9% of the shifts,
25 the maximum exposure would be \$30,700, which is calculated as \$50 penalty multiplied by 614
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1 pay periods (26.6% of the 2310 pay periods). Plaintiff extrapolated the same 26.6% for rest break
2 violations, which would equate to an exposure of \$68,300 (\$100 penalty per pay period
3 multiplied by 683 pay periods, which is 26.6% of the total pay periods of 2,569). As far as the
4 claim for rounding, Plaintiff discovered that there was unfavorable rounding in 16% of the shifts,
5 which would equate to 411 shifts. At \$100 per pay period for failure to pay the minimum wage,
6 the maximum exposure would be \$41,100. Assuming that Plaintiff's calculations and analysis is
7 accurate, the maximum exposure presumes that the Court will not reduce the penalty award as
8 unjust, arbitrary, oppressive, or confiscatory. Moreover, Plaintiff is aware of no California state
9 courts awarding Plaintiff multiple PAGA penalties for the same violation for the same pay period
10 under different Labor Code provisions. As such, one of the risks Plaintiff faces is that the Court
11 would refuse to "stack" civil penalties arising under the various Labor Code statutes.
12 Furthermore, judges have awarded extremely small sums to PAGA claimants in the past. In
13 addition, Defendants would make an argument under *Naranjo v. Spectrum Security Services,*
14 *Inc.*, 40 Cal. App. 5th 444 (Cal. App. 2d Dist., Sept. 26, 2019) and other similar cases, which at
15 the time of this settlement, held that meal or rest period violations are not a predicate for civil
16 penalties for improper wage statements and untimely final wages under Labor Code secs.201-
17 203, 226, 226.3, and 2699. Defendants also adamantly disputes all of Plaintiff's allegations in
18 the operative Complaint.

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22 14. The source of penalties available is under PAGA, which allows employees to
23 seek civil penalties for certain violations of the Labor Code so long as the penalties are not unjust,
24 arbitrary, oppressive, or confiscatory. There are no State Court decisions under the PAGA to date
25 with substantial awards of civil penalties. There is a substantial risk that the Court could reduce
26 civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence of willful
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1 and intentional conduct. The PAGA expressly counsels against such awards. *See Lab. Code* §
2 2699(e)(2) (“...a court may award a lesser amount than the maximum civil penalty amount
3 specified by this part if, based on the facts and circumstances of the particular case, to do
4 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”).
5 Further, although, class certification is not required for a PAGA claim, Defendants could contend
6 that Plaintiff should show that the PAGA claims are manageable.
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8 15. As such, Defendants could also convince the Court to dismiss the claims due to
9 unmanageability. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA claim because it
10 was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The Ortiz court cited the
11 “multitude of individualized assessments” that case would have required in ordering dismissal.
12 *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA claims where, as here,
13 there are a large number of allegedly aggrieved individuals whose claims require individual
14 assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D. Cal. 2014);
15 *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see also Stafford v.*
16 *Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating trial of
17 plaintiff’s claim from representative claims: “in light of the number of potential aggrieved
18 employees, judicial economy favors deferring the representative portion of the PAGA claim”);
19 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). DS, ¶ 24. The
20 risk of an unmanageable trial is heightened in a representative PAGA claim because the burden
21 of proof rests with the plaintiff to establish violations of the Labor Code “with respect to each and
22 every individual on whose behalf [they] seek[] to recover civil penalties.” *Molina v. Dollar Tree*
23 *Stores, Inc.*, 2013 U.S. Dist. LEXIS 138642, at *33–34 (C.D. Cal. Aug. 9, 2013); *Hibbs-Rines v.*
24 *Seagate Techs, LLC*, 2009 WL 513496, at *4 (N.D. Cal. Mar. 2, 2009). Moreover, in a PAGA
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1 case the plaintiff must prove liability with respect to “each and every individual” through
2 representative evidence – but without sacrificing the defendant’s due process right to present
3 proof of their affirmative defenses. *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1357 (2007);
4 *Walmart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Duran v. U.S. Bank Nat’l Ass’n*, 59
5 Cal. 4th 1, 33-34 (2014). Plaintiff is required to establish a violation of the Labor Code in each
6 pay period of each and every one of the approximately 29 employees. The Court could find that
7 this is an impractical task and require the Eligible Employees to bring individual claims instead
8 of a PAGA representative claim.
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10 16. The Parties further recognize that the issues presented in the Representative
11 PAGA Claim are likely only to be resolved with extensive and costly pretrial and trial
12 proceedings, and that further litigation will cause inconvenience, distraction, disruption, delay,
13 and expense disproportionate to the maximum potential benefits to the Subject Employees and
14 Plaintiff from continued litigation, especially in the post-pandemic era where further and
15 extensive litigation may cause businesses to shut down, resulting in no monetary compensation
16 to Plaintiff, Plaintiff’s attorneys, other Aggrieved Employees, and the State of California.
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19 17. The settlement of the Representative PAGA Claim involves monetary relief to
20 all Aggrieved Employees, Plaintiff, her attorneys, and the State of California.

21 18. Furthermore, Plaintiff recognizes that continued litigation presents significant
22 risks that support a significant downward departure from Plaintiff’s estimated civil penalties
23 amount. In view of the risks, the Settlement represents a fair, adequate, and reasonable
24 compromise amount for these claims and is in the best interest of Plaintiff and Eligible
25 Employees and thus, warrants approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479
26 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3. The PAGA settlement and its terms are fair, just,
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1 reasonable, adequate, and equitable to Defendants, Plaintiff, and the State, especially in light of
2 the current economic climate, and are the product of good faith, and informed arms-length
3 negotiations between the Parties consistent with public policy and fully comply with applicable
4 provisions of law. See Declaration of Sevag Nigoghosian, Plaintiff's counsel, at paragraph 19,
5 filed concurrently.

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7 19. The Settlement covers any and all civil penalties claims arising from Plaintiff's
8 allegations in her Complaint, as laid out above.

9 20. Defendants agrees to pay \$85,000.00 toward the Settlement (the "Gross
10 Settlement Amount" or "GSA") which will be distributed by Defendants as follows:

11 a. \$28,333.33 (33 1/3% of the GSA) in attorneys' fees to the Law Offices of
12 Sevag Nigoghosian;

13 b. \$9,053.94 (as of September 29, 2023) in attorney litigation costs to the Law
14 Offices of Sevag Nigoghosian;

15 c. \$2,500.00 in PAGA Settlement Administrator costs to Phoenix Settlement
16 Administrator;

17 d. \$45,112.73 (the "Net Settlement Amount" or "NSA") will be divided as
18 follows:

19 i. \$33,834.55 (75% of "NSA") to the LWDA, which represents civil
20 penalties payable to the LWDA under the Labor Code Private Attorneys
21 General Act ("PAGA"), Labor Code section 2698, *et seq.*; and

22 ii. \$11,278.18 (25% of NSA) (the "Aggrieved Employee Amount") to the
23 Aggrieved Employees which represents civil penalties payable to the
24 Aggrieved Employees as compensation for civil penalties that are
25 allegedly owed on the Representative PAGA Claim for the period from
26 February 1, 2021 through June 16, 2023.

27 21. Plaintiff and each Aggrieved Employee shall receive a portion of the Aggrieved
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Employee Amount on a pro-rata basis by multiplying the Aggrieved Employee Amount by the ratio of (i) the number of pay periods worked by the Aggrieved Employee during the release period and (ii) the total number of pay periods worked by all Aggrieved Employees during the release period.

22. For purposes of computing taxes, one-hundred percent (100%) of the Aggrieved Employee Settlement Award shall be considered to be a civil penalty and shall not be subject to withholding, unless otherwise required by law. The Claims Administrator shall file proof of payment.

Attorneys' Fees and Costs

23. I represent Plaintiff on a straight contingency basis. My firm's request for \$28,333.33 in attorney fees and \$9,053.94 in litigation costs is fair and reasonable. "Empirical studies show that, regardless of 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, 47 fn. 11 (quoting *Shaw v. Toshiba America Information Systems, Inc.* (E.D. Tex. 2000) 91 F.Supp.2d 942, 972; *See also Lafitte v. Robert Half Int'l Inc.* (Cal. Aug. 11, 2016) 1 Cal.5th 480, 503, 376 P.3d 672, 686 (holding that courts can use the percentage method for the calculation of attorneys' fees). This is also consistent with Plaintiff's Counsel's experience in cases involving PAGA claims. This award is justified here because Plaintiff's counsel achieved a strong result for the Aggrieved Employees and the State while bearing the substantial burdens of contingency representation.

24. The litigation costs expended to aid in the representation of the Aggrieved Employees include the following: lawsuit filing fee of \$454.22, PAGA initial filing fee of \$75.00, a mediation fee of \$6,500.00 (for Plaintiff's portion of the mediation); electronic filing

1 fees 207.93; postage \$14.40; Jury Fees \$161.39; Service of Process \$100.00; and expert data
2 analysis fee of \$1,550.00 for a total of \$9,053.94. All of these costs are documented and
3 reasonably incurred.

4 ***Plaintiff's Additional Released Claims***

5 25. Plaintiff entered into a confidential individual settlement agreement with
6 Defendants to settle her individual claims. As part of this confidential agreement, Plaintiff also
7 provided Defendants with a general release of all claims, whether known or unknown, including
8 provided Defendants with a general release of all claims, whether known or unknown, including
9 unknown claims covered by Civil Code Section 1542. Plaintiff will provide the individual
10 settlement to the Court upon request.

11 ***Notice of Settlement to the LWDA***

12 26. Pursuant to Lab. Code § 2699(1)(2), Plaintiff submitted a copy of the Settlement
13 with the LWDA at the same time the Settlement is being filed with the Court. True and correct
14 copies of the LWDA confirmation email is attached as **Exhibit "A"** to this declaration.

15 I declare under the penalty of perjury of the laws of the State of California that the
16 foregoing is true and correct to the best of my knowledge.

17 Executed on October 9, 2023, at Glendale, California.
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21 SEVAG NIGOGHOSIAN,
22 Declarant
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EXHIBIT “A”