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

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

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

16 *Plaintiff,*

17 vs.

18 PRO CUSTOM SOLAR LLC DBA
19 MOMENTUM SOLAR, a New Jersey limited
20 liability company; and DOES 1–50, inclusive,

21 *Defendants.*

Case No. 37-2021-00040509-CU-OE-CTL

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

Hearing Date: February 9, 2024
Hearing Time: 9:00 a.m.
Hearing Dept.: C-67, The Honorable
Eddie C. Sturgeon
Action filed: September 22, 2021
Trial Date: Not Set



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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **APPROVAL OF PAGA SETTLEMENT**

3 **I. INTRODUCTION**

4 Plaintiff Brandy Ruiz (“Plaintiff” or “Ruiz”) submits this memorandum of points and
5 authorities in support of her motion for approval of the PAGA SETTLEMENT AGREEMENT
6 (the “Agreement” or “PAGA Settlement” or “Settlement”)² for the civil penalties claim she
7 brought against Defendant Pro Custom Solar LLC dba Momentum Solar (“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 AGREEMENT represents a reasonable and adequate settlement of
13 strongly disputed claims and is in the best interest of the State of California, the PAGA Employees,
14 and Plaintiff. Through this motion, therefore, Plaintiff respectfully requests for this Court to
15 approve the PAGA SETTLEMENT AGREEMENT for resolution of the PAGA claim. The
16 Plaintiff seeks division of the \$273,600.00 Gross Settlement Amount as follows:

Item	Amount
PAGA Counsel Fees Payment	\$91,200.00
PAGA Counsel Litigation Expenses Payment	up to \$20,000.00
Administration Expenses Payment	up to \$6,000.00
PAGA civil penalties (PAGA Penalties)	\$156,400.00
75% to LWDA	\$117,300.00
25% to PAGA Employees	\$39,100.00
Gross Settlement Amount	\$273,600.00

20 **II. FACTUAL AND PROCEDURAL BACKGROUND**

21 Defendant is one of the fastest-growing companies in the nation that provides renewable
22 energy services. Defendant specializes in designing, installation, and activation of solar systems
23 in 11 states DS, ¶ 3. Defendant employed Plaintiff as a call center representative and remote phone
24 agent from about January 01, 2020 until December 15, 2020. *Id.*

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

26 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under
27 PAGA. By letter dated August 9, 2021, Plaintiff, on behalf of herself and other aggrieved hourly

28 ² The PAGA SETTLEMENT AGREEMENT 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 employees gave written notice by certified mail to the Labor and Workforce Development
2 Agency (“LWDA”) and Defendant of the specific provisions of the California Labor Code alleged
3 to have been violated, including the facts and theories to support the alleged violations. DS, ¶ 4,
4 Ex. 3.

5 **B. Plaintiff’s PAGA Claim**

6 Plaintiff and the PAGA Employees are subject to arbitration agreements with Defendant.
7 Plaintiff filed her class action lawsuit in San Diego County Superior Court on September 22,
8 2021. DS, ¶ 5, Ex. 4. On December 13, 2021, Plaintiff filed a First Amended Complaint (“1AC”).
9 DS, ¶ 5, Ex. 5. Plaintiff’s 1AC presents one cause of action for civil penalties under PAGA. *Id.*
10 Shortly after Plaintiff served her first set of discovery requests, the Parties agreed to stay formal
11 discovery and participate in mediation. On March 16, 2022, Defendant filed an answer to
12 Plaintiff’s First Amended Complaint. DS, ¶ 5, Ex. 6. Defendant denies all of Plaintiff’s allegations
13 and strongly contends that its wage and hour policies, practices and procedures are fully compliant
14 with all applicable laws. DS, ¶ 5.

15 **C. Mediation**

16 On March 24, 2022, the Parties participated in mediation with mediator Tripper Ortman
17 in an attempt to resolve the PAGA claim. The Parties engaged in arm’s-length negotiations and
18 ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA
19 SETTLEMENT AGREEMENT was reached after exchanges of data, information and
20 documents, and is a result of extensive arms-length negotiations. The Parties conducted informal
21 discovery for purposes of potential resolution through which they ascertained the size of the
22 aggrieved employee group and the number of pay periods worked by them during the PAGA
23 Period to ascertain the total value of Plaintiff’s PAGA claim. Now that the parties have finalized
24 the PAGA SETTLEMENT AGREEMENT, Plaintiff submits it to this Court for approval. DS, ¶
25 6.

26 **III. OVERVIEW OF SETTLEMENT**

27 **A. “PAGA Employees” Definition**

28 The PAGA Employees are all current and former non-exempt call center representatives
and/or canvassing employees Defendant employed in California any time during the period from
October 09, 2020 through August 3, 2023 (the “PAGA Period”) (collectively referred to as
“PAGA Employees”). Agreement, ¶¶ 1.4 and 1.18.

B. Monetary Terms Of The Settlement

Defendant promises to pay \$273,600.00 and no more as the Gross Settlement Amount.





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1 Defendant has no obligation to pay the Gross Settlement Amount prior to the deadline stated in
2 Paragraph 6.1 of the Agreement. The Administrator will disburse the entire Gross Settlement
3 Amount without asking or requiring PAGA Employees to submit any claim as a condition of
4 payment. None of the Gross Settlement Amount will revert to Defendant. Agreement, ¶ 3.1

5 The Administrator will make and deduct the following payments from the Gross
6 Settlement Amount, in the amounts specified by the Court in the Court's Approval order:

7 1. To PAGA Counsel: A PAGA Counsel Fees Payment of not more than 33.33%,
8 which is currently estimated to be \$91,200.00 and a PAGA Counsel Litigation Expenses Payment
9 of not more than \$20,000.00. If the Court approves a PAGA Counsel Fees Payment and/or a
10 PAGA Counsel Litigation Expenses Payment less than the amounts requested, the Administrator
11 will allocate the remainder to the PAGA Penalties.

12 2. To the Administrator: An Administrator Expenses Payment not to exceed
13 \$6,000.00 except for a showing of good cause and as approved by the Court. To the extent the
14 Administration Expenses are less or the Court approves payment less than \$6,000.00, the
15 remainder will be added to the PAGA Penalties. The Parties and their counsel represent that they
16 do not have any involvement in the governance or work of the Administrator.

17 3. To the LWDA and PAGA Employees: PAGA Penalties in the amount of
18 \$156,400.00 to be paid from the Gross Settlement Amount, with 75% (\$117,300.00) allocated to
19 the LWDA PAGA Payment and 25% (\$39,100.00) allocated to the Individual PAGA Payments.
20 The PAGA Employees' Individual PAGA Payments will be treated as non-wage income and
21 reported by the Administrator on IRS Forms 1099 (if applicable) to the respective PAGA
22 Employee and applicable governmental authorities. The Administrator will calculate each
23 Individual PAGA Payment by (a) dividing the amount of the PAGA Employees' 25% share of
24 PAGA Penalties (\$39,100.00) by the total number of PAGA Period Pay Periods worked by all
25 PAGA Employees during the PAGA Period and (b) multiplying the result by each PAGA
26 Employee's PAGA Period Pay Periods. PAGA Employees assume full responsibility and liability
27 for any taxes owed on their Individual PAGA Payment. The Administrator will report the
28 Individual PAGA Payments on IRS 1099 Forms. Agreement, ¶ 3.

C. Timing of Payments

Defendant shall fully fund the Gross Settlement Amount by transmitting the funds to the
Administrator no later than 15 business days after the Effective Date. Within 14 days after

1 Defendant funds the Gross Settlement Amount, the Administrator will mail checks for all
2 Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment,
3 the PAGA Counsel Expenses Payment. Disbursement of the PAGA Counsel Litigation Expenses
4 Payment shall not precede disbursement of Individual PAGA Payments. Agreement, ¶ 4.3-4.4.

5 **D. Apportionment of Settlement Shares**

6 One hundred percent (100%) of the individual PAGA payment under this Settlement will
7 be considered penalties. The PAGA Employees' Individual PAGA Payments will be treated as
8 non-wage income and reported by the Administrator on IRS Forms 1099 (if applicable) to the
9 respective PAGA Employee and applicable governmental authorities. Agreement, ¶ 3.23.

10 **E. The Releases**

11 All PAGA Employees are deemed to release, on behalf of themselves and their respective
12 former and present representatives, agents, attorneys, heirs, administrators, successors, and
13 assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably
14 could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and
15 the PAGA Notice. Agreement, ¶ 5.1.

16 **F. Uncashed Checks**

17 For any PAGA Employee whose Individual PAGA Payment check is uncashed and
18 cancelled after the void date, the Administrator shall transmit the funds represented by such check
19 to the California Controller's Unclaimed Property Fund in the name of the PAGA Employee.
20 Agreement, ¶ 4.4.3.

21 **IV. ARGUMENT**

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

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

28 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(1)(2). The
Court necessarily has broad discretion in making the decision to approve or reject a settlement
for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
Although the PAGA does not set forth the particular standards against which a PAGA settlement



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1 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
2 for evaluating class action settlements. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist.
3 LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's guidance, that approval
4 of PAGA settlements may be had where the statutory requirements of the PAGA are met and the
5 terms of the settlement are fundamentally fair, reasonable, and adequate). The established
6 standards for evaluating whether class action settlements are fair, reasonable, and adequate
7 provide a familiar, useful framework for the Court to evaluate PAGA settlements and have been
8 adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n.4 (E.D.
9 Cal. 2017) (citing *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688
10 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS
11 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
12 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v.*
13 *H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast*
14 *Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

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

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

- 28 1. Strength of plaintiff's case. This is the most important factor.
2. Expense associated with taking the case to trial, *i.e.*, the avoided cost of further
litigation.
3. Amount or value offered in settlement.



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4. Extent of discovery completed and state of proceedings.
5. Experience and views of counsel.
6. Presence of a governmental participant.
7. Reaction of class members to proposed settlement.

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

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

B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA.

PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here. First, any civil penalties recovered, whether by judgment or settlement, must be distributed as 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). The Parties’ Settlement so provides. Second, the LWDA must be given notice of the settlement so that it may be heard before the Court decides whether to grant approval. Cal. Lab. Code § 2699(l)(2). Under the Settlement, notice is being given to the LWDA concurrently with the filing of this motion. DS, ¶ 7, Ex. 7. As a result, Plaintiff has met all procedural statutory requirements for settling a PAGA action.

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

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



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the strength of the Plaintiff's case, the risk, expense, complexity and likely 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.

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

The PAGA SETTLEMENT AGREEMENT 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 Employees, 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 AGREEMENT.

1. 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). Defendant has posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims 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 \$431,000.00 in civil penalties. This estimate did not take into account any of the risks discussed and assumed a violation for all applicable pay periods. *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



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1 penalties in this fashion may be appropriate to determine the amount in controversy for purposes
2 of removal jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding
3 plaintiffs multiple PAGA penalties for the same violation for the same pay period under different
4 Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many
5 employers characterize as claim splitting and not merely stacking. *Id.*

6 In preparation for mediation and during the settlement negotiations that followed,
7 Defendant disclosed that there were approximately 157 potentially aggrieved employees and
8 1,685 pay periods. The maximum possible civil penalties under the PAGA is the total number of
9 pay periods with one or more violations multiplied by the maximum possible civil penalty amount
10 per pay period. Unfortunately for the employees concerned, the potential for recovery of the
11 maximum possible civil penalties depends on circumstances that are extremely unlikely
12 independently and in combination. It would depend on the Court stacking the maximum
13 recoverable civil penalties per pay period for all 1,685 pay periods for all 157 potentially
14 aggrieved employees during the PAGA Period. Plaintiff's counsel is not aware of any California
15 State court decision awarding a plaintiff and the other aggrieved employees she represents
16 multiple civil penalties for the same pay period under different Labor Code provisions. Plaintiff's
17 counsel had to substantially discount the value of these claims in the settlement negotiations for
18 this and a variety of other reasons (outlined below). DS, ¶ 15.

19 **a. Risks Associated with Regular Rate of Pay Claims**

20 Labor Code section 510 states employees are entitled to overtime pay for work in excess
21 of eight hours in one day or 40 hours in one week. "[A]n employee is entitled to overtime pay at
22 one and one-half times the 'regular rate' for work in excess of eight hours in one day and twice
23 the 'regular rate' for work in excess of 12 hours in one day." *Huntington Mein Hosp. v. Superior*
24 *Court* (2005) 131 Cal. App. 4th 893, 902. Plaintiff claims Defendant improperly calculated PAGA
25 Members' regular rates of pay by failing to include the value of nondiscretionary monetary
26 bonuses and commission. Spivak Decl. ¶16.

27 Defendant contends that all forms of incentive pay at issue were discretionary and they
28 properly excluded such payments from the regular rate of pay on that basis. Bonuses were based
on salary. Defendant also argued that only a portion of the pay periods had both overtime and
bonus/commission pay and, even if Plaintiff is able to prove that the forms of payment in question



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1 were non-discretionary and should have been included in the regular rate of pay, the alleged civil
2 penalties would be extremely limited. Spivak Decl. ¶ 16.

3 **b. Risks Associated with Plaintiff's Claim That Defendant Failed**
4 **To Indemnify for Expenses**

5 Plaintiff alleges that Defendant failed to reimburse Plaintiff and the PAGA Employees for
6 their reasonable expenses such mobile phones, telecom, tools, equipment, supplies, home office
7 and storage, computers/laptops, and repair expenses that Defendant required Plaintiff and all the
8 other Aggrieved Employees to supply to perform their job duties. There is a risk that the Court
9 may consider Plaintiff's claim that Defendant failed to indemnify for business expenses to be
10 individual in nature and thus decline to allow a trial on behalf of all aggrieved employees and the
11 State. DS, ¶ 17.

12 **c. Risks Associated with Plaintiff's Claim That Defendant Failed**
13 **To Issue Accurate and Complete Wage Statements**

14 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
15 PAGA penalties. Under Labor Code section 226, wage statements must include various
16 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
17 DS, ¶ 18. Here, Plaintiff's wage statement claim has the same underlying risks as the above
18 claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant
19 comply with the requirements of Labor Code § 226.

20 **d. Risks Associated with Plaintiff's Claim That Defendant Failed**
21 **To Timely Pay All Wages**

22 Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 204. Like
23 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.
24 The evidence of good faith Defendant put forth will defeat this claim. DS, ¶ 19.

25 **e. The Absence of Large Civil Penalty Awards under PAGA**

26 The sole source of money recoverable for the PAGA Employees and the State is civil
27 penalties available under PAGA. It allows employees to seek civil penalties for certain violations
28 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 aggrieved employee suffered an overtime wage violation; and (2) Every paycheck
that Defendant issued to employees during the PAGA Period represents a pay period in which



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1 every aggrieved employee suffered an unreimbursed expense violation. There are no California
2 state court decisions under the PAGA to date with substantial awards of civil penalties. Plaintiff's
3 counsel is aware of only two significant awards under the PAGA in a contested proceeding, both
4 issued by federal district courts, one of which was overturned on May 28, 2021.³ DS, ¶ 20.

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

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

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

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

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



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1 Labor Code occurred. Under *Carrington*, assuming 14 violations for each pay period (a violation
2 for each calendar day of a bi-weekly pay period), for all PAGA Employees, will result in a
3 recovery of \$117,950 (1,685 x 14 x \$5 = \$117,950) which is significantly less than the GSA here.
4 DS, ¶ 21.

5 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
6 *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court, case number BC430633, the
7 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
8 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
9 awarded approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 22, Exs. 8-110. In a
10 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
11 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
12 prevailing PAGA plaintiff civil penalties totaling only \$50.00. DS, ¶ 22, Ex. 11. A similar result
13 could occur here.

14 Defendant could also convince the Court to dismiss the claims due to unmanageability
15 because determining whether each PAGA Employee worked overtime or incurred business
16 expenses would require separate mini-trials. *See, Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60
17 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA claim because it was
18 unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The *Ortiz* court cited the “multitude
19 of individualized assessments” that case would have required in ordering dismissal. *Id.* at *4.
20 Several other courts have adopted *Ortiz*, and dismissed PAGA claims where, there are a large
21 number of allegedly aggrieved individuals whose claims require individual assessments. *See, e.g.,*
22 *Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3 (C.D. Cal. 2014); *Bowers v. First Student,*
23 *Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see also Stafford v. Dollar Tree Stores, Inc.*,
24 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating trial of plaintiff’s claim from
25 representative claims: “in light of the number of potential aggrieved employees, judicial economy
26 favors deferring the representative portion of the PAGA claim”); *Amey v. Cinemark USA Inc.*,
27 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on September 9, 2021, the
28 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, ¶ 23.



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1 While the evidence gathered through Plaintiff's discovery supports the merits of the
2 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks
3 associated with the merits of Plaintiff's claims, the uncertainties of complex litigation, the cost of
4 pretrial and trial proceedings, the Court's discretion to lower the amount of penalties ultimately
5 awarded, and the secured benefit to the PAGA Employees and the LWDA promoting compliance
with the Labor Code. DS, ¶ 24.

6 **f. The Risk That PAGA Claims Are Subject To Arbitration**
7 **Agreements**

8 The arbitration agreements entered into between Defendant on the one hand, and the
9 Plaintiff and comparable workers, on the other, present a significant risk to the success of
10 Plaintiff's representative litigation. DS, ¶ 25. According to Defendant, all PAGA Employees
11 entered into arbitration agreements with Defendant, which include class action and representative
12 waivers that bring these agreements in line with the recent holding of *Viking River Cruises, Inc.*
13 *v. Moriana* (2022) 142 S.Ct. 1906. *Id.* As the arbitration agreements in question restrict potential
14 litigants from bringing PAGA representative actions against Defendant, Plaintiff would be
15 effectively barred from pursuing claims on behalf of the PAGA Employees in Court. *Id.* As such,
16 by continuing to trial on representative claims, Plaintiff would run the high risk of suffering defeat
17 due to the existence of the arbitration agreements. Also, because different defenses would apply
18 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 manageable PAGA trial. *Id.*

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

21 Plaintiff's counsel estimates that the cost of taking this case to trial will exceed \$500,000
22 in attorney fees and costs alone. DS, ¶ 26.

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

24 As stated above, Defendant offers \$273,600.00. The Parties have also agreed to a separate
25 payment to Plaintiff of \$10,000 for a general release of her individual (non-PAGA) claims
26 pursuant to a separate confidential settlement agreement. DS, ¶ 27. Plaintiff will present the
confidential agreement to the Court if requested. *Id.*

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

Plaintiff considered various sources of information in the lead-up to, during and after the



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mediation that enabled her to achieve the PAGA SETTLEMENT AGREEMENT at issue. Among other things, Plaintiff considered the following:

- Defendant produced and Plaintiff reviewed her personnel file.
- Defendant produced and Plaintiff reviewed and analyzed time and payroll records for over 137 PAGA Employees.
- 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.
- Plaintiff analyzed the state of caselaw on PAGA claims, claims for unpaid overtime and unreimbursed expenses, and related claims.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded before trial.

DS, ¶ 13.

5. The Experience and Views of Counsel Favor This Settlement

As Plaintiff's counsel explains in his declaration, this settlement makes good sense based on his experience litigating wage and hour actions, including claims seeking civil penalties under PAGA. DS, generally.

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

Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under PAGA. By letter dated August 9, 2021, Plaintiff, on behalf of herself and other "aggrieved employees" gave written notice by certified mail to the Labor and Workforce Development Agency ("LWDA") and Defendant of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. DS ¶ 4, Ex. 3. Plaintiff also notified this LWDA of this settlement. DS ¶ 7, Ex. 7.

7. The PAGA SETTLEMENT AGREEMENT Is A Result of Extensive, Non-Collusive Arm's Length Negotiations Between The Parties.

The PAGA SETTLEMENT AGREEMENT was reached only after litigation and arms' length negotiations between experienced attorneys, which included a full day mediation with Tripper Ortman, a respected mediator. At all times, the negotiations were adversarial and contentious, although still professional in nature. DS, ¶ 6.



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

5 Each Aggrieved Employee 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, ¶ 3. With a total of approximately 157 PAGA Employees, the average estimated
8 individual Settlement Payment for each Aggrieved Employee is approximately \$249.04
9 (\$39,100.00 / 157 PAGA Employees). Although an average payment of \$249.04 per Aggrieved
10 Employee is not an enormous sum of money, it is an excellent result given the uncertainties this
11 lawsuit entails. It is also reasonable given the structure and purpose of the PAGA. The PAGA is
12 not a restitution statute with a traditional damages provision designed to restore victims to the
13 position they would have been in had the Labor Code violations not taken place. Rather, it is at
14 best a punishment statute designed to reduce future Labor Code violations. It provides for civil
15 penalties only. DS, ¶¶ 28-29.

16 **9. 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, 34;
20 Declaration of Walter L. Haines ("Haines Decl.") ¶¶ 2-3.

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

23 "The law empowers the court to set the amount of fees independently without
24 disapproving the entire settlement." *Garabedian v. Los Angeles Cellular Telephone Co.* (2004)
25 118 Cal.App.4th 123, 129. The benchmark for determining attorney fees is reasonableness.
26 *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 744. The determination
27 of what constitutes a reasonable fee generally begins with the lodestar, i.e., the number of hours
28 reasonably expended multiplied by the reasonable hourly rate. *Graciano v. Robinson Ford Sales,*
Inc. (2006) 144 Cal.App.4th 140, 154. The lodestar figure may then be adjusted, based on factors
specific to the case, to fix the fee at the fair market value for the legal services provided. *PLCM*
Group v. Drexler (2000) 22 Cal.4th 1084, 1095.

Of the \$273,600.00 Gross Settlement Amount, Plaintiff's counsel requests \$91,200.00
(1/3 of the Gross Settlement Amount) in attorney's fees and up to \$20,000.00 in litigation



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1 expenses. DS, ¶ 30; Agreement, ¶ 3. The written retainer agreement Plaintiff's counsel entered
2 into with Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded
3 attorney fees or (b) up to 40% of any recovery. *Id.*

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

12 California courts have the discretion to employ (or decline to employ) a "lodestar cross-
13 check" on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
14 1 Cal. 5th 480, 505 ("*Laffitte*"). However, the California Supreme Court in *Laffitte* has now made
15 clear that this cross-check is not required and approved one-third of the class action settlement
16 fund as reasonable attorney fees as "[t]he percentage of the fund method survives in California
17 class action cases...." *Id.* at 574. As other courts have acknowledged since *Laffitte*, "California
18 courts routinely award attorneys' fees of one-third of the common fund." *Lopez v. Mgmt. &*
19 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not "engage
20 in a full-blown lodestar analysis when the primary basis remains the percentage method..." The
21 lodestar calculation is merely a "useful perspective on the reasonableness of a given percentage
22 award." *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 ("Trial courts 'also
23 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
24 reasonableness of a requested percentage fee.'" ⁴ *Id.* (citing *Laffitte*)).

25 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a))
26 does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon*
27 *Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 ["Citing unpublished federal opinions does not violate
28 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 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
2 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008) 162
3 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
4 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
5 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is also
6 consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA 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 \$91,200.00 (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, ¶ 31, Ex. 12, 34.
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. *Id.*

13 In addition, Plaintiff’s Counsel incurred substantial costs, \$19,380.10 to date, including
14 the costs of a mediator to aid in the representation of the PAGA Employees.⁵ DS, ¶ 32, Ex. 13;
15 Haines Decl. ¶ 11. Plaintiff’s Counsel anticipate that Plaintiff will incur an additional \$146.90 in
16 costs, which consist of filing fees and attorney service fees for filing this motion and notice of
17 entry of order. Plaintiff’s Counsel anticipate that litigation costs will total approximately
18 \$19,535.50 through final accounting of the Settlement. *Id.* As the evidence submitted herewith
19 shows, all of these costs are documented and reasonably incurred. *Id.* Accordingly, they warrant
the Court’s approval.

20 **11. The Proposed Administration Expenses Payment Are Fair and**
21 **Reasonable and Should Be Approved.**

22 With regard to the Administration Expenses Payment provision, it is reasonable. Before
23 agreeing to Phoenix Class Action Administration Solutions, the Parties sought and reviewed bids
24 from other reputable third-party administrators which provided higher bids. DS, ¶ 35 - 36, Exs.
14 - 16. Thus, the Administration Expenses Payment provision should be given approval.

25 _____
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 Employees 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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1 **V. CONCLUSION**

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

4
5 Respectfully submitted,

6 THE SPIVAK LAW FIRM

7
8 Dated: August 17, 2023

9 By:



10 DAVID G. SPIVAK, Attorneys for
11 Plaintiff, BRANDY RUIZ, and all
12 others similarly situated
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