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

9
10 **FOR THE COUNTY OF SAN JOAQUIN**
11 **(UNLIMITED JURISDICTION)**

12 AMBER ASHLEY DAMAS, on behalf of
13 herself and as an “aggrieved employee” on behalf
14 of other “aggrieved employees” under the Labor
Code Private Attorneys General Act of 2004,

15 *Plaintiff(s),*

16 vs.

17 JUST WINGIN' IT, INC., a California
18 corporation; and DOES 1–50, inclusive,

19 *Defendant(s).*

Case No. STK-CV-UOE-2022-0007989

**PLAINTIFF AMBER ASHLEY
DAMAS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
APPROVAL OF 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 Amber Ashley Damas (“Plaintiff” or “Damas”) submits this memorandum of
5 points and authorities in support of her motion for approval of the PAGA Settlement Agreement
6 (the “Agreement” or “PAGA Settlement” or “Settlement”)

7 ¹ for the civil penalties claim she brought against Defendant Just Wingin' It, Inc. (“Just
8 Wingin' It, Inc.” or “Defendant”) under the Labor Code Private Attorneys General Act of 2004,
9 Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code section
10 2699(l) of the PAGA requires Court-approval of any civil penalties sought as part of a proposed
11 settlement agreement. Based on Plaintiff’s and her attorneys’ investigation and evaluation,
12 Plaintiff is of the opinion that the PAGA Settlement Agreement represents a reasonable and
13 adequate settlement of strongly disputed claims and is in the best interest of the State of California,
14 the Aggrieved Employees, and Plaintiff. Through this motion, therefore, Plaintiff respectfully
15 requests for this Court to approve the PAGA Settlement Agreement for resolution of the PAGA
16 claim. The Plaintiff seeks division of the \$235,000.00 Gross Settlement Amount as follows:

Item	Amount
PAGA Counsel Fees Payment	\$78,333.00
PAGA Counsel Litigation Expenses Payment	\$16,000.00
Administration Expenses Payment	\$7,500.00
PAGA civil penalties (Net Settlement Amount)	\$133,167.00
25% to Aggrieved Employees	\$99,875.25
75% to LWDA	\$33,291.75
Gross Settlement Amount	\$235,000.00

21 **II. FACTUAL AND PROCEDURAL BACKGROUND**

22 Defendant, Just Wingin' It, Inc., is a restaurant known for their various flavors of chicken
23 wings. DS, ¶ 3. Defendant employed Plaintiff as a Crew Member/Crew Lead from about August
24 21, 2021 until January 28, 2022 and then again from approximately March 16, 2022 through May
25 5, 2022. *Id.* DS, ¶ 3.

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

27 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under

28 ¹ 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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PAGA. By letter dated September 12, 2022, Plaintiff, on behalf of herself and other aggrieved hourly 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.

B. Plaintiff’s PAGA Claim

Plaintiff and the Aggrieved Employees are subject to arbitration agreements with Defendant. Plaintiff filed her lawsuit in San Joaquin County Superior Court on September 12, 2022. DS, ¶ 5, Ex. 4. On March 23, 2023, Plaintiff filed a First Amended Complaint (“1AC”). DS, ¶ 5, Ex. 5. On February 17, 2023, Defendant moved to compel this Action to arbitration. The Court granted the motion. At present, Plaintiff’s representative, non-individual PAGA claim is stayed while she arbitrates her representative, individual PAGA claim and various other non-representative individual claims before the Honorable Monica Bachner (ret.) at Judicate West (no. A313431). *Id.*

Plaintiff’s complaint in Court presents one cause of action for civil penalties under PAGA. *Id.* Shortly after the litigation began, the Parties agreed to stay formal discovery and participate in mediation. *Id.*

C. Mediation

On December 19, 2023, the Parties participated in mediation with mediator John Leo Wagner in an attempt to resolve the PAGA claim. The Parties engaged in arm’s-length negotiations and ultimately reached a resolution of the PAGA claims asserted in the Action. The PAGA Settlement Agreement was reached after exchanges of data, information and documents, and is a result of extensive arms-length negotiations. The Parties conducted informal discovery for purposes of potential resolution through which they ascertained the size of the aggrieved employee group and the number of pay periods worked by them during the PAGA Period to ascertain the total value of Plaintiff’s PAGA claim. Now that the parties have finalized the PAGA Settlement Agreement, Plaintiff submits it to this Court for approval. DS, ¶ 7.

III. OVERVIEW OF SETTLEMENT

A. “Aggrieved Employees” Definition

The Aggrieved Employees are all current and former non-exempt California employees Defendant employed any time during the period from September 12, 2021 through February 29, 2024 (the “PAGA Period”) (collectively referred to as “Aggrieved Employees”). Agreement, ¶¶

1.4, 1.19.

B. Monetary Terms Of The Settlement

Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below, Defendant promises to pay the total amount of \$235,000.00, and no more, as the Gross Settlement Amount. Defendant has no obligation to pay the Gross Settlement Amount prior to the deadline stated in Paragraph 6.1 of the Agreement. The Administrator will disburse the entire Gross Settlement Amount without asking or requiring Aggrieved Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount will revert to Defendant. Settlement,

¶ 3.1

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

To PAGA Counsel: A PAGA Counsel Fees Payment of not more than 33.33%, which is currently estimated to be \$78,333.00 and a PAGA Counsel Litigation Expenses Payment of not more than \$16,000.00. Defendant will not oppose requests for these payments provided they do not exceed these amounts. Plaintiff and/or PAGA Counsel will file an application or motion for PAGA Counsel Fees Payment and PAGA Litigation Expenses Payment. If the Court approves a PAGA Counsel Fees Payment and/or a PAGA Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to PAGA Counsel or any other Plaintiff's Counsel arising from any claim to any portion any PAGA Counsel Fee Payment and/or PAGA Counsel Litigation Expenses Payment. The Administrator will pay the PAGA Counsel Fees Payment and PAGA Counsel Expenses Payment using one or more IRS 1099 Forms. PAGA Counsel assumes full responsibility and liability for taxes owed on the PAGA Counsel Fees Payment and the PAGA Counsel Litigation Expenses Payment and holds Defendant harmless, and indemnifies Defendant, from any dispute or controversy regarding any division or sharing of any of these Payments. Settlement, ¶ 3.2.1.

To the Administrator: An Administrator Expenses Payment not to exceed \$7,500.00 except for a showing of good cause and as approved by the Court. To the extent the Administration Expenses are less or the Court approves payment less than \$7,500.00, the Administrator will retain the remainder in the Net Settlement Amount. Settlement, ¶ 3.2.2.



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1 To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$133,167.00
2 to be paid from the Gross Settlement Amount, with 75% (\$99,875.25) allocated to the LWDA
3 PAGA Payment and 25% (\$33,291.75) allocated to the Individual PAGA Payments. Settlement
4 § 3.2.3.

5 The Administrator will calculate each Individual PAGA Payment by (a) dividing the
6 amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$33,291.75) by the total
7 number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA
8 Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods.
9 Aggrieved Employees assume full responsibility and liability for any taxes owed on their
Individual PAGA Payment. Settlement, ¶ 3.2.3.1.

10 **C. Timing of Payments**

11 Funding of Gross Settlement Amount. Defendant shall fully fund the Gross Settlement
12 Amount by transmitting the funds to the Administrator no later than 14 days after the Effective
13 Date. Settlement, ¶ 4.3.

14 Payments from the Gross Settlement Amount. Within 14 days after Defendant funds the
15 Gross Settlement Amount, the Administrator will mail checks for all Individual PAGA Payments,
16 the LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Expenses
17 Payment. Disbursement of the PAGA Counsel Litigation Expenses Payment shall not precede
disbursement of Individual PAGA Payments. Settlement, ¶ 4.4.

18 The Administrator will issue checks for the Individual PAGA Payments and send them to
19 the Aggrieved Employees via First Class U.S. Mail, postage prepaid. The face of each check shall
20 prominently state the date (not less than 180 days after the date of mailing) when the check will
21 be voided. The Administrator will cancel all checks not cashed by the void date. Before mailing
22 any checks, the Administrator must update the recipients' mailing addresses using the National
Change of Address Database. Settlement, ¶ 4.4.1.

23 The Administrator must conduct an Aggrieved Employee Address Search for all other
24 Aggrieved Employees whose checks are returned undelivered without USPS forwarding address.
25 Within 7 days of receiving a returned check the Administrator must re-mail checks to the USPS
26 forwarding address provided or to an address ascertained through the Aggrieved Employee
27 Address Search. The Administrator need not take further steps to deliver checks to Aggrieved
28 Employees whose re-mailed checks are returned as undelivered. The Administrator shall



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1 promptly send a replacement check to any Aggrieved Employee whose original check was lost or
2 misplaced, requested by the Aggrieved Employee prior to the void date. Settlement, ¶ 4.4.2.

3 For any Aggrieved Employee whose Individual PAGA Payment check is uncashed and
4 cancelled after the void date, the Administrator shall transmit the funds represented by such check
5 to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee.
Settlement, ¶ 4.4.3.

6 The payment of Individual PAGA Payments shall not obligate Defendant to confer any
7 additional benefits or make any additional payments to Aggrieved Employees (such as 401(k)
8 contributions or bonuses) beyond those specified in the Agreement. Settlement, ¶ 4.4.4.

9 **D. Calculation of Settlement Shares**

10 "Individual PAGA Payment" means the Aggrieved Employee's pro rata share of 25% of
11 the PAGA Penalties calculated according to the number of Pay Periods the Aggrieved Employee
12 worked during the PAGA Period. Settlement § 1.24. The Administrator will calculate each
13 Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share
14 of PAGA Penalties (\$33,291.75) by the total number of PAGA Period Pay Periods worked by all
15 Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved
16 Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and
liability for any taxes owed on their Individual PAGA Payment. Settlement, ¶ 3.2.3.1.

17 **E. The Releases**

18 Effective on the date when Defendant fully funds the entire Gross Settlement Amount
19 Plaintiff, Aggrieved Employees, and PAGA Counsel will release claims against all Released
Parties as follows:

20 Plaintiff's Release. Plaintiff and her respective former and present spouses,
21 representatives, agents, attorneys (including PAGA Counsel), heirs, administrators, successors,
22 and assigns generally, release and discharge Released Parties from all claims, transactions, or
23 occurrences [that occurred during the PAGA Period], including, but not limited to: (a) all claims
24 that were, or reasonably could have been, alleged, based on the facts contained in the Operative
Complaint and the PAGA Notice ("Plaintiff's Release"). Plaintiff's Release does not extend to
25 any claims or actions to enforce the Agreement, or to any claims for vested benefits,
26 unemployment benefits, disability benefits, social security benefits, workers' compensation
27 benefits that arose at any time, or based on occurrences outside the PAGA Period. It also does not
28 extend to the individual non-PAGA claims in Plaintiff's arbitration demand submitted to Judicate



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1 West of February 16, 2024 (which individual non-PAGA claims are subject to a separate
2 confidential settlement agreement between the Parties). Plaintiff acknowledges that Plaintiff may
3 discover facts or law different from, or in addition to, the facts or law that Plaintiff now knows or
4 believes to be true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective
5 in all respects, notwithstanding such different or additional facts or Plaintiff's discovery of them.
Settlement, ¶ 5.1.

6 Plaintiff's Waiver of Rights Under California Civil Code Section 1542. Further, Plaintiff
7 expressly waives and relinquishes the provisions, rights, and benefits, if any, of and pursuant to
8 section 1542 of the California Civil Code, which reads:

9 A general release does not extend to claims that the creditor or releasing party does not
10 know or suspect to exist in his or her favor at the time of executing the release, and that if
11 known by him or her would have materially affected his or her settlement with the debtor
12 or Released Party. Settlement, ¶ § 5.1.1

13 Release by Aggrieved Employees: All Aggrieved Employees are deemed to release, on
14 behalf of themselves and their respective former and present representatives, agents, attorneys,
15 heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA
16 penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period
17 facts stated in the Operative Complaint and the PAGA Notice. This includes all claims that were,
18 or reasonably could have been alleged, based on the facts and allegations set forth in the Operative
19 Complaint, and also the PAGA notice to the California Labor and Workforce Development
20 Agency that arose during the PAGA Period, including but not limited to claims for: (1) unpaid
21 minimum, regular and overtime wages; (2) meal period violations; (3) rest period violations; (4)
22 noncompliant wage statements; (5) untimely payment of final wages; (6) unreimbursed business
23 expenses; (7) unfair competition; (8) off the clock work; and (9) all claims for liquidated damages,
24 penalties, interest, fees, and costs based on the foregoing. Settlement, ¶ 5.2.

25 Release by PAGA Counsel: PAGA Counsel release on behalf of their present and former
26 attorneys, employees, agents, successors and assigns the Released Parties from all claims for
27 PAGA Fees incurred in connection with the Operative Complaint and the PAGA Period facts
28 stated in the Operative Complaint and the PAGA Notice. Settlement, ¶ 5.3.

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1 **F. Notice Process and Procedures**

2 The Administrator will send the Notice of PAGA Settlement (Exhibit "A" to the PAGA
3 Settlement Agreement) to each Aggrieved Employee with his or her Settlement check.

4 **G. Uncashed Checks**

5 For any Aggrieved Employee whose Individual PAGA Payment check is uncashed and
6 cancelled after the void date, the Administrator shall transmit the funds represented by such check
7 to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee.
8 Settlement, ¶ 4.4.3.

9 **IV. ARGUMENT**

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

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

16 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
17 Court necessarily has broad discretion in making the decision to approve or reject a settlement
18 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
19 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
20 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2).
21 Although the PAGA does not set forth the particular standards against which a PAGA settlement
22 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
23 for evaluating class action settlements. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist.
24 LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's guidance, that approval
25 of PAGA settlements may be had where the statutory requirements of the PAGA are met and the
26 terms of the settlement are fundamentally fair, reasonable, and adequate). The established
27 standards for evaluating whether class action settlements are fair, reasonable, and adequate
28 provide a familiar, useful framework for the Court to evaluate PAGA settlements and have been
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. Dist. LEXIS
137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.



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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).

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

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

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.
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



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1 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
2 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
3 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
4 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
5 *Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
6 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

7 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
8 **PAGA.**

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

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

21 To make its determination that the PAGA Settlement Agreement is fair, reasonable, and
22 adequate, the Court may consider several factors, including:

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

27 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
28 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.



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

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

11 A court has discretion under PAGA to award a lesser amount than the maximum penalty.
12 Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th
13 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid defenses to
14 the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise
15 face significant uncertainty. DS, ¶ 15. There is a risk that the Court would consider the maximum
16 civil penalty available to be confiscatory. This uncertainty increases Plaintiff's risk of pursuing
17 the PAGA claims and required a significant discount for settlement purposes. DS, ¶ 15. For
18 mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately
19 \$2,376,000.00 in civil penalties. This estimate did not take into account any of the risks discussed
20 above and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed
21 multiple penalties for the same pay period for the same alleged violations of different Labor Code
22 provisions and derivative violations. *Id.* Although two federal district court decisions held that
23 "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in
24 controversy for purposes of removal jurisdiction, Plaintiff's counsel is not aware of any California
25 state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay
26 period under different Labor Code provisions. *Id.* This may be because the PAGA does not
27 provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

28 In preparation for mediation and during the settlement negotiations that followed,
Defendant disclosed that there were approximately 364 potentially aggrieved employees and
4,320 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 \$550 per pay period for all 4,320 pay periods for all 364 potentially
4 aggrieved employees during the PAGA Period. Plaintiff's counsel is not aware of any California
5 State court decision awarding a plaintiff and the other aggrieved employees she represents
6 multiple civil penalties for the same pay period under different Labor Code provisions. Plaintiff's
7 counsel had to substantially discount the value of these claims in the settlement negotiations for
8 this and a variety of other reasons (outlined below). DS, ¶ 16.

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

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

26 The difficulty inherent in proving that off-the-clock work occurred poses a significant
27 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
28 Generally, a court will not certify a class unless it can determine an appropriate methodology for
all aggrieved employees. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here,
Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially
given the lack of records indicating when such off-the-clock work may have taken place.



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1 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine
2 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there
3 is a significant risk that the Court would consider this evidentiary showing insufficient as a
4 methodology for all aggrieved employees. DS, ¶ 18.

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

7 There are risks to Plaintiff’s claims that Defendant failed to provide all meal periods. DS,
8 ¶ 19. Defendant contends that, to establish a violation of the meal period law, a plaintiff must do
9 more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an
10 employer provides employees with a “reasonable opportunity” to take a duty-free meal period, it
11 has no further duty to “police meal breaks and ensure no work thereafter is performed.” *Id.* at
12 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the
13 employee from taking a proper break, or otherwise failed to release the employee of all control.
14 *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a particular
15 employee may have failed to take a meal break.” *Washington v. Joe’s Crab Shack* (N.D. Cal.
16 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, ¶ 19. Defendant’s policies mandate that employees take at
19 least a 30-minute, uninterrupted meal periods 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**
27 **To Authorize or Permit Rest Breaks**

28 There are risks to Plaintiff’s claims that Defendant failed to authorize or permit rest
breaks. DS, ¶ 20. Employers are not required to record rest periods and such periods are paid. *Id.*
Defendant contends it provided non-exempt employees the opportunity to take rest periods in
accordance with California law. Further, Defendant’s written policies on meal and rest periods
are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records



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1 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
2 period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial
3 has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and
4 surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant
5 caselaw makes such claims risky from a trial management and due process perspective. *Id.*, See
6 *Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common
7 questions exist to support class certification, it may be possible to manage individual issues
8 through the use of surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015)
136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

9 **d. Risks Associated with Plaintiff’s Claim That Defendant Failed**
10 **To Indemnify for Expenses**

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

20 **e. Risks Associated with Plaintiff’s Claim That Defendant Failed**
21 **To Issue Accurate and Complete Wage Statements**

22 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
23 PAGA penalties. Under Labor Code section 226, wage statements must include various
24 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
25 DS, ¶ 22.

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

29 **f. Risks Associated with Plaintiff’s Claim That Defendant Failed**
30 **To Timely Pay All Wages**

31 Plaintiff’s claim for untimely wages is predicated on Labor Code section 201 to 203. Like
32 the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful.



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1 The evidence of good faith Defendant put forth will defeat this claim. DS, ¶ 23.

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

3 The sole source of money recoverable for the Aggrieved Employees and the State is civil
4 penalties available under PAGA. It allows employees to seek civil penalties for certain violations
5 of the Labor Code so long as the penalties are not unjust, arbitrary, oppressive, or confiscatory.
6 As discussed above, Plaintiff's maximum estimated liability exposure is based on the theories
7 that: (1) Every paycheck that Defendant issued to employees during the PAGA Period represents
8 a pay period in which every Aggrieved Employee suffered a minimum wage violation; (2) Every
9 paycheck that Defendant issued to employees during the PAGA Period represents a pay period in
10 which every Aggrieved Employee suffered an overtime wage violation; (3) Every paycheck that
11 Defendant issued to employees during the PAGA Period represents a pay period in which every
12 Aggrieved Employee suffered a meal period violation; (4) Every paycheck that Defendant issued
13 to employees during the PAGA Period represents a pay period in which every Aggrieved
14 Employee suffered a rest period violation; and (5) Every paycheck that Defendant issued to
15 employees during the PAGA Period represents a pay period in which every Aggrieved Employee
16 suffered an unreimbursed expense violation. There are no California state court decisions under
17 the PAGA to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only
18 two significant awards under the PAGA in a contested proceeding, both issued by federal district
19 courts, one of which was overturned on May 28, 2021.² DS, ¶ 24.

20 ² In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil
21 penalties under the PAGA of \$12,277,500.00 where total adjusted damages were \$18,695,692.58.
22 In this regard, the district court stated,

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



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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
9 Labor Code occurred. Under *Carrington*, assuming 5 violations for each pay period for all 364
10 Aggrieved Employees, will result in a recovery of \$108,000.00 (4,320 pay periods x 5 days x \$5
= \$108,000.00). DS, ¶ 25.

11 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
12 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
13 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
14 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
15 awarded approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 26, Exs. 8-11. In a
16 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
17 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
18 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 26.

19 Defendant could also convince the Court to dismiss the claims due to unmanageability
20 because determining whether each Aggrieved Employee worked off the clock or why each
21 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*

22
23 *Id.*, fnnt. 9. The district court further stated, "Virgin "has not presented any evidence that the full
24 penalty would be excessive in relation to its ability to pay," the weight of this factor is lessened."
Id.

25 In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
26 awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
27 comply with the requirements of California Labor Code section 226. On May 28, 2021, the United
28 States Court of appeals for the Ninth Circuit overturned the decision finding that there is no
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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1 CPS Sec. Solutions, Inc. (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court
2 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal.
3 2014). The *Ortiz* court cited the “multitude of individualized assessments” that case would have
4 required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed
5 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims
6 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
7 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
8 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating
9 trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved
10 employees, judicial economy favors deferring the representative portion of the PAGA claim”);
11 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). Further, on
12 September 9, 2021, the California Court of Appeal issued a decision in *Wesson v. Staples The*
13 *Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), reh’g denied (Sept. 27, 2021) holding that
14 trial courts have authority to ensure that claims under PAGA are manageable, and that courts may
15 limit or strike unmanageable PAGA claims. DS, ¶ 27.

15 While the evidence gathered through Plaintiff’s discovery supports the merits of the
16 claims asserted in this lawsuit, the settlement is fair, reasonable, and adequate in light of the risks
17 associated with the merits of Plaintiff’s claims, the uncertainties of complex litigation, the cost of
18 pretrial and trial proceedings, the Court’s discretion to lower the amount of penalties ultimately
19 awarded, and the secured benefit to the Aggrieved Employees and the LWDA promoting
20 compliance with the Labor Code. DS, ¶ 30.

21 **2. Plaintiff’s Counsel’s Estimate of the Expense of Taking This Case To**
22 **Trial Also Favors This Settlement**

23 Plaintiff’s counsel estimates that the cost of taking this case to trial will exceed \$500,000
24 in attorney fees and costs alone. DS, ¶ 28.

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

26 As stated above, the Parties have agreed to resolve this matter for \$235,000.00. The Parties
27 have also agreed to a separate payment to Plaintiff of \$15,000.00 for a general release of her
28 individual (non-PAGA) claims pursuant to a separate confidential settlement agreement. DS, ¶
29. Plaintiff will present the confidential agreement to the Court if requested. *Id.*

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

32 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 37 Aggrieved 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 , and related claims.
- Plaintiff surveyed the outcomes of PAGA cases that went to trial or otherwise concluded before trial.

DS, ¶ 14.

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 letters dated September 12, 2022, Plaintiff, on behalf of herself and other "aggrieved employees" gave written notice by certified mail to the Labor and Workforce Development Agency ("LWDA") and Defendant of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. DS ¶ 4, Exhibit 3. Plaintiff also notified this LWDA of this settlement. DS ¶ 8, Exhibit 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 the Honorable John Leo Wagner (ret.), a respected mediator. At all times, the negotiations were adversarial and contentious, although still professional in nature. DS, ¶ 7.

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

3 A court has discretion under PAGA to award a lesser amount than the maximum penalty.
4 Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th
5 1112, 1135 (reducing PAGA award). As set forth above, Defendant has posed valid defenses to
6 the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise
7 face significant uncertainty. DS, ¶ 15. There is a risk that the Court would consider the maximum
8 civil penalty available to be confiscatory. This uncertainty increases Plaintiff's risk of pursuing
9 the PAGA claims and required a significant discount for settlement purposes. DS, ¶ 15. For
10 mediation purposes, Plaintiff's counsel estimated a maximum exposure of approximately
11 \$2,376,000.00 in civil penalties. This estimate did not take into account any of the risks discussed
12 above and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed
13 multiple penalties for the same pay period for the same alleged violations of different Labor Code
14 provisions and derivative violations. *Id.* Although two federal district court decisions held that
15 "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in
16 controversy for purposes of removal jurisdiction, Plaintiff's counsel is not aware of any California
17 state courts awarding plaintiffs multiple PAGA penalties for the same violation for the same pay
18 period under different Labor Code provisions. *Id.* This may be because the PAGA does not
19 provide for what many employers characterize as claim splitting and not merely stacking. *Id.*

20 In preparation for mediation and during the settlement negotiations that followed,
21 Defendant disclosed that there were approximately 364 potentially aggrieved employees and
22 4,320 pay periods. The maximum possible civil penalties under the PAGA is the total number of
23 pay periods with one or more violations multiplied by the maximum possible civil penalty amount
24 per pay period. Unfortunately for the employees concerned, the potential for recovery of the
25 maximum possible civil penalties depends on circumstances that are extremely unlikely
26 independently and in combination. It would depend on the Court stacking the maximum
27 recoverable civil penalties for \$550 per pay period for all 4,320 pay periods for all 364 potentially
28 aggrieved employees during the PAGA Period. Plaintiff's counsel is not aware of any California
State court decision awarding a plaintiff and the other aggrieved employees she represents
multiple civil penalties for the same pay period under different Labor Code provisions. Plaintiff's
counsel had to substantially discount the value of these claims in the settlement negotiations for
this and a variety of other reasons (outlined below). DS, ¶ 16.



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1 more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an
2 employer provides employees with a “reasonable opportunity” to take a duty-free meal period, it
3 has no further duty to “police meal breaks and ensure no work thereafter is performed.” *Id.* at
4 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the
5 employee from taking a proper break, or otherwise failed to release the employee of all control.
6 *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a particular
7 employee may have failed to take a meal break.” *Washington v. Joe’s Crab Shack* (N.D. Cal.
8 2010) 271 F.R.D. 629, 641. *Id.*

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

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

20 There are risks to Plaintiff’s claims that Defendant failed to authorize or permit rest
21 breaks. DS, ¶ 20. Employers are not required to record rest periods and such periods are paid. *Id.*
22 Defendant contends it provided non-exempt employees the opportunity to take rest periods in
23 accordance with California law. Further, Defendant’s written policies on meal and rest periods
24 are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records
25 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
26 period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial
27 has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and
28 surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant
caselaw makes such claims risky from a trial management and due process perspective. *Id.*, *See*
Duran v. U.S. Bank National Assn., (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common
questions exist to support class certification, it may be possible to manage individual issues
through the use of surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015)



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136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

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

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

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

Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA penalties. Under Labor Code section 226, wage statements must include various information, including the applicable rates of pay, corresponding hours worked, and gross pay. DS, ¶ 22.

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

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

Plaintiff's claim for untimely wages is predicated on Labor Code section 201 to 203. Like the claim under Labor Code sec. 226, Plaintiff must establish that the late payments were willful. The evidence of good faith Defendant put forth will defeat this claim. DS, ¶ 23.

g. The Absence of Large Civil Penalty Awards under PAGA

The sole source of money recoverable for the Aggrieved Employees and the State is civil penalties available under PAGA. It 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 Aggrieved Employee suffered a minimum wage violation; (2) Every



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1 paycheck that Defendant issued to employees during the PAGA Period represents a pay period in
2 which every Aggrieved Employee suffered an overtime wage violation; (3) Every paycheck that
3 Defendant issued to employees during the PAGA Period represents a pay period in which every
4 Aggrieved Employee suffered a meal period violation; (4) Every paycheck that Defendant issued
5 to employees during the PAGA Period represents a pay period in which every Aggrieved
6 Employee suffered a rest period violation; and (5) Every paycheck that Defendant issued to
7 employees during the PAGA Period represents a pay period in which every Aggrieved Employee
8 suffered an unreimbursed expense violation. There are no California state court decisions under
9 the PAGA to date with substantial awards of civil penalties. Plaintiff's counsel is aware of only
10 two significant awards under the PAGA in a contested proceeding, both issued by federal district
11 courts, one of which was overturned on May 28, 2021.³ DS, ¶ 24.

12 Additionally, PAGA states a court has discretion to award a lesser amount than the

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.”
29 *Id.*

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



1 maximum penalty. Labor Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
2 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the
3 Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's
4 evidence of willful and intentional conduct. *Carrington v. Starbucks (2018) 30 Cal.App.5th 504*
5 (*"Carrington"*) illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
6 discounted award of only \$5 per violation because it was within the Court's discretion to
7 significantly reduce PAGA penalties even when there is a finding that a violation of the California
8 Labor Code occurred. Under *Carrington*, assuming 5 violations for each pay period for all 364
9 Aggrieved Employees, will result in a recovery of \$108,000.00 (4,320 pay periods x 5 days x \$5
= \$108,000.00). DS, ¶ 25.

10 Moreover, judges have awarded extremely small sums to PAGA claimants in the past. In
11 *Ghrdilyan v. RJ Financial, Inc., Los Angeles Superior Court*, case number BC430633, the
12 employer underpaid commission overtime wages. The plaintiff sought in excess of \$9 million in
13 civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
14 awarded approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 26, Exs. 8-11. In a
15 similar PAGA case before the Los Angeles Superior Court, *Shields v. Security Paving Company,*
16 *Inc.*, LA Superior Court case no. BC492828, on October 24, 2017, the court awarded the
17 prevailing PAGA plaintiff civil penalties totaling only \$50.00. A similar result could occur here.
DS, ¶ 26.

18 Defendant could also convince the Court to dismiss the claims due to unmanageability
19 because determining whether each Aggrieved Employee worked off the clock or why each
20 employee missed a meal or rest period would require separate mini-trials. *Id. See, Mendiola v.*
21 *CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833. In *Ortiz v. CVS Caremark Corp.*, the court
22 dismissed a PAGA claim because it was unmanageable. 2014 WL 1117614, at *3-4 (N.D. Cal.
23 2014). The *Ortiz* court cited the "multitude of individualized assessments" that case would have
24 required in ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed
25 PAGA claims where, there are a large number of allegedly aggrieved individuals whose claims
26 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
27 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
28 *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



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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, ¶ 27.

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 Aggrieved Employees and the LWDA promoting compliance with the Labor Code. DS, ¶ 30.

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, ¶ 31. 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 manageable PAGA trial. *Id.*

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

Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis depending on the number of pay periods Defendant employed them for during the PAGA Period. Agreement, ¶¶ 1.11, 3.2.3.1. With a total of approximately 364 Aggrieved Employees, the average estimated individual Settlement Payment for each Aggrieved Employee is approximately \$91.46



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1 (\$33,291.75 / 364 Aggrieved Employees). Although an average payment of \$91.46 per Aggrieved
2 Employee is not an enormous sum of money, it is an excellent result given the uncertainties this
3 lawsuit entails. It is also reasonable given the structure and purpose of the PAGA. The PAGA is
4 not a restitution statute with a traditional damages provision designed to restore victims to the
5 position they would have been in had the Labor Code violations not taken place. Rather, it is at
6 best a punishment statute designed to reduce future Labor Code violations. It provides for civil
penalties only. DS, ¶¶ 32-33.

7 **10. Plaintiff's Counsel is Experienced in Similar Litigation.**

8 Plaintiff's counsel have considerable experience in class actions and wage and hour
9 litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving
10 forward with litigation, and viability of possible affirmative defenses. See DS, ¶¶ 11-13;
Declaration of Walter L. Haines ("Haines Decl.") ¶ 2.

11 **11. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and**
12 **Reasonable and Should Be Approved.**

13 "The law empowers the court to set the amount of fees independently without
14 disapproving the entire settlement." *Garabedian v. Los Angeles Cellular Telephone Co.* (2004)
15 118 Cal.App.4th 123, 129. The benchmark for determining attorney fees is reasonableness.
16 *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 744. The determination
17 of what constitutes a reasonable fee generally begins with the lodestar, i.e., the number of hours
18 reasonably expended multiplied by the reasonable hourly rate. *Graciano v. Robinson Ford Sales,*
19 *Inc.* (2006) 144 Cal.App.4th 140, 154. The lodestar figure may then be adjusted, based on factors
20 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.

21 Of the \$235,000.00 Gross Settlement Amount, Plaintiff's counsel requests \$78,333.00
22 (1/3 of the Gross Settlement Amount) in attorney's fees and up to \$16,000.00 in litigation
23 expenses. DS, ¶ 34; Agreement, ¶ 3.2.1. The written retainer agreement Plaintiff's counsel entered
24 into with Plaintiff provided that her counsel may elect to recover either (a) statutorily awarded
attorney fees or (b) up to 40% of any recovery. *Id.*

25 It is an accepted practice in wage and hour class action settlements to award attorneys'
26 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
27 parties. California courts have long recognized that an appropriate method for awarding attorneys'
28 fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest* (1977) 20



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1 Cal.3d 25, 48-49 [“when a number of persons are entitled in common to a specific fund, and an
2 action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation
3 of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund”]; *Wershba*
4 *v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial California, Inc.*
(2000) 82 Cal.App.4th 19, 26-30.)

5 California courts have the discretion to employ (or decline to employ) a “lodestar cross-
6 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
7 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
8 clear that this cross-check is not required and approved one-third of the class action settlement
9 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
10 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
11 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
12 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not “engage
13 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
14 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
15 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
16 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*)).

17 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
18 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008) 162
19 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
20 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
21 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is also
22 consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA settlements.
DS, ¶ 37.

23 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
24

25 _____
26 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a))
27 does not apply to unpublished decisions from the lower federal courts. (*Farm Raised Salmon*
28 *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.)

1 fees, notwithstanding courts' clear preference for the percentage method, Plaintiff's Counsel's
2 fee request of \$78,333.00 (one-third of the Gross Settlement Amount) is fair and reasonable based
3 on their lodestar as cross-checked against the percentage of the recovery. DS, ¶ 35, Ex. 12; Haines
4 Decl. ¶¶ 4-10. Plaintiff's counsel's previous experience in litigating wage and hour class actions
5 and the caliber of opposing counsel also support the reasonableness of the fee request. DS, ¶¶ 37-
38.

6 i. In addition, Plaintiff's Counsel incurred substantial costs,
7 \$14,419.90 to date, including the costs of a mediator to aid in the
8 representation of the Aggrieved Employees.⁵ DS, ¶ 36, Ex. 13;
9 Haines Decl. ¶ 11. Plaintiff's Counsel anticipate that Plaintiff will
10 incur an additional \$121.36 in costs, which consist of filing fees
11 and attorney service fees for filing this motion and notice of entry
12 of order. Plaintiff's Counsel anticipate that litigation costs will
13 total approximately \$14,542.34 through final accounting of the
14 Settlement. *Id.* As the evidence submitted herewith shows, all of
15 these costs are documented and reasonably incurred. DS, ¶ 36,
16 Ex. 13. Accordingly, they warrant the Court's approval.

17 **12. The Proposed Administration Expenses Payment Are Fair and**
18 **Reasonable and Should Be Approved.**

19 With regard to the Administration Expenses Payment provision, it is reasonable. Before
20 agreeing to Simpluris, Inc., the Parties sought and reviewed bids from other reputable third-party
21 administrators which provided higher bids. DS, ¶¶ 39-40, Exs. 14-16. Thus, the Administration
22 Expenses Payment provision should be given approval.

23 **V. CONCLUSION**

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

26 Respectfully submitted,

27 THE SPIVAK LAW FIRM

28 Dated: November 26, 2024

By:



DAVID G. SPIVAK, Attorneys for
Plaintiff, AMBER ASHLEY DAMAS,
and all others similarly situated

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



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