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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

VERONICA TAPIA, *et al*.,

Plaintiffs,

vs.

HOME & BODY COMPANY, *et al*.,

Defendants.

Case No.: 30-2020-01155185-CU-OE-CXC

Assigned for all purposes to:
Hon. Glenda Sanders, Dept. CX-101

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEY GENERAL'S ACT OF 2004; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 3, 2022
Time: 1:30 p.m.
Courtroom: Dept. CX-101

Action Filed: August 13, 2020
Trial Date: Not Set

ELIZABETH REYES,

Plaintiff,

vs.

HOME & BODY COMPANY, *et al*.,

Defendants.

Case No.: 30-2020-01169522-CU-OE-CXC

Assigned for all purposes to:
Hon. Glenda Sanders, Dept. CX-101

Action Filed: November 10, 2020
Trial Date: Not Set

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 3, 2022, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Department CX-101 of the above-captioned Court, located at 700 Civic Center Drive West, Santa Ana, CA 92701, Plaintiffs VERONICA TAPIA, CLAUDIA MORALES, and ELIZABETH REYES ("Plaintiffs") will and hereby do move this Court for an order approving of the PRIVATE ATTORNEYS GENERAL ACT SETTLEMENT AGREEMENT AND RELEASE ("Agreement" or "Settlement") reached with Defendant HOME & BODY COMPANY ("Defendant"), a true and correct copy of which is attached as Exhibit 1 to the Declaration of H. Scott Leviant submitted herewith.

Specifically, the Plaintiffs move for an order to:

1. grant approval of the terms of the Agreement pursuant to the Labor Code Private Attorney Generals Act of 2004, Labor Code § 2698, *et seq*., including the amount of the settlement and all allocations thereof; and,

2. direct disbursement of the Gross Settlement Amount pursuant to the Agreement.

This Motion is made pursuant to Rule 3.1113(e) of the California Rules of Court, which permits the Court to extend the page limit for memoranda.

This motion is based on this Notice, the following Memorandum of Points and Authorities, the Declarations of H. Scott Leviant, Jennifer Connor, and Sean Hartranft (for ILYM Group, Inc.) submitted herewith, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

Dated: May 2, 2022

MOON & YANG, APC

By: ______________________

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I. <u>INTRODUCTION</u>

In this matter, Plaintiffs VERONICA TAPIA, CLAUDIA MORALES, and ELIZABETH REYES ("Plaintiffs") asserted wage and hour claims against Defendant HOME AND BODY COMPANY ("Defendant") (Plaintiffs and Defendant collectively referred to herein as the "Parties"), which is a manufacturer of personal care and home products (mainly hand soap, lotions sold in Bath & Body Works and other stores).

Recognizing that an arbitration agreement would likely preclude class treatment, Plaintiffs dismissed class action and individual wage and hour claims, proceeding with claims arising under the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq*. ("PAGA"). The *Tapia* matter was eventually related to the *Reyes* matter, and *Tapia* and *Reyes* matters were consolidated on March 23, 2022. Under the PAGA claim, Plaintiffs seeks penalties against Defendant, arising from alleged deficient wage and hour policies and procedures. Defendant disputes these allegations.

After exchanging documents and voluminous data prior to mediation, Plaintiffs and Defendant reached a proposed settlement to resolve the PAGA claims in this consolidated action (the "Lawsuit").

Under the Agreement, Defendant shall pay a maximum sum of **$650,000.00**, referred to in the Agreement as the Maximum Settlement Amount, for aggrieved employees employed in California as non-exempt hourly employees during the designated PAGA period (there were approximately **<u>1,086</u>** individuals meeting this definition of aggrieved employee as of the mediation date of January 25, 2022). This is a good result, based upon the facts and circumstances discovered to exist.

The proposed settlement will dispose of the PAGA claim alleged in this matter – which was predicated upon certain alleged violations of the Labor Code – on behalf of the California Labor and Workforce Development Agency ("LWDA") and certain current and former California employees of Defendants who were employed at any time after October 5, 2019.

This motion is brought pursuant to Labor Code § 2699.3(b)(4). This motion and the Settlement Agreement were served on the LWDA prior to the filing of this Motion. Labor Code § 2699(e)(2).

For the reasons below, Plaintiffs request that the Court enter an order approving the settlement.

II. <u>SUMMARY OF THE TERMS OF SETTLEMENT</u>

The full terms of the settlement are in the Agreement. The key material terms are as follows:

(a) The Aggrieved Employees: The Aggrieved Employees (also known as the "PAGA Members") are: "All non-exempt employees who are or were employed by Defendant within the State of California between July 1, 2019 and April 30, 2022." It is estimated that there are approximately 25,172 pay periods. (Agreement, at 2, and ¶ 7.)

(b) No Reversion: The Settlement is ***non-reversionary***. (Agreement, ¶ 5.)

(c) Gross Settlement Amount: Defendant agrees to pay the maximum sum of **$650,000.00** (hereinafter referred to as the "Gross Settlement Amount" or "GSA") for settlement of the PAGA Penalties, which shall be inclusive of Plaintiffs' Counsel attorney's fees and costs, a general release payment to Plaintiffs, and the settlement administrator's fees and costs. (Agreement, ¶ 5.)

(d) Net Settlement Amount: At least **$372,637.49** will be available for distribution to the Aggrieved Employees and the LWDA. Of this amount, the LWDA will receive at least **$279,478.12** under the Agreement, and Aggrieved Employees will receive at least **$93,159.37**. (Agreement, ¶ 5.d.)

(e) Attorney's Fees: Plaintiffs' Counsel request an award of attorney's fees in the amount of **$227,500.00**, with $113,750.00 (50%) awarded to Moon & Yang, APC, and $113,750.00 (50%) awarded to CounselOne, PC. (Agreement, ¶ 5.a; Leviant Decl., ¶ 17.)[1] The requested fee is 35% of the GSA.

(f) Litigation Costs: Plaintiffs' Counsel seek reimbursement of actual litigation costs, to a maximum amount of $40,000. Those costs are $9,196.94 for Moon & Yang, APC, and $8,445.57 for CounselOne, PC. (Agreement, ¶¶ 5.b; Leviant Decl., ¶ 38 and Exh. 2.) The total reimbursement requested is **$17,642.51**.

(g) Settlement Administration: Payment to Aggrieved Employees and administration will be accomplished through third-party settlement administrator ILYM Group,

[1] Moon & Yang, APC, and CounselOne, PC, have entered into a written fee-sharing agreement that was approved and signed by their respective clients. Under that agreement, Moon & Yang, APC, is to receive 50% of the fees awarded and CounselOne, PC, is to receive 50% of the fees awarded.

Inc., which has agreed to perform Administrator duties for a flat fee not to exceed **<u>$14,220.00</u>**, which is reasonable, based on all of the services offered. (Agreement, ¶ 11; Leviant Decl., ¶ 39 and Exh. 3; ILYM Decl., ¶ 9.)

(h) <u>General Release Payments to Plaintiffs</u>: Plaintiffs request approval of an allocation of $6,000.00 to each Plaintiff from the GSA (for a total of $18,000.00) for their general releases of all potential claims against Defendant and for their efforts in bringing and prosecuting these Actions. (Agreement, ¶ 5.c.)

(i) <u>Uncashed Checks</u>: Funds represented by checks returned as undeliverable after a re-mailing, and funds represented by checks remaining un-cashed for more than 180 days after issuance, will be tendered to the Unclaimed Property Fund or like fund. (Agreement, ¶ 10.c.)

(j) <u>Release</u>: In exchange for the above settlement consideration, Defendant shall be entitled to a *limited* release from the LWDA and each and every Aggrieved Employee, including Plaintiffs.[2] (Agreement, ¶ 2; Leviant Decl., Exh. 1.)

(k) <u>Other Actions</u>: No other class or representative actions are known to exist. (Leviant Decl., ¶ 44.)

(l) <u>Notice to the LWDA</u>: Documentation showing notice of service of the Settlement on the LWDA is attached to the Leviant Declaration. (Leviant Decl., Exh. 4.)

III. <u>STATEMENT OF FACTS</u>

Plaintiffs allege that Defendant engaged in practices and procedures that violated the California Labor Code. These alleged statutory violations subject Defendant to potential liability for PAGA penalties pursuant to Labor Code § 2698. Through this action, Plaintiffs seek to recover penalties pursuant to Labor Code § 2698, *et. seq*. (Leviant Decl., ¶ 4.)

Defendant is a manufacturer of personal care and home products (mainly hand soap, lotions sold

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[2] This comports with settled California Supreme Court authority. *See Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (concluding that “with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act….”).

in Bath & Body Works and other stores). (Leviant Decl., ¶ 5.) For purposes of this settlement, Defendant employed individuals in various positions in California. (Leviant Decl., ¶ 6.) Plaintiffs worked for Defendant in California during the PAGA Period. (Leviant Decl., ¶ 7.) Defendant contends it had lawful policies, including break and pay policies, in effect throughout the statutory period, and viable legal defenses to a substantial portion of the alleged penalty claims. (Leviant Decl., ¶ 8.)

IV. PROCEDURAL HISTORY

On August 12, 2020, Plaintiff's Counsel sent a letter to the LWDA on behalf of Plaintiffs Veronica Tapia and Claudia Morales, in compliance with California Labor Code § 2699.3. (Leviant Decl., ¶ 9.) More than 65 days passed after the letter was sent to the LWDA, and the LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter. (Leviant Decl., ¶ 10.) On August 13, 2020, Plaintiffs Veronica Tapia and Claudia Morales filed a class action complaint in the Orange County Superior Court, entitled *Tapia et al. v. Home & Body Company*, Orange County Superior Court Case No. 30-2020-01155185-CU-OE-CXC ("*Tapia*") (the "Lawsuit"). On or about April 23, 2021, Plaintiffs Veronica Tapia and Claudia Morales filed a First Amended Complaint, adding a claim for violation of the California Labor Code Private Attorneys General Act ("PAGA"). Due to an enforceable arbitration agreement, Plaintiffs Veronica Tapia and Claudia Morales filed an application requesting dismissal of their class and individual claims without prejudice, leaving PAGA only claims in the *Tapia* action. On November 10, 2020, Plaintiff Elizabeth Reyes filed a class action and PAGA complaint in *Reyes v. Home & Body Company*, Orange County Superior Court Case No. 30-2020-01169522-CU-OE-CXC ("Reyes"). As did Plaintiffs Veronica Tapia and Claudia Morales, Plaintiff Elizabeth Reyes requested dismissal of class and individual claims, proceeding only under the PAGA claim. *Tapia* and *Reyes* are substantially similar in their allegations. On February 4, 2021, the Court issued a ruling relating the *Tapia* and *Reyes* cases. The *Tapia* and *Reyes* were consolidated by stipulation on March 23, 2022. (Leviant Decl., ¶ 11.) Defendant denies all liability and admits to no claim by virtue of its agreement to settle. (Leviant Decl., ¶ 12.) Because Court approval of a PAGA settlement is required, the settlement is presented for approval. (Leviant Decl., ¶ 13.)

V. SETTLEMENT NEGOTIATIONS

Counsel for Plaintiffs have thoroughly investigated the facts relating to the claims alleged in the operative complaint and have made a thorough study of the legal principles applicable to the claims asserted against Defendant. Based on their investigation and evaluation of this case, Plaintiffs' Counsel have concluded that the settlement is fair, reasonable, and adequate in light of all known facts and circumstances, including the defenses asserted by Defendant, potential adverse findings regarding liability, and numerous potential appellate issues. (Leviant Decl., ¶ 14.)

The Parties agreed to participate in a mediation in an effort to resolve the PAGA claims asserted in this matter. The Parties selected mediator Lynn Frank, Esq., a neutral with extensive experience mediating wage and hour class and representative actions. Prior to the mediation, Plaintiffs requested substantial data from Defendant, and Defendant provided requested data. (Leviant Decl., ¶ 15.)

The Parties participated in a full-day mediation on January 25, 2022, reaching a settlement at that time. The Parties then spent many weeks thereafter negotiating the detailed terms of the Settlement memorialized in a long-form agreement to resolve this matter. (Leviant Decl., ¶ 16.)

DISCUSSION

VI. THE QUI TAM NATURE OF PAGA CLAIMS

This case is solely a PAGA claim, not a class action, and the standard for determining the reasonableness of a settlement has not been the subject of significant judicial discussion. In 2003, California enacted the Private Attorneys General Act of 2004 to remedy systemic underenforcement of many worker protections. *Williams v. Superior Court*, 3 Cal. 5th 531, 545 (2017).

The solution enacted by the Legislature deputized private citizens to recover civil penalties for the State, where those penalties were previously only available to State law enforcement agencies:

> The Legislature declared that ***adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market***, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Arias v. Superior Court, 46 Cal. 4th 969, 980 (2009) (emphasis added).

"Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Arias*, 46 Cal. 4th at 986. With limited exceptions, "[o]f the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.'" *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380 (2014) *certiorari denied sub nom*. *CLS Transportation Los Angeles v. Iskanian*, —— U.S. ——, 135 S.Ct. 1155, 190 L.Ed.2d 911 (Jan. 20, 2015). Thus, a PAGA claim is, predominantly, a claim belonging to the State.

"The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities." *Iskanian*, 59 Cal. 4th at 381. Because of this distinction, and the fact that the penalties made available through PAGA fell previously within the exclusive domain of State enforcement, the California Supreme Court explained that PAGA suits are best viewed as a species of *qui tam* action. *Iskanian*, 59 Cal. 4th at 382. After recognizing that PAGA actions are a form of *qui tam* action, *Iskanian* concluded that because the State was the real party in interest in a PAGA suit, it would violate public policy to compel an individual employee to waive representative claims under PAGA: "[W]where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." *Iskanian*, 59 Cal. 4th at 384.

VII. THE STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT

In deciding whether to grant approval of the proposed Settlement, the primary issue to be decided is whether the Settlement is fair, adequate, and reasonable. Specifically, the issues are whether the PAGA penalties to which the parties have agreed provide "genuine and meaningful" relief, "consistent with the underlying purpose of the statute to benefit the public" and whether the penalties are reasonable in light of the potential verdict value in this case. *Villalobos v. Calandri Sonrise Farm LP*, 2015 WL 12732709, Case No. CV 12-2615 PSG (JEMx) (C.D. Cal., July 22, 2015).

In *O'Connor v. Uber Technologies*, No. 13-CV-03826-EMC, 2016 WL 4398271 (N.D. Cal. Aug. 18, 2016) the court was faced with a proposed class action settlement which also included a claim under PAGA. The court separately discussed the standard for approval under PAGA. The court recognized that cases discussing class action standards may be helpful and required the parties to demonstrate that either the factors set forth in the class action case of *Hanlon v. Chrystler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998) "or any other coherent analysis" justified the proposed settlement of the PAGA claim.[3]

Therefore, although class settlement jurisprudence has no direct application to this case, it is not inappropriate to consider the *Hanlon* factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the experience and views of counsel; and (6) the presence of a government participant.

The *Hanlon* court also mentioned, as a factor, the "reaction of the class members to the proposed settlement." That factor has no analogous component here. The interest served is that of the State of California and the LWDA is the only person or entity who has standing to comment upon any settlement. Labor Code § 2699.3(b)(4). The *Hanlon* court also identified "the risk of maintaining class action status throughout the trial" as a factor, but, again, that factor has no application here. Otherwise, the six remaining factors provide a useful framework for evaluating the settlement. *Hanlon*, 150 F.3d at 1026; *see also Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (same); *Churchill Vill., L.L.C. v. Gen. Elec*., 361 F.3d 566, 575 (9th Cir. 2004) (same).

Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794 (1996), held that "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; and (4) the percentage of objectors is small."[4] *Id*. at 1801; *In re Microsoft I-V Cases*, 135 Cal. App. 4th 703, 723 (2006); *see also* Newberg & Conte, Newberg on Class Actions, (2d.Ed. 1987) § 11.41, p. 11-91.

It would also be appropriate for this court to look to case law concerning settlement of a claim

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[3] The *O'Connor v. Uber* court did not approve the settlement, finding the disparity between the amount proposed for the class compared to the PAGA settlement was not fair to the LWDA. That is not a concern here. Seventy-five percent of the net will be paid to the LWDA by statute.

[4] PAGA provides no notice or claim procedures as exist in class action cases. Therefore, objections (other than potentially by the LWDA) are not contemplated in PAGA actions. Despite the absence of any right to object, the Agreement here contemplates informing Aggrieved Plaintiffs of the resolution so that they are made aware of the result, despite having no standing to object to this settlement.

brought under the Fair Labor Standards Act 28 U.S.C. § 201 et seq. ("FLSA") which, likewise, requires court approval. Because the Ninth Circuit has not established a standard for district courts to follow when evaluating an FLSA settlement, California district courts have applied the standard established by the Eleventh Circuit in *Lynn's Food Stores, Inc. v. U.S. By &Through U.S. Dept of Labor*, 679 F.2d 1350, 1352 (11th Cir. 1982). *See Dunn v. Teaches Ins. & Annuity Ass'n of Am*., 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016) and *Ambrosino v. Home Depot U.S.A., Inc*., No. 11 CV 1319 L (MDD), 2014 WL 3924609, at * 1 (S.D. Cal. Aug. 11, 2014) ("A district court may approve an FLSA settlement if the proposed settlement reflects 'a reasonable compromise over [disputed] issues.'") (quoting *Lynn's Food Stores, Inc*., 679 F.2d at 1354). Although the standard for approving FLSA collective actions may be different from the standard for approving class actions under Federal Rule of Civil Procedure 23, courts have applied the *Hanlon* factors to a settlement of an FLSA claim. *Millan v. Cascade Water Sews., Inc*., No. 1:12 - cv -1821-AWI-EPG, 2016 WL 3077710, at * 3 (E.D. Cal. Jun. 2, 2016); see also *Otey v. CrowdFlower, Inc*., No. 12-CV-05524-JST, 2014 WL 1477630, at * 11 (N.D. Cal. Apr. 15, 2014). In *Selk v. Pioneers Mem'l Healthcare Dist*., 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016) the court evaluated an FLSA settlement using a totality of the circumstances approach "that replicates the factors relevant to Rule 23 class actions where appropriate, but adjusts or departs from those factors when necessary to account for the labor rights at issue."

While a court should not simply "rubber stamp" a proposed settlement with little or no independent evaluation, the court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Clark v. Am. Residential Sews. LLC*, 175 Cal. App. 4th 785, 799 (2009). The court should not expect that the parties offer concrete "proof" in support of settlement, but rather that the parties have made a good faith effort to explain the reasoning behind certain strategic decisions and the valuation of specific claims. "[W]hether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook, Inc*., 696 F.3d 811, 819 (9th Cir. 2012). "It is, of course, the strong public policy of this state to encourage the voluntary settlement of litigation." *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1359 (2007).

Finally, the factors identified above are not exclusive and the court is free to balance factors depending on circumstances. *Wershba v. Apple Computer, Inc*., 91 Cal. App. 4th 224, 244-245 (2001).

While class settlement factors provide some guidance as to how a Court may approach the evaluation of a PAGA settlement, there are significant differences between PAGA settlements and class action settlements that must be recognized. Unlike a class action settlement, the scope of release permitted in a PAGA settlement is limited. While "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding," *Arias*, 46 Cal. 4th at 986, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *See id*., at 987. Thus, with the possible exception of a Plaintiffs, the scope of a release in a PAGA settlement is confined to PAGA penalties, and not related individual claims.[5] Applying the above standards to this settlement, the settlement meets all criteria for approval.

VIII. <u>THE SETTLEMENT MEETS ALL THE CRITERIA FOR APPROVAL</u>

Applying the class settlement fairness factors discussed above – limited to those compatible with the unique features of PAGA claims – the proposed settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for approval.

A. <u>The Relative Strength of the PAGA Claim, and the Realistic Range of Outcomes in the Litigation, Strongly Favor Approval of the Settlement</u>

"In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter v. Lyft, Inc*., 176 5 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation omitted). Here, the relative strength of the PAGA claim brought by Plaintiffs weigh in favor of the Court finding that the settlement is fair, adequate, and reasonable, since there are significant risk

[5] This is contrasted with the much broader release permitted in a class action context, which may be based on "any matter or fact" alleged in the complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) ("The weight of authority establishes that … a court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint."); *Hesse v. Sprint Corp*., 598 F.3d 581, 590 (9th Cir. 2010) ("we have held that federal district courts properly released claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement."). In this matter, the Agreement will not affect the rights of Aggrieved Employees who may possess individual wage and hour claims.

factors that Plaintiffs would face if they did not settle this matter.

Most significantly, the ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Subdivision (a) states, "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." Subdivision (f) specifies the penalties in instances where the underlying statute does not specify any civil penalty. In other words, where the facts and circumstances of the case demonstrate that an unreduced award would be "unjust, arbitrary and oppressive, or confiscatory," the court (or arbitrator) may reduce the award to ameliorate such.

In *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate because "[t]his does not appear to be a case where a company has deliberately sought to evade the law." *Cotter*, 176 F. Supp. 3d at 941. Here, Defendant can state a strong case that, as the Court concluded in *Cotter*, its efforts to devise compliant operational policies do not indicate an organization that has deliberately sought to evade the law. This is a very significant risk factor. Defendant disputes that Plaintiffs could find a coherent method for proving liability for roughly **1,086** employees working in different departments and/or positions in Defendant's business. Establishing violations for purposes of PAGA would be difficult in this matter.

After analyzing the claims in this matter, Plaintiffs have concluded that the value of this Settlement is fair, adequate, and reasonable. (Leviant Decl., ¶ 23.)

Using the most straightforward formulation of applying the "catch-all" $100 penalty specified in Labor Code § 2699(f)(2) to each pay period per employee, for all of the estimated 25,172 pay periods through mediation, the maximum plausible exposure under that direct approach is **$2,517,200.00**. The

Settlement of <u>**$650,000.00**</u> is about 25.8% of that roughly estimated maximum exposure value. When considering the serious risks discussed herein, and the Court's inherent power to adjust penalties downward to reflect an employer that sought to be in compliance with wage and hour laws, even if mistakes were sometimes made, the compromise figure is reasonable.

The Settlement can also be evaluated by looking at each allegation and the penalty that would attach thereto. (*Id*.)

The maximum calculated plausible exposure is **$5,841,575.00***, when examining each penalty provision separately* ***and*** *including liberal assumptions about proof rates for all violations*. (*Id*.) That exposure consists of the following components:

- The reasonably estimated penalty exposure for unpaid minimum wage off-the-clock work (Labor Code § 1194) was estimated to be **$503,400**. Based on allegations of occasional problems with timeclocks, underpaid wages from rounding, and infrequent post-work assignments, the risk-adjusted estimated exposure is estimated to be **$125,850.00**, based on a risk reduction of 75%, before any Court-imposed reductions for good faith conduct by Defendant.
- The reasonably estimated penalty exposure for unpaid overtime work (Labor Code § 558) was estimated to be **$580,900.00**. Based on allegations of occasional problems with timeclocks, underpaid wages from rounding, and infrequent post-work assignments, the risk-adjusted estimated exposure is estimated to be **$145,225.00**, based on a risk reduction of 75%, before any Court-imposed reductions for good faith conduct by Defendant.
- The reasonably estimated penalty exposure for late payment of wages owed (Labor Code § 210) was calculated to be **$1,258,600.00**. Based on allegations of occasional problems with timeclocks, underpaid wages from rounding, and infrequent post-work assignments, the estimated exposure is estimated to be **$314,650.00**, based on a risk reduction of 75%, before any Court-imposed reductions for good faith conduct by Defendant. This penalty is contingent on unpaid wage penalties.

- The reasonably estimated exposure for meal break violations over the class period was calculated at **$856,800.00**. Based on the records of facial violations and the serious risk that employee choice would become an issue that impeded proof, the risk-adjusted estimated exposure is estimated to be **$85,680.00**, based on a risk reduction of 90%, before any Court-imposed reductions for good faith conduct by Defendant.
- The reasonably estimated exposure for rest break violations over the class period was calculated at **$628,175.00**. Based on allegations of missed or interrupted rest breaks, and the serious risk that employee choice would become an issues that impeded proof, the risk-adjusted estimated exposure is estimated to be **$157,043.75**, based on a risk reduction of 75%, before any Court-imposed reductions for good faith conduct by Defendant.
- The risk-adjusted penalty recovery for violation of Labor Code § 203 was estimated to be approximately **$100,680.00**, on a maximum exposure of **$503,400.00**. A risk reduction of 80% was applied to reflect the contingent nature of this claim and the additional need to demonstrate willful misconduct.
- The risk-adjusted penalty recovery for violation of Labor Code § 226 was estimated to be approximately **$125,860.00**, on a maximum exposure of **$1,258,600.00**. A risk reduction of 90% was applied to reflect the contingent nature of this claim and the additional need to demonstrate willful misconduct.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **$1,105,328.75.** (*Id.*)

The concurrently-filed Leviant Declaration sets forth claim valuation. (*See*, Leviant Decl., ¶ 23.)

B. <u>The Risk, Expense, and Complexity of Further Litigation Balances Strongly in Favor of Approval of the Settlement</u>

To assess the fairness, adequacy, and reasonableness of a class action settlement, the court should consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at 1801. Here, the expense, complexity and likely duration of future litigation was to some extent an unknown. However, what is certain is that to adequately establish the foundational violations that would support a substantial penalty award, tremendous time and expense would be invested. To adequately establish that aggrieved employees experience the alleged violations, and at what frequency, most of the aggrieved employees would need to be interviewed in a systematic fashion and their testimony cataloged in way sufficiently meaningful to permit the submission of summary evidence at trial, such as via survey. *First,* the burdensome nature of such a process would be expensive and time-consuming. *Second*, the individuals already interviewed confirmed substantial risk that the Court would either substantially reduce any penalty ultimately awarded *or* conclude that the conduct was insufficient to support a penalty award. *Third*, it would be essentially impossible to formulate an objectively reliable means of summarizing testimonial experiences, other than by an extraordinarily detailed survey. And formulating such a survey would have been important, since frequency of violations would need to be established before any penalties could be recovered. (Leviant Decl., ¶ 22.) In sum, the evidence collected to date leads Plaintiffs to conclude that, to the extent violations occurred, a fact which Defendant disputes, the violations were ***not*** systematic and ***not*** uniform across all of Defendant's employees who worked during the relevant period. Alternatively, direct testimony would have been required from as many of the roughly 1,356 aggrieved employees as could be obtained, which would be, at best, very difficult.

C. The Amount Offered in Settlement Under the Agreement

The Settlement provides a monetary benefit that falls well within "the range of an acceptable settlement" under the circumstances, which is the standard on which the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where it only provides a fraction of what could have been obtained at trial. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

1. The Total Amount Offered in Settlement is $650,000.00

Under the Agreement, Defendants shall pay a maximum sum of $650,000.00. Plaintiffs' Counsel, with the assistance of a data analyst, assess the maximum plausible penalty exposure to be **$5,841,575.00**. (Leviant Decl., 23.) This estimate is overly optimistic. The Settlement is 11% of that maximum plausible exposure before factoring in the many risk adjustments (*e.g.*, many employees would have chosen on-site rest breaks, donning and doffing would be shown to take negligible time, *etc*.) and the Court's ability to reduce the penalty at its discretion.

Furthermore, Defendant asserted a number of defenses that potentially could have undermined Plaintiffs' claims if they were to be litigated. For example, Defendant contended that Plaintiffs claims would be unmanageable under *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746, 865 (2021). Specifically, Defendant argued that numerous individualized inquiries would be needed to determine liability on Plaintiffs' claims, including (1) whether employees worked off-the-clock with knowledge of a supervisor or Defendant, (2) whether each individual took a particular meal period or rest break on a particular occasion, (3) whether the meal period was waived, and (4) where the individual skipped the meal or rest period, ***why*** it was skipped for each of the allegedly aggrieved employees. Defendant argued the cases would be unmanageable, given that alleged aggrieved employees encompass multiple hospitals, the university, and thousands of positions.

2. Payment of At Least $372,637.49 in Penalties

Under the Agreement, the amount available for distribution as penalties under PAGA is at least **<u>$372,637.49</u>**. The amount is a significant penalty, but it is not confiscatory, nor is it, in the terms of the PAGA statute, "unjust, arbitrary, or oppressive." Labor Code § 2699(e)(2).

a) The LWDA shall receive at least $279,478.12

As 75% of the penalties are allocated to the LWDA, the LWDA stands to receive at least **<u>$279,478.12</u>** under the Agreement. Further, pursuant to Labor Code § 2699.3(b)(4) the "provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on the settlement provisions, and the court shall grant the division's commentary appropriate weight." The LWDA will have an opportunity to comment upon the amount to be paid to the LWDA. This provision protects against collusive settlements for less than a reasonable value of the claim.

b) Aggrieved Employees shall receive at least $93,159.37

Approximately 29,000 Aggrieved Employees shall receive at least **<u>$93,159.37</u>** (25% of the penalty) under the terms of the Agreement and by operation of PAGA. The distribution formula reduces the weight applied to part-time student worker pay periods to more fairly allocate the penalties.

D. <u>The Presence of a Government Participant</u>

As set forth above, 75% of the penalty is paid to the LWDA. In connection therewith, Labor

Code § 2699.3(b)(4) permits the LWDA to comment on the penalties. This provides an independent check on collusive settlements. The LWDA was notified of the Settlement. (Leviant Decl., ¶ 43.)

E. PAGA Counsel Are Experienced and Negotiated Aggressively

The court may also consider that negotiations between the Parties were conducted at arm's length, in an adversarial manner, despite a mutual desire to resolve the case. (Leviant Decl. ¶¶ 15-16.) The court may consider the opinion of all counsel that the settlement arrived at is fair, reasonable and in the best interests of the aggrieved employees. PAGA Counsel are experienced with employment class actions and representative actions, as set forth more fully in the Declarations of H. Scott Leviant and Jennifer Connor filed herewith.

F. The Substantial Exchange of Data and the Stage of the Proceedings Favor Approval

In evaluating the Parties' basis for valuing a settlement, "'formal discovery is not a necessary ticket to the bargaining table.'" *Linney*, 151 F.3d at 1239.

Here, the substantial exchange of data was sufficient to enable Plaintiffs' Counsel to evaluate the strength and value of the claim for purposes of settlement. (Leviant Decl., ¶¶ 19, 21-22.) As discussed above, Plaintiffs' Counsel spoke with employees, reviewed policies, performed calculations with data, and inspected related documents, such as handbooks and wage statements, to assess exposure and risk.

Based on Plaintiffs' Counsel's experience litigating wage and hour claims, such investigation was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this claim for purposes of settlement. (Leviant Decl., ¶ 21.)

G. Additional Factors Weigh in Favor of Approving the Terms of the Proposed Settlement, Including the Requested Fees and Costs

In addition to the factors presented above, the proposed settlement does not possess any obvious deficiencies with respect to its other terms, including the agreed-upon fees and costs.

1. Fees and Costs

Courts in the Ninth Circuit and California generally use the "percentage method" rather than the lodestar approach when awarding attorneys' fees in a common fund settlement. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). *See generally*, *Serrano*, 20 Cal. 3d at 25; *accord Hanlon*, 150 F.3d 1011 (9th Cir. 1998). While this settlement is what is traditionally imagined when using the term "common fund," it does create benefit for others beyond Plaintiff.

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." *See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03. Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in cases where the settlement is relatively small***. *See id*; *see also, Van Vranken v. Atlantic Richfield Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million).

While this is not a class action, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around ***one-third*** of the recovery.") (emphasis added). The proposed attorney fee award here is 33,3% of the Maximum Settlement Amount minus the General Release Payment, and amount reasonably comparable to "average" fees awarded in California state court class action cases used for comparison purposes here. *Chavez*, 162 Cal. App. 4th at 66 n. 11. Again, this is ***not*** a class action. It is more akin to contingent representation with an additional requirement of Court review due to the qui tam nature of a PAGA claim.

As a PAGA claim is unique to California, it is also appropriate to consider how California treats common fund recoveries. The California Supreme Court removed all doubt about the use of the percentage of the fund method to award attorney's fees in California, stating, "We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Laffitte v. Robert Half Intern. Inc*., 1 Cal. 5th 480, 503 (2016).[6]

Thus, Ninth Circuit and California state courts regard circumstances in which class counsel's work is wholly contingent, such as in class actions and other common fund type cases, as a factor weighing in favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001). This matter has been litigated by Plaintiff's Counsel in a manner that is reasonable, diligent, and efficient. The actual lodestar incurred by Counsel for Plaintiffs Veronica Tapia and Claudia Morales to date is no less than **$78,588.00** not including at least $3,975 in unbilled time and $3,975 in estimated future work. (Leviant Decl., ¶¶ 35-36.) The actual lodestar incurred by Plaintiff Elizabeth Reyes' Counsel to date is no less than **$65,275.00**. (Connor Decl., ¶ 18.) Attorneys for Plaintiffs invested substantial amounts of time evaluating data before the mediation in this matter, revising damage models, and in preparing for the mediation. Those efforts led to this reasonable settlement. (Leviant Decl., ¶ 34-36.) Plaintiffs' Counsel requests **<u>$227,500.00</u>**, as specified in the Settlement Agreement, which constitutes a lodestar multiplier of **1.49**, when compared to total recorded, unbilled, and estimated future lodestar of **$151,813.00**. (Leviant Decl., ¶ 37.)

The Agreement also provides for the award of actual costs, up to $40,000, based on Plaintiffs' Counsel's actual out of pocket expenses in taking on representation in this Lawsuit on a contingency basis. (Leviant Decl., ¶ 38.) Costs requested by Moon & Yang, APC are $9,196.94. (Leviant Decl., ¶ 38.) Costs requested by CounselOne, PC are $8,445.57. (Connor Decl., ¶ 26.) Plaintiffs therefore request an aggregate award of **<u>$17,642.51</u>** in costs.

2. Administration Fees Are Very Reasonable

Administration will be completed by ILYM Group, Inc. for **<u>$14,220.00</u>**, a very reasonable amount for the services rendered. (Leviant Decl., ¶ 39 and Exhibit 3.)

[6] The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport to bar its usage generally in common fund cases." *Laffitte*, at 501.

IX. CONCLUSION

For the above reasons in fact and law, Plaintiffs requests this Court enter an order approving the settlement memorialized in the Agreement.

Respectfully submitted,

Dated: May 2, 2022

MOON & YANG, APC

By: ______________________

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7th Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEY GENERAL'S ACT OF 2004; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [ ] as stated on the attached service list:

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[ ] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[✓] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court at whose direction the service was made, or I am a member of the bar of this court. Executed this **May 2, 2022** at Los Angeles, California.

H. Scott Leviant	
Type or Print Name	Signature