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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DANIEL COLMENARES, an individual,
CATHY HERNANDEZ, and individual, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

FREE ENERGY SAVINGS COMPANY,
LLC, a California Limited Liability
Corporation; ALLAN RAGO, an individual;
KRISTINE VANNEMAN, an individual;
LEFLORIDA LESLIE, an individual and
DOES I through 100, inclusive;

Defendants.

Case No. CIVSB2028719

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Jessica Morgan
Department S26

REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT (PAGA)
SETTLEMENT**

Date: December 13, 2023

Time: 8:30 a.m.

Dept: S26

Judge: Hon. Jessica Morgan

Complaint filed: December 9, 2020

Trial date: Not Set

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I. INTRODUCTION

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698 *et seq*, Plaintiffs Daniel Colmenares and Cathy Hernandez (“Plaintiffs”) seek court approval of the Joint Stipulation and PAGA Settlement and Release (“Settlement Agreement” or “SA”)¹ reached by Plaintiffs and Defendants Free Energy Savings Company, LLC, Allan Rago, Kristine Vanneman, and Leflorida Leslie (“Free Energy” or “Defendants”), which, if approved will resolve this matter entirely. Plaintiffs filed this PAGA representative action on behalf of all other aggrieved employees employed by Defendants in California seeking PAGA civil penalties due to Defendants’ alleged failure to: (1) pay overtime wages; (2) pay minimum wages; (3) pay meal period compensation; (4) pay rest period compensation; (5) furnish accurate wage and hour statements; (6) pay wages due upon discharge; and (7) indemnify for business expenses. The Settlement resolves all claims for civil penalties based on the alleged Labor Code violations on behalf of approximately 423 individuals who worked for Defendants as non-exempt employees in California or persons retained as independent contractor Outreach Specialists (“PAGA Members”) at any time from November 19, 2019 to August 18, 2023 (“PAGA Period”).

Under the terms of the Settlement, Defendants will pay a Gross Settlement Amount of \$200,000.00 to settle Plaintiffs’ PAGA claims against the Released Parties. The civil penalties secured by the Settlement are significant in light of the claims and defenses and fulfill PAGA’s underlying purpose to benefit the public and to deter future labor law violations. As such, the Court should approve the Settlement. Plaintiffs’ request for attorneys’ fees in the amount of \$66,600.00, reimbursement of costs in the amount of \$19,372.00 (Settlement allows for up to \$22,000.00), and settlement administration costs to ILYM Group, Inc. in the amount of \$3,995.00 are also reasonable and should be approved by the Court. Accordingly, Plaintiffs respectfully request that the Court enter an order and judgment granting approval of the Settlement, pursuant to Labor Code § 2699(1)(2).

¹ A copy of the Settlement Agreement is attached as Exhibit 1 to the Declaration of Michael Singer, (“Singer Decl.”).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Free Energy Savings Company, LLC is a licensed heating and air conditioning, insulation, and weatherization contractor providing free weatherization, insulation, and other energy improvements to California residents statewide, funded by local gas and electric utilities. Free Energy Savings Company, LLC operates out of the city of Montclair in San Bernardino County, California. Singer Decl. ¶13. Plaintiffs contend that Allan Rago, Kristine Vanneman, and Leflorida Leslie are each an owner, manager, or managing agent of Free Energy Savings Company, LLC. *Id.*

Plaintiff Daniel Colmenares performed work as an Outreach Specialist for Free Energy from approximately 2013 to 2020. Declaration of Daniel Colmenares, (“Colmenares Decl.”), ¶5. Plaintiff Cathy Hernandez performed work as an Outreach Specialist for Free Energy from approximately 2017 to 2020. Declaration of Cathy Hernandez, (“Hernandez Decl.”), ¶5. The PAGA Members are hourly-paid employees of Defendants in California or persons retained as independent contractor Outreach Specialists for Defendants during the PAGA Period. SA¶ II.12-13; Singer Decl. ¶14.

B. Procedural History

Plaintiffs gave notice of their claims to the Labor and Workforce Development Agency (“LWDA”) on November 19, 2020. Labor Code § 2699.3(a)(1). The LWDA declined to investigate and on December 9, 2020 Plaintiff Daniel Colmenares commenced a putative class action lawsuit against Defendant asserting multiple causes of action under the California Labor Code and Code of Business & Professions § 17200. Singer Decl. ¶15, Exh. 2 – PAGA Notice. On April 22, 2021, Plaintiff Daniel Colmenares and Cathy Hernandez filed a First Amended Complaint. SA ¶I.1. The First Amended Complaint added a cause of action for violation of PAGA.

On May 25, 2021, Defendants filed a Motion to Compel Arbitration of Plaintiffs’ Individual Claims, which the Court granted on September 1, 2021. Specifically, the Court ruled the arbitration agreements in question had specifically delegated the authority to decide the

1 issue of enforceability of the arbitration agreement to the arbitrator. The arbitrators subsequently
2 found the arbitration agreements enforceable as to both Plaintiffs, and Plaintiffs were left with
3 only their individual claims and group/collective PAGA claims. Parties thereafter engaged in
4 settlement discussion, culminating in a mediation session held with experienced wage and hour
5 mediator Lou Marlin, Esq. on June 19, 2023, whereby parties reached resolution on Plaintiff's
6 individual claims, as well as their collective PAGA claims.

7 **C. Discovery and Investigation**

8 Prior to reaching the Settlement, Plaintiffs and their counsel conducted extensive
9 investigation and discovery into the claims alleged in the Action. Before the mediation,
10 Defendants produced timekeeping and payroll data for a 25% randomly selected sample of
11 aggrieved employees from November 2019 to April 2023. Plaintiffs' expert analyzed the time
12 and payroll data for a total of approximately 77 allegedly aggrieved employees and over
13 120,000 shifts, and assisted Plaintiffs' counsel in preparing a model of the potential civil
14 penalties prior to mediation. Singer Decl. ¶16. In addition, Defendants produced relevant wage-
15 and-hour policies and procedures, job descriptions, and the applicable independent contractor
16 agreements. *Id.* Based on this discovery and investigation, Plaintiffs' counsel was able to act
17 intelligently and effectively in negotiating the proposed Settlement. *Id.*

18 **D. Settlement Negotiations**

19 The Parties mediated a full-day mediation with Louis Marlin on June 19, 2023.
20 Settlement was not reached at the mediation, but Mr. Marlin tendered a mediator's proposal that
21 was subsequently accepted by the parties. After many conversations and emails, a detailed
22 Settlement Agreement and Release was signed in August 2023. SA ¶I.2; Singer Decl. ¶17.

23 On the same date the instant motion is filed with the Court, it will be served upon
24 Defendant and provided to the Labor and Workforce Development Agency ("LWDA")
25 electronically through the LWDA's website using the appropriate intake form. SA ¶III.26;
26 Singer Decl. ¶53, Exh. 6 - LWDA Confirmation of Receipt.

27 ///

28 ///

1 **III. SUMMARY OF SETTLEMENT**

2 **A. The PAGA Members**

3 Of the PAGA Members, 31 individuals, including Plaintiffs, were retained by
4 Defendants as Outreach Specialists (“OSs”), and were classified as independent contractors
5 until January 2021, when they were reclassified from independent contractors to W-2
6 employees. Plaintiffs contend that based on the job duties of OSs, they were misclassified and
7 should have at all times been treated as non-exempt employees. Singer Decl. ¶18; Colmenares
8 Decl. ¶¶5, 6; Hernandez Decl. ¶¶5, 6.

9 After the COVID-19 pandemic, Defendants reclassified OSs from independent
10 contractors to non-exempt employees. Plaintiffs contend that OS’ job duties remained
11 unchanged. In fact, nothing about their employment with Defendants changed (OSs were still
12 not provided with legally compliant meal/rest breaks and were not reimbursed for all business
13 expenses incurred) other than they were officially switched to W2 employees. Singer Decl. ¶19;
14 Colmenares Decl. ¶¶5,6; Hernandez Decl. ¶¶5, 6. As such, the alleged violations continued after
15 the reclassification. Therefore, Plaintiffs bring claims on behalf of all non-exempt employees in
16 addition to the individuals who were misclassified for a period of time during the relevant time
17 period. There are approximately 392 non-exempt employees who are PAGA Members. Singer
18 Decl. ¶20.

19 Defendants deny Plaintiffs’ allegations and their theory of the case in full. Defendants
20 contend that while the OSs were classified as independent contractors, they were *correctly* so
21 classified. Even if they had been improperly classified (which Defendants deny), Defendants
22 contend that their role was that of an outside salesperson—a position exempt from overtime and
23 meal and rest break obligations in any event, thus mooted nearly all Plaintiffs’ claims.
24 Moreover, when the OSs became W-2 employees, Defendants contend that their job duties
25 changed materially, and they were subject to more oversight and control. Nevertheless, even
26 when reclassified as W-2 employees, OSs were still not entitled to meal and rest breaks or
27 overtime because they were properly classified as outside salespeople. Finally, Defendants also
28 deny that the broader population of non-exempt employees suffered violations of any kind.

B. Settlement Terms

Under the Settlement, the claims of all PAGA Members shall be settled for the Gross Settlement Amount (“GSA”) of \$200,000.00, which is inclusive all attorneys’ fees and costs to Plaintiffs’ Counsel, Settlement Administration Costs, and payment to the LWDA and PAGA Members.

The GSA shall be allocated as follows:

<u>GROSS SETTLEMENT AMOUNT:</u>	\$ 200,000.00
Plaintiffs’ Counsel’s Fees:	-\$ 66,600.00
Plaintiffs’ Counsel’s Litigation Costs:	-\$ 19,372.00
Administration Costs:	-\$ 3,995.00
<u>NET SETTLEMENT FUND:</u>	\$ 110,033.00
Labor Workforce & Development Agency: 75%	-\$ 82,524.75
Aggrieved Employees: 25%	-\$ 27,508.25

Pursuant to the PAGA, 25% of PAGA penalties estimated at \$27,508.25 will be distributed proportionately to the 423 PAGA Members who worked during the PAGA Period based on the number pay periods each worked during the PAGA Period. With an aggregate 14,325 pay periods worked by all PAGA Members, each will receive an estimated \$1.92 per pay period (“PAGA Pay Period Value”). SA ¶¶ II.2-3, 8-10,12-13, 19; SA ¶¶III.22-25, 28-30; Singer Decl.¶¶21-23.

C. The Release

The Settlement releases “all claims, rights, demands, damages, and penalties pursuant to the Private Attorneys General Act (Labor Code section 2699, *et seq.*) for alleged violations of the California Labor Code, arising at any time during the PAGA Period for the claims brought by Plaintiffs in the Action or that could have been brought against Released Parties in the Action based on the facts or theories alleged in Plaintiffs’ PAGA letter or the Action. This includes any claims for civil penalties under Labor Code section 2699, including but not limited to, (1) misclassification; (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to provide accurate wages statements; (5) failure to keep accurate payroll records; (6) failure to pay minimum wages; (7) violation of Labor Code § 1199; (8) failure to pay overtime wages; (9) failure to timely pay wages at separation; (10) failure to indemnify; (11) failure to

1 timely pay wages; (12) violation of Labor Code § 216; (13) failure to pay meal period
2 compensation; (14) failure to pay rest period compensation.” SA ¶¶II.17.

3 A PAGA “judgment [] is binding not only on the named employee plaintiff but also on
4 government agencies and any aggrieved employee not a party to the proceeding.” *Arias v.*
5 *Superior Court* (2009) 46 Cal.4th 969, 986. Aggrieved employees are not given notice, nor an
6 opportunity to opt-out or object, and are not bound by the judgment except as to civil penalties.
7 *Id.* at p. 987.

8 “Released Parties” means Defendant Free Energy Savings Company, LLC, its current
9 and former parent, subsidiaries and/or related companies, affiliated and related corporations and
10 other entities, their successors and assigns, and all of its current and former owners,
11 shareholders, directors, officers, partners, principals, managers, members, employees, agents,
12 attorneys, representatives, firms, associations, partnerships, joint ventures, and entities, and their
13 agents, guardians, successors, assigns, heirs, executors, and administrators, specifically
14 including Allen Rago, Kristine Vanneman, LeFlorida Leslie, and Richard Esteves. SA ¶¶II.18.

15 **D. Settlement Administration**

16 Defendants will provide contact information to ILYM Group, Inc., (“ILYM”), who will
17 mail each PAGA Member a cover letter explaining the settlement, the basis for the payment,
18 and a settlement check for that amount. SA ¶¶II.11, 21; SA ¶¶III.24, 34, 36; Exh. A –
19 Settlement Cover Letter; Singer Decl. ¶24; Declaration of Kimberly Sutherland on behalf of
20 ILYM Group, Inc., (“ILYM Decl.”), ¶6, Exh. C - Administration Bid. ILYM will perform all
21 services reasonably necessary to locate mailing addresses, calculate, issue and mail payments to
22 aggrieved employees and the LWDA, with tax forms, and, 180 days after mailing, will send the
23 amount of uncashed settlement checks to the California State Controller for deposit in the
24 Unclaimed Property Fund in each employee’s name. SA ¶¶III.33, 37.

25 **IV. THE COURT SHOULD GRANT APPROVAL OF THE PAGA SETTLEMENT**

26 **A. The Standard of Review and Approval of PAGA Settlements**

27 The PAGA statute specifically proves that “[t]he superior court shall review and approve
28 any settlement of any civil action filed pursuant to this part.” Lab. Code § 2699(1)(2). The

1 statute, however, does not require a two-step (preliminary and final approval) process or
2 otherwise mimic the class action approval requirements when the parties reach a settlement only
3 as to PAGA civil penalties. *See Arias v. Superior Court* (2009) 46 Cal.4th 969, 975 (class action
4 requirements “need not be met when an employee’s representative action against an employer is
5 seeking civil penalties” under PAGA). “[A] trial court should evaluate a PAGA settlement to
6 determine whether it is fair, reasonable, and adequate in view of PAGA’s purpose to remediate
7 present labor law violations, deter future ones, and to maximize enforcement of state labor
8 laws.” *Moniz v. Adecco USA, Inc.* (2102) 72 Cal.App.5th 56, 77.

9 A PAGA representative action to recover civil penalties “is fundamentally a law
10 enforcement action designed to protect the public and not to benefit private parties.” *Iskanian v.*
11 *CLS Transportation, Los Angeles*, (2014) 59 Cal.4th 348, 381. When evaluating a PAGA
12 settlement, a trial court “must scrutinize whether, in resolving the action, a PAGA plaintiff has
13 adequately represented the state’s interests, and hence the public interest.” *Moniz*, 72
14 Cal.App.5th at 89. In addition, a court must independently determine whether a PAGA
15 settlement is fair, adequate, and reasonable using similar factors that apply to the evaluation of
16 the fairness of a class action settlement, “including the strength of the plaintiff’s case, the risk,
17 the stage of the proceeding, the complexity and likely duration of further litigation, and the
18 settlement amount.” *Id.* at 77.

19 **B. The Settlement is Fair, Reasonable, and Adequate**

20 The Settlement is consistent with PAGA’s goal of penalizing Defendants for the alleged
21 violations, deterring future violations, and providing a benefit to the public through enforcement
22 of state labor laws.

23 The Gross Settlement Amount of \$200,000.00 is significant enough to deter Defendants
24 from future violations, creating an effective disincentive for Defendants to engage in unlawful
25 business practices. Singer Decl. ¶25. The Settlement provides a substantial benefit to the State
26 of California, with the LWDA receiving \$82,524.75, as 75 percent of the Net Settlement
27 Amount, to assist with future enforcement of state labor laws. *Id.* The Settlement also provides a
28 substantial benefit to the PAGA Members, who will share approximately \$27,508.25 as 25

1 percent of the Net Settlement Amount. *Id.* Accordingly, the Settlement fulfills the underlying
2 purposes of the statute and confers a benefit to the public.

3 In assessing whether the Settlement is fair, reasonable, and adequate, the Court may
4 balance the amount in penalties with the risks of further litigation. Here, Plaintiffs obtained a
5 meaningful amount in civil penalties despite facing significant challenges and risks had the
6 litigation continued. Plaintiffs considered several factors in reaching the decision to settle at this
7 point in the litigation, including (a) the risk that the Court would strike all or parts of Plaintiffs'
8 claims on manageability grounds given the current split of authority as to whether the court has
9 inherent power to strike PAGA claims on manageability grounds;² (b) the risk and uncertainty
10 in proving liability and PAGA penalties at trial; (c) the prospect that the Court could
11 substantially reduce any award of civil penalties on the grounds that "to do otherwise would
12 result in an award that is unjust, arbitrary and oppressive, or confiscatory," pursuant to Labor
13 Code § 2699(e)(2); and (d) the risk that Defendants would appeal any unfavorable judgment.
14 Continued litigation would be an expensive, time-consuming and extremely uncertain
15 proposition, and could lead to an unfavorable judgment and/or a lengthy and unsuccessful
16 appeal. Singer Decl. ¶26.

17 Here, Plaintiffs contend that Defendants willfully misclassified OSs as independent
18 contractors until approximately January 2021, resulting in violations of the Labor Code,
19 including failure to: (1) pay overtime wages; (2) pay minimum wages; (3) pay meal period
20 compensation; (4) pay rest period compensation; (5) furnish accurate wage and hour statements;
21 (6) pay wages due upon discharge; and (7) indemnify for business expenses. In January 2021,
22 Defendants stopped classifying OSs as independent contractors and reclassified the role of OS
23 to a W-2 employee, classified as an exempt outside salesperson. Plaintiffs also contend that
24 subsequent to the reclassification, OSs were improperly classified as outside salespersons
25 because their compensation was not based on the price of a product or service since Defendants'

26 ² See *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685 (holding that PAGA
27 claims could not be stricken on manageability grounds) and *Wesson v. Staples the Office*
28 *Superstore, LLC* (2021) 68 Cal.5th 736 (standing for the proposition that the Court has inherent
power to strike PAGA claims as unmanageable).

1 customers do not pay anything for the services and products they obtain from Defendants.
2 Additionally, OSs do not spend more than 50% of their time engaged in selling. Therefore,
3 Plaintiffs contend that violations continued after reclassification. Singer Decl. ¶27.

4 Defendants contended that OSs were properly classified as independent contractors
5 because OSs had a legally required business license, maintained a business location separate
6 from the Defendants' location, had authority to hire and fire other persons to assist in providing
7 services to Defendants, and regularly spent more than half the working time away from the
8 Defendants' place of business obtaining contracts for services. Defendants also contended that
9 OSs regularly spent more than 50% of their time engaged in selling products and obtaining
10 contracts for services and therefore meet the outside salesperson exemption. Plaintiffs' claims
11 for violations of the Labor Code hinged on proving that OSs were misclassified.
12 Misclassification claims such as the claims alleged here can be challenging to prove on a group-
13 wide basis because how each individual spends their time can vary drastically from day-to-day.
14 While Plaintiffs believe in the strength of their claims, it was possible that a judge would decide
15 aggrieved employees were not willfully misclassified and did not suffer any of the alleged
16 violations. Singer Decl. ¶28.

17 Defendants supported its contentions with written policies distributed to Plaintiffs and
18 aggrieved employees, a random sample of time and pay records, and citations to relevant
19 authority. If its evidence and arguments were accepted, the possibility of penalties would not
20 merely be reduced, but eliminated. Plaintiffs' counsel considered the risks of summary
21 adjudication/ judgment, trial, and, if successful, the risk penalties would be severely reduced, or
22 the decision reversed. Singer Decl. ¶29.

23 Considering the risks of continued litigation, the uncertainties involved in the split of
24 authority on the issue of manageability of PAGA claims, the burdens of proof necessary to
25 establish liability, and the probability of appeal of a favorable judgment, it is clear that the non-
26 reversionary settlement amount of \$200,000 is fair, adequate, and reasonable in light of
27 PAGA's purpose to remediate present labor law violations, to deter future violations, and to
28 maximize enforcement of the Labor Code. Singer Decl. ¶30.

1 Some courts have held “subsequent violation” rates cannot be assessed until the
2 defendant receives notice it is violating the law, and only “initial violation” rates may be
3 recovered. See *Amaral v. Cintas* (2008) 163 Cal. App. 4th 1157, 1209; *Vieyara-Flores v. Sika*
4 *Corp.* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 98081, *13 [“employers are not subject to
5 heightened penalties for subsequent violations unless and until a court or commissioner notifies
6 the employer that it is in violation of the Labor Code.”]. Free Energy argued it complied with
7 the law and, if any violations could be shown, it could not be subjected to the subsequent
8 violation rate. Therefore, Plaintiffs calculated the maximum potential penalties in an
9 “everything goes right” scenario to be approximately \$7,465,500, using only initial violation
10 rate of \$100 for each aggrieved employee per pay period. Singer Decl. ¶31. Defendants
11 employed 423 PAGA Members during the PAGA Period, who worked an aggregate 14,325 pay
12 periods. *Id.*

13 PAGA penalties were estimated by Plaintiffs for eight alleged underlying violations at
14 the initial violation rate of \$100, assuming one violation per aggrieved employee (423 EEs) per
15 pay period (14,325 PPs) as follows:

- 16 • Failure to Pay Wages (§ 1194) (14,325 PPs x \$100): \$1,432,500
- 17 • Failure to Pay Overtime Wages (§ 510) (14,325 PPs x \$100): \$1,432,500
- 18 • Meal Periods (§ 512) (14,325 PPs x \$100): \$1,432,500
- 19 • Rest Periods (§ 226.7) (14,325 PPs x \$100): \$1,432,500
- 20 • Wage Statements (§ 226) (423 EEs x \$250): \$105,750
- 21 • Expense Reimbursement (§ 2802) (14,325 PPs x \$100): \$1,432,500
- 22 • Final Wages (§ 203) (423 EEs x \$100): \$42,300
- 23 • Misclassification (§ 226.8) (31 ICs x \$5,000): \$155,000 (Singer Decl. ¶32.)
- 24 • **Maximum PAGA Penalties: \$7,465,550**

25 Maximum exposure was highly discounted for several reasons. First, Defendants
26 claimed that nearly all non-exempt employees, including Plaintiffs, signed arbitration
27 agreements limiting their claims to individual disputes. Second, at the time of the settlement,
28 Plaintiffs’ counsel estimated a 50 percent likelihood that Plaintiffs’ claims could be dismissed

1 based on manageability grounds, given that Defendants argued that there are 26 unique non-
2 exempt positions, reducing the value of the PAGA claims to \$3,732,750. Singer Decl. ¶33.
3 Lastly, Plaintiffs' counsel estimated a 50 percent likelihood that Plaintiffs would prevail at trial
4 on their claims, further reducing the value to the PAGA claims to approximately \$1,866,375.
5 Singer Decl. ¶34. Additionally, the Court could exercise its discretion to reduce the amount of
6 PAGA penalties under Labor Code § 2699(e)(2). Singer Decl. ¶35. A court has the authority to
7 reduce penalties almost completely, as long as not to "zero." *Thurman v. Bayshore Transit*
8 *Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135. The Settlement obviates all of these
9 risks.

10 After considering the risk the scope of the action could be limited, liability may not be
11 proven, and penalties, if awarded, could be substantially reduced, Plaintiffs assessed the realistic
12 exposure as \$1,866,375 (25% of 7,465,550). Singer Decl. ¶36.

13 The proposed \$200,000 settlement represents nearly 11% of Plaintiffs' Counsel's
14 assessment of the realistic exposure of what may have been obtained through lengthy,
15 expensive, risky litigation. (2.68% of \$7,465,550 maximum exposure). The settlement amount
16 is reasonable, fulfills the purpose of PAGA and provides a substantial amount to the LWDA for
17 education and enforcement. Singer Decl. ¶37.

18 The settlement was reached after extensive informal discovery and review and analysis
19 of all relevant policies, expert analysis, and protracted negotiation. Taking all factors into
20 consideration, Plaintiffs' Counsel concluded the settlement is more than "fair, reasonable, and
21 adequate," and avoids the risk, after extended litigation, there could be little or no recovery.
22 Singer Decl. ¶38. For these reasons, the Court should find that the Settlement is fair, reasonable,
23 and adequate.

24 **V. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE REASONABLE**

25 Plaintiffs' Counsel requests \$66,600.00 for their attorneys' fees, (33.33% of the Gross
26 Settlement Amount), and \$19,372.00 in litigation costs. As of the date of the filing of this
27 Motion and to bring this settlement to a final closure, Plaintiff's Counsel will have incurred
28 \$121,150.00 in attorneys' fees and \$19,372.00 in litigation costs. Singer Decl. ¶39, Exh. 3 –

1 Consolidated Summary of Time & Costs, Exh. 4 - Itemized Costs; Declaration of Daniel
2 Srourian, (“Srourian Decl.”), ¶¶29, 31, 32, 36; Exh. 1 - Itemized Costs.

3 The PAGA provides for reasonable attorney's fees and costs, but “does not provide a
4 specific standard for evaluating attorney’s fees in connection with a settlement of PAGA
5 claims.” “Under Ninth Circuit [and California] law, the district court has discretion in common
6 fund cases to choose either the ‘percentage-of-the-fund or the lodestar method’ to determine a
7 reasonable attorney’s fee.” *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047;
8 *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503; *Ramirez v. Benito Valley*
9 *Farms, LLC, supra*, at *18.³ “Despite its primacy, the lodestar method is not necessarily utilized
10 in common fund cases.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.

11 The California Supreme Court affirmed the granting of attorneys’ fees in common fund
12 cases based on a percentage of the recovery. *Laffitte v. Robert Half International, Inc., supra*, at
13 p. 503. A fee award based on a percentage of the common fund recovery here is proper as it
14 spreads the attorneys’ fees among all beneficiaries of the fund, aligns the incentives between
15 plaintiffs’ counsel, the State, and the aggrieved employees, is a better approximation of the
16 market conditions in a contingency case, and encourages counsel to seek early settlement and
17 avoid unnecessarily prolonging the litigation. *Id.* The Court also approved an optional lodestar
18 cross-check. *Id.* at p. 504.

19 **A. The Results Achieved Support the Fee Request**

20 The most important factor to consider in granting a fee award is the success obtained. *In*
21 *re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), (C.D. Cal. June
22 10, 2005) 2005 U.S. Dist. LEXIS 13627, at *27 (citing *Hensley v. Eckerhart* (1983) 461 U.S.
23 424). In the face of uncertainties associated with continued litigation of Plaintiffs’ claims,
24 Defendants’ vigorous denials and affirmative defenses, there is no question the results achieved
25 are excellent. Counsel fulfilled the purpose of PAGA by obtaining \$82,524.75 in penalties to
26 distribute to the State, the LWDA for enforcement and education, and to the allegedly aggrieved

27 ³ California trial courts may use cases applying Federal Rule 23 for guidance in class issues.
28 *Vasquez v. Sup. Court*, 4 Cal.3d 800, 821(1971); *Green v. Obledo*, 29 Cal.3d 126, 145-146
(1981).

employees, as well as to compensate the Plaintiffs' Counsel representing the interests of the State.

B. The Requested Fees Are Reasonable Under the Common Fund Method

A request for attorneys' fees as a percentage of the gross settlement amount is supported by the "common fund theory," where "one who expends attorney fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 (citing *Quinn v. State of California* (1975) 15 Cal.3d 162); *Laffitte*, 1 Cal.5th at 503 (trial court "may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created"). The percentage is properly based upon the maximum settlement amount, rather than upon the amount of funds distributed to class members. *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026. In *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." *Id.* at 110, fn. omitted.

The lodestar analysis may be used to cross-check a percentage-of-recovery award. *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-558. However, the Supreme Court of California clarified that:

[W]hen an attorney fee is awarded out of the common fund preserved or recovered by means of litigation [citation], the award is not per se unreasonable merely because it is calculated as a percentage of the common fund.

Laffitte, 1 Cal.5th at 486. The *Laffitte* court further held that "trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . [and] also retain the discretion to forego a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee." *Id.* at 506.

California courts routinely award attorneys' fees equaling one-third or more of the common fund. *See, e.g., Laffitte*, 1 Cal.5th at 506 (affirming fee award representing one-third of a non-reversionary fund); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ("fee awards in class actions average around one-third of the recovery"); Eisenberg & Miller, *Attorney*

1 *Fees in Class Action Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1,
2 Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide
3 conclude that fees representing one-third of the total recovery is consistent with market rates).
4 In addition, a fee award in the amount of one-third of the common fund is reasonable because it
5 best reflects the market rate for contingency fees. *See Lealao v. Beneficial California, Inc.*
6 (2000) 82 Cal.App.4th 19, 47 (“[A]ttorneys providing the essential enforcement services must
7 be provided incentives roughly comparable to those negotiated in the private bargaining that
8 takes place in the legal marketplace.”).

9 Here, Plaintiffs’ request for attorneys’ fees in the amount of 33.33% of the gross
10 Settlement is reasonable given the significant result achieved on behalf of the State of
11 California and PAGA Members. First, the settlement amount of \$200,000 represents
12 approximately 11% of the realistic value of the PAGA claims, after discounting for risks. Singer
13 Decl. ¶¶40-41. Second, Plaintiffs’ counsel litigated this case on a purely contingent basis,
14 incurring over \$19,000 in costs with no guarantee of recovery. Singer Decl. ¶42. Plaintiffs’
15 counsel invested over 184 hours of attorney and support staff time into this action, with
16 payment deferred to the end and entirely contingent on the outcome. Singer Decl. ¶43; Srourian
17 Decl. ¶¶31, 32, 34. Furthermore, the efforts of Plaintiffs’ counsel have resulted in benefits
18 beyond the settlement fund as, after Plaintiffs mailed notice of the alleged violations to the
19 LWDA, Defendants reclassified OSs to W-2 employees. Singer Decl. ¶44.

20 Accordingly, Plaintiffs’ request for attorneys’ fees in the amount of \$66,660.00, or
21 33.33% of the GSA, is reasonable under California law.

22 **C. The Requested Fees Are Reasonable Under the Lodestar Cross-Check**

23 Plaintiffs’ request for attorneys’ fees is reasonable based upon a crosscheck of PAGA
24 Counsel’s lodestar with the application of a multiplier. Under the lodestar method, the court
25 considers a compilation of the time spent and a reasonable hourly compensation of each
26 attorney to evaluate the reasonableness of the fee requested. *Ramos v. Countrywide Home*
27 *Loans, Inc.* (2000) 82 Cal.App.4th 615, 622. The moving party meets its burden in this regard
28 by submitting “declarations evidencing the reasonable hourly rate for their services and

1 establishing the number of hours spent working on the case” as “California case law permits fee
2 awards in the absence of detailed time sheets.” *Wershba v. Apple Computer* (2001) 91
3 Cal.App.4th 224, 254-55; *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1810;
4 *Nightengale v. Hyundai Motors America* (1994) 31 Cal.App.4th 99, 103. The hours spent and
5 the reasonable hourly compensation are computed to arrive at a “lodestar” figure which may
6 then be augmented or diminished by the court taking into account various “multiplier” factors.
7 See *Ramos*, 82 Cal.App.4th at 622 (citing *Serrano*, 20 Cal.3d at 48-49).

8 While a percentage fee may be cross-checked against a lodestar increased by a risk
9 multiplier, courts are not required to engage in this exercise, and many California courts decline
10 to do so. See, e.g. *Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC, (N.D. Cal. Jan.
11 26, 2007) 2007 WL 221862 (finding “no need to conduct a lodestar cross-check [as] [c]lass
12 counsel’s prompt action in negotiating a settlement while the state of the law remained
13 uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. 07-0474-DLB, (E.D. Cal. Sept.
14 2, 2011) 2011 WL 10483569 (“A lodestar cross-check is not required in this circuit, and in a
15 case such as this, is not a useful reference.”)

16 Here, the lodestar of Plaintiffs’ counsel is \$121,150.00 which is based on 184.2 hours of
17 attorney and support staff time at customary hourly rates. Singer Decl. ¶45, Exh. 3 –
18 Consolidated Summary of Time and Costs; Srourian Decl. ¶¶29, 32. The hours expended are
19 reasonable in light of the complexity and duration of the litigation.

20 **1. Plaintiffs’ Counsel’s Hours Are Reasonable**

21 In determining whether the number of hours expended on the litigation was reasonable,
22 the court must determine that “the time spent was reasonably necessary and that [] counsel
23 made ‘a good faith effort to exclude from the fee request hours that are excessive, redundant, or
24 otherwise unnecessary.” *Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263 n.8.
25 The court “should defer to the winning lawyer’s professional judgment as to how much time he
26 was required to spend on the case.” *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d
27 1106, 1112 (noting that “[l]awyers are not likely to spend unnecessary time on contingency fee
28 cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the

1 amount of the fee.”). It is well established that reasonable fees for support staff services may be
2 included as part of a fee award. *See Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985)
3 172 Cal.App.3d 914, 951 (“necessary support services for attorneys, e.g. secretarial and
4 paralegal services, are includable within an award of attorney fees”); *Guinn v. Dotson* (1994) 23
5 Cal.App.4th 262, 268-270 (“[a]n award of attorney’s fees which does not compensate for
6 paralegal service time would not fully compensate the attorney”); *Missouri v. Jenkins* (1989)
7 491 U.S. 274, 285 (fee award must account for work of non-attorneys “whose labor contributes
8 to the work product for which an attorney bills her client”).

9 Hours are reasonable if, “at the time rendered, [they] would have been undertaken by a
10 reasonable and prudent lawyer to advance or protect his client’s interest.” *Moore v. Jas. H.*
11 *Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, 839. *Norman v. Housing Auth.* (11th Cir.
12 1988)836 F.2d 1292, 1306 (“The measure of reasonable hours is determined by the profession’s
13 judgment of the time that may be conscionably billed and not the least time in which it might
14 theoretically have been done”). Here, the 184.2 hours expended to litigate and settle this action
15 were reasonable. Singer Decl. ¶45.

16 **2. Plaintiffs’ Counsel’s Rates Are Reasonable**

17 The reasonable hourly rate is that prevailing in the community for similar work. *PLCM*
18 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. “[I]n assessing a reasonable hourly rate,
19 the trial court is allowed to consider the attorneys’ skill as reflected in the quality of work, as
20 well as the attorneys’ reputation and status.” *MBNA Am. Bank, N.A. v. Gorman* (2006) 147
21 Cal.App.4th 1, 3. The trial court may also “find hourly rates reasonable based on evidence of
22 other courts approving similar rates.” *Parkinson v. Hyundai Motor Am.* (C.D. Cal. 2010) 796
23 F.Supp.2d 1160, 1172. “Affidavits of the plaintiff’s attorney and other attorneys regarding
24 prevailing fees in the community, and rate determinations in other cases, particularly those
25 setting a rate for the plaintiff’s attorney, are satisfactory evidence of the prevailing market rate.”
26 *United Steelworkers of Am. v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407; *Bouman*
27 *v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235 (9th Cir. 1991) (the submission of “declarations
28 stating that the rate was the prevailing market rate in the relevant community [was]... sufficient

1 to establish the appropriate rate for lodestar purposes”).

2 Plaintiffs’ Counsel’s skill and experience support their hourly rates and are in line with
3 rates typically approved in California wage and hour class actions. Cohelan Khoury & Singer’s
4 practice is limited to litigating class and representative actions on behalf of employees and
5 consumers, and our firm has been appointed Class Counsel or co-Class Counsel in over 300
6 such cases. Singer Decl. ¶¶3-11, 46. Mr. Srourian has devoted a significant portion of his
7 practice to employment law and class and representative actions and has been appointed counsel
8 for plaintiff in numerous class and representative wage and hour class actions. Srourian Decl.
9 ¶41.

10 Plaintiffs’ Counsel’s skill and experience support their hourly rates: Cohelan Khoury &
11 Singer: Managing Partner, Michael D. Singer - \$925; Associate, Marta Manus - \$700; Srourian
12 Law Firm, P.C.: Founding Partner, Daniel Srourian - \$650. These rates are in line with those
13 typically approved in California wage-and hour class action litigation. Indeed, the Laffey
14 Matrix would actually provide for a rate increase. Singer Decl. ¶47, Exh. 5 - Laffey Matrix;
15 Srourian Decl. ¶35. Given Plaintiffs’ Counsel’s skill and experience, Plaintiffs’ Counsel’s rates
16 are reasonable.

17 **D. Litigation Expenses Are Reasonable**

18 Plaintiffs’ Counsel are entitled to reimbursement of reasonable litigation costs under
19 PAGA. *See* Lab. Code § 2699(g)(l). The Settlement provides for reimbursement of costs not to
20 exceed \$22,000. Plaintiffs’ Counsel seeks reimbursement of actual costs of \$19,372.00. These
21 costs are reasonable and were necessary to prosecute this case. Singer Decl. ¶48, Exh. 4 -
22 Itemized Costs; Srourian Decl. ¶29, Exh. 1 - Itemized Costs. Accordingly, Plaintiffs’ Counsel
23 respectfully requests the Court approve the reimbursement of costs in the amount of
24 \$19,372.00.

25 **VI. THE REQUESTED ADMINISTRATION COSTS ARE REASONABLE**

26 The Settlement provides for settlement administration costs not to exceed \$4,500 to be
27 paid from the Gross Settlement Amount to ILYM Group, Inc. SA ¶19. ILYM Group, Inc. has
28 submitted a bid for the capped amount of \$3,995. Singer Decl. ¶49; ILYM Decl. ¶6, Exh C -

Bid. Given the number of PAGA Members and the scope of the duties to be performed by ILYM Group. Inc., the Court should approve the settlement administration costs as reasonable.

VII. SETTLEMENT OF PLAINTIFFS' INDIVIDUAL CLAIMS

Free Energy's arbitration agreements prevented Plaintiffs from bringing individual damages claims in court. Singer Decl. ¶50. The Parties avoided the time and cost of arbitration to resolve Plaintiffs' individual claims. Although by definition not a part of the PAGA action, and court approval is not required, in the interest of providing the Court with all information as it considers approval of the PAGA settlement, the individual settlement for Plaintiffs is described here.

Plaintiffs released all claims, and waived Civil Code section 1542, in exchange for \$12,500 each. Ms. Hernandez was employed as an Outreach Specialist for three years. As with the representative PAGA claims, Free Energy strongly denies the merits of the individual claims, asserted credible defenses, and resolved the claims only to buy peace and avoid the inconvenience and expense of arbitration. Singer Decl. ¶51. Subject to the usual litigation risks, the settlement amount is less than what may have reasonably been obtained in arbitration if successful. If considered only as a payment for a general release of claims, no part of the payment is consideration for agreeing to settlement of PAGA claims. Singer Decl. ¶52.

VIII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant approval of the Settlement and enter the proposed judgment.

Respectfully submitted,

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Dated: October 6, 2023

By: 

Michael D. Singer

Marta Manus

Attorneys for Plaintiffs Daniel Colmenares and
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all others similarly situated