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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF ALAMEDA**

DONOVIN FOXX, BYRON BRYANT, and  
YOLANDA CARBAJAL, on behalf of  
themselves, the State of California and all  
aggrieved employees

Plaintiffs,

v.

HEALTHCARE SERVICES GROUP, INC.,  
a Pennsylvania Corporation; HCSG WEST  
LLC, a New Jersey Limited Liability  
Company; KOA HOLDINGS, LLC, a  
California Limited Liability Company d/b/a  
COTTONWOOD CANYON  
HEALTHCARE CENTER; and DOES 1-10,  
inclusive,

Defendants.

Case No.: RG21100855

ASSIGNED FOR ALL PURPOSES TO  
THE HON. EUMI LEE

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO APPROVE SETTLEMENT  
PURSUANT TO PRIVATE ATTORNEYS  
GENERAL ACT OF 2004**

Date: January 21, 2022

Time: 8:30 a.m.

Department: 512

**Res. ID: 505433587009**

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1       **I.     INTRODUCTION**

2           Plaintiffs Donovan Foxx, Byron Bryant, and Yolanda Carbajal seek approval of a Settlement  
3 for civil penalties against Defendants Healthcare Services Group, Inc. and HCSG West, LLC under  
4 the California Labor Code Private Attorneys General Act of 2004 (“PAGA”).<sup>1</sup> This Settlement  
5 resolves all claims pending in the present Action.

6           Plaintiffs brought this PAGA action for wage and hour violations with respect to Defendants’  
7 alleged violations of California Labor Code, including failing to pay for all hours worked, including  
8 specifically the time spent going through pre-shift health screenings and failing to reimburse  
9 employees for business related expenses. Plaintiffs and the aggrieved employees work for  
10 Defendants at long-term care facilities operated by Defendants’ clients in California, in  
11 housekeeping, laundry, kitchen, janitorial, and other roles.<sup>2</sup>

12           In mid-2021, the Parties began to explore the possibility of a resolution that would resolve  
13 the Action in its entirety. The Parties ultimately reached a non-reversionary \$2,100,000.00  
14 settlement that resolves the PAGA claims. Plaintiffs now seek this Court’s approval of the PAGA  
15 Settlement pursuant to Cal. Lab. Code § 2699(1)(3).<sup>3</sup> The basic terms of the Settlement are as  
16 follows: (1) no portion of the Gross Settlement Amount will revert to Defendants; (2) Plaintiffs  
17 will receive Service Awards of up to \$15,000.00 for their service in bringing the representative  
18 claims and providing a general release; (3) Plaintiffs’ Counsel will receive an award of attorneys’  
19 fees of up to one-third of the Gross Settlement Amount, or \$700,000; (4) Plaintiffs’ Counsel will  
20 be reimbursed \$25,030.80 for out of pocket expenses; (5) Phoenix Class Action Administration  
21 Solutions will administer the settlement and receive \$24,000.00 for its service as settlement  
22

23           <sup>1</sup> “Plaintiffs” refers to Plaintiffs Donovan Foxx, Byron Bryant, and Yolanda Carbajal on behalf of  
24 the State of California and aggrieved employees. “Defendants” refers to Defendants Healthcare  
Services Group, Inc. and HCSG West, LLC, as well as Defendant KOA Holdings, LLC, a California  
Limited Liability Company D/B/A Cottonwood Canyon Healthcare Center.

25           <sup>2</sup> The “aggrieved employees” refers to all current and former non-exempt employees of Defendants  
26 in California employed at any time between December 28, 2019, and January 31, 2022, including  
Plaintiffs.

27           <sup>3</sup> A true and correct copy of the Settlement Agreement and Release of Claims – Private Attorneys  
28 General Act (the “Settlement”) is attached as Exhibit 1 to the Declaration of Carolyn Hunt Cottrell  
in Support of Motion to Approve Settlement Pursuant to Private Attorneys General Act of 2004  
 (“Cottrell Decl.”).

1 administrator; and (6) The remaining funds (the “net PAGA settlement amount”), \$1,305,969.20,  
2 will be split between the State of California and the aggrieved employees.

3 The Settlement warrants approval because it fulfills the purpose of the PAGA (i.e., to deter  
4 potential violations of the Labor Code and to provide relief that is genuine, meaningful, and  
5 consistent with California’s goal of benefitting the public through enforcement of labor laws) and  
6 because it is fair and reasonable in light of the risks of continued litigation. Approximately  
7 \$979,476.90, or 75% of the net PAGA settlement amount, will be remitted to the State of California,  
8 while the remaining \$326,492.30, or 25% of the net PAGA settlement amount, will be remitted to  
9 the aggrieved employees.

10 For these reasons and those discussed below, Plaintiffs respectfully request that the Court  
11 approve the Settlement.

## 12 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### 13 **A. The PAGA Notice and Complaint**

14 Defendants employed Plaintiff Foxx from approximately April 2018 to approximately June  
15 2020, Plaintiff Bryant from approximately January to June 2020, and Plaintiff Carbajal from  
16 approximately January to July 2020. On December 28, 2020, Plaintiffs Foxx and Bryant filed their  
17 Private Attorney Generals Act (“PAGA”) notice with the Labor and Workforce Development  
18 Agency (“LWDA”). Plaintiff Carbajal filed her PAGA notice with the LWDA on January 29, 2021.  
19 A copy of each notice was severed on Defendants. Plaintiffs subsequently filed this Action in  
20 Alameda County Superior Court on June 2, 2021, alleging wage and hour violations under the  
21 California Labor Code and seeking penalties under the PAGA for Defendants’ violations. Cottrell  
22 Decl., ¶ 9-10.

23 Plaintiffs’ Complaint alleges causes of actions under the PAGA for penalties pursuant to Cal.  
24 Lab. Code § 2699(f) for (1) failure to pay minimum, regular and overtime wages pursuant to Cal.  
25 Lab. Code §§ 510, 1194, 1197.1, 1198, and the IWC Wage Order(s); (2) failure to provide accurate  
26 itemized wage statements pursuant to Cal. Lab. Code §§ 226, 226.3; (3) failure to timely pay wages  
27 due during employment and at separation pursuant to Cal. Lab. Code §§ 201-204, 210 and 256; (4)  
28 failure to maintain accurate records pursuant to Cal. Lab. Code §§ 1174, 1174.5, 1198 and the IWC

1 Wage Order(s); and (5) failure to reimburse expenses pursuant to Cal. Lab. Code § 2802. Cottrell  
2 Decl., ¶ 11.

3 **B. Pre-Mediation Discovery**

4 The Parties agreed to participate in a private mediation for the PAGA claims. Prior to  
5 mediation, discovery included Defendants producing data regarding the time and scope of the  
6 policies at issue as well as the number of pay periods and employees affected. Defendants indicated  
7 that approximately 4597 employees worked 81,750 pay periods while the health screening policy  
8 was in effect between March 2020 and the end of May 2021. Cottrell Decl., ¶ 12.

9 Plaintiffs' counsel also was provided the contact information for a portion of the aggrieved  
10 employees, relevant policies and procedure documents, and time and payroll documents in a related  
11 case, *Gonzales v. Healthcare Services Group, Inc. et al.*, San Francisco Superior Court Case  
12 No. CGC-18-570988 ("Gonzales Action"). Cottrell Decl., ¶ 13. In the Gonzales Action, the  
13 plaintiff also took the deposition of Defendants Healthcare Services Group, Inc. and HCSG West,  
14 LLC, regarding relevant employment practices and payroll processing, as well as the depositions  
15 of the heads of Defendants' Payroll and Human Resources Departments, and six of Defendants'  
16 regional and district managers, and gathered testimony regarding the policies and practices at issue  
17 in this case. Through these depositions, Plaintiffs found that the COVID-19 health screening policy  
18 was implemented state-wide in March 2020. At the end of May 2021, the policy was amended to  
19 provide payment for time spent undergoing COVID-19 health screenings. Cottrell Decl., ¶ 14.

20 **C. Mediation and Settlement Negotiations**

21 On May 25, 2021, the Parties participated in a private mediation with Deborah Saxe, Esq.  
22 Prior to mediation, Plaintiffs conducted an in-depth analysis of the claims and defenses, including  
23 Defendants' potential exposure. Plaintiffs' primary claim is for unpaid time worked during COVID-  
24 19 health screenings. Using the data and information gathered from Plaintiffs, as well as that data  
25 and information collected in the *Gonzales Action*, Plaintiffs determined that based on the 81,750  
26 pay periods at issue, the maximum penalty for unpaid wages based on the COVID-19 health  
27  
28

1 screenings was \$8,175,000.<sup>4</sup> Plaintiffs determined that their second claim for reimbursement for  
2 purchase of PPE and non-slip shoes provides a maximum penalty of \$8,175,000.<sup>5</sup> Together, the  
3 claims alleged by Plaintiffs could result in maximum penalties of \$16,350,000. Notably, Plaintiffs  
4 did not include penalties for the derivative claims for failure to provide accurate itemized wage  
5 statements (Cal. Lab. Code §§ 226, 226.3), failure to timely pay wages due during employment  
6 and at separation pursuant (Cal. Lab. Code §§ 201-204, 210 and 256), or failure to maintain accurate  
7 records (Cal. Lab. Code §§ 1174, 1174.5, 1198 and the IWC Wage Order(s)) because they were  
8 covered by the settlement in the *Gonzales Action*. Cottrell Decl., ¶ 15, 17-20.

9 The Parties were unable to reach an agreement at the mediation and participated in a  
10 subsequent mediation with Ms. Saxe on September 2, 2021. The Parties were again unable to reach  
11 an agreement, but continued negotiating after the September 2, 2021 mediation. The Parties  
12 accepted a mediator's proposal to resolve the case on September 7, 2021. The negotiations leading  
13 to settlement and to the terms of this agreement were at all times non-collusive and conducted at  
14 arm's length. Cottrell Decl., ¶ 20.

#### 15 **D. The Settlement Terms and Distribution of PAGA Penalties**

16 The Settlement provides that Defendants Healthcare Services Group, Inc. and HCSG West,  
17 LLC will pay a non-reversionary settlement amount of \$2,100,000.00 (the "Gross Settlement  
18 Fund"). Cottrell Decl., ¶ 21. From the Gross Settlement Fund, payments will be made to the  
19 Settlement Administrator for settlement administration costs, to Plaintiffs for a service award, and  
20 to Plaintiffs' counsel for attorneys' fees and litigation costs. *Ibid*.

21 The Settlement provides for a Service Award of up to \$15,000 for each Plaintiff for their  
22

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23 <sup>4</sup> Under Cal. Lab. Code § 2699(f), the penalty for failing to pay all wages is \$100 per pay period for  
24 initial violations. Plaintiffs did not consider the \$200 penalty for subsequent violations because  
25 Defendants had not been put on notice of the violations. Until the employer has been notified that  
26 it is violating a Labor Code provision (whether or not the commissioner or court chooses to impose  
27 penalties), the employer cannot be presumed to be aware that its continuing underpayment of  
employees is a "violation" subject to penalties. *Amaral v. Cintas Corp. No. 2* (2008) 163  
Cal.App.4th 1157, 1209. *See also, Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 990 F.3d 1157,  
1172-1173.

28 <sup>5</sup> PAGA also provides for a penalty of \$100 per pay period for initial violations under Cal. Lab.  
Code § 2699(f) for violations of Cal. Lab. Code § 2802.

1 work in litigating this case along with their general release of claims. The settlement administration  
2 costs for the Settlement Administrator, Phoenix Class Action Administration Solutions, are  
3 \$24,000.00. Pursuant to the Settlement, Plaintiff's counsel seeks a fee award of one-third of the  
4 Gross Settlement Amount, along with reimbursement of actual litigation costs (in the amounts of  
5 \$700,000.00 and \$25,030.80, respectively). Cottrell Decl., ¶ 22-24.

6 The net PAGA settlement amount paid to the aggrieved employees and the State of California  
7 will be \$1,305,969.20. The LWDA will receive a projected \$979,476.90 from the Settlement. The  
8 remaining 25% of the net PAGA settlement amount, approximately \$326,492.30, will be paid to  
9 the aggrieved employees. These allocations will result in an average payment amount of \$50.23 for  
10 each of the approximately 6,500 aggrieved employees. Cottrell Decl., ¶ 25.

11 Per the Settlement Agreement, the amounts paid to aggrieved employees will be determined  
12 pro rata based on the number of pay periods worked in California by each such employee during  
13 the PAGA Recovery Period of December 28, 2019, through judgement or January 31, 2022  
14 (whichever comes later), in proportion to the total of all such pay periods worked by the aggrieved  
15 employees during the PAGA Recovery Period. Each Pay Period during which the individual was  
16 employed will be equal to one (1) settlement share, except that Pay Periods worked from March 1,  
17 2020 through May 31, 2021 will be equal to five (5) settlement shares to reflect the increased value  
18 of claims resulting from the unpaid health screening policy that was in effect during that time  
19 period. Cottrell Decl., ¶ 26, Settlement § II(D)(5).

20 As the Settlement payments to the aggrieved employees are for the compromise of claims  
21 for alleged PAGA civil penalties, the payments will be treated as non-wage income with no taxes  
22 withheld and will be reported by the Settlement Administrator on IRS Form 1099s to the aggrieved  
23 employees and governmental authorities. Cottrell Decl., ¶ 27.

#### 24 **E. The Releases for the Aggrieved Employees and Plaintiff**

25 Under the Settlement, upon the Effective Date, Plaintiffs, on behalf of the State of California,  
26 shall be deemed to have forever released, acquitted, and discharged Defendants and the other  
27 Released Parties from any and all demands, rights, liabilities, claims, and/or causes of action under  
28 the PAGA, based on or arising out of the facts alleged by Plaintiffs in the Action, or that could have

1 been alleged under the PAGA based on the same facts, during the PAGA Recovery Period,  
2 including the specific PAGA claims alleged in the Complaint. The release does include a release of  
3 all overlapping PAGA claims made in *Fardanesh v. Healthcare Services Group, et al.*, Los Angeles  
4 Superior Court Case No. 20STCV33842 (“*Fardanesh Action*”), but does not include PAGA claims  
5 that are alleged in the *Gonzales Action*. The Judgment to be entered by the Court shall have *res*  
6 *judicata* effect as to each Aggrieved Employee with respect to the claims released herein. Cottrell  
7 Decl., ¶ 29, Settlement § II(E)(1-2).

8 Additionally, Named Plaintiffs Donovan Foxx, Byron Bryant and Yolanda Carbajal agree to  
9 a broader, general release of all claims of any kind against Defendants, regarding events that have  
10 occurred as of the date of the Settlement Agreement, including any and all claims related or in any  
11 manner incidental to the Action. This release of claims by Plaintiffs will take effect upon the  
12 Effective Date. Cottrell Decl., ¶ 30, Settlement § II(E)(3).

### 13 **III. THE SETTLEMENT IS FAIR, REASONABLE, AND WARRANTS COURT** 14 **APPROVAL**

#### 15 **A. Judicial Review of PAGA Settlements**

16 While Court approval is required for PAGA settlements, the PAGA does not establish any  
17 standards for the review of PAGA settlements and no Court has definitively identified the  
18 applicable standard. *See* Cal. Lab. Code § 2699(1)(2); *Jordan v. NCI Group, No. 16 1701 JVS* (C.D.  
19 Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at \*5 (“[N]either the California legislature, nor  
20 the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided  
21 any definitive answer’ as to what the appropriate standard is for approval of a PAGA settlement.”)  
22 (quoting *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F.Supp.3d  
23 1074, 1075).

24 In reviewing PAGA settlements, courts have recognized that PAGA settlements must be  
25 viewed in light of the PAGA’s public purpose, namely augmenting the state’s enforcement  
26 capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance  
27 with California’s labor law. *See, e.g., Vargas v. Central Freight Lines* (Sept. 25, 2017 S.D. Cal.)  
28 No. 16-cv-00507-JLB, 2017 WL 4271893, \*6; *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S.

1 Dist. LEXIS 137272. “[T]he Court will approve the PAGA settlement upon a showing that the  
2 settlement terms are fundamentally fair, adequate, and reasonable in light of PAGA’s policies and  
3 purposes.” *Jordan, supra*, 2018 U.S. Dist. LEXIS 25297, at \*5. The proposed Settlement here is  
4 fair and reasonable in light of the purposes of the PAGA.

5 **B. PAGA and its Purpose**

6 Enacted in 2004, PAGA provides an enforcement mechanism for California’s Labor Code  
7 by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state,  
8 with a share also going to the individual plaintiffs and other employees. *See Arias v. Superior Court*  
9 (2009) 46 Cal.4th 969, 980.

10 The Labor Code’s primary purpose is to “ensure employees are not required or permitted to  
11 work under substandard unlawful conditions ... and to protect employers who comply with the law  
12 from those who attempt to gain a competitive advantage at the expense of their workers by failing  
13 to comply with minimum labor standards.” Cal. Lab. Code § 90.5(a). In enacting PAGA, the  
14 Legislature expressly stated that “the only meaningful deterrent to unlawful conduct is the vigorous  
15 assessment and collection of civil penalties as provided in the Labor Code.” Stats. 2003 ch. 906, §  
16 l(b). The Legislature thus determined that it is “in the public interest to allow aggrieved employees,  
17 acting as private attorneys general, to recover civil penalties for Labor Code violations, with the  
18 understanding that labor law enforcement agencies were to retain primacy over private enforcement  
19 efforts.” *Arias, supra*, 46 Cal.4th at 980.

20 Under this regime, Plaintiffs Donovan Foxx, Byron Bryant and Yolanda Carbajal, acting as  
21 private attorneys general and proxy for the State of California, filed this action seeking civil  
22 penalties for Defendants’ alleged violations of the Labor Code.

23 **C. The Settlement Enforces the PAGA’s Purpose**

24 The \$2,100,000 penalty in this case serves as a warning to Defendants and to employers  
25 throughout California that failing to ensure strict compliance with the California Labor Code will  
26 lead to expensive repercussions. If approved by the Court, the \$2,100,000 penalty will achieve  
27 PAGA’s objectives by (1) holding an employer accountable for its violations of the labor code; (2)  
28

1 deterring future violations of the Labor Code by Defendants and other employers;<sup>6</sup> (3) collecting  
2 penalties from an employer and recovering 75% of the penalties, i.e., \$979,476.90, on behalf of the  
3 State of California for purposes of enforcement and education; and (4) distributing 25% of the  
4 penalties, i.e., \$326,492.30, to the PAGA Employees pursuant to Cal. Lab. Code § 2699(i).

5 This large penalty shows Defendants and other employers that having compliant policies is  
6 insufficient if those policies are not strictly enforced. This settlement encourages employers to  
7 expend additional resources to ensure that they pay employees for all hours worked and authorize  
8 and permit meal and rest breaks and deter other violations of the Labor Code.

9 In addition, the Settlement will result in a large payment to the LWDA to use for furthering  
10 its mission of protecting workers as well as reasonable payments to the Aggrieved Employees  
11 which do not require them to release their individual claims.

12 **D. The Risks Associated with Continuing to Litigate, Including Anticipated Trial**  
13 **Result, Weight of Evidence, Clarity of Controlling Law, And Defendants’**  
14 **Defenses Warrant Approval of the Settlement**

15 Not only does the settlement in this case serve as a deterrent to future violations, but the  
16 result achieved is well within the range of reasonableness based on the underlying facts and the  
17 risks faced by Plaintiffs in proving these claims. “A PAGA action is at heart a civil enforcement  
18 action filed on behalf of and for the benefit of the state, not a claim for class relief.” *Baumann v.*  
19 *Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1124. The Court’s focus is not the amount  
20 aggrieved employees ultimately receive as a result of a settlement, but on whether the total  
21 settlement achieves PAGA’s objectives, even if it represents only a portion of Defendants’ total  
22 exposure. “In determining whether the proposed settlement falls within the range of reasonableness,  
23 perhaps the most important factor to consider is plaintiffs’ expected recovery balanced against the  
24 value of the settlement offer.” *O’Connor v. Uber Technologies, Inc.* (2016) 201 F.Supp.3d 1110,  
25 1120-1121 (citing *Cotter v. Lyft, Inc.* (N.D. Cal. Apr. 7, 2016) 176 F.Supp.3d 930, 935).

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26  
27 <sup>6</sup> See *O’Connor v. Uber Technologies, Inc.*, *supra*, 201 F.Supp.3d 1110 at 1134 (holding that the  
28 deterrent purpose of the PAGA also applies to deterring other employers (not just settling Defendants)).

1 Plaintiffs were confronted with considerable uncertainty in proceeding to litigate the PAGA  
2 claims. First, there was a risk that the claims would not even have make it to trial. This case was in  
3 the early stages, and Defendants would likely have moved for summary judgment. Defendants  
4 would likely argue, as they highlighted at mediation, that they do not own or control the facilities  
5 at which they provide labor. Therefore, that the facilities imposed a screening process to enter their  
6 premises, would not constitute compensable time worked. In addition, Defendants would argue that  
7 arguing that the off-the-clock health screenings were not under their control but were instead due  
8 to government mandates outside their control. Similarly, because each facility is independently  
9 owned, each instituted its own screening procedures over which Defendants had no control.  
10 Additionally, Defendants would argue that PPE and non-slip shoes are not business-related  
11 expenses that required reimbursement.

12 Assuming Plaintiffs were able to defeat Defendants’ anticipated motions, Plaintiffs would  
13 then need to take their claims to trial. Trials are inherently risky for all parties. Although Plaintiffs  
14 believe that they could have been successful in proving these claims, and that Defendants’ evidence  
15 would not have been as persuasive, a trial on the claims would have carried a high degree of risk.

16 Finally, there is the risk that even if Plaintiffs successfully prevailed in proving liability as to  
17 their claims, the Court would award penalties less than the amount of Defendants’ total exposure.  
18 “A trial court’s discretion to reduce PAGA penalties might be a reason to ultimately discount the  
19 value of PAGA claims, perhaps even significantly, in reaching a settlement. However, before the  
20 court could exercise that discretion it would have to know the actual estimated values of the PAGA  
21 claims.” *Gonzales v. CoreCivic of Tennessee, LLC* (E.D. Cal., Sept. 13, 2018) 2018 WL 4388425,  
22 at \*6-9. The Court could, and likely would, exercise its discretion pursuant to Cal. Lab. Code §  
23 2699(e)(2) to award an amount less than the maximum civil penalty amount based on the facts and  
24 circumstances of the case – namely the impact of the pandemic on the circumstances under which  
25 the violations arose.

26 Recent judgements show that courts exercise broad discretion when discounting PAGA civil  
27 penalties. Four California appellate cases reveal judicial discounts applied to the civil penalties  
28

sought ranging from 95% to 25%.<sup>7</sup> These are cases that have already reached judgement, whether through trial or summary adjudication. From these cases it also appears that courts are willing to provide steeper discounts to larger claims for penalties.

Here, if the case were to proceed to judgment, multiple factors could lead the court to award a lower penalty, including that Defendants are an important provider of services that support the nursing home and acute care industries during an unprecedented global pandemic, Defendants had a compliant written policy to pay all wages earned, Defendants changed their practices prior to the settlement being reached, and because the claims alleged herein are directly related to steps Defendants took to prevent the spread of COVID-19 to the residents of the nursing homes and acute care centers where Aggrieved Employees worked.

Given all these risks, this settlement is reasonable, and indeed excellent, based on the strength of the claims, the size of the group of aggrieved employees, and the risks of going to trial. Cottrell Decl., ¶¶ 34-35. The \$2,100,000 Settlement represents approximately 12.7% of Defendants' total potential exposure of \$16,350,000. *Id.* at ¶ 28.

#### **IV. THE SERVICE AWARD TO PLAINTIFFS IS REASONABLE AND SHOULD BE APPROVED**

In the Class action context, Courts award service payments to advance public policy by encouraging individuals to come forward and perform their civic duty in protecting the rights of the class, as well as to compensate representatives for their time, effort, inconvenience, and for any expense or risk incurred. *In Re California Indirect Purchases* (1998) 1998 WL 1031494, \*11; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412. The same

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<sup>7</sup> *Carrington vs. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (\$75 million in penalties sought, yet Court awarded PAGA penalties of only \$150,000 based on 30,000 violations and reduced the penalty rate to \$5 per violation, equating to a 95% discount of the initial penalty rate of \$100 per violation, affirmed on appeal); *Atempa v. Pama* (2018) 27 Cal.App.5th 809 (San Diego County Superior Court, July 31, 2015) (PAGA penalties of \$456,133 sought, \$197,434 assessed, reflecting a 56% discount; Trial Judge Joel Wohlfeil); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, disapproved on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196 n8 (requested \$512,000, awarded \$358,588 reflecting a 25% discount; Trial Judge Tim Taylor, San Diego County Superior Court); *Amaral v. Cintas Corp. No. 2, supra*, 163 Cal.App.4th 1157 (requested \$500,000, awarded \$258,900, reflecting a 48% discount; Trial Judge Steven Brick, Alameda County Superior Court).

1 should apply in the PAGA context. The unopposed payment to Plaintiffs in the amount of  
2 \$15,000.00 each is reasonable in light of the efforts they made and the risks they took in filing and  
3 prosecuting this action to obtain this \$2,100,000.00 Settlement. Throughout this litigation, Plaintiffs  
4 worked with Counsel and assisted in the development of the case. They produced documents which  
5 Counsel relied upon in mediation, answered Counsel's questions in developing its position for  
6 mediation, and remained apprised of the case at all times during litigation. As a result of Plaintiffs'  
7 efforts and their willingness to step forward, the State of California and the Aggrieved Employees  
8 will receive significant recoveries if the Settlement is approved. Cottrell Decl. at ¶¶ 33-35,  
9 Declaration of Michael D. Singer in Support of Motion for Court Approval of PAGA Settlement  
10 ("Singer Decl.") ¶ 21.

11 In addition, Plaintiffs agreed to a broader release of claims, including their individual wage  
12 and hour claims that underpin the PAGA action. Cottrell Decl. at ¶ 30, Settlement § II(E)(3).

13 **V. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR**  
14 **AND REASONABLE**

15 For their efforts and the substantial risk that they undertook in obtaining a common fund  
16 settlement to benefit the LWDA and the aggrieved employees, the Parties allocated one-third of the  
17 Gross Settlement Amount to Plaintiffs' counsel for reasonable attorneys' fees, plus actual litigation  
18 costs of \$25,030.80. Cottrell Decl. at ¶ 38-39, Singer Decl. at ¶ 20, Declaration of Jonathan M. Lebe  
19 in Support of Motion for Court Approval of PAGA Settlement ("Lebe Decl.") at ¶ 10, Settlement  
20 § II(A)(18) & (C)(2)(b). These fees and costs are warranted under the law and within the range  
21 commonly awarded in similar cases.

22 PAGA provides that plaintiffs are entitled to recover reasonable attorneys' fees, expenses,  
23 and costs. Cal. Lab. Code Section 2699(g)(1) provides that "[a]ny employee who prevails in any  
24 action shall be entitled to an award of reasonable attorney's fees and costs." As discussed below, in  
25 a qui tam action, reasonable attorneys' fees and costs are typically awarded under the common fund  
26 doctrine where, as here, the litigation creates a common fund of money in a specific amount for the  
27 benefit of others.

1       **A. Plaintiffs' Counsel are Entitled to Recover Attorneys' Fees of One-Third Under the**  
2       **Common Fund Doctrine in this Action**

3       The California Supreme Court, in *Iskanian v. CLS Transportation*, held that “[a] PAGA  
4 representative action is therefore a type of qui tam action.” *Iskanian v. CLS Transp. L.A., LLC*  
5 (2014) 59 Cal.4th 348, 382. A qui tam action allows a private person to sue to recover damages or  
6 penalties, all or part of which will be paid to the government. *People ex rel. Strathmann v. Acacia*  
7 *Research Corp.* (2012) 210 Cal.App.4th 487, 501. A PAGA action is a qui tam action because the  
8 statute allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement  
9 agency, to sue his or her employer for Labor Code violations and recover civil penalties that  
10 otherwise would have been assessed and collected by the LWDA. *Iskanian, supra*, 59 Cal. 4th at  
11 382. Indeed, a majority of the civil penalties recovered in a PAGA action are paid to the State, with  
12 a smaller portion paid to the aggrieved employees (e.g., 75% paid to the state; 25% paid to the  
13 aggrieved employees). *See* Cal Lab. Code § 2699(i).

14       As here, where a common fund is created in a qui tam action by the successful litigation of  
15 a plaintiff and his attorneys, the plaintiff’s attorneys are entitled to recover their fees from the  
16 common fund:

17       Those benefiting from the recovery of the fund, in this case some depositors and  
18 eventually the People of the State of California, must bear their share of the cost of  
19 litigation. Fees for taxpayers’ attorneys will be deducted from the judgment, and each  
20 claimant’s share reduced proportionately. To the extent the judgment relies upon  
section 1021.5 for recovery of attorney fees, it must be modified to confine the award  
of fees to the common fund theory.

21       *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 91 (authorizing common fund fees in a  
22 qui tam taxpayer suit against certain banks).

23       Likewise, in this case, through the successful efforts of Plaintiffs and their attorneys, a  
24 common fund was created in the amount of \$2,100,000.00 for the benefit of the employees and the  
25 State of California. Thus, these beneficiaries must bear their share of the costs and attorneys’ fees,  
26 to be deducted from the Gross Settlement Amount under the common fund theory. *Id.* Such fees  
27 are deducted as a percentage of the settlement amount. *See, e.g., Boeing Co. v. Van Gernert* (1980)  
28 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904

1 F.2d 1301, 1311; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026,  
2 1027; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.

3 The California Supreme Court upheld the use of the common fund theory of recovery for  
4 attorneys' fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the  
5 settlement created a common fund of \$19 million. The Court approved the award of attorneys' fees  
6 in the amount of one third of the gross \$19 million settlement (e.g., an award of \$6.33 million)  
7 under the common fund theory. *Id.* By awarding counsel a percentage of the total recovery, rather  
8 than fees based on hours worked, the common fund method encourages attorneys to efficiently  
9 litigate to achieve the best results possible for the class. *See Laffitte*, 1 Cal. 5th at 492-494. Indeed,  
10 "the percentage method is generally favored in common fund cases because it allows courts to  
11 award fees from the fund in a manner that rewards counsel for success and penalties it for failure.  
12 *Id.* at 493 (quoting *In re Rite Aid Corp. Securities Litig.* (3d Cir. 2005) 396 F.3d 294, 300 (internal  
13 quotations omitted).

14 California state and federal courts routinely award attorneys' fees equaling one-third of the  
15 common fund. *See, e.g., Laffitte, supra*, 1 Cal.5th at 506 ("33 1/3 percent of the common fund is  
16 consistent with, and in the range of, awards in other class action lawsuits"); *Chavez v. Netflix, Inc.*  
17 (2008) 162 Cal.App.4th 43, 66 n.11 (accord); Eisenberg & Miller, *Attorney Fees in Class Action*  
18 *Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004,  
19 at 35 (independent studies of class action litigation nationwide conclude that fees representing one-  
20 third of the total recovery is consistent with market rates). A one-third common fund attorneys' fees  
21 award is also consistent with what courts have awarded in PAGA cases:

- 22 • *Vorise v. 24 Hour Fitness USA, Inc.*, Contra Costa County Superior Court, Case No.  
23 C15-02051 (33.33% fee awarded on \$11,000,000 settlement of a PAGA-only case);
- 24 • *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007  
25 (33.33% fee awarded on \$12,500,000 settlement of a PAGA-only case);
- 26 • *Garcia v. Pep Boys, Orange County Superior Court*, Case No. 30-2014-00720574-CU-  
27 OE-CJC (33.33% fee awarded on a \$1,030,000 settlement of a PAGA-only case);
- 28 • *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-  
00852123-CU-OC-CXC (33.33% fee awarded on a PAGA-only case);

- *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (33.33% fee awarded on a \$650,000 settlement of a PAGA- only case).

Based on the foregoing, awarding attorneys’ fees based on a one-third percentage of the gross settlement amount is favored by California Courts when a fund established for the common benefit of others is involved, as is the case here. Accordingly, awarding fees on this basis in the amount of one third of the \$2,100,000.00 Gross Settlement Amount is appropriate.

**B. A Fee of One-Third of the Gross Settlement Amount is Fair and Reasonable**

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of plaintiffs’ counsel and the quality of work performed by plaintiffs’ counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50.

“California courts routinely award attorneys’ fees of one-third of the common fund.” *Beaver v. Tarsadia Hotels* (S.D. Cal. Sept. 28, 2017) 2017 U.S. Dist. LEXIS 160214, \*28. Several studies of class action fee awards have found the median common fund fee award is approximately one third of the total settlement fund. *See, e.g., Chavez v. Netflix, Inc., supra*, 162 Cal.App.4th 43 at n.11 (numerous studies have shown that “fee awards in class actions average around one-third of the recovery.”); Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems: Fee Objections and Class Counsel’s Response, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, 90 (1996) (finding attorneys’ fees in class litigation “were generally in the traditional range of approximately one-third of the total settlement”).

Some courts have found an award of 33% of the common fund represents the “benchmark” in California. *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL 163293, \*5 (“These percentages compare favorably with” the California (33%) benchmark.); *Dennis v. Kellogg Co.* (S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC, 2013 WL 6055326, at \*7. All these factors support an award here of one-third of the common fund.

1 First, Plaintiffs' counsel's efforts resulted in a common fund settlement amount of  
2 \$2,100,000.00. This is a substantial settlement and an especially favorable result in light of the  
3 challenges Plaintiffs would have faced at trial. This result was achieved by the work and success of  
4 Plaintiffs' counsel, who negotiated the Settlement after extensive preparation and discovery.  
5 Cottrell Decl., ¶ 34.

6 Second, Plaintiffs faced significant risks going forward with this litigation. This case  
7 involved thousands of employees who worked at different locations and held different positions.  
8 The differences in testimony from these employees, combined with the fact that these events  
9 occurred over the past few years and the high likelihood that these employees have changed jobs,  
10 present issues of variability within testimony that could be detrimental to Plaintiffs' case. Cottrell  
11 Decl., ¶ 35.

12 Third, Plaintiffs' counsel are experienced representative action litigators. Cottrell Decl., ¶¶  
13 6-8, Singer Decl. ¶¶ 2-8 and Lebe Decl. ¶¶ 3-8. This experience and expertise, combined with the  
14 high quality of work performed in this case by Plaintiffs' counsel, resulted in the Settlement  
15 achieved. *Id.*, ¶ 36.

16 Fourth, Plaintiffs' counsel has been representing Plaintiffs (and the State of California) in  
17 these matters on strictly contingency basis, and had to forego opportunities to litigate other cases.  
18 Plaintiffs' counsel incurred the risk of non-recovery after a substantial investment of time, money,  
19 and resources, and have done so since the inception of the cases without any payment or  
20 compensation. Cottrell Decl., ¶ 37 and Singer Decl. ¶ 20. This is no easy burden for any firm.

21 Fifth, as discussed above, the requests for attorneys' fees in the amount of one-third of the  
22 common fund falls well within the range accepted by state and federal courts in California in  
23 comparable wage and hour actions. The award of a one-third fee recovery under the common fund  
24 doctrine was approved by the California Supreme Court in *Laffitte, supra*, 1 Cal.5th at 503.

25 For the above reasons, a common fund fee award in the amount of one-third of the  
26 \$2,100,000.00 common fund created by Plaintiffs and their attorneys is fair and reasonable.

27 **C. Plaintiffs' Counsel's Lodestar Supports the Fee Request**

28 The trial court may use an abbreviated lodestar cross-check for common fund awards if the

1 court considers it useful. *Laffitte, supra*, 1 Cal. 5th at 504-05. However, under *Laffitte*, this is not  
2 meant to displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme Court  
3 expressly instructed that “the lodestar calculation, when used in this manner, does not override the  
4 trial court’s primary determination of the fee as a percentage of the common fund and thus does not  
5 impose an absolute maximum or minimum on the fee award.” *Id.* at 505. Critically, the Court in  
6 *Laffitte* emphasized that only where the “multiplier calculated by means of a lodestar cross-check  
7 is extraordinarily high or low” should the court “consider whether the percentage should be adjusted  
8 so as to bring the imputed multiplier within a justifiable range.” *Id.* Furthermore, in conducting a  
9 lodestar cross-check, the court is not “required to closely scrutinize each claimed attorney-hour.”  
10 *Id.* at 505. An evaluation may be done by reviewing “counsel declarations summarizing overall  
11 time spent.” *Id.*

12 Here, the lodestar for Plaintiffs’ counsel in this Action is over \$262,000.00. Cottrell Decl., ¶  
13 38, Exh. 2, Singer Decl. ¶ 16 and Lebe Decl. ¶ 10. The attorneys’ fees requested (\$700,000.00)  
14 represent approximately a 2.67 multiplier of the lodestar incurred by Plaintiffs’ counsel. Cottrell  
15 Decl., ¶ 38. This relatively low multiplier is well within the range of what has been approved by  
16 other courts.<sup>8</sup> A cross-check of Plaintiffs’ counsel’s lodestar confirms that a fee award of one third  
17 of the \$2,100,000.00 Settlement Amount is a reasonable and fair payment.

18 **D. The Litigation Costs are Fair and Reasonable**

19 Plaintiffs’ counsel request reimbursement of their actual out-of-pocket expenses incurred to  
20 prosecute the Action, which are approximately \$25,030.80. Cottrell Decl., ¶ 39, Exh. 3, Singer  
21 Decl. Exh. 3, Lebe Decl. Exh. 1. Attorneys are permitted to recover their litigation costs and  
22 expenses under PAGA and the common fund doctrine. Cal. Lab. Code § 2699 (g)(1); *Rider v.*  
23 *County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6. Plaintiffs’ counsel incurred costs  
24 including filing fees, mediation fees, and service of process fees. Cottrell Decl., ¶ 40. These  
25 expenses were incidental and necessary to the effective representation of the aggrieved employees.  
26 *Id.* They are reasonable and uncontested and should be approved.

27  
28 <sup>8</sup> See, e.g., *Asalati v. Intel Corp.* (Santa Clara Super. Ct., Oct. 29, 2018) No. 16cv302615 (approving  
33.3% fee award, at a multiplier of 3.98 over lodestar).

1   **VI.   THE PROPOSED NOTICES OF SETTLEMENT SHOULD BE APPROVED**

2           The Notices of Settlement and reminder, attached as **Exhibits A and B** to the Settlement  
3 Agreement (together, “Notices”), and manner of distribution negotiated and agreed upon by the  
4 Parties should be approved by the Court. All Aggrieved Employees will be identified, and the  
5 Notices will be mailed directly to each Aggrieved Employee in both English and Spanish. The  
6 proposed Notices are clear and straightforward, and provide information on the nature of the action,  
7 the terms and provisions of the Settlement, and the monetary awards that the Settlement will provide  
8 to the Aggrieved Employees. Settlement, Exs. A-B.

9           Furthermore, reasonable steps will be taken to ensure that all Aggrieved Employees receive  
10 the Notices. Before mailing, Defendants Healthcare Services Group, Inc. and HCSG West, LLC  
11 will provide to the Settlement Administrator a database that contains the names, last known  
12 addresses, and social security numbers of each Aggrieved Employee, along with the applicable  
13 number(s) of Workweeks for calculating the respective settlement shares. The Notices will be sent  
14 by United States Mail. The Settlement Administrator will make reasonable efforts to update the  
15 contact information in the database using public and private skip tracing methods. Within 12 days  
16 of receipt of the Class List from Defendants, the Settlement Administrator will mail the Notices to  
17 each Class Member. Settlement, §§ II(D)(2-5).

18           With respect to Notices returned as undeliverable, the Settlement Administrator will re-mail  
19 any Notices returned to the Settlement Administrator with a forwarding address following receipt  
20 of the returned mail. If any Notice is returned to the Settlement Administrator without a forwarding  
21 address, the Settlement Administrator will undertake reasonable efforts to search for the correct  
22 address, including skip tracing, and will promptly re-mail the Notice to any newly found address.  
23 Settlement, § II(D)(6).

24           Because the proposed Notices clearly and concisely describe the terms of the Settlement and  
25 the awards and obligations for Aggrieved Employees, and because the Notices will be disseminated  
26 in a way calculated to provide notice to as many Aggrieved Employees as possible, the Notices  
27 should be approved.

1 **VII. CONCLUSION**

2 As set forth herein, the proposed PAGA Settlement provides a reasonable and efficient result  
3 for both the State of California and the aggrieved employees. Plaintiffs respectfully request that the  
4 Court approve the Settlement.

5  
6 Dated: December 28, 2021

Respectfully Submitted,

7  
8 

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16 *Attorneys for Plaintiffs Donovan Foxx, Byron Bryant,*  
17 *and Yolanda Carbajal on behalf of themselves, the*  
18 *State of California, and all Aggrieved Employees*



# Superior Court of Alameda County Public Portal

## Make a Reservation

Foxx VS Healthcare Services Group, Inc.

Case Number: RG21100855 Case Type: Unlimited Civil Category: Other Employment Complaint Case

Date Filed: 2021-06-03 Location: Hayward Hall of Justice - Department 512

### Reservation

|                                                       |                                                       |
|-------------------------------------------------------|-------------------------------------------------------|
| Case Name:<br>Foxx VS Healthcare Services Group, Inc. | Case Number:<br>RG21100855                            |
| Type:<br>Motion to Confirm Settlement                 | Status:<br>RESERVED                                   |
| Filing Party:<br>Yolanda Carbajal (Plaintiff)         | Location:<br>Hayward Hall of Justice - Department 512 |
| Date/Time:<br>01/21/2022 8:30 AM                      | Number of Motions:<br>1                               |
| Reservation ID:<br>505433587009                       | Confirmation Code:<br>CR-MTSD2UMFFXD4JBCB6            |

### Fees

| Description                  | Fee  | Qty | Amount |
|------------------------------|------|-----|--------|
| Motion to Confirm Settlement | 0.00 | 1   | 0.00   |
| Court Technology Fee         | 1.00 | 1   | 1.00   |
| TOTAL                        |      |     | \$1.00 |

### Payment

|                             |                          |
|-----------------------------|--------------------------|
| Amount:<br>\$1.00           | Type:<br>MasterCard      |
| Account Number:<br>XXXX3681 | Authorization:<br>05764S |

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