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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

PAULA CATALINA CORREA
CAMPOS and AGATHA MAHER,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

INTERNATIONAL TRAINING
& EXCHANGE, INC. d/b/a
AUPAIRCARE, INC. a California
Company,

Defendant.

CASE NO.: CGC-21-590812

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPROVAL
OF PRIVATE ATTORNEY GENERAL
ACT SETTLEMENT**

*[Concurrently filed with Plaintiffs' Notice of
Motion and supporting papers]*

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1 **I. INTRODUCTION**

2 Plaintiffs Paula Catalina Correa Campos and Agatha Maher seek approval of a settlement
3 reached in this Private Attorneys General Act (“PAGA”) case against Defendants International
4 Training & Exchange, Inc. d/b/a AuPair Care, Inc. and AuPairCare, Inc. (“AuPairCare”).¹ This
5 settlement was reached after nearly two years of factual investigation and litigation, including
6 document and deposition discovery. The \$1,150,000.00 proposed settlement is non-reversionary
7 and will cover the cost of settlement administration, service awards to the representative
8 Plaintiffs, and attorneys’ fees and litigation expenses. The Settlement provides an outstanding
9 recovery of approximately \$515,000 in penalties for California’s Labor Workforce Development
10 Agency (“LWDA”) and a recovery of roughly \$171,666 to be distributed to approximately 3,370
11 aggrieved au pairs.

12 The settlement is an excellent result particularly given a number of significant challenges
13 Plaintiffs faced in the litigation. Most obviously, Plaintiffs faced the uncertainty surrounding the
14 Supreme Court’s decision in *Moriana v. Viking River Cruises, Inc.*, 142 S.Ct. 1906 (2022),
15 including what impact the decision will have on representative PAGA cases like this one, where
16 the PAGA plaintiff had signed an arbitration agreement. Plaintiffs also faced a hurdle in proving
17 employment status, since Defendants argue that it is host families, not AuPairCare, which
18 employs au pairs. Finally, Plaintiffs would have had to contend with Defendants’ argument that
19 Plaintiffs’ state law claims are preempted by a federal regulatory scheme governing the au pair
20 exchange program. In the face of all of these challenges, Plaintiffs were able to obtain a
21 \$1,150,000 monetary settlement that will provide a meaningful payment to the LWDA and
22 aggrieved employees.

23 Pursuant to PAGA, the superior court shall “review and approve any settlement of any
24 civil action filed pursuant to this part.” Lab. Code § 2699(1)(2). As discussed below, the PAGA
25 settlement here is a fair, adequate, and reasonable resolution of the PAGA claims, with a release
26 that is appropriately limited. The settlement—which was negotiated at arm’s length with the
27

28 ¹ Defendant answered as “AuPairCare, Inc., erroneously sued as International Training &
Exchange, Inc. D/B/A AuPair Care, Inc.” See Dkt. No. 7.

1 assistance of an experienced, skilled mediator, Jeffrey Krivis—provides a substantial penalty,
2 particularly in light of the risk that Plaintiffs would not succeed on their claims or that, even if
3 they did, the Court would substantially reduce the amount of PAGA penalties. The settlement
4 amount is consistent with court-approved amounts in other PAGA cases, and the service awards
5 and attorneys’ fees and costs are reasonable. Plaintiffs therefore respectfully move the Court to
6 grant approval of the proposed PAGA settlement.

7 **II. BACKGROUND ON THE CASE**

8 AuPairCare is a California company with its principal place of business in San Francisco.
9 AuPairCare is a sponsor agency authorized by the United States Department of State to place
10 childcare workers known as “au pairs” with host families in California and around the United
11 States. In this PAGA action, Plaintiffs sought civil penalties on behalf of the State of California
12 for the alleged nonpayment of minimum, overtime, and premium (missed meal break) wages to
13 au pairs placed in California during the PAGA period.

14 AuPairCare’s defense centered around its contention that it is not an employer of au pairs
15 but merely administering an exchange program under the authority of the United States
16 Department of State’s preemptive regulatory scheme. Defendants also denied the alleged Labor
17 Code violations.

18 **A. Procedural Background**

19 Plaintiffs submitted a letter to the LDWA on January 22, 2021 identifying the alleged
20 Wage Order and Labor Code violations. Rukin Decl. ¶ 7. After receiving no response, they filed
21 this PAGA action on April 14, 2021. In the lawsuit, Plaintiffs allege that AuPairCare was liable
22 for civil penalties based on: (1) Defendants’ failure to meet their minimum wage obligations to
23 au pairs in violation of Labor Code §§ 1194 and 1197.1 and Wage Order No. 15; (2) Defendants’
24 failure to pay overtime wages to au pairs in violation of Labor Code §§ 510, 1194, 1197 and
25 1454; (3) Defendants’ failure to provide meal periods to au pairs in violation of Labor Code §§
26 512 and 226.7; (4) Defendants’ failure to failure to timely pay wages owed in violation of Labor
27 Code §§ 204 and 210; (5) taking illegal credits against minimum wage, including for housing
28 and meals, in violation of Labor Code §§ 221, 224, 225.5, and Wage Order No. 15; (6)

Defendants’ failure to maintain records showing hours worked, breaks taken, and value of room and board provided in violation of Labor Code § 1174.5 and Wage Order No. 15; and (7) Defendants’ failure to provide accurate wage statements in violation of Labor Code §§ 226 and 226.3. *See* Compl. ¶¶ 29-76.

AuPairCare filed an answer on June 14, 2021. On September 24, 2021, the Court granted complex designation, and the initial case management conference was held on November 2, 2021. The parties engaged in substantial discovery, including meet and confer on disputed issues. Plaintiffs served discovery, to which Defendants responded. Rukin Decl. ¶ 9. Defendants produced documents, including electronically stored information (“ESI”). *Id.* Plaintiffs also took the deposition of AuPairCare’s person most knowledgeable on a variety of topics. *Id.*

On March 8, 2022, the Court granted Defendants’ motion to stay proceedings pending the United States Supreme Court’s decision in the *Viking River* case. On July 28, 2022, the parties participated in a mediation with respected employment mediator Jeffrey Krivis. Rukin Decl. ¶ 11. The parties reached a settlement in principal in August 2022, signed a memorandum of understanding in November 2022, and eventually executed the long form settlement agreement now submitted for court approval. Rukin Decl. ¶ 11.

III. SETTLEMENT TERMS

The material terms of the settlement are summarized below and set forth in the Settlement Agreement (“SA”) attached to the Declaration of Peter Rukin as Exhibit 1.

A. The Settlement Period and PAGA Settlement Members

The Aggrieved Employees covered by the SA include all persons who have been placed by Defendants with families in California any time during the period between January 22, 2020 and December 31, 2022. SA, ¶ I.2. According to data provided by Defendants, there are approximately 3,370 aggrieved au pairs in the PAGA settlement group. Rukin Decl. ¶ 12.

B. The Settlement Sum and Allocation

AuPairCare has agreed to pay the Gross Settlement Amount \$1,150,000.00. SA, ¶ II.2. The total monetary amount includes:

- 1 1. Up to \$383,333.33 (one-third of the Gross Settlement Amount) will be paid to
2 Plaintiffs' counsel for attorneys' fees. *Id.* ¶ II.3.a.
- 3 2. Up to \$20,000 will be paid to Plaintiffs' counsel for litigation expenses. *Id.*
- 4 3. Up to \$5,000 will be paid to each of the named plaintiffs as a service award in
5 recognition of their service to the aggrieved au pairs and the LWDA, and the risk incurred. *See*
6 *id.* ¶ II.3.b.
- 7 4. Up to \$50,000 of the Gross Settlement Amount will be paid to Analytics
8 Consulting LLC, which shall act as the settlement administrator and will distribute the settlement
9 payments to the aggrieved au pairs and the LWDA. *See id.* ¶ II.3.c.
- 10 5. The amount of the Gross Settlement Amount remaining after payment of
11 attorney's fees and costs, service awards, and administration costs will be termed the "Net
12 Settlement Amount" and shall be deemed to be PAGA civil penalties. *Id.* ¶ I.9. This Net
13 Settlement Amount shall be distributed as follows:
- 14 a. Seventy-Five Percent (75%) shall be paid to the LWDA. *Id.* ¶ II.4.
- 15 b. Twenty-Five Percent (25%) will be distributed to the Aggrieved Employees. Each
16 Aggrieved Employee will receive a share based on the proportionate number of
17 pay periods worked by each Aggrieved Employee during the PAGA Period, by
18 multiplying the 25% portion of the Net Settlement Amount by a fraction, the
19 numerator of which is each Aggrieved Employee's total pay periods worked
20 during the PAGA Period, and the denominator of which is the total aggregate
21 number of pay periods worked by all Aggrieved Employees during the PAGA
22 Period. SA, ¶ II.4.

23 **C. Scope of the Release**

24 The release of claims includes all claims arising on or before December 31, 2022 for civil
25 penalties pursuant to PAGA, that were pled or could have been pled based on the factual
26 allegations in the operative Complaint filed in the Action, including specifically, claims for
27 PAGA penalties arising out of or based on alleged: failure to pay minimum wages, failure to pay
28 overtime wages, failure to provide compliant meal periods, failure to provide compliant rest

1 periods, failure to provide timely wages, failure to provide timely wages upon separation, failure
2 to provide accurate itemized wage statements, failure to maintain accurate payroll records,
3 failure to maintain records of room and board provided, and alleged illegal credits against the
4 minimum wage, including for housing and meals. The release extends only to the penalties
5 available through PAGA and does not release the individual claims of the PAGA group,
6 including any individual claims for unpaid minimum, overtime, or premium wages.

7 **D. Distribution of Funds to PAGA Aggrieved Employees**

8 PAGA “Aggrieved Employees” are those current or former au pairs who worked for
9 Defendants in the State of California from January 22, 2020 to December 31, 2022 (the “PAGA
10 Period”). SA, ¶¶ I.2, and I.11. If the Court approves the proposed settlement, Defendants must
11 provide Aggrieved Employee information to the Administrator within thirty (30) calendar days
12 after the Effective Date. *Id.*, ¶ III.2. Defendants will, in good faith, compile from its records a list
13 of Aggrieved Employees that will be in a computer-readable format, such as a Microsoft Excel
14 spreadsheet, and will include each Aggrieved Employee’s full name, last known mailing address,
15 last known email address, last known telephone number, number of applicable pay periods
16 during the PAGA Period, and Social Security numbers or tax identification numbers. Because
17 Social Security or tax identification numbers are included in the list, the Settlement
18 Administrator will maintain the list securely and in confidence, and access will be limited to
19 those with a need to use the list as part of the administration of the Settlement. *Id.*

20 Within ten (10) business days of receiving the Aggrieved Employees’ information from
21 Defendants, the Settlement Administrator will circulate to counsel for both Parties an
22 anonymized spreadsheet containing the Individual Settlement Payments to each Aggrieved
23 Employee and the data used to calculate said payments. Within fourteen (14) business days of
24 receiving the anonymized spreadsheet the Parties will either approve of or explain the basis for
25 any objections to the calculations. The Settlement Administrator must have approval from all
26 counsel for the Parties before emailing the Individual Settlement Payments. *Id.*

27 Within fourteen (14) calendar days of Defendants’ deposit of the Maximum Settlement
28 Amount and after receiving approval from all counsel for the Parties, the Settlement

1 Administrator will email the explanatory letter, which has been mutually approved by the
2 Parties. The Settlement Administrator will also at the same time communicate with Aggrieved
3 Employees by email regarding the process for securing their Individual Settlement Payments via
4 PayPal, ACH, or other approved electronic funds transfer platform. The Settlement
5 Administrator shall make its best efforts to secure within 30 days confirmation from the
6 Aggrieved Employees as to their preferred method of electronic fund delivery, and shall
7 thereafter effectuate delivery of the Individual Settlement Payments according to such elections.
8 Any Aggrieved Employees who have not made an affirmative election within 30 days shall
9 receive their Individual Settlement Payments via PayPal. *Id.*, ¶ III.3.

10 **IV. THE COURT SHOULD APPROVE THE PROPOSED PAGA SETTLEMENT**

11 **A. The Proposed PAGA Settlement is Fair, Adequate, and Reasonable**

12 The PAGA was enacted because the California legislature determined that it was “in the
13 public interest to allow aggrieved employees, acting as private attorneys general, to recover civil
14 penalties for Labor Code violations,” since the state had not been able to fully or adequately
15 enforce its labor laws. *Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 980; see also *Ochoa-Hernandez*
16 *v. Cjaders Foods, Inc.* (N.D. Cal. 2010) 2010 WL 1340777, *4 (“The act’s declared purpose is to
17 supplement enforcement actions by public agencies, which lack adequate resources to bring all
18 such actions themselves. Unlike class actions, these civil penalties are not meant to compensate
19 unnamed employees because the action is fundamentally a law enforcement action.” [citations
20 omitted]).

21 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
22 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
23 PAGA claims “as the proxy or agent” of the state. *See Arias*, 46 Cal.4th at 986. Of the civil
24 penalties recovered, 75% goes to the LWDA and the remaining 25% goes to the “aggrieved
25 employees” for collecting the penalties on behalf of the State. Lab. Code § 2699(i).

26 The Labor Code states that the courts “review and approve” a settlement in a civil action
27 filed under PAGA, Lab. Code § 2699(1)(2), but it does not provide a standard of review of a
28 PAGA settlement. However, the First Appellate District recently set forth the standard for

1 approval as “whether [the PAGA settlement] is fair, reasonable, and adequate in view of
2 PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize
3 enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.*, (2021) 72 Cal. App. 5th 56, 77
4 (citing *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 546; *Arias*, 46 Cal.4th at 980). Accordingly,
5 the court evaluates whether the settlement is fair using the factors to evaluate a class settlement,
6 i.e., the strength of the plaintiff’s case, the risk, the stage of the proceeding, the complexity and
7 likely duration of further litigation, and the settlement amount, and whether it is fair in view of
8 PAGA’s purposes and policies. *Id.*

9 **1. The Settlement Reflects the Informed Views of Experienced Counsel**
10 **and is the Product of Serious, Arm’s-Length Negotiations Conducted**
11 **After Investigation and Discovery**

12 An arm’s-length negotiation conducted by competent counsel is an indicium of fairness.
13 *See Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 965 (“We put a good deal
14 of stock in the product of an arms-length, non-collusive, negotiated resolution”); Here, the
15 settlement is the result of arm’s-length negotiations between experienced attorneys who are
16 familiar with PAGA actions specifically and wage and hour litigation generally, as well as the
17 legal and factual issues of the case. *See* Rukin Decl. ¶¶2-5; Helland Dec. ¶¶ 2-5. The parties
18 conducted discovery. Plaintiffs requested and reviewed documents produced by Defendant,
19 including key policy information and custodial emails. Rukin Decl. ¶ 9. Plaintiffs took a full day
20 deposition of Sarah McNamara, Defendant’s Senior Vice President, on a number of topics. The
21 parties then participated in a full day mediation and reached a settlement in principle in August
22 2022, after the *Viking River* decision came down but before any California Court of Appeal
23 rulings issued interpreting the impact of *Viking River* on PAGA claims. Rukin Decl. ¶ 11. The
24 parties continued their settlement discussions over the following months until they arrived at a
25 long form agreement. *Id.* ¶ 11. With the benefit of years of experience combined with their
26 knowledge of the law and familiarity with the facts of this case, Plaintiffs’ counsel fully supports
27 the resulting settlement as fair and reasonable.
28

1 **2. The Settlement is Fair Given the Strength of Plaintiffs’ Case and the**
2 **Risk, Expense, and Complexity of Further Litigation**

3 Though Plaintiffs believe that they would prevail at trial, they recognize that litigation
4 entails significant risks. The law under PAGA is still developing and unsettled in important
5 respects. Issues related to the stacking of penalties and manageability of the litigation had yet to
6 be decided. *See Merante v. American Institute for Foreign Study*, 2022 WL 2918896, at *6 (N.D.
7 Cal. July 25, 2022) (Chen, J.) (preliminary approval granted on behalf of an *au pair* Rule 23 and
8 PAGA class; noting that “California Law is unsettled as to whether PAGA penalties may be
9 stacked”). It is possible that Plaintiffs would have recovered a fraction of the penalties sought, or
possibly none at all. The settlement is fair and reasonable in light of those risks.

10 **i. Plaintiffs Face Risk Related to the Supreme Court’s**
11 **Decision in *Moriana v. Viking River Cruises, Inc.***

12 In negotiating this Settlement, Plaintiffs faced a risk that the Supreme Court’s decision
13 last Spring in *Moriana v. Viking River Cruises Inc.* impaired PAGA as a vehicle for recovery of
14 civil penalties. In *Viking River*, the Supreme Court held that the Federal Arbitration Act
15 preempted the California Supreme Court’s so-called *Iskanian* “indivisible” rule precluding the
16 splitting of individual and representative PAGA claims. 142 S.Ct. at 1924. The *Viking River*
17 decision left several issues regarding PAGA unresolved, including whether PAGA plaintiffs
18 compelled to arbitrate their individual PAGA claims retain standing to litigate the representative
19 PAGA claims in court. *Id.* Here, both Plaintiffs executed arbitration agreements with Defendants.
20 Rukin Decl. ¶13.

21 When this case resolved in August 2022, no California Courts of Appeal had addressed
22 the standing issues left unresolved in *Viking River*. Rukin Decl. ¶ 14.² Given the uncertainties
23 surrounding PAGA, had this case not settled, Plaintiffs expected that Defendants would have
24 moved to compel this case to arbitration. Plaintiffs expected that Defendants would argue that

25 _____
26 ² The question is now before the California Supreme Court in *Adolph v. Uber Technologies, Inc.*,
27 *review granted* July 20, 2022, S274671, in which the Court will consider “[w]hether an
28 aggrieved employee who has been compelled to arbitrate claims under [PAGA] that are
‘premised on Labor Code violations actually sustained by’ the aggrieved employee [citations]
maintains statutory standing to pursue ‘PAGA claims arising out of events involving other
employees’ [citation] in court or in any other forum the parties agree is suitable.”

the absence of the term “PAGA” in the arbitration agreement’s class waiver clause, coupled with the broad scope of individual claims subject to arbitration, means that Plaintiffs’ individual PAGA claims were subsumed in the general scope of arbitrable claims, while the “representative” aspect of PAGA claims were subsumed in the class waiver provision.

Though Plaintiffs would have opposed any such motion on various grounds, it is possible that the result would not have been favorable for Plaintiffs. The Settlement is fair and reasonable in light of these risks. *Id.*

ii. Plaintiffs Face Risk in (a) Proving They Were Employed By Defendants and (b) Refuting Defendants’ Contention That Plaintiffs’ California Wage and Hour Claims Are Preempted by U.S. Department of State Regulations

Whether Defendants employed Plaintiffs and other aggrieved au pairs is a threshold question in this case. Plaintiffs anticipate that AuPairCare will raise several arguments against employer status. First, Defendants will argue that host families, not AuPairCare, employ the au pairs. It will likely further argue that the control it exercises over au pairs is exercised solely to comply with the U.S. Department of State regulations, and that such regulatory responsibilities cannot render it an employer. Finally, and separately, it will also contend that the federal regulations which govern the exchange visitor program—and which set a minimum weekly compensation rate for au pairs—preempt state wage and hour laws like PAGA and preclude a finding that au pairs are Defendants' employees.

Plaintiffs have arguments and evidence to counter Defendants' contentions. For example, Plaintiffs will argue that (1) there is nothing that prevents a finding that families and AuPairCare can qualify as an employer of au pairs under California law, (2) control exercised to comply with regulatory obligations still supports employer status, and (3) that even if it does not, Defendants exercised control that went beyond their regulatory responsibilities. However, Plaintiffs recognize the risk that they could lose these arguments. If Plaintiffs do not prevail on employment status, or if the court agrees with Defendants that federal Department of State regulations preempt PAGA, they cannot recover any civil penalties at all in this case.

1 **iii. AuPairCare’s Total PAGA Exposure is Uncertain and**
2 **Plaintiffs Face Risk That, Even if Successful, Any PAGA**
3 **Award Would Be Substantially Reduced**

4 In addition to the distinct possibility that Plaintiffs will not prevail on the liability issues
5 in this case, Plaintiffs face great risk and uncertainty as to the calculation and assessment of civil
6 penalties. While AuPairCare’s theoretical maximum exposure for PAGA penalties is high, its
7 ultimate exposure will depend on numerous future determinations by the Court, including
8 whether: penalties are “stacked” and assessed as to each of the alleged eight violations; the
9 violations are considered “initial” or “subsequent” violations, AuPairCare’s violations are
10 considered knowing and intentional; or the Court exercises its inherent discretion to reduce the
11 PAGA penalties.

12 As an initial matter, it is important to note that Plaintiffs are not aware of any court or
13 tribunal that has found an au pair sponsor agency like AuPairCare to be an employer of au pairs.
14 Aside from the question of liability, this fact is potentially relevant to several defenses, including
15 whether the wage statement violations were willful and intentional, whether stacking of penalties
16 is appropriate, whether the violations should be subject to the lower “initial violation”
17 calculation, and whether the assessment of maximum penalties would be unjust, arbitrary and
18 oppressive, or confiscatory. *See, e.g., Amaral v. Cintas* (2007) 163 Cal.App.4th 1157 (holding
19 “initial violation” rate is assessed per pay period and the “subsequent violation” rate cannot be
20 assessed until the defendant has been put on notice that it is violating the law); Labor Code
21 Section 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount
22 specified by this part if, based on the facts and circumstances of the particular case, to do
23 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”)
24 Here, AuPairCare is expected to argue that the absence of any caselaw or enforcement agency
25 authority finding it to be an employer of au pairs means that there was no conclusive “notice” it
26 was violating the law, and that under the circumstances the maximum penalty would be unjust,
27 arbitrary, oppressive and confiscatory.

28 AuPairCare’s total exposure could fall anywhere in a very large band between
\$6,289,450 (for one initial violation) and well over \$100,000,000 (for eight violations at a

subsequent violation rate). Rukin Decl. ¶ 17. Thus while it is theoretically possible that the maximum penalties in the case could be over \$100,000,000 were Plaintiffs to recover separate and stacked penalties at a subsequent violation rate for each of the eight violations they have asserted, Plaintiffs believe there is an infinitesimal chance of such an outcome and never calculated exposure using that assumption. *See* Rukin Decl. ¶ 17. Instead, Plaintiffs believe realistic exposure is in the neighborhood of \$6 million to \$12.5 million, which approximates the value of a single PAGA penalty for the core alleged minimum wage violation at an initial violation rate (with the lower \$6 million figure assuming a 50% reduction under Labor Code Section 2699(e)(2)) given the absence of any prior authority holding sponsor agencies to be employers of au pairs). Under the circumstances, a settlement for over \$1 Million in penalties is reasonable. *Merante*, 2022 WL 2918896, at *6 (approving PAGA allocation of \$100,000 on behalf of 1,349 California *au pairs*, which equates to between .27% and 2% of exposure); *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) F.Supp.3d 1030, 1037 (finding \$1 million PAGA allocation reasonable and noting that a “significant reduction” of PAGA penalties would be appropriate).

Indeed, courts routinely award far less than the statutory maximum, even when where an underlying violation of the Labor Code is found. In particular, some courts have refused to award multiple penalties for where the violations flow from a single predicate violation. For example, in *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, the plaintiff asked for nearly \$70 million in PAGA penalties. The Court of Appeal affirmed the trial court’s award of 0.2% of the total penalties, based on its refusal to award multiple penalties stemming from the same underlying violation and finding that the violations were “minimal.” *Id.* at 529. In *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, the court calculated the maximum civil penalties to be \$2.8 million, then reduced them to \$500,000. *Id.* at *3-4.

Here, even if Plaintiffs proved their case at trial, AuPairCare would certainly argue for a reduction in penalties, on the theory that all violations flow from a single wrong: the failure to classify au pairs as its own employees. As noted, Plaintiffs believe likely exposure is in the range of \$6 million to \$12.5 million, with a roughly \$9 million midpoint. The \$1.150 million PAGA settlement here represents approximately 10 percent of that exposure and provides for an average

per-worker gross penalty of \$50.94. This is well within the range of penalties approved in PAGA-only cases and is fair, adequate, and reasonable here given the risks that Plaintiffs could lose at trial and recover nothing.

iv. The Settlement Furthers PAGA's Purposes and Policies

Under PAGA, the penalties recovered are meant to supplement agency funding for education and enforcement purpose. *See* Lab. Code § 2699(i). Here, the settlement represents an excellent recovery for the state and the aggrieved au pairs; therefore, the settlement effectuates PAGA's purpose.

The settlement also furthers the State's public policy favoring the resolution of disputes. "California law favors the settlement of disputes as our high court clarified in *Neary*[], Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The parties are best positioned to understand their interests and resolve a dispute in a mutually beneficial manner without court intervention into the settlement." *Consumer Advocacy Group, Inc. v. Kintestsu* (2006) 141 Cal.App.4th 46, 62-63 (citing *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal.4th 273, 277-278). Finally, it accomplishes PAGA's objectives in that it puts AuPairCare and other California businesses on notice that the potential penalties for misclassifying independent contractors can be significant. *O'Connor*, 201 F.Supp.3d at 1134 (noting that deterring noncompliance with the Labor Code is one of PAGA's objectives).

B. Plaintiffs' Counsel's Request for Fees and Costs is Reasonable

Lab. Code § 2699(g)(1) provides for the recovery of attorneys' fees and costs in any successful action brought under PAGA. For their efforts and the risks they undertook in obtaining a common fund settlement that benefits the LWDA and the aggrieved au pairs, the Settlement allocates one-third of the total settlement fund (\$383,333.33) to Plaintiffs' counsel for reasonable attorneys' fees and litigation costs. SA ¶ II.3.a.

This common fund fee request of \$383,333.33 is warranted and reasonable because Plaintiffs' counsel, working on a contingency basis, have secured resolution of these PAGA claims in a manner that confers a significant benefit on the State of California, the Plaintiffs, and the other aggrieved au pairs. In *Lafitte v. Robert-Half* (2016) 1 Cal.5th 480, the California

1 Supreme Court endorsed the practice of assessing the “the amount of a reasonable fee by
2 choosing an appropriate percentage of the fund created.” *Id.* at 503. As *Lafitte* recognized, “most
3 courts and commentators now believe that the percentage method is superior.” *Id.* at 493-94.
4 Courts favor the percentage-of-the-fund method in common fund cases “because it allows courts
5 to award fees from the fund in a manner that rewards counsel for success and penalizes it for
6 failure.” *In re Rite Aid Corp. Sec. Litig.* (3d Cir. 2005) 396 F.3d 294, 300; *Lafitte*, 1 Cal.5th at
7 503 (it has a tendency to better “align[] incentives between counsel and the class” and provides a
8 “better approximation of market conditions in a contingency case”). When California courts use
9 the percentage method, they “routinely award attorneys’ fees of one-third of the common fund.”
10 *Beaver v. Tarsadia Hotels* (S.D. Cal. Sept. 28, 2017) 2017 WL 4310707, at *9 (surveying
11 California state cases); *Chavez v. Netflix*, 162 Cal.App.4th 43, n. 11 (2008) (“Empirical studies
12 show that, regardless whether the percentage method or the lodestar method is used, fee awards
13 in class actions average around one-third of the recovery”); *Cicero v. DirecTV, Inc.* (C.D. Cal.
14 July 27, 2010) 2010 WL 2991486, at *6 (“a review of California cases in other districts reveals
15 that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that
16 result in recovery of a common fund under \$10 million); *see also Lafitte*, 1 Cal.5th at 506
17 (affirming a percentage-based fee award equal to one-third of a \$19 million wage and hour class
18 settlement amount).

19 Plaintiffs’ fee request is also supported by a lodestar crosscheck. Although not required in
20 evaluating attorneys’ fee requests, trial courts “have discretion” to conduct a lodestar cross-check
21 on a percentage fee. *Lafitte*, 1 Cal.5th at 506. A lodestar calculation is based on “the reasonable
22 hours spent multiplied by the hourly prevailing rate for private attorneys’ in the community
23 conducting *noncontingent* litigation of the same time.” *Ketchum v. Moses* (2001) 24 Cal.4th
24 1122, 1133 (emphasis in original). Among the factors considered in determining whether the
25 requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further
26 litigation; (3) the risk required of plaintiffs’ counsel and the quality of work performed by
27 plaintiff’s counsel; (4) the contingent nature of the fee and financial burden carried by the
28 plaintiff; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290

1 F.3d 1043, 1048-50.

2 Here, all of these factors support and award of one-third of the common fund here. First,
3 the efforts of Plaintiffs' counsel resulted in a PAGA settlement of \$1,150,000, which is an
4 outstanding result considering the contested issues and AuPairCare's potential total exposure.

5 Second, Plaintiffs faced significant risks going forward with the litigation. As discussed
6 *supra*, the potential for this case to be compelled to individualized arbitration, along with the
7 various defenses raised by AuPairCare, make Plaintiffs' potential for recovery unsure. Moreover,
8 in the absence of settlement, it would have taken significant time to realize any recovery.

9 Third, Plaintiffs' counsel are experienced litigators and employment lawyers who have
10 previously obtained significant results in PAGA and class action employment cases. This
11 expertise, combined with the high quality of work performed in this case by Plaintiffs' counsel,
12 resulted in the Settlement achieved. Rukin Decl., ¶¶ 2-5; Helland Decl., ¶¶ 2-5.

13 Fourth, Plaintiffs' counsel represented Plaintiffs and the State of California in this matter
14 on a contingency fee basis and as such have incurred the risk of non-recovery despite significant
15 investment of time and money. Plaintiffs' counsel's commitment to this litigation has also forced
16 them to forego other legal engagements, including hourly work. Rukin Decl., ¶¶ 33, 34; Helland
17 Decl., Decl., ¶ 15.

18 Fifth, the request of one third of the common fund for both attorney's fees and litigation
19 costs falls well within the norms accepted by the state and federal courts in comparable
20 representative actions. *See, e.g., Lafitte*, 1 Cal.5th 480 (affirming one third fee request); *Chavez*,
21 162 Cal.App.4th 43, n. 11 (noting that "fee awards in class actions average around one-third of
22 the recovery"); *Martinez v. JLS Transport, L.L.C.*, Alameda County Superior Court, No.
23 RG20050358 (33.33% of \$185,000 settlement of PAGA-only case); *Padilla v. Staffmark*
24 *Investment, Inc.*, San Bernadino County Superior Court Case No. CIVDS1408641 (33.33% fee
25 awarded on \$2,000,000 settlement of PAGA-only case); *Brewer v. Connell Chevrolet*, Orange
26 County Superior Court Case No. 30-2016-00852123-CU-OC-CXC (33.33% fee awarded on a
27 PAGA-only case).
28

1 Finally, Plaintiffs’ counsel’s hours and rates are reasonable, as set forth in their
2 concurrently filed declarations. Rukin Decl., ¶¶ 25-29; Helland Decl., ¶¶ 4-6. In total, Plaintiffs’
3 counsel have spent approximately 310 hours investigating, preparing, briefing, and resolving this
4 action to date. Rukin Decl., ¶ 20; Helland Decl., ¶¶ 7-10. The resulting lodestar is approximately
5 \$175,000. Rukin Decl., ¶ 20; Helland Decl., ¶ 10.

6 The percentage of the fund fee request sought by counsel results in a modest fee
7 enhancement (a roughly 2.2 multiplier). Prevailing law supports a fee enhancement in light of the
8 contingent risk in this case and the excellence of the results. *See Ketchum v. Moses* (2001) 24
9 Cal.4th 1122, 1136-40; *accord Chaudry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096,
10 1112 (California law permits multiplier for contingent risk); *see also In re Bluetooth Headset*
11 *Products Liability Litig.* (9th Cir. 2011) 654 F.3d 935, 942 (court may adjust the lodestar figure
12 to reflect a host of “reasonableness” factors, “including the quality of representation, the benefit
13 obtained for the class, the complexity and novelty of the issues presented, and the risk of
14 nonpayment”). The 2.2 multiplier on counsel’s lodestar and expenses is well within the range of
15 multipliers awarded by California and federal courts and appropriate given the outstanding result
16 obtained in this case. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 225
17 (multipliers can range from 2 to 4, or even higher); *Vizcaino*, 290 F.3d at 1052, n. 6 (collecting
18 cases and finding that risk multiplier fell between 1.0 and 4.0 in 83% of cases); *see also id.* at
19 1051 (approving fee award where lodestar cross-check resulted in 3.65 multiplier).

20 **C. The Requested Cost Award Is Reasonable**

21 Plaintiffs’ counsel has incurred \$15,184.09 in out of pocket costs, including filing fees,
22 deposition costs, mediation fees, e-discovery hosting charges, and legal research/copying
23 charges. Rukin Decl., ¶ 31; Helland Decl., ¶ 14. These expenses were reasonable and necessary
24 for the prosecution of the case and should be awarded.

25 **D. The Requested Service Awards Are Reasonable**

26 Service awards are common in class and representative actions and “are intended to
27 compensate class representatives for work done on behalf of the class, to make up for financial
28 or reputational risk undertaken in bringing the action, and sometimes, to recognize their

1 willingness to act as a private attorney general.” *In re Cellphone Termination Fee Cases* (2010)
2 186 Cal.App.4th 1380, 1393-94 (internal citations omitted). Criteria which warrant an
3 appropriate service award include: “(1) risk to the class representative in commencing suit, both
4 financial and otherwise; (2) the notoriety and personal difficulties encountered by the class
5 representative; (3) the amount of time and effort spent by the class representative; (4) the
6 duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class
7 representative as a result of the litigation.” *Id.*

8 Here, relevant factors support a service award in the amount of \$5,000 to each named
9 Plaintiff. By serving as Plaintiffs in a lawsuit against their employer, Plaintiffs incurred the risk
10 of paying costs if AuPairCare prevailed. Plaintiffs also exposed themselves to the risk of
11 retaliation. *See Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 2013 WL 163293, at
12 *6 (approving \$15,000 service award). Furthermore, Plaintiffs assisted counsel in their
13 investigation of the claims. They met with counsel in connection with the preparation and filing
14 of the case, prepared for and participated in the mediation, and conferred with counsel regarding
15 the settlement. Helland Decl., ¶ 13. The modest service award requested is reasonable and
16 appropriate.

17 **E. The Settlement Administrator**

18 The Parties have agreed to use Analytics Consulting LLC as the Settlement
19 Administrator. The Settlement Administrator will be responsible for processing the individual
20 payments and any related tax documents. *Id.* Analytics Consulting LLC has agreed to administer
21 this settlement for a maximum not to exceed fee of \$50,000. Rukin Decl. ¶ 30. Plaintiffs’ counsel
22 has used Analytics Consulting LLC in the past and has found them to be professional,
23 competent, and reasonably priced, particularly in cases involving transient and/or internationally-
24 located aggrieved employees. *Id.*

25 **F. Submission to the LWDA**

26 As set forth in the Rukin Declaration at ¶ 35, the Settlement is concurrently being
27 submitted to the LWDA in accordance with Lab. Code § 2699(1)(2). The proof of electronic
28 submission is attached as Exhibit 2 to the Rukin Declaration.

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiffs request that the Court: (1) approve the proposed
3 Settlement; (2) appoint Analytics Consulting LLC as the Settlement Administrator; (3) award
4 Plaintiffs' counsel \$383,333.33 in attorneys' fees and \$15,184.09 in litigation costs; and (4)
5 award Plaintiffs \$5,000 each as service awards (\$10,000 total).

6
7 DATED: May 10, 2023

RUKIN HYLAND & RIGGIN LLP

8
9 BY: /s/Peter Rukin

Peter Rukin

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PROOF OF SERVICE
STATE OF CALIFORNIA

I am employed in the County of Alameda, State of California; I am over the age of 18 years and not a party to the within entitled action; my business address is 1939 Harrison Street, Suite 925, Oakland, California 94612.

On May 10, 2023, I served the foregoing documents, described as:

- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF PRIVATE ATTORNEY GENERAL ACT SETTLEMENT**

on the interested parties to said action by the following means:

☐	(By Mail) By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California addressed as set forth below.
☐	(By Hand Delivery) By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the addresses shown below.
☐	(By Overnight Delivery) By placing a true copy thereof, enclosed in a sealed envelope, with delivery charges prepaid, to be sent by Federal Express, addressed as shown below.
☐	(By E-Mail) By electronically transmitting the document(s) listed above addressed as set forth below.
☒	(By E-Service) By electronically transmitting the document(s) listed above, by File & ServeXpress to service parties listed.

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- ☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 10, 2023, at Corona del Mar, California.

Brigitte A. Butler