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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BERNIE GERMANI, as an aggrieved employee
pursuant to the Private Attorneys General Act
("PAGA"),

PLAINTIFF,

vs.

HORIZON AIR INDUSTRIES, INC., a
Washington Corporation; Alaska Airlines, Inc., an
Alaska Corporation; and DOES 1 through 20,

DEFENDANTS.

Case No.: 21STCV11163

PAGA ENFORCEMENT ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF PAGA SETTLEMENT**

Date: April 26, 2022

Time: 8:30 a.m.

Dept: 78

[Reservation No. 966662442038]

*[Filed concurrently with Notice of Motion and
Motion; Declaration of Matthew S. D'Abusco;
Declaration of Cynthia S. Sandoval; Declaration
of Bernie Germani; Declaration of Carlos
Canizales; and [Proposed] Judgment]*

Complaint Filed: March 23, 2021

Trial Date: None

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Following the exchange and analysis of extensive information and detailed and thorough
4 discussions between counsel, Plaintiffs Bernie Germani and Carlos Canizales (“Plaintiffs”), as aggrieved
5 employees under the California Private Attorneys’ General Act (“PAGA”), and Defendant Horizon Air
6 Industries, Inc. (“Defendant”) agreed to resolve this case—which has just a singular cause of action for
7 PAGA civil penalties—for the total sum of \$227,125.00. This settlement was negotiated by the parties
8 at arms’ length. The civil penalties secured by the settlement represent a fair compromise of Plaintiffs’
9 PAGA claim in view of the limited timeframe of applicable PAGA penalties, the risks of continued
10 litigation, and the hotly contested issues of law and fact relating to Plaintiffs’ claim under the PAGA.
11 The settlement accomplishes PAGA’s objectives by imposing sufficient civil penalties “to punish and
12 deter” Defendant from future alleged Labor Code violations, while also ensuring that the penalties are
13 not “unjust, arbitrary and oppressive, or confiscatory.” *See* Labor Code §2699(e)(2); *Iskanian v. CLS*
14 *Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 384. For this, as well as the reasons set forth below,
15 Plaintiffs respectfully request the Court approve this settlement and enter judgment accordingly.¹

16 **II. SUMMARY OF FACTS AND PROCEDURAL POSTURE.**

17 **A. Overview of Plaintiffs’ Complaint and Claims.**

18 Before ceasing operations on October 18, 2020, Defendant provided aviation ground services at
19 Los Angeles International Airport. Plaintiffs both worked for Defendant as hourly Ground Service
20 Agents at Los Angeles International Airport until Defendant’s cessation of operations, at which point
21 their employment was terminated. Plaintiffs contend that, during the course of their employment,
22 Defendants failed to pay them for all hours worked because they were required to park at distant
23 locations and take a shuttle to the worksite without compensation. Plaintiffs also contend Defendant
24 failed to provide them meal periods, rest periods, and itemized wage statements in compliance with
25 California law. Throughout this litigation, Defendant has, and continues to, deny it engaged in any
26 improper wage and hour practices and contends its employees were properly paid for all hours worked.

27
28 ¹ All of the documentation related to settlement, including copies of this Motion and its accompanying documents have been submitted to the LWDA pursuant to its requirements to that effect. See the Declaration of Matthew S. D’Abusco (“D’Abusco Decl.”) at ¶23.

1 On January 12, 2021, Plaintiff Germani submitted a PAGA letter to the California Labor and
2 Workforce Development Agency (“LWDA”). See the Declaration of Matthew S. D’Abusco
3 (“D’Abusco Decl.”) at ¶13. On March 9, 2021, Plaintiff Canizales submitted a separate PAGA letter to
4 the LWDA. *Id.* The LWDA did not initiate an investigation into either letter. *Id.* Having thus
5 exhausted their respective administrative remedy requirements, Plaintiff Germani filed an initial
6 Complaint in this Court on March 23, 2021 alleging a single cause of action for civil penalties under
7 PAGA. *Id.* On May 17, 2021, Plaintiffs filed a First Amended Complaint for the sole purpose of adding
8 Plaintiff Canizales. *Id.*

9 **B. Plaintiffs’ Counsel Thoroughly Investigated The Factual And Legal Issues.**

10 Since the inception of this case, counsel for Plaintiffs commenced and continued to advance an
11 extensive and comprehensive investigation into the merits of the case. See D’Abusco Decl., at ¶14.
12 After its initial investigation into the merits of Plaintiffs’ individual claims, counsel for Plaintiffs
13 sought additional records from Defendant and sent a PAGA letter to the LWDA. *Id.* Since contact
14 with Defendant was formally established, the parties have engaged in consistent, detailed, and
15 thorough discussions and evidentiary exchanges about the merits of this case. *Id.* This included,
16 among other things, detailed communications about the merits of the case, the scope of claims and
17 aggrieved employees, as well as informal exchanges of information and documentation for purposes
18 of considering potential resolution. *Id.* Considering Defendant ceased operations in October 2020
19 and the available statutory period for the imposition of PAGA penalties was only seven (7) months, as
20 well as the fact the total number of aggrieved employees was just 395, the opportunity to explore
21 potential early resolution of this matter became of greater relevance and importance.

22 Overall, Plaintiffs’ Counsel performed an extensive investigation into the claims at issue,
23 which included: (1) determining Plaintiffs’ suitability as a private attorney general through legal
24 research, interviews, and analyses of their employment files and related records; (2) evaluating all of
25 Plaintiffs’ potential predicate claims for PAGA civil penalties; (3) researching similar wage and hour
26 actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing
27 each of the Defendant’s employment policies and practices; (5) researching settlements in similar
28 cases as well as outstanding issues which could affect settlement approval; (6) analyzing Defendant’s

time and payroll records to determine Defendant's potential liability for each claim for purposes of settlement; (7) engaging in extensive settlement discussions necessary to resolve the case. See D'Abusco Decl., at ¶15. The discussions, document and data exchanges have allowed Plaintiffs' Counsel to fully assess the nature and magnitude of the PAGA claims being settled, as well as the impediments to recovery, to allow for an independent assessment of the reasonableness of the terms to which the Parties have agreed. *Id.*

C. The Parties Agreed to Resolve This Matter.

Following months of discussions and evidentiary disclosures, the Parties agreed to the principal terms of a settlement of PAGA civil penalties. See D'Abusco Decl., at ¶16. The complete and final terms of the Parties' settlement are now set forth in the PAGA Settlement Agreement. See D'Abusco Decl., at ¶16, Exhibit "2." At all times, the Parties' negotiations were adversarial and non-collusive, and the settlement thus constitutes a fair, adequate, and reasonable compromise of the claims at issue. *Id.*

III. ARGUMENT.

A. The PAGA Penalties Secured By The Settlement Are Genuine, Meaningful, And Fulfill PAGA's Underlying Purpose To Benefit The Public.

The PAGA statute specifically provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part." See Labor Code §2699(l)(2). The statute, however, does not require a two-step process or otherwise mimic the class action approval requirements when the parties reach a settlement only as to PAGA civil penalties. See *Salazar v. Sysco Central Cal* (E.D. Cal. Feb. 2, 2017) 2017 WL 1135801 at *2 (rejecting the application of class action settlement rules and procedures for PAGA settlement approval). In the absence of an explicit statutory requirement, the LWDA has provided guidance, explaining that courts should evaluate settlements of PAGA claims based on whether "the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public." See *O'Connor v. Uber Techs., Inc.* (N.D. Cal. Jul. 29, 2016) No. 13-03826-EMC, ECF No. 736 at 2-3; *see also, Salazar*, 2017 WL1135801 at *2 (quoting the above passage). Courts defer to the agency's interpretation of a statute where authority has been delegated to that agency. See *New Cingular Wireless PCS, LLC v. Pub. Utilities Comm'n* (2016) 246 Cal.App.4th 784, 807. Thus, in evaluating a stand-alone PAGA

1 settlement, the Court should evaluate whether the amount of civil penalties obtained is “genuine and
2 meaningful” in light of PAGA’s statutory purpose.

3 The California legislature enacted PAGA to “augment the limited enforcement capability of the
4 [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency.” See
5 *Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal.4th 348, 383. This statute authorizes an employee
6 to bring an action for “civil penalties on behalf of the state against his or her employer for Labor Code
7 violations committed against the employee and fellow employees. . .” *Id.* at 360. “As the state’s
8 proxy, an employee-plaintiff may obtain civil penalties for violations committed against absent
9 employees [citation], just as the state could if it brought an enforcement action directly.” *Id.* Under the
10 PAGA penalties scheme, 75% of the civil penalties recovered goes to the State while the remaining
11 amount is given to the aggrieved employees. See Labor Code §2699(i).

12 The PAGA action is one of the “primary mechanisms for enforcing the Labor Code.” See
13 *Iskanian*, 59 Cal.4th at 383. PAGA’s purpose is not to recover damages or restitution, but to supplement
14 state law enforcement efforts by having private attorneys general enforce the Labor Code when the
15 LWDA does not. See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986. As the state’s proxy or
16 agent, “the employee plaintiff represents the same legal right and interest as state labor law enforcement
17 agencies— namely, recovery of civil penalties that otherwise would have been assessed by and collected
18 by the [LWDA].” *Id.* “[A]n aggrieved employee’s action under [PAGA] functions as a substitute for an
19 action brought by the government itself.” *Id.* The goal of PAGA is to impose civil penalties for Labor
20 Code violations “significant enough to deter violations.” See *Iskanian*, 59 Cal.4th at 379.

21 Thus, the PAGA action is “fundamentally different from a class action.” See *Baumann v. Chase*
22 *Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123 (“These differences stem from the central nature
23 of PAGA. PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA,
24 bring claims on behalf of the state agency.”). The PAGA statute expressly distinguishes and preserves
25 the right of employees to separately (or concurrently) pursue their own causes of action against their
26 employers and to recover other available federal and state remedies. See Labor Code §2699(g)(1); see
27 *Baumann*, 747 F.3d at 1123 (explaining the differences between the finality in class action judgments
28 and the limited res judicata effect of PAGA judgments). “Unlike a class action seeking damages or

injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.” See *McKenzie v. Federal Express Corp.* (C.D. Cal. 2011) 765 F. Supp.2d 1222, 1233.

For Labor Code violations for which no penalty is provided, PAGA provides that the penalties are generally \$100.00 for each aggrieved employee per pay period for the initial violation and \$200.00 per pay period for each subsequent violation. See Labor Code §2699(f)(2). The Court’s evaluation of the settlement should therefore take into account PAGA’s statutory purpose in deterring Labor Code violations through the imposition of civil penalties, with special attention on whether the relief is “genuine and meaningful.”

B. The Amount of Civil Penalties Secured By The Settlement Is Reasonable Given The Limited Statutory Period and Risks of Further Litigation.

1. The Parties’ Respective Positions Regarding Plaintiffs’ Claims.

Plaintiffs’ PAGA claim is based upon their contentions that they were not paid for all hours worked because Defendant allegedly required them to park at a distant location and shuttle to work, that Defendant did not provide them with meal and rest periods in compliance with California law and, as a consequence of those actions, Defendant failed to provide Plaintiffs with accurate itemized wage statements. In assessing whether the amount of civil penalties are genuine and meaningful with respect to those allegations, the Court may balance the amount in penalties with the risks of further litigation. Defendant not only denied these practices, denied any consistency of potential violations leading to representative liability, and further claimed that, even if Plaintiffs could prove representative liability, Defendant’s cessation of operations would not allow for the recovery of significant PAGA penalties. Therefore, considering the significance of those factors, Plaintiffs obtained a meaningful amount in civil penalties despite facing what appeared to be significant obstacles had the litigation continued.

2. Plaintiffs’ assessment of Defendant’s potential exposure.

Analyzing the sampling data provided by Defendant, Plaintiffs calculated Defendant’s potential exposure for PAGA penalties according to the formula provided by Labor Code section 2699(f)(2). It should be noted that courts have interpreted Labor Code §2699(f)(2) to impose the enhanced

1 “subsequent violation penalty” or “heightened penalty” only after an employer has been notified that its
2 conduct violates the Labor Code. See *Trang v. Turbine Engine Components Technologies Corp.* (C.D.
3 Cal. Dec. 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (“courts have held that
4 employers are not subject to heightened penalties for subsequent violations unless and until a court or
5 commissioner notifies the employer that it is in violation of the Labor Code”); *Amalgamated Transit*
6 *Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.* (S.D. Cal. 2009) No. 05cv1199– IEG–
7 CAB, 2009 WL 2448430 (finding that California law imposes the “subsequent violation penalty” only
8 after an employer has been notified its conduct violates the Labor Code). While Plaintiffs do not believe
9 this determination is necessarily determinative, they nonetheless recognize that this interpretation has
10 gained traction with courts and elected therefore to conservatively estimate Defendant’s potential
11 exposure for PAGA penalties by assessing a \$100.00 penalty for the pay periods during the statute of
12 limitation period in which there was a violation. Incorporating the \$100.00 penalty, Plaintiffs then
13 estimated the approximate number of pay periods in which aggrieved employees suffered violations
14 based on a review of the facts ascertained through Plaintiffs’ Counsel’s investigation and review of
15 relevant documents and records. Applying that information to create a fair and reasonable estimate of
16 penalties, Plaintiffs concluded eight (8) pay period violations—just over 1/2 of the total pay periods
17 worked by aggrieved employees—represented a conservative, but reasonable damages assessment per
18 aggrieved employee. Accordingly, under this liability framework, Plaintiffs calculated Defendant’s
19 potential PAGA exposure at approximately \$316,000.00 for the relevant claims. See D’Abusco Decl., at
20 ¶17.

21 After calculating Defendants’ exposure under PAGA, Plaintiffs then discounted that exposure for
22 settlement purposes to account for the risks of continued litigation, including: (i) the strength of
23 Defendant’s defenses on the merits; (ii) the risk of losing on any of a number of dispositive motions that
24 could have been brought between now and trial which may have eliminated all or some of the covered
25 claims, or barred evidence necessary to prove such claims; (iii) the risk of the Court not allowing this
26 action to proceed on a representative basis because of purported “manageability” concerns; (iv) the risk
27 of losing at trial or prevailing only on some of the claims; (v) the risk that the Court would exercise its
28 discretion under PAGA to significantly reduce the maximum civil penalties available by statute; and (vi)

1 the chances of a favorable verdict being reversed on appeal. Taking into account the above
2 contingencies, Plaintiffs determined that a settlement in the range of 65% of Defendant's potential
3 exposure was warranted by the circumstances of the case. Ultimately, the case settled at just over that
4 amount, at 71.9% of Defendant's potential exposure—a settlement equal to an all-in penalty assessment
5 of approximately \$575.00 per aggrieved employee (before costs and fees). See D'Abusco Decl., at ¶18.

6 Based on this valuation, Plaintiffs and Plaintiffs' Counsel believe that the Settlement
7 accomplishes PAGA's objectives by imposing sufficient civil penalties "to punish and deter" Defendant
8 from future alleged Labor Code violations, while also ensuring that the penalties are not "unjust,
9 arbitrary and oppressive, or confiscatory." The amount in PAGA civil penalties obtained here is
10 "genuine and meaningful," achieves PAGA's statutory purposes, and seriously penalizes an offending
11 business while continuing to allow it to operate rather than shut down. Therefore, as the settlement
12 strongly achieves the purpose and intention of PAGA, it should be approved.

13 **C. The Proposed Service Award Is Fair and Reasonable.**

14 Both the State of California and all 395 Aggrieved Employees are beneficiaries of a settlement
15 that would not have been made possible but for the effort and commitment of Plaintiffs. The Settlement
16 therefore provides for a \$5,000.00 service award for each Plaintiffs effort in bringing the Action, serving
17 as private attorney general under PAGA, assisting counsel with the investigation, litigation and
18 settlement, regularly conferring with counsel on the status of the case and the strategies for prosecuting
19 the claims, continuing to work through the settlement negotiation process, and reviewing the proposed
20 settlement to ensure that its terms are fair and achieve PAGA's objectives. The amount of the requested
21 service award is reasonable by reference to, and was negotiated in view of, amounts the California
22 Superior Court has repeatedly approved for PAGA settlements. See *Blanchard v. BJ's Restaurants, Inc.*
23 (Orange County Superior Court, Sept. 26, 2016) No. 30-2014-00761961-CU-OE-CXC (approving
24 \$10,000 service award); *Bui v. Vitamin Shoppe Industries Inc.*, No. BC518486 (Los Angeles County
25 Superior Court, Aug. 31, 2016) (approving \$10,000 service award); *Jesus Miranda v.*
26 *HomeDeliveryLink, Inc.* (San Bernardino County Superior Court, Aug. 9, 2016) No. CIV DS1505393
27 (approving \$10,000 service award); *Mohamad Najjar v. Calop Business Systems, Inc. d/b/a Calop*
28 *Aeroground Service* (Los Angeles County Superior Court, April 5, 2016) No. BC582290 (approving

1 \$10,000 service award).

2 Other considerations also support the service award. First, the service award is justified in light
3 of the reputational risk that Plaintiffs have assumed by litigating claims against a former employer. See
4 *Bellinghausen v. Tractor Supply Co.*, (N.D. Cal. 2015) 306 F.R.D. 245, 267-68 (finding “personal
5 detriment” upon testimony that future employers can easily learn that a prospective employee served as
6 a plaintiff through the internet); *see also Guippone v. BH S&B Holdings LLC* (S.D.N.Y. Oct. 28, 2011)
7 No. 09 Civ. 1029, 2011 U.S. Dist. LEXIS 126026, at *4, 20 (“[T]he fact that a plaintiff has filed a
8 federal lawsuit is searchable on the internet and may become known to prospective employers when
9 evaluating the person . . . Even where there is not a record of actual retaliation, notoriety, or personal
10 difficulties, [representative Plaintiffs] merit recognition for assuming the risk of such for the sake of
11 absent [parties].”). Employers commonly screen employee candidates to determine whether they have
12 ever filed suit, and employee candidates who might be branded “litigious” are likely to be screened out
13 of the process. In fact, an entire industry has developed for providing employers with background
14 information on employee candidates. This included websites that specifically name plaintiffs who have
15 brought PAGA claims. By bringing this action against an employer, Plaintiffs have assumed
16 considerable reputational risk that may impact their ability to find employment in the future. See *La*
17 *Fleur v. Medical Management Intern, Inc.* (C.D. Cal. June 25, 2014) No. 13-00398-VAP, 2014 WL
18 2967475, *8 (awarding \$15,000 to each named plaintiff in part for attesting to their fear that the lawsuit
19 will harm their future job prospects in the industry).

20 Second, the service award is reasonable because Plaintiffs “remained fully involved and
21 expended considerable time and energy during the course of the litigation.” *See In re Toys ‘R’ Us-Del*
22 *FACTA Litig.* 295 F.R.D. at 471 (citation omitted). Plaintiffs expended considerable time and effort
23 assisting their attorneys with the prosecution of the claims and negotiating this settling, and their unique
24 contributions to the litigation should be rewarded. The service award is appropriate because Plaintiffs
25 otherwise “will not gain any benefit beyond that he [or she] would receive as an ordinary [Aggrieved
26 Employee].” *See In re Toys “R” Us FACTA Litig.* 295 F.R.D. at 472; *Van Vranken v. Atlantic Richfield*
27 *Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299 (holding that a substantial award is appropriate where a
28 [representative’s] claim made up “only a fraction of the common fund.”). Here, absent the service

award, Plaintiffs will recover no more than other Aggrieved Employees in the PAGA settlement, despite undergoing personal sacrifice in bringing this suit on behalf of the State of California and Aggrieved Employees. Thus, the proposed service awards are reasonable and justified.

D. The Parties' Settlement of Attorneys' Fees Is Reasonable In Light of Plaintiffs' Counsel's Lodestar and the Litigation.

1. Attorneys' Fees May Properly Be Awarded From A Common Fund.

The Settlement Agreement specifically provides that Defendant shall not object to or oppose an award of attorneys' fees in the amount of 33.33% of the settlement and actual costs incurred, which is the amount sought by Plaintiff's Counsel, or \$75,700.76. Plaintiffs also seek \$1,988.99 in costs.

Under California law, "when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." See *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ("*Serrano III*"). A common fund results when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money-out of which sum or 'fund' the fees are to be paid." *Id.* at 35. Here, the structure of the parties' Settlement Agreement creates a Maximum Settlement Amount that constitutes a common fund (of \$475,000.00) out of which reasonable attorneys' fees will be paid.

California courts may employ the percentage-of-the-benefit method when calculating a reasonable award of attorneys' fees in common fund actions. See *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 26. The percentage-of-the-benefit method calculates attorneys' fees based on a percentage of the benefit bestowed upon the class. *Id.* The percentage-of-the-benefit method is generally preferred in common fund cases: "[B]ecause the percentage-of-the-benefit approach is result-oriented rather than process-oriented, it better approximates the workings of the marketplace than the lodestar approach." *Id.* at 48 (internal citations omitted).

Indeed, according to the Ninth Circuit "the primary basis of the fee award remains the percentage method." See *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050; Silber and Goodrich, *Common Funds and Common Problems. Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 534 (1998) (the percentage of the fund approach avoids numerous drawbacks of the lodestar

approach and is preferable because “the attorneys will receive the best fee when the attorneys obtain the best recovery for the class. Hence, under the percentage approach, the class members and the class counsel have the same interest - maximizing the recovery of the class.”). It is thus well-established law that counsel are entitled to a fee award based on a percentage of the total benefit conferred on classes.

2. Plaintiffs’ Counsel’s Request For Attorneys’ Fees And Costs From The Settlement Amount Is Equitable And Fair.

The Settlement provides attorneys’ fees in the amount of \$75,700.76 to Plaintiffs’ Counsel. This amount is fair and reasonable. Plaintiffs are entitled to attorneys’ fees as a matter of right under California Labor Code §2699(g)(1), which provides that “[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorneys’ fees and costs.” See *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 765 (holding that attorneys’ fees to prevailing party are mandatory when the statute uses the word “shall”). It is undisputed that Plaintiffs are the prevailing party. See *Graciano v. Robinson Ford Sales* (2006) 144 Cal.App.4th 140, 153 (“[P]laintiffs may be considered ‘prevailing parties’ for attorney’s fee purposes if they succeed on any significant issue in the litigation that achieves some of the benefit the parties sought in bringing suit.” (internal citation omitted)).

In wage and hour class-action matters, as well as representative actions under the PAGA, the calculation and award of attorneys’ fees and costs from a common fund rests on equitable considerations that assure fairness to the successful litigants and their counsel. See *Apple Computer Inc. v. Sup. Ct.* (2005) 126 Cal.App.4th 1253, 126-1278. As stated in *In re Estate of Stauffer* (1959) 53 Cal.2d 124:

The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful. *In re Estate of Stauffer*, 53 Cal. 2d at 132; See also *Serrano III*, 20 Cal. 3d at 35; *Melendres v. City of Los Angeles* (1975) 45 Cal. App. 3d 267, 272-273.

The percentage of the fund approach heeds the Supreme Court’s admonition that “[a] request for

attorneys' fees should not result in a second major litigation." See *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437. No one set of factors has been prescribed by the California courts to evaluate the reasonableness of the percentage-of-the-benefit requested in common fund settlements; instead, the goal is to assess the reasonableness of the requested fee. See *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557. The lodestar approach may (but need not always) be used to assess reasonableness. *Id.* To award attorneys' fees to Plaintiffs' Counsel as a percentage of a common fund, the Court must be able to: (1) sufficiently identify the class of beneficiaries under the settlement; (2) accurately trace the benefits to be paid; and (3) shift the fee to those benefitting with some exactitude. *Staton v. Boeing Co.*, 327 F.3d 938, 972; *see also Dunk*, 48 Cal.App.4th at 1809 (award of attorneys' fees based on a percentage of a common fund may be used where the amount was a "certain or easily calculable sum of money"). All three prerequisites for awarding attorneys' fees as a percentage of the common fund are present in this case. First, the identities of the Aggrieved Employees and the LWDA who will benefit from the judgment are known from the Aggrieved Employees list that was generated by Defendant. Second, the benefits to be paid to each Aggrieved Employee can be traced from each Aggrieved Employee's employment with Defendant, and the resulting alleged harm therefrom. There is a record of all Aggrieved Employees to whom checks will be issued under the Settlement and the amounts thereof. Third, because both the Aggrieved Employees and the LWDA are benefitting under the Settlement and the benefits received by them are fully identifiable, the attorneys' fees will be shifted to those benefitting under the Settlement with complete exactitude.

3. Plaintiffs' Counsel's Request For Attorneys' Fees Equal To 33.33% Of The Settlement Fund Is Justified By The Circumstances Of The Litigation.

The relevant factors considered in determining whether a request for attorneys' fees and costs is justified include: (1) the time and labor required of the attorneys; (2) the contingent nature of the fee agreement, both from the point of view of eventual success on the merits and from the point of view of securing an award; (3) the extent to which the nature of the litigation precluded other employment by the attorneys; (4) the experience, reputation, and ability of the attorneys who performed the services, and the skill they displayed in litigation; (5) the amount involved and the results obtained; and (6) the informed consent of the client to the fee agreement. See *Serrano III*, 20

Cal. 3d at 49; *Dunk*, 48 Cal.App.4th at 1810 n.21; *Glendora Commonwealth. Redev. Agency v. Demeter* (1984) 155 Cal.App.3d 465, 474. Consideration of each of these factors strongly favors granting the attorneys' fees and costs award requested by Plaintiffs' Counsel in this case.

a. Time And Labor Required.

The first consideration in awarding attorneys' fees is the time and labor Plaintiffs' Counsel has invested in the litigation. Plaintiffs' wage and hour PAGA claim required development of extensive factual evidence through, among other things, a detailed and continuing investigation, communications with counsel for Defendant, a review of Defendant's policies and procedures, and a review of time and pay records of Plaintiffs and other aggrieved employees. To that effect, Plaintiffs' Counsel has spent more than 118.1 hours in the prosecution of this case to date.² D'Abusco Decl. at ¶19. Plaintiffs' Counsel expects to incur additional hours in finalizing this settlement and overseeing the distribution of funds to Aggrieved Employees and the Labor and Workforce Development Agency. *Id.*

b. Contingent Nature Of The Case and The Informed Consent Of The Client.

Plaintiffs brought this action as an Aggrieved Employees pursuant to PAGA and have agreed to the requested award of attorneys' fees. Further, Plaintiffs' Counsel undertook this matter solely on a contingency basis, with no guarantee of recovery, and agreed to advance all costs. *Id.* See *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal.App.3d 465, 472 (holding contingency fee agreement is factor in attorney fee award). Hence, from the outset to the present, prosecution of this case has involved significant financial risk for Plaintiffs' Counsel. For example, Plaintiffs' Counsel has had to pay overhead and costs while the case was pending. *Id.* Had the case not settled, Plaintiffs' Counsel would have had to continue funding the litigation and the cost of maintaining their representation for an undetermined amount of time, possibly many years. *Id.*

² Plaintiffs' Counsel each have a billable rate of \$650.00 per hour. Plaintiffs' Counsel's rates have been approved by Courts in Riverside County, Los Angeles County, San Bernardino County and the United States District Court—Central District of California. See D'Abusco Decl., at ¶22. Thus, using the Lodestar Method, Plaintiffs' Counsel's requested fee of 33.33% of the Fund (\$75,700.76) amounts to less than the total fees billed, and to be billed, on this matter (\$76,765.00) without the application of a multiplier.

1 **c. Preclusion Of Other Employment.**

2 As California case law recognizes, Plaintiffs' Counsel's commitment to this litigation
3 should not be assessed in a vacuum. The time span of litigation and negotiation required to
4 resolve this case has prevented Plaintiffs' Counsel from pursuing other work, particularly when
5 faced with investigating the claims in detail and preparing reasonable liability analyses.
6 Additional work was available that Plaintiffs' Counsel had to forego to devote the time
7 necessary to pursue this litigation.

8 **d. The Experience, Reputation, Ability, And The Skill Displayed By**
9 **Counsel In Litigation.**

10 The experience and ability of Plaintiffs' Counsel was essential to success in this litigation.
11 Only counsel well versed in representative and complex litigation and employment law could
12 effectively marshal the evidence gathered in this complicated case to reach such a prompt and
13 favorable resolution. Protracted litigation would make settlement more cumbersome and uncertain
14 because of the increased costs and attorneys' fees invested in the case by the litigants. This
15 settlement provides a fair, adequate and reasonable recovery to the State of California and
16 aggrieved employees.

17 **e. The Results Achieved.**

18 As provided above, the results of this Settlement are favorable to the Aggrieved Employees
19 and the LWDA. As set forth above, the agreed upon settlement represents a recovery of
20 approximately 71.9% of liability exposure for the State of California and Aggrieved employees. In
21 addition. Thus, this result fully ameliorates the alleged harm and represents a strong result that justifies
22 a fee of 33.33% of the settlement amount.

23 **4. The Parties' Settlement Of Attorneys' Fees Is Reasonable In Light Of**
24 **Plaintiffs' Counsel's Lodestar.**

25 In fixing fees under the lodestar method, successful attorneys should recover "all attorney fees
26 reasonably expended, without limiting the fees to a proportion of [the] actual recovery." See *Graciano v.*
27 *Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 164. "[T]here is 'no mathematical rule requiring
28 proportionality between compensatory damages and attorneys' fees award.'" *Harman v. City and*

1 *County of San Francisco* (2007) 158 Cal.App.4th 407, 421 (citation omitted). For instance, in *Harman*,
2 the court affirmed a fee award of \$1.1 million on damages of \$33,300 under the Civil Rights Act after
3 determining that it cannot be tied to a proportion of the recovery. *Id.* at 419-22.

4 The non-proportionality rule applies with equal force to PAGA cases. This was made clear by an
5 award in a relatively recent arbitration where retired Federal District Judge James Larson awarded
6 statutory fees of \$978,505.00 to plaintiffs on PAGA penalties totaling \$230,000.00, in an action that
7 initially sought recovery through the class action device. See *Williams v. Veolia Transp.* (Feb. 10, 2015)
8 JAMS Ref. No.1220048226. Likewise, the non-proportionality rule applies generally to attorneys
9 prosecuting employment cases. See, e.g., *Taylor v. Nabors Drilling U.S.A.* (2014) 222 Cal.App.4th 1228
10 (affirming \$680,520.00 in attorneys' fees on a \$150,000.00 recovery in an employment discrimination
11 case). In determining the reasonableness of statutory fees, the court should apply the lodestar method.
12 See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136 (holding that the court should "presume that the
13 Legislature intended courts to use the prevailing lodestar adjustment method" in fixing statutory fees).
14 This method most effectively compensates successful counsel for "all the hours reasonably spent." *Id.*
15 at 1133. The base lodestar is produced by multiplying the number of hours reasonably expended by
16 counsel by a reasonable hourly rate. *Id.* at 1134-36. The base lodestar then may be adjusted by a
17 multiplier to account for contingent risk and other factors.

18 For hourly rates, the Court must evaluate whether that rate is "within the range of reasonable
19 rates charged by and judicially awarded comparative attorneys for comparable work." *Children's*
20 *Hospital & Med. Ctr. v. Bontá* (2002) 97 Cal.App.4th 740, 783. Determination of a reasonable rate is
21 derived from the community "where the services are rendered." *MBNA Am. Bank v. Gorman* (2006) 147
22 Cal.App.4th Supp. 1, 13. Plaintiffs' Counsel's rates are reasonable and within the range of similar
23 attorneys in the Southern California area where the services are rendered and where the action was
24 litigated. Courts have recently approved Plaintiffs' counsel requested hourly rates in Los Angeles
25 County (2021), Riverside County (2022), San Bernardino County (2019), and the United States District
26 Court—Central District of California (2018). See D'Abusco Decl., at ¶20. Likewise, Plaintiffs' counsel
27 is aware that their rates are commensurate with other attorneys with similar experience and expertise.
28 *Id.* As the requested rates are within the range of market rates, they should be approved. See *United*

1 *Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407, citing *Chalmers v.*
2 *City of Los Angeles* (9th Cir. 1986) 796 F.2d 1205, 1214, amended, 808 F.2d 1373 (9th Cir. 1987)
3 (“Affidavits of the plaintiff’s attorney and other attorneys regarding prevailing fees in the community,
4 and rate determinations in other cases, particularly those setting a rate for the plaintiff’s attorney are
5 satisfactory evidence of the prevailing market rate.”).

6 In evaluating hours worked, the general principle is that “the attorney who takes [a statutory fee-
7 shifting] case can anticipate receiving full compensation for every hour spent litigating a claim even
8 against the most polemical opponent.” See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128,
9 1175. However, courts should not be “enmeshed in a meticulous analysis of every detailed facet of the
10 professional representation.” See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 642. Rather, “[t]he essential
11 goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.” See *Fox*
12 *v. Vice* (2011) 131 S.Ct. 2205, 2216. In determining the reasonableness of the hours expended, “the
13 court should defer to the winning lawyer’s professional judgment as to how much time he was required
14 to spend on the case; after all, he won, and might not have, had he been more of a slacker.” See *Kerkeles*
15 *v. City of San Jose* (2015) 243 Cal.App.4th 88, 196 (quoting *Moreno v. City of Sacramento* (9th Cir.
16 2008) 534 F.3d 1106, 1112). Whether attorneys expended reasonable hours in pursuit of the litigation is
17 the major building block of any fee award. See *Serrano v. Unruh*, 32 Cal.3d at 632 (“absent facts
18 rendering the award unjust, parties who qualify for a fee should recover for all hours reasonably
19 spent.”). Typically, all time reasonably spent by prevailing attorneys during the course of litigation
20 should be awarded if it is the type of work that would be paid by a fee-paying client. *Hensley v.*
21 *Eckerhart* (1983) 461 U.S. 424, 431.

22 Here, Plaintiffs’ counsel, Matt D’Abusco and Cynthia Sandoval have spent over 118.1 hours
23 litigating this Action, not including the hours to be spent in efforts to finalize the settlement and oversee
24 distribution. See D’Abusco Decl., at ¶19. Thus, multiplying Plaintiffs’ Counsel’s hourly rates by hours
25 billed to the litigation to date (not including anticipated additional work on this case, such as supervising
26 the administration of the settlement) yields a lodestar of \$76,765.00.00, *with no multiplier*. Thus,
27 although Plaintiffs’ Counsel would otherwise be entitled to a positive multiplier of 1.5 or higher on their
28 lodestar to compensate them for contingent risk, ***they have negotiated fees reflecting an amount less***

1 *than their lodestar, underscoring the reasonableness of the negotiated amount.* Therefore, in
2 summary, the Court should find that amount allocated in the settlement for attorneys' fees is reasonable.

3 **E. The Requested Recovery In Litigation Costs and Expenses Is Reasonable.**

4 Plaintiffs' Counsel is also entitled to reimbursement of its discretionary litigation costs.
5 California Labor Code Section 2699(g)(1). Out-of-pocket discretionary expenses are compensable if
6 they would normally be billed to a fee-paying client. *See Beasley v. Wells Fargo Bank* (1991) 235
7 Cal.App.3d 1407, 1419, *overruled in part on other grounds in Olson v. Automobile Club of Southern*
8 *Calif.* (2008) 42 Cal.4th 1142. Such discretionary costs may be claimed as part of an attorneys' fees
9 motion when seeking statutory fees under the Labor Code. *See Amaral*, 163 Cal.App.4th at 1218, n. 27
10 (awarding costs that are necessarily incurred). The following chart reflects the costs incurred by
11 Plaintiff's Counsel:

Cost & Expense Categories	Amount
PAGA Filing Fees	\$150.00
Court Filing Fees	\$1,838.99
TOTAL	\$1,988.99

12
13
14
15 As indicated above, Plaintiffs' Counsel advanced \$1,988.99 in out-of-pocket costs for, among
16 other things, filing fees and LWDA fees. See D'Abusco Decl., at ¶21. Because these reasonable costs
17 were necessarily incurred during the case's pendency, they should be reimbursed to Plaintiffs' Counsel.

18 **F. The Parties Request Appointment Of A Settlement Administrator.**

19 The Parties propose that the Court appoint Simpluris Settlement Administrators to serve as the
20 Settlement Administrator. Simpluris is experienced in administering class action and representative
21 settlements and has estimated its fees and costs for this settlement at a capped fee of \$5,000.00. See
22 D'Abusco Decl., at ¶22.

23 **IV. CONCLUSION.**

24 The Parties have negotiated a fair and reasonable settlement of Plaintiff's claims. Having
25 appropriately presented the materials and information necessary for approval, the Parties request that the
26 Court approve the settlement and enter judgment as requested forthwith.

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28 ///

1 DATED: February 16, 2022

ARES LAW GROUP, P.C

2
3 By:



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Cynthia S. Sandoval

Attorneys for Plaintiff BERNIE GERMANI, as an
aggrieved employee pursuant to the Private Attorneys
General Act ("PAGA")