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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

ISMAEL VIERA and ERIC DAVILA,
individually and on behalf of aggrieved
employees and the State of California,

Plaintiffs,

v.

CRANE ACQUISITION, INC., dba CRANE
PEST CONTROL, ROLLINS, INC., ORKIN,
LLC, and DOES 1-20, inclusive,

Defendants.

Case No. CGC-22-597870

**PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION FOR
APPROVAL OF PRIVATE ATTORNEYS
GENERAL ACT SETTLEMENT**

Date: January 21, 2025

Time: 1:30 P.M.

Dept.: 305

Hon. Mary E. Wiss

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1 **I. INTRODUCTION**

2 Plaintiffs Ismael Viera and Eric Davila submit this supplemental brief to address the issues
3 raised by the Court in its January 6, 2025 Tentative Ruling on Plaintiffs’ Motion for Approval of
4 Private Attorneys General Act Settlement (“Tentative”).

5 **II. TENTATIVE RULING**

6 **1. The PAGA Notices Have Now Been Provided to the Court.**

7 As the Court noted in the Tentative (Tentative at 2), the declaration of Melody Rissell
8 Leonard mistakenly stated that Plaintiff Ismael Viera filed his notice with the Labor Workforce
9 Development Agency on July 30, **2020**, rather than on July 30, **2021**. Attached as **Exhibit A** to the
10 Supplemental Declaration of Rachel Bien in Support of Plaintiffs’ Motion for Approval of PAGA
11 Settlement (“Supp. Bien Decl.”) are: (1) the initial notice that Plaintiff Viera filed on July 30, 2021,
12 and (2) the amended notice that he filed on April 10, 2024.

13 **2. The Settlement Agreement Is Fair, Adequate, and Reasonable.**

14 **a. Defendants Are an Integrated Enterprise with the Same Business**
15 **Practices that Affect All PAGA Settlement Members Uniformly.**

16 In its Tentative, the Court asked for clarification regarding the relationship between the three
17 Defendants, the uniformity of the alleged unlawful practices, and the contribution amounts to the
18 Settlement of each Defendant. (Tentative at 2-3.)

19 There are three Defendants in this action: Rollins, Inc. (“Rollins”), Orkin LLC (“Orkin”),
20 and Crane Acquisition, Inc. (“Crane”). Rollins is the parent company, and Orkin and Crane are
21 wholly owned subsidiaries of Rollins doing business in California.¹ The PAGA Settlement
22 Members are all pest control workers who worked for Orkin and/or Crane and were jointly
23 employed by Rollins in California during the PAGA Period, from July 30, 2020 through January
24 10, 2025.² Plaintiff Ismael Viera was hired by Crane to perform pest control services in California.

25 _____
26 ¹ Supp. Bien Decl. Ex. E (Pls.’ Trial Brief) at 5-6.

27 ² Supp. Bien Decl. Ex. F (First Amended Complaint (“FAC”)) ¶¶ 5-6, 26; Ex. E (Pls.’ Trial Brief)
28 at 5-6; Decl. of Rachel Bien in Support of Motion for PAGA Settlement Approval (“Bien Decl.”)
Ex. B (Settlement Agreement) ¶¶ 1.17-1.18.

1 Plaintiff Eric Davila was hired by Orkin to perform pest control services in California.³ Both Crane
2 and Davila, like all PAGA Settlement Members, were subjected to policies and practices developed
3 by Rollins and implemented by Crane and Orkin.⁴ Rollins designed and adopted the allegedly
4 unlawful non-compete and pay card policies, and Orkin and Crane jointly imposed the policies on
5 the PAGA Settlement Members.⁵ Plaintiffs, therefore, allege joint and several liability against all
6 Defendants.

7 First, during the entire relevant period, all PAGA Settlement Members, including Viera and
8 Davila, signed the same form Employment Agreement containing the unlawful non-compete,⁶
9 copies of which are attached to the Supplemental Declaration of Rachel Bien as **Exhibit B**. Rollins
10 authored the Employment Agreement and provided it to Orkin and Crane for their employees to
11 sign.⁷ In addition, all PAGA Settlement Members were paid by Rollins from the same Rollins bank
12 account in Atlanta, Georgia.⁸ Thus, Plaintiffs allege both the parent (Rollins) and its subsidiaries
13 (Orkin and Crane) are liable as joint employers for the unlawful non-compete.

14 Second, during the entire relevant period, Rollins adopted a policy of paying employees
15 their final pay via a pay card without employee consent. Rollins required its subsidiaries, Orkin and
16 Crane, to apply this policy to employees who separated from employment.⁹ Thus, Plaintiffs allege
17 that a subset of the PAGA Settlement Members, *i.e.*, those who separated from employment during
18

19 _____
³ Supp. Bien Decl. Ex. F (FAC) ¶¶ 8-9, 29-30.

20 ⁴ Ex. E (Pls.’ Trial Brief) at 5-7. The Tentative asked for clarification regarding Plaintiffs’
21 statement that Davila was a “direct employee of Orkin.” (Tentative at 3.) This language was
22 simply to identify Davila as being hired by Orkin in the same way that Viera was hired by Crane,
23 *i.e.*, they each worked directly for the Rollins’ subsidiary and identified themselves as the
24 subsidiary’s employee. Nonetheless, as discussed above, both Viera and Davila—like all
25 Aggrieved Employees—were subject to the same non-compete and/or pay card policy that
26 Rollins, the parent, designed and required of its subsidiaries.

24 ⁵ Ex. E (Pls.’ Trial Brief) at 5-7, 10-11.

25 ⁶ Ex. E (Pls.’ Trial Brief) at 5-7; Ex. F (FAC) ¶ 31.

25 ⁷ Ex. E (Pls.’ Trial Brief) at 3-7, 10-11.

26 ⁸ Ex. E (Pls.’ Trial Brief) at 6; *see also* Declaration of Rachel Bien in Support of Plaintiff’s
27 Motion for Summary Adjudication, filed on Nov. 21, 2023 (“Bien S.A. Decl.”) Ex. F (Stephens
28 Dep. Tr.) 21:1-8, 37:23-39:7; Ex. I.

⁹ Ex. E (Pls.’ Trial Brief) at 5-6; Ex. F (FAC) ¶¶ 36-37, 46.

1 the PAGA period and were paid their final wages by pay card, have pay card-related violations.¹⁰
2 Thus, as with the non-compete violation, Plaintiffs allege that Rollins, Crane, and Orkin are jointly
3 liable for the unlawful pay card violations.

4 The Labor Code broadly defines “employer” as including both direct and indirect employers
5 and contemplates that responsibility may be shared among joint employers. (*See, e.g., Medina v.*
6 *Equilon Enterprises, LLC* (2021) 68 Cal.App.5th 868, 879 [“If the putative joint employer instead
7 exercises enough control over the intermediary entity to indirectly dictate the wages, hours, or
8 working conditions of the employee, that is a sufficient showing of joint employment”]; *Castaneda*
9 *v. Ensign Grp., Inc.* (2014) 229 Cal.App.4th 1015, 1019 [“Multiple entities may be employers
10 where they ‘control different aspects of the employment relationship’”] [quoting *Martinez v. Combs*
11 (2010) 49 Cal.4th 35, 76]; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737-38
12 [recognizing that a parent can be held liable for the actions of its subsidiary where the evidence
13 shows they are an integrated enterprise].) Plaintiffs alleged joint employment and integrated
14 enterprise from the outset of this action, and subsequently litigated and settled this action with those
15 legal principles in mind. For purposes of the Settlement, Rollins, Orkin, and Crane are therefore
16 joint employers with respect to the employment policies at issue in this case.¹¹ As the parent
17 company of Crane and Orkin, Rollins is entirely funding the Settlement.¹²

18 Finally, it is appropriate to treat all PAGA Settlement Members similarly because they were
19 all harmed in a uniform manner. That is, each PAGA Settlement Member was subjected to the
20 allegedly unlawful non-compete contract term, and the subset of PAGA Settlement Members who
21 separated from employment during the relevant period and were paid final wages by pay card were
22 subjected to the allegedly unlawful pay card policy. Accordingly, the plan of allocation, after 75%
23 of the Net Settlement Amount is allocated to the LWDA, allocates the PAGA penalties for the non-
24 compete provision to PAGA Settlement Members on a basis proportional to the number of pay
25

26 ¹⁰ Ex. E (Pls.’ Trial Brief) at 5, 8-9; Ex. F (FAC) ¶ 46.

27 ¹¹ *See* Ex. E (Pls.’ Trial Brief) at 5-7, 9-13; Ex. F (FAC) ¶¶ 10, 13-15.

28 ¹² Supp. Bien Decl. ¶ 4.

periods worked, and allocates an additional pro rata pay period violation to those PAGA Settlement Members who were paid their final pay by pay card. This plan of allocation thus fairly apportions the Net Settlement Amount among PAGA Settlement Members.

b. The Details of the Plan of Allocation Demonstrate that the Settlement Is Fair, Adequate, and Reasonable and Should be Approved.

The Tentative requested additional details regarding the plan of allocation, which Plaintiffs now provide along with some updated information. (Tentative at 3-4.)

As set forth in Plaintiffs' Motion, the Gross Settlement Amount is \$2.9 million. That amount will be allocated as follows, subject to the Court's approval:

Gross Settlement Fund	\$2,900,000.00
Less Attorneys' Fees	\$1,015,000.00
Less Costs and Expenses	\$81,229.94
Less Settlement Administration	\$14,500.00¹³
Less Service Awards	\$30,000.00
PAGA Amount Payable to LWDA	\$1,319,452.55
PAGA Amount Payable to Aggrieved Employees	\$439,817.52

Based on updated data Defendants provided on December 27, 2024, there are 3,521 PAGA Settlement Members who signed the allegedly unlawful non-compete provision during the PAGA Period.¹⁴ Of those, 1,388 are eligible to receive a payment from the Settlement for the allegedly unlawful pay card violation.¹⁵ The plan of allocation calls for allocating the PAGA penalties for the non-compete provision to PAGA Settlement Members on a basis proportional to the number of pay periods worked, and to allocate an additional pro rata pay period violation to those PAGA Settlement Members who were paid their final pay by pay card.¹⁶ The updated data reflects a total

¹³ The Settlement Administrator has revised its estimate downward and provided a not-to-exceed quote of \$14,500 for settlement administration. Its proposal is **Exhibit H** to the Supp. Bien Decl.

¹⁴ Supp. Bien Decl. ¶ 5.

¹⁵ *Id.* ¶ 6.

¹⁶ Supp. Bien Decl. ¶ 7; Bien Decl. Ex. B (Settlement Agreement) ¶ 4.6.

1 of 158,996 Eligible Pay Periods, *i.e.*, those pay periods for which a penalty is owed to PAGA
2 Settlement Members.¹⁷

3 The Tentative requested additional detail regarding the range of payments to PAGA
4 Settlement Members. (Tentative at 3.) The lowest payments will be \$2.77 for 17 PAGA Settlement
5 Members who each worked one Eligible Pay Period, and the highest payments will be \$295.99 for
6 624 PAGA Settlement Members who each worked for the duration of the PAGA Period, a period
7 of approximately 53 months.¹⁸ The median payment is \$85.75, and the average payment is
8 \$124.91.¹⁹

9 Further, the Tentative requested clarification as to the total Gross Settlement Amount as a
10 result of the escalator clause in the Settlement Agreement. (Tentative at 3.) Although the updated
11 data added 206 PAGA Settlement Members, the number of Eligible Pay Periods did not increase
12 by more than 10%, and thus, the escalator clause was not triggered.²⁰ As a result, Defendants will
13 not be required to pay more than the \$2.9 million Gross Settlement Amount.²¹

14 Finally, the Tentative requested clarification as to a date certain for the end of the release
15 period. (Tentative at 3-4). The Settlement Agreement states that PAGA Settlement Members will
16 release claims within the PAGA Period, which is defined as ending on January 10, 2025,²² the
17 original hearing date for the Motion for Approval to be heard.²³

18 **c. The Additional Eligible Pay Period for PAGA Settlement Members with**
19 **Pay Card Claims Is Fair and Reasonable.**

20 The Tentative noted that some PAGA Settlement Members are being accorded one
21 additional Eligible Pay Period in recognition that they separated from employment, were paid their
22 final wages on a pay card, and thus have alleged pay card violations. (Tentative at 3.) The Tentative
23

24 ¹⁷ Supp. Bien Decl. ¶ 5.

25 ¹⁸ *Id.* ¶ 8.

26 ¹⁹ *Id.*

27 ²⁰ *Id.* ¶ 9.

28 ²¹ *Id.*

²² Bien Decl. Ex. B (Settlement Agreement) ¶¶ 1.17, 5.1.

²³ Supp. Bien Decl. ¶ 10.

1 requested clarification as to whether all Defendants had the same practice, how many individuals
2 fall into this category, and whether they are similarly situated. (*Id.*)

3 As explained above, the plan of allocation provides for one additional pay period for each
4 PAGA Settlement Member to whom Defendants paid their final wages on a pay card during the
5 PAGA Period. As noted above, there are 1,388 such PAGA Settlement Members.²⁴ In addition, as
6 discussed above, Defendants had the same final wage pay card practice that they applied uniformly
7 to separated employees. In particular, the evidence showed that Defendants automatically issued
8 pay cards to separated employees without first obtaining their consent to be paid in this manner.²⁵

9 Plaintiffs allege that Labor Code § 213(d) requires employees to give their consent before
10 they can be paid via pay card, and thus Defendants' automatic pay card policy is unlawful.
11 Additionally, Plaintiffs allege that the pay cards violate Labor Code §§ 201-202, 212, 221, because
12 they are subject to fees and other obstacles that prevent employees from receiving their wages in
13 full and on a timely basis.²⁶ It is appropriate to treat all PAGA Settlement Members who were paid
14 their final wages on a pay card similarly because all were subject to Defendants' automatic/no
15 consent pay card practice and to the same or very similar obstacles to obtaining their wages in full
16 on a timely basis.

17 The Court noted that Plaintiff Viera's initial complaint did not allege a violation of Lab.
18 Code § 221 (for unlawful deductions from wages), and that Judge Karnow denied his motion to file
19 the First Amended Complaint ("FAC") in part because the FAC sought to add a section 221
20 violation too close to the trial date.²⁷ (Tentative at 3.) Defendants later consented to the addition of
21 the alleged section 221 violation when they agreed to allow Plaintiffs to file the First Amended
22

23 ²⁴ Supp. Bien Decl. ¶ 6.

24 ²⁵ See Supp. Bien Decl. Ex. E (Pls.' Trial Br.) at 5, 7-9; *see also* Bien S.A. Decl. Ex. R (at Special
25 Interrogatory Supplemental Response Nos. 8, 12-13).

26 ²⁶ Lab. Code § 212(a)(1) precludes "conditions or obstacles which interfere with or prevent an
26 employee from promptly receiving their due wages *in full*." Sections 201-202 require timely
27 payment of all wages due at the time of termination or separation. Section 221 precludes unlawful
27 deductions from wages. *See* Supp. Bien Decl. Ex. E (Pls.' Trial Br.) at 8-9.

28 ²⁷ Order Denying Motion for Leave to File First Amended Complaint, dated July 17, 2024.

1 Complaint by stipulation on September 9, 2024.²⁸ The section 221 violation is based on the same
2 facts and circumstances that Plaintiff Viera alleged in his initial complaint and that underlie the
3 section 212 violation—*i.e.*, that the pay cards subjected employees to obstacles, including fees, that
4 prevented them from receiving their final wages in full. Because all PAGA Settlement Members
5 who were paid their final wages on a pay card were subject to this same policy, and because
6 Plaintiffs allege that Defendants are jointly liable for the reasons articulated above, it is reasonable
7 to treat all PAGA Settlement Members similarly under the Settlement even if they did not all incur
8 fees. While Plaintiffs do not have data showing which PAGA Settlement Members incurred fees,
9 Netspend bank records show the majority of employees paid on a pay card incurred fees of \$17.17
10 on average.²⁹ This fact further supports the reasonableness of treating all PAGA Settlement
11 Members who were paid their final wages on a pay card similarly under the Settlement.

12 Finally, it is reasonable that the Settlement accords each of these PAGA Settlement
13 Members with one additional Eligible Pay Period because the violations relate to just their final pay
14 period. The amount of the penalty is also reasonable. If Plaintiffs had prevailed at trial and the Court
15 had awarded the highest potential penalty of \$100 for each of the four violations (§§ 201/202, 212,
16 213, and 221), the 1,388 relevant Aggrieved Employees would be entitled to \$100 each, totaling to
17 \$138,300.³⁰ This constitutes less than 1% of Plaintiffs' best possible recovery at trial, which they
18 estimated to be approximately \$18 million.³¹ The proposed Settlement therefore allocates
19 approximately the same percentage of the fund to the alleged pay card violations, relative to the
20 more extensive non-compete violations.³² Based on this allocation, each PAGA Settlement Member
21 who was paid their final wages on a pay card will receive the equivalent of one additional Eligible
22 Pay Period, or \$2.77, on top of their award attributable to the non-compete violation.³³

23
24 ²⁸ See Joint Stipulation to File First Amended Complaint, filed on September 9, 2024.

25 ²⁹ See Pls.' Trial Br. Ex. S (Netspend Corporation's Supplemental Objections and Responses to
Deposition Subpoena for Production of Business Records) at p. 7.

26 ³⁰ Supp. Bien Decl. ¶ 11.

27 ³¹ Bien Decl. ¶ 43.

28 ³² Supp. Bien Decl. ¶ 11.

³³ *Id.*

1 This amount is reasonable even if it is a small percentage of the best possible recovery. (*See*,
2 *e.g.*, *In re Omnivision Techs., Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036, 1042 [“It is well-settled
3 law that a cash settlement amounting to only a fraction of the potential recovery does not per se
4 render the settlement inadequate or unfair. Plaintiff has agreed to accept a smaller certain award
5 rather than seek the full recovery but risk getting nothing”] [internal quotation marks omitted]);
6 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 517 (after finding Starbucks liable,
7 imposing a penalty of just \$5 per violation because a larger penalty “would be unjust, arbitrary, and
8 oppressive”].) With respect to the pay card violations, the Court found factual questions that
9 precluded summary adjudication, including whether aggrieved employees had the option not to be
10 paid by pay card in compliance with Labor Code § 213, and whether Defendants provided sufficient
11 information to employees to enable them to access their wages in full, in compliance with Labor
12 Code §§ 201-202, 212, and 212.³⁴ This raised the risk that Plaintiffs would not be able to prove
13 these violations at trial and would recover nothing. Even if Plaintiffs had proven all of the
14 violations, the Court may have exercised its discretion to reduce the applicable penalties well below
15 \$100 per violation if it found the violations were minimal or that Defendants had attempted to
16 comply with the law. (*See Carrington*, 30 Cal.App.5th at 517.)

17 **d. The Settlement Satisfies all *Moniz* Factors in Light of the Clarifications**
18 **Above.**

19 Based on the clarifications above, Plaintiffs submit that the proposed settlement is fair,
20 reasonable and adequate under all of the relevant *Moniz* factors. (*See Moniz v. Adecco USA, Inc.*
21 (2021) 72 Cal.App.5th 56, 69-70, 77 [overruled on other grounds by *Turrieta v. Lyft, Inc* (2024) 16
22 Cal.5th 664].) As the Court in *Moniz* held, when evaluating PAGA settlements, courts should
23 consider the following, non-exhaustive factors: “the strength of Plaintiffs’ case, the risk, expense,
24 complexity and likely duration of further litigation, the risk of maintaining class action status
25 through trial, the amount offered in settlement, the extent of discovery completed and the stage of
26 the proceedings, the experience and views of counsel, the presence of a governmental participant,

27 ³⁴ *See* Order re Motion for Summary Adjudication, filed on February 21, 2024, at 2.

1 and the reaction of the class members to the proposed settlement.” (*Id.* at 76 [internal citation
2 omitted].)

3 As Plaintiffs argued in their Approval Motion,³⁵ the settlement secures a substantial sum for
4 the State and aggrieved employees, in furtherance of important public policies that promote
5 employee mobility and ensure payment of all wages in full. The settlement was reached after arms’-
6 length negotiations after several years of vigorous litigation on the first day of trial, and accounts
7 for the risks Plaintiffs faced and the likelihood that even if they had prevailed, Defendants would
8 have appealed.³⁶ (*See Moniz*, 72 Cal.App.5th at 77.) Plaintiffs and all aggrieved employees were
9 well represented by counsel with substantial experience in the subject matter of this litigation. The
10 settlement was not the product of fraud, collusion, or unfairness. (*Id.*)

11 Furthermore, as clarified above, the proposed Settlement comports with Plaintiffs’
12 allegations and the record evidence that all Defendants were responsible for the violations and thus
13 it requires all Defendants to pay the settlement amount (even if Rollins will shoulder that burden
14 on behalf of Orkin and Crane). The Settlement also appropriately and reasonably treats all PAGA
15 Settlement Members uniformly with respect to the non-compete violation under Labor Code §
16 432.5 because each signed the same form Employment Agreement containing the unlawful terms.
17 The settlement also appropriately accords certain PAGA Settlement Members an additional Eligible
18 Pay Period in recognition that they also allege pay card-related violations for their final pay period.
19 These PAGA Settlement Members are similarly situated to each other in terms of the facts
20 underlying the pay card violations and the risk they faced in proving the violations, and thus, it is
21 reasonable for the settlement to treat them similarly by paying them the same amount.

22 For all of these reasons and those in Plaintiffs’ Approval Motion, the Court should approve
23 the proposed Settlement because it is fair, reasonable, and adequate.

24
25
26
27 ³⁵ Pls.’ Motion at 6-10.

28 ³⁶ *Id.*

1 **3. The Settlement Administrator Has Capped Costs and Submitted Its Bid.**

2 The Tentative asked Plaintiffs to attach the proposed bid by the proposed Settlement
3 Administrator, Strategic Claims Services. (Tentative at 4.) Attached as **Exhibit H** to the Supp. Bien
4 Decl. is the proposal, which caps administration costs at \$14,500.

5 **4. Attorneys’ Fees and Costs.**

6 The Tentative asked for clarification regarding certain items relating to Plaintiffs’ request
7 for attorneys’ fees and costs. (Tentative at 4.)

8 First, Plaintiffs herewith submit counsel’s cost itemizations as **Exhibits C and D** to the
9 Supplemental Bien Declaration.

10 Second, the Tentative correctly notes that the information regarding Hannah Shirey’s work
11 on the case erroneously references “appeals.” In this case, Ms. Shirey performed legal research
12 early in the matter before the complaint was filed, drafted the complaint, drafted the initial PAGA
13 notice, and drafted an initial set of discovery requests.³⁷

14 Finally, the Court requested a further showing as to why counsel should be awarded their
15 requested 35% of the common fund in attorneys’ fees. Plaintiffs respectfully submit the following
16 additional information for the Court’s consideration. The diligent and hard work of counsel over
17 several years of litigation, the novelty of the issues presented by this litigation, the strength of the
18 settlement outcome achieved, and the length of the proceeding and thus the risk to counsel, all
19 weigh in favor of granting Plaintiffs’ request for fees of 35%. (*See Laffitte v. Robert Half Internat.*
20 *Inc.* (2016) 1 Cal. 5th 480, 504 [identifying factors to consider in awarding attorneys’ fees].)

21 This case presented significant risk as to both liability and penalties. In particular, California
22 courts have not squarely addressed whether non-competes that violate Section 16600 of the
23 Business & Professions Code also violate Labor Code § 432.5 giving rise to a PAGA violation, but
24 there are several unfavorable federal court decisions.³⁸ This was the thrust of Defendants’ Motion
25 *in Limine* No. 2, which argued that Plaintiffs could not establish a section 432.5 violation until
26

27 ³⁷ Supp. Bien Decl. ¶ 12.

28 ³⁸ *See* Defs.’ Mot. *in Limine* No. 2, at 3-4, filed on Oct. 16, 2024.

1 January 1, 2024, when Section 16600 was amended to expressly provide that non-competes are
2 unlawful and not merely void.³⁹ If Defendants had prevailed on their argument, it would have
3 severely limited the liability period from more than four years (from July 30, 2020) to just the period
4 after January 1, 2024.⁴⁰

5 California courts have also not resolved how to award PAGA penalties for section 432.5
6 violations. Defendants argued that aggrieved employees are entitled to just one penalty for the pay
7 period in which they signed the non-compete, whereas Plaintiffs argued they are entitled to a
8 penalty for every pay period during which they were subject to the non-compete.⁴¹ Under
9 Defendants’ theory, the best possible recovery that Plaintiffs could have achieved if they had
10 established liability under section 432.5 for the full liability period would have been \$352,100 (*i.e.*,
11 a one-time \$100 penalty for 3,521 employees).⁴² The proposed settlement, on the other hand,
12 secures far more—\$2.9 million, with over \$1.7 million allocated to the State and PAGA Settlement
13 Members.⁴³ Thus, the substantial risks involved with litigating these novel and undetermined legal
14 issues, as well as the value of the settlement in light of the potentially much lower litigation value,
15 wholly support awarding counsel their full requested fee. (*See Laffitte*, 1 Cal. 5th at 504 [evaluating
16 the risks, novelty, and potential value of the litigation].)

17 In addition, Counsel’s skill and dogged efforts played a large role in securing such a positive
18 result, in the face of defense tactics that significantly drove up counsel’s hours. (*See Laffitte*, 1 Cal.
19 5th at 504 [considering skill shown by counsel and hours worked].) Counsel repeatedly invited
20 Defendants to discuss settlement at every juncture—early in the litigation before substantial
21 discovery was taken, after summary adjudication was granted but before trial preparation had
22 begun, and in the early stages of trial preparation before it was completed.⁴⁴ However, Defendants

23 ³⁹ Defs.’ Mot. *in Limine* No. 2.

24 ⁴⁰ Supp. Bien Decl. ¶ 13.

25 ⁴¹ Defs.’ Mot. *in Limine* No. 1, at 3-4, filed on Oct. 16, 2024.

26 ⁴² Supp. Bien Decl. ¶ 14.

27 ⁴³ As discussed above, this amount is almost entirely attributable to the alleged section 432.5
violation. Supp. Bien Decl. ¶ 11.

28 ⁴⁴ *See* Bien Decl. ¶¶ 12-14; Decl. of Melody Rissell Leonard in Support of Mot. for Approval of
PAGA Settlement (“Rissell Decl.”) ¶¶ 32-35; Supp. Bien Decl. ¶ 15.

1 remained resistant to a negotiated resolution. For example, after initially agreeing to an early
2 mediation, Defendants cancelled at the last minute,⁴⁵ and a second mediation was cut short by
3 Defendants even though Plaintiffs were willing to continue negotiating.⁴⁶ The parties then engaged
4 in direct settlement negotiations just prior to trial, but Defendants cut those off abruptly without
5 explanation.⁴⁷ Plaintiffs also attempted to resolve the case with Defendants at a final settlement
6 conference, but those efforts, too, were unsuccessful.⁴⁸ Each time, Plaintiffs' counsel made
7 significant efforts to achieve a resolution and did the necessary preparatory work, including
8 performing damages calculations and/or preparing position statements, to engage in negotiations.⁴⁹
9 Despite Plaintiffs' counsel's willingness to engage in settlement negotiations, it was only on the
10 first day of trial, after all of the trial preparation work was completed and Plaintiffs demonstrated
11 that they would ably try the case, that the parties were able to reach a reasonable settlement.⁵⁰

12 Defendants' discovery tactics also drove up Plaintiffs' counsel's fees and costs. Defendants'
13 discovery responses were almost always deficient and frequently failed to provide any responses or
14 documents at all—only objections.⁵¹ This required counsel to spend a great deal of time and effort
15 meeting and conferring and documenting the deficiencies before Defendants would agree to
16 supplement their responses.⁵² It also required motion practice, including a successful motion to
17 compel further responses to Plaintiffs' first set of discovery requests,⁵³ and an *ex parte* motion to
18 compel on the eve of trial after Defendants failed to produce updated employee data, deposition
19 witnesses, and other discovery that they had agreed to produce.⁵⁴ The *ex parte* motion was time-

22 ⁴⁵ Supp. Bien Decl. ¶ 15; Bien Decl. ¶ 12.

23 ⁴⁶ Supp. Bien Decl. ¶ 15.

24 ⁴⁷ Supp. Bien Decl. ¶ 15; Bien Decl. ¶ 14.

24 ⁴⁸ Supp. Bien Decl. ¶ 15; Bien Decl. ¶ 14.

25 ⁴⁹ Supp. Bien Decl. ¶ 16.

25 ⁵⁰ *Id.*

26 ⁵¹ Supp. Bien Decl. ¶ 17.

26 ⁵² Supp. Bien Decl. ¶ 17; *see* Rissell Decl. ¶¶ 4-7, 11, 15, 17-19.

27 ⁵³ Supp. Bien Decl. ¶ 17; *see* Rissell Decl. ¶¶ 4-7.

28 ⁵⁴ Supp. Bien Decl. ¶ 18.

1 consuming but necessitated by Defendants’ unreasonable foot-dragging and refusal to meet the
2 commitments they had made.⁵⁵

3 Despite these challenges, Plaintiffs’ counsel displayed great skill in litigating this case. They
4 obtained summary adjudication of the section 432.5 violation, working as efficiently as possible
5 under the circumstances to muster the documentary and testimonial evidence they needed to prevail
6 on the motion.⁵⁶ Although the Court denied summary adjudication on the alleged pay card
7 violations, which also presented novel liability questions for which there was scant authority,
8 Plaintiffs’ counsel mustered considerable evidence supporting those violations as well. For
9 example, Plaintiffs’ counsel successfully negotiated with the third-party pay card issuer, Netspend,
10 to provide information on pay card fees incurred by aggrieved employees that Netspend initially
11 refused to produce in response to Plaintiffs’ subpoenas.⁵⁷ As a result of these negotiations, Netspend
12 also agreed to produce a corporate representative witness to respond to questions about the fees at
13 a deposition even though the company was outside the reach of the Court’s subpoena power.⁵⁸
14 These negotiations required several rounds of meet and confers, and ultimately resulted in
15 beneficial compromises that avoided motion practice and ensured that Plaintiffs obtained the
16 information they needed to prove the pay card violations at trial.⁵⁹ All of these efforts by Plaintiffs’
17 counsel were taken on a strictly contingency basis with no guarantee of any recovery.

18 Thus, Plaintiffs’ counsel achieved a sizable benefit for the State and PAGA Settlement
19 Members that relied on their considerable negotiation and litigation skills. They did so despite the
20 significant obstacles created by Defendants and the significant risks this litigation presented. These
21 circumstances support Plaintiffs’ request for a fee of 35% of the fund.

22 Finally, the 35% percent requested is reasonable in light of the lodestar cross-check. As the
23 Court of Appeal has noted, the “goal” under either the percentage or lodestar method is to afford
24

25 ⁵⁵ Supp. Bien Decl. ¶ 18.

26 ⁵⁶ Supp. Bien Decl. ¶ 19.

27 ⁵⁷ Supp. Bien Decl. ¶¶ 19-20; *see also* Rissell Decl. ¶¶ 9-10.

28 ⁵⁸ Supp. Bien Decl. ¶ 20.

⁵⁹ *Id.*

1 counsel “a reasonable fee that compensates counsel for their efforts.” (*Laffitte*, 1 Cal. 5th at 505.)
2 “Absent special circumstances rendering the award unjust, an attorney fee award should ordinarily
3 include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee.”
4 (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 [emphasis in original].) In contingency cases like
5 this one, the “fee must be higher than a fee for the same legal services paid as they are performed.
6 The contingent fee compensates the lawyer not only for the legal services he renders but for the
7 loan of those services. The implicit interest rate on such a loan is higher because the risk of default
8 (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of
9 conventional loans.” (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 579-580 [internal
10 quotations and citations omitted].)

11 Here, a fee of 35% is appropriate to reasonably compensate counsel. A fee of 35% results
12 in a negative multiplier of the lodestar, which already does not account for time spent preparing the
13 approval motion, this supplemental filing, and additional time preparing for the approval hearing
14 and overseeing the settlement administration.⁶⁰ The negative multiplier is not due to Plaintiffs’
15 counsel’s inefficiency or unreasonable fee rates,⁶¹ but the complexity and novelty of the case, the
16 late stage at which the case settled after all of the trial preparation work was completed, and
17 Defendants’ litigation tactics which considerably drove up Plaintiffs’ counsel’s hours. Although
18 these circumstances would have warranted a positive multiplier (*see Ridgeway v. Wal-Mart Stores*
19 *Inc.* (N.D. Cal. 2017) 269 F.Supp.3d 975, 995-99 [applying California law and awarding a 2x
20 multiplier where counsel took the case through to trial, risking an unfavorable jury verdict, and in
21 light of the contingent risk, case complexity, and counsel’s inability to take on other matters due to
22 demands of the litigation]), they at least warrant an upward adjustment from one-third to the 35%
23 of the fund that counsel request. (*See Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716
24

25 ⁶⁰ Bien Decl. ¶¶ 45-46; Rissell Decl. ¶ 45.

26 ⁶¹ In support of their Motion, Plaintiffs cited cases in which their fee rates were approved by
27 courts, *see* Bien Decl. ¶ 58; Rissell Decl. ¶ 41, and submitted declarations from two plaintiffs’
28 employment attorneys, Lauren Teukolsky and Steven M. Tindall, attesting that they charge
comparable rates and that these rates have also been approved by courts.

1 F.Supp.2d 848, 854 [“Because the lodestar cross-check revealed a multiplier of 0.59, the court is
2 satisfied that counsel’s requested fee award is not unreasonable”]; *Bennett v. SimplexGrinnell LP*
3 (N.D. Cal. Sept. 3, 2015) No. 11 Civ. 01854, 2015 WL 12932332, at *6 [awarding counsel 38.8%
4 of the fund which represented 59.7% of their lodestar]; *see also In re Bluetooth Headset Products*
5 *Liability Litig.* (9th Cir. 2011) 654 F.3d 935, 944 [affirming that courts must not use “a mechanical
6 or formulaic approach that results in an unreasonable [fee] reward”] [internal quotations omitted].)

7 **5. Cy Pres Beneficiary**

8 As set forth in the Supp. Bien Decl., Plaintiffs and their counsel do not have any relationship
9 with Legal Aid At Work (“LAAW”) that would render it an inappropriate Cy Pres Beneficiary.
10 Lawyers from Olivier & Schreiber and Rissell Law have volunteered at the LAAW Workers Rights
11 clinic and Olivier & Schreiber has two cases in which LAAW serves as co-counsel.⁶² Plaintiffs also
12 submit herewith a declaration from LAAW demonstrating that it is an appropriate Cy Pres
13 Beneficiary and discussing the purposes for which it would use the funds.⁶³

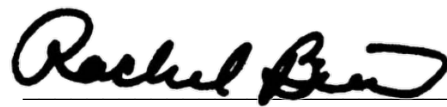
14 **6. Judgment**

15 Per the Tentative, Plaintiffs have created two separate documents for the proposed order
16 and judgment and have emailed Word versions of them to Department 305.

17
18 Respectfully submitted,

19 Dated: January 14, 2025

OLIVIER & SCHREIBER PC
RISSELL LAW, APC

21
22 

23 Rachel Bien

24 *Attorneys for Plaintiffs and*
25 *Aggrieved Employees*

26
27 ⁶² Supp. Bien Decl. ¶ 26.

28 ⁶³ Supp. Bien Decl. Ex. G.