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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

REBECCA DE BENNING, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION,
a Washington Corporation; and Does 1
Through 10, Inclusive,

Defendants.

Case No. 34-2021-00309030
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Jill H. Talley
Department 25

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ORDER GRANTING
FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTERING JUDGMENT**

Hearing Set By Court (10/31/2022 Order)

Date: February 10, 2023
Time: 9:00 a.m.
Dept: 25
Judge: Honorable Jill H. Talley
Complaint filed: September 30, 2021
Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks final approval of a \$9,000,000 wage and hour class and Private Attorneys General Act (PAGA) settlement on behalf of 52,854 non-exempt California employees, for whom it was alleged Defendant Costco Wholesale Corporation (“Costco”), underpaid sick pay wages by failing to correctly calculate the regular rate. Declaration of Jeff Geraci, (“Geraci Decl.”), ¶10.

On December 12, 2022, the Court-approved Notice of Class and Representative Action Settlement (“Notice of Settlement”) was mailed to 52,871 Class Members informing them of their rights and benefits under the Settlement, the number of credited paid sick leave hours, how to dispute those hours and the estimated settlement payment, and the right to request exclusion or file a written objection to the Settlement by January 26, 2023. Declaration of Bryn Bridley on behalf of Atticus Administration, LLC, (“Atticus Decl.”), ¶6, Exh A.

Support for the Settlement is strong. As of this Motion’s filing, there are no objections and only seventeen opt-outs. (Class Members may opt-out/object until January 26, 2023. An updated Administrator declaration will be submitted seven days before the Final Approval hearing.)

II. THE PARTIES, CLASS, AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

Rebecca De Benning worked as a cashier at Costco’s Folsom, Roseville, and Citrus Heights, facilities from June 2013 to March 2021, with several periods off-work on disability. Declaration of Plaintiff Rebecca De Benning, (“De Benning Decl.”), ¶2. Costco is a multinational corporation operating member-only stores selling merchandise and services and is one of the world’s largest retailers. Geraci Decl. ¶12.

B. Class and Aggrieved Employees

Class Members are all non-exempt Costco California employees who, during the period September 30, 2017 through July 6, 2022, (a) earned wages at more than one rate during a week they took paid sick leave, (b) took paid sick leave any time during the period March 2, 2020 through February 28, 2021, or (c) took sick leave any time during the six-month period before receiving an Extra Check. (Employees with seniority received an “Extra Check” every six months based on a formula crediting them for, among other things, sick pay hours.) Geraci Decl. ¶13.

Those who would otherwise be Class Members are excluded if they sued Costco on any claim released or precluded by the Settlement, or for time worked at Costco’s distribution centers (“Depots”), in Tracy and Mira Loma, California. Geraci Decl. ¶14.

Aggrieved Employees are members of the Class who took paid sick leave during the period September 30, 2020 to July 6, 2022 (“PAGA Period”). Geraci Decl. ¶15.

III. PROCEDURAL HISTORY

On August 30, 2021, Plaintiff filed charges with the California Labor and Workforce Development Agency (LWDA), and on September 30, 2021, a class action complaint alleging failure to pay all sick pay and final wages, and unfair business practices Geraci Decl. ¶16.

On November 8, 2021, Plaintiff filed a First Amended Complaint adding claims for PAGA civil penalties (Cal. Lab. Code § 2698, et seq.) for each alleged violation. Geraci Decl. ¶17.

IV. PLAINTIFF’S CONTENTIONS AND COSTCO’S DEFENSES

Employers may calculate sick pay each workweek in the same manner as overtime wages. Labor Code § 246 (l)(1). Plaintiff’s primarily contended Costco failed to add all compensation to hourly wages, such as Extra Checks and Outstanding Service Bonuses, when calculating regular rate for sick pay; and, when employees earned two different rates during a workweek, Costco used the lower rate as the regular rate for sick pay, rather than a blended rate. Geraci Decl. ¶18.

The “Extra Check” is paid every six months based on the number of hours employees are “credited” with, including vacation, holiday, sick, regular, and hours worked on Sundays. Costco paid a monthly “Outstanding Service Bonus” to employees who worked during the start of the pandemic, February 28, 2020 to March 2, 2021. Geraci Decl. ¶19.

Costco contended there was a high probability the sick pay claim under Labor Code § 246 might be dismissed. *Rudolph v. Herc Rentals*, 2021 U.S. Dist. LEXIS 244970, *7, 14 (C.D. Cal. August 27, 2021). (“This Court, too, finds that no private right of action exists for violations of California Labor Code section 246,” or as the basis for a PAGA claim); *Phoung v. Winco Holdings, Inc.* (E.D.Cal. Aug. 23, 2022, No. 2:21-cv-2033-MCE-JDP) 2022 U.S.Dist.LEXIS 151127, at *18 (“no private right of action” for section 246.) Plaintiff argued the claims would be allowed to proceed under PAGA or as a predicate for a section 17200 claim. Geraci Decl. ¶20.

Costco contended 90% of its unionized employees were exempt from sick leave laws because they satisfy the requirement of earning more than 130% of minimum wage. § 245.5. Plaintiff argued this exemption is triggered only when all covered employees are exempt. *Div. of Labor Stds. Enf't v. Save Mart Supermarkets*, 2022 U.S. Dist. LEXIS 50422, *14-15 (C.D. Cal. March 21, 2022). Geraci Decl. ¶21.

Plaintiff contended, although sick hours were included when calculating the Extra Check, (along with several other types of work and non-work hours), no part of the Extra Check could substitute for, or offset, the obligation to provide sick pay at the correct regular rate. Costco argued, because sick hours were included in the calculation, employees were already receiving additional compensation in the Extra Check for the number of sick hours taken. Geraci Decl. ¶22.

Plaintiff contended the sick pay claim supported a failure to pay all final wages claim. Costco pointed out there are no cases finding this, and argued it cannot be liable for waiting time penalties because, any alleged underpayment of sick pay wages was not willful. Geraci Decl. ¶23.

V. DISCOVERY, INVESTIGATION, AND MEDIATION

Plaintiff conducted sufficient investigation and informal discovery to evaluate the strengths and weaknesses of her claims and Costco's defenses. Geraci Decl. ¶24.

For mediation, Defendant provided sick leave policies effective during the class period, formula used to calculate sick pay, random sample of complete data for 100 employees, aggregate data showing number of putative class members, total number of hours employees received sick pay, and number of pay periods sick leave was received and two different rates were paid, an Outstanding Service Bonus was paid, or to which an Extra Check could have applied. Counsel conferred extensively about data, claims and defenses, and issues for settlement. Geraci Decl. ¶25.

With significant investigation, research, discovery, and analysis of data by Plaintiff's damages consultant, the Parties mediated with Mark S. Rudy, Esq., perhaps the preeminent mediator of wage and hour class actions, on April 7, 2022. After a full day of arms'-length negotiations, the matter was settled in principle. The Parties negotiated all necessary terms and entered the Class and PAGA Action Settlement Agreement, ("Agreement"), preliminarily approved by this Court on October 31, 2023. Geraci Decl. ¶26.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

Subject to Court approval, Costco will pay a Gross Settlement Amount (“GSA”) of \$9,000,000, which includes all the following: (a) settlement administration costs to Atticus up to \$128,682; (b) attorneys’ fees of \$3,000,000 (one-third of the GSA) [apportioned 50/50 between Class Counsel with Plaintiff’s consent. Geraci Decl. ¶28]; (c) litigation costs of \$18,335; (d) Class Representative service payment of \$10,000; and (e) PAGA payment of \$300,000 (\$225,000 to the LWDA (75%), and \$75,000 (25%) to Aggrieved Employees). Costco will pay employer’s share of payroll taxes in addition to the GSA. Geraci Decl. ¶27.

After approved deductions, the estimated \$5,541,318 Net Settlement Amount (“NSA”) will be distributed pro rata to Settlement Class Members based on number of sick leave hours taken by each Class Member in relation to total number of sick leave hours taken by all Class Members. Aggrieved Employees will receive payments based on the number of pay periods worked during the PAGA Period in relation to the total number of pay periods worked by all Aggrieved Employees during that Period. Geraci Decl. ¶29.

The 52,854 Class Members will receive an average estimated payment of \$104, and highest payment of \$380, upon Approval. Plaintiff’s estimated individual settlement amount is \$119. (rounded to nearest dollar) Geraci Decl. ¶30; Atticus Decl. ¶16.

The 45,784 Aggrieved Employees will receive a share of the \$75,000 PAGA Payment based on Pay Periods worked during the PAGA Period, even if they request exclusion, as no right exists to opt out of a PAGA Settlement. Geraci Decl. ¶31; Atticus Decl. ¶¶4, 18.

No portion of the GSA will revert to Costco under any circumstances. After 180 days of issuance, the uncashed checks shall be voided and the principal for those uncashed checks shall be transmitted 50% to the Los Angeles Center for Law and Justice and 50% to Legal Aid at Work, two non-profit legal entities, to further the objectives of the underlying class action, or promote the law consistent with the objectives of the underlying class action. Geraci Decl. ¶32.

Settlement payments are characterized as 60% penalties and interest (Form 1099), 40% wages (W-2), with PAGA Payments as penalties (Form 1099). Geraci Decl. ¶33.

B. Preliminary Approval, Notice to the Class, and Response

1. Preliminary Approval and Class Notice

On October 31, 2023, the Court preliminarily approved the proposed Settlement (ROA #41). Geraci Decl. ¶34. On December 12, 2022, after searching the National Change of Address database, and updating Class Member addresses, the Settlement Administrator mailed a Notice of Settlement to all Class Members. The Notice Packet informed them of (1) the pendency of the Action; (2) proposed settlement terms; (3) automatic payment of Settlement shares if exclusion not requested; (4) released claims; (5) right to object or request exclusion, and (6) date, time and place of the final approval hearing. Geraci Decl. ¶35; Atticus Decl. ¶6, Exh. A.

2. The Class' Response to the Notice

The Class response to the Settlement was extremely favorable. No objections and only seventeen requests for exclusion were received. Geraci Decl. ¶¶11, 36; Atticus Decl. ¶¶12, 13.

The Court determined the first three Dunk factors were met when it granted preliminary approval: (1) the settlement was reached through arm's-length bargaining; (2) investigation and discovery allowed counsel and the court to act intelligently; and, (3) counsel was experienced in similar litigation. The fourth factor could not be known until the Class had notice and an opportunity to respond. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801-1802 (1996).

The fourth *Dunk* factor was established when the Class, after receiving notice, and having an opportunity to respond, overwhelmingly approved the Settlement.

VII. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

The Preliminary Approval Motion thoroughly analyzed the terms of the proposed Settlement in light of *Dunk*, (establishing factors supporting a presumption of fairness); and *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008), (establishing factors determining whether a settlement is in the Class' best interest, is adequate, and reasonable). The Court carefully reviewed and ruled on these analyses and they are fully incorporated here by reference. *See*, Preliminary Approval Motion, at 7:7 – 11:28 (ROA #26).

Nothing has changed since Preliminary Approval to negate the presumption of fairness and Class Counsel remains convinced the Settlement is in the Class' best interest.

VIII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Class Counsel requests attorneys' fees of \$3,000,000, one-third of GSA, and litigation costs of \$18,335. Counsel expended 479 hours, a \$375,468 lodestar. Geraci Decl. ¶¶37, Exh. 1 – Summary of Time & Costs; Exh. 2 – Costs; Declaration of Sahag Majarian II, ¶¶10, 11.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An excellent result was achieved, enforcing the law and providing benefits to the Class.

The Class was provided notice of all settlement terms, including that Counsel would request an award of attorneys' fees up to one-third of the GSA, \$3,000,000.00. Atticus Decl. ¶6, Exh. A, ¶14. No Class Member objected to the attorneys' fees award. *Id.* at ¶13.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement, also known as the "common fund" method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts look to federal courts analyzing class issues. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001)).

"[T]he lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000); *Dunk*, at 1808 (attorneys' fees may be calculated as percentage of common fund where settlement amount is certain or easily calculable).

A common fund fee award is especially appropriate here as it spreads the attorneys' fees among all beneficiaries of the fund; aligns incentives between counsel and the class; better approximates market conditions in a contingency case; and encourages class counsel to seek early settlement and avoid unnecessarily prolonging litigation, which prevents unnecessary use of judicial and party resources, delay in correcting alleged unlawful practices, and delay in compensating the class. *Laffitte*, 1 Cal.5th at 503.

1 With the guiding principle that early class action settlements are favored and may not
2 diminish an award of attorneys' fees, Class Counsel submits the fee request should be awarded,
3 based on the risks and complexities of prosecuting the action, the contingent nature of any fee,
4 their experience in handling cases of this type, fees commonly awarded in these cases, and
5 vindication of the Class' rights.

6 The purpose of the common fund approach is to "spread litigation costs proportionally
7 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone."
8 *Vincent, supra*, 557 F.2d at 769. "[O]ne who expends attorneys' fees in winning a suit which
9 creates a fund from which others derive benefits may require those passive beneficiaries to bear
10 a fair share of the litigation costs." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). The
11 common fund doctrine has been applied "consistently in California when an action brought by
12 one party creates a fund in which other persons are entitled to share." *City and County of San*
13 *Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

14 Class Counsel undertook representation at their own expense, with compensation wholly
15 contingent upon providing a Class benefit. Class Members will benefit from the proposed
16 Settlement and receive monetary payments. Based on the defined and clearly traceable Class
17 benefit, the Court may award a percentage of the common fund as attorneys' fees.

18 **C. One-Third of the Common Fund is a Reasonable Fee**

19 "California courts routinely award attorneys' fees of one-third of the common fund."
20 *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017). Several
21 studies of class action fee awards found median common fund fee awards are about one-third of
22 the total settlement fund and this has been accepted by California courts. See, e.g., *Chavez v.*
23 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("fee awards in class actions average around
24 one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, Common Funds and
25 Common Problems: Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 546
26 (1998); T. Willging, L. Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal
27 District Courts: Final Report to the Advisory Committee on Civil Rules, 90 (1996) (class action
28 attorneys' fees are generally about "one-third of total settlement").

Counsel's request for one-third of the common fund is in the mid-range of awards which range from 20% to 50%, and is fair compensation for undertaking complex, risky, litigation on a contingent basis, and for the result achieved for the Class. Geraci Decl. ¶38.

Some courts have found an award of 33% of a common fund is the "benchmark" in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) ("These percentages compare favorably with" the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013). Class Counsel's fee request is consistent with awards in similar California cases, and market rates, and is reasonable.

Cohelan Khoury & Singer has routinely been awarded attorneys' fees of one-third of a common fund in wage and hour class actions, including: *Schaffer v. Rady Children's Hospital – San Diego, et al.*, San Diego County Superior Court, Case No. 2015-00022978 [Hon. Joel R. Wohlfeil – approving attorneys' fees of \$4,166,666, one-third of \$12,500,000 settlement in a certified wage and hour class action]; *McGrath v. Wyndham Resort Dev. Corp.*, [S.D. Cal. Jan. 30, 2018, No. 15cv1631 JM (KSC)] 2018 U.S. Dist. LEXIS 16095*24 [Hon. Jeffrey T. Miller – approving attorneys' fees of \$2,416,666.67, one-third of \$7,250,000 settlement in a pre-certification wage and hour class action]; *Rodriguez v. Healthcare Partner Medical Group, Inc.*, Los Angeles County Superior Court, Case No. BC541313 [Hon. Kenneth Freeman – approving attorneys' fees of \$2,000,000, one-third of \$6,000,000 settlement in a pre-certification wage and hour class action]; *Gutierrez v. Save Mart Supermarkets*, San Mateo County Superior Court, Case No. CIV530955 [Hon. Marie S. Weiner – approving attorneys' fees of \$1,666,666.67, one-third of \$5,000,000 in a certified wage and hour class action]; *Vaquero v. Stoneledge Furniture LLC*, Los Angeles County Superior Court, Case No. BC522676 [Hon. Elihu M. Berle – attorneys' fees of \$1,300,000, one-third of \$3,900,000 in certified wage and hour class action]; and *Popal v. Wells Fargo Bank, National Associate*, San Diego County Superior Court, Case No. 37-2020-00038101 [Hon. Gregory W. Pollack – approving attorneys' fees of \$1,000,000, one-third of \$3,000,000 settlement in pre-certification wage and hour class and representative action]. Geraci Decl. ¶39.

1 In very large settlements, courts have awarded fees of 30%, rather than one-third.
2 *Gallen v. Gambro Healthcare, Inc.*, Orange County Superior Court, Case No. 04CC00571
3 [Hon. Nancy Wieben Stock –attorneys’ fees of \$5,250,000, 30% of \$17,500,000 settlement in
4 pre-certification wage and hour class action]; *Fairley v. Kaiser Foundation Hospitals*, Alameda
5 County Superior Court, Case No. RG19021099 [Hon. Evelio Grillo –attorneys’ fees of
6 \$6,555,000, 30% of \$21,850,000 settlement in pre-certification wage and hour class action].
7 Geraci Decl. ¶40.

8 **D. A Lodestar Cross-Check is Not Required**

9 Many Courts decline to consider a lodestar cross-check. See, *Glass v. UBS Financial*
10 *Services, Inc.*, No. 06-4066-MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) (“no
11 need to conduct a lodestar cross-check [as] [c]lass counsel’s prompt action in negotiating a
12 settlement while the state of the law remained uncertain should be fully rewarded”); *Lopez v.*
13 *Youngblood*, No. 07-0474-DLB, 2011 U.S. Dist. LEXIS 99289 (E.D. Cal. Sep. 1, 2011) (“lodestar
14 cross-check is not required in this circuit, and in a case such as this, is not a useful reference.”)

15 Even when used, a cross-check “calculation need entail neither mathematical precision
16 nor bean-counting,” is not a “full-blown lodestar inquiry,” and “can be performed with a less
17 exhaustive cataloguing and review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp.*,
18 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

19 Under the lodestar method, a base fee is calculated from compilation of time reasonably
20 spent on the case and the reasonable hourly compensation of the attorneys. *Serrano v. Priest*,
21 *supra*, at 48. The court then enhances the lodestar by a “multiplier” to account for a range of
22 factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of
23 success achieved. *Id.*, at 49; see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001).

24 **E. Counsel’s Hourly Rates Are Reasonable**

25 Class Counsel are entitled to hourly rates charged by attorneys of comparable experience,
26 reputation, and ability for similar litigation. *Ketchum, supra* at, 1133; *Children’s Hospital and*
27 *Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as “within the range of
28 reasonable rates charged by and judicially awarded comparable attorneys for comparable work”).

When determining reasonable rates, Courts may consider attorney skill and experience, nature of the work performed, and the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

Class Counsel's skill and experience support their hourly rates and are in line with rates typically approved in California wage and hour class actions. Geraci Decl. ¶¶2-9, 44; Majarian Decl. ¶¶2-4, 10. Cohelan Khoury & Singer's practice is limited to litigating class and representative actions on behalf of employees and consumers, and has been appointed Class Counsel or co-Class Counsel in over 300 such cases. Geraci Decl. ¶¶6, 8-9, 45. Mr. Majarian has devoted a significant portion of his practice to employment law and class actions, and has been appointed co-class counsel for plaintiff in no less than 300 wage and hour class actions. Majarian Decl. ¶¶2, 3.

Class Counsel's skill and experience support their hourly rates: Cohelan Khoury & Singer: Founding Partners, Timothy D. Cohelan Isam C. Khoury - \$900; Managing Partner, Michael D. Singer - \$900; Partner, Jeff Geraci - \$790; Law Offices of Sahag Majarian II: Principal, Sahag Majarian II - \$850, Associate, Garen Majarian - \$375. These rates are in line with those typically approved in California wage-and hour class action litigation. The Laffey Matrix would actually provide for a rate increase. (Cohelan Khoury & Singer: Founding Partners, Timothy D. Cohelan, Isam C. Khoury, 20+ years' experience - \$997; Managing Partner, Michael D. Singer 20+ years - \$997; Partner, Jeff Geraci 20+ years - \$997. Law Offices of Sahag Majarian II: Principal Sahag Majarian II, 20+ years' - \$997; Associate, Garen Majarian 1-3 years - \$413). Geraci Decl. ¶47, Exh. 3 - Laffey Matrix; Majarian Decl. ¶10.

F. Plaintiff's Counsel's Total Hours are Reasonable

Hours are reasonable if, "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

G. Lodestar Multiplier

When a lodestar is used it may be enhanced by a multiplier. *Serrano III*, 20 Cal.3d at 48. Factors determining level of enhancement include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Lealao* at 49. The list is not exhaustive and a Court may consider other factors it deems important in setting the multiplier. *Id.* at 40; *Ketchum, supra* at 1139.

In *Lealao*, the Court held a trial court's refusal to enhance the lodestar was an abuse of discretion, remanded for consideration of the original 8.0 request, and opining a multiplier more than 3.5 was reasonable. *Lealao, supra*, 82 Cal. App. 4th at 24, 52. See *SternwestCorp. v. Ash*, 183 Cal.App.3d 74, 76 (1986) (case remanded with directions "to enhance the lodestar award...");

To the extent a lodestar was used to check the fee, a multiplier is supported by the novelty and difficulty of the questions involved, the skill displayed by Class Counsel in addressing them, the judgment and skill used to resolve them while the law remains uncertain, and the contingent nature of any recovery.

H. Litigation Expenses Are Reasonable

The Settlement allows Class Counsel to recover up to \$20,000 in costs. Counsel seeks \$18,335, in reasonable and necessary costs. Geraci Decl. ¶49, Exh. 2 – Costs; Majarian Decl. ¶11.

IX. THE PROPOSED PAGA PAYMENT IS REASONABLE

The settlement of PAGA penalties for \$300,000.00, of which \$225,000.00 (75%) will be paid to the LWDA and \$75,000.00 (25%) to aggrieved employees, is reasonable and appropriate. The Parties negotiated a good faith amount for PAGA penalties, which was not the result of self-interest at the expense of Class Members. Geraci Decl. ¶50. Where a "good faith amount" is negotiated and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," it is generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900, at *25 (N.D. Cal. Apr. 3, 2009).

The amount allocated to PAGA is within the range, or higher, than other settlements. See *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d at 1101, citing, among others, *Ceja-Corona v.*

CVS Pharm., Inc., 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (\$10,000 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, *5-6 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA penalties, \$2.5m settlement); *Garcia v. Gordon Trucking*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. 2012) (\$10,000 PAGA, \$3.7m settlement).

Class Counsel provided the LWDA with the Motion for Preliminary Approval and the Agreement. The LWDA did not object. Geraci Decl. ¶51, Exh. 4 – LWDA, August 17, 2022 Confirmation of Receipt. The LWDA was served with this Final Approval Motion when filed. Geraci Decl. ¶53, Exh. 5 – LWDA Confirmation.

X. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED

Service awards “are fairly typical in class action[s],” “to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action.” *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394.

Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971).

Enforcement of laws protecting California employees would be “random and fragmentary,” or non-existent, if no one was willing to come forward and spend time to work on behalf of others, and perhaps most importantly, take risks those others do not bear.

Class action plaintiffs, not class members, risk a judgment for defendant’s costs. “Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). The *Earley* court contended this risk was balanced by potential reward.

1 “While imposition of the entire cost burden on the named plaintiffs may have a chilling
2 effect on the willingness of plaintiffs to bring class action suits, this effect easily may be
3 outweighed by the potential recovery.” *Id.* Plaintiff’s recovery in a class action will always be less
4 than an individual action, take longer to obtain, and have no potential for early settlement.

5 So, if “[t]hose who choose to take the risks of litigation should be the ones who bear the
6 cost when they are unsuccessful,” how can that risk be offset? *Id.* An adequate Service Award.

7 Ms. De Benning more than satisfied her obligation to be available when asked and work
8 with counsel to protect the interests of the Class and place them above her own. Accepting the
9 risk of judgment for Defendant’s costs, the potential loss of employment opportunities, or
10 achieving compensation for the Class, are each sufficient to support a Service Award of \$10,000.
11 De Benning Decl. ¶¶3-17. Together, they are more than sufficient.

12 It is impossible to know, or intervene, each time a class action plaintiff loses an
13 employment opportunity, making it essential to compensate them at final approval, the only time
14 the risk they took can be at least slightly offset and they can be adequately compensated.

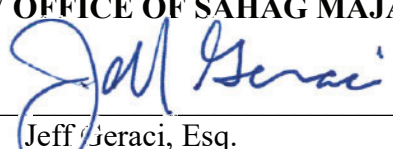
15 The Class received notice Plaintiff requested \$10,000 for “prosecuting this case,
16 undertaking risks for the payment of costs in the event this case had been lost, and a general
17 release of all her claims.” Atticus Decl. ¶6, Exh. A, ¶14. No Class Member objected. *Id.* at ¶13.

18 **XI. CONCLUSION**

19 The Settlement favorably resolves what would otherwise be uncertain litigation.
20 Class Counsel respectfully requests the Court grant final approval of the proposed Settlement,
21 approve the Service Award, attorneys’ fees and costs, and administration expenses as requested.

22 **COHELAN KHOURY & SINGER**
23 **LAW OFFICE OF SAHAG MAJARIAN II**

24 Dated: January 19, 2023

25 By: 
26 Jeff Geraci, Esq.

27 Attorney for Plaintiff REBECCA DE BENNING, on
28 behalf of herself and all others similarly situated