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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MIGUEL ANGEL RUBALCABA, individually and on behalf of all others similarly situated, Plaintiff, vs. FIRST TO SERVE; and DOES 1 through 20, inclusive, Defendants.	Case No. 21STCV39015 *Assigned for all purposes to:* *Judge: Hon. William F. Highberger* *Dept.: 10* **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF PRIVATE ATTORNEYS GENERAL ACT REPRESENTATIVE ACTION SETTLEMENT** Date: February 19, 2025 Time: 2:00 p.m. Dept.: 10

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff Miguel Angel Rubalcaba ("Plaintiff") seeks approval of a settlement of claims under the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq*. ("PAGA") against Defendant First to Serve, Inc. ("Defendant") in the amount of $375,000.00. Plaintiff alleges approximately 613 non-exempt employees who worked for Defendant were not paid wages for all hours worked, not provided with meal periods or compensation in lieu thereof, not provided with rest breaks or compensation in lieu thereof, were not paid all wages owed within the required time and upon separation of employment, and not provided with accurate wage statements.

Under Labor Code § 2699(l)(2), the Court must review and approve any proposed PAGA settlement. Here, the Parties entered into a binding Memorandum of Understanding ("MOU") to settle this case on a PAGA basis. The MOU is sufficient to deter and punish future violations, and is attached to the Declaration of Alex J. Valle ("Valle Decl.") as Exhibit 1, and the proposed letter to be sent to the PAGA Members is attached hereto as Exhibit 2. Plaintiff now seeks this Court's approval of the MOU terms.

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2021, Plaintiff's counsel sent a letter to the California Labor & Workforce Development Agency ("LWDA") via online submission and to Defendant via certified mail regarding Defendant's alleged violations. (Valle Decl., ¶ 3, Exhibit 4.) The LWDA did not respond to this notice within 65 days, indicating it did not intend to investigate, thus allowing Plaintiff to file the instant lawsuit pursuant to Labor Code Section 2699.3(a)(2)(A). (*Id.*)

That same day, Plaintiff filed his class action Complaint against Defendant for failure to pay minimum wages; failure to pay overtime wages; failure to provide meal periods; failure to permit rest breaks; failure to pay all wages due within the required time and upon separation of employment; and violation of Business and Professions Code §§ 17200 *et seq.* against Defendant in the Los Angeles County Superior Court. (Valle Decl., ¶ 4.) On March 3, 2022, Plaintiff filed his First Amended Complaint ("FAC") adding a cause of action against Defendant for Enforcement of Labor Code Private § 2698 *et seq.* ("PAGA"). (*Id.*)

Due to the presence of arbitration agreements that Plaintiff and putative class members allegedly signed, Defendant filed its motion compelling arbitration, arguing that Plaintiff was required to arbitrate his individual and class claims. (Valle Decl., ¶ 5.) On August 19, 2022, the Court compelled Plaintiff's individual claims to arbitration, struck the class claims, and stayed the PAGA claims. (*Id.*)

Plaintiff initiated arbitration. (Valle Decl., ¶ 6.) Before conducting an evidentiary hearing in individual arbitration, the Parties agreed to attend a private mediation session. (*Id.*) Prior to mediation, Defendant produced its employee handbook and other employment policies; Plaintiff's personnel file, timekeeping and payroll records; and the timekeeping and payroll records of other employees. (*Id.*) Plaintiff retained an expert to review the records and calculate potential PAGA damages. (*Id.*)

The Parties attended private mediation on February 20, 2024, with mediator Gig Kyriacou. (Valle Decl., ¶ 7.) After arms-length negotiations and bargaining, the Parties reached an agreement to settle and signed a binding MOU the same day, which is the subject of the instant motion. (*Id.*, Exhibit 1.) Although the MOU contemplates that the Parties would submit a long form settlement agreement, the Parties were not able to due to Defendant's insistence that it could not afford the agreed-upon payment plan. (*Id.*) The Parties, however, intended the MOU to be binding. (*Id.*, Exhibit 1 at ¶ 20.) In accordance with the terms of the MOU, Plaintiff now moves for settlement approval based on its terms. Plaintiff provided notice of the MOU to the LWDA. (*Id.* at ¶ 8.)

III. PAGA REQUIREMENTS

Based on the California Supreme Court's opinions in *Arias v. Superior Court* (2009) 46 Cal. 4th 969, and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, plaintiffs can seek appropriate civil penalties as called for under PAGA on behalf of the State of California and other similarly aggrieved employees without seeking class certification or meeting the requirements of class certification (i.e. numerosity, typicality, commonality and adequacy). As such, the class action two-step preliminary and final approval process is not required.

PAGA was enacted to allow enforcement of the Labor Code and recovery of penalties by the State and by private individuals who have been aggrieved by their employers. The statute calls for 75% of any penalties recovered to be paid to California's LWDA and the remaining 25% to the aggrieved employees (Lab. Code § 2699(i).)

In order to enforce and seek penalties under PAGA in a civil action, an aggrieved employee must first provide written notice to the LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the employer has violated. (Labor Code § 2699.3(a)(l)(A).) Once the LWDA notifies the aggrieved employee that it does not intend to investigate the alleged violations, or if the LWDA does not respond within a certain time period, the aggrieved employee is then allowed to proceed in a civil action against the employer on behalf of the LWDA and all other similarly aggrieved employees. (Labor Code § 2699.3(a)(2)(A).)

In 2009, the California Supreme Court considered the issue of whether an aggrieved employee who brings a PAGA representative claim needs to meet class certification requirements. (*Arias, supra*, 46 Cal. 4th at 976.) After a substantial review of the legislative history of PAGA, the Court held that an aggrieved employee's representative action brought on behalf of other aggrieved employees against an employer for PAGA violations does not need to meet the requirements for class certification. (*Id*. at 975, 980-88.) As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of California's labor law enforcement agencies. (*Id*. at 986.) Because the employee's PAGA action functions as a substitute for an action brought by the government itself, a judgment in the PAGA action binds all those who would be bound by a judgment in an action brought by the government. (*Id.*)

Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court need only "review and approve" the settlement. (Lab. Code § 2699(1)(2).) The Parties to this current PAGA action have reached such an agreement and now seek this Court's approval of the proposed settlement.

IV. THE SETTLEMENT TERMS AND DISTRIBUTION OF PENALTIES

Defendant will pay $375,000 to settle this PAGA case. (Valle Decl., Exhibit 1, ¶ 2.)[1] The Maximum Payment will provide for (1) civil penalties under PAGA to the LWDA and to the PAGA Members; (2) attorneys' fees to Class Counsel of up to one-third of the Gross Settlement Fund; (3) reimbursement of Class Counsel's litigation costs and expenses of $23,225.50;[2] (4) a representative

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[1] The MOU also includes a payment of $15,000 for Plaintiff's individual settlement. Valle Decl., Exhibit 1, ¶ 6. This amount will be paid separately from the $375,000 Maximum Payment.

[2] The Parties agreed that Plaintiff's counsel could seek reimbursement for expenses not to exceed $25,000. After compiling all outstanding litigation expenses, Plaintiff's costs do not exceed $23,225.50

award of up to $5,000.00 to Plaintiff in addition to his amount under the Settlement; and (5) Settlement Administration costs not to exceed $6,000. (*Id.*, at Exhibit 1, ¶¶ 2(a), 4-8.)

After deducting the above amounts, the remaining amount ("Net Settlement Amount") will constitute PAGA Penalties in which 75% will be paid to the LWDA and 25% will be paid to the PAGA Members. The PAGA Members are all current and former non-exempt employees of Defendant from October 21, 2020 through February 20, 2024. (Valle Decl., Exhibit 1, ¶ 1.) If the actual number of pay periods at the end of the PAGA Period is 10%, or greater than the 17,859 payroll periods represented by Defendant, the Maximum Payment will be increased on a pro rata basis equal to the increase in number of payroll periods. (*Id.*, Exhibit 1 at ¶ 2(d).) Funds from uncashed or returned checks will be sent to the cy pres charity Justice Gap Fund. (*Id.*, at ¶ 9, Exhibit 1 at 10(d).)

Plaintiff further proposes as follows: (1) individual payments shall be paid to the PAGA Members pro rata based on the number of pay periods worked; (2) the administrator shall pay the PAGA Members by way of a single check which will be valid for 180 days, and characterized as penalties for tax purposes and reported on an IRS Form 1099; (3) prior to this disbursement, the administrator shall check the PAGA Members' addresses provided by Defendant using the National Change of Address database; (4) for any returned payments without a forwarding address, the administrator shall run a skip trace; and (5) mailing the notice in English and Spanish.

Plaintiff will release all claims against Defendant and a Civil Code § 1542 waiver will be applied. (Valle Decl., Exhibit 1, § 6.) The Parties also agreed that PAGA Members and the State of California should release, as of the date of the approval hearing, Defendant from "all claims, rights, demands, liabilities and causes of action for PAGA Penalties as asserted in the" operative complaint. (*Id.*, Exhibit 1, at § 3.) This release is consistent with the law. (*See Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537-539, 541.)

V. THE SETTLEMENT IS FAIR AND REASONABLE

A. Standard for Approval.

While there are no statutory or common law standards for approval of PAGA settlements, the legislative history of the Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et. seq.* ("PAGA") sheds some light on the approval requirement as it was phrased in § 2699, subdivision (l) prior to the July 1, 2016 and 2024 amendments. (Lab. Code § 2699(l) (2015) (amended 2016) ("The superior court shall review and approve any penalties sought as part of a proposed settlement…").)

PAGA was passed by the legislature as Senate Bill ("SB") 796, and it was signed by the Governor and filed with the Secretary of State on October 12, 2003. (Legislative Counsel's Digest re Senate Bill No. 796, attached as Exhibit A to the Request for Judicial Notice ("RJN") filed herewith.) It took effect on January 1, 2004. The original version of the act did not contain the court approval requirement now codified in § 2699(l). That subdivision was added as part of the amendments to the Act that were introduced as SB 1809 in February of 2004 and signed by the Governor and filed with the Secretary of State on August 11, 2004. (*See* Exhibit B to the RJN, p. 91.) Those amendments took effect immediately, and the court approval requirement of § 2699(l) was one of the provisions that the legislature made retroactive to January 1, 2004. (*Id.* at pp. 1-2.)

Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments (SB 1809). (*See* RJN, Exhibits. A & B.) On July 29, 2004, during the consideration of the amendments in SB 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was published in the Senate Daily Journal, "to clarify the intent of subdivision (l)" of what would become § 2699. (*See* 7/29/04 Letter from Sen. Dunn to Sen. Burton, attached as Exhibit C to the RJN.) He was sending this letter "in response to an issue raised by the Judicial Council of California." (*Id.*) In the letter, Senator Dunn stated that:

> The purpose of court review of the penalties in subdivision (l) is to ensure that settlements involving penalties arising under Labor Code Section 2699 do not undercut the dual statutory purposes of punishment and deterrence, or result in unjust, arbitrary, and oppressive, or confiscatory settlements.

(RJN, Exhibit C.)

To Plaintiff's knowledge, this is the only statement in the legislative history directly addressing the purpose of the court approval requirement. (Valle Decl., ¶ 10.) While the letter does not address any specific factual issues to be considered, it does provide some very broad criteria. It suggests that courts consider whether penalties are so small as to "undercut the dual purposes of punishment and deterrence" or so large that they may result in an "unjust, arbitrary and oppressive, or confiscatory" settlement. (RJN, Exhibit C.)

These broad criteria appear to give the Court wide latitude in determining whether to approve the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on the effect the penalties may have on the defendant/employer rather than the LWDA or the aggrieved employees who will receive the penalties. This is different than the analysis of a class action settlement, which typically focuses on the amount received by the class and compares that to the reasonable range of potential outcomes in the case. (*See, e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130; *Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399, 407.)

B. <u>The Settlement Meets the Standard for Approval.</u>

The $375,000.00 Settlement Sum is reasonable when considered in light of the principles discussed in Senator Dunn's letter. For a group of approximately 613 employees, a penalty of $375,000 is large enough to punish Defendant for alleged past violations and deter future violations. (Valle Decl., ¶ 11.) Before the division of payment between Aggrieved Employees and the LWDA, the settlement amount is equivalent to a penalty of about $615.00 per employee or $21.00 per pay period. (*Id.*) At the same time, the penalty amount is not so large as to be unjust, oppressive or confiscatory, considering the company's potential exposure. (*Id.*) The Maximum Payment is also reasonable in light of the facts of the present action, the real risk that no PAGA penalties would be paid, and inherent risks and uncertainties associated with PAGA claims. (*Id.*)

When calculating civil penalties under PAGA, Plaintiff applied the penalty amounts associated with initial violations for each pay period where a violation occurred. This is because a defendant is not subject to heightened penalties for any Labor Code violations unless it is "notified by the Labor Commissioner or any court that it [is] subject to the California Labor Code." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.) Here, Plaintiff's counsel did not find any prior PAGA or LWDA actions against Defendant. (Valle Decl., ¶ 12.) As such, heighted penalties were not warranted. (*Id.*)

Defendant provided Plaintiff's counsel with the timekeeping and pay records for the PAGA Members, which was analyzed by an expert hired by Plaintiff's counsel. (Valle Decl., ¶ 6.) The Parties estimate that there are 17,859 Pay Periods for all employees. (*Id.* at ¶ 13.) If the Court allowed stacking of different types of penalties in each PAGA Pay Period and Plaintiff could recover penalties for every violation, then the maximum potential exposure would be as follows:

- 10,587 Pay Periods x $100 x 100% violation rate (for unpaid regular and overtime wages due to Defendant's alleged requirement of employees to complete COVID-19 health screenings before work through the end of 2022) = $1,058,700.00 for unpaid wages violations;
- 17,859 Pay Periods x $100 x 16.0% violation rate (for meal periods violations [late, short, or interrupted] allegedly shown in the time records) = $285,700.00 for meal period violations;
- 17,859 Pay Periods x $100 x 50% violation rate (for allegedly conditioning rest breaks upon supervisor approval, but failing to provide adequate coverage to actually provide breaks) = $892,900.00 for rest break violations;
- 17,859 Pay Periods x $100 x 100% violation rate (for derivative wage statement penalties) = $1,785,900.00 for wage statement violations; and
- 216 separated employees x $100 x 100% violation rate (for derivative waiting time penalties) = $21,600.00 for waiting time violations.

(*Id.*)

In negotiating the settlement, Plaintiff's counsel also assessed the risk of whether Plaintiff would prevail in arbitration, and whether the arbitrator would decide that he was an aggrieved employee. (Valle Decl., ¶ 14.) Failing to prevail at arbitration would likely foreclose Plaintiff from recovering any penalties on behalf of himself or other employees under PAGA. (*Id.*) As to the PAGA claims, Plaintiff assessed the risks involved with proceeding with PAGA litigation, as Defendant disputed the expert's calculations, and argued it could defeat Plaintiff's claims: (1) through declarations and testimony from employees that they actually took timely rest breaks and meal periods, and did not work before their shifts; (2) by showing employees completed timesheets voluntarily, and input the time actually worked and meal periods actually taken to defeat meal period and unpaid wages claims; (3) because the actual amount of recorded meal period violations was low; and (4) by showing there would be no PAGA penalties for derivative §§ 203 and 226 claims if Plaintiff failed to prove the other claims. (*Id.,* ¶¶ 15, 16.) Furthermore, Defendant provided its financial records to Plaintiff's counsel, who reviewed them, and confirmed that Defendant is a non-profit organization with a significant amount of its revenue coming from government grants that would affect Defendant's ability to pay a large settlement. (*Id.* at ¶ 15.) Plaintiff's counsel assessed the reasonableness of the settlement with significant consideration to the financial records, including the likelihood of recovery should this matter proceed to trial. (*Id.*)

Another crucial factor in evaluating the value of a PAGA-only case is that all PAGA awards are discretionary and can be reduced by the Court. The Court can reduce the PAGA penalties "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code § 2966(e)(2).) In other words, were this matter to go to trial, any award granted would be at the discretion of the Court.

Plaintiff recognizes that, although he believes there would be no persuasive grounds to reduce the penalties, the Court could determine otherwise and significantly reduce the PAGA penalties, especially given that Defendant operates a non-profit organization that provides services to homeless individuals and domestic violence transitional housing, and has not previously been sued for wage and hour violations. (Valle Decl., ¶¶ 12, 17.) The wide range of potential recovery and the additional delays and risks of trial justified settling at this point for a reasonable amount of recovery. (*Id.*)

VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEY'S FEES

For their efforts and the substantial risks Plaintiff's counsel undertook in obtaining a common fund settlement that benefits the LWDA and PAGA Members, the Parties allocated one-third of the Maximum Amount to Plaintiff's counsel for reasonable attorneys' fees, plus actual litigation costs. These fees are warranted under law and within the range of fees commonly awarded in similar cases.

A. Plaintiff's Counsel Is Entitled to Recover Attorneys' Fees Under the Common Fund Doctrine in This Quasi Qui Tam Action.

PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and costs under Labor Code § 2699(g)(1), which provides that "[a]ny employee who prevails in any action shall be entitled to an award of attorneys' fees and costs, including any filing fee paid pursuant to . . . Section 2699.3." As discussed below, in a qui tam action, reasonable attorneys' fees and costs are typically awarded under the common fund doctrine, where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

A PAGA action is a quasi qui tam action because the statute allows the employee plaintiff, acting as the proxy of the state's labor law enforcement agency, to sue his employer for Labor Code violations and recover civil penalties that otherwise would have been assessed and collected by the LWDA. (*Iskanian*, *supra*, 59 Cal. 4th at 380.) "A PAGA representative action is therefore a type of *qui tam* action." (*Id.* at 382.) Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state, with the smaller portion paid to the aggrieved employees (*e.g.* 75% to the state, and 25% to the aggrieved employees. (Lab. Code § 2699(i).)

As here, where a common fund is created in a qui tam action by the successful litigation of a plaintiff and his attorneys, the attorneys are entitled to recover their fees from the common fund. (*Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91.) In *Bank of America*, attorneys were awarded their fees from the common fund in a taxpayer action to enforce unclaimed property law. Affirming the award, the Court stated:

> Those benefiting from the recovery of the fund, in this case some depositors and eventually the People of the State of California, must bear their share of the cost of litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each claimant's share reduced proportionately.

(*Id.* at 91.)

Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common fund was created in the amount of $375,000.00 for the benefit of Defendant's employees and the State of California. Thus, these beneficiaries must bear their share of the costs and attorneys' fees which will be deducted from the Settlement Amount under the common fund theory.

In *Laffitte*, the California Supreme Court held that it is not an abuse of discretion for a trial court to utilize the percentage method for calculating an attorneys' fee award in a common fund case, which this case is. (*Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, 503; *see also Serrano v. Priest* (1977) 20 Cal. 3d 25, 35-40; *City and County of San Francisco v. Sweet* (1995) 12 Cal. 4th 105, 110 (the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.").) The Court held "that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Laffitte*, *supra*, 1 Cal. 5th at 503.) Explaining that the percentage method "is a valuable tool" for trial courts to calculate attorneys' fees, the Court extolled "[t]he recognized advantages" of the method, such as "ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." (*Id.* (citations omitted).)

In applying the common fund doctrine, California courts routinely award attorneys' fees equaling one-third of the common fund's total potential value. (*See, e.g., Laffitte v. Robert Half Int'l Inc.*, 231 Cal. App. 4th 860, 878 (2014) ("trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with [] awards in other class action lawsuits" and "studies show that ... fee awards in class actions average around one-third of the recovery"), *aff'd by Laffitte, supra*, 1 Cal. 5th at 489; *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide conclude that a one-third fee is consistent with market rates).)

One-third of the common fund is also reasonable because it best reflects the market rate for contingency fees. (*See Lealoa v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 47 ("attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace").) Fees representing up to forty percent of the recovery reflect the rate negotiated in "typical contingency fee agreements [which] provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried." (*Fernandez v. Victoria Secret Stores LLC*, 2008 U.S. Dist. LEXIS 123546, *55-57 (C.D. Cal. July 21, 2008) (citing an academic study collecting contingency fee agreements and finding that a fee award constituting 34% of the fund is reasonable on that basis).) Because the negotiated fee structure mimics the marketplace, it is reasonable and should be approved.

Here, Plaintiff's counsel efficiently litigated this matter, making the entire Net Settlement Amount available to PAGA Members with no reversion to Defendant. The percentage of fees sought by Plaintiff's counsel is in line with awards in similar cases in California and is reasonable for the benefit obtained for PAGA Members in this case.

B. Lodestar Cross-Check Confirms the Reasonableness of the Fee Award.

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar "cross-check" for common fund awards (*Lealoa*, *supra*, 82 Cal.App.4th at 46-47.) In *Laffitte*, the court permitted use of a "lodestar cross check," by which the trial court would first select a percentage of the common fund for the fee award, and then verify that the percentage chosen in fair and reasonable in light of the attorney hours spent on the case. (*Laffitte, supra*, 1 Cal. 5th at 504.) While some "multiplier" would be expected, the multiplier should be "evaluated for reasonableness;" "rough parity" between the lodestar and the percentage-based recovery would make sense. (*Id.* at 496.) Use of the lodestar cross-check, the court explained, represents a "blending of the two fee calculation methods" (percentage and lodestar), where "one method is used to confirm or question the reasonableness of the other's result." (*Id.* at 497.) The court, however, did not require a lodestar cross check, explaining that courts "retain the discretion to forego a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee." (*Id.* at 505.)

California's lodestar/multiplier method is a two-step process of fee calculation under which the court first determines a lodestar value for the fees by multiplying the time reasonably spent by plaintiff's counsel on the case by a reasonable hourly rate. (*In re Consumer Privacy Cases* (2014) 175 Cal.App.4th 545, 556-557.) The starting point in determining the appropriate hourly fee is to discern the prevailing rate for similar work in the pertinent geographic region. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096-97 (using prevailing hourly rate in community for comparable legal services even though party used in-house counsel); *see also* Herr, David F., *Manual* *for Complex Litigation*, § 14.122 ("reasonable fees . . . are to be calculated according to the prevailing market rates in the relevant community.").

Here, Plaintiff's counsel's hourly rates are comparable to those charged by other class action plaintiff's counsel and the firms defending class actions. (Valle Decl., ¶ 37.) Further, the total attorney hours expended on this action are reasonable and in line with comparable cases. Plaintiff's counsel billed a total of 147.1 hours prosecuting this case. (*Id.*, at ¶ 36.) The firm dedicated significant resources to this case by dividing the tasks required according to skill level; the professional hours generated by each attorney are not unreasonable or duplicative. (*Id.*)

Multiplying the total hours billed by Plaintiff's counsel in this litigation by their reasonable hourly rates yields a lodestar of $94,792.50. (Valle Decl., ¶ 36.) Plaintiff's counsel accordingly requests a lodestar multiplier of approximately 1.32 to meet the fee award. (*Id.*, at ¶ 38.)

C. A Multiplier is Justified in Light of the Results Achieved and Plaintiff's Counsel's Extensive Work Performed at the Risk of Receiving No Payment.

The Court may enhance or reduce the lodestar by applying a multiplier to take into account multiple factors, including the following: (1) the results achieved on behalf of the Aggrieved Employees; (2) the novelty and difficulty of the questions involved and the skills displayed in presenting them; (3) counsel's experience, reputation and ability; (4) counsel's preclusion from other work; and (5) the contingent nature of the fee award. (*See Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1139; *Cundiff v. Verizon Cal., Inc.* (2008) 167 Cal.App.4th 718, 724.) Application of each of these factors strongly favors granting the full attorneys' fees and costs award that Plaintiff's counsel has requested in this case, as explained in detail below.

California courts routinely award multipliers on plaintiff's counsel's lodestars ranging from 2 to 4, or even higher. (*See, e.g. Chavez*, *supra*, 162 Cal. App. 4th at 49-50 (approving multiplier of approximately 2.5); *Ridgeway v. Wal-Mart Stores Inc.* (N.D. Cal. 2017) 269 F.Supp.3d 975, 1000 (approving multiplier of 2.0).) Here, Plaintiff's counsel requests a modest 1.364 multiplier to reach the one-third fee amount provided in the Settlement. (Valle Decl., ¶ 38.)

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1. The Results Achieved on Behalf of the Aggrieved Employees

Due to Plaintiff's counsel's efforts, PAGA Members will receive immediate and reasonable payment for their claims. (Valle Decl., ¶ 39.) A settlement at this juncture also avoids the risk and expense of losing on some or all of the claims at trial. (*Id.*) Plaintiff's counsel believed it was preferable here to reach a resolution at this stage of the case to save time and money that would otherwise go to litigation and would not have guaranteed any larger of an award than the Settlement. (*Id.*) Accordingly, the benefits achieved by Plaintiff's counsel favor approval of the requested fees.

2. The Novelty and Difficulty of the Questions Involved, and the Skill in Presenting Them.

Plaintiff's counsel used their experience to negotiate a suitable settlement that avoided potential pitfalls for PAGA Members who would be forced to arbitrate their claims. (Valle Decl., ¶ 40.) First, Plaintiff's counsel engaged in discovery with Defendant to prove PAGA claims. (*Id.* at ¶ 9.) Additionally, in 2022, Plaintiff's counsel spent a significant amount of time briefing and opposing Defendant's Motion to Compel Arbitration. (*Id.*, at ¶ 40.) Plaintiff's counsel thoroughly briefed and researched novelty in the changing law resulting from the *Viking River Cruises, Inc. v. Moriana*'s, (2022) 142 S.Ct. 1906, change to splitting of PAGA claims into representative and individual claims, and successfully argued against unconscionable provisions of the arbitration agreement. (*Id.*) Plaintiff's counsel was successful in allowing this Action to proceed. (*Id.*) Had Plaintiff's counsel lost this Opposition, Plaintiff would have been forced to arbitrate his individual PAGA claim only and would have been precluded from recovering penalties on behalf of the State of California for Defendant's employment violations. (*Id.*)

In preparation for mediation, Plaintiff's counsel also extensively reviewed and analyzed discovery provided by Defendant and reviewed applicable law and other authority. (Valle Decl., ¶ 6.) Plaintiff's counsel's skill in researching and presenting the issues in this case resulted in a fair settlement for the Aggrieved Employees, and weighs in favor of approving the fee request.

3. Plaintiff's Counsel's Experience, Reputation, and Ability.

Plaintiff's counsel submit that their skill contributed to the efficient resolution of this case. They are experienced litigators who focus their practices on wage and hour class actions and PAGA cases, with extensive experience litigating both. (Valle Decl., ¶¶ 18-34.) Plaintiff's counsel has been appointed class counsel or co-class counsel in many cases, have obtained substantial recoveries for thousands of employees through these cases, and have the requisite skill and experience to justify the requested fees. (*See id.*)

4. Plaintiff's Counsel's Preclusion from Other Work

During the pendency of this action, Plaintiff's counsel thoroughly investigated and researched the claims in controversy, their defenses, and the relevant body of law. (Valle Decl., ¶ 44.) Overall, Plaintiff's counsel performed extensive work and obtained a favorable result through time-consuming litigation (both in court and in arbitration), substantial analysis of the records, a full day of mediation, and negotiation of the Settlement. (*Id.*) This time could have been spent on other potentially lucrative cases. (*Id.*) Accordingly, Plaintiff's counsel's time should be compensated.

5. The Contingent Nature of the Fee Award

The California Supreme Court has recognized that attorney fee awards should be enhanced to compensate attorneys for the risks of loss involved in contingency fee cases. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 154.) The main criterion for risk is the risk of complete loss, which would leave counsel unable to recover fees. (*Graham v. DaimlerChrysler Corp.*, (2004) 34 Cal.4th 553, 583 (explaining that a multiplier corresponds to risk of loss, with the risk of not being the successful party ranking highest).) In *Ketchum*, the California Supreme Court instructed courts to adjust fee compensation to ensure that the fees account for contingency risk:

> A lawyer who both bears the risk of not being paid and provides legal services is not receiving fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

(*Ketchum*, *supra*, 24 Cal.4th at 1132-33.)

A fee award that adjusts for contingency fee risk "constitutes earned compensation; unlike a windfall, it is neither expected or fortuitous." (*Id.* at 1138.) The contingent risk factor is the single most important enhancement factor under California law even for actions where statutory fees are available. (*See Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 399 (reversing a trial court order for failure to consider contingent risk for statutory fees under FEHA).)

The main criterion for the risk is the risk of complete loss, which would leave counsel unable to recovery any fees. (*Graham*, *supra*, 34 Cal.4th at 583 (explaining that a multiplier corresponds to risk of loss, with the risk of not being the successful party ranking highest).) This risk is particularly acute for contingency fee attorneys because they "must use savings or incur debt to keep their offices afloat and their families fed during the years-long litigation." (*Horsford*, *supra*, 132 Cal.App.4th at 400.)

Here, Plaintiff's counsel bore the entire risk of recovery. They took Plaintiff's case on a pure contingency basis, with no guarantee of payment. (Valle Decl., ¶ 42.) Before mediation, Plaintiff's counsel spent significant time litigating arbitration issues in court, analyzing records, proceeding in arbitration, and researching theories of liability despite the risk of recovering nothing. (*Id.*) A defeat at one of these stages could have foreclosed the possibility of Plaintiff's counsel recovering full remuneration for their time and effort. (*Id.*) Yet, in spite of these considerable challenges that enhanced the already-high contingency risk, Plaintiff's counsel was able to obtain a settlement amount of $375,000.00. A fee award in the amount of $125,000.00 is fair and reasonable.

VII. THE SETTLEMENT ADMINISTRATOR COSTS ARE REASONABLE

Plaintiff proposes hiring Phoenix Settlement Administrators as the Settlement Administrator. The Settlement Administrator will be responsible for updating the mailing addresses of the PAGA Members, mailing the Notice to each PAGA Member, disbursing payments as ordered by the Court, responding to PAGA Member inquiries, and providing a declaration to document its duties and responsibilities under the Settlement. The Parties previously agreed to use Phoenix Settlement Administrators as the Settlement Administrator. (Valle Decl., ¶ 48, Exhibit 6.) The requested amount of $6,000.00 for services rendered and to be rendered is fair and reasonable and should be granted.

VIII. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement pursuant to PAGA in this Action.

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Dated: December 30, 2024

AEGIS LAW FIRM, PC

By ______________________

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