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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

LAPHILL KNOX, individually and on behalf of all other aggrieved employees,

Plaintiff,

vs.

EXPRESS MESSENGER SYSTEMS, INC. DBA ONTRAC, a Delaware corporation, and DOES 1 through 50, inclusive,

Defendants.

CASE NO. CIV-DS-1932323

[Assigned for all purposes to the Hon. Gilbert Ochoa, Dept. S-26]

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT

[Filed concurrently with Declarations of Launa Adolph, James Hawkins, Christina M. Lucio, Laphill Knox, Susana Acosta, and Harold Fox; and [Proposed] Final Order and Judgment]

Date: January 9, 2023
Time: 10:00 a.m.
Dept.: S-26

Complaint Filed: October 28, 2019
Trial Date: Vacated

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 9, 2023, at 10:00 a.m., in Department S-26 of the San Bernardino Superior Court, located at 247 Third Street, San Bernardino, California 92415, plaintiffs Laphill Knox, Susana Acosta, and Harold Fox will, and hereby do, move this Court for entry of an order and judgment approving the parties' PAGA settlement pursuant to Labor Code section 2699(a)(2).

The motion will be based upon this notice, the attached Memorandum of Points and Authorities, the Declarations of Launa Adolph, James R. Hawkens, Christina M. Lucio, Laphill Knox, Susana Acosta, and Harold Fox, and all exhibits thereto, the complete files and records of this case, and any other evidence or oral argument which may be considered by the Court at the time of the hearing.

DATED: December 15, 2022

MATERN LAW GROUP, PC

By: Launa W.

MATTHEW J. MATERN
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Attorneys for Plaintiffs LAPHILL KNOX, SUSANA ACOSTA, and HAROLD FOX individually and on behalf of all other aggrieved employees

DATED: December 15, 2022

JAMES HAWKINS APLC

By: */s/ Christina M. Lucio*

JAMES R. HAWKINS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the California Private Attorneys General Act of 2004 ("PAGA"), Labor Code section 2699, *et seq.*, plaintiffs Laphill Knox ("Knox"), Susana Acosta ("Acosta"), and Harold Fox ("Fox") (collectively, "Plaintiffs") seek court approval of the settlement of their claim under PAGA. In the Action, Plaintiffs allege that defendant Ontrac Logistics, Inc. (fka Express Messenger Systems, Inc.) dba Ontrac ("Defendant") failed to provide Plaintiffs and other Representative Group Members with lawful meal and rest periods and failed to pay overtime wages. Plaintiffs additionally allege that, as a result of these violations, Defendant failed to issue accurate wage statements and failed to pay all wages due upon separation. Plaintiffs further allege that Defendant failed to reimburse necessary business expenses, made unlawful wage deductions, and failed to provide safe working conditions during the Settlement Period. Plaintiffs brought this Action as representatives of the state to recover penalties for these alleged Labor Code violations on behalf of all current and former non-exempt employees of Defendant in the State of California in sorter, loader, unloader, or package handler positions who were employed by Defendant at any time from September 20, 2015 through February 28, 2022.

Under the terms of the Settlement, Defendant will pay $6,800,000.00 to settle the PAGA claim. The PAGA penalties secured by the Settlement are genuine and meaningful, and fulfill PAGA's underlying purpose to benefit the public. As detailed below, the Settlement was reached after extensive discovery and investigation by the Parties, including a thorough review and analysis of Defendant's wage and hour policies and a sampling of the Representative Group Members' time and payroll records, interviews with Representative Group Members, and two full-day mediations before experienced mediators well-versed in wage and hour litigation. The Settlement is also strongly supported by experienced counsel, who carefully considered the strength of the claims and Defendant's multiple defenses, as well as the expense, complexity, risks, and likely duration of continued litigation. The Settlement in the amount of $6,800,000.00 is an excellent result given the conflicting evidence and multiple procedural and substantive defenses, which may substantially undercut the projected value of the claims and resultant damages, or potentially eliminate the claims altogether. In light of the Parties' support for the Settlement, and because it satisfies all the criteria for final settlement approval under California law and will provide significant monetary recovery to the State of California and the Representative Group Members, the Court should approve the Settlement.

Plaintiffs' requests for attorneys' fees in the amount of $2,266,666.67, reimbursement of costs and expenses in the amount of $23,698.47, service awards to Plaintiffs Knox and Acosta in the amount of $10,000.00 each, and a service award to Plaintiff Fox in the amount of $7,000.00, also are reasonable and thus should be approved by the Court.

Accordingly, Plaintiffs respectfully requests that the Court enter an order granting approval of the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Defendant operates a national courier/messenger or delivery service and services every zip code in California. Declaration of Launa Adolph ("Adolph Decl.") ¶ 3. Defendant has 28 facilities in California and employs non-exempt sorters, loaders, unloaders, and package handlers. *Id.*

Plaintiff Acosta worked for Defendant as a non-exempt package sorter from approximately August 2015 to September 2015 at Defendant's facility in Santa Ana, California. Declaration of Susana Acosta ("Acosta Decl.") ¶ 2.

Plaintiff Knox worked for Defendant as a non-exempt sorter from approximately January 2018 to December 2018 at Defendant's facility in Fontana, California. Declaration of Laphill Knox ("Knox Decl.") ¶ 3.

Plaintiff Fox worked for Defendant as a non-exempt sorter and package handler from approximately September 2020 to March 2021 at Defendant's facility in Sun Valley, California. Declaration of Harold Fox ("Fox Decl.") ¶ 2.

B. Procedural History

On September 20, 2016, Acosta sent notice to the LWDA of her intent to pursue a representative PAGA action against Defendant on behalf of herself and the State of California as well as on behalf of other allegedly aggrieved current and former employees. The LWDA did not provide a response. Declaration of Christina M. Lucio ("Lucio Decl.") ¶ 4.

On March 6, 2017, Acosta filed a complaint against Defendant which asserted claims for: (1) Violation of the Fair Labor Standards Act, 29 U.S.C. section 201 et seq.; (2) failure to pay overtime wages; (3) failure to pay minimum wages; (4) failure to provide meal periods; (5) failure to authorize and permit rest periods; (6) unlawful wage deductions; (7) failure to indemnify for necessary business expenses; (8) failure to timely pay wages due at termination or resignation; (9) violations of the unfair competition law; (10) penalties under the Private Attorneys' General Act ("PAGA") (the "*Acosta* Action"). *Id.* at ¶ 5. Defendant filed an answer on April 18, 2017. *Id.* On October 4, 2019, Acosta filed a First Amended Complaint ("FAC") alleging a single cause of action under the PAGA. *Id.* Defendant filed an answer to the FAC on November 15, 2019. *Id.*

On August 14, 2019, Knox sent notice to the LWDA of her intent to pursue a representative PAGA action against Defendant on behalf of herself and the State of California as well as on behalf of other allegedly aggrieved current and former employees. The LWDA did not provide a response. Adolph Decl. ¶ 6.

On October 28, 2019, Knox filed her lawsuit against Defendant in San Bernardino Superior Court, alleging a single cause of action under PAGA (the "*Knox* Action"). *Id.* at ¶ 7. On December 24, 2019, Defendant filed an answer to Knox's complaint. *Id.*

On August 17, 2020, Knox filed a First Amended Complaint (the "FAC") which added Acosta as a named plaintiff in the *Knox* Action and, pursuant to a tolling agreement between Acosta and Defendant, asserted all claims asserted in the *Acosta* Action during the relevant time period, and to clarify the intent of the parties to continue the *Acosta* Action. *Id.* at ¶ 8. Defendant filed an answer to the FAC on September 16, 2020. *Id.*

On November 16, 2021, Fox sent notice to the LWDA of his intent to pursue a representative PAGA action against Defendant on behalf of himself and the State of California as well as on behalf of other allegedly aggrieved current and former employees. Lucio Decl. ¶ 9. The LWDA did not provide a response. *Id.*

Pursuant to the stipulation of the Parties, a Second Amended Complaint adding Fox as a named plaintiff was filed on July 27, 2022. *Id.* at ¶ 10.

C. <u>Discovery and Investigation</u>

Prior to reaching the Settlement, Plaintiffs and their counsel conducted an investigation into the claims alleged and performed legal research. Adolph Decl. ¶ 10. The Parties have engaged in extensive written discovery and meet and confer efforts regarding their respective discovery requests and responses. *Id.*

Defendant produced various policy documents and a representative sampling of the time and payroll data for the Representative Group Members. *Id.* at ¶ 11. Plaintiffs' expert analyzed the time and payroll data, which assisted Plaintiffs' counsel in preparing a damages model prior to the mediation. *Id.*

D. <u>Settlement Negotiations</u>

On May 14, 2020, the Parties participated in a private mediation with mediator Joan Kessler, Esq. *Id.* at ¶ 12. However, the Parties were unable to reach a resolution of the Action at the time of mediation. *Id.* On December 21, 2021, the Parties participated in a second private mediation session with mediator Lisa Klerman, Esq. *Id.* at ¶ 13. The Parties were unable to reach a resolution at the mediation, but subsequently accepted a mediator's proposal on December 31, 2021, which the Parties memorialized in a signed Memorandum of Understanding, made subject to the Parties entering into a more comprehensive written settlement agreement. *Id.* The Settlement Agreement and Release of PAGA Claims ("Settlement Agreement") was fully executed on December 14, 2022. *Id.* at ¶ 15, Exh. A.

On December 14, 2022, Plaintiffs submitted a copy of the Stipulation to the Labor and Workforce Development Agency ("LWDA"). *Id.* at ¶ 16, Exh B.

III. SUMMARY OF SETTLEMENT

A. <u>The Representative Group Members</u>

The Representative Group Members consist of Plaintiffs and all current and former non-exempt employees of Defendant in the State of California in sorter, loader, unloader, or package handler positions who were employed by Defendant at any time during the period September 20, 2015 through February 28, 2022 ("Settlement Period"). Settlement Agreement ¶¶ 20, 25. There are approximately 20,403 Representative Group Members who worked approximately 432,510 pay periods during the Settlement Period. Adolph Decl. ¶ 17.

B. Settlement Terms

Under the Settlement, the claims of all Representative Group Members shall be settled for the Maximum Settlement Amount of $6,800,000.00, which is inclusive of all Individual Settlement Payments to Representative Group Members, Plaintiffs' Counsel Award, the Service Awards, Settlement Administration Costs, and the LWDA Payment. Settlement Agreement ¶ 11.

The Settlement Fund shall be allocated as follows:

1. Net Settlement Amount. After deducting the Plaintiffs' Counsel Award, the Service Awards, and the Settlement Administration Costs, the remainder of the Maximum Settlement Amount shall be allocated toward payment to the LWDA and Representative Group members ("Net Settlement Amount"). Seventy-five percent of the Net Settlement Amount will be sent to the LWDA and 25% of the Net Settlement Amount will be allocated among the Representative Group Members. Settlement Agreement ¶ 14.

2. The payments to the Representative Group Members will be based on the number of Qualifying Pay Periods worked by each Representative Group Member as a non-exempt employee of Defendant in the position of sorter, loader, unloader, or package handler in California during the Settlement Period. Defendant shall provide the Settlement Administrator with the Qualifying Pay Periods for each Representative Group Member. The Settlement Administrator shall then divide the portion of the Net Settlement Amount allocated to the Representative Group Members by the total number of Qualifying Pay Periods for all Representative Group Members resulting in a value for each pay period worked by the Representative Group Members during the Settlement Period ("Pay Period Value"). The Settlement Administrator shall then multiply the number of Qualifying Pay Periods for each Representative Group Member by the Pay Period Value. Settlement Agreement ¶¶ 18, 44.a.i.

Individual Settlement Payment checks shall remain negotiable for one hundred eighty (180) days from the date of mailing. If an Individual Settlement Payment check remains uncashed after one hundred eighty (180) days from issuance, the Settlement Administrator shall distribute the value of the uncashed check to the State Controller's Unclaimed Property Fund in the name of the Representative Group Member. In such event, such Representative Group Members shall nevertheless remain bound by the Settlement. Settlement Agreement ¶ 44.a.iv.

3. Service Award. Subject to Court approval, Plaintiffs Knox and Acosta shall each be paid a Service Award not to exceed Ten Thousand Dollars ($10,000.00), and Plaintiff Fox shall be paid a Service Award not to exceed Seven Thousand Dollars ($7,000.00), for their time and effort in bringing and presenting the Action and for releasing their Released Claims. Settlement Agreement ¶ 44.b.

4. Plaintiffs' Counsel Award. Subject to Court approval, Plaintiffs' Counsel shall be entitled to receive reasonable attorneys' fees in an amount not to exceed one-third of the Maximum Settlement Amount, which amounts to $2,266,666.67, and reimbursement of costs in amount not to exceed $30,000.00. Settlement Agreement ¶ 44.c.

5. Settlement Administration Costs. The settlement administration fees and expenses shall be paid from the Maximum Settlement Amount. Settlement Agreement ¶ 44.d.[1]

C. The Release

Upon the Effective Date, all Representative Group Members shall be deemed to have released the Released Parties of any and all claims for civil penalties under PAGA based on the factual allegations alleged in the notice letters or attachments Plaintiffs sent to the LWDA on or about September 20, 2016, August 14, 2019, and November 16, 2021, and the operative complaint in the Action, including failure to pay for all hours worked, including overtime and minimum wages; failure to provide meal periods; failure to pay one hour of premium pay when lawful meal periods were not provided; failure to provide rest periods; failure to pay one hour of premium pay when lawful rest periods were not provided; failure to maintain accurate records of hours worked; failure to timely pay all wages at termination; failure to furnish accurate itemized wage statements; failure to pay all earned wages twice per month; failure to reimburse necessary

[1] The total estimated settlement administration costs are $52,800.00. Adolph Decl. ¶ 35. Plaintiffs request that the Court approve these costs to be paid from the Maximum Settlement Amount.

business expenses; unlawful wage deductions; and failure to provide lawful and safe working conditions, which arose during the Settlement Period. The Released Claims specifically include claims for penalties under PAGA arising from violations of Cal. Labor Code §§ 201, 202, 203, 204, 210, 212, 216, 221, 222.5, 223, 224, 225, 225.5, 226, 226.7, 510, 512, 516, 558, 1182.12, 1194, 1197, 1197.1, 1198, 2802, applicable IWC Wage Order (Wage Order 9), and California Code of Regulations, Title 8, section 11000, *et seq*. Settlement Agreement ¶ 43.a.

The "Released Parties" are Defendant and each of its subsidiaries, officers, directors, members, partners, owners, shareholders, employees, former employees, agents, servants, attorneys, assigns, affiliates, independent contractors, volunteers, predecessors, successors, parent companies and organizations, insurers, and any and all other persons, firms and corporations in which Defendant may have an interest, including, without limitation, LaserShip, Inc., ASP LS Intermediate Holdings, Inc., ASP LS Parent Holdings, Inc., and ASP LS Holdings LP. Settlement Agreement ¶ 19.

In addition, upon the Effective Date and subject to Defendant providing the Maximum Settlement Amount to the Settlement Administrator, Plaintiffs will generally release any and all claims against Defendant. Stipulation ¶ 43.b.

D. Settlement Administration

Within 30 days of approval of the Settlement by the Court, Defendant shall provide the Settlement Administrator with the Employee Information for purposes of mailing the Settlement Packets to Representative Group Members, which shall include each Representative Group Members' full name, last known address, Social Security number, and total number of Qualifying Pay Periods. Settlement Agreement ¶¶ 6, 45.a. Upon receipt of the Employee Information, the Settlement Administrator shall perform a search based on the National Change of Address Database maintained by the United States Postal Service to update and correct any known or identifiable address changes. Within 10 days of receiving the Maximum Settlement Amount from Defendant, the Settlement Administrator shall mail the Settlement Packets, which shall include the Notice and each Representative Group Member's respective Individual Settlement

Payment, to all Representative Group Members via regular First Class U.S. Mail. Settlement Agreement ¶ 45.a.[2]

Any Settlement Packet returned to the Settlement Administrator as non-deliverable shall be re-mailed to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator shall promptly attempt to determine a correct address by the use of skip-tracing, or other type of automated search, using the name, address, and/or Social Security number of the Representative Group Member involved, and shall then perform a re-mailing to the Representative Group Member whose Settlement Packet was returned as non-deliverable, assuming another mailing address is identified by the Settlement Administrator. The Settlement Administrator shall attempt no more than one re-mailing. Settlement Agreement ¶ 45.b.

IV. THE COURT SHOULD GRANT APPROVAL OF THE PAGA SETTLEMENT

A. <u>The PAGA Penalties Secured by the Settlement Are Genuine and Meaningful and Fulfill PAGA's Underlying Purpose to Benefit the Public</u>

Because a settlement of PAGA claims compromises a claim that could otherwise be brought by the state, PAGA provides that "court[s] shall review and approve any settlement of any civil action filed pursuant to [PAGA]." *Ramirez v. Benito Valley Farms, LLC* (N.D. Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 WL 3670794, at *2. In *Moniz v. Adecco USA,* Inc. (2021) 72 Cal.App.5th 56, the court defined the standard of review for PAGA settlements, finding that the trial court must consider whether the settlement is "fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." *Id*. at 77; see also *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1133 (adopting guidance from the LWDA providing that "when a PAGA claim is settled, the relief provided for under the PAGA [must] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public").

The court's role in reviewing PAGA settlements differs from its gatekeeping function in the class action context. In class actions, courts have a fiduciary duty to protect the interests of absent class members, whose individual claims will be discharged. *Kullar v. Foot Locker Retail,*

[2] The Notice shall be in substantially the same form as Exhibit 1 to the Stipulation.

Inc. (2008) 168 Cal.App.4th 116, 129. In this role, courts conduct an "independent assessment of the adequacy of the settlement terms," which requires them to have sufficient data and information about the amount in controversy and the realistic range of outcomes. *Id.* at 132. Courts consider a variety of factors in conducting this analysis, including whether the settlement is negotiated at an arm's length, whether there is sufficient discovery and information to permit parties and the court to act intelligently, whether the attorneys have experience with the type of issues, and whether the number of objectors is small. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801.

But a PAGA representative action is "not akin to a class action;" it "is a species of *qui tam* action." *Flores,* 253 F.Supp.3d at 1076. When reviewing a PAGA-only settlement, courts do not consider the value of individuals' claims for damages because a PAGA settlement does not release those claims. *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 87 (PAGA claims have no individual component); *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 188 (noting that PAGA penalties do not seek damages that are compensatory in nature). "The state's interest in such an action is to enforce its laws, not to recover damages on behalf of a particular individual." *Huff v. Securitas Sec. Servs., USA, Inc.* (2018) 23 Cal.App.5th 745, 760. Instead of focusing on fair recovery for individual claims, the goal of PAGA enforcement is to achieve "maximum compliance with state labor laws." *Id*. at 756; see also *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383 (noting that the goal of PAGA is to impose civil penalties for Labor Code violations "significant enough to deter violations"); *McKenzie v. Federal Exp. Corp.*, 765 F.Supp.2d 1222, 1233 (C.D. Cal. 2011) ("Unlike a class action seeking damages… for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.").

Here, the Settlement is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. Plaintiffs allege that Defendant failed to provide lawful meal and rest periods and failed to pay overtime wages. Plaintiffs additionally allege that, as a result of these violations, Defendant also failed to issue accurate wage statements and failed to pay all wages due upon termination or resignation. Plaintiffs further allege that Defendant failed to reimburse necessary business expenses, made unlawful wage deductions, and failed to provide safe working conditions during the Settlement Period.

The Settlement of $6,800,000.00 penalizes Defendant for the alleged violations of California's labor laws in an amount that is significant enough to deter violations and provide genuine and meaningful relief—approximately $4,476,333.33 to the State and the Aggrieved Employees—thus fulfilling the underlying purpose of PAGA to benefit the public. See *Jordan v. NCI Grp., Inc.*, No. EDCV161701JVSSPX, 2018 WL 1409590, at *3 (C.D. Cal. Jan. 5, 2018) ("The proposed settlement imposes a substantial penalty payment of $150,000, paid in exchange for a release of only those claims pled in the notice to the LWDA and the Complaint. This penalty has a substantial deterrent effect on NCI and other California employers. Furthermore, the proposed settlement encourages compliance with the specific requirements of the Labor Code, which has the effect of protecting workers from unlawful employment practices and working conditions."); *Echavez v. Abercrombie & Fitch Co*. (C.D. Cal. Mar. 23, 2017) No. CV 11-09754-GAF, 2017 WL 3669607, at *3 (finding that "[t]he primary purpose of PAGA, i.e., the empowerment of aggrieved employees to act as private attorneys general to collect civil penalties from their employers for Labor Code violations, [was] served by the proposed PAGA penalty in the parties' settlement agreement," where $340,000 of $700,000 settlement was allocated to PAGA penalties which were divided 75% to the LWDA and 25% to an estimated 10,000 aggrieved employees).

B. The Settlement Is Reasonable Given the Risks of Further Litigation

In assessing whether the amount in civil penalties is genuine and meaningful, the Court may balance the amount in penalties with the risks of further litigation. Here, Plaintiffs obtained a meaningful amount in civil penalties despite facing significant challenges had the litigation continued. Plaintiffs have calculated the maximum potential penalties to be approximately $43,251,000.00, which is the maximum potential recovery in the event Plaintiffs are able to establish liability at trial on all claims and the Court does not exercise its discretion to reduce the amount of PAGA penalties. Adolph Decl. ¶ 17.

While Plaintiffs are confident in the merits of the case, a legitimate controversy exists as to each cause of action. *Id.* at ¶¶ 19-22. Plaintiffs also took into account the fact that continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery to the state and the Representative Group Members. *Id.* at ¶ 18. Finally, Plaintiffs took into account the significant risk that Defendant could compel Plaintiffs' PAGA claim to arbitration on an individual basis following the United States Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, which was issued on June 12, 2022. *Id.* at ¶ 23.

Thus, when the risks of litigation, the burdens of proof necessary to establish liability, and the probability of appeal of a favorable judgment are considered, it is clear that the settlement amount of $6,800,000.00 is reasonable and in the best interest of the state and the public. *Id.* at ¶ 25. Plaintiffs objectively and knowledgably balanced the strengths and weaknesses of their claims against the risk of continued litigation, and were able to determine a realistic range of settlement recovery for PAGA penalties. *Id.* The Settlement therefore accomplishes PAGA's objectives by imposing sufficient civil penalties "to punish and deter" Defendant from future alleged Labor Code violations, while also ensuring that the penalties are not "unjust, arbitrary and oppressive, or confiscatory." Lab. Code § 2699(e)(2); *Iskanian,* 59 Cal. 4th at 384.

V. PLAINTIFFS' COUNSEL'S REQUESTED FEES AND COSTS ARE REASONABLE

The Settlement provides for attorneys' fees to Plaintiffs' Counsel in an amount not to exceed one-third of the Maximum Settlement Amount, which amounts to $2,266,666.67, plus reasonable and actual litigation expenses not to exceed $50,000.00. Settlement Agreement ¶ 44.c. Plaintiffs' Counsel is entitled to reasonable attorneys' fees pursuant to Labor Code § 2699(g)(1). The requested fees are reasonable as a percentage of the settlement fund.

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A. <u>Plaintiffs' Counsel Is Entitled to Attorneys' Fees and Costs under PAGA</u>

Plaintiffs are entitled to attorneys' fees under Labor Code section 2699(g)(l), which provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." Lab. Code § 2699(g)(1); see also *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 765 (holding that attorneys' fees to prevailing party are mandatory when the statute uses the word "shall"). It is undisputed that Plaintiffs are the prevailing party. See *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153 ("[P]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in the litigation that achieves some of the benefit the parties sought in bringing suit.") (internal citation omitted). Accordingly, Plaintiffs are entitled to recover attorneys' fees and costs.

B. <u>Plaintiffs' Counsel's Requested Attorneys' Fees Are Reasonable under the Common Fund Method</u>

The request for attorneys' fees as a percentage of the Settlement Fund is supported by the "common fund theory," where "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." *Serrano v. Priest* (1977) 20 Cal.3d 25, 35.

The purpose of the common fund approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. Thus, 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." *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110; *see Quinn v. State of California* (1975) 15 Cal.3d 162, 167 ("[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs.").

A number of other courts have recognized the advantages of awarding fees as a percentage of the common fund over the alternative lodestar approach, which usually involves wading through voluminous and often indecipherable time records. *See, e.g., In re Activision*

Securities Litigation (N.D. Cal. 1989) 723 F.Supp. 1373, 1375. The percentage approach is preferable to the lodestar method because: (1) it provides predictability to counsel; (2) encourages efficient resolution of the litigation by providing an Service for early, yet reasonable, settlement; and (3) reduces the demands on judicial records. *Id.* at 1378-79; *see also Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 28 (discussing findings of task force commissioned by the Third Circuit, which "concluded that the lodestar approach (1) increases the workload of an already overtaxed judicial system, (2) is insufficiently objective and produces results that are far from homogenous, (3) creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, (4) is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the Claimants or of an overall dollar amount, (5) encourages lawyers to expend excessive hours, and engage in duplicative and unjustified work, (6) creates a disservice for the early settlement of cases, (7) deprives trial courts of flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered, (8) works to the particular disadvantage of the public interest bar, and (9) results in confusion and lack of predictability.").

The percentage of attorneys' fees set forth in the Stipulation—33.33% of the Settlement Fund—is reasonable. Historically, courts have awarded percentage fees in the range of 20% to 50% in common fund cases. Newberg on Class Actions, 4th Ed. 2002, § 14: 6. Newberg notes that achievement of a substantial recovery with modest hours expended should not be penalized, but should be rewarded for considerations of time saved by superior services performed. *Id.* Furthermore, California and federal courts have long recognized that a percentage of recovery for attorneys' fees is properly awarded on the basis of the total value. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 480-481; *see also In re Consumer Privacy Cases*, 175 Cal.App.4th at 558 n.13 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around ***one-third*** of the recovery.") (emphasis added).

The Court should also consider that Plaintiffs' Counsel's efforts have resulted in substantial benefits to the State of California and the Representative Group Members, in the form of a significant, non-reversionary settlement fund established to compensate the State and the

Representative Group Members and to punish Defendant for the alleged PAGA violations. Without the efforts of Plaintiffs' Counsel over the six years, the claims alleged in the complaint would likely have gone without remedy. In addition, the requested fee percentage is less than that charged by Plaintiffs' Counsel for other employment cases. Adolph Decl. ¶ 30.

C. <u>Plaintiffs' Counsel's Costs Are Reasonable</u>

Plaintiffs' Counsel is entitled to reimbursement of its litigation costs under PAGA. See Lab. Code § 2699(g)(l) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs."). The Stipulation provides for reimbursement of costs not to exceed $30,000.00. Stipulation ¶ 44.c. To date, Plaintiffs' Counsel has incurred actual costs in the amount of $23,698.47. Adolph Decl. ¶ 31, Exh. C; Lucio Decl. ¶ 22, Exh. D. These costs were reasonably incurred in prosecuting this Action on behalf of the Representative Group Members and should be approved by the Court. *Id*. Accordingly, Plaintiffs' Counsel respectfully requests the Court approve costs in the amount of $23,698.47.

VI. THE REQUESTED SERVICE AWARDS TO PLAINTIFFS ARE REASONABLE

Both the State of California and the Representative Group Members are beneficiaries of a settlement that would not have been made possible but for the effort and commitment of Plaintiffs. The Settlement provides that Plaintiffs Knox and Acosta shall each be paid a Service Award not to exceed $10,000.00, and Plaintiff Fox shall be paid a Service Award not to exceed $7,000.00 in recognition of their effort in bringing and presenting the Action and for releasing their Released Claims. Settlement Agreement ¶ 44.b. The requested payments are intended to recognize Plaintiffs' effort in bringing the Action, serving as private attorney general under PAGA, assisting counsel with the investigation, litigation, and settlement, regularly conferring with counsel on the status of the case, and reviewing the proposed settlement to ensure that its terms are fair and achieve PAGA's objectives.

The amount of the requested service awards are reasonable. *See Blanchard v. BJ's Restaurants, Inc.,* Orange County Superior Court Case No. 30-2014-00761961-CU-OE-CX (Sept. 26, 2016) (approving $10,000 service award); *Bui v. Vitamin Shoppe Industries Inc.,* Los Angeles County Superior Court Case No. BC518486 (Aug. 31, 2016) (approving $10,000 service award); *Jesus Miranda v. HomeDeliveryLink, Inc.,* San Bernardino County Superior Court Case No. CIV DS1505393 (Aug. 9, 2016) (approving $10,000 service award); *Mohamad Najjar v. Calop Business Systems, Inc. dlb/a Ca/op Aeroground Service,* Los Angeles County Superior Court Case No. BC582290 (April 5, 2016) (approving $10,000 service award); *Sheldon v. AHMC Monterey Park Hospital LP,* Los Angeles County Superior Court Case No. BC440282 (March 2, 2016) (approving $10,000 service award). Significantly, the service awards collectively represent less than 0.4% of the Settlement Fund.

During the more than six years since the *Acosta* Action was filed, Plaintiffs have actively participated in making decisions in this case, including the decision to settle this case. Acosta Decl. ¶¶ 17-18; Knox Decl. ¶ 5; Fox Decl. ¶¶ 17-18. Plaintiffs Knox and Acosta devoted approximately 30 hours of their time to the case, and Plaintiff Fox devoted approximately 15 hours of time to the case. Acosta Decl. ¶ 19; Knox Decl. ¶ 5; Fox Decl. ¶ 19. Plaintiffs also faced the real risk that future employers may not hire them because they lent their names as PAGA representatives in this case, and they could have been liable for Defendant's litigation costs if the case went to trial and they lost. Acosta Decl. ¶¶ 10-11; Knox Decl. ¶¶ 6-7; Fox Decl. ¶¶ 10-11.

Accordingly, Plaintiffs respectfully requests that the Court approve the Service Awards in the amounts of $10,000.00 to Plaintiffs Knox and Acosta, and $7,000.00 to Plaintiff Fox ($27,000.00 total).

VII. CONCLUSION

Based on the foregoing argument and authority, Plaintiffs respectfully request that the Court grant approval of the Settlement.

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DATED: December 15, 2022

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