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KEVIN TOBIN and ROSA FALDON, on behalf of the general public as private attorney general.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

KEVIN TOBIN and ROSA FALDON,
on behalf of the general public as private
attorney general,

Plaintiffs,

v.

ADVENTIST HEALTH SYSTEM/WEST,
a California Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. S-CV-0049484

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

Date: November 14, 2024
Time: 8:30 a.m.
Dept.: 3

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1 and healthful workplace; and the failure to reimburse for business expenses. (Declaration of Roman
2 Otkupman (Hawkins Decl., ¶ 3; Otkupman Decl., ¶ 13)

3 The LWDA did not inform Plaintiffs of any intent to investigate the noticed claims within
4 the sixty-five (65) day statutory deadline and, to this day, has not communicated any intent to
5 investigate the claims. Thus, Plaintiffs became authorized under Labor Code section 2698, *et seq.*
6 to act as private attorneys general for the alleged PAGA claims. (Hawkins Decl., ¶ 4; Otkupman
7 Decl., ¶ 14)

8 On November 16, 2022, Plaintiff Tobin filed a representative action entitled *Kevin Tobin,*
9 *on behalf of the general public as private attorney general v. Adventist Health System/West, et al.*
10 in Placer County Superior Court, alleging PAGA violations as set forth in Plaintiff's Complaint
11 pursuant to Labor Code § 2698, *et seq.* ("PAGA") for alleged violations of the Labor Code (the
12 "Tobin PAGA Action"). (Hawkins Decl., ¶ 5; Otkupman Decl., ¶ 15)

13 On March 6, 2023, Plaintiff Faldon filed a representative action entitled *Rosa Faldon, on*
14 *behalf of herself and all others similarly situated, and on behalf of the general public v. Adventist*
15 *Health System/West, et al.* in Kings County Superior Court, alleging PAGA violations as set forth
16 in Plaintiff's Complaint pursuant to Labor Code § 2698, *et seq.* ("PAGA") for alleged violations of
17 the Labor Code (the "Faldon PAGA Action"). (Hawkins Decl., ¶ 6; Otkupman Decl., ¶ 16)

18 On June 27, 2023, Plaintiff Tobin filed a First Amended Complaint to informally
19 consolidate the Tobin PAGA Action and Faldon PAGA Action (the "Operative Complaint").
20 (Hawkins Decl., ¶ 7; Otkupman Decl., ¶ 17)

21 The Operative Complaint alleges violations of the PAGA for Defendant's failure to pay all
22 minimum and overtime wages, failure to provide meal periods, failure to make meal period
23 premium payments, failure to authorize and permit rest periods, failure to make rest period premium
24 payments, failure to pay all wages earned and owed upon separation from Defendant's employ,
25 failure to pay wages timely during employment, failure to provide accurate itemized wage
26 statements, failure to maintain accurate records, failure to maintain a safe and healthful workplace,
27 and failure to reimburse necessary business expenses. (Hawkins Decl., ¶ 8; Otkupman Decl., ¶ 18).
28 The Operative Complaint specifically alleges that Defendant violated California Labor Code

1 sections 201, 202, 203, 204, 210, 218, 218.5, 222, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5,
2 1175, 1194, 1194.2, 1197, 1197.1, 1198, 2802, 6400, 6401, 6402, 6403, 6404, and 6407, as well as
3 the corresponding sections of any applicable Wage Order including without limitation IWC Wage
4 Order 5. (Id.)

5 Defendant denies all of the allegations in the Action and denies that it has committed any
6 misconduct, statutory or regulatory violation, wrongdoing, or any other actionable conduct.
7 (Otkupman Decl., ¶ 19)

8 During the course of litigation, Plaintiffs and Defendant (hereinafter, Plaintiffs and
9 Defendant are collectively referred to as the “Parties”) engaged in informal discovery and
10 exchanged extensive documents and information that allowed both sides to thoroughly evaluate the
11 potential exposure and potential risk, such as review of Defendant’s policies and procedures related
12 to the claims alleged and time and pay records, among others. Specifically, Plaintiffs obtained,
13 through informal discovery, statistical data including records of the Aggrieved Employees, which
14 consisted of wage statements, clock-in and clock-out times, times taken for meal breaks, and wages
15 earned during the relevant pay periods, as well as written policies and procedures on meal breaks,
16 rest breaks, overtime compensation, and reimbursement for business expenses, the number of pay
17 periods in the PAGA Period and the total number of Aggrieved Employees. During this process,
18 PAGA counsel analyzed, researched, and investigated the potential issues, including matters related
19 to the calculation of PAGA penalties, trial management, and appellate issues and risks. (Otkupman
20 Decl., ¶ 20; Hawkins Decl., ¶¶ 10-13)

21 Following extensive discovery and investigation, the Parties participated in an all-day
22 mediation presided over by Lisa Klerman on June 4, 2024, and reached a settlement of all claims
23 alleged in the Operative Complaint, the terms and conditions of which are memorialized in the
24 Parties’ PAGA Settlement Agreement (“Settlement Agreement”). (Otkupman Decl., ¶ 21, Exhibit
25 1; Hawkins Decl., ¶ 9)

26 The Parties have conducted a thorough investigation into the facts of the Action. Based on
27 the foregoing data and on their own independent investigation and evaluation, PAGA Counsel is
28 of the opinion that the settlement with Defendant for the consideration and on the terms set forth in

1 the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the LWDA
2 and Aggrieved Employees in light of all known facts and circumstances, including the risk of
3 significant delay, uncertainty associated with litigation, various defenses asserted by Defendant,
4 and numerous potential appellate issues. (Otkupman Decl., ¶ 22; Hawkins Decl., ¶¶ 14-16)

5 From the beginning, Defendant has contested the merits of this Action, denied any
6 wrongdoing whatsoever, challenged the manageability of the case for a representative trial, and
7 challenged Plaintiff's ability to prove a violation in each pay period for each Aggrieved Employee
8 among other defenses and contentions it made challenging the propriety of this Action. Defendant
9 further contended that, even assuming there was a finding supporting the imposition of PAGA
10 penalties, the Court would likely exercise its discretion to substantially reduce any such penalties
11 owed based on an alleged good faith attempt to comply with the Labor Code obligations by
12 Defendant. Notwithstanding its agreement to settle the matter, Defendant believes the practices
13 Plaintiff is contending do not exist or, to the extent they do exist, fully comply with all state and
14 federal employment laws with respect to Plaintiff and all Aggrieved Employees. (Otkupman Decl.,
15 ¶ 23; Hawkins Decl., ¶¶ 14-18)

16 The Parties have reached a settlement of the claims of Aggrieved Employees, defined as:
17 "All current and former non-exempt or hourly paid employees of Defendant who have worked in a
18 Revenue Cycle or IT Department, as those terms are defined in the Parties' Settlement Agreement,
19 in the State of California between October 19, 2019 and October 15, 2024. (Settlement Agreement,
20 ¶¶ 1.4, 1.26)

21 **III. SETTLEMENT RESULTS**

22 **A. Material Terms of the Settlement**

23 The material terms of the Settlement are as follows:

24 **1. The Payment**

25 The Gross Settlement Amount is One Million Eight Hundred Sixty-Five Thousand Dollars
26 (\$1,865,000.00) to settle this Action (the "Gross Settlement Amount"). (Settlement Agreement, ¶
27 1.13) This Settlement amount includes PAGA Counsel's Fee Payment, PAGA Counsel's Litigation
28 Expenses Payment, Administrator Expenses Payment, LWDA PAGA Payment, and Individual

1 PAGA Payments. (Settlement Agreement, ¶ 3.2) Pursuant to the Settlement Agreement, after
2 deducting PAGA Counsel's Fee Payment, PAGA Counsel's Litigation Expenses Payment, and
3 Administrator Expenses Payment, twenty-five percent (25%) of the remaining funds will be
4 distributed to the Aggrieved Employees who will receive a pro rata share according to the number
5 of Pay Periods the Aggrieved Employee worked during the PAGA Period. (Id.) This amount is
6 estimated to be Two Hundred Ninety-Eight Thousand Six Hundred Seventy Dollars and Seven Cents
7 (\$298,670.07). Seventy-five percent (75%) of the remaining funds will be paid to the LWDA. This
8 amount is estimated to be Eight Hundred Ninety Six Thousand Ten Dollars and Twenty Cents
9 (\$896,010.20).¹

10 **2. PAGA Counsel's Fee Payment, PAGA Counsel's Litigation Expenses**
11 **Payment, and Administrator Expenses Payment**

12 The Settlement provides that the amount awarded to PAGA Counsel for attorney's fees
13 shall not exceed thirty-three percent (33%) of the Gross Settlement Amount, which amounts to Six
14 Hundred Twenty Thousand Four Hundred Dollars (\$620,400.00), and the amount awarded to PAGA
15 Counsel for out-of-pocket litigation costs and expenses shall not exceed Thirty Thousand Dollars
16 (\$30,000.00). (Settlement Agreement, ¶ 3.2.1) The Settlement also provides a payment not to exceed
17 Thirty Thousand Dollars (\$30,000.00) to the Administrator for settlement administration costs.
(Settlement Agreement, ¶ 3.2.2)

18 **3. Notice To The LWDA**

19 On September 19, 2024, Plaintiff Faldon submitted the Settlement Agreement attached as
20 Exhibit 1 to the Declaration of Roman Otkupman to the LWDA. Plaintiff further gave notice of the
21 instant Motion and hearing date to the LWDA on October 11, 2024 via online filing and will serve
22 this Motion on the LWDA via online filing. (Otkupman Decl. ¶ 32, Exhibits 2, 3)

23 **4. No Objection Received from LWDA**

24 The LWDA has not objected to the Settlement to date. (Otkupman Decl. ¶ 32)

25 **5. The Released Claims**

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27
28 ¹ These amounts take into account PAGA Counsel's actual costs and final Administration Expenses, which is why
they differ from the amounts stated in the Settlement Agreement.

1 In exchange for the Settlement, and effective on the date when the Court enters its Approval
2 Order, all Aggrieved Employees and the LWDA will be deemed to release, on behalf of themselves
3 and their respective former and present representatives, agents, attorneys, heirs, administrators,
4 successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged,
5 or reasonably could have been alleged, based on the PAGA Period facts stated in the Complaint and
6 the LWDA Notice. This Release specifically includes but is not limited to claims for penalties based
7 on underlying alleged violations for: failure to pay minimum wage, including but not limited to
8 failure to pay minimum wage for any uncontrolled or controlled standby hours; failure to pay
9 overtime, including but not limited to any failure to properly calculate and pay overtime wages at
10 the appropriate rate and/or using the appropriate workday and/or workweek; meal period violations,
11 including but not limited to failure to provide meal periods and failure to correctly calculate the
12 appropriate rate of pay for meal period premiums; rest period violations, including but not limited
13 to failure to authorize and permit rest periods and failure to correctly calculate the appropriate rate
14 of pay for rest period premiums; untimely payment of wages; wage statement violations; waiting
15 time penalties; failure to reimburse business expenses; failure to maintain accurate records; and
16 failure to provide a safe and healthful workplace. This Release shall include all theories giving rise
17 to a claim for civil penalties arising under California Labor Code sections 201, 202, 203, 204, 210,
18 218, 218.5, 222, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1,
19 1198, 2802, 6400, 6401, 6402, 6403, 6404, and 6407, as well as the corresponding sections of any
20 applicable Wage Order including without limitation IWC Wage Order 5. As a result of this release,
21 the Aggrieved Employees and LWDA will be unable to bring a claim under, or recover in any other
22 claim brought under, the California Private Attorneys General Act, California Labor Code § 2698
23 et seq., for any violations of the Released Claims that took place during the PAGA Period.
24 (Settlement Agreement, ¶ 5.1)

25 **6. Administration Process**

26 The Settlement provides for an administrator to distribute the funds to the Aggrieved
27 Employees in accordance with a specified schedule. (Settlement Agreement, ¶ 4.4) The Settlement
28 Agreement provides for up to Thirty Thousand Dollars (\$30,000.00) to be allocated to the

1 administrator in administering the settlement. (Settlement Agreement, ¶ 3.2.3) The Parties have
2 obtained a not-to-exceed bid from APEX for administration costs in the amount of Twenty-Seven
3 Thousand Five Hundred Seventy-Six Dollars and Fifteen Cents (\$27,576.15) (Otkupman Decl., ¶
4 43, Exhibit 6)

5 IV. ARGUMENT

6 A. Standard of Review

7 Labor Code § 2699(l)(2) states that “the superior court shall review and approve any
8 settlement of any civil action filed pursuant to this part.” Unfortunately, PAGA does not specify a
9 standard of review for PAGA settlements. Existing law, however, does provide some guidance as to
10 the appropriate standard of review. Plaintiff contends, and for the purposes of this Motion,
11 Defendant does not contest, that the Court should look to: (1) the standard of review used in
12 analogous statutory schemes; and (2) the purposes and policies of PAGA.

13 1. Analogous Statutory Schemes

14 A PAGA case is in the nature of a *qui tam* proceeding. *Iskanian v. CLS Transp. Los Angeles*
15 *LLC* (2014) 59 Cal. 4th 348, 394. California has at least two other statutory schemes whereby an
16 individual may sue on behalf of the State or in the public interest: The California False Claims Act
17 and Proposition 65. Under both schemes, a court must approve a settlement or dismissal of the
18 action.

19 Under the California False Claims Act, a *qui tam* plaintiff may only dismiss the case with a
20 court’s (and the government’s) consent. Gov’t. Code § 12652(c)(1). In deciding whether to give
21 consent, a court must take into account “the best interests of the parties involved and the public
22 purposes behind the act.” *Id.* Moreover, if a *qui tam* plaintiff objects to a settlement between the
23 government and a defendant, the court can only approve the settlement after finding it is “fair,
24 adequate, and reasonable under all the circumstances.” Gov’t Code § 12652(e)(2)(B).

25 Similarly, Proposition 65 actions, like PAGA actions, are brought by private plaintiffs to
26 safeguard public rights. *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006)
27 141 Cal. App. 4th 46, 63. In addition to complying with specified statutory criteria, Proposition 65
28 settlements may only be approved if: (1) they are “just” and (2) they “serve the public interest.” *Id.*

1 at 61-62. In making this determination, the *Kintetsu* court described the appropriate inquiry as
2 similar to the “fair, reasonable, adequate” test used in class actions. *Id.* at 61. The *Kintetsu* court also
3 stated that, in determining whether to approve a Proposition 65 settlement, a court should consider
4 the policies underlying the statute. *Id.* at 63.

5 **2. The Purposes and Policies of PAGA**

6 PAGA was passed because the Legislature believed it necessary “to achieve maximum
7 compliance with state labor laws” and “to ensure an effective disincentive for employers to engage
8 in unlawful and anticompetitive business practices.” 2003 Cal. Legis. Serv. Ch. 906 § (1)(a). The
9 Legislature found that, while self-policing efforts have had some success, “in other cases the only
10 meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties
11 as provided in the Labor Code.” *Id.* at § 1(b). Through PAGA, the Legislature thus: (1) sought to
12 “enlist[] willing citizens in the task of private enforcement,” *Iskanian*, 59 Cal. 4th at 390; (2)
13 “deputized” aggrieved employees to sue on behalf of the State to enforce state labor laws; and (3)
14 authorized them to recover civil penalties, attorney’s fees, and costs. 2003 Cal. Legis Serv. Ch. 906
15 (Legislative Counsel’s Digest). In bringing a PAGA action, “[t]he employee-plaintiff acts as the
16 proxy or agent of the state labor enforcement agencies representing the same legal right and interest
17 as those agencies...” *Iskanian*, 59 Cal. 4th at 394.

18 As for the interests of the LWDA (in whose shoes Plaintiffs stand), its top enforcement
19 priorities are “to vigorously enforce minimum labor standards in order to ensure employees are not
20 required or permitted to work under substandard unlawful conditions...” and to “protect employers
21 who comply with the law from those who attempt to gain a competitive advantage at the expense of
22 their workers by failing to comply with minimum labor standards.” Labor Code § 90.5(a).

23 In light of the above law, as well as the policies and purposes of PAGA, Plaintiffs propose
24 (and for purposes of this Motion, Defendant does not contest) that the Court consider the following
25 factors in determining whether to approve the settlement:

- 26 (1) The extent to which the settlement achieves compliance with state labor laws;
- 27 (2) The extent to which the settlement deters violations of state labor laws;
- 28 (3) Whether the settlement serves to enlist private citizens in public enforcement of

1 PAGA; and

2 (4) Whether the settlement is otherwise “just” and “in the public interest.”

3 Because the proposed settlement reasonably and fairly advances each of the above factors,
4 the Parties ask that it be approved.

5 **B. The Settlement Should Be Approved**

6 **1. Although the Parties Dispute Whether Any Violations Have Occurred,**
7 **the Settlement Achieves Compliance With, and Deters Violations of**
8 **State Labor Laws**

9 As described above, Defendant has agreed to pay a substantial sum in settlement of the
10 PAGA claim. (Otkupman Decl., ¶ 25) In addition, Defendant has at all times maintained its
11 compliance to make sure their employees are given, and management provides, at least the minimum
12 wage and hour protections required by California law. (Otkupman Decl., ¶ 30) Accordingly, the
13 proposed settlement reasonably advances PAGA’s purpose of achieving compliance with the Labor
14 Code and deterring similar violations.

15 **2. The Settlement Serves to Enlist Private Citizens in Public Enforcement**
16 **of PAGA**

17 Plaintiffs believe the proposed settlement acts to encourage private enforcement of PAGA.
18 Through the settlement, PAGA Counsel will receive attorney’s fees and costs as determined by the
19 Court, and all Aggrieved Employees will receive a share of the Net Settlement Amount. (See
20 Settlement Agreement)

21 **3. The Settlement Is “Just” and “In the Public Interest”**

22 Finally, the proposed settlement is both just and in the public’s interest. While Plaintiffs
23 believe the claims are meritorious and that they would have recovered unreduced penalties,
24 Defendant has asserted numerous defenses to the claims. (Otkupman Decl., ¶ 23)

25 In accordance with the PAGA, the court in a PAGA action has discretion “to assess a civil
26 penalty” that the Labor Commissioner would have, as well as complete discretion to “award a lesser
27 amount than the maximum civil penalty amount specified [by the PAGA] if, based on the facts and
28 circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary
and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2))).

Furthermore, there is a substantial risk that the Court could reduce civil penalties to an

1 insignificant amount if it is unpersuaded by Plaintiffs' evidence that Defendant intentionally violated
2 the law. These uncertainties increase Plaintiffs' risk of pursuing the PAGA claims and required a
3 significant discount for settlement purposes. Likewise, where the employer does not act willfully,
4 and makes good faith attempts to comply with wage and hour laws, a reduction or lesser penalty is
5 warranted because imposing maximum PAGA penalty for each violation could be seen as unjust,
6 arbitrary, and oppressive. (*Carrington v. Starbucks Corp.*, *supra*, 30 Cal.App.5th at 528-529.)
7 (affirming trial court's award of only 10% of maximum PAGA penalty for meal break violations).
8 The amount to be paid to the LWDA under this settlement comports with PAGA settlement amounts
9 approved by other courts. (Otkupman Decl., ¶¶ 27, 28)

10 Assuming liability was found as set forth above after accounting for the potential risks, the
11 overall PAGA penalties in this case may also be reduced under the discretionary authority provided
12 to the Court pursuant to California Labor Code section 2699(e)(2). Furthermore, Defendant appears
13 to have adopted a number of policies and practices covering the wage and hour issues being litigated,
14 which a Court may find shows a good faith attempt to comply with the law, meriting a reduction of
15 civil penalties. The statutorily authorized discretion that Courts have used to reduce penalties ranges
16 substantially. *See, e.g., Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135
17 (2012) (30% reduction); *Fleming v. Covidien, Inc.*, 2011 U.S. DIST. LEXIS 154590, *9 (C.D. Cal.
18 2011) (82% reduction). (Otkupman Decl., ¶ 29)

19 Defendant has further maintained that its practices, policies, and procedures are compliant
20 with California law. For example, Defendant has raised defenses that, if this case was tried, could
21 have resulted in a defense verdict. Specifically, Defendant has and at all relevant times had an
22 attestation system pursuant to which employees are expected to attest each day as to whether or not
23 a timely and proper meal breaks were provided. The same procedure applied to rest breaks and the
24 accuracy of employees' time records. Additionally, if an employee stated that he/she did not receive
25 a timely meal or rest break, the system would then ascertain the violation and pay the proper
26 meal/rest break premium. Additionally, if an employee attested that his/her time records were
27 incorrect, the employee was given an opportunity to correct the records. Furthermore, Defendant
28 maintained that the regular rate issues were non-existent (*i.e.*, that Defendant correctly calculates

1 and pays employees' regular rate of pay). Lastly, Defendant argued that Plaintiffs had serious
2 manageability concerns. (Otkupman Decl., ¶ 30)

3 Plaintiffs believe the Settlement is favorable for Plaintiffs and the Aggrieved Employees,
4 providing a remedy consistent with and potentially beyond what the employees could expect to
5 receive if they prevailed at trial, but without the lengthy delay and risk of loss that a trial and
6 subsequent appeal would entail. The settlement terms represent a compromise of the Parties'
7 disputes and are fair, adequate and reasonable to the representative group given the risks that both
8 sides faced in the litigation. The Parties believe and agree that the Settlement provides for a fair,
9 adequate, and reasonable resolution of the Representative PAGA claim. (Otkupman Decl., ¶ 32)

10 Moreover, the settlement provides a substantial sum to the State. (Settlement
11 Agreement, ¶ 3.2.3) It also provides a small sum to each employee on a pro rata basis. (Id.)
12 Furthermore, public policy strongly favors the settlement of litigation. *Consumer Advocacy Group*
13 *v. Kintetsu*, supra 141 Cal. App. 4th at 63. Because the proposed settlement is neither unjust nor
14 ignores the public interest, is should be approved.

15 **4. Sufficiency of Amount of Settlement**

16 Plaintiff determined the maximum exposure to be \$19,888,900. The Parties settled this
17 matter for \$1,865,000, which is 9.4% of the maximum exposure. (Otkupman Decl., ¶ 31)

18 The maximum exposure is based upon an analysis of a 100% violation rate. While this
19 would be unlikely, even for purposes of the maximum exposure, Plaintiff calculated the PAGA
20 liability at 100%. Plaintiff used the data provided by Defendant and determined there were 198,889
21 PAGA pay periods. Since the Labor Code allows for a maximum exposure of \$100 per pay period,
22 and there are 198,889 PAGA pay periods, the maximum exposure was calculated to be \$19,988,900.
23 PAGA claims are subject to a one-year statute of limitations, and penalties can be received for a
24 period of one year prior to the date notice is sent to the LWDA. *Taylor v. Interstate Grp., LLC*, No.
25 15-CV-05462-YGR, 2016 WL 335226, at *1 (N.D. Cal. Jan. 28, 2016). Unless a Labor Code
26 provision provides for a specific civil penalty, PAGA imposes a default civil penalty of "one hundred
27 dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred
28 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation." Cal. Lab.

1 Code § 2699(f)(2). The court in *Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127, 1144,
2 held that the defendant was not liable for heightened penalties for any Labor Code violation that
3 occurred before the defendant was notified by the Labor Commissioner or any court that it had
4 violated the Labor Code provisions at issue. The California Court of Appeal in *Gunther v. Alaska*
5 *Airlines, Inc.* (2021) 72 Cal.App.5th 334, 356 confirmed that “the increased \$200 civil penalty for
6 ‘subsequent violation[s]’ does not apply unless [plaintiff] presents evidence that the Labor
7 Commission or a court notified [defendant] that it was in violation of the Labor Code”). Here, PAGA
8 penalties were discounted by using only initial violation rates, based on Defendant’s argument that
9 heightened penalties would not apply because Defendant has not been notified by the Labor
10 Commissioner or any court that it had violated the Labor Code provisions at issue. (Otkupman Decl.,
11 ¶ 31)

12 Defendant’s defenses to liability are an important basis for validating the reasonableness
13 of the settlement amount. Defendant has consistently maintained that it has ample legal and factual
14 grounds for defending this action. (Otkupman Decl., ¶¶ 23, 30)

15 In addition to the defenses on the merits, Plaintiffs considered Defendant’s position that
16 PAGA penalties are discretionary in nature and that even if Plaintiffs were successful at trial, the
17 Court has discretion to significantly decrease the amount of damages awarded in this PAGA action.
18 (Otkupman Decl., ¶ 23)

19 **C. The Attorney’s Fee Award Is Reasonable and Routinely Awarded**

20 PAGA Counsel requests attorney’s fees in an amount not to exceed 33% of the Gross
21 Settlement Amount (i.e., \$620,400.00). The requested fee is fair compensation for undertaking
22 complex, risky, expensive, and time-consuming litigation on a contingent fee basis, especially in
23 light of the benefits achieved by PAGA Counsel for the Aggrieved Employees. (Otkupman Decl., ¶¶
24 35-37) PAGA Counsel diligently litigated and investigated the case. (Id.)

25 Attorney’s fees may be calculated in one of two ways: the percentage method (a percentage
26 of the common fund or settlement value); or the lodestar-multiplier method (reasonable hours
27 multiplied by reasonable hourly rates multiplied by an amount more or less than 1.0 to account for
28 factors such as the risks taken and results achieved.) *Laffitte v. Robert Half International, Inc.* (2016)

1 Cal.5th 480, 489.

2 The starting point for determining the appropriateness of attorney's fees is to assess the
3 amount of time spent by the attorneys working for the class. *Lealao v. Beneficial California, Inc.*,
4 82 Cal.App.4th 19, 24-25 (2000). Under this approach, this Court can assess the reasonableness of
5 the requested fees by comparing it to the amount of work performed. It is not an abuse of discretion
6 to choose one method over another as long as the method chosen is applied consistently using
7 percentage figures that accurately reflect the marketplace. *Chavez v. Netflix, Inc.*, 162 Cal.App.4th
8 43, 65 (2008).

9 **1. The Attorney's Fee Award Is Reasonable Under the Common Fund**
10 **Approach**

11 PAGA Counsel intends to seek an award of attorney's fees on the common fund approach.
12 California courts have recognized that an appropriate method for awarding attorney's fees in class
13 actions is to award a percentage of the "common fund" created as a result of the settlement. (*City &*
14 *County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-11; *Quinn v. State* (1975) 15 Cal.3d
15 162, 168; *see also Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1270;
16 *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26.) The basis of the common fund
17 is fairness to the successful litigant, who might otherwise receive no benefit because his recovery
18 might be consumed by expenses; correlative prevention of an unfair advantage to others who are
19 entitled to share in the fund and who should bear their share of the burden of its recovery;
20 encouragement of the attorney for the successful litigant, who will be more willing to undertake and
21 diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that
22 he will be properly and directly compensated should his efforts be successful. (*Sweet, supra*, 12
23 Cal.4th at 111.) In *Quinn*, the California Supreme Court stated: "[O]ne who expends attorneys' fees
24 in winning a suit which creates a fund from which others derive benefits may require those passive
25 beneficiaries to bear a fair share of the litigation costs." (*Quinn, supra*, 15 Cal.3d at 167.) Similarly,
26 in *Sweet*, the California Supreme Court recognized that the common fund doctrine has been applied
27 "consistently in California when an action brought by one party creates a fund in which other persons
28 are entitled to share." (*Sweet, supra*, 12 Cal.4th at 110.)

1 Several courts have expressed frustration with the alternative “lodestar” approach for
2 deciding fee awards, which usually involves wading through voluminous and often indecipherable
3 time records. (*Lealao, supra*, 82 Cal.App.4th at 31 n.5 [citing *In re Activision Sec. Litig.* (N.D. Cal
4 1989) 723 F. Supp. 1373, 1375.]) The percentage approach is preferable to the lodestar because: (1)
5 it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution
6 of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the
7 demands on judicial resources. (*In re Activision Sec. Litig., supra*, 723 F. Supp. at 1378-79.) The
8 Ninth Circuit now routinely uses the percentage of the common fund approach to determine the
9 award of attorney’s fees. (*Lealao, supra*, 82 Cal.App.4th at 30-31; see e.g., *In re Pacific Enters. Sec.*
10 *Litig.* (9th Cir. 1995) 47 F.3d 373, 378-79.)

11 The California Supreme Court recently confirmed that the percentage method “is a valuable
12 tool” for trial courts to calculate attorneys’ fees, given “[t]he recognized advantages” of the method,
13 such as “ease of calculation, alignment of incentives between counsel and the class, a better
14 approximation of market conditions in a contingency case, and the encouragement it provides
15 counsel to seek an early settlement and avoid unnecessarily prolonging the litigation.” *Laffitte v.*
16 *Robert Half* (2016) 1 Cal.5th 480, 489 (citations omitted).

17 PAGA Counsel’s request for fees of 33% of the total settlement amount is within the range
18 of reasonableness. Historically, courts have awarded percentage fees in the range of 20% to 50%,
19 depending on the circumstances of the case. (See *In re Activision Sec. Litig., supra*, 723 F. Supp. at
20 1378.) PAGA Counsel’s request for fees is also in line with the prevailing guidelines established in
21 California case law and academic literature, and is consistent with awards in California.
22 Accordingly, Plaintiff respectfully requests that the Court approve the attorney’s fees as negotiated
23 by the Parties and requested herein.

24 Moreover, PAGA Counsel have considerable expertise in PAGA matters and have been
25 involved as lead counsel in a multitude of class and PAGA cases, which resulted in beneficial results
26 for Aggrieved Employees in California. (Hawkins Decl. ¶¶ 17, 18; Otkupman Decl. ¶¶ 6, 7) PAGA
27 Counsel have also frequently received fee awards of this percentage from the gross recovery in class
28 and representative cases and PAGA Counsel’s experience in wage and hour litigation was crucial in

1 evaluating both the strengths and weaknesses of the case and the reasonableness of the settlement.
2 Therefore, the requested fee award is fair and reasonable. (Hawkins Decl. ¶¶ 17, 18; Otkupman
3 Decl., ¶¶ 34, 41, 43)

4 **2. While the Lodestar Method is Not Necessary in Common Fund Cases,**
5 **Courts May Perform a Cross-Check to Award Fees**

6 Although California supports the common fund doctrine, the lodestar method is also used
7 independently or as a cross check for fee awards. *In re Consumer Privacy Cases* 175 Cal. App. 4th
8 545, 557 (2009). The “reasonableness” of the fee award requested is supported by the lodestar
9 methodology, whether the Courts treat such methodology as operative or as a cross check.

10 The lodestar calculation typically proceeds in three steps. First, a trial court must determine
11 a baseline guide or “lodestar” figure based on the time spent and reasonable hourly compensation
12 for each attorney involved in the case. *Serrano v. Priest* 20 Cal.3d 25, 48 (1977). The court then sets
13 a reasonable hourly fee to apply to the time expended, with reference to the prevailing rates in the
14 geographical area in which the action is pending. *Bihun v. AT&T Information Systems, Inc.* 13
15 Cal.App.4th 976, 997 (1993). Finally, a “multiplier” is selected with reference to the following
16 factors: (1) the novelty and difficulty of issues involved, (2) the skill displayed in presenting them,
17 (3) the extent to which the nature of litigation precluded other employment by the attorneys, and (4)
18 the contingent nature of the fee award owing to the uncertainty of prevailing on the merits and of
19 establishing eligibility for the award. *Serrano, supra*, 20 Cal. App.3d at 49.

20 PAGA Counsel’s lodestar calculation supports the requested attorney’s fees. (Hawkins Decl.
21 ¶¶ 19, 20; Otkupman Decl., ¶¶ 36 - 31) The amount requested here will fairly compensate PAGA
22 Counsel for their successful vindication of Aggrieved Employees’ rights, taking into account the
23 quality, nature and extent of counsel’s efforts, the results achieved and the fact that the amount of
24 fees is sought is consonant with legal precedent. (Id.) PAGA Counsel’s diligent, efficient and
25 creative pursuit of this matter positioned Plaintiffs to settle this action successfully, affording redress
26 to all Aggrieved Employees and avoiding the inevitable expense and risk attendant to protracted
27 litigation. (Id.) In sum, it was through the efforts of Plaintiffs and Counsel that the settlement was
28 obtained. (Id.)

1 PAGA Counsel's charge rate is commensurate with the market rates in Los Angeles for
2 attorneys of comparable experience and skill handling similar litigation. (Hawkins Decl. ¶ 20;
3 Otkupman Decl., ¶ 41) For this reason, this Court should approve the rates of PAGA Counsel as
4 reasonable in conjunction with awarding requested fees and any lodestar calculations it makes when
5 evaluating the request.

6 The declaration of Roman Otkupman submitted herewith authenticates a copy of the
7 contemporaneous time records maintained by the Otkupman Law Firm for the services performed
8 in this case. (Otkupman Decl., ¶ 36, Exhibit 4) The declarations of Roman Otkupman and James
9 Hawkins further describe the hourly rate customarily charged by Mr. Otkupman and Mr. Hawkins
10 during the period in which those services were performed and their experience and expertise that
11 justify such a rate. (Hawkins Decl. ¶¶ 17-20; Otkupman Decl., ¶¶ 6-9, 41)

12 PAGA Counsel has worked a total of 426.1 hours on the matter. PAGA Counsel's fees from
13 the inception to completion of this matter are approximately \$347,084.00. As such, the fees
14 requested equate to an average multiplier of 1.8. (Hawkins Decl. ¶¶ 19, 20; Otkupman Decl., ¶ 38)
15 Previously, in California the Court of Appeals has held that a multiplier of 2.0 is appropriate
16 depending on the risk undertaken and the complexity of the issues presented during litigation. For
17 example, in *Wekks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 1175 (1998), California Court of
18 Appeals approved a multiplier of 2.0, when it took into account the contingency risk factors and the
19 allegations brought under the California employment laws. Here, PAGA Counsel is seeking a 1.8
20 multiplier, which is less than the 2.0 multiplier. In *Crommie v. State of Cal. Public Utilities*
21 *Comm'n*, 840 F. Supp. 719, 726 (N.D. Cal. 1994), and *Lealao v. Beneficial California, Inc.*, 82 Cal.
22 App. 4th 19, 26-27 (2000), the courts similarly awarded fees with a multiplier of 2.0. (Otkupman
23 Decl., ¶ 39)

24 The court should approve the requested attorneys' fees, which are justified by the results
25 achieved, the complexity of the issues, the difficulty of the case, and the risks undertaken by PAGA
26 Counsel. The requested attorney's fees will not be opposed by Defendant, and are well within
27 established guidelines.

28 **D. The Requested Costs Awarded is Reasonable**

1 The settlement provides for cost reimbursement to PAGA Counsel of actual costs upon
2 submission of records to the Court in an amount not to exceed \$30,000.00. PAGA Counsel's costs
3 are approximately \$22,343.58 which include litigation expenses and out-of-pocket costs PAGA
4 Counsel incurred in investigating, prosecuting, and settling the case. (Hawkins Decl. ¶ 21, Exhibit
5 1; Otkupman Decl., ¶ 42, Exhibit 5) These costs were reasonably incurred in prosecuting this action
6 on behalf of the Aggrieved Employees and should be approved by the Court. (Id.)

7 **V. CONCLUSION**

8 For all the reasons discussed above, Plaintiffs request that the Court approve the proposed
9 Settlement and adopt the Order and Judgment filed with this Motion.

10
11 DATED: October 14, 2024

JAMES HAWKINS APLC

12
13 By: 

14 _____
James R. Hawkins, Esq.
Gregory Mauro, Esq.
Michael Calvo, Esq.
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private attorney general

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21 DATED: October 14, 2024

**OTKUPMAN LAW FIRM,
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22
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