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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN JOAQUIN

LILLIAN DAVENPORT, on behalf of the State of California, and others similarly situated and aggrieved, Plaintiff, v. BROOKDALE SENIOR LIVING COMMUNITIES, INC., a Delaware Corporation; EMERITUS CORPORATION, a Washington Corporation; and DOES 1-100, inclusive, Defendants.	Case No.: STK-CV-UOE-2023-0009791 Assigned for All Purposes to: Hon. Barbara Kronlund Dept. 10D **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT UNDER PRIVATE ATTORNEYS GENERAL ACT** Date: TBD Time: 9:00 a.m. Dept.: 10D

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I. INTRODUCTION

Plaintiffs Lillian Davenport, Destiny Hernandez, Artin Torossian, Griselda Garcia, and Jalisa Monique Blake hereby seek Court approval of a proposed settlement of claims brought under the Private Attorneys General Act ("PAGA") against defendants Emeritus Corporation; Brea Emeritus LLC; Emeritus Properties XVI, Inc.; Brookdale Senior Living Communities, Inc.; Brookdale Employee Services, LLC; Brookdale Employee Services – Corporate, LLC; Brookdale Liberty, LLC; Brookdale Management of California, LLC; Brookdale Chancellor, Inc.; Brookdale Gardens, Inc.; Brookdale Living Communities, Inc.; Brookdale Wellington, Inc.; Brookdale Operations, LLC; Brookdale Vehicle Holding, LLC; Brookdale Provident Management, LLC; Summerville at Heritage Place, LLC; Summerville at Barrington Court LLC; Summerville at Fairwood Manor, LLC; Summerville at Cobbco, Inc.; Summerville at Roseville Gardens LLC; Summerville at Harden Ranch, LLC; Summerville at Atherton Court LLC; BKD Twenty-One Propco, Inc.; BKD Twenty-One Opco, Inc.; BKD Twenty-One Management Company; BKD Gardens-Tarzana Propco, LLC; BKD Personal Assistance Services, LLC; BKD Corona LLC; BKD Kettleman Lane LLC; BKD Cortona Park, LLC; BKD Folsom LLC; BKD Lodi, LLC; BKD FM7 Holdco CA, LLC; BKD Arbors of Santa Rosa, LLC; and Brea Citrus Heights, LLC (collectively, "Defendants"). Consistent with PAGA, the proposed settlement releases claims under PAGA only and has no impact on the individual claims of any allegedly aggrieved employee other than Plaintiffs. Since the settlement resolves nothing more than claims under PAGA, it requires only a one-step review and approval process by the Court, and for the reasons discussed below, the proposed settlement is fair, reasonable, and adequate, and advances the statutory purposes of PAGA. Plaintiffs respectfully request the Court approve the Settlement in its entirety.

II. BACKGROUND

Defendants all are part of a national senior living company that owns/operates over 1,100 communities in 46 states, including 32 locations in California. Defendants provide independent living, assisted living, memory care, skilled nursing, continuing care retirement communities, and at home care. [Ardestani Decl., ¶ 4.]

Plaintiff Davenport worked for Defendants from April 2022 through May 2023 as a non-exempt Caregiver at Brookdale Kettleman Lane. On September 13, 2023, and after exhausting her administrative remedies with the LWDA, she filed a representative complaint seeking penalties pursuant to PAGA for Defendants Emeritus Corporation and Defendant Brookdale Senior Living Communities for the alleged failure to pay all minimum wages, overtime wages, premium wages in lieu of late, short, or denied meal and rest periods, all wages due upon separation of employment, failure to furnish accurately itemized wage statements, and failure to reimburse business expenses to Plaintiff and Aggrieved Employees defined as "all current and former non-exempt employees employed by Defendants in California at any time during the PAGA Period (July 10, 2022 to the present). [Ardestani Decl., ¶ 5.]

Plaintiff Blake worked full time for Defendants as a medication technician. Plaintiff Hernandez worked as an hourly paid, non-exempt employee from approximately October 2022 to June 2023 at the Brookdale Senior Living location in Roseville, California. On February 6, 2024, and after exhausting her administrative remedies with the LWDA, Plaintiff filed a representative complaint seeking civil penalties under PAGA by Defendants Brea Citrus Heights LLC; Emeritus Corporation; Brookdale Senior Living Communities, Inc; Brookdale Senior Living Foundation; and Jerry Lynn against Plaintiff Blake and all Aggrieved Employees, defined as "all employees of Defendants working during the Civil Penalty Period [November 15, 2022 to present]." [Ardestani Decl., ¶ 6.]

Plaintiff Hernandez was an hourly paid, non-exempt employee from approximately October 2022 to June 2023, and she worked for Defendants as a Care Giver at the Brookdale Senior Living location in Roseville, California. On October 13, 2023, Plaintiff Hernandez filed her notice of claims under PAGA with the LWDA. On December 18, 2023, and after exhausting her administrative remedies with the LWDA, she filed a representative complaint seeking penalties pursuant to PAGA for Defendants. Plaintiff Hernandez alleged a failure to pay all minimum wages and overtime wages, provide meal periods, provide rest periods, provide accurate and complete wage statements, maintain payroll records, timely pay all earned wages during employment and upon termination, pay without unlawful deductions, pay at least the minimum wage rate required by statute, pay all vested vacation time, properly calculate and pay all sick pay, provide one day's rest in seven, provide suitable seating, pay reporting time pay, pay split shift premiums, provide sufficient toilet facilities, reimburse business expenses, provide written notice of material employment information, timely notify employees of potential COVID-19 exposure, and Defendants' requirement that employees patronize Defendants' business in the purchase of anything of value. [Ardestani Decl., ¶ 7.]

Plaintiff Torossian started working for Defendants on or around June 2023 as a chef and Dining Services Manager, until his employment ended on or around October 26, 2023. On October 31, 2023, Plaintiff Torossian filed his notice of claims under PAGA with the LWDA. On January 5, 2024, and after exhausting his administrative remedies with the LWDA, Plaintiff filed an individual and PAGA representative complaint asserting the following claims: 1) failure to compensate for all hours worked; 2) failure to pay minimum wages; 3) failure to pay overtime; 4) failure to provide accurate itemized wage statements; 5) failure to pay wages owed every pay period; 6) failure to give rest breaks; 7) failure to give meal breaks; 8) failure to reimburse business expense; 9) failure to pay wages when employment ends; 10) Private Attorneys General Act (PAGA); 11) failure to provide personnel file; 12) failure to provide pay records; and 13) violation of California Business and Professions Code Section 17200. [Ardestani Decl., ¶ 8.]

Plaintiff Garcia was employed by Defendants as a non-exempt "Caregiver" at Defendants' "Dementia and Alzheimer's Senior Living" facility in Corona, CA from approximately November 17, 2022, to April 23, 2023. On January 9, 2024, Plaintiff Garcia submitted her notice of claims under PAGA with the LWDA and filed a class action complaint in Riverside County Superior Court on the same date. Plaintiff Garcia subsequently amended the complaint on April 12, 2024, to add a cause of action under PAGA after completing the exhaustion period. On April 29, 2024, Plaintiff Garcia dismissed her class claims without prejudice, while maintaining her PAGA claim in Superior Court. On May 28, 2024, Plaintiff Garcia submitted her individual claims to arbitration with the American Arbitration Association. Plaintiff Garcia's claims (in both the PAGA action and the individual arbitration) are based on allegations that Defendants miscalculated the regular rate of pay for overtime purposes by failing to incorporate various forms of compensation, including "Sign On Bonuses" and other forms of bonuses and/or incentive pay, failed to provide compliant meal periods and authorize compliant rest periods due to pervasive understaffing, failed to pay meal and rest period premiums for violations and in the event that meal or rest period premiums were paid, paid them at the incorrect rate due to the miscalculation of the regular rate of pay, failed to reimburse employees for business expenses including the purchase of a required uniform shirt with Defendants' name and logo on it, and underpaid required sick pay wages as an additional result of miscalculating the regular rate of pay. [Ardestani Decl., ¶ 9.]

Once the cases were at issue, the Parties initiated discovery and began meeting and conferring regarding discovery, potential law and motion, and other case management issues, and eventually agreed to attempt a global mediation of cases and claims. They also agreed to and did informally exchange information to permit both sides to evaluate Plaintiffs' allegations. Through this informal discovery, Defendants provided Plaintiffs with information including, inter alia, Plaintiffs' personnel files, the number of potential Aggrieved Employees, the number of aggregate pay periods, pay stubs and time records for a sampling of about 20% of the Aggrieved Employees, and relevant policies regarding Defendants' time keeping and reporting policies and meal and rest break policies, among other pertinent materials. [Ardestani Decl., ¶ 10.]

In September 2024, the Parties mediated all cases with Steve Mehta, Esq., a respected professional neutral with extensive class action/wage and hour experience. Before and during the mediation, Plaintiffs and their counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiffs' ability to proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiffs' claims and Defendants' defenses, and the Parties' data analyses and conclusions based on data provided by Defendants. After a contentious day of negotiations, the Parties reached agreement through a mediator's proposal and subsequently formalized their tentative settlement in the Settlement Agreement now before the Court for approval. [Ardestani Decl., ¶ 11.] A fully executed, true and correct copy of the PAGA Settlement Agreement ("Settlement Agreement") is attached to the Ardestani Declaration as Exhibit 1.

Finally, in order to fully effectuate the tentative global settlement, Plaintiff Davenport will file a First Amended Complaint, adding all other Plaintiffs as party-plaintiffs and otherwise conforming the operative complaint's allegations to the terms of the proposed settlement. [Ardestani Decl., ¶ 12.]

III. SUMMARY OF SETTLEMENT TERMS

A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES

Under the settlement, Defendants will pay a non-reversionary settlement amount of $2,537,500 (the "Maximum Settlement Amount" or "MSA"). The MSA is inclusive of payments to the LWDA and Aggrieved Employees, costs of settlement administration (estimated at no more than $21,995), a modest service award to each Plaintiff, and reasonable attorney's fees and costs.[1] After payment of settlement administration costs, Plaintiffs' service awards, and reasonable attorney's fees and costs from the MSA, Plaintiffs presently estimate about $1,611,462.48 will remain (the "Net Settlement Amount" or "NSA"). Seventy-five percent of the NSA (about $1,208,896.86) will go to the LWDA, and the remaining 25% (about $402,865.62) will be distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each individual worked during the PAGA Period of March 27, 2023, to April 15, 2025. The average award currently is estimated at about $69 per individual, based on $2.76 per pay period. [Ardestani Decl., ¶ 13.]

B. PAYMENT AND THE NOTICE

The Parties propose using Phoenix Settlement Administrators as the Settlement Administrator. Phoenix has extensive experience administering PAGA settlements and has agreed to cap its fees at $21,995.00. [Declaration of Jodey Lawrence, ¶¶ 2-16; Exhs. A-B.] Defendants will fund the MSA within 30 calendar days of the Effective Date, and within 10 business days after funding Phoenix will mail a Notice and settlement check to all Aggrieved Employees via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in Defendants' records. Aggrieved Employees need not submit claim forms and will automatically receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed residual funds will be forwarded to the California State Controller's Unclaimed Property

[1] Plaintiffs' counsel collectively request 1/3 of the MSA ($845,833.33) in fees and costs of $33,209.19. Plaintiffs each request a modest service award of $5,000.00 ($25,000 total).

Fund. [Ardestani Decl., ¶ 14.]

C. THE RELEASE

The California Supreme Court has explained that a judgment in "a representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." Arias v. Superior Court (2009) 46 Cal.4th 969, 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended to be "binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." The Settlement Agreement protects the rights of the Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement Agreement specifically provides the Release is inapplicable to any claims other than those brought under PAGA. [Ardestani Decl., ¶ 15.]

IV. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE, FURTHERS THE PURPOSES UNDERLYING PAGA, AND WARRANTS APPROVAL

PAGA requires the Court to "review and approve any settlement of any civil action filed pursuant to this part." Labor Code § 2699(*l*)(2). Recently, the appellate court in Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, defined the standard for courts to apply when reviewing settlements under PAGA. The court held a trial court must ensure that 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.

In so holding, Moniz noted many federal district courts had imported class action settlement approval principles when evaluating PAGA settlements, demanding that PAGA settlements be "fair, reasonable, and adequate," and weighing factors such as "the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount[.]" Id. at 75-76 (collecting cases). Observing that "PAGA's purpose" is to "protect the public interest"—especially the allegedly Aggrieved Employees—the Court agreed with this district court authority, concluding that much the same principles that ensure fairness in class action settlements serve the public interest in the PAGA context. Essentially, these factors are more or less identical to those California courts use to evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiffs submit they should inform the Court's analysis as well. For the reasons below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

A. NATURE OF THE ALLEGED VIOLATIONS

Plaintiffs first contend Defendants failed to pay at least the applicable minimum wage for all hours worked for several reasons. First, Plaintiffs allege Defendants' facilities typically had only a single time clock available, which resulted in long lines of employees waiting to clock in/out as each shift turned over and also when clocking in/out for meal breaks. Plaintiffs further alleged Defendants' facilities regularly were understaffed and, as a result of this policy, employees regularly had to work through meal/rest breaks, stay late while waiting for the next shift to arrive, etc., all of which time went unrecorded and uncompensated. Plaintiffs allege employees typically lost as much as 15 minutes per shift in pay due working "off the clock." [Ardestani Decl., ¶ 16.]

Plaintiffs next contend Defendants failed to pay all wages due because it did not pay meal period premiums, overtime, and sick pay wages based on the correct "regular rate" of pay, and instead made such payments based on employees' base hourly wage without accounting for bonuses and other non-discretionary pay. Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804, 807 (holding that bonuses must be included in the calculation of an employee's regular rate of pay); Alvarado v. Dart Container Corp. of Cal. (2018) 4 Cal. 5th 542 549 (holding that bonuses should be factored into the employee's regular rate of pay so the regular rate reflects all forms of regular compensation that the employee earned). Here, Plaintiffs contend employees regularly received various non-discretionary bonuses and this non-discretionary income was not factored into the "regular rate" of pay. Per Plaintiffs, this resulted in the underpayment of sick time, overtime, and meal period premiums for all pay periods where an employee both had sick time, overtime, or a meal period violation and earned any kind of non-discretionary bonus pay. [Ardestani Decl., ¶ 17.]

On the meal break claims, Plaintiffs allege that even though Defendants' written meal and rest period policies seem facially compliant, as applied there were substantial "de facto" violations for lunches that either were missed completely, untimely, or cut short. Per Plaintiffs' experts' review, the data suggested at least a 33.5% violation rate for such missed or non-compliant breaks. On top of the "de facto" violations, Plaintiffs also contended Defendants had a policy that required employees to record lunches at exactly 30 minutes regardless of how long the lunch break actually lasted or whether it was interrupted by work. On the rest break claims, Plaintiffs likewise allege employees did not receive all required rest breaks and argued that Plaintiffs and other Aggrieved Employees regularly worked through rest periods in order to meet the demands of their jobs. [Ardestani Decl., ¶ 18.]

On the expense reimbursement claim, Plaintiffs allege employees had to use personal cell phones for work-related reasons and further had to launder and maintain their work uniforms. An employer must reimburse employees for use of personal devices, and if the employee has an unlimited monthly plan then the employer must reimburse an amount that equates to the employee's percentage of use for work. <u>Cochran v. Schwan's Home Serv.</u> (2014) 228 Cal.App.4th 1137. [Ardestani Decl., ¶ 19.]

Finally, Plaintiffs also alleged claims derivative of the foregoing claims, including a derivative wage statement claim based on the failure to pay all wages due, and failure to pay all wages due and owing upon separation of employment under Labor Code §§ 201-203. [Ardestani Decl., ¶ 20.]

B. <u>NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES</u>

For mediation, Defendants indicated they employed approximately 5,840 non-exempt employees in California during the relevant time frame, and these individuals worked approximately 145,786 pay periods during that time. Based on the data provided by Defendants, Plaintiffs estimated Defendants' maximum PAGA exposure at approximately $64,247,200, including around $14,578.600 on the unpaid wage/off the clock claim, approximately $724,300 on the unpaid wage/regular rate claims, about $4,883,800 on the meal period claims, $14,578.600 on the rest period claims, $14,578.600 on the wage statement claims, $14,578.600 on the expense reimbursement claims, and about $324,500 in civil penalties for failing to timely pay wages on separation of employment. [Ardestani Decl., ¶¶ 21-22.] Plaintiffs, however, substantially discounted these estimates in light of Defendants' many procedural and merits defenses.

C. <u>THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE STRENGTH OF PLAINTIFFS' CASE, THE DISCOVERY PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT</u>

On Plaintiffs' unpaid wage/off the clock claim, Defendants argued their time keeping policies accurately tracked and paid for all hours worked by their employees and did not deprive employees of compensable hours worked. Brookdale also emphasized that its policies strictly prohibited any "off the clock work," that employees were not required to arrive at work early or otherwise work "off the clock," and to the extent it happened it was not done with management's knowledge or consent. <u>White v. Starbucks Corp.</u> (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 (employer must have actual or constructive knowledge of the off the clock work). Defendants further argued proving this claim would require hundreds of individualized inquiries and would be impossible to resolve on a representative basis. [Ardestani Decl., ¶ 23.]

In response to Plaintiffs' unpaid wage/regular rate claim, Defendants argued that the bonuses Plaintiffs claim should have been included in the "regular rate" were, in fact, properly factored into the regular rate and/or were discretionary in nature and therefore properly excluded from the regular rate calculation. Consequently, per Defendants, these "bonuses" did not influence the employees' regular rate of pay when calculating meal premiums, sick pay, and/or overtime rates and, thus, employees were paid at the correct hourly rate. [Ardestani Decl., ¶ 24.]

On the meal break claims, Defendants offered multiple defenses. First, they emphasized the strength of their written policies, as well as reporting mechanisms for payment of meal premiums. Defendants further emphasized they provide all necessary meal breaks, and that employees received full uninterrupted lunch periods as reflected in their time records. Defendants further argued that even to the extent meal breaks were missed or arguably non-compliant, it was in violation of Company policy and aberrational and would require significant individual inquiries to determine the reasons underlying any such alleged violations and whether it was by employee choice or some other reason. Thus, per Defendants, any trial on this issue would be unmanageable because of these individualized issues. [Ardestani Decl., ¶ 25.]

As with meal breaks, Defendants argued the applicable rest break policies complied with California law, and that it authorized and permitted employees to take all required breaks, that such breaks were a net 10 minutes and otherwise fully compliant, and employees could leave the premises. Further, per Defendants, in light of the fact that it is not required to maintain a record of rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking rest periods would be purely anecdotal and individual issues would predominate on liability. This arguably would once again make a trial unmanageable since the number of instances an employee missed a rest break would have to be tested on a case-by-case basis to determine compliance. [Ardestani Decl., ¶ 26.]

For Plaintiffs' expense reimbursement claim, Defendants emphasized there were be no need for employees to use their personal cell phones for work purposes, and if they did it was purely for personal convenience and therefore it was not reimbursable as a "necessary" business expense. [Ardestani Decl., ¶ 27.] Defendants further asserted that employees were provided sufficient uniforms, and no specific laundering and/or maintenance requirements existed such that reimbursement would be necessary.

Plaintiffs also alleged derivative violations of Labor Code § 226 (wage statement violations) and §§ 201-203 (waiting time penalties). Both claims, since they are entirely derivative, will rise or fall along with the primary claims, in addition to being subject to "good faith" and other defenses available to Defendants. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay living wages); see Pedroza v. PetSmart, Inc. (C.D. Cal. June 14, 2012) 2012 WL 9506073 ("The good faith defense to the willfulness element of these sections [226, 203] is clearly established under California law); Woods v. Vector Mktg. Corp. (N.D. Cal. May 22, 2015) 2015 WL 2453202, at *3 ("The 'good faith dispute' rule has been extended by courts to apply to California Labor Code Section 226). Accordingly, Plaintiffs had to discount the value of these claims significantly in light of these multiple potential defenses. Defendants also contended a substantial discount should be applied to the civil penalties for these derivative (i.e., "stacked") violations, as it would be unfair to penalize Defendants multiple times for the same violation. [Ardestani Decl., ¶ 28.]

Defendants also emphasized PAGA gives the Court wide latitude to reduce the amount of civil penalties "based on the facts and circumstances of a particular case" if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(h). Several state and federal courts in California have applied significant reductions to PAGA civil penalties even after plaintiffs prevailed on the merits. In Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just $5 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). [Ardestani Decl., ¶ 29.]

Thus, Defendants raised various and multi-layered defenses to each of Plaintiffs' claims, anyone of which, if successful, could have derailed Plaintiffs' case. And Defendants vowed to raise all these defenses at trial. Accordingly, Plaintiffs faced risky issues going forward with litigation, and it could have taken years to realize any recovery in this action along with the possibility of post-trial appeals. In additional to its merits defenses and arguing trial would be unmanageable, Defendants also intended to raise additional defenses on damages, including the proper measure of civil penalties and the appropriate discount to place on any assessment of such penalties. [Ardestani Decl., ¶¶ 30-31.]

Moreover, the recovery is in line with a number of other PAGA settlements approved by California courts. McLeod v. Bank of Am., N.A., No. 16-CV-03294-EMC, 2018 U.S. Dist. LEXIS 195314, 2018 WL 5982863, at *4 (N.D. Cal. Nov. 14, 2018) (finding $50,000 PAGA allocation for claims estimated at $4.7 million — approximately 1.1% — adequate); Smith v. Kaiser Found. Hosps., 2020 WL 5064282, at *17 (S.D. Cal. Aug. 26, 2020) (finding that PAGA award that was 2.4% of maximum estimated value of PAGA claims was not "unfair, inadequate, or unreasonable given the risks of continued litigation"); Gilmore v. McMillan-Hendryx Inc., 2022 WL 184004, at

*4 (E.D. Cal. Jan. 20, 2022) (PAGA award of 4.2% of the maximum estimated value of PAGA claims and 2.3% of the total settlement amount was "not unreasonable and weighs in favor of settlement"); Hartley v. On My Own, Inc., 2020 WL 5017608, * 4 (E.D. Cal. Aug. 25, 2020) (approving settlement at 3.47% of verdict value of PAGA penalty, resulting in average payment per employee of $61); North v. Superior Hauling & Fast Transit, Inc., No. EDCV 18-2564 JGB (KKx), 2020 WL 12967997, at *4 (C.D. Cal. May 29, 2020) (approving settlement that included PAGA average payout of $21.01).

Although Plaintiffs and their counsel believe they could have prevailed, there was no such guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits on all claims, securing the maximum theoretical civil penalties, and appellate risks all are factored into the equation, the settlement value is reasonable and supported. Of course, to recover anywhere near the maximum penalties Plaintiffs would have to shoot the moon and win both liability and maximum penalties on all claims for every single pay period at issue, which outcome, for the reasons discussed, is unlikely. Given Defendants' various procedural and merits defenses, as well as the substantial penalty reductions ordered in the cases above – which occurred after trial – the proposed settlement is reasonable. [Ardestani Decl., ¶ 31.]

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 ("even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court"); White v. Experian Information Solutions, Inc. (C.D. Cal.

2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims).

In sum, when the risks of litigation, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any penalty award all are accounted for, it is clear a settlement amount of $2,537,500 for the PAGA claims is within the ballpark of reasonableness, furthers the purposes underlying PAGA, and approval is appropriate.

V. SUBMISSION TO THE LWDA

Plaintiffs timely provided the LWDA with the Settlement Agreement and this Motion and notified the LWDA of this approval hearing via the LWDA's online portal. [Ardestani Decl., ¶ 32; Exh. 3.] Accordingly, the LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and no comment or objection has been received.").

VI. PLAINTIFFS' ENHANCEMENTS

A modest incentive award for each Plaintiff is appropriate under applicable law. See Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000). Each Plaintiff devoted time and resources to the litigation, provided documents, assisted counsel with investigating the claims asserted and in preparing for mediation. The service payments provided to Plaintiffs as the PAGA representatives are typical in representative action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.”).

Here, the Settlement Agreement provides for an enhancement of up to $5,000.00 to each Plaintiff. The requests are reasonable given the risks they undertook on behalf of the Aggrieved Employees and State. By contacting and retaining counsel to pursue these claims, Plaintiffs helped make this settlement possible for the absent employees, while shouldering the risk of being liable for Defendants’ litigation costs. Plaintiffs also exposed themselves to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple Google search) for the benefit of other employees, placing themselves at risk of discrimination by future prospective employers. As stated in their respective declarations filed herewith, among taking many other actions assisting in the successful litigation of this case, Plaintiffs provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Ardestani Decl., ¶ 33; Declaration of Lillian Davenport, ¶¶ 2-9; Declaration of Griselda Garcia, ¶¶ 2-7; Declaration of Destiny Hernandez, ¶¶ 2-14; Declaration of Artin Torossian, ¶¶ 2-9.]

VII. THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE

For their efforts and the contingent risk undertaken in obtaining a common fund settlement that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or $845,833.33, is allocated to Plaintiffs’ counsel for reasonable attorney’s fees, plus actual litigation costs which amount to $33,209.19. These fees and costs are warranted under the law and within the range of fees commonly awarded in similar cases, and counsel will split any fees awarded as follows: The proposed fee split has been approved by all Plaintiffs in writing. [Ardestani Decl., ¶ 34.]

A. PLAINTIFFS’ COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM ACTION

PAGA provides a plaintiff is entitled to recover reasonable attorney’s fees, expenses, and costs under Labor Code § 2699(g)(l): “Any employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs, ...” As discussed below, reasonable attorney’s fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one, where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

"A *qui tam* action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government." People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-492. As our Supreme Court recently affirmed, a PAGA action is a *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 or her employer for Labor Code violations and recover civil penalties that otherwise could only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th 73; Iskanian, 59 Ca1.4th at 380-82 ("[a] PAGA representative action is therefore a type of qui tam action"). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state; 25% paid 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 plaintiff's attorneys are entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

Through the successful efforts of Plaintiffs and their attorneys here, a common fund was created in the amount of $2,537,500 for the benefit of the Aggrieved Employees and the State. Thus, these beneficiaries should bear their share of the costs and attorney's fees out of the overall amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

Not long ago, the California Supreme Court upheld the use of the common fund theory of recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Ca1.5th 480, 506. In Laffitte, the Supreme Court upheld an award of attorney's fees of one-third of the $19 million gross settlement (*e.g*., awarded $6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent with prior decisions recognizing "when a number of persons are entitled in common to a specific fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." Serrano v. Priest (1977) 20 Ca1.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole]; Lealao v. Beneficial California, Inc. (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when a settlement or adjudication results in the establishment of a separate or so-called common fund for the benefit of the class").

Accordingly, the common fund doctrine allows a court to award attorney's fees based on a percentage of the total fund created when the fund consists of a "certain or easily calculable sum of money," and California law has long applied the percentage of the recovery method for awarding attorney's fees where a common fund is established. Serrano, 20 Ca1.3d at 34; Bell v. Farmers Ins. Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1809; Sanders v. City of Los Angeles (1970) 3 Ca1.3d 252, 261-63 (affirming award of attorney's fee based on percentage of recovery).

Awarding attorney's fees of one-third of gross common fund amount is favored by California courts when a fund established for the common benefit of others is involved, such as here. Accordingly, awarding fees on this basis out of the $2,537,500 MSA, for a total of $845,833.33, is reasonable and appropriate. [Ardestani Decl., ¶¶ 34-52; Declaration of Raul Perez ("Perez Decl."), ¶¶ 6-18; Declaration of Harout Messelrian ("Messelrian Decl."), ¶¶ 2-7; Declaration of David Bibiyan ("Bibiyan Decl."), ¶¶ 4-18; Declaration of Paul Haines ("Haines Decl."), ¶¶ 2-22.].]

B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE FEE AWARD

Despite the recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier" method of cross-checking proposed fee awards, the court first ascertains counsel's total "lodestar" amount by multiplying the number of hours reasonably expended by each attorney's reasonable hourly rate, and then enhances or reduces this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Ca1.4th 1084, 1095-96; Lealao, 82 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the "fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation").

Here, Plaintiffs' counsel's lodestar is approximately $612,995, based on 828.9 attorney/paralegal hours spent litigating the case. [Ardestani Decl., ¶¶ 34-52; Exh. 5; Perez Decl., ¶¶ 6-18, Exh. 1; Messelrian Decl., ¶¶ 2-7; Bibiyan Decl., ¶¶ 4-18; Haines Decl., ¶¶ 2-22.] On a lodestar basis, the fee request of $845,833.33 results in a multiplier of 1.28, which is a modest enhancement entirely in line with California law. Indeed, California courts routinely approve multipliers in the in the 2-4 range to compensate for the time and risk of class action cases. Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward multiplier of 2.5); Wershba, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); City of Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).) Class Counsel submits that the requested 1.38 multiplier effectively operates to show that the percentage fee request is reasonable considering the challenges presented in this contingency fee matter and appropriately compensates Class Counsel for the contingent risk assumed and delay in payment during the 2+ years counsel has been representing Plaintiff. Thus, the multiplier results in a fee constituting a fair return on the contingency.

C. The Requested Costs Are Fair And Reasonable

Plaintiffs' Counsel also requests reimbursement of actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees, and Plaintiffs' Counsel is permitted to recover their litigation costs and expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees by ... [Plaintiffs'] attorneys"). Furthermore, Plaintiffs' Counsel is entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

While the Settlement Agreement authorizes litigation costs not to exceed $47,000, Plaintiffs' Counsels' actual costs presently are $33,209.19. [Ardestani Decl., ¶¶ 53-54; Perez Decl., ¶ 19; Messelrian Decl., ¶ 9; Bibiyan Decl., ¶ 19, Exh. 1; Haines Decl., ¶ 21.] This includes filing fees, service of process, mediation costs, and expert witness fees. These costs are reasonable and uncontested and should be approved in full.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs request the Court approve the proposed settlement under PAGA, approve the requested service awards, approve the requested award of reasonable attorney's fees and costs, approve Phoenix, Inc. as the settlement administrator and approve its fees in the amount of $21,995.00, approve the proposed distributions to the LWDA and Aggrieved Employees, and enter judgment.

Dated: September 15, 2025

CROSNER LEGAL, PC

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