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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

CASE NO.: 23CV050251

JESSICA PLUMMER, PAIGE RIEBOLDT, and
DANIELLE DEVENNEY individually and on
behalf of all other similarly situated aggrieved
employees,

Plaintiffs,

vs.

FLEXCARE, LLC and DOES 1-50, inclusive,

Defendants

[Assigned for all purposes to Judge Julia
Spain, Department 520]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION
FOR APPROVAL OF PAGA
SETTLEMENT, ATTORNEYS' FEES
AND COSTS, AND SERVICE AWARDS**

Hearing Date: April 17, 2024
Time: 2:00 p.m.
Dept.: 520
Reservation No.: A-502151-001

Complaint Filed: November 6, 2023
Trial Date: Not Set

[Filed concurrently with Notice of Unopposed
Motion and Unopposed Motion for Approval of
PAGA Settlement, Attorneys' Fees and Costs,
and Service Awards; Declaration of Eve H.
Cervantez and Accompanying Exhibits;
Declaration of K. Ross Merrill and
Accompanying Exhibits; and Proposed Order]

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1 **I. INTRODUCTION**

2 Plaintiffs Jessica Plummer, Paige Rieboldt, and Danielle Devenney (“Plaintiffs”)
3 respectfully request that the Court approve their Labor Code Private Attorneys General Act of 2004,
4 Labor Code §2698, *et seq.* (“PAGA”) settlement with Defendant Flexcare, LLC. The \$860,000
5 settlement resolves Plaintiffs’ PAGA claims filed in this Court on behalf of themselves and
6 similarly aggrieved employees, which are based on alleged Labor Code violations stemming from
7 Defendants’ actions in offering contracts to travel nurses for fixed-term assignments at guaranteed
8 rates of pay and subsequently making “taking it or leave it” amendments to those assignments to
9 accept less pay or be terminated (“bait and switch”) and from Defendant’s failure to include
10 purported stipends in employees’ regular rate of pay for the purpose of calculating overtime pay
11 rates. A copy of the proposed settlement has been submitted to the Labor & Workforce
12 Development Agency (“LWDA”) concurrently with its submission to the court. (Cervantez Decl.
13 ¶16.) Because the settlement provides substantial recoveries for the LWDA and approximately
14 2,256 aggrieved employees, and effectuates the Labor Code enforcement purposes of PAGA, it
15 should be approved.

16 Plaintiffs also seek approval of an award of attorneys’ fees and litigation costs from the
17 settlement, which should be approved as a reasonable proportion of the common fund and because it
18 is supported Plaintiffs’ counsel’s lodestar in this case with a reasonable multiplier of 1.3, and all the
19 costs were necessarily incurred for the benefit of the aggrieved employees and the State in pursuing
20 this litigation. Finally, Plaintiffs seek approval for payments out of the settlement fund of \$1,000 to
21 each of the three Plaintiffs in recognition of their service to the aggrieved employees.

22 **II. THE LITIGATION**

23 Plaintiffs brought a representative action under PAGA seeking civil penalties for themselves
24 and other aggrieved California travel clinicians and the State of California due to Defendants’
25 alleged violations of the Labor Code. (See First Amended Complaint (“FAC”), filed concurrently
26 with this Motion.) Plaintiffs alleged violations of numerous Labor Code provisions, predicated on
27 two different legal theories. First, plaintiffs alleged that Flexcare had a pattern and practice of
28 offering contracts to travel employees for fixed-term travel nurse assignments at a guaranteed rate of

1 pay, and then making “take-it-or-leave-it” demands for lower rates after the nurses had accepted the
2 contract, secured short-term housing, and incurred other expenses. (*Id.* ¶¶2, 15-23.) Plaintiffs
3 alleged this bait-and-switch conduct violated § 970 of the California Labor Code, which prohibits
4 inducing an employee to change locations by misrepresentations relating to the existence, character,
5 or kind of employment. Second, Plaintiffs alleged that Flexcare significantly underpaid its travel
6 nurses for overtime work, because it provided payments styled as “stipends” that were tied to hours
7 worked and acted as a form of compensation for time worked, but were not included in employees’
8 regular rate of pay for purposes of calculating overtime pay rates. (*Id.* ¶¶3, 36-46.)

9 On July 26, 2023, Jessica Plummer and Paige Rieboldt filed a notice with the California
10 Labor & Workforce Development Agency (“LWDA”) asserting multiple violations of the Labor
11 Code, including bait-and-switch claims under Labor Code § 970 and failure to pay correct overtime
12 premiums under §§ 510 and 1194 based on the omission of “stipend” pay from the regular rate.
13 Plaintiffs also asserted violations of several other provisions based on those underlying bait-and-
14 switch and overtime theories: failure to indemnify employees for expenses and losses under § 2802;
15 failure to indemnify employees for want of ordinary care under § 2800; failure to furnish accurate
16 wage statements under §§ 226, 1174, 1175; and unlawful failure to make payment of all wages due
17 upon termination under §§ 201, 202, 203, and/or 204. (*Id.* Ex. 1.) As the LWDA did not indicate
18 that it intended to investigate these claims, on November 6, 2023, Plaintiffs Plummer and Rieboldt
19 filed their initial PAGA complaint in this Court.

20 Plaintiffs filed an amended PAGA letter on November 28, 2023 which added claims from
21 another aggrieved employee, Danielle Devenney, and also added a claim for unlawful secret
22 underpayment of wages, Labor Code § 223. (*Id.* Ex. 2.). The LWDA likewise did not indicate that
23 it intended to investigate these claims. (*Id.* ¶5.) As settlement discussions were in process when the
24 time for LWDA action expired, plaintiffs included Devenney’s claims in the negotiations, but did
25 not amend the complaint at that time. Plaintiffs’ First Amended Complaint, adding Devenney’s
26 claims and Labor Code § 223 claims for all plaintiffs, is filed concurrently with this motion,
27 pursuant to the parties’ eventual settlement agreement.
28

1 Flexcare’s counsel reached out to plaintiffs’ counsel and suggested early mediation of this
2 case. The parties therefore agreed to a short stay of the case pending this mediation, and,
3 accordingly, the parties stipulated to, and the Court ordered, a stay of the case through February 29,
4 2024. The parties conducted initial informal discovery prior to the mediation, in which Defendant
5 furnished to plaintiffs various core documents, including Travel Agreements between Defendant
6 and plaintiffs, the Overtime section of the Clinician Handbook, and Defendant’s Account
7 Reimbursement Plan, as well as a sample of payroll data sufficient to allow plaintiffs to analyze the
8 number of pay periods at issue in this litigation. (Cervantez Decl. ¶12.)

9 The Parties exchanged confidential mediation briefs in which each side carefully explained
10 their view of the law and facts. (Cervantez Decl. ¶13.) The Parties engaged in a full day mediation
11 session with Hon. Wynne Carvill (Ret.) on February 21, 2024. (*Id.*) The Parties were unable to
12 reach a resolution at the mediation, but following further conversations and email correspondence
13 with the mediator and among counsel, the Parties reached a settlement in principle on February 24,
14 2024. (*Id.*) Throughout the case, plaintiffs have provided the LWDA notice of their PAGA letters
15 and complaints, and paid LWDA the requisite PAGA fees. (See Cervantez Decl. ¶16; Labor Code
16 §§2699(l)(1), 2699.3(a)(1)(A) [notice requirements].)

17 **III. THE SETTLEMENT**

18 The Private Attorneys General Act Settlement Agreement and Release provides that
19 Defendants will pay a total of \$860,000 to settle this Action. (“Agreement,” Cervantez Decl. Ex. A
20 §3(f).)¹ The aggrieved employees’ (“PAGA Members”) release is narrowly tailored to the facts
21 alleged in the First Amended Complaint, and is expressly limited to PAGA penalties and
22

23 ¹ The plaintiffs separately resolved their individual claims for damages under the Labor Code, which
24 were not asserted in this litigation. (See generally FAC.) This Court need not review or approve
25 these individual settlements, which are outside the scope of this Settlement Agreement, and would
26 not be subject to court review even if they had been part of the same agreement. (See, e.g.,
27 *Tenorio v. Gallardo* (E.D. Cal. Sep. 30, 2019, No. 1:16-cv-00283-DAD-JLT) 2019 WL 4747949,
28 at *3 [“While California Labor Code §2699(l)(2) requires this court to approve any settlement
agreement with respect to plaintiffs’ PAGA claims, the court is aware of no corresponding
provision that imposes any duty on this court to supervise settlement of plaintiffs’ non-PAGA
claims.”]; *Ramirez v. Benito Valley Farms, LLC* (N.D. Cal. Aug. 25, 2017, No. 16-CV-04708-
LHK) 2017 WL 3670794, at *1 [“Under the PAGA ... the Court is not required to approve
settlement provisions resolving Plaintiff’s individual claims.”].)

1 corresponding attorneys’ fees and costs “arising out of the facts and violations alleged in the
2 Complaint or the PAGA Notices ... during the PAGA Period,” of specified Labor Code sections²
3 and does not include aggrieved employees’ Labor Code claims, if any. (*Id.* §1(p).)

4 After deduction of Court-approved attorneys’ fees and costs, plaintiff service awards, and
5 settlement administration costs, the net settlement amount will be distributed 75% to the LWDA,
6 and 25% to the aggrieved employees, as required by Labor Code §2699(i). (Agreement §§1(j)(m).)

7 The Agreement provides that the aggrieved employees’ share of the PAGA Payment will be
8 allocated among employees based on the number of pay periods for which they worked during the
9 PAGA Period in which there was an alleged violation. (Agreement §3(f).) Each Section 970
10 Settlement Pay Period and Overtime Settlement Pay Period is valued at \$50; if a pay period includes
11 both alleged violations, it is valued at \$75. (*Id.* §3(f)(i).) The remaining portion of the Gross
12 Settlement amount shall be allocated to aggrieved employees on a *pro rata* basis based on the
13 number of other pay periods they worked within the PAGA period, covering the asserted derivative
14 claims, including those under §226 for wage statement violations.

15 No employee is required to file a claim in order to receive their settlement payment. (See
16 Agreement §3(k).) The payments will be calculated by the settlement administrator based on data
17 provided by Defendant. (*Id.* §§3(f)(g).) The payments will be sent by check to the employee’s last
18 known address, updated using the U.S. Postal Service’s national change of address database, with
19 skip tracing to attempt to deliver checks returned as undeliverable. (*Id.* §3(g)(iii)-(iv).) The
20 settlement is non-reversionary. Any checks remaining uncashed for more than 180 days will be
21 cancelled and the funds transmitted by the settlement administrator to Legal Aid at Work as *cy pres*,
22 or, if the Court does not approve the *cy pres*, the funds will escheat to the State in the name of the
23 individual aggrieved employees.³ (*Id.* §3(k)(d).)

24 The Agreement provides for Plaintiffs’ counsel to recover up to 33.33% of the gross
25 settlement fund, or \$286,638, in attorneys’ fees, and Plaintiff’s counsel’s litigation costs actually

26 ² The PAGA Period is “July 26, 2022 through February 21, 2024.” (Agreement §1(g).)

27 ³ Legal Aid at Work is a nonprofit legal services organization that assists working families with
28 low-incomes in various legal areas, including enforcement of workplace protections, such as those
at issue here. (See <https://legalaidatwork.org/our-programs/combating-wage-theft/>.)

1 incurred up to \$20,000. (Agreement §3(h).) The Agreement also provides for service payments of
2 \$1,000 to each plaintiff. (*Id.* §3(i).) Any amount of attorneys’ fees and costs, or service awards, not
3 awarded by the Court will not revert to Defendant but will instead be added to the Net Settlement
4 Fund for distribution to the LWDA and PAGA Members. The Agreement also provides for the
5 payment of the settlement administrator’s fees, estimated not to exceed \$10,000. (*Id.* §3(l).)

6 **IV. THE SETTLEMENT SHOULD BE APPROVED**

7 Plaintiffs’ PAGA claim is not a class claim; it is a representative claim for civil penalties
8 brought by plaintiffs as proxies for the State. Therefore, the two-step procedure for obtaining
9 judicial approval and providing notice to a class does not apply. (*Arias v. Superior Court* (2009) 46
10 Cal.4th 969, 986; *Iskanian v. CLS Trans. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) However,
11 PAGA provides that the LWDA must be notified of a PAGA settlement (which Plaintiffs have
12 done) and that the court “shall review and approve” any PAGA settlement. (Labor Code, §
13 2699(l)(2).) The court reviews a PAGA settlement to “determine whether it is fair, reasonable, and
14 adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones,
15 and to maximize enforcement of state labor laws.” (*Moniz v. Adecco USA, Inc.* (2021) 72
16 Cal.App.5th 56, 77.; see also *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110,
17 1133 [California trial courts will generally approve PAGA settlement that provides “genuine and
18 meaningful” relief “consistent with the underlying purpose” of PAGA (quoting amicus brief of
19 LWDA)].) The proposed settlement satisfies these criteria.

20 The settlement provides significant monetary compensation under the circumstances of this
21 case. This litigation, and the settlement, encompasses approximately 51,798 total pay periods from
22 the beginning of the release period (July 26, 2022) to February 21, 2024. (Agreement §1(g).) This
23 case involves multiple different claims, encompassing different subsets of these pay periods, making
24 a maximum potential recovery for the whole case difficult to calculate. But PAGA itself establishes
25 a default civil penalty of “one hundred dollars (\$100) for each aggrieved employee per pay period
26 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period
27 for each subsequent violation” for all provisions of the Labor Code in which no other civil penalty is
28 specified. (Cal. Labor Code, § 2699(f)(2).) The settlement here provides for \$50 per pay period for

1 each pay period covered by either the bait-and-switch claim (approximately 1,061 pay periods) or
2 the overtime claim (approximately 12,600 pay periods), and \$75 for those covered by both theories.
3 (*Id.* §3(f).) The remainder of the gross settlement amount is allocated to the rest of the total
4 Settlement Pay Periods for alleged derivative claims, such as violations of plaintiffs’ wage statement
5 claim under § 226, the weakest of plaintiff’s claims, as described below. This compares extremely
6 favorably to settlements of other PAGA cases and to the proportional recovery approved in class
7 action cases. (See, e.g., *Sharp v. Safeway Inc.*, Case No. 2011-1-cv-202901, Santa Clara County
8 Superior Court (Oct. 21, 2019 order approving PAGA settlement for approximately \$5 per pay
9 period) (Cervantez Decl. Ex. C); cf. *Custom LED, LLC v. eBay, Inc.* (N.D. Cal. June 24, 2014, No.
10 12-cv-00350-JST) 2014 WL 2916871, at *4 [in class action context, “courts have held that a
11 recovery of only 3% of the maximum potential recovery is fair and reasonable when the plaintiffs
12 face a real possibility of recovering nothing absent the settlement.”].)

13 Moreover, the settlement was the product of extensive, arms-length negotiation, including
14 participating in a mediation session with retired Judge Wynne S. Carvill, a highly experienced
15 mediator with experience in employment class actions and PAGA cases. This supports the
16 presumption of fairness in the class action approval context. (See *Clark v. American Residential*
17 *Services LLC* (2009) 175 Cal.App.4th 785, 800 [“The court undoubtedly should give considerable
18 weight to the competency and integrity of counsel and the involvement of a neutral mediator in
19 assuring itself that a settlement agreement represents an arm's-length transaction entered without
20 self-dealing or other potential misconduct.”].) This settlement is fair and reasonable, and well-
21 designed to further the purposes of PAGA “to remediate present labor law violations, deter future
22 ones, and to maximize enforcement of state labor laws.” (*Moniz*, 72 Cal.App.5th at 77.)

23 The proposed PAGA settlement and payments provide meaningful relief to the State of
24 California and PAGA Members, in light of all known facts and circumstances in this case, including
25 the risk of significant delay and uncertainty associated with litigation. First, given the early stage of
26 this litigation, resolution of this case on the merits in this Court and through any potential appeal is
27 likely years away. The parties would have to conduct extensive fact discovery, brief and resolve
28 any demurrer, and brief and resolve motions for summary judgment, and possibly brief an appeal.

1 Consequently, the State of California and the aggrieved employees greatly benefit from the timely
2 relief provided by this settlement. Second, the settlement avoids the risk to the State and aggrieved
3 employees of an unfavorable judgment, particularly in light of the defenses asserted by Defendant.
4 Plaintiff's specific claims faced different litigations risks, reflected in the settlement allocation.

5 **A. Bait-and-Switch Claims**

6 Flexcare has raised several possible defenses to plaintiffs' bait-and-switch claim under
7 Labor Code § 970 that increase the uncertainty of litigation. First, Flexcare has indicated that it
8 would likely assert that Plummer and Rieboldt's bait-and-switch claims are untimely, as the mid-
9 contract rate reductions both experienced occurred more than a year before the complaint was filed.
10 Plaintiffs believe that this argument is incorrect, given the California Supreme Court's recent
11 approval of *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, for the
12 proposition that "[t]he fact that the plaintiff's 'individual claim may be time-barred does not nullify
13 the alleged Labor Code violations nor strip [the plaintiff] of her standing to pursue PAGA
14 remedies.'" (*Adolph v. Uber Techs., Inc.* (2023) 14 Cal. 5th 1104, 1121, quoting *Johnson*, 66
15 Cal.App.5th at 930.) But plaintiffs acknowledge that there is a small risk that this Court could
16 distinguish *Johnson* and rule that these claims are untimely.

17 Second, and more fundamentally, a claim under Section 970 requires plaintiffs to show that
18 Flexcare "influence[d], persuade[d], or engage[d] any person to change from one place to another in
19 this State or from any place outside to any place within the State," and did so "through or by means
20 of knowingly false representations." (Cal. Labor Code, § 970.) Plaintiffs have alleged and believe
21 the evidence will demonstrate that Flexcare's representations about the work it initially offered to
22 plaintiffs were knowingly false. However, Plaintiffs acknowledge that knowing falsity will be a
23 fact-intensive inquiry in this case, and there is a risk that, if the PAGA bait-and-switch claim went
24 to trial, the Court could find that Flexcare did not knowingly misrepresent the compensation offered
25 to its employees.

26 Finally, plaintiffs were unable to locate any litigated PAGA claim based on section 970
27 violations that would demonstrate the correct way to calculate affected pay periods. The data
28 provided by Flexcare showed 152 mid-contract reductions in pay, for which employees had an

1 average of seven pay periods remaining in the assignment, and plaintiffs believe that each of those
2 pay periods is subject to a PAGA penalty. But plaintiffs acknowledge that there is uncertainty about
3 the total PAGA recovery that would be granted if plaintiffs won at trial.

4 The settlement values each Section 970 Settlement Pay Period following a mid-contract
5 adjustment at \$50. (Agreement §3(f).) This is a substantial settlement for the State and aggrieved
6 employees given these factors.

7 **B. Overtime wages**

8 Plaintiffs' overtime claim is based on a theory that Flexcare failed to include per diem
9 stipends in calculating employees' regular rate of pay as required by *Clarke v. AMN Services, LLC*
10 (9th Cir. 2021) 987 F.3d 848, *cert. denied*. In *Clarke*, the Ninth Circuit held that per diem payments
11 made by a similar nursing staffing agency that varied depending on how much the nurses worked
12 were part of the workers' regular rate of pay under the FLSA and California law. The parties here
13 dispute the extent to which Flexcare's policy is similar to the policy described in *Clarke*, and thus
14 whether the per diem stipends Flexcare offers must be treated as part of the regular rate for the
15 purposes of calculating overtime.

16 Plaintiffs believe that the allegations of overtime violations here are strong, as Flexcare's
17 policy meets the crucial factors of the Ninth Circuit's test: (1) "the tie of the per diem deductions to
18 shifts not worked regardless of the reason for not working"; and (2) "the default payment of per
19 diem on a weekly basis, including for days not worked away from home, without regard to whether
20 any expenses were actually incurred on a given day." (*Id.* at 858.) But plaintiffs acknowledge that
21 this Court could determine that the distinctions between the policies, such as Flexcare's lack of a
22 system for "banking hours," are sufficient to distinguish this case from *Clarke*, in which case there
23 would be no recovery.

24 The settlement values each Overtime Settlement Pay Period at \$50. (Agreement §3(f).)⁴
25 This is a substantial settlement for the State and aggrieved employees given these factors.

26
27 ⁴ If a pay period is included in both the Section 970 Settlement and Overtime Settlement, the
28 agreement allocates \$75. (Agreement §3(f).)

1 **C. Derivative claims**

2 Plaintiffs also assert claims under multiple other Labor Code statutes based on the same
3 legal theories described above. Plaintiffs allege that Flexcare is subject to civil penalties under
4 PAGA for violations of §§ 201-204 for failure to timely pay wages due at regular pay periods and
5 upon termination, because the wages paid did not properly reflect employees' pre-bait-and-switch
6 rates and required overtime pay. Plaintiffs also allege violations of § 226 by provision of improper
7 wage statements with every paycheck listing regular, overtime, and double time rates, and § 223 by
8 secretly paying a lower wage than that to which plaintiffs were entitled while purporting to pay
9 appropriate overtime and double time wages. Moreover, plaintiffs allege that the misclassification of
10 wages as stipends not dependent on actual expenses means that Flexcare has not indemnified or
11 reimbursed employees for the costs of necessary business expenses in violation of § 2802.

12 Plaintiffs believe that these penalties for different violations can be "stacked," such that each
13 pay period is subject to multiple penalties. (See *Hernandez v. Towne Park, Ltd.* (C.D. Cal. June 22,
14 2012, No. CV 12-02972 MMM) 2012 WL 2373372, at *17 n.77.) But plaintiffs also recognize the
15 discretion afforded to judges to "award a lesser amount than the maximum civil penalty amount
16 specified ... if, based on the facts and circumstances of the particular case, to do otherwise would
17 result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Cal. Lab. Code, §
18 2699(e)(2).) And plaintiffs recognize that many of these theories of derivative claims have not been
19 previously litigated in PAGA cases. Thus, the settlement agreement does not distinguish between
20 the derivative claims and the predicate Section 970 and overtime claims as to those derivative
21 claims that would apply to the same pay periods, but instead considers them to be part of the total
22 \$50 per-pay-period recovery.

23 However, plaintiffs' § 226 claim is slightly different from their other derivative claims.
24 Section 226(a) mandates that an employer "furnish to their employee ... an accurate itemized
25 statement in writing showing (1) gross wages earned, (2) total hours worked by the employee ...
26 and (9) all applicable hourly rates in effect during the pay period and the corresponding number of
27 hours worked at each hourly rate by the employee," and assesses penalties of \$50 for the first
28 violation and \$100 for each subsequent violation of the statute. Plaintiffs believe the wage

1 statements Flexcare provided to every PAGA Member for every pay period violated § 226,
2 regardless of whether each employee worked overtime during that period, because each wage
3 statement failed to include the per diem stipend pay in the regular rate when calculating the
4 overtime rate, and thus failed to accurately reflect the applicable hourly rates in effect. Plaintiffs
5 recognize that this theory is a novel application of *Clarke*, and even if the Court ultimately agreed
6 with plaintiffs on the merits, it could reduce the PAGA penalties as described in § 2699(e)(2). The
7 settlement agreement thus values these claims at a much lower rate than the § 970 claims and the
8 overtime claim itself: the remainder of the gross settlement amount not allocated to the Section 970
9 Settlement Pay Periods or Overtime Settlement Pay Periods is distributed to the remaining
10 Settlement Pay Periods. (Agreement §3(f).) Based on the initial data provided by Flexcare,
11 plaintiffs estimate this to be approximately \$3 per pay period.

12 **V. PLAINTIFFS' COUNSEL SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS**

13 Pursuant to Labor Code § 2699(g)(1), “[a]ny employee who prevails in any [PAGA] action
14 shall be entitled to an award of reasonable attorney’s fees and costs.” The parties’ settlement
15 agreement provides for a fee award, subject to this Court’s approval, of an amount up to one-third
16 (33.33%) of the Gross Settlement Fund, totaling \$286,638, for attorneys’ fees, and an amount of up
17 to \$20,000 for reimbursement of actual litigation costs and expenses. (Agreement §3(h).) This
18 settlement agreement provided a substantial benefit to aggrieved employees and to the State, both
19 monetarily and in promoting the enforcement of the California Labor Code. This fee request is thus
20 appropriate and reasonable under both the common fund and lodestar methods.

21 A percentage of a common fund is a reasonable basis to support a request for attorney’s fees.
22 (See, e.g., *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503 [“We join the overwhelming
23 majority of federal and state courts in holding that when class action litigation establishes a
24 monetary fund for the benefit of the class members, and the trial court in its equitable powers
25 awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee
26 by choosing an appropriate percentage of the fund created.”].) Moreover, one-third of the common
27 fund is standard in class action settlements, and is routinely granted by California Superior Courts in
28 PAGA-only settlements like this one. (See, e.g., *id.* at 506 [approving fees of one-third of the

common fund]; *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 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.”]; *Martin v. Aircraft Service Intern., Inc.* (Cal. Super. July 16, 2020, No. CGC-18-566072), 2020 WL 5649943, at *1 [approving fees of one-third of \$1,100,000 Gross Settlement Amount in PAGA-only case]; *Navarro v. Tire Staffing* (Cal. Super. Apr. 28, 2022, No. CIVDS 2016343), 2022 WL 17482794, at *2 [likewise granting fees of one-third of gross PAGA settlement fund].) In fact, courts also regularly approve fee awards in excess of one-third of the fund. (See, e.g., *Cubillas v. Dav-El Los Angeles* (Cal. Super. June 14, 2018, No. BC427918), 2018 WL 3760657, at *3-4 [awarding \$1.12 million in attorneys’ fees, equivalent to 40% of the common fund, where lodestar-multiplier exceeded the fee request].)

The requested attorney’s fees here represent one-third of the Gross Settlement Amount. Moreover, this settlement clearly establishes a true common fund, in which there is no claims process required in order to receive a share of the PAGA Fund, and no portion of the Gross settlement amount reverts to the Defendant. (Agreement §3(j); see *Laffitte*, 1 Cal.5th at 503.) Finally, the overall fee in this case is consistent with the purpose of PAGA, which is to incentivize employees and their attorneys to bring private actions to enforce the Labor Code, thereby supplementing the State’s limited enforcement resources. This proportion of the fund is entirely appropriate based on the contingent risk incurred by counsel and the benefits conferred on plaintiffs, the aggrieved employees, and the State, which include substantial per-pay-period penalties for the primary claims in this case.

This fee is also reasonable under the lodestar-multiplier method. The lodestar-multiplier method calculates attorneys’ fees by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. The court may then increase or decrease the amount by applying a multiplier to take into account such factors as the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. (See, e.g., *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095, citation omitted [“the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.... may then be

adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.”]; *Ramirez v. Benito Valley Farms, LLC*, (N.D. Cal. Aug. 25, 2017) 2017 WL 3670794, at *6-7 [calculating attorneys’ fees in PAGA settlement on lodestar method].) In common-fund cases, the lodestar is typically used as a cross-check to determine whether the percentage is reasonable, although courts retain discretion to forgo a lodestar cross-check as well. (*Laffitte*, 1 Cal.5th at 505-506.)

Here, Plaintiffs’ counsel’s lodestar is approximately \$222,722.50. As set forth in the accompanying Declarations, Plaintiffs’ counsel devoted more than 232.6 hours to the prosecution of this case, resulting in a total lodestar of more than \$222,722.50 at counsel’s 2024 commercial hourly rates. (Cervantez Decl. ¶¶19-23; Merrill Decl. ¶¶13-17.) With the requested fee award of \$286,638, the multiplier is approximately 1.3.

The hours incurred were reasonably and necessarily devoted to the litigation. Plaintiffs’ counsel engaged in fact investigation, including interviews with Plaintiffs and review of documents; preparation and filing of pleadings; legal research regarding the alleged Labor Code violations; preparation of a mediation brief; mediation; and drafting, negotiation, and revision of the Settlement Agreement. (Cervantez Decl. ¶¶11-15; Merrill Decl. ¶¶18.) The rates charged are also reasonable, representing the actual rates Plaintiffs’ counsel charges to commercial market rate clients. (Cervantez Decl. ¶¶24-26; Merrill Decl. ¶¶19-20.) Numerous California courts have approved Plaintiffs’ counsel’s rates. (Cervantez Decl. ¶28; Merrill Decl. ¶20.)

Moreover, the contingent nature of the litigation, the novelty and complexity of many of the issues, and the results ultimately obtained fully justify a multiplier on the lodestar. (See, e.g., *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1217 (affirming 1.65 multiplier awarded to Altshuler Berzon LLP based on contingent risk, skill, and results obtained); see also *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 (“[m]ultipliers can range from 2 to 4 or even higher”), *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) And here, one reason for the multiplier is that counsel were able to swiftly resolve the case, to the great benefit of PAGA Members and the State, who did not have to wait years for a recovery. In this case, the multiplier of 1.3 is reasonable.

1 Finally, both Labor Code §2699(g)(1) and the common fund doctrine provide for the
2 reimbursement of plaintiffs' litigation expenses. (See *Laffitte*, 1 Cal.5th at 486, 503.) The
3 Agreement accordingly provides for the reimbursement of Plaintiffs' counsel's reasonable costs. In
4 the present case, Plaintiffs' counsel spent \$6,807.94 in out-of-pocket expenses (filing fees, mediator
5 fees, travel, transcripts, copy costs, on-line legal research, etc.) of the type that are normally and
6 customarily compensated in common fund and representative litigation. (Cervantez Decl. ¶29;
7 Merrill Decl. ¶21.) These amounts should be awarded to Plaintiffs' counsel as set forth in the
8 Agreement.

9 **VI. PLAINTIFFS' INDIVIDUAL SERVICE PAYMENTS**

10 The Agreement also provides a Service Payment of \$1,000 to each plaintiff. Service awards
11 are typical in both class action cases and PAGA cases, and the requested service award is eminently
12 reasonable. (E.g. *In re Yahoo Mail Litig.* (N.D. Cal. Aug. 25, 2016, No. 13-CV-4980-LHK) 2016
13 WL 4474612, at *11 ["Ninth Circuit has established \$5,000 as a reasonable benchmark [for service
14 awards]."]; *Abelar v. American Residential Services, L.L.C.* (C.D. Cal. Nov. 14, 2019, No. ED
15 CV19-00726 JAK) 2019 WL 6054607, at *6 [approving PAGA only settlement and holding "[t]he
16 service award of \$5000 is reasonable compensation for the time and acceptance of adverse
17 employment risk by Plaintiff"].). This PAGA settlement would not have been possible without the
18 efforts of plaintiffs, who undertook significant risk bringing this case against a former employer.
19 The modest service awards here are reasonable compensation for that risk.

20 **VII. CONCLUSION**

21 For the foregoing reasons, the Court should approve the PAGA settlement, the award of
22 attorneys' fees and costs, and the service award.

23 Dated: March 26, 2024

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