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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

JANINE MIRELES, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

LODI MEMORIAL HOSPITAL
ASSOCIATION, INC.; ADVENTIST
HEALTH SYSTEM/WEST; and DOES 1
through 25, inclusive

Defendants.

Case No. STK-CV-UOE-2020-0004458
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Erin Guy Castillo
Department 10B

REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF
PRIVATE ATTORNEYS' GENERAL ACT
("PAGA") SETTLEMENT**

Date: August 29, 2023

Time: 9:00 a.m.

Dept: 10B

Judge: Hon. Erin Guy Castillo

Complaint filed: June 2, 2020

Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks approval of a \$1,500,000 non-reversionary settlement in this Private Attorneys' General Act ("PAGA") action for civil penalties against Lodi Memorial Hospital Association, Inc. and Adventist Health System/West ("Lodi" or "Defendants") based on the alleged failure, from May 16, 2019 to June 24, 2023, to provide non-exempt clinical employees all: wages earned, by allowing off-the-clock work; rest and meal periods; reimbursement for business expenses; accurate wage statements; and timely final wages.

The settlement was reached after a significant exchange of information and extended arms'-length negotiations with experienced mediator Deborah Saxe, Esq. and has achieved PAGA's goals of enforcing the California Labor Code, protecting employees, and collecting civil penalties for the State. The settlement, and its distribution to the State of California and aggrieved employees, is consistent with PAGA's purpose and procedures.

II. PARTIES AND AGGRIEVED EMPLOYEES

Lodi Memorial Hospital opened in 1952, grew steadily, and affiliated with Adventist Health in 2015. Lodi operates five primary care medical practices, a free outreach clinic, and ten specialty medical practices. Declaration of Jeff Geraci, ("Geraci Decl.") ¶11.

Plaintiff Janine Mireles worked for Defendants as a non-exempt Medical Assistant from September 24, 2018, until March 26, 2020. Aggrieved employees worked in non-exempt clinical positions, in the Hospital and in 19 clinics, with responsibility for direct patient care or supporting that care, including Medical Assistants, RNs, LVNs, technicians, and others, from May 16, 2019 to June 24, 2023 ("PAGA Settlement Members," "PAGA Period"). Geraci Decl. ¶12.

III. PROCEDURAL HISTORY

Plaintiff gave notice of her claims, alleging Defendant failed to pay her and other aggrieved employees for all time worked, failed to provide meal and rest periods, failed to reimburse all business expenses, and derivative claims, to the Labor and Workforce Development Agency ("LWDA") on May 16, 2020, and the LWDA declined to investigate. Plaintiff initially filed a class action lawsuit and amended to add PAGA claims. Defendants

1 later produced an arbitration agreement and class action waiver and on September 16, 2020,
2 Plaintiff determined the class action causes of action could not proceed and they were
3 dismissed, leaving only PAGA claims. Geraci Decl. ¶13.

4 The Parties exchanged written discovery and Plaintiff filed motions to compel. The
5 Court did not rule on the motions, but appointed a discovery referee. After additional and
6 extensive meet and confer efforts Defendants supplemented their responses and a referee was
7 not retained. Geraci Decl. ¶14.

8 In November 2022, the Parties agreed to mediate and Defendants produced all relevant
9 policies during the PAGA Period, meal periods waivers and “attestations” of receipt of rest and
10 meal periods, and 100% of time data through February 10, 2023, and earnings data through
11 March 4, 2023. Plaintiff retained an expert consultant to analyze the data and prepare a model
12 which extrapolated penalties through the date of mediation. Plaintiff also surveyed a randomly
13 selected one-third of PAGA Settlement Members, with a 12.5% response rate, which informed
14 Plaintiff’s damage analysis at mediation. Geraci Decl. ¶15.

15 **IV. PLAINTIFF’S CONTENTIONS AND DEFENDANT’S DEFENSES**

16 Plaintiff contended PAGA Settlement Members worked off-the-clock to meet patient
17 demands created by the Covid-19 pandemic and deal with the backlog after it began to subside.
18 Geraci Decl. ¶16. Lodi produced written policies prohibiting work while not clocked in and
19 describing how employees could seek authorization before and after working at non-scheduled
20 times. Lodi also argued it was not as impacted as many health care systems by the pandemic.
21 Lodi also argued claims for off-the-clock work would require an inquiry into every employee’s
22 experience and make a PAGA trial unmanageable. *Id.*

23 Plaintiff also contended Lodi failed to provide all meal periods as a result of patient
24 demands and, for a period of time, Lodi had a type of “auto-deduct” policy, so whenever an
25 employee clocked out for a meal, 30 minutes was deducted, whether the employee left to
26 respond to patient needs, returned to work for other reasons, or was interrupted. Geraci Decl.
27 ¶17. Lodi contended it did not use an “auto deduct” system, and for the limited time a system
28 was in place using a 30-minute default. Lodi produced evidence showing an employee could

1 override the system to manually enter the actual meal period, some employees did this, and
2 meal period premiums were paid, including to Plaintiff. *Id.*

3 Plaintiff contended Lodi did not authorize and permit all rest breaks. Geraci Decl. ¶18.
4 Lodi offered evidence of compliant rest period policies, and produced evidence showing an
5 unusually high number of premium payments specifically for missed rest periods. *Id.*

6 Plaintiff contended PAGA Settlement Members were required to purchase their own
7 scrubs, and also had to use their personal cellular devices for work-related purposes, such as
8 communicating with other co-workers and researching medications. Geraci Decl. ¶19.

9 Lodi contended it did not require unique scrubs, but only generic scrubs, which could be
10 used at any hospital, and which did not require reimbursement. Plaintiff confirmed this before
11 mediation. Lodi contended cell phone use is unnecessary for PAGA Members to perform their
12 duties and that other means existed for work-related communication, and procedures existed to
13 request reimbursement if cell phone use was necessary. Plaintiff confirmed most employees had
14 access to phones which arguably made personal cell phone use unnecessary. Geraci Decl. ¶20.

15 **V. MEDIATION**

16 On April 24, 2023, the Parties mediated with experienced class and PAGA mediator
17 Deborah Crandall Saxe, Esq. Settlement was not reached that day, but the Parties accepted a
18 mediator's proposal on May 3, 2023, and a term sheet was signed. A detailed written agreement
19 was signed in July 2023. Geraci Decl. ¶21, Exh. 1, Settlement Agreement and Release of PAGA
20 Claims ("Settlement Agreement" or "SA").

21 **VI. SUMMARY OF PROPOSED SETTLEMENT**

22 "PAGA Settlement Members" are "all individuals employed in California by
23 Defendants, or either of them, as non-exempt clinical employees at any time during the PAGA
24 Period" (May 16, 2019 to June 24, 2023). SA, ¶¶ I. 8, 9.

25 The Agreement provides for distribution as follows, subject to Court approval:

PAGA Penalties	\$ 936,105
Settlement Administration	\$ 9,795
General Release Payment	\$ 7,500
Attorneys' Fees	\$ 525,000
Attorneys' Litigation Costs	\$ 21,600
Total	\$1,500,000

PAGA penalties are allocated 75% (\$702,078.75) to the LWDA and 25% (\$234,026.25) to aggrieved employees based on the number Pay Periods worked during the PAGA Period. With an estimated 78,750 Pay Periods worked by all PAGA Settlement Members, each would receive an estimated \$123 ($\$234,026/1,900 = \123.17) ($\$233,176/78,750$). Geraci Decl. ¶22.

The Settlement becomes final, if there are no objections or appeals, when Notice of Entry of Judgment is filed and served. SA ¶ I. 5. Defendants will deposit the Total Settlement Payment into a qualified settlement fund fifty (50) days after the Settlement becomes final. SA, ¶ V. A. 2. The Settlement Administrator will distribute the settlement amounts sixty-seven (67) days after the Settlement becomes final. SA ¶¶ V. D. 2, 3, E-G.

If it is determined PAGA Settlement Members worked more than 84,656 pay periods ($78,750 + 7.5\%$) in the PAGA Period the Gross Settlement Amount will increase by the same percentage above 7.5% by which the actual number of pay periods worked exceeds 84,656. For instance, if the actual number of pay periods worked during the PAGA Period is 10% higher than 78,750, the Gross Settlement Amount will increase by 2.5%. In the alternative, in their discretion, Defendants may elect to end the PAGA Period on the date the number of pay periods reached 84,656. SA ¶ V. B. If the “escalator” clause is triggered, Counsel will file a declaration before the approval hearing explaining the result. Geraci Decl. ¶23.

A. Scope of Release

The settlement releases “all claims for PAGA penalties that were asserted in the Complaint for the PAGA Period, or that reasonably could have been asserted based on the facts alleged in the Complaint or in the Notice(s) of Labor Code Violations sent to the LWDA for the PAGA Period.” SA ¶ VI. A.

A PAGA “judgment [] 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, 986. Aggrieved employees need not be given notice, nor may they opt out or object, and are bound by the judgment as to civil penalties only. *Id.*, at 987.

B. Settlement Administration

Lodi will provide contact information to the agreed-upon third-party Claims

1 Administrator, Xpand Legal (“Xpand”), who will mail PAGA Settlement Members a cover
2 letter explaining the settlement, the basis for the payment, and a check for that amount. Geraci
3 Decl. ¶24, Exh. 2 - Administration Bid; Exh. 3 - Cover Letter. Xpand will perform all services
4 reasonably necessary to locate mailing addresses, calculate, issue and mail payments to PAGA
5 Settlement Members and the LWDA, with tax forms, and, 180 days after mailing, will send the
6 amount of uncashed settlement checks to the California State Controller for deposit in the
7 Unclaimed Property Fund in each employee’s name. SA ¶ D. 6.

8 **VII. PAGA’S PURPOSE AND PROCEDURE**

9 **A. PAGA Actions are Brought on Behalf of the State of California**

10 PAGA was enacted after a 2004 budget shortfall led to insufficient LWDA resources to
11 enforce the Labor Code and was intended to ensure more vigorous enforcement of employment
12 laws. *Tseng v. Nordstrom, Inc.* (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 176790, *13-14.

13 “[T]he purpose of PAGA is to incentivize private parties to recover civil penalties for
14 the government . . . Unlike class actions, these civil penalties are not meant to compensate
15 unnamed employees because the action is fundamentally a law enforcement action.” *Tseng*,
16 *supra*, at *13-14. “The primary purpose of PAGA is to ensure compliance with the law;
17 restitution is not the object of a PAGA action.” *Franco v. Athens Disposal Co., Inc.* (2009) 171
18 Cal.App.4th 1277, 1300.

19 PAGA deputizes private attorneys general to enforce the Labor Code on behalf of the
20 State. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489. “By deputizing aggrieved
21 employees, the [] Legislature intended to create incentives for non-governmental actors to
22 enforce the law in a growing labor market that could not be effectively controlled by public
23 agents.” *Tseng, supra*, at *13.

24 A plaintiff does not bring a PAGA claim on his or her own behalf as an individual claim,
25 but “as the proxy or agent of the state’s labor law enforcement agencies.” *Arias, supra*, at 986;
26 *Iskanian v. CLS Transp. Los Angeles, LLC* (2015) 59 Cal.4th 348, 380. Aggrieved employees
27 bring PAGA claims, but “the government is always the real party in interest.” *Securitas Sec.*
28 *Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.* (2015) 234 Cal.App.4th 1109, 1119; *Montano v.*

1 *The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222 (“[A] PAGA action is a dispute
2 between an employer and the State agency.”).

3 A PAGA plaintiff represents “the same legal right and interest as state labor law
4 enforcement agencies,” and seeks penalties the LWDA could collect. *Securitas, supra*, at 1119.

5 **B. Exhausting PAGA’s Administrative Remedies**

6 A PAGA action is commenced by notice “to the Labor and Workforce Development
7 Agency and the employer of the specific provisions of this code alleged to have been violated,
8 including the facts and theories to support the alleged violation.” Labor Code § 2699.3(c)(1).

9 An employer has 33 days after notice to cure violations. The LWDA must notify an
10 employee within 60 days if it intends to investigate an alleged violation. If notice of cure or
11 investigation is not provided, a civil action may be filed 65 days after notice (formerly 33).
12 Labor Code § 2699.3(c)(2).

13 Plaintiff complied with all notice requirements, Lodi did not provide notice of cure, and
14 the LWDA did not provide notice it intended to investigate. SA ¶ II. 1.

15 **VIII. THE SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

16 **A. Class Action Standards Do Not Govern Approval of PAGA Settlements**

17 Proposed PAGA settlement are submitted simultaneously to the Court and LWDA to
18 allow Agency comment and Plaintiff provided that notice here. Geraci Decl. ¶49. Courts
19 “review and approve any penalties sought” and have discretion to lower penalties “if, based on
20 the facts and circumstances of the particular case, to do otherwise would result in an award that
21 is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(1)(2).

22 “Because state law enforcement agencies are the ‘real parties in interest’ for PAGA
23 claims, the Court’s task in reviewing the settlement is to ensure that the state’s interest in
24 enforcing the law is upheld,” “however, the PAGA does not establish a standard for evaluating
25 PAGA settlements.” *Ramirez v. Benito Valley Farms, LLC* (N.D. Cal. 2017) 2017 U.S. Dist.
26 LEXIS 137272, *6-8.

27 A trial court has discretion to approve a proposed class action settlement based on
28 established factors used to evaluate reasonableness, including “the strength of Plaintiff’s case,

1 the risk, expense, complexity and likely duration of further litigation, the risk of maintaining
2 class action status through trial, the amount offered in settlement, the extent of discovery
3 completed and the stage of the proceedings, the experience and views of counsel, the presence
4 of a governmental participant, and the reaction of the class members to the proposed
5 settlement.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128. When a court
6 is satisfied a settlement meets this standard, class notice is ordered, and a second hearing held to
7 finally decide the fairness of the settlement. CRC 3.769(c)(e)(f).

8 PAGA settlements are not obliged to “satisfy class action requirements,” when seeking
9 approval. *Arias, supra*, at 980-988; *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747
10 F.3d 1117, 1121. There is no requirement, and no mechanism, for a two-step PAGA settlement
11 approval. “Unnamed employees need not be given notice of the PAGA claim.” *Ochoa-*
12 *Hernandez v. Cjaders Foods, Inc.* (N.D. Cal. April 2, 2010) 2010 U.S. Dist. LEXIS 32774, *13.

13 An approach courts have found consistent with the LWDA’s approach is to “approve a
14 settlement of PAGA claims upon a showing that the settlement terms (1) meet the statutory
15 requirements set forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate in
16 view of PAGA’s public policy goals.” *Salazar v. Sysco Cent. Cal., Inc.* (E.D. Cal. February 2,
17 2017) 2017 U.S. Dist. LEXIS 14971, *6.

18 **B. The Settlement Satisfies PAGA’s Purpose and the State’s Interest**

19 “A PAGA action is at heart a civil enforcement action filed on behalf of and for the
20 benefit of the state, not a claim for class relief.” *Baumann, supra*, at 1124. Courts focus not on
21 the amount employees receive, but on whether the settlement achieves PAGA’s objectives.

22 The proposed Settlement accomplishes PAGA’s objective of “detering noncompliance”
23 with the Labor Code, protecting workers from “unlawful conditions,” and protecting compliant
24 employers ““from those who attempt to gain a competitive advantage at the expense of their
25 workers by failing to comply with minimum labor standards.”” *O’Connor v. Uber Techs., Inc.*
26 (2016) 201 F. Supp. 3d 1110, 1133.

27 The Settlement enforces the law; collects penalties; recovers over \$700,000 for the State
28 for enforcement and education; and distributes 25% of penalties to aggrieved employees.

C. The Settlement Recognizes the Risks of Litigation

PAGA claims are decided by judges, not juries. *LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App. 5th 388, 400. A class claim wins with 9 out of 12 jurors, but a PAGA claim may be denied by a single judge. This adds additional risk with fewer opportunities for appellate relief.

Plaintiff's primarily claim was that patient demands, particularly during the Covid-19 pandemic, forced non-exempt clinical employees to work off-the-clock and not receive all compliant meal and rest periods. It can be difficult for one employee to prove work demands caused off-the-clock work or missed meal and rest breaks; for a group of aggrieved employees, performing different duties, in twenty different locations, it can be impossible.

While Plaintiff believed she had strong arguments, there are no records to support claims of off-the-clock work or missed rest periods and proof is largely, or completely, anecdotal. While records exist for meal period claims, they can show only facially non-compliant meal periods. Lodi contended, and based on its policies, meal period waivers, employees' attestations each pay period they had received meal and rest breaks, and the meal period premiums it did pay, a judge could decide aggrieved employees missed few meal breaks and that even facially non-compliant meals were late, short, or uninterrupted by choice.

If Lodi's evidence and arguments were accepted, penalties would not merely be reduced, but eliminated. Plaintiff's counsel considered the risks of summary judgment, trial, appeal and, if successful, the risk penalties would be severely reduced. Geraci Decl. ¶25.

D. The Settlement is Fair, Reasonable, and Adequate

When the Labor Code section violated "provides for a civil penalty to be assessed and collected by the LWDA," PAGA allows an employee to recover that penalty. Section 2699(a). When the violated section does not specifically provide a "civil penalty," an employee may recover \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each employee per pay period for each subsequent violation. Section 2699(f)(2). *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 (\$200 subsequent violation rate cannot be assessed unless defendant put on notice by LWDA); *See also, Bernstein v. Virgin Am., Inc.* (9th Cir. Mar. 8, 2021, Nos. 19-15382, 20-15186) 2021 U.S. App. LEXIS 6641, at *35.)

1 PAGA penalties were estimated for six alleged underlying Labor Code violations for
2 failure to provide: (1) wages – overtime and minimum (§§ 510, 1197); (2) meal periods
3 (§§ 226.7 and 512); (3) rest periods (§ 226.7); (4) accurate wage statements (§ 226);
4 (5) expense reimbursements (§ 2802); (6) timely final wages (§ 201-203).

5 Meal Periods. California employers must provide “an uninterrupted 30-minute period
6 during which the employee is relieved of all duty.” “[F]irst meal periods must start after no
7 more than five hours,” and a second, “after no more than 10 hours of work.” *Brinker Restaurant*
8 *Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1035. Employers must also authorize a first
9 rest period in “shifts from three and one-half to six hours in length...” *Id.*, at 1029.

10 A review of time records showed facial meal period violations in about 9% of shifts and
11 22.9% of pay periods for maximum penalties of \$1,803,375 (78,750 pp x .229 x \$100).
12 Plaintiff believed there was no greater than a 50% probability of prevailing for maximum
13 penalties of \$901,688. Geraci Decl. ¶26.

14 Rest Periods. Plaintiff concluded it would be difficult to prove rest period violations, and
15 the claim was likely to be found unmanageable, as Lodi had compliant rest period policies, no
16 records exist, and Lodi paid more rest period premiums than meal period premiums, something
17 Counsel has not seen in any other case. Plaintiff believed there was no greater than a 10%
18 probability of prevailing for maximum penalties of \$787,500 (78,750 x \$100). Geraci Decl. ¶27.

19 Wages. Employers must pay for all hours they “suffer or permit” employees to work.
20 *Morillon v. Royal Packing Company* (2000) 22 Cal. 4th 575, 584-585. Plaintiff concluded proof
21 of off-the-clock violations could be found unmanageable, as Lodi had policies prohibiting such
22 work, no records could be used, and many employees reported no work while not clocked in.
23 Plaintiff believed there was no greater than a 10% probability of prevailing for maximum
24 penalties of \$787,500 (78,750 x \$100). Geraci Decl. ¶28.

25 Expense Reimbursement. The claim based on purchase of scrubs was abandoned after it
26 was determined they were not unique and could be used at any similar employer.

27 “To show liability under section 2802, an employee need only show that he or she was
28 required to use a personal cell phone to make work-related calls, and [] was not reimbursed.”

1 *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App. 4th 1137, 1145. Less than half
2 of employees reported quite limited cell phone use, despite Defendants' prohibition against it.
3 For many positions, in clinics for example, all employees had access to phones, making it
4 difficult to argue cell phone use was required. It was assumed 10% of employees incurred
5 reasonable cell phone expenses, which could have reasonably been reimbursed quarterly, or in
6 1,575 pay periods, for maximum penalties of \$157,500. Geraci Decl. ¶29.

7 Final Wages. An employer must pay all final wages due when an employee is
8 involuntarily terminated or within 72 hours of a voluntary termination. Labor Code §§ 201 -
9 203. A single penalty was calculated for each of an estimated 950 former employees, for
10 exposure of \$95,000 (950 x \$100). Geraci Decl. ¶30.

11 The wage statement claim was completely derivative of the wage and meal and rest
12 claims and maximum penalties were believed to be no more than \$787,500 (78,750 x \$100).
13 Geraci Decl. ¶31.

14 Failure to Pay Wages §§ 1194, 1197.1	\$1,803,375
Meal Periods § 226.7	\$901,688
15 Rest Periods § 226.7	\$787,500
Wage Statements § 226	\$787,500
16 Expense Reimbursement § 2802	\$157,500
17 Final Wages § 203 (est. 950 formers)	<u>\$95,000</u>
Total PAGA Penalties	\$4,532,563

18 In addition to the probable limitations on maximum penalties described above, a
19 reasonable estimate of a maximum award must also take into account the risk a court could find
20 they were "unjust, arbitrary and oppressive, or confiscatory," and substantially reduced. Labor
21 Code § 2699(e)(2). This appeared likely given Defendants' status as non-profit healthcare
22 providers, with demonstrated efforts to develop compliant policies, and evidence of payments
23 for non-compliant meal and rest periods. This was considered with a court's authority to reduce
24 penalties almost completely, as long as not to "zero." *Thurman v. Bayshore Transit*
25 *Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135. After considering the risk the scope of
26 the action could be limited, liability may not be proven, and penalties, if awarded, could be
27 substantially reduced, Plaintiff assessed Lodi's realistic exposure as 50% of maximum exposure,
28 or \$2,266,282 (\$4,532,563 x .50). Geraci Decl. ¶32.

The proposed \$1,500,000 settlement represents over 66% of Plaintiffs' Counsel's assessment of the realistic maximum penalties that may have been obtained through lengthy, expensive, risky litigation, ($\$1,500,000/\$2,266,282 = .661$), and 33 % of the realistic maximum penalties ($\$1,500,000/\$4,532,563 = .33$). The settlement amount is reasonable, fulfills the purpose of PAGA and provides a substantial amount to the LWDA for education and enforcement. Geraci Decl. ¶33.

The settlement was reached after extensive formal and informal discovery and review and analysis of all relevant policies, and expert analysis of time and pay records. Taking all factors into consideration, Plaintiff's Counsel concluded the settlement is more than "fair, reasonable, and adequate," and avoids the risk, after extended litigation, there could be little or no recovery. Geraci Decl. ¶34.

IX. THE ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Plaintiff's Counsel requests \$525,000 in attorneys' fees, 35% of the Gross Settlement Amount, and \$21,600 in actual litigation costs. (The Agreement allows up to \$25,000 in costs). Counsel expended 534.4 hours, a \$360,605 lodestar. Geraci Decl. ¶35, Exh. 4 – Summary of Time & Costs; Exh. 5 – Costs; Declaration of Jonathan M. Lebe, ("Lebe Decl.") ¶¶12-13, 15.

PAGA provides for recovery of attorneys' fees and costs. Labor Code § 2699(g). Although it does not provide a specific standard for evaluating fees, class action cases may be used.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), (C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627, at *27 (*citing Hensley v. Eckerhart* (1983) 461 U.S. 424). In the face of the uncertainties of continued litigation of these claims, and Lodi's vigorous defenses, there is no question the results achieved are excellent. Counsel fulfilled the purpose of PAGA by obtaining \$936,105 to distribute to the State and aggrieved employees.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees

1 based on a percentage of the total value of benefits obtained, also known as the “common fund”
2 method. *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 503; *Serrano v. Priest*
3 (1977) 20 Cal.3d 25, 34 (*Serrano III*); *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557
4 F.2d 759, 769. (California courts look to federal courts analyzing class issues. *Wershba v.*
5 *Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40).

6 “[T]he lodestar method is not necessarily utilized in common fund cases.” *Lealao v.*
7 *Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27; *Dunk v. Ford Motor Co.* (1996) 48
8 Cal. App. 4th 1794, 1808 (attorneys’ fees may be calculated as percentage of common fund
9 where settlement amount is certain).

10 A common fund fee award is especially appropriate here as it spreads the attorneys’ fees
11 among all beneficiaries of the fund; aligns incentives between counsel and the class; better
12 approximates market conditions in a contingency case; and encourages class counsel to seek
13 early settlement and avoid unnecessarily prolonging litigation, which prevents unnecessary use
14 of judicial and party resources, delay in correcting alleged unlawful practices, and delay in
15 compensating the class. *Laffitte, supra*, at 503.

16 With the guiding principle that early settlements are favored and may not diminish an
17 award of attorneys’ fees, the fee request should be awarded, based on the risks and
18 complexities of prosecuting the action, the contingent nature of any fee, Counsel’s experience
19 in handling cases of this type, fees commonly awarded in these cases, and fulfilling PAGA’s
20 purpose by recovering over \$700,000 for the State’s use in education and enforcement.

21 The purpose of the common fund approach is to “spread litigation costs proportionally
22 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.”
23 *Vincent, supra*, at 769. “[O]ne who expends attorneys’ fees in winning a suit which creates a
24 fund from which others derive benefits may require those passive beneficiaries to bear a fair
25 share of the litigation costs.” *Quinn v. State of California* (1995) 15 Cal.3d 162, 167. The
26 common fund doctrine has been applied “consistently in California when an action brought by
27 one party creates a fund in which other persons are entitled to share.” *City and County of San*
28 *Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.

Counsel undertook representation at their own expense, with compensation wholly contingent upon providing a benefit. The State and aggrieved employees will benefit from the Settlement. Based on the defined and clearly traceable benefit, the Court may award a percentage of the common fund as attorneys' fees.

C. Thirty-Five Percent of the Total Settlement Payment is a Reasonable Fee

Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown that "fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems: Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, 90 (1996) (finding attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement").

Plaintiff's Counsel's request for slightly over one-third percent of the common fund created falls in the mid-range of fee percentage awards which commonly range from 20% to 50% of a common fund. The requested sum constitutes fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis for three years, and for the results achieved for the State and the aggrieved employees. Geraci Decl. ¶36.

Some courts have found an award of 33% of a common fund is the "benchmark" in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), (S.D. Cal. Jan. 14, 2013) 2013 U.S. Dist. LEXIS 6049, *14 ("These percentages compare favorably with" the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMc), (S.D. Cal. Nov. 14, 2013) 2013 U.S. Dist. LEXIS 163118, at *7. Plaintiff's Counsel's fee request is in line with awards in similar California cases, consistent with market rates, and is reasonable. Geraci Decl. ¶39.

D. Although Not Required, a Lodestar Cross-Check Shows the Fee is Reasonable

Counsel seeks approval of attorneys' fees based on a percentage of the recovery, not a

1 lodestar. While a percentage fee may be cross-checked against a lodestar increased by a risk
2 multiplier, courts are not required to engage in this exercise, and many California courts decline
3 to. See, e.g. *Glass v. UBS Fin. Servs.*, No. C-06-4068 MMC, (N.D. Cal. Jan. 26, 2007) 2007
4 U.S. Dist. LEXIS 8476, *49 (finding “no need to conduct a lodestar cross-check [as] [c]lass
5 counsel’s prompt action in negotiating a settlement while the state of the law remained
6 uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, (E.D.
7 Cal. Sep. 1, 2011) 2011 U.S. Dist. LEXIS 99289, *39 (“[I]n a case such as this, [a lodestar
8 cross-check] is not a useful reference.”).

9 A cross-check is not a “full-blown lodestar inquiry,” does not entail “mathematical
10 precision nor bean-counting,” and “can be performed with a less exhaustive cataloguing and
11 review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. July 2, 2013)
12 297 F.R.D. 431, 451.

13 The lodestar is calculated by multiplying hours reasonably expended on the litigation by
14 a reasonable hourly rate. *Serrano, supra*, at 48. A reasonable hourly rate is the prevailing rate
15 charged by attorneys of similar skill and experience in the relevant community. *PLCM Group,*
16 *Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.

17 The hours expended were reasonable in light of the complexity and duration of the
18 litigation, and Counsel’s fees, if the lodestar method were used, represent a 1.46 multiplier.
19 (\$525,000/\$360,605 = 1.459.) Geraci Decl. ¶38.

20 **E. Counsel’s Hourly Rates Are Reasonable**

21 Counsel is entitled to hourly rates charged by attorneys of comparable experience,
22 reputation, and ability for similar litigation. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.
23 When determining reasonable hourly rates, Courts may consider the attorney’s skill and
24 experience, nature of the work performed, relevant area of expertise, and customary billing
25 rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632. Prior awards of
26 counsel’s rates are strong evidence of reasonableness. *Margolin v. Regional Planning*
27 *Commission* (1982) 134 Cal.App.3d 999, 1005.

28 Counsel’s skill and experience support their hourly rates and are in line with rates

typically approved in California wage and hour class action litigation and have been specifically approved by many California state and federal courts. Geraci Decl. ¶¶2-9, 37, 41. Cohelan Khoury & Singer's practice is limited to litigating class and representative actions on behalf of employees and consumers. Cohelan Khoury & Singer has been appointed Class Counsel or co-Class Counsel in over 300 such cases. Geraci Decl. ¶42. As leading attorneys in the field, Plaintiff's counsel monitors prevailing market rates of defense and plaintiff firms and sets billing rates to follow attorneys and staff of comparable skill, qualifications, and experience. Other Class and Representative Counsel before California courts charge comparable if not higher rates. Geraci Decl. ¶43, Exh. 6 - 2014 National Law Journal Billing Survey.

F. Plaintiffs' Counsel's Total Hours are Reasonable

Hours billed by counsel are reasonable if, "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, 839. (reasonable hours are determined by profession's judgment of time that may be conscionably billed, not least time in which work might theoretically have been done).

G. Litigation Expenses Are Reasonable

The Settlement Agreement allows Plaintiff's Counsel to request up to \$25,000 in costs. Counsel seeks reimbursement of actual costs of \$21,600. These costs were reasonable and necessary to prosecute this case. Geraci Decl. ¶¶35, 44, Exh. 5 - Itemized Costs.

X. SERVICE PAYMENT AND SETTLEMENT OF INDIVIDUAL CLAIMS

Service awards "are fairly typical in class action[s]," "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." *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394.

"Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there

1 is any at all.” *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 807.

2 Enforcement of laws protecting California employees would be “random and
3 fragmentary,” or non-existent, if no one was willing to come forward and spend time to work on
4 behalf of others, and perhaps most importantly, take risks those others do not bear.

5 Although not specifically provided for by PAGA, trial courts have routinely awarded
6 service payments or enhancements to PAGA plaintiffs using standards similar to those applied
7 to class action plaintiffs. Courts have also made awards to plaintiff based on executing a
8 general release. Both apply here. Geraci Decl. ¶45.

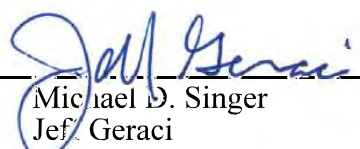
9 Plaintiff devoted time and energy and accepted risks to represent the State and similarly
10 aggrieved employees. Declaration on Janine Mireles, ¶¶5-14. Her service, and the excellent
11 result achieved justify a service award.¹

12 **XI. CONCLUSION**

13 Plaintiff respectfully requests the Court approve the Settlement and order distribution as
14 called for in the Agreement.

15 LEBE LAW, APLC
16 COHELAN KHOURY & SINGER

17 Dated: July 31, 2023

18 By: 
19 Michael D. Singer
Jef. Geraci
Attorneys for Plaintiff Janine Mireles, individually and on
behalf of all others similarly situated

20 ¹ Lodi’s arbitration agreement prevented Plaintiff from bringing individual damages claims in
21 court. Geraci Decl. ¶46. The Parties avoided the time and cost of arbitration to resolve
22 Plaintiff’s individual claims. Although by definition not a part of the PAGA action, and court
23 approval is not required, in the interest of providing the Court with all information as it
24 considers approval of the PAGA settlement, the individual settlement is described here.

25 Plaintiff released all claims, and waived Civil Code section 1542, in exchange for
26 \$7,500. Ms. Mireles was employed as a Medical Assistant for a year and a half, and also served
as an interpreter. She was terminated and believed she had individual claims. As with the
representative PAGA claims, Lodi strongly denies the merits of the individual claims, asserted
credible defenses, and resolved the claims only to buy peace and avoid the inconvenience and
expense of arbitration. Geraci Decl. ¶47.

27 Subject to the usual litigation risks, the settlement amount is less than what may have
28 reasonably been obtained in arbitration if successful. If considered only as a payment for a
general release of claims, no part of the payment is consideration for agreeing to settlement of
PAGA claims. Counsel is taking no fees or costs from the \$7,500 payment. Geraci Decl. ¶48.