UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROSE ANN PAGUIRIGAN, individually and on behalf of all others similarly situated,

Plaintiff,

-vs-

PROMPT NURSING EMPLOYMENT AGENCY LLC d/b/a SENTOSA SERVICES, SENTOSACARE LLC, SENTOSA NURSING RECRUITMENT AGENCY, BENJAMIN LANDA, BENT PHILIPSON, BERISH RUBENSTEIN a/k/a BARRY RUBENSTEIN, FRANCIS LUYUN, GOLDEN GATE REHABILITATION & HEALTH CARE CENTER LLC, and SPRING CREEK REHABILITATION AND NURSING CENTER,

Defendants.

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1:17 Civ. 1302 (NG) (CLP)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS**

THE HOWLEY LAW FIRM P.C.
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## Statement of Facts

Plaintiff Rose Ann Paguirigan commenced this action on March 7, 2017, by filing a complaint. [ECF No. 1]. In the ensuing four and one-half years, six defense attorneys of record from multiple law firms asserted every conceivable defense, objected to virtually every discovery request, made every possible procedural and dispositive motion, and attempted every imaginable interlocutory appeal.

Two lawyers for the plaintiff, John J.P. Howley and Leandro B. Lachica ("Class Counsel"), prevailed in every instance, including by:

- defeating defendants' motion to dismiss the complaint [ECF No. 37];
- prevailing on multiple motions to compel discovery [ECF Nos. 28, 36];
- defeating defendants' motion to compel the production of plaintiff's tax returns and phone records [ECF No. 36];
- prevailing on plaintiff's motion to certify a class and appoint class counsel [ECF No. 72];
- defeating defendant's petition for certification of an interlocutory appeal of the class certification order [ECF No. 84];
- disqualifying and precluding testimony from defendants' proposed expert witness at the accounting firm of Mazars USA LLP [ECF No. 95];
- defeating defendants' motion for summary judgment [ECF No. 95];
- prevailing on plaintiff's cross-motion for partial summary judgment on liability [ECF No. 95];
- prevailing on plaintiff's motion for a permanent injunction against enforcement of the so-called "liquidated damages" clause in the defendants' employment contracts [ECF No. 95];

- defeating defendants' motion for reconsideration of the summary judgment order [ECF No. 115];
- defeating defendants' motion for certification of an interlocutory appeal of the summary judgment order [ECF No. 116];
- prevailing on defendants' Second Circuit appeal of the judgment granting a permanent injunction and declaratory relief [ECF No. 137];
- defeating defendants' argument that the Second Circuit should exercise pendent appellate jurisdiction over the other summary judgment rulings [ECF No 137];
- negotiating with defendants' attorneys to reach agreement on a spreadsheet with 11,524 lines of payroll and prevailing wage data to allow the Court to decide the issue of compensatory damages based on stipulated facts [*see, e.g.,* ECF Nos. 100, 130];
- defeating defendants' motion to decertify the class [ECF No. 140]; and
- prevailing on plaintiff's motion for summary judgment awarding $1,599,099.79 in compensatory damages to the class [ECF No. 140].

This Court's permanent injunction prohibiting enforcement of the so-called "liquidated damages" clause has released foreign nurses – both class members and foreign nurses who may work for the defendants in the future – from the fear of serious financial harm. The permanent injunction and declaratory judgment have also changed practices at other employers that recruit foreign nurses. For example, United Staffing Registry, Inc., a large foreign labor recruiter, used to require foreign nurses to pay "liquidated damages" of up to $90,000.00 for early termination of their employment contracts. *See* Pre-*Paguirigan* United Staffing Contract § 3(b) (Howley Decl., Exh. A). After this Court entered a permanent injunction against the defendants in this action, United Staffing changed its contracts to require reimbursement only for a percentage of

actual immigration-related costs, with the percentage decreasing each year of employment. *See* Post-*Paguirigan* United Staffing Contract, Schedule I (Howley Decl., Exh. B).

The award of compensatory damages in this case, together with the permanent injunction and declaratory relief, have made class members whole financially and protected them from future threats. The issues that remained during settlement negotiations were: whether class members would be able to collect 9% interest from individual defendant Berish Rubenstein and his employment agency; and whether class members should wait several more years and take the risk of an adverse appellate decision in order to pursue the possibility of a punitive damages award.

While class members were awarded interest at the federal rate against all defendants for violations of the Trafficking Victims Protection Act ("TVPA"), they were awarded 9% interest on their state law contract claims only against individual defendant Berish Rubenstein and his employment agency. There was and is substantial doubt that class members would be able to collect 9% interest, amounting to more than $774,000.00, from Mr. Rubenstein.

Litigating this lawsuit to a final conclusion would require class members to wait an uncertain and possibly lengthy period of time for a jury trial on punitive damages, entry of a final judgment, an appeal to and decision by the Second Circuit, and a potential appeal to the U.S. Supreme Court. Given the scarcity of appellate court decisions interpreting the TVPA, the outcome of appeals is difficult to predict. An appellate court could reverse, vacate, or remand all or part of the class claims.

After consulting with the named plaintiff and a large number of other class members, Class Counsel negotiated a settlement agreement with the defendants. The proposed settlement agreement will provide the class with 100% of the $1,569,099.79 in compensatory damages, plus

$774,467.78 for 9% interest at the statutory rate under New York law, for total damages of $2,343,567.57. The collection risk has been eliminated because each defendant is liable for payment of the full settlement amount, which must be paid to class members within 30 days of final approval.

The settlement agreement also provides for a partial vacatur of some of this Court's non-final rulings. The permanent injunction, however, remains in full force and effect. Class Counsel also insisted that the Court's decisions interpreting the TVPA be preserved as precedents for future litigants.

## Argument

### Class Counsel's Request for an Award of Attorneys' Fees and Costs Should be Granted

Defendants have agreed to pay $3 million to settle all claims under federal and state law, including claims for attorneys' fees and costs. This Court therefore has discretion to calculate reasonable attorneys' fees using either the lodestar method or a percentage-of-the-fund method. *See, e.g., Fresno County Employees' Ret. Ass'n. v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 68 (2d Cir.), *cert. denied*, 140 S. Ct. 385 (2019); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 06 Civ. 1842 (NG), 2014 WL 12829910, at *6 (E.D.N.Y. Aug. 1, 2014).

Class Counsel request an award of $656,432.43 in attorneys' fees and costs based on their contemporaneous time records and actual out-of-pocket expenses. The total amount of attorneys' fees and costs equals 21.9% of the settlement amount.

#### A. The Proposed Award is Reasonable Under the Lodestar Method

Under the lodestar method, a court ascertains the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate. *See, e.g., Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). When deciding what is "reasonable"

and "appropriate," a court considers "'traditional criteria' including '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Shady Grove*, 2014 WL 12829910, at *6 (quoting *Goldberger*, 209 F.3d at 50) (alteration in original)). The resulting lodestar "creates a 'presumptively reasonable fee.'" *Millea v. Metro–North R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011).

**1. Reasonable Hourly Rates**

Courts in the Second Circuit adhere to the forum rule, "which states that a district court should generally use the prevailing hourly rates in the district where it sits." *Joseph v. HDMJ Rest., Inc.*, 970 F. Supp. 2d 131, 155 (E.D.N.Y. 2013) (citations omitted).

In the Eastern District of New York, prevailing rates range from $300 to $450 per hour for experienced lawyers. *See, e.g., Hui Luo v. L&S Acupuncture, P.C.*, No. 14 Civ. 1003, 2015 WL 1954468, at *2 (E.D.N.Y. Apr. 29, 2015), *aff'd*, 2016 WL 2848646 (2d Cir. May 16, 2016); *Hall v. ProSource Techs., LLC*, No. 14 Civ. 2502, 2016 WL 1555128, at *12 (E.D.N.Y. Apr. 11, 2016) (awarding $450 per hour to partner with 12 years of experience litigating FLSA wage and hour lawsuits); *Bosoro v. Am. Comp. Healthcare Med. Grp.*, No. 14 Civ. 1099, 2015 WL 5676679, at *9 (E.D.N.Y. Aug. 31, 2015), *report and recommendation adopted*, 2015 WL 5686481 (E.D.N.Y. Sept. 25, 2015) ("prevailing hourly rates in the Eastern District of New York [are] between $350 and $400 for law firm partners"); *Bodon v. Domino's Pizza, LLC*, No. 09 Civ. 2941, 2015 WL 3889577, at *8 (E.D.N.Y. June 4, 2015), *report and recommendation adopted*, 2015 WL 3902405 (E.D.N.Y. June 24, 2015) ("recent cases have held that partners are generally entitled to recover $300 to $450 per hour"); *Griffin v. Astro Moving & Storage Co.*

*Inc.*, No. 11 Civ. 1844, 2015 WL 1476415, at *8 (E.D.N.Y. Mar. 31, 2015) (awarding partner $400 per hour); *Lesser v. U.S. Bank N.A.*, No. 09 Civ. 2362, 2013 WL 1952306, at *10 (E.D.N.Y. May 10, 2013) (awarding partner $425 per hour in straightforward commercial litigation).

"In determining whether an hourly rate is reasonable, courts must take into account 'the nature of representation and type of work involved in a case.'" *Bodon*, 2015 WL 3889577, at *8 (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 n.2 (2d Cir. 2008)). Accordingly, courts sometimes award higher rates when warranted by an attorneys' experience, the complexity of the case, and other factors. *See, e.g., United States v. Sixty-One Thousand Nine Hundred Dollars and No Cents*, 856 F. Supp. 2d 484, 494 (E.D.N.Y. 2012) (awarding $600 per hour for law firm partner); *Coakley v. Webb*, No. 14 Civ. 8438, 2016 WL 1047079, at *4–6 (S.D.N.Y. Mar. 9, 2016) (awarding $575 hourly rate in civil rights action).

The goal "is to provide 'a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious . . . case.'" *Fresno County,* 925 F.3d at 67 (quoting *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010)). Very few lawyers have demonstrated a willingness to represent plaintiffs in civil actions under the TVPA, let alone pursue them on a contingency fee basis. In fact, several of the relevant TVPA precedents were established in cases brought by Class Counsel in this lawsuit. *See, e.g., Macolor v. Libiran*, No. 14 Civ. 4555, 2016 WL 1488121 (S.D.N.Y. Mar. 25, 2016); *Javier v. Beck*, No. 13 Civ. 2926 (WHP), 2014 WL 3058456 (S.D.N.Y. July 3, 2015); *Javier H. v. Garcia-Botello*, 239 F.R.D. 342 (W.D.N.Y. 2006).

This case presented factually novel and legally challenging questions which required more than average legal skill to address properly. Representing and communicating with class members also required an understanding of the language and culture of recent immigrants from

the Philippines who were not familiar with the U.S. legal system and who were afraid of losing their professional licenses and legal immigration status in this country. Class Counsel were uniquely qualified in all respects.

**a. John J.P. Howley**

John J.P. Howley is an experienced litigation attorney whose complex litigation practice spans more than thirty years. He graduated from Skidmore College in 1980 with a B.A. in Government and History. After graduation, he worked as a registered lobbyist for the Commission on Independent Colleges and Universities in Albany, New York. He graduated from New York Law School *magna cum laud*e in 1989. During law school, he was Articles Editor of the Law Review, an intern to U.S. District Judge Kevin Thomas Duffy, and a research assistant to former U.S. Magistrate Judge (later U.S. District Judge) Shira A. Scheindlin.

After graduating from law school, Mr. Howley served as a law clerk to U.S. Circuit Judge Roger J. Miner on the U.S. Court of Appeals for the Second Circuit. He joined Kaye Scholer LLP as a litigation associate in 1990 and was elected to the partnership in 1997. He represented Kaye Scholer clients in complex labor and employment litigation, including as plaintiffs' attorney in *McReynolds v. Sodexho Marriott Servs. Inc.*, No. 01 Civ. 0510 (ESH) (D.D.C.), a race discrimination class action that settled for $80 million, and as defendants' attorney in *Roberts v. Texaco Inc.*, No. 94 Civ. 2015 (CLB) (S.D.N.Y.), a race discrimination class action that settled for $115 million. He also served as Chair of the firm's Pro Bono Committee.

In 2012, Mr. Howley opened his own law firm to represent plaintiffs in labor, employment, and whistleblower litigation. His significant cases include several precedent-setting lawsuits under the TVPA, including *Macolor v. Libiran,* No. 14 Civ. 4555, 2016 WL

1488121 (S.D.N.Y. Mar. 25, 2016); *Javier v. Beck,* No. 13 Civ. 2926 (WHP), 2014 WL 3058456 (S.D.N.Y. July 3, 2015); *Javier H. v. Garcia-Botello,* 239 F.R.D. 342 (W.D.N.Y. 2006). A prominent litigation client he represented at Kaye Scholer, the Police Benevolent Association of the City of New York, Inc. (PBA), continues to retain him for labor and employment matters, including litigation related to collective bargaining negotiations and disputes with the City of New York.

Mr. Howley has argued numerous appeals in the U.S. Court of Appeals for the Second Circuit. He has also argued in the U.S. Supreme Court on behalf of the Governments of India and Mongolia in *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007).

Mr. Howley's *pro bono* work has focused on representing death row inmates in *habeas corpus* and clemency petitions. He has won clemency for two death row inmates from two different Governors of Virginia, and he has won *habeas corpus* relief for death row inmates four times. He has also represented the Government of the United Kingdom as *amicus curiae* in capital murder cases involving United Kingdom nationals in the United States, including before the U.S. Supreme Court. He has Chaired the New York City Bar Association's Annual Habeas Corpus Training Seminar for Capital Post-Conviction Attorneys and has served as a Trustee of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C.

Mr. Howley speaks Tagalog (Pilipino) and Cebuano (Bisaya), two Philippine dialects spoken by plaintiff and other class members. He is familiar with Philippine culture having studied in the southern Philippines in 1975-76, served as CEO of an energy services company in Manila from 2007 to 2012, and served as chairman of The Philippine American Chamber of

Commerce, Inc. for 24 years. He currently serves on the Board of Directors of the Philippine Disaster Recovery Foundation.

Mr. Howley charges clients $550.00 per hour. In contingency fee cases, courts in this Circuit have awarded him between $500 and $550 per hour. *See, e.g., Campos v. BKUK 3 Corp.*, No. 18 Civ. 7507, 2021 WL 3540243, at *13 (S.D.N.Y. Aug. 10, 2021), *report and recommendation adopted by*, 2021 WL 3863266 (S.D.N.Y. Aug. 30, 2021) (awarding Mr. Howley $550 per hour in an FLSA lawsuit); *Macolor v. Libiran*, No. 14 Civ. 4555 (JMF) (RLE), 2016 WL 1488121, at *7 (S.D.N.Y. Mar. 25, 2016), *report and recommendation adopted by*, 2016 WL 1453039 (S.D.N.Y. Apr. 13, 2016) (awarding Mr. Howley $500 per hour in a TVPA lawsuit).

**b. Leandro B. Lachica**

Mr. Lachica is an experienced employment and immigration attorney. He earned his undergraduate and law degrees from the University of the Philippines, a Master of Business Administration (MBA) degree from Nanyang Technological University in Singapore, and a Graduate Diploma in Legal Practice from the Australian National University in Canberra, Australia. He was admitted to practice law in the Philippines 23 years ago, in the State of New York 16 years ago, and in New South Wales, Australia 14 years ago.

Mr. Lachica began his legal career in the litigation department of the law firm of Manalo, Puno, Jocson & Placido in the Philippines. In 2001, he joined the Philippine Foreign Service and became a career diplomat with the Philippine Department of Foreign Affairs. He has served as Vice Consul and Third Secretary of the Philippine Embassy in Canberra, Australia, and as Consul of the Philippine Consulate General in New York City. In both postings, he was

responsible for providing employment and immigration legal assistance to Philippine citizens abroad.

Mr. Lachica has advised hundreds of Philippine citizens on their employment and immigration rights in the United States, including their rights and responsibilities under immigrant and non-immigrant visas, minimum, overtime and prevailing wage issues, protections under U.S. labor and anti-trafficking laws, and disputes with foreign labor recruiters.

Since January 1, 2015, Mr. Lachica has been of counsel to The Howley Law Firm P.C. in New York City, where he represents clients in employment litigation and immigration matters. His usual billing rate is $450 per hour, which is within the range for an experienced attorney in employment and civil rights cases.

**2. Reasonable Number of Hours Required by the Case**

In evaluating whether an attorney's hours were reasonably expended, a court considers "whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Barbour v. City of White Plains*, 788 F. Supp. 2d 216, 222–23 (S.D.N.Y. 2011) (citations omitted).

In this case, Class Counsel faced a vigorous and tenacious defense. The number of hours required was dictated by that aggressive defense. Class Counsel investigated the facts, interviewed class members, developed the legal theory behind this case, litigated multiple discovery disputes, reviewed more than 15,000 documents produced by the defendants, took depositions of the defendants and their proposed expert witness, prepared the named plaintiff and multiple class members for depositions, defended those depositions, defeated defendants' motions to dismiss and for summary judgment, prevailed on motions to certify a class and for

summary judgment, and defeated multiple attempts by the defendants to reargue or appeal adverse decisions over a period of four and one-half years.

Class Counsel succeeded on all claims alleged in the complaint. As a result, all class members will be made whole for all wage underpayments plus pre-judgment interest. The precedent set by the declaratory and injunctive relief awarded in this case will protect class members from threats from these or other employers now and in the future.

The only claim that was dismissed on summary judgment was plaintiff's claim that two of the individual defendants, Benjamin Landa and Bent Philipson, should be held personally liable for breach of contract. As a result, class members could not collect 9% interest – which accounts for one-third of the compensatory damages amount – from these individual defendants or their nursing homes. This raised a concern that the class might not actually recover the full amount of a final judgment. Class Counsel eliminated this risk by negotiating a settlement agreement that holds all defendants – including Mr. Landa, Mr. Philipson, and their nursing homes – jointly and severally liable for payment of all compensatory damages including 9% annual interest.

Class Counsel have submitted contemporaneous time records of their work on this case. *See* Lachica Decl., Exh. C; Howley Decl., Exh. D. Given the number of motions, attempted appeals, and an actual appeal – and given Class Counsel's success on every claim, motion, and appeal – the number of hours spent were reasonable. *See, e.g., Shady Grove*, 2014 WL 12829910, at *6 (number of hours expended were justified by extensive motion practice and appeals); *Schneider v. Citicorp Mortg., Inc.*, 324 F. Supp. 2d 372, 378 (E.D.N.Y. 2004).

**3. Reasonable Costs and Expenses**

Courts generally award "reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998). Attached to the accompanying Howley Declaration as Exhibit C is a schedule with supporting invoices and receipts for $8,551.17 in costs advanced by Class Counsel for court filing fees, deposition transcripts, hearing transcripts, and expert witness fees. Class Counsel respectfully submit that these costs are properly charged to the class because they are reasonable, well-documented, and would ordinarily have been charged to the client. *See, e.g., id.*

**B. The Proposed Award is Reasonable Under the Percentage-of-the-Fund Method**

Class Counsel's request for attorneys' fees and costs equal to 21.9% of the common fund is within the range of awards in this Circuit. *See, e.g., Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (approving one third of common fund for attorneys' fees alone) (citing *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954, 1999 WL 38179, at * 4 (S.D.N.Y. Jan. 28, 1999) (same)); *In re Medical X–Ray Film Antitrust Litig.*, No. 93 Civ. 5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (same); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (awarding 33.8% of common fund for attorneys' fees alone).

Class Counsel assumed the risk of not being paid anything for years of intense litigation. They took the risk – which soon became a reality – that the defendants would mount an aggressive defense backed by multiple lawyers and law firms, thereby preventing Class Counsel from spending time on other matters. These are relevant factors when considering an award of attorneys' fees as a percentage of a common fund. *See, e.g., Fresno County,* 925 F.3d at 70; *Shady Grove*, 2014 WL 12829910, at *7.

Class Counsel also assumed the risk that the case would not result in any recovery at all. While there were a few decisions denying motions to dismiss TVPA claims based on allegations that a liquidated damages clause could constitute a threat of serious harm under the TVPA, no court in this Circuit had ever entered judgment in favor of plaintiffs on such a claim. There was also a significant issue of contract interpretation. Defendants identified case law holding that the immigration laws allow an employer to pay the prevailing wage in effect at the time immigration petitions were first submitted to the government, even if the prevailing wage rate increased by the time the employee started working. Defendants also pointed out that the contracts called for employees to be paid an initial training wage before the obligation to pay the prevailing wage would begin. Defendants therefore argued that the contractual provision requiring payment of the prevailing wage "[a]s of the Commencement Date" referred to payment of the prevailing wage required by the immigration laws (*i.e.*, the wage in effect at the time immigration petitions were filed) starting at the Commencement Date (*i.e.*, the date the employee finished training and started working as a nurse).

In hindsight, the Court correctly held that the language "[a]s of the Commencement Date" required payment of the prevailing wage in effect on that date. The defendants' arguments, however, were reasonable. At the time the complaint was filed, Class Counsel accepted the risk of an adverse ruling that could have resulted in dismissal of the case after more than four years of litigation. Under their contingency fee agreement with the named plaintiff, Class Counsel would have been paid nothing in that event.

The Second Circuit has held that this type of "contingency risk" is properly considered under the common fund approach to awarding attorneys' fees and costs:

> "The plaintiff class is therefore appropriately charged for contingency risk where such risk is appreciable because the class has benefited from class counsel's

> decision to devote resources to the class's cause at the expense of taking other cases. That is, because class counsel has decided to represent the plaintiff class, class counsel's ability to freely represent other clients is limited by the risk she has assumed that the class's cause will be unsuccessful. The class, having been enriched by counsel's acceptance of its cause at the expense of other clients' causes, may be charged for counsel's assumption of risk on its behalf."

*Fresno County,* 925 F.3d at 70.

**Conclusion**

For all the foregoing reasons, Class Counsel respectfully request an award of $656,432.43 for attorneys' fees and costs to be paid from the total settlement amount.

Dated: New York, New York
October 21, 2021

Respectfully submitted,

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