

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KEITH BRITTO et al.,
Plaintiffs and Respondents,
v.
ZEP INC. et al.,
Defendants and Appellants.

A141870

(Alameda County
Super. Ct. No. VG-10553718)

Zep Inc. and Acuity Specialty Products, Inc., challenge the trial court’s award of \$1,162,000 in attorney fees to respondents Keith Britto and Justin Cowan. They contend the court approved too many hours at too high a rate and should not have used a multiplier. Britton and Cowan cross-appeal, contending the court should have awarded fees at the hourly rate they requested. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Plaintiffs’ Class Action Claims

In December 2010, Britto and Cowan (Plaintiffs), sales representatives for Zep Manufacturing Company, filed a complaint on behalf of themselves and a class of current and former California sales representatives, asserting claims for unlawful deductions from their commission payments, failure to reimburse business expenses (Lab. Code, § 2802), and violation of Business and Professions Code section 17200. They sought damages, injunctive relief, and attorney fees (Lab. Code, §§ 218.5, 2802).

Acuity answered the complaint and asserted affirmative defenses; Plaintiffs filed a demurrer to the affirmative defenses and later took it off calendar.

In June 2011, Plaintiffs filed an amended complaint against Zep and Acuity (Zep). The amended complaint added a claim for violation of the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.), by which Plaintiffs sought to recover penalties for defendants' violations of Labor Code sections 221 et seq. and 2802. Plaintiffs also explained their claim for unreimbursed business expenses, alleging they were unlawfully required to pay for equipment, technicians, products used by customers, and their own cell phones and vehicles used for work.

B. Zep's Changes in Policies and Practices

Before Plaintiffs' lawsuit, Zep did not reimburse California sales representatives for business-related expenses, as evidenced by contracts with sales representatives, its written reimbursement policy, and letters Zep wrote to third parties including the Internal Revenue Service.

On July 1, 2011, after Plaintiffs' lawsuit was filed, Zep put into effect a new written policy that all of its California sales representatives would be reimbursed for the types of expenses for which Plaintiffs were seeking reimbursement.

In addition, before the litigation, Zep deducted amounts from sales representatives' commission payments for items that were not expressly mentioned in the commission formula, including equipment, repair and maintenance of equipment, freight for return of products, and samples, novelties, and demonstration kits.

On July 1, 2011, Zep changed its commission program for all commission-only Zep sales representatives in California, so it no longer contains these hidden deductions.

C. Plaintiffs' Pursuit of Class Discovery

Plaintiffs pursued the case as a putative class action, and their written discovery and depositions were for the purpose of class discovery. Plaintiffs served over 338 form and special interrogatories, 98 document requests, and 46 requests for admissions; Zep propounded 30 interrogatories and 109 document requests. Plaintiffs' attorneys allegedly

spent approximately 222.5 hours on the discovery propounded to Zep. Zep contends approximately 23 percent of the discovery Plaintiffs propounded was duplicative of earlier discovery; Plaintiffs counter that Zep's discovery tactics necessitated that Plaintiffs ask the same questions in different ways.

D. Settlement Discussions in 2011

In May 2011, about six months after Plaintiffs filed their complaint, Zep made settlement offers to all members of the putative class (other than Britto and Cowan) who were then employed by Zep. Approximately 30 of the putative class members accepted the settlement offers.

The parties proceeded to mediation in September 2011. Plaintiffs made an initial demand of \$5,925,000 on behalf of the putative class, which did not include the value of the commission deduction claim, but did include \$1.7 million for PAGA penalties.

In October 2011, Zep made a settlement offer to all former employees in the putative class; approximately 59 of them accepted. In total, Zep settled the claims of about 89 sales representatives, over half the putative class.

E. Denial of Plaintiffs' Motion for Class Certification; Amended Complaints

In October 2011, Plaintiffs filed an amended motion to certify the class. Zep opposed it.

While the certification motion was pending, Plaintiffs filed a third amended complaint in December 2011. Zep answered, and Plaintiffs filed a demurrer to Zep's affirmative defenses. In March 2012, Plaintiffs sought to reopen the class certification record to introduce new evidence. Zep opposed the request, and the court denied it.

In March 2012, Plaintiffs sought leave to file a fourth amended complaint to assert a new cause of action for failure to provide accurate wage statements. Zep opposed this motion as well.

After a hearing, the court in May 2012 denied Plaintiffs' amended motion for class certification and their request to file a fourth amended complaint.

F. Plaintiffs' Motion for Reconsideration and Complaint in Intervention

Later in May 2012, Plaintiffs filed a motion for reconsideration of the order denying class certification. Zep opposed the motion.

Plaintiffs also filed a motion for leave to file a complaint in intervention, seeking to add 54 of the putative class members as plaintiff-intervenors. Zep opposed the motion.

After a hearing on July 30, 2012, the court denied Plaintiffs' reconsideration motion but granted their request to file a complaint in intervention. Zep, however, filed a petition for a writ of mandate in this court, challenging the intervention order.

We issued a writ directing the trial court to "vacate its July 30, 2012 order granting real parties' motion for leave to file a complaint in intervention, and to enter a new and different order denying that motion." In December 2012, the trial court complied, leaving Britto and Cowan the sole plaintiffs in this action.

G. Separate Aguilar Action Filed by Putative Class Members

In December 2012, the 54 putative class members filed a separate action against Zep. That litigation, *Aguilar v. Zep Inc.* (Super. Ct. Alameda County, 2012, No. RG12661127) (*Aguilar*), advanced the same complaint that Plaintiffs had sought to file on behalf of intervenors in this case. Zep removed the action to federal court and subsequently settled with a number of the plaintiffs in that case.

H. Summary Judgment Motion and Settlement

In January 2013, while the claims in this case were pursued by Britto and Cowan individually, Plaintiffs made a settlement demand of \$1,007,331.08 (\$910,500 of which was for PAGA penalties), excluding fees and costs.

In February 2013, Zep filed a motion for summary judgment or summary adjudication against Britto, in part on the ground that Britto had filed for bankruptcy without disclosing the claims he had against Zep.

While the summary judgment motion was pending, Zep made a settlement offer to Britto and Cowan pursuant to Code of Civil Procedure section 998 with respect to their individual claims and PAGA penalties. Plaintiffs accepted the offer on July 9, 2013.

By the terms of the offer of compromise, (1) Britto would receive \$26,000, plus interest, costs, and attorney fees in an amount to be determined by the court “in accordance with law”; (2) Cowan would receive \$22,000, plus interest, costs, and attorney fees in an amount to be determined by the court “in accordance with law”; (3) civil penalties would be paid to the California Labor and Workforce Development Agency (LWDA) pursuant to PAGA in the amount of \$275,000, plus costs and attorney fees to be determined by the court “in accordance with law”; and (4) dismissal would become effective after the court approved the amount and allocation of PAGA penalties.

I. Court’s Ruling on Zep’s Motion for Summary Judgment

Although Plaintiffs accepted Zep’s 998 offer, the court proceeded to rule on Zep’s summary judgment motion against Britto. On August 19, 2013, the court granted the motion in part, finding that Britto could not proceed with claims arising on or before March 14, 2010, but he or his bankruptcy estate could file a fourth amended complaint to add the estate as the real party in interest for those claims, and Britto could still proceed with his claims arising after March 14, 2010.

J. Approval of Settlement and Determination of Prevailing Party

On August 23, 2013, Plaintiffs filed a motion to approve the settlement and determine Plaintiffs to be prevailing parties. Zep opposed the motion, arguing that Plaintiffs were not prevailing parties. The court granted Plaintiffs’ motion.

K. Plaintiffs’ Attorney Fees Motion and Trial Court’s Order

On December 24, 2013, Plaintiffs filed a motion for attorney fees and costs pursuant to Labor Code sections 218.5, 2699, and 2802, Code of Civil Procedure section 1021.5, and the provisions of the offer of compromise that entitled Plaintiffs to recover attorney fees according to law. Plaintiffs requested attorney fees based on a lodestar amount of \$1,677,160 for work performed from December 2010 to October 29, 2013, plus a 3.0 multiplier, for a total of \$5,031,480. They also sought \$60,634 for fees incurred after being declared a prevailing party, for a total fee award of \$5,092,114.

1. Plaintiffs' Evidence

Plaintiffs supported the fee motion with declarations from Alejandro P. Gutierrez and Daniel J. Palay, the lead attorneys of their two law firms. The declarations set forth the qualifications of the attorneys who worked on the matter, summarized the hours billed by each firm, and included itemized billing spreadsheets of the legal services recorded by each biller.

a. Counsel's Hourly Rates and Market Rates

Gutierrez, charging an hourly rate of \$700 for commercial clients for complex litigation work, averred that he is a shareholder of the law firm of Hathaway, Perrett, Webster, Powers, Chrisman and Gutierrez; he has practiced law in California since 1983; he has “extensive experience in civil litigation and an over 25-year history of aggressive, successful prosecution of labor law cases”; his “efforts [in obtaining a \$51.2 million settlement in a wage-and-hour class action] resulted in the largest per-person award in California history”; he has prosecuted and defended many wage-and-hour class actions; and he has “extensive trial experience in Ventura, Santa Barbara, and Los Angeles counties and [has] tried numerous cases in those courts.” Gutierrez also represented the experience and current hourly rate of other attorneys in the firm: Alexis Ridenour, who passed the bar examination in 2004, \$450; Adam Acevedo, an associate with over five years of experience in complex litigation, \$350; and Coleen De Leon, a certified paralegal with over 20 years of experience in civil and complex litigation, \$180.

Palay, also charging an hourly rate of \$700, averred he is the “founder of Palay Law Firm”; he has been practicing law in California since 1992; has “personally handled well over fifty wage-and-hour class actions” and was appointed class counsel in many of them; received the award for Trial Lawyer of the Year from the Trial Lawyers section of the Ventura County Bar Association; and has litigated “many hundreds of cases” in his career, including what he understands to be “two of the largest per-person recoveries in the history of California class action litigation.” Palay described the experience and hourly rates of other attorneys in his firm: Michael Strauss, a shareholder with seven

years of experience practicing plaintiff-side employment litigation, \$500; Brian Hefelfinger, an associate who focuses on employment litigation, \$450; and Andrew Ellison, an associate with 1.5 years of experience practicing employment litigation, \$250.

Gutierrez and Palay represented that their stated rates were reasonable for the San Francisco Bay Area. Gutierrez explained that “[t]hrough my experience in class-action lawsuits in Los Angeles, Ventura, San Francisco, and Alameda counties and handling attorneys’ fee motions, I have become familiar with the non-contingent prevailing market rates charged by attorneys in California. The rate that I charge, \$700 per hour, is in line with the non-contingent market rates charged for reasonably comparable services for 30-year attorneys.” Gutierrez then identified a number of San Francisco Bay Area cases in which the court had awarded attorney fees at rates of \$750 to \$850 per hour to lawyers with his skill and experience for comparable services.

Palay similarly opined that the rates billed by his firm to commercial clients were consistent with the prevailing rates for attorneys of similar experience. He cited a case in which the Alameda County Superior Court approved partner rates between \$650 and \$785 per hour. He also cited a survey by the National Law Journal, which reported hourly billing rates for the nation’s 250 largest law firms, as evidence that his firm’s rates were in line with those of other employment litigation firms in California.

b. Reasonableness of Hours

The declarations of Gutierrez and Palay also contended the hours were reasonable, in light of the litigation’s procedural history and Zep’s defense tactics. They accused Zep of employing a “scorched earth” strategy that included unsupported and fabricated defenses, fictionalized facts, and resistance to Plaintiffs’ efforts to obtain discovery, even though Zep characterized its liability as “probable” in filings with the Securities and Exchange Commission.

Gutierrez accused Zep of the “in terrorem” discovery strategy of issuing subpoenas to Britto’s tax preparer and former employer for private records, pursuing an

unlawful arbitration policy, and following up on settlement and release agreements with intimidating phone calls from its CEO and president.

Gutierrez also averred that every task performed as to Britto and Cowan and the putative class was intertwined with the representative PAGA cause of action. Although the billing entries attached to counsel's declarations were redacted to avoid disclosing attorney-client privileged communications, Palay offered to provide the court with unredacted entries at the court's request.

2. Zep's Opposition

Zep's opposition memorandum and supporting declarations and objections amassed 685 pages. As relevant here, Zep argued (1) Plaintiffs' counsel's claimed number of hours was too high, because it included work on unsuccessful motions and the evaluation of claims of other employees who were never class members, and the billing records contained redactions or other entries that failed to provide sufficient detail; (2) the hourly rates were too high, because they did not reflect the prevailing local market rates for attorneys with similar skill and experience in employment cases, and they were not in line with rates Plaintiffs' counsel claimed earlier in other cases; (3) the billings were "top-heavy" and unreasonable because Palay and Gutierrez performed the bulk of the work; (4) Plaintiffs' counsel should be awarded just 35 percent of the total recovery (or \$118,644.82) or, alternatively, no more than \$358,984; and (5) no multiplier was appropriate because Plaintiffs did not obtain exceptional or rare success.

In support of its position, Zep submitted a report from attorney John Steele, a purported expert on attorney fees, who opined that the top biller rates for the Palay and Hathaway firms should be in the range of \$300 to \$400 per hour. Steele proposed that the court apply a \$336 average hourly rate for the Palay Law Firm and a \$304 average hourly rate for the Hathaway Law Firm.

Zep also submitted a declaration of one of its attorneys, Y. Anna Suh. To support its argument that Plaintiffs had not recovered much on their claims, Suh provided evidence of Plaintiffs' offers during settlement negotiations and mediation. She also

attached a copy of an engagement letter Plaintiffs' counsel had sent to prospective clients indicating attorney fees would equate to 35 percent of recovery.

3. Plaintiffs Depose Steele

Plaintiffs took the deposition of Steele in February 2014. Steele testified, among other things, that he did not recall ever dealing with billing rate histories or employment litigation in his own law practice; never testified in court regarding billing rates; before this case, had never been hired as an expert in a case involving employment litigation; had never been qualified as an expert regarding billing rates; had not used the market data for rates solely in the Bay Area; did not consider the rates charged by Zep's counsel to be relevant; and believed the market rate for legal services should take into account the "region" and whether counsel worked in a "high-cost downtown urban center[].".

4. Plaintiffs' Reply

In their reply papers in support of their fees motion, Plaintiffs submitted supplemental declarations from Gutierrez and Palay and other materials described below. Among other things, they sought an additional \$31,180 for work after they filed the fee motion, bringing the total of their requested fees for the fee motion to \$91,814.

a. The Suh Declaration in Tompkins as Evidence of Market Rate

As an exhibit to Gutierrez's declaration, Plaintiffs presented a declaration that Zep's counsel—Y. Anna Suh—had submitted in *Michelle Tompkins v. Acuity Specialty Products, Inc. and Zep Inc.* (July 10, 2013, JAMS Reference No. 1130005868) (*Tompkins*).

In *Tompkins*, Suh had averred that the rates charged by her firm to Zep included \$693 for a partner who had 27 years of experience and was a member of the Georgia Bar, \$508.50 for a partner who had 10 years of experience and practiced in Northern California (Suh), \$450 for an associate who obtained her law degree in 2004 and was licensed to practice in California and Georgia, \$396 for an associate who obtained his law degree in 2008, \$387 for an associate who obtained her law degree in 1991 and was licensed to practice in Georgia and Florida, \$364.50 for an associate who obtained his

law degree in 1998 and practiced in Texas, \$243 for an associate who obtained her law degree in 2011 and was licensed to practice in Georgia, \$238.50 for an associate who obtained his law degree in 2013 and was licensed to practice in Georgia, \$193.50 for a senior paralegal with 12 years of experience in litigation and employment matters, and \$175.50 for a paralegal with 29 years of experience in litigation and employment matters.

Suh also averred that those rates were reasonable. She explained: “Based on my experience as a partner at an international law firm, and from working in the Bay Area market since 2003, I am informed and believe that the hourly rates charged by the Hunton legal professionals identified [above] are reasonable, if not below market, when compared to the hourly rates of similarly qualified and experienced attorneys handling similar matters in the Bay Area.”

b. Objections to the Steele Declaration

Plaintiffs filed objections to Steele’s declaration and the use of his expert report. Based on excerpts from Steele’s deposition, Plaintiffs argued that Steele did not qualify as an expert on attorney fees and erred by not using the San Francisco Bay Area as the relevant legal market.

c. Objections to the Suh Declaration in This Case

Plaintiffs also objected to the declaration Suh filed in these proceedings, to the extent she improperly disclosed settlement negotiations and mediation discussions, as well as the evidence concerning Plaintiffs’ counsel’s engagement letter.

5. Trial Court’s Order

The trial court issued a tentative ruling and, on March 11, 2014, heard oral argument.

By written order on March 18, 2014, the court granted Plaintiffs’ motion for fees, but for less than Plaintiffs requested. As set forth in greater detail *post*, the court deducted 705.3 hours from the hours Plaintiffs claimed, finding the remainder to be “reasonable under the circumstances of this case.” The court also reduced the hourly rates for Gutierrez and Palay (from \$700 to \$475), Strauss (from \$500 to \$350), Acevedo

(from \$350 to \$300), and De Leon (from \$180 to \$100), finding the lower rates were reasonable. On this basis, the court calculated the lodestar to be \$910,000, rather than the \$1,677,160 Plaintiffs requested. The court imposed a 1.25 multiplier, rather than the 3.0 Plaintiffs requested. And the court awarded \$25,000 as fees for the attorney fees motion, rather than the \$91,814 Plaintiffs requested. In total, the fee award amounted to \$1,162,000, less than the requested sum of over \$5 million.¹

The court also sustained Plaintiffs' objections to Steele's report and the declaration Suh had filed in this case.

L. Judgment and Appeal

After entry of judgment, Zep filed a notice of appeal. Plaintiffs filed a notice of cross-appeal.

II. DISCUSSION

The parties do not dispute that the appropriate means of calculating attorney fees in this case was the lodestar method. "The lodestar method begins by multiplying the number of hours spent by the attorneys by an hourly rate that is reasonable under the circumstances. [Citation.] The court may then adjust the lodestar upward or downward, depending on the circumstances of the litigation and counsel's representation" (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 879-880 (*Northwest Energetic*); see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (*Ketchum*).

Zep contends the court erred in determining the number of compensable hours and approving too high an hourly rate, and further erred by adjusting the lodestar upward with a 1.25 multiplier. Plaintiffs contend the court should have used the higher hourly rate they requested.

¹ According to Zep's Securities and Exchange Commission Form 10-K for the period ending August 31, 2013, Zep had spent \$2.1 million in legal fees related to this litigation (and *Aguilar*) in fiscal year 2012 and approximately \$1.5 million in fiscal year 2013.

We consider each of the parties' contentions in turn, reviewing the order for an abuse of discretion. (*Ketchum, supra*, 24 Cal.4th at p. 1132.) The trial court's discretion in this regard is indeed broad, leading one court to observe: "The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination. [Citation.]" (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134 (*Akins*).

A. Lodestar Hours

In determining the number of hours for the lodestar, the court reduced Gutierrez's and Palay's combined hours from 2,035.9 to 1,600. The court also reduced Acevedo's hours from 269.7 to 260, Strauss's hours from 107.1 to 48, and De Leon's hours from 866.30 to 802, and it awarded zero hours for Hefelfinger, Ellison, and Ridenour. In all, the court reduced the compensable hours from the 3,415 Plaintiffs claimed to 2,710, finding this total reasonable under the circumstances. No further explanation was required. (See *Ketchum, supra*, 24 Cal.4th at p. 1140.)

Zep argues that the court should have reduced the hours even more. None of its arguments establishes error.

1. Fees for Unsuccessful Efforts to Certify Class and Intervene

Zep contends the trial court improperly included hours associated with Plaintiffs' unsuccessful efforts to obtain class certification and intervention, their mediation of claims of the putative class, and other work on behalf of individuals who, unlike Britto and Cowan, are not parties to this case. Zep asserts this work accounted for over 1,500 hours; the court's order does not specify whether it excluded any hours for this work or not.

Zep refers us to decisions by courts in other jurisdictions that have declined to award attorney fees for unsuccessful class certification motions. In *Barfield v. New York City Health and Hospitals* (2d Cir. 2008) 537 F.3d 132, 152-153 (*Barfield*), the plaintiff's primary aim had been to certify a collective action, but after she ended up recovering just

\$1,744.50 for herself, the trial court awarded only 50 percent of the \$49,889 in fees she requested. The appellate court found this was not an abuse of discretion. (*Id.* at p. 152.)

Zep's reliance on *Barfield* is unavailing. In the first place, we are not bound by decisions of the Second Circuit, particularly in regard to whether a California court acted within its discretion in determining an appropriate attorney fees award. In addition, *Barfield* is distinguishable on its facts: as discussed *post*, Plaintiffs' counsel in this case secured a benefit to *other* sales representatives *within the putative class*, in light of Zep's change in reimbursement and deduction policies; no such success is mentioned in *Barfield*. And at any rate, *Barfield* merely found that the district court's decision was not an abuse of discretion; by no means did it conclude that fee awards must be reduced whenever class certification is denied, or that work performed on behalf of a putative class can never be compensated if the class is ultimately not certified.

Zep also refers us to federal *lower* court rulings in other states, in which judges declined to award fees for unsuccessful efforts to obtain class certification or work on behalf of a class that was never certified. (E.g., *Riddle v. National Sec. Agency, Inc.* (N.D.Ill., Apr. 23, 2010, No. 05-C-5880) 2010 WL 1655443; *Clarke v. Ford Motor Co.* (E.D.Wis., Mar. 21, 2006, No. 01-C-0961) 2006 WL 752902.) These decisions, however, merely tell us how trial courts exercised their discretion on the facts before them. They have neither precedential nor persuasive value here, and they certainly do not compel the conclusion that the court in this case abused its discretion in awarding fees for class certification work under the circumstances.²

To the extent Zep cites California law, it relies on cases stating that attorney fees may not be awarded for services on "unsuccessful and unrelated claims," because such services "cannot be deemed to have been "expended in pursuit of the ultimate result achieved." ' ' (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th

² As Zep itself acknowledges in its response to Plaintiffs' cross-appeal, a district court ruling "merely stands for the proposition that trial courts have broad discretion in setting reasonable hourly rates based on the relevant factors. That one court may disagree with another court is not evidence of an abuse of discretion."

407, 417 (*Harman*) [no fees for work performed on an issue resolved adversely in a prior appeal, since plaintiff was not the prevailing party on that issue].) Under *Harman*, an unsuccessful “claim” is “unrelated” if it was “intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.” (*Ibid.*) Zep contends that Plaintiffs’ attempts at class certification and intervention were unrelated to their PAGA claim because Plaintiffs represented that the discovery they took early in the case was limited to class certification issues, and PAGA claims have different standards and remedies than class action claims.³

Zep’s reliance on *Harman* is unpersuasive. In the first place, *Harman* pertains to unsuccessful and unrelated *claims*; Plaintiffs’ class certification and intervention efforts were not unsuccessful *claims*, but unsuccessful *motions*. (See *Little v. Sanchez* (1985) 166 Cal.App.3d 501, 506 [“Proceeding collectively by means of a class is a form of remedy, not a cause of action in and of itself”]; *Allen v. Bay Area Rapid Transit Dist.* (N.D.Cal., July 31, 2003, No. C 00-3232 VRW) 2003 WL 23333580, at p. *7 [declining to disallow fee award for unsuccessful motions, because “[a]n unsuccessful motion is not an unsuccessful claim”].)

Moreover, the trial court could have reasonably concluded that Plaintiffs’ efforts to certify the class and join class members as intervenors *were*, in fact, *related* to their successful PAGA claims. The PAGA claims were premised on violations of the Labor

³ Zep’s contention that the relief and standards applicable to PAGA claims are different from a class action is based largely on cases that decided PAGA claims did not have to comply with the procedural requisites for class actions. (See, e.g., *Mendez v. Tween Brands, Inc.* (E.D.Cal., July 1, 2010, No. 2:10-cv-00072-MCE-DAD) 2010 WL 2650571, at p. *2; *Cardenas v. McLane Foodservice, Inc.* (C.D.Cal., Jan. 31, 2011, No. SACV 10-473 DOC) 2011 WL 379413, at p. *3; *Arias v. Superior Court* (2009) 46 Cal.4th 969; but see *Fields v. QSP, Inc.* (C.D.Cal., June 4, 2012, No. CV 12-1238 CAS) 2012 U.S. Dist. Lexis 78001 [plaintiff asserting PAGA claim must meet the requirements of rule 23 of Federal Rules of Civil Procedure]; see also *Lou v. Ma Labs., Inc.* (N.D.Cal., Oct. 17, 2013, No. C 12-05409 WHA) 2013 WL 5663464, at p. *2 [denying motion for leave to amend to add PAGA claim because it would “insert additional defenses and legal issues into this already-complex action, and would likely require additional discovery”].) None of these cases held that attorney fees could not be recovered for unsuccessful class certification efforts.

Code for failing to reimburse business expenses and improperly deducting amounts from sales representatives' compensation. The attempt to certify the class or obtain intervention reflected an effort to increase the number of plaintiffs who could obtain relief for these Labor Code violations in a single proceeding. From this perspective, Plaintiffs' motions for class certification and intervention were related to the PAGA claims, since they did not seek relief " 'intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.' " (*Harman, supra*, 158 Cal.App.4th at p. 417.) Work that is related to claims on which plaintiffs obtained relief, even if unsuccessful, may be compensated. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1251 (*Taylor*) [no abuse of discretion not to apportion attorney fees between a single cause of action on which plaintiff prevailed and three causes of action on which he did not]; *Akins, supra*, 79 Cal.App.4th at p. 1133 [to same effect]; *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 423 (*Greene*) [" 'Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised' "].)⁴

Zep argues that, even if the class certification work *was* related to the successful PAGA claims, Plaintiffs should not recover fees for that work because they did not obtain substantial relief overall. (See *Harman, supra*, 158 Cal.App.4th at p. 417.) They argue that Plaintiffs initially demanded \$1.7 million in PAGA penalties but ultimately settled for just \$275,000. As discussed *post*, however, it was reasonable for the court to

⁴ As the trial court remarked to Zep's counsel at the hearing on the attorney fees motion: "[Y]ou've ably described the plaintiffs' lack of success of the class certification state, their attempt, again unsuccessful, to bring other employees in as intervenors and so forth, *but what I'm left with here based on the record I have is that it's a fairly substantial number of your client's employees were affected by the outcome of this case. . . . I believe this Court is tasked with arriving at an appropriate way to reward plaintiffs' counsel for having done so.*" (Italics added.)

conclude that Plaintiffs' counsel had obtained *substantial* relief, even though it was not as much as they had sought. Zep fails to establish an abuse of discretion.

2. Due Process

Zep contends that, by awarding attorney fees (and a multiplier) for Plaintiffs' unsuccessful class action work, the trial court unconstitutionally punished Zep for exercising its due process right to defend itself. The contention is meritless.⁵

Zep relies on *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327 (*California Teachers*). There, the court considered a statute requiring teachers who exercised their constitutional right to request a hearing regarding a threatened suspension or dismissal, but ultimately did not prevail at the hearing, to pay half the cost of the administrative law judge. (*Id.* at p. 331.) This cost was imposed "in every case in which the teacher ultimately is suspended or dismissed, even if the teacher reasonably and in good faith has challenged the district's disciplinary action." (*Ibid.*) In striking the statute as unconstitutional, the court observed: "A litigant's nonfrivolous assertion of a procedural right may not be chilled through fear of subsequent reprisals in the form of monetary penalties. [Citation.] The prospect of liability for hearing costs could cause teachers to limit their defense and forgo vigorous advocacy." (*Id.* at pp. 345-346.)

Zep argues that, if the award of fees and multiplier for the unsuccessful pursuit of class certification is allowed to stand in this case, it would somehow have a chilling effect on the due process rights of defendants to defend against such actions: plaintiffs could file meritless class action motions knowing there was no downside as long as they eventually obtained a settlement from an individual defendant, even if they do not succeed on their class claims; and defendants would be forced to forgo vigorous advocacy and settle bogus class actions to avoid paying the plaintiffs' fees incurred in

⁵ Zep contends we must review the trial court's decision de novo to the extent it presents a question of law involving the application of the due process clause. (Citing *Spanner v. Rancho Santiago Community College Dist.* (2004) 119 Cal.App.4th 584, 589; *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333-1334.) Whether we review for an abuse of discretion or review de novo, we reach the same conclusion.

attempting to certify a class. As such, it would encourage frivolous class actions and offend notions of fairness and equity. Additionally, Zep claims, requiring defendants to pay Plaintiffs' fees for their unsuccessful pursuit of a class action would constitute a penalty for successfully exercising its right to vigorously defend itself.

California Teachers is plainly inapposite. Most obviously, it addressed a *statute* applicable to all teachers, which mandated that *every* teacher who lost would have to pay, regardless of the reasonableness of the teacher's challenge. Here, by contrast, the judicial decision in this case binds the parties only, and we do not hold that every defendant will have to cover every plaintiff's attorney fees for any and all unsuccessful class certification work: we hold only that it was not an abuse of discretion for the trial court to rule as it did in this case, based on the record and arguments presented.

Furthermore, it is at best speculative to say that the mere possibility of having to pay a plaintiff's reasonable attorney fees would compel a corporation to forgo defending against class certification efforts. And if a plaintiff's class certification work was indeed frivolous, the court could take that into consideration when deciding whether to award the plaintiff attorney fees. None of the problems concerning the court in *California Teachers* arise here.

Nor was the trial court's order in this case a "penalty" for Zep's vigorous defense against Plaintiffs' class certification motions. Zep was not penalized for its defense, but *rewarded* by the denial of Plaintiffs' certification motions. The attorney fees award, by contrast, was actually a product of Zep's own settlement agreement—by which it agreed Plaintiffs would be awarded attorney fees according to law (including the court's discretionary calculations under the lodestar method)—and the reasonableness of counsel's fees and rate under the circumstances. The court did not abuse its discretion in implicitly finding that the class certification and intervention work was related to Plaintiffs' PAGA claims, and Zep fails to establish anything unconstitutional about the award.

3. Zep's Other Arguments Regarding Hours

Zep contends Plaintiffs' counsel should not have been compensated for three other categories of work. First, it urges that fees should not have been awarded for work that did not advance the Plaintiffs' case, including Plaintiffs' opposition to Zep's *pro hac vice* request, their late demurrer, their late attempt to assert a new claim, and their drafts of motions and other work they ultimately did not use in the case. (Citing *Frank v. Wilbur-Ellis Co. Salaried Employees Ltd Plan* (E.D.Cal., Aug. 19, 2009, No. CV-F-08-284-LJO-GSA) 2009 WL 2579100, at pp. *6-7; *Ackermann v. Carlson Indus., LLC* (C.D.Cal., Mar. 8, 2004, No. CV 03-05170 PA (PJWx)) 2004 WL 3708670, at pp. *2-3.) However, Zep fails to establish that this work did not, at least indirectly, contribute in some manner to Plaintiffs' case. Furthermore, Plaintiffs' counsel voluntarily excluded approximately 94 hours of billed time, including hours spent on a demurrer that was withdrawn and work that turned out to be "non-productive." Zep fails to show that the court could not have reasonably concluded this voluntary exclusion of time adequately accounted for work that did not advance Plaintiffs' case.

Next, Zep contends that redacted time entries, or entries referring to communications between Plaintiffs and counsel without disclosing the subject matter or nature of the communication, did not satisfy Plaintiffs' burden to prove the fees were reasonable and necessary for the prosecution of their claims. Zep premises this argument on the *federal* requirement that counsel submit detailed time records to justify the hours allegedly worked. (Citing *Chalmers v. City of Los Angeles* (9th Cir. 1986) 796 F.2d 1205, 1210; *Navarro v. General Nutrition Corp.* (N.D.Cal., Sept. 22, 2005, No. C 03-0603 SBA) 2005 WL 2333803, at p. *14.) But this is *state* court. " "Because time records are not required under California law . . . , there is no required level of detail that counsel must achieve.' " (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 699 (*Syers*)). Nor has Zep cited authority suggesting it had a right to details protected by the attorney-client privilege or that Plaintiffs were required to waive the privilege to recover their fees.

Finally, Zep argues that Plaintiffs' billings included roughly 164 hours for travel by Gutierrez and Palay, which, Zep contends, are not recoverable. (Citing *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 775 (*Ladas*); *Gallo v. Masco Corp.* (S.D.Cal., Apr. 28, 2011, No. 08cv0604-CAB) 2011 WL 1627942, at p. *9 (*Gallo*)). However, *Ladas* involved a cost bill, not a fee award, and the *Gallo* plaintiffs voluntarily excluded a claim for travel time from their fee application. (*Ladas, supra*, 19 Cal.App.4th at pp. 775-776; *Gallo* at p. *9.)

In any event, Zep fails to show that the court actually awarded any fees for any of these categories of work. The court declined to award fees for over 700 hours claimed by Plaintiffs, without specifying what work it was excluding.

Zep has not established that the court abused its discretion in its determination of the number of hours for purposes of the lodestar.

B. Lodestar Hourly Rate

The hourly rate for lodestar purposes is usually determined by looking to the market rates prevalent in the community in which the court is located. (*Syers, supra*, 226 Cal.App.4th at p. 700.) It may be established by declarations attesting to counsel's skill, experience, reputation, and billing rates, as well as evidence of rates awarded to attorneys of comparable experience in other cases in the same market. (See generally *Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 783.)

Here, the court determined that the reasonable hourly rates were as follows: \$475 for Gutierrez and Palay (instead of \$700), \$350 for Strauss (instead of \$500), \$300 for Acevedo (instead of \$350), and \$100 for De Leon (instead of \$180).

Substantial evidence supports the court's conclusion. The Gutierrez and Palay declarations set forth counsel's qualifications and identified cases in which courts had approved hourly rates of over \$700. Suh's declaration in *Tompkins* stated that the rates billed by Zep's counsel—including \$693 for an attorney with 27 years of experience in labor and employment matters and \$508.50 for Suh—were "reasonable, if not below market" in the Bay Area. While Plaintiffs submitted this evidence as proof of the

reasonableness of the *full* hourly rate claimed by their counsel, the court approved rates that were substantially *lower*, after Zep had made numerous arguments they repeat here. The reasonable inference is that the court reached its conclusions after careful consideration of the competing arguments and evidence presented.

As discussed next, Zep’s arguments fail to show an abuse of discretion.

1. Case Law

Zep contends the court approved hourly rates that exceed the prevailing market rate for similar work and skill, citing *United States v. \$28,000.00 in U.S. Currency* (S.D.Cal., Feb. 11, 2013, No. 10CV2378-LAB (CAB)) 2013 WL 525648. There, a trial court decided that a reasonable rate in a civil forfeiture case in the Southern District of California was \$300 per hour, since “much of the work in a [civil forfeiture] case like this is fairly routine, and the degree of expertise required for those tasks is much lower.” (*Id.* at p. *2.) However, the matter before us is not a civil forfeiture case, and it was not litigated in the Southern District of California.

Zep also cites *Lota by Lota v. Home Depot U.S.A., Inc.* (N.D.Cal., Dec. 31, 2013, No. 11-cv-05777-YGR) 2013 WL 6870006 (*Lota*). But *Lota* is *consistent* with the court’s ruling in this case: the court in *Lota* determined that a reasonable rate in a disability discrimination case in the Northern District of California was \$575 for an attorney with 34 years’ experience (*id.* at p. *17); the court here set an hourly rate for Gutierrez and Palay at just \$475 an hour.

2. Steele Report

Steele opined that top biller rates for the Palay and Hathaway law firms should have been in the range of \$300 to \$400. The parties debated, however, whether Steele was qualified to opine as an expert in this case: Plaintiffs argued that he lacked sufficient knowledge of attorney billing rates in employment litigation in the Bay Area, while Zep contended he was qualified due to his experience as an attorney, a fee dispute arbitrator, and an expert witness on matters involving attorney fees. Moreover, the parties debated whether his opinion was probative: Plaintiffs argued that the relevant market was the

Bay Area specifically, while Steele focused not on large firms “downtown,” but on smaller firms in the broader western region of the United States. The court resolved this dispute by ruling Steele’s report inadmissible, and Zep fails to show an abuse of discretion.

3. Plaintiffs’ Counsel’s Other Cases and Retainer Agreement

Zep further argues that the rates Plaintiffs’ counsel claimed in this case were higher than the rates they previously claimed in other cases: while Strauss sought fees in December 2013 at a \$500 an hour rate in this case, he had sought fees at a rate of \$275 in a wage-and-hour lawsuit in May 2013, and \$300 in an unpaid wage case in June 2012; and Palay, who urged a rate here of \$700, stated in the latter case in June 2012 that his “hourly rate, when he bills by the hour, is \$400.” Those other cases, however, were not in the Bay Area. Moreover, the court here did not *accept* the higher rates that Plaintiffs claimed, but decided on rates of \$350 for Strauss and \$475 for Palay, which were closer to the rates sought in the other cases and substantially lower than Plaintiffs requested in this case.

Next, Zep points to a form retainer agreement that Plaintiffs’ counsel had sent to potential intervenors, which stated that counsel’s “hourly rate will be \$500.00 per hour *only* for purposes of any motion for attorney’s fees.” (Italics substituted for underscoring.) Since the court in this case awarded hourly rates that were *lower* than \$500, however, the form retainer agreement does not establish an abuse of discretion.

4. “Top-Heavy” Billing

Zep argues that a \$475 hourly rate should not be applied to the work of partners Gutierrez and Palay for lower-level tasks such as research, reviewing documents, summarizing deposition transcripts, preparing discovery and discovery responses, and drafting pleadings. They note that Palay and Gutierrez billed hundreds of hours on these tasks.

The cases on which Zep relies, however, are inapposite on this point. Although the court in *Hensley v. Eckerhart* (1983) 461 U.S. 424 (*Hensley*) said “ ‘[h]ours that are

not properly billed to one's *client* also are not properly billed to one's *adversary*,⁶ ” the court was referring to hours billed for excessive, redundant, or unnecessary work; the court did not find any error on the basis of fees awarded for low-level work. (*Id.* at p. 434.) In *Ursic v. Bethlehem Mines* (3d Cir. 1983) 719 F.2d 670, the court admonished against fee awards for the “wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates,” but Zip ignores the court’s next sentence: “*Routine* tasks, if performed by senior partners in *large* firms, should not be billed at their *usual* rates.” (*Id.* at p. 677, italics added.) Here, there is no showing that the research, discovery preparation, and drafting performed by Palay and Gutierrez were merely “routine” tasks; Palay and Gutierrez were members of small firms, not “large firms”; and in any event Palay and Gutierrez were not awarded fees for this work—or any work—at “their usual rates.” And while the federal trial court in *Hernandez v. Taqueria El Grullense* (N.D.Cal., Apr. 30, 2014, No. 12-cv-03257-WHO) 2014 WL 1724356 decided to reduce fees because the judge thought much of the work was routine and should have been performed by less senior attorneys or a paralegal, nothing in that case compels the conclusion that the trial court in *this* case abused its discretion by not reducing the compensable hourly rates any *more* than it did.⁶

⁶ In a similar argument, Zep claims that Palay and Gutierrez did too much of the work, since Palay billed 90.7 percent of his law firm’s hours and Gutierrez billed 52.47 percent of his firm’s hours. It appears, however, that nearly one-third of the time for which the court compensated Plaintiffs was for work performed by a paralegal, at the awarded rate of \$100 an hour. We also note that the court rejected Zep’s argument on this point in *Aguilar v. Zep Inc.* (N.D.Cal., Aug. 15, 2014, No. 13-cv-00563-WHO) 2014 WL 4063144, at p. *7: “Plaintiffs’ counsel’s small firms are not structured like large defense firms. . . . They should not suffer consequences in a fee award because a significant amount of the work fell on their shoulders due to the size of their firms.” (See *Moreno v. City of Sacramento* (2008) 534 F.3d 1106, 1115 [the court may not attempt to impose its own judgment regarding the best way to operate a law firm or staff a case].) Indeed, the court approved hourly rates that are as high or higher than those awarded by the court in this case: \$700 for Gutierrez, \$650 for Palay, \$350 for Strauss, \$300 for Acevedo, and \$180 for De Leon. (*Aguilar v. Zep Inc.*, at pp. *3-6.)

5. Zep's Other Arguments Regarding Hourly Rates

In response to Plaintiffs' use of the Suh declaration in the *Tompkins* case—in which Suh averred that rates as high as \$693 were reasonable for employment litigation in the Bay Area—Zep contends that rates billed by attorneys in large, multidiscipline law firms like Hunton & Williams LLP should not be used by small firms in cases like this one. To this end, they cite a remark by a trial judge in *Kranson v. Federal Express Corp.* (N.D.Cal., Dec. 11, 2013, No. 11-cv-05826-YGR) 2013 WL 6503308, at p. *8: “Simply put, average hourly rates of big law firm partners and associates (irrespective of whether the work involved any employment law) do not provide a meaningful basis for comparison of what is appropriate for trial counsel in an employment discrimination case involving an individual plaintiff asserting claims arising from one chain of events.” The point in *Kranson*, however, was that the plaintiff had not shown that the *work* of the large law firm was sufficiently similar to justify consideration of its rates, not that attorneys in smaller law firms are necessarily relegated to rates that are lower than their big firm counterparts.

Finally, Zep complains that Plaintiffs' evidence pertained to current market rates for commercial clients, but Plaintiffs are not commercial clients; the rates Plaintiffs' counsel purportedly charged in December 2013 (at the time of the fees motion) is not appropriate for work billed in prior years; Plaintiffs did not present the actual orders from the cases purportedly approving hourly rates of \$750 to \$800; and the billing survey on which Plaintiffs relied showed billing rates for the largest law firms in the United States, while the Plaintiffs' law firms employed 6 and 12 lawyers. While these arguments were appropriately made in the trial court, they do not establish an abuse of discretion on appeal. Indeed, there is no indication that the court did *not* take these arguments into consideration when deciding that a reasonable rate was less than what Plaintiffs requested.⁷

⁷ Ironically, Zep makes a similar point in opposing Plaintiffs' cross-appeal: “[T]here was nothing ‘arbitrary’ about the [s]uperior court’s ruling below that Plaintiffs’ counsel . . . were entitled to \$475 per hour for Palay and Gutierrez, \$350 an hour for

In the final analysis, the record shows that the trial court considered the evidence and the arguments of counsel and decided on reasonable hourly rates under the totality of the circumstances. The fact that the rates were lower than what the Plaintiffs' attorneys requested indicates that the court did not merely accept the Plaintiffs' evidence but gave careful consideration to the parties' competing positions. Zep fails to establish an abuse of discretion in the court's calculation of the lodestar.

C. Multiplier

In deciding whether the lodestar should be augmented or diminished, the court may consider factors such as the novelty and difficulty of the questions involved; the skill the attorney displayed in presenting the issues; the extent to which the nature of the litigation precluded other employment by the attorney; the contingent nature of the fee award; the delay in the attorney receiving payment; and the amounts involved and results obtained. (*Northwest Energetic, supra*, 159 Cal.App.4th at pp. 879-880; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174 (*Weeks*).)

Here, after noting that Plaintiffs had requested a 3.0 multiplier "for the combined contingent risk, results obtained, delay in receipt of payment, and to encourage attorneys to undertake public interest litigation of similar importance in the future on a contingent fee basis," the court applied a much lower multiplier of 1.25.

We review for an abuse of discretion and assume the trial court considered all appropriate factors in selecting the multiplier and applying it to the lodestar. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 581 (*Graham*); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 998.)

Strauss, \$300 an hour for Acevedo, and \$100 an hour for De Leon. [Citation.] The [s]uperior [c]ourt relied on evidence from Zep that the rates sought by Plaintiffs' counsel were unreasonable, including evidence of the reasonable hourly rates recently charged by Plaintiffs' counsel in wage and hour/employment litigation, which were lower, as well as relevant case law establishing reasonable rates for similar cases and argument by Zep's counsel at the hearing. . . . [¶] Thus, it was not an abuse of discretion for the [s]uperior [c]ourt judge, through his years of experience on the bench (and with the evidence presented) to discern what a reasonable hourly rate for this type of litigation and in this market would be for Plaintiffs' counsel."

1. Contingent Risk

Plaintiffs' attorneys took the case on a contingent fee basis. Plaintiffs did not agree to pay any portion of the fee regardless of the outcome, and counsel advanced all litigation costs and expenses. Plaintiffs' law firms purportedly spent over 3,000 hours of time on the case, which is not an insubstantial number of hours for smaller law firms.

Zep urges that the contingent fee risk factor should not apply, and no multiplier is warranted, because Plaintiffs sought attorney fees pursuant to Labor Code provisions that mandate an award of attorney fees to a prevailing party. (Lab. Code, §§ 218.5, 2802; see *Weeks, supra*, 63 Cal.App.4th at pp. 1174-1175 [contingent risk did not justify a multiplier because prevailing party was entitled to mandatory attorney fees, and therefore “the possibility of receiving full compensation for litigating the case [is] greater than that inherent in most contingency fee actions”]; see also *Ketchum, supra*, 24 Cal.4th at pp. 1132-1133 [purpose of multiplier for contingent risk is to increase the financial incentives for attorneys in cases involving the enforcement of important constitutional rights but little or no damages].)

We agree that taking a case on a contingency in a matter for which fee recovery is mandatory for the prevailing party may be less risky than taking a case on a contingency when fee recovery to a prevailing party is only possible. On the other hand, it is still riskier than taking a case in which the client is contractually obligated to pay fees on an hourly basis *regardless* of the result. In any event, the contingent nature of the representation in this case is but one factor underlying the trial court's imposition of a multiplier.

2. Results Obtained

Plaintiffs' counsel secured not insubstantial relief for Britto and Cowan on their individual claims: pursuant to the offer of compromise, Cowan recovered \$22,000 and Britto recovered \$26,000. In addition, Plaintiffs' counsel secured positive results for others. Zep paid \$275,000 as “civil penalties for the PAGA representative claim.” Zep also provided financial compensation to many putative class members by settlement, and

a reasonable inference from the record is that this was triggered by Plaintiffs' pursuit of this litigation as a class action. It may also be inferred that Plaintiffs' counsel succeeded in precipitating significant changes to Zep's employment policies, which in turn provided an economic benefit to Zep's California sales representatives overall. And while the value of this benefit is not clearly quantified, there is a basis for concluding it was significant: Britto recovered \$26,000, Cowan recovered \$22,000, and one member of the putative class (William Tellous) recovered in arbitration over \$300,000 for unpaid mileage, wrongful deductions, interest, and attorney fees. A reasonable inference is that, but for Plaintiffs' attorneys' efforts, Zep sales representatives would still be forfeiting substantial amounts of money each year.

Zep minimizes the results Plaintiffs' counsel obtained, arguing that Britto and Cowan recovered less than the amount to which they claimed entitlement. Zep calculated that Britto was claiming \$73,324 and Cowan was claiming \$70,136 in unreimbursed business expenses alone; and in verified interrogatory responses, Britto stated his damages were in "excess of \$60,000" and Cowan stated his damages were in "excess of \$30,000." In addition, Zep argues, the \$275,000 in PAGA penalties was a fraction of the \$1.7 million Plaintiffs initially sought. However, the question is not whether Plaintiffs settled for less than they originally wanted, but whether they recovered an amount of significance. It is reasonable to conclude they did.⁸

Zep also tells us that Plaintiffs did not prevail on much *before* they settled the case: demurrers were withdrawn or not ruled on, the class certification motion and other motions were denied, and Zep's summary judgment motion was granted in part. Again,

⁸ We find no prejudicial abuse of discretion in the court's exclusion of evidence in Suh's declaration concerning Plaintiffs' settlement offers and counsel's engagement letter. Even without this evidence, there was other evidence that Plaintiffs did not obtain all the relief they sought. There is thus no indication that the court would have awarded a different amount of fees if it had also considered the evidence in Suh's declaration. Nor is there any indication the court would have ruled differently if it had admitted the engagement letter.

however, the question is whether Plaintiffs obtained substantial relief, not whether they won everything. The overall litigation results reasonably justified a modest multiplier.

3. Delay in Compensation

“[P]ayment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate.” (*Graham, supra*, 34 Cal.4th at pp. 583-584.)

Here, Plaintiffs’ compensation has been delayed. The initial complaint was filed in December 2010, and by the time this appeal is resolved, Plaintiffs’ attorneys will not have received any compensation for nearly five years, including two years after Plaintiffs’ acceptance of Zep’s offer of compromise.

The parties cast stones at each other for causing this delay: Zep argues that any delay was due to Plaintiffs’ counsel unsuccessfully attempting to certify the class and then seeking intervention; Plaintiffs argue it was due to Zep’s tenacious defense. Based on our review of the record, it is reasonable to conclude that both parties aggressively litigated the action, and the delay was due not so much to the fault of either party but to the intrinsic nature of hard-fought litigation, which could reasonably be considered in determining an appropriate multiplier.

Zep additionally argues that the delay in payment was already accounted for in the lodestar calculation, because Plaintiffs obtained attorney fees at their “current” hourly rates charged to commercial clients at the time of the attorney fees motion, as opposed to the hourly rates in effect when the hours were actually billed. But Plaintiffs’ attorneys were *not* awarded their “current” hourly rates; instead, they were awarded fees at a substantially lower rate. The court’s use of a lower hourly rate could well have been due, at least in part, to the fact that some of counsel’s work was performed in prior years, when the market rates were presumably lower.

4. Public Interest and Public Policy

The court recognized that Plaintiffs' counsel, by bringing this litigation, provided a benefit not only to named plaintiffs Britto and Cowan, but also to other Zep sales representatives. As mentioned, Zep's policy changes meant that its California sales representatives would no longer suffer certain deductions from their commissions or have to cover certain business-related expenses, and Zep settled with members of the putative class even though the class was never certified. In addition, Plaintiffs argue, the litigation impacted the public interest, because Labor Code protection inures to the benefit of the public. (Citing *Nicholas Laboratories, LLC v. Chen* (2011) 199 Cal.App.4th 1240, 1247; *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 829.) Indeed, the Legislature enacted PAGA to protect the public from Labor Code violations. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501 [PAGA relief is “ ‘for the benefit of the general public rather than the party bringing the action’ ”].) And of the \$275,000 Zep paid as PAGA penalties, 75 percent went to the LWDA, which uses it “for enforcement of labor laws and education of employers and employees about their rights and responsibilities under [the Labor Code].” (Lab. Code, § 2699, subd. (i).)

Zep maintains this is not the type of public interest case justifying a multiplier, insisting that the litigation resulted in financial recovery for just two employees. (Citing *Weeks, supra*, 63 Cal.App.4th at p. 1174 [overturning award that used a 1.7 multiplier in a sexual harassment case because it was “in essence a personal injury action, brought by a single plaintiff to recover her own economic damages”].) Zep urges that multipliers are appropriate in cases like *Serrano v. Priest* (2007) 20 Cal.3d 25, where the court's holding that the California public school financing system was unconstitutional affected large numbers of people. (*Id.* at pp. 31, 48.)

While Plaintiffs' lawsuit is not public interest litigation of the same magnitude as cases securing constitutional rights for large numbers of people, it is also not a case that merely affects the pecuniary interests of one or two named plaintiffs. And although in this case the “public interest” factor somewhat overlaps with the “results obtained”

factor, it was not an abuse of discretion for the court to mention it in assigning a multiplier.

5. Zep's Other Arguments Regarding the Multiplier

Zep argues that, as a general rule, multipliers are permitted only in rare or exceptional circumstances because the lodestar itself yields a fee that is presumptively sufficient. For this proposition, Zep again relies on federal law. (*Perdue v. Kenny A.* (2010) 559 U.S. 542, 552; *Hensley, supra*, 461 U.S. at p. 435.)

However, “California trial courts have considerably wider latitude than their federal counterparts in the selection of factors that may be used to adjust the lodestar and . . . , therefore, ‘an upward or downward adjustment from the lodestar figure will be *far more common under California law than under federal law.*’ ” (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 42 (*Lealao*), italics added; *Weeks, supra*, 63 Cal.App.4th at p. 1173.) The goal is to arrive at a fee that is reasonable, and the record supports the conclusion that the court did just that.

Finally, Zep advises, courts typically limit attorney fees awards to 25 to 40 percent of recovery in common fund cases. (Citing, e.g., *Chavez v. Netflix Inc.* (2008) 162 Cal.App.4th 43, 65; *Fischel v. Equitable Life Assur. Society of U.S.* (9th Cir. 2002) 307 F.3d 997, 1006 [in common fund case, court has discretion to apply lodestar method *or* percentage-of-the-fund method]; *Tarlecki v. Bebe Stores, Inc.* (N.D.Cal., May 14, 2009, No. C 05-01777 MHP) 2009 WL 1364340.)

But this is not a common fund case. This is a fee-shifting case, in which Zep agreed to pay specific amounts to Plaintiffs and the LWDA, plus an amount to be awarded by the court “in accordance with law” for attorney fees and costs. And while “[p]ercentage fees have traditionally been allowed in . . . common fund cases,” in fee-shifting cases “the primary method for establishing the amount of ‘reasonable’ attorney fees is the lodestar method.” (*Lealao, supra*, 82 Cal.App.4th at p. 26.) Under the lodestar method, a fee award need *not* bear any specific proportionality to the dollar amount of the recovery. (*Harman, supra*, 158 Cal.App.4th at p. 421 [award of \$1.1

million in attorney fees did not require reversal despite recovery of only \$30,300; there is “no mathematical rule requiring proportionality between compensatory damages and attorney’s fees awards”]; *Taylor, supra*, 222 Cal.App.4th at pp. 1251-1253 [affirming \$680,520 attorney fees award based on lodestar figure and multiplier in action under the Fair Employment and Housing Act, despite jury verdict of just \$160,000]; *Greene, supra*, 101 Cal.App.4th at p. 422 [affirming fee award of \$1,095,794.55, despite damages of only \$490,000]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 446 [affirming fee award of \$470,000 when plaintiff had only recovered \$37,500].)

In the final analysis, the contingent nature of the representation, the results obtained, the delay in compensation, and public policy supported the application of a modest multiplier. Zep therefore fails to establish that the court abused its discretion in applying a 1.25 multiplier to the lodestar. (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1399 [“modest” multiplier of 1.25 was not an abuse of discretion in light of contingency fee risk, delay before counsel received compensation, and unique issues presented]; *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, 291-293 [affirming award of \$978,121.98 in attorney fees based on a 1.75 multiplier in a wage-and-hour case with six individual plaintiffs, where case was vigorously litigated, involved complex issues of employment law, and was undertaken on a contingency basis].)

Zep fails to establish error.

D. Plaintiffs’ Cross-Appeal

While Zep contends the court erred by not reducing Plaintiffs’ counsel’s requested hourly rates enough, Plaintiffs in their cross-appeal contend the court erred by reducing the hourly rates at all. Specifically, Plaintiffs argue, they presented evidence that their counsel’s and paralegal’s hourly rates were comparable to rates in the Bay Area for attorneys and paralegals with similar skill and experience, but Zep did not present any admissible evidence to rebut it.

Plaintiffs rely on *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140 (*Graciano*). There, the plaintiff submitted a declaration of one of her attorneys in support of her attorney fees motion, averring that her attorneys' rates of \$350, \$275, and \$270 were within the range charged by other plaintiff's counsel in similar practice areas. The defendant did not produce evidence or object to these rates as unreasonable or excessive, arguing only that the rates should be based on the Imperial County market. (*Id.* at p. 155.) Indeed, defendant's counsel at the hearing "indicated it was *not challenging* the rate." (*Ibid.*, italics added.) Nonetheless, the trial court awarded a flat rate of \$250 for each attorney, based on a local rule setting the rates for attorney expert testimony. (*Ibid.*)

On appeal, the court in *Graciano* found this to be an abuse of discretion, since "[t]he sole evidence before the court demonstrated that [the plaintiff's] counsel's requested fee rates were reasonable" for similar work within the legal market, and the defendant "did not challenge that evidence." (*Graciano, supra*, 144 Cal.App.4th at p. 155.) The trial court had therefore not engaged in "the relevant objective analysis" of determining the prevailing rate for comparable services in the market, but "arbitrarily relied" on a rule relevant to expert witness testimony. (*Id.* at p. 156.) The appellate court concluded that the plaintiff's "*unrebutted* declarations established the prevailing rates in the region for attorneys with comparable skills and expertise, and her evidence compelled a finding that the requested hourly rates were within the reasonable rates for the purposes of setting the base lodestar amount." (*Ibid.*, italics added.)

Graciano is obviously distinguishable. While the defendant in *Graciano* did not challenge the plaintiff's hourly rates with evidence or argument, here Zep vigorously challenged the hourly rates of Plaintiffs' counsel with both evidence and argument. And although the court sustained objections to Steele's report and to part of Suh's declaration, Zep still attacked the evidence produced by Plaintiffs with several assertions:

(1) Plaintiffs improperly defined the relevant market, and therefore failed to show that their counsel's (and paralegal's) rates were reasonable; (2) the rates were too high for the relevant market; (3) Plaintiffs' attorneys had attested to lower billing rates in other cases,

during the time they were rendering services in this case; (4) Plaintiffs provided evidence only of counsel's rates (and a paralegal's rates) for commercial clients, and Plaintiffs were not commercial clients; (5) rates charged in 2013 were not relevant to work performed years before; (6) Plaintiffs did not provide the actual court orders approving fees over \$700 in comparable cases; and (7) Plaintiffs' counsel's billing was top-heavy and counsel should not be able to claim premium rates for low-level work.

A reasonable reading of the record is that the trial court considered the evidence and arguments presented by both parties and arrived at hourly rates that the court, in its discretion, found to be reasonable. Plaintiffs fail to establish an abuse of discretion.⁹

III. DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

⁹ In their reply brief for their cross-appeal, Plaintiffs rely on *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603 (*Biological Diversity*), proclaiming that it stands for the proposition that a “judge cannot substitute his own knowledge of hourly rates in the local community when there is un rebutted evidence before the court of the prevailing market rates.” Plaintiffs are incorrect. In *Biological Diversity*, the trial court abused its discretion in capping hourly rates at \$370 based on the court's general familiarity with “local prevailing rates,” because the “only evidence on the issue of availability of local counsel showed plaintiffs' need to retain *out-of-area* counsel”; in other words, the court was using the wrong market. (*Id.* at pp. 615, 619, italics added.) Not so here. Moreover, the court here did not say it was picking hourly rates based on its own knowledge of local rates; the record, reasonably read, is that the court adjusted Plaintiffs' proposed rates in light of the evidence, arguments, and circumstances of the case.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

(A141870)