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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

JOANNE SOWLE, individually, on a
representative basis, and on behalf of all others
similarly situated;

Plaintiff,

vs.

SHERPAUL CORPORATION, a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: RIC2002410

*[Assigned to Hon. Judge Craig Riemer, Dept 1, for
all purposes]*

**NOTICE OF MOTION AND MOTION TO
APPROVE THE SETTLEMENT PURSUANT
TO THE PRIVATE ATTORNEYS GENERAL
ACT OF 2004; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

*Filed Concurrently with: [Proposed] Order and
Declarations of Brian J. Mankin, Esq., Peter J.
Carlson, Esq., and Michael E. Moore of Phoenix
Settlement Administrators*

Hearing

Date: September 26, 2022

Time: 8:30 a.m.

Dept.: 1

Reservation #: 890960827233

Complaint filed: June 1, 2020

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 26, 2022, at 8:30 a.m., or as soon thereafter as the
3 matter may be heard in Department 1 of the Riverside County Superior Court, located at 4050 Main
4 Street, Riverside, CA 92501, Plaintiff Joanne Sowle will move this Court for an order approving a
5 settlement pursuant to the Private Attorneys General Act of 2004, Labor Code § 2698 *et seq.*, (the
6 “PAGA”).

7 This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities;
8 the Declarations of Plaintiff’s counsel (Brian Mankin and Peter Carlson of Lauby Mankin Lauby LLP)
9 and Settlement Administrator (Michael Moore of Phoenix Settlement Administrators in support thereof;
10 the PAGA Memorandum of Understanding (the “Settlement Agreement”); the [Proposed] Order
11 granting Approval of the PAGA Settlement and entry of Judgment thereon; and all other records,
12 pleadings, and papers filed in this action; and upon such other evidence or argument as may be presented
13 to the Court at the hearing of this Motion.

14
15 Dated: August 12, 2022

LAUBY, MANKIN & LAUBY LLP

16
17 BY:



18 Brian J. Mankin, Esq.
19 Attorneys for Plaintiff, on behalf of the State of
20 California and Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF THE ACTION AND SETTLEMENT**

3 In this PAGA-only action, Plaintiff Joanne Sowle – serving as the representative for the State of
4 California – and her counsel sought civil penalties against Defendant Sherpaul Corporation
5 (“Defendant” or “Sherpaul”) under the Private Attorneys General Act of 2004, Labor Code § 2698 *et*
6 *seq.* (commonly referred to as “PAGA”)¹ on behalf of all similarly situated non-exempt employees who
7 worked for Defendant in California (the “PAGA Class Members” or “Aggrieved Employees”) at any
8 time during the period of June 1, 2020 through March 17, 2022 (the “PAGA Period”).

9 Here, Defendant employed Plaintiff and the Aggrieved Employees to carry out its core business:
10 providing in-home health care and caregiving services. While performing their duties for Defendant,
11 Plaintiff alleges that she and the Aggrieved Employees were subjected to various Labor Code violation,
12 including: failure to provide compliant meal periods and rest breaks, the failure to pay proper minimum
13 and overtime wages, the failure to reimburse business expenses and/or the unlawful deduction of wages
14 for certain expenses, failure to timely pay wages each period and upon separation of employment, and
15 the failure to provide accurate itemized wage statements. However, as discussed below, Defendant
16 raised many very strong defenses, including that it had a complete defense to all claims because the
17 Aggrieved Employees are “personal attendants,” and thus exempt from the requirement to pay minimum
18 and overtime wages, provide meal and rest breaks, and so on.

19 The Parties attempted early mediation with the Hon. Keith Davis (Ret.) in April 2021, which
20 was unsuccessful. Plaintiff then moved forward with formal discovery to investigate the claims and
21 theories of liability. Ultimately, following an additional exchange of information and documents, the
22 Parties attempted a second mediation, this time with the Hon. Jonathan Cannon (Ret.) on March 17,
23 2022, and reached a settlement of the alleged PAGA claims, all of which were heavily disputed.

24 Now with a Settlement Agreement that resolves the claims alleged in this case, Plaintiff seeks
25 this Court’s approval of a \$110,000 PAGA-only settlement on behalf of approximately 300 Aggrieved
26

27 ¹ The PAGA action is a type of *qui tam* action filed on behalf of the state to assist it with labor law enforcement. *Iskanian*
28 *v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380-382. As such, the state is the real party in interest in a
PAGA action. *Id.* at 382. The State of California was timely served with a copy of the Settlement Agreement in this case
and this Motion to Approve the Settlement.

1 Employees employed by Defendant during the PAGA Period. The settlement merits full approval
2 because it fulfills the purpose of PAGA (i.e., to deter violations of the Labor Code and secure obedience
3 to California's labor laws; to end ongoing violations of the Labor Code either through injunctive relief
4 or a defendant's voluntary policy change in light of a PAGA action; and to provide relief that is genuine,
5 meaningful, and consistent with California's goal of benefitting the public through enforcement of labor
6 laws).

7 Because this is a PAGA-only settlement, the process for approval is very straight-forward under
8 PAGA: "The superior court shall review and approve any settlement of any civil action filed pursuant
9 to this part." (Labor Code § 2699(1)(2).) Based on the California Supreme Court's holdings in *Arias v.*
10 *Superior Court* (2009) 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LL*
11 *(2014) 59 Cal.4th 348*, there is no requirement under PAGA for a Plaintiff to establish the requirements
12 of class certification (i.e. numerosity, typicality, commonality and adequacy) nor is there the usual two-
13 step preliminary and final approval process as found in class actions. Rather, this PAGA-only settlement
14 merely requires a one-step review and approval process.

15 For these reasons and those discussed below, the Parties now seek the Court's approval of the
16 Settlement.

17 **II. BACKGROUND**

18 **A. PROCEDURAL HISTORY**

19 On May 1, 2020, Plaintiff Sowle submitted her notice via online filing to the California Labor
20 Workforce Development Agency (the "LWDA"), notifying the agency of Plaintiff's claims under the
21 PAGA. (Mankin Decl. ¶ 7; Exhibit A to same). Then, on June 1, 2020, Plaintiff filed a putative class
22 action complaint alleging causes of action mirroring those alleged in the LWDA notice. On July 15,
23 2020, and because the LWDA did not assert jurisdiction over the PAGA claims within the 65-day
24 exhaustion period, Plaintiff filed a First Amended Complaint adding PAGA causes of action. However,
25 during this period, counsel for Defendant sent correspondence and documents to Plaintiff's counsel,
26 including evidence that Plaintiff allegedly signed a binding arbitration agreement with a class action
27 waiver. For that reason, the Parties stipulated to allow Plaintiff to file a Second Amended Complaint
28 ("SAC") that dismissed the class and individual claims, without prejudice, and left this as a PAGA-only

1 action. (Mankin Decl. ¶ 8).

2 On February 17, 2021, Plaintiff filed the operative SAC alleging the following causes of action
3 under PAGA: (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to provide
4 meal periods, (4) failure to provide rest breaks, (5) failure to reimburse business expenses, (6) unlawful
5 deduction of wages, (7) failure to timely pay each period, (8) failure to timely pay final wages, and (9)
6 failure to provide accurate itemized wage statements. (Mankin Decl. ¶ 9).

7 The Parties agreed that it was in the best interests of all to attempt early resolution, and thereafter
8 attended mediation with the Hon. Keith Davis (Ret.) with JAMS in April 2021. However, that mediation
9 was unsuccessful because Defendant raised new theories of defense, namely that the Aggrieved
10 Employees were exempt from meal period and rest break requirements as “personal attendants” under
11 IWC Wage Order 15. (Mankin Decl. ¶ 10).

12 After the unsuccessful mediation, the Court lifted the stay on formal discovery, and Plaintiff
13 propounded a full set of written discovery seeking documents and information to investigate and verify
14 the claims. But, despite that Defendant provided substantial information and documents, Plaintiff’s
15 counsel still believed that certain responses were deficient and a lengthy meet and confer process began.
16 However, despite the disputed nature of the claims and pending discovery disputes, the Parties agreed
17 to table the dispute and attempt mediation for a second time. (Mankin Decl. ¶ 11).

18 The second mediation took place on March 17, 2022, with the Hon. Jonathan Cannon, a retired
19 judge who sat in the Orange County Complex Division for many years and ruled upon countless class
20 action wage and hour cases like this one, and now serves as a well-respected class action and PAGA
21 mediator. And, in preparation for mediation, the Parties exchanged documents and information that
22 allowed both sides to calculate the potential damages and evaluate potential risk, including policies and
23 procedures, timekeeping and payroll records, among other documents. This analysis enabled both parties
24 to take a good look into the claims, in particular allegations relating to the failure to pay proper wages,
25 and failure to provide compliant meal and rest periods, among other things. During this process,
26 Plaintiff’s counsel evaluated the documents and determined that there were approximately 6,400 pay
27 periods at issue through mediation. This information enabled Plaintiff and his counsel to analyze,
28 research, and investigate the potential claims, including matters related to the calculation of PAGA

1 penalties, trial, and appellate issues and risks. (Mankin Decl. ¶ 12).

2 After a full day of mediation, Judge Cannon issued a mediator's proposal that both Parties
3 accepted, resulting in a settlement of all PAGA claims alleged in the action, as well as Plaintiff's
4 individual claims. The Parties entered into a Memorandum of Understanding (the "Settlement
5 Agreement"), which contains all necessary and material terms of this settlement. (Mankin Decl. ¶ 14;
6 Exhibit B to same). Pursuant to the Court's CMO, Plaintiff's separate individual settlement is discussed
7 in the Mankin Declaration at ¶¶ 43-57.

8 Notably, Defendant is of the opinion that the Settlement Agreement entered into after mediation
9 sufficiently covers all applicable terms and conditions, and it advised that it did not believe that a longer
10 form was needed. Plaintiff agrees that the Settlement Agreement is sufficient and is therefore seeking
11 approval pursuant to its terms.

12 **B. SUMMARY OF PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

13 Plaintiff alleged nine causes of action on behalf of the Aggrieved Employees. However, as
14 discussed herein, some of the claims are overlapping due to the nature of the violation (so, in essence,
15 there are not 9 distinct penalties recoverable). (Mankin Decl. ¶ 16).

16 *First*, Plaintiff claimed that Defendant failed to provide compliant meal periods and rest breaks
17 to the Aggrieved Employees. However, Defendant vehemently opposed this claim based on the
18 argument that the Aggrieved Employees could not bring such claims since they were not entitled to meal
19 periods and rest breaks under the "personal attendant" exemption at IWC Wage Order 15 § 1(b) ("the
20 provision of this order shall not apply to personal attendants." In addition to this exemption argument,
21 Defendant argued that it provided and made available meal and rest breaks to all employees, and any
22 employee who did not take a meal or rest break did so entirely of his or her own volition. As such,
23 Defendant argued that these claims were without merit because, for each violation, a fact-finder would
24 have to determine why a break was noncompliant/nonexistent, because if it was by the employee's
25 choice, no liability attaches to Defendant. And, finally, Defendant also argued that many Aggrieved
26 Employees worked short shifts (4 hours or less) that did not entitle them to meal periods or rest breaks.
27 (Mankin Decl. ¶ 17).

28 ///

1 *Second*, Plaintiff alleged unpaid minimum and overtime wage claims under two separate
2 theories. For example, Plaintiff alleged that Defendant paid Plaintiff and the Aggrieved Employees a
3 base hourly rate with higher hourly rates for items such as weekend work. However, during weeks when
4 an Aggrieved Employee worked at two different rates of pay and worked overtime, Defendant illegally
5 paid overtime at only 1.5 times the base (lower) rate of pay. Plaintiff also alleged that Defendant utilized
6 a rounding policy that resulted in a widespread failure to pay minimum and overtime wages for all hours
7 worked because the policy was not neutral on its face or in its application. (Mankin Decl. ¶ 18).

8 *Third*, Plaintiff alleged what are often referred to as “derivative” violations. For instance,
9 Plaintiff argued that, due to the unpaid wages, Defendant is liable to each *former* Aggrieved Employee
10 for failure to timely pay all wages due and owing upon separation of employment (Labor Code § 203)
11 and, moreover, that Defendant’s wage statements failed to comply with Labor Code § 226 since the
12 wage statements did not accurately state total hours worked, gross and net wages earned, all deductions,
13 among other violations. However, as Defendant argued that the overarching claims had no merit,
14 Defendant also argued that these derivative claims would fail as well. (Mankin Decl. ¶ 20).

15 In a nutshell, the claims were heavily disputed, such that both sides likely realized that a trial
16 result could be a coin flip. Indeed, the uncertainty is reflected in the mediator’s proposal and the Parties
17 ultimate decision to resolve the claims for the agreed upon amount.

18 **III. THE PAGA AND ITS REQUIREMENTS**

19 PAGA provides an enforcement method for California’s Labor Code by enlisting individual
20 plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to
21 the individual plaintiffs and other employees. Prior to the enactment of PAGA in 2003, the recovery of
22 civil penalties for violations of certain Labor Code provisions were solely within the province of the
23 California Department of Labor. *Arias*, 46 Cal.4th at 980.

24 However, due to the lack of financing for California’s agencies, and the substantial number of
25 Labor Code violations by California employers, the California Legislature found that it was in the public
26 interest to allow aggrieved employees to act as “private attorneys general” to enforce and recover civil
27 penalties on behalf of the State of California for Labor Code violations committed by employers. *Id.*
28 As the Legislature that adopted PAGA observed, “the only meaningful deterrent to unlawful conduct is

1 the vigorous assessment and collection of civil penalties as provided in the Labor Code.” Stats. 2003
2 ch. 906, § 1(b). Moreover, the Labor Code’s primary purpose is to “ensure employees are not required
3 or permitted to work under substandard unlawful conditions ... and to protect employers who comply
4 with the law from those who attempt to gain a competitive advantage at the expense of their workers by
5 failing to comply with minimum labor standards.” Labor Code § 90.5(a). Therefore, the Legislature
6 determined that “adequate financing of labor law enforcement was necessary to achieve maximum
7 compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined
8 and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in
9 the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil
10 penalties for Labor Code violations, with the understanding that labor law enforcement agencies were
11 to retain primacy over private enforcement efforts.”

12 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor and
13 Workforce Development Agency for enforcement of labor laws and education of employers and
14 employees about their rights and responsibilities under this code ...; and 25 percent to the aggrieved
15 employees.” Lab. Code § 2699(i).

16 Before filing a PAGA action, an aggrieved employee must first provide written notice to the
17 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the
18 employer has violated. Labor Code § 2699.3(a)(1). This notice provides the LWDA with the opportunity
19 to investigate and prosecute the claim. The employee may only sue on the state’s behalf if the LWDA
20 fails to respond to the notice within 65 days, responds that it does not intend to investigate, or investigates
21 and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In this case, Plaintiff
22 provided the LWDA with notice letters advising it of the alleged Labor Code violations, but the LWDA
23 deferred the prosecution of these violations to Plaintiff and his attorneys. Accordingly, the Settlement
24 and the common fund created by it for the benefit of the State and Aggrieved Employees, is solely the
25 result of the work performed by Plaintiff and his attorneys.

26 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the
27 court. Lab. Code § 2699(1)(2). In 2009, the California Supreme Court considered the PAGA approval
28 process and, more specifically, whether an aggrieved employee needs to meet class certification

1 requirements. *Arias*, 46 Cal.4th at 976. After a substantial review of the legislative history of PAGA,
2 the Court held that an aggrieved employee's representative action brought on behalf of the state and
3 other aggrieved employees against an employer for PAGA violations *does not* need to meet the
4 requirements for class certification nor does there need to be notice to the other employees. *Id.* at 975,
5 980-88. As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of
6 California's labor law enforcement agencies. *Id.* at 986. Thus, the Court simply reviews the settlement
7 and approves it if it is deemed to be fair and reasonable.

8 Accordingly, the Parties to this PAGA action have reached such an agreement and now seek this
9 Court's approval of the settlement.

10 **IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

11 The following is a summary of the principal terms of the Settlement Agreement.

12 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

13 The settlement provides that Defendant will pay a non-reversionary settlement amount of One
14 Hundred Ten Thousand Dollars (\$110,000) (the "Settlement Amount"), inclusive of payments for
15 Attorneys' Fees and Attorneys' Costs,² and Settlement Administration Costs.³ (Settlement Agreement
16 ["S.A."] ¶ 5, attached as Exhibit B to the Mankin Decl.) After these payments, approximately
17 \$62,135.18 will remain as the estimated PAGA Award for payment to the LWDA and Aggrieved
18 Employees and, pursuant to Labor Code § 2699(i), 75% shall be paid to the LWDA (which shall be used
19 to assist in the enforcement of labor laws and education of employers and employees about their rights
20 and responsibilities under the Labor Code), and the remaining 25% being paid to the Aggrieved
21 Employees on a pro rata basis based the number of pay periods each Aggrieved Employee worked during
22 the PAGA Period. (S.A. ¶ 8).

23 ///

24 ///

26 ² Plaintiff's Counsel will seek a standard fee of one-third (\$36,666.66) of the Settlement Amount, and reimbursement of
27 actual attorney costs of \$7,698.16. Since the Settlement Agreement authorized up to \$15,000 for costs, the savings will be
placed in the PAGA Award and paid to the LWDA and Aggrieved Employees.

28 ³ The Parties selected Phoenix Settlement Administrators as the Settlement Administrator, with an al-in flat rate cost of
\$3,500, which will be deducted from the Settlement Amount.

The following chart reflects the estimated payments from the Settlement Amount:

Total Amount(s)	
<i>Settlement Amount</i>	\$110,000.00
Attorneys' Fees (1/3)	\$ 36,666.66
Actual Litigation Costs	\$ 7,698.16
Administrator Costs	\$ 3,500.00
<i>PAGA Award</i>	\$ 62,135.18
75% to the LWDA	\$ 46,604.38
25% to the Aggrieved Employees	\$ 15,533.80
<i>Balance</i>	\$0

As such, the LWDA will receive approximately \$46,604.38 and the Aggrieved Employees will receive \$15,533.80. Assuming 300 employees, the average payment will be \$51.78. Each Aggrieved Employee's share will be treated as non-wage income and reported by the Settlement Administrator on IRS Form 1099 to the respective Aggrieved Employee and applicable governmental authorities.

B. PAYMENT AND THE NOTICE LETTER

Pursuant to S.A. ¶ 15, Defendant has agreed to issue payment under the following payment plan:

1. On or before December 1, 2022, Defendant shall fund \$40,000, which shall be used to pay the amounts approved by the Court for: (1) PAGA Penalties payable to the Aggrieved Employees (i.e., the 25% share of the Net Settlement Amount), and (2) any remaining balance paid towards the Court-approved attorneys' fees.

2. On or before December 1, 2023, Defendant shall fund \$50,000, which shall be used to pay: (1) the remaining balance of the Court-approved attorneys' fees, (2) the Court-approved costs, (3) the Court-approved third-party administrator expenses, and (4) any remaining balance to the PAGA Penalties payable to the LWDA.

3. On or before April 1, 2024, Defendant shall fund the remaining \$20,000 (the balance of the PAGA Settlement Amount), which shall be used to pay the remaining balance of the PAGA Penalties payable to the LWDA.

The Settlement Administrator shall issue the applicable payments as specified above within 10 calendar days of receiving each payment from Defendant. The Aggrieved Employees will have 180 days to cash their checks, and if for any reason a check is un-cashed, that share will be forwarded to State

1 Controller's Office for the State of California in the name of the Aggrieved Employee. (S.A. ¶ 11).

2 Plaintiff's counsel also preemptively addresses one possible concern of the Court: how inflation
3 will impact these payments. In another recent PAGA settlement (*Diaz v. Legacy Tile*, Riverside Case
4 No. RIC2104520), the Court raised concerns regarding inflation when the LWDA was paid last under
5 an installment plan. And although Plaintiff's counsel revised the *Diaz* settlement to address such
6 concerns, they do not do so here. Instead, Plaintiff's counsel seeks approval as-is because this is the
7 best settlement possible under the circumstances due to financial concerns and the specter of *Viking*
8 *River* looming large, and the fact that defendant has represented that it will not enter into a further
9 agreement. Without changing any of the material terms, one potential alternative that Plaintiff's counsel
10 would be amenable to is that any uncashed checks be sent to the LWDA, rather than to the State
11 Controller in the name of the Aggrieved Employee(s) that did not cash their checks, which will offset
12 any impact related to inflation.

13 A Notice will be sent to the Aggrieved Employees advising of the settlement and payment. (*see*
14 Exhibit F to Mankin Decl.).

15 **C. SETTLEMENT ALLOCATION TO THE AGGRIEVED EMPLOYEES.**

16 As noted, 25% of the PAGA Award (totaling \$15,533.80) will be paid to approximately 300
17 Aggrieved Employees on a pro-rata basis according to the number of pay periods each Aggrieved
18 Employee worked during the PAGA Period. (S.A. ¶ 8). The portion of the PAGA Award allocated to
19 each Aggrieved Employee shall be referred to as the Aggrieved Employee's "Individual Share." The
20 Aggrieved Employees will receive \$51.78 on average while preserving all potential claims for unpaid
21 wages and statutory penalties, if any exist.

22 **D. THE RELEASE**

23 The California Supreme Court has explained that a judgment in "a representative action brought
24 by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004... is binding
25 not only on the named employee plaintiff but also on government agencies and any aggrieved employee
26 not a party to the proceeding." *Arias*, 46 Cal.4th at 985-986.

27 The release in the Settlement Agreement strictly complies with CMO ¶ C(8). For instance, it
28 was agreed that the "release of claims for PAGA penalties shall bind only the named plaintiff and the

1 State of California.” (S.A. ¶ 9(a)). Moreover, the Settlement Agreement further states that “[u]pon entry
2 of the PAGA Approval Order and Defendant funding of the Settlement Amount, Plaintiff – in her
3 individual capacity and on behalf of the State of California and LWDA - shall completely release and
4 discharge the Released Parties from the PAGA Released Claims for the PAGA Period. As such, Plaintiff
5 does not release any Aggrieved Employee’s claim for wages or damages.” (S.A. ¶ 9(a)).

6 Additionally, the release claims are limited, as required by the CMO. Indeed, the Settlement
7 Agreement states as follows: “The release of claims for PAGA penalties shall release only those claims
8 described in the LWDA notice sent by Plaintiff on May 1, 2021, and only to the extent that those claims
9 are alleged in the operative complaint. See CMO ¶ C(8)(c). Thus, the PAGA Released Claims are
10 defined as follows: any and all PAGA claims that Plaintiff alleged against Defendant, on behalf of
11 Aggrieved Employees and State of California, based on the facts stated in the operative Complaint in
12 the Action and in the LWDA notice letter sent on May 1, 2021, including all PAGA claims seeking civil
13 penalties premised upon (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure
14 to provide meal periods, (4) failure to provide rest breaks, (5) failure to reimburse business expenses,
15 (6) unlawful deduction of wages, (7) failure to timely pay wages each period, (8) failure to timely pay
16 final wages, (9) failure to provide accurate itemized wage statements, and (10) all other claims for civil
17 penalties recoverable under the Private Attorneys General Act, Labor Code §§ 2698 *et seq.* that were
18 stated in the Complaint and based solely upon the facts alleged in the Complaint and the notice sent by
19 Plaintiff to the LWDA. The time period governing the PAGA Released Claims shall be any time during
20 the PAGA Period.” (S.A. ¶ 9(c)).

21 Furthermore, the Released Parties are in compliance with CMO ¶ C(8)(b): “The release of claims
22 for PAGA penalties shall release only Defendant, together with its officers, directors, employees, and
23 agents.” (S.A. ¶ 9(b)).

24 Separate and apart from Plaintiff’s PAGA claims, Plaintiff also alleged individual claims for the
25 underlying wage claims. Therefore, subject to the Court’s approval, Defendant agrees to pay Plaintiff
26 separately, in full and complete resolution of any and all such claims, and in return for a complete and
27 general release and waiver of claims under Civil Code § 1542, a total sum of \$10,000, less applicable
28 withholdings. After one-third attorneys’ fees, Plaintiff will receive \$1,000 for alleged unpaid wages on

1 IRS Form W-2, and \$6,500 for statutory penalties on an IRS Form 1099. (S.A. ¶¶ 16-19).

2 For these reasons, the Parties contend that the release in the Settlement Agreement narrowly
3 applies only to the claims alleged, and only binds the named Plaintiff as is consistent with the California
4 Supreme Court's ruling in *Arias*, 46 Cal.4th at 986.

5 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT**
6 **APPROVAL**

7 In 2016, PAGA was amended to require the Court to "review and approve any settlement of any
8 civil action filed pursuant to this part." Labor Code § 2699(1)(2). The amendment also required that
9 the "proposed settlement shall be submitted to the agency at the same time that it is submitted to the
10 court." As such, the Settlement Agreement and this Motion have been concurrently submitted to the
11 LWDA in accordance with this section. (Mankin Decl. ¶ 64; Exhibit E).

12 On December 17, 2020, this Court issued its PAGA Case Management Order #1, which seeks
13 information regarding the settlement. To the extent not already discussed herein, the Mankin Declaration
14 contains the requested information, as follows:

15 • CMO ¶ C(2) requests information regarding the settlement, whether a neutral was utilized
16 and whether the settlement was submitted to the LWDA. This is addressed at Mankin Decl. ¶¶ 10, 12-
17 14, and 64.

18 • CMO ¶ C(3) requests information regarding the maximum penalties for which Defendant
19 could be liable, including many distinct subparts. These topics are addressed at Mankin Decl. ¶¶ 16-32.

20 • CMO ¶ C(4) requires support for Plaintiff's counsel's requested attorneys' fees and costs.
21 This is addressed at Mankin Decl. ¶¶ 37-42 and Carlson Decl. ¶¶ 7-12.

22 • CMO ¶ C(5) seeks information regarding Plaintiff's separate individual settlement. This
23 is addressed at Mankin Decl. ¶¶ 43-57.

24 • CMO ¶ C(6) does not apply since Plaintiff is not requesting a service award.

25 • CMO ¶ C(7) does not apply because this settlement results in a judgment, not dismissal.

26 • CMO ¶ C(8) [re: the release] is addressed above and fully compliant. (S.A. ¶¶ 9(a)-(c)).

27 • CMO ¶ C(9) seeks information regarding the administrator and bidding process for the
28 same. This is addressed at Mankin Decl. ¶¶ 62-63 and Moore Decl. ¶¶ 1-9 and Exhibits A and B to same.

- CMO ¶ C(10) does not apply.
- CMO ¶ C(11) seeks information as to how uncashed checks will be distributed. Here, the Settlement called for them to go to the State Controller's office, but as noted, Plaintiff's counsel is agreeable to sending uncashed checks to the LWDA to offset any impact caused by inflation and the fact that the LWDA will receive the final payment. (S.A. ¶ 11).

VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR AND REASONABLE

For their efforts and the substantial risk they undertook in obtaining a common fund settlement that benefits the LWDA and Aggrieved Employees, the Parties allocated one-third of the Settlement Amount to Plaintiff's Counsel for reasonable attorneys' fees, plus actual litigation costs. These fees are warranted under the law and within the range of fees commonly awarded in similar cases.

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

PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and costs under Labor Code § 2699(g)(1), which provides that, "Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3." As discussed below, in a qui tam action, reasonable attorney's fees and costs are typically awarded under the common fund doctrine where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

A PAGA action is a qui tam action because the statute allows the employee plaintiff, acting as the proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code violations and recover civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency (LWDA). *Iskanian*, 59 Cal.4th at 380. "A PAGA representative action is therefore a type of *qui tam* action." *Id.* at p. 382. Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the aggrieved employees). See Lab. C. 2699(i).

1 As here, where a common fund is created in a qui tam action by the successful litigation of a
2 plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the common
3 fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. In *Bank of America*, attorneys were
4 awarded their fees from the common fund in a taxpayer action to enforce unclaimed property law.

5 Affirming the award, the Court stated:

6 "Those benefiting from the recovery of the fund, in this case some
7 depositors and eventually the People of the State of California, must bear
8 their share of the cost of litigation. Fees for taxpayers' attorneys will be
9 deducted from the judgment, and each claimant's share reduced
proportionately. To the extent the judgment relies upon section 1021.5 for
recovery of attorney fees, it must be modified to confine the award of fees
to the common fund theory." *Id.* at p. 91.

10 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common
11 fund was created in the amount of \$110,000 for the benefit of the employees and the State of California.
12 Thus, these beneficiaries must bear their share of the costs and attorney's fees, which fees and costs
13 must be deducted from the \$110,000 settlement amount under the common fund theory. *Id.* Moreover,
14 such fees are deducted as a percentage of the settlement amount. *Boeing Co. v. Van Gemert* (1980) 444
15 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301,
16 1311; *Williams v. MGM-Pathe Communicatioins Co.* (9th Cir. 1997) 129 F.3d 1026, 1027; *Staton v.*
17 *Boeing Co.*(9th Cir. 2003) 327 F.3d 938, 967.

18 The California Supreme Court upheld the use of the common fund theory of recovery for
19 attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506, approving attorney's fees
20 of \$6.33M on a \$19M settlement. This ruling is consistent with the Court's prior rulings recognizing
21 that "when a number of persons are entitled in common to a specific fund, and an action brought
22 by...plaintiffs for the benefit of all results in the creation or preservation of that fund, such...plaintiffs
23 may be awarded attorneys' fees out of the fund." *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing*,
24 444 U.S. at 478 ("[A] lawyer who recovers a common fund...is entitled to reasonable attorneys' fees
25 from the fund as a whole;" *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 393-394 [discussing the
26 acceptance of awarding attorneys' fees and expenses from a settlement where "litigation has conferred
27 a substantial benefit on the members of an ascertainable class"]; see also *Lealao v. Beneficial California,*
28 *Inc.* (2000) 82 Cal.App.4th 19, 26 "[f]ee spreading occurs when a settlement or adjudication results in

1 the establishment of a separate or so-called common fund for the benefit of the class.”]).

2 Accordingly, the common fund doctrine allows a court to award attorneys’ fees based upon a
3 percentage of the total fund that is created for the satisfaction of beneficiaries’ claims when the fund
4 consists of a “certain or easily calculable sum of money.” *Dunk v. Ford Motor, Co.* (1996) 48
5 Cal.App.4th 1794, 1809; *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 110 [application of the
6 percentage of the fund recovery depended on “[t]he critical point” that “a fund was created from which
7 attorneys’ fees could be paid”]; A. Conte & H. Newberg, *Newberg on Class Actions*, § 14:6 (4th ed.
8 2002).

9 California law has long upheld, and continues to uphold, the percentage of the recovery method
10 for awarding attorneys’ fees where a fund is established. See e.g., *Serrano*, 20 Cal.3d at 34; *Bell v.*
11 *Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v. Netflix, Inc.* (2008) 162
12 Cal.App.4th 43, 563 [“fees based on a percentage of the benefits are in fact appropriate in large class
13 actions...”]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 263 [affirming award of attorneys’
14 fee based on percentage of recovery]; see also *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food*
15 *Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 [the common fund doctrine is “frequently applied in
16 class actions when the efforts of the attorney for the named class representatives produce monetary
17 benefits for the entire class”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [“courts
18 recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method and
19 the percentage of recovery”].

20 Accordingly, awarding fees on this basis in the amount of one-third of the \$190,000 gross
21 settlement amount is reasonable and appropriate.

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

23 This is yet another example that some cases result in a sharp negative multiplier, which are then
24 offset by some cases that result in a positive multiplier. The actual aggregated lodestar between the
25 attorneys that worked on this case is approximately \$104,562.50, whereas the requested fee is only
26 \$36,666.66. This results in a *large (almost -3) negative multiplier*. The aggregated lodestar is
27 summarized in the following table, and in the submitted declaration of Plaintiff’s counsel:

28 ///

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin Partner	Trial Counsel	21	\$775	49.3⁴	\$38,207.50
Peter Carlson Senior Associate	Handling Attorney	8	\$575	115.4	\$66,355.00
Grand Total for All Attorneys				164.7	\$104,562.50

(Mankin Decl. ¶¶ 39-40 and Exhibit C; Carlson Decl. ¶¶ 7-12 and Exhibit A).

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (i.e., the Laffrey Matrix at www.laffreymatrix.com indicates that the benchmark rate for an 8–10-year attorney to be \$676/hour and a 11-19 year attorney at \$764/hour, and a 20+ year attorney at \$919/hour). Moreover, the Wolters Kluwer 2017 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual hours and fees billed by law firms.

Thus, the requested attorneys’ fees should be awarded (hopefully with a nod to future cases that seek a positive multiplier to offset such losses).

C. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE

Plaintiff’s Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of

⁴ Includes an estimated 20 hours of additional work in preparation for and attending the hearing, as well as work that is anticipated to be performed after the hearing with counsel, administrator, employees, and the court

1 the employees. *See Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19. Plaintiff's Counsel are permitted
2 to recover their litigation costs and expenses under the common fund doctrine. *See Serrano III*, 20 Cal.3d
3 at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San*
4 *Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f
5 necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys'
6 fees by . . . [Plaintiff's] attorneys"). Furthermore, Plaintiff's Counsel are entitled to recover "those out-
7 of-pocket expenses that would normally be charged to a fee-paying client." *Harris v. Marhoefer* (9th
8 Cir. 1994) 24 F.3d 16, 19.)

9 The Settlement Agreement authorized Plaintiff's Counsel to recover litigation costs not to exceed
10 \$15,000. (S.A. ¶ 7). Plaintiff's Counsels' actual costs are \$7,698.16 through the conclusion of this
11 matter, which includes costs of filing, serving, and attending the approval hearing. (Mankin Decl. ¶ 42;
12 Exhibit D). The savings will be placed in the PAGA Award and paid to the LWDA and Aggrieved
13 Employees based on the percentages set forth above. These costs include two mediation fees, filing
14 fees, and other costs that include Attorney Service charges, CourtCall charges, and process service fees.
15 These costs are reasonable and uncontested, and should be approved.

16 **VII. SUBMISSION TO THE LWDA**

17 As set forth in the Mankin Declaration at ¶ 64, the settlement and this motion are concurrently
18 being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic
19 submission is attached as Exhibit E to the Mankin Declaration.

20 **VIII. THE COURT SHOULD APPOINT PHOENIX AS THE ADMINISTRATOR**

21 Subject to the Court's approval, the parties stipulated to Phoenix serving as the Settlement
22 Administrator who will process the settlement payments and provide notice to the Aggrieved
23 Employees. Phoenix is highly experienced in administering class/PAGA settlements, and provided a
24 capped proposal to administer the settlement for \$3,500. (Moore Decl. ¶ 9 and Exhibit B to same).

25 Aside from Simpluris, Phoenix was the lowest bidder in the competitive bidding process, which
26 revealed the following results: Simpluris (\$3,000), Phoenix (\$3,500), ILYM (\$4,500), Rust (\$4,959),
27 CPT Group (\$6,500) and AB Data (\$6,863). (Mankin Decl. ¶ 63).

28 ///

1 **IX. CONCLUSION**

2 For the foregoing reasons, Plaintiffs request the Court approve the Settlement under the PAGA.

3
4 Dated: August 12, 2022

LAUBY, MANKIN & LAUBY LLP

5
6 BY:



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