

1 JAMIE SERB (SBN 289601)
jamie@crosnerlegal.com
2 CHAD SAUNDERS (SBN 257810)
chad@crosnerlegal.com
3 ZACHARY CROSNER (SBN 272295)
zach@crosnerlegal.com
4 **CROSNER LEGAL, PC**
9440 Santa Monica Blvd. Suite 301
5 Beverly Hills, CA 90210
Tel: (866) 276-7637
6 Fax: (310) 510-6429

7 Attorneys for Plaintiff
NANCY ETEMAD

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**
11

12 NANCY ETEMAD, an individual, on behalf
of herself, and all others similarly aggrieved,

13 Plaintiff,

14 v.

15 RAYMOND JAMES & ASSOCIATES, INC., a
16 Florida corporation; and DOES 1-50, inclusive,

17 Defendants.
18
19
20
21
22
23
24
25
26
27
28

CASE NO. 21STCV35039

Assigned for All Purposes to:
Hon. Bruce G. Iwasaki
Dept. 58

MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF SETTLEMENT
UNDER PRIVATE ATTORNEYS
GENERAL ACT

[Filed concurrently with Notice of Motion
and Motion; Declarations of Chad Saunders,
Nancy Etemad, and Sean Hartranft;
[Proposed] Order]

Date: January 18, 2024
Time: 9:00 a.m.
Dept.: 58

Reservation ID 597658885447

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	SUMMARY OF SETTLEMENT TERMS	3
A.	Terms of the Settlement and Distribution of PAGA Penalties	3
B.	Payment and Notice	3
C.	The Release	4
IV.	THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE, FURTHERS THE PURPOSES UNDERLYING PAGA, AND WARRANTS APPROVAL	4
A.	Nature of the Alleged Violations	5
B.	Number of Alleged Violations and Potential Penalties.....	6
C.	The Settlement Meets the Moniz/Kullar Factors and is Fair, Reasonable and Adequate.....	6
V.	SUBMISSION TO THE LWD	10
VI.	THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE	10
A.	Plaintiff’s Counsel Are Entitled to Recover Attorney’s Fees Under the Common Fund Doctrine.....	10
B.	A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award	12
C.	The Requested Costs Are Reasonable.....	13
VII.	PLAINTIFF’S ENHANCEMENT AWARD.....	14
VIII.	CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases

<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135	9
<u>Bank of America v. Cory</u> (1985) 164 Cal.App.3d 66	11
<u>Bell v. Farmers Ins. Exch.</u> (2004) 115 Cal.App.4th 715	12
<u>Boeing Co. v. Van Gemert</u> (1980) 444 U.S. 472	11
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504	8
<u>Donohue v. AMN Servs.</u> (2021) 11 Cal.5th 58	5
<u>Dunk v. Ford Motor Co.</u> (1996) 48 Cal.App.4th 1794	12
<u>Echavez v. Abercrombie & Fitch Co., Inc.</u> (C.D. Cal. Mar. 23, 2017) 2017 WL 3669607	10
<u>Fleming v. Covidien</u> (C.D. Cal. 2011) 2011 U.S.	8
<u>Harris v. Marhoefer</u> (9th Cir. 1994) 24 F.3d 16	13
<u>Jordan v NCI Grp., Inc.</u> (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297	10
<u>Kim v. Reins Int'l California, Inc.</u> (2020) 9 Cal.5th 73	11
<u>Kullar v. Foot Locker Retail, Inc.</u> (2008) 168 Cal.App.4th 116	5
<u>Laffitte v. Robert Half Int'l Inc.</u> (2016)	11

1	<u>Lane v. Facebook, Inc.</u>	
2	(9th Cir. 2012) 696 F.3d 811	9
3	<u>Lealao v. Beneficial California, Inc.</u>	
4	(2000) 82 Cal.App.4th 19	11, 12
5	<u>Moniz v. Adecco USA, Inc.</u>	
6	(2021) 72 Cal.App.5th 56	4, 5
7	<u>PLCM Group, Inc. v. Drexler</u>	
8	(2000)	12
9	<u>Rider v. County of San Diego</u>	
10	(1992) 11 Cal.App.4th 1410	13
11	<u>Sanders v. City of Los Angeles</u>	
12	(1970)	12
13	<u>Serrano v. Priest</u>	
14	(1977)	11, 12, 13
15	<u>Six (6) Mexican Workers v. Arizona Citrus Growers</u>	
16	(9th Cir. 1990) 904 F.2d 1301	11
17	<u>People ex rel. Stratham v. Acacia Research Corp.</u>	
18	(2012) 210 Cal.App.4th 487	10
19	<u>In re Taco Bell Wage and Hour Actions</u>	
20	(E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557	8
21	<u>White v. Experian Information Solutions, Inc.</u>	
22	(C.D. Cal. 2011) 803 F.Supp.2d 1086	9
23	<u>White v. Starbucks Corp.</u>	
24	(N.D. Cal. 2007) 497 F.Supp.2d 1080	7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Statutes

Lab. Code § 2699(i)..... 11

Labor Code §§ 201-203 6

Labor Code § 2699(e)(2) 8

Labor Code § 2699(g)(l)..... 10

Labor Code § 2699(l)(2)..... 4

1 **I. INTRODUCTION**

2 Plaintiff Nancy Etemad (“Plaintiff”) hereby seeks Court approval of a proposed settlement
3 of claims brought under the Private Attorneys General Act (“PAGA”) against defendant Raymond
4 James & Associates, Inc. (“Raymond James” or “Defendant”). Consistent with PAGA, the
5 proposed settlement releases claims under PAGA only and has no impact on the individual claims
6 of any alleged aggrieved employee. Since the settlement resolves nothing more than claims under
7 PAGA, it requires only a one-step review and approval process by the Court, and for the reasons
8 discussed below, the proposed settlement is fair, reasonable, adequate, and advances the purposes
9 underlying PAGA. Plaintiff respectfully requests the Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 Defendant Raymond James is a publicly traded multinational independent investment bank
12 and financial services company providing financial services to individuals, corporations, and
13 municipalities through its subsidiary companies that engage primarily in investment and financial
14 planning, in addition to investment banking and asset management. Defendant is headquartered in
15 St. Petersburg, Florida. Plaintiff worked for Defendant as a non-exempt client associate from
16 approximately 2015 until May 2021. [Declaration of Chad Saunders (“Saunders Decl.”), ¶ 4.]

17 Plaintiff contends Raymond James violated the Labor Code in several ways during the
18 relevant time period. First, she contends Defendant failed to pay Plaintiff and the Aggrieved
19 Employees for all hours worked including pre-shift and post-shift duties and work performed
20 during unpaid meal periods. She also alleges Raymond James failed to provide Plaintiff and the
21 Aggrieved Employees with required meal and rest periods by (1) requiring employees to remain on
22 duty and perform work off the clock during meal periods, and, (2) refusing to pay premium
23 payments for missed, late, or short meal periods. She also contends Defendant failed to reimburse
24 Plaintiff and the Aggrieved Employees for all business expenses including the cost of personal cell
25 phones and home office equipment used for work purposes. [Saunders Decl., ¶ 5.]

26 Based on these allegations, and after appropriate notice to the Labor & Workforce
27 Development Agency (“LWDA”),¹ Plaintiff filed a PAGA-only complaint on September 22, 2021.

28

¹ Plaintiff’s June 28, 2021 PAGA notice letter is attached as Exhibit 2 to the Saunders Declaration.

1 The Complaint sought only PAGA civil penalties for the following alleged wage and hour
2 violations: (a) failure to pay wages, including minimum and overtime wages; (b) failure to provide
3 meal and rest periods; (c) failure to reimburse expenses; (d) failure to provide complete and accurate
4 wage statements; and (d) waiting time penalties, on behalf of all individuals employed by Raymond
5 James as non-exempt employee in California during the PAGA Period. [Saunders Decl., ¶ 8.]

6 Defendant has at all times denied Plaintiff's allegations and maintained it complied with all
7 relevant provisions of the Labor Code and Wage Orders. Specifically, Defendant contends among
8 other things that Plaintiff and all alleged aggrieved employees were timely paid for all hours worked
9 at the correct hourly rates in conformance with all applicable laws, that it authorized and permitted
10 Plaintiff and the alleged aggrieved employees to take fully compliant meal and rest periods in
11 accordance with all applicable laws, and that Plaintiff and the alleged aggrieved employees received
12 accurate and complete itemized wage statements. Defendant also strongly contends the case cannot
13 be maintained as a representative action because among other things Plaintiff's
14 missed/interrupted/late/short meal and rest period allegations necessarily require detailed
15 individualized assessments and accordingly individualized issues predominate and a trial under
16 PAGA would be unmanageable. [Saunders Decl., ¶ 9.]

17 On April 19, 2022, pursuant to the Parties' stipulation the Court issued an order staying the
18 case pending the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*. That stay
19 was lifted on June 29, 2022. Following *Viking River*, and in light of the California Supreme Court's
20 grant of review *Adolph v. Uber Techs, Inc.*, the Parties' elected to pursue mediation rather than
21 litigating a motion to compel arbitration. The Parties further agreed to a protocol for exchanging
22 additional documents and information before the mediation. Through this informal discovery,
23 Defendant provided Plaintiff with information including, inter alia, the number of potential alleged
24 aggrieved employees, the number of aggregate pay periods, sample pay stubs and time records for
25 around 20% of the alleged aggrieved employees, employee handbooks and manuals, and relevant
26 policy documents on Defendant's time keeping and reporting policies, etc. [Saunders Decl., ¶ 10.]

27 The parties then attended a full day mediation before highly-regarded mediator Louis
28 Marlin, Esq., who has extensive experience mediating wage and hour class and PAGA actions.

1 Before and during the mediation, Plaintiff and counsel analyzed, researched, and investigated the
2 potential issues, including matters related to the calculation of damages, trial, and appellate issues
3 and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to
4 proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims
5 and Defendant's defenses, and the parties' data analyses and conclusions based on data provided
6 by Defendant. After a contentious full day of negotiations, the Parties were able to reach agreement
7 on all major issues. The Parties then subsequently formalized the tentative settlement in the
8 settlement agreement now before the Court. [Saunders Decl., ¶ 11.] A true and correct copy of the
9 Settlement Agreement is attached to the Saunders Declaration as Exhibit 1.

10 **III. SUMMARY OF SETTLEMENT TERMS**

11 **A. Terms of the Settlement and Distribution of PAGA Penalties**

12 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$340,000
13 (the "Gross Settlement Amount" or "GSA"), which is inclusive of payments to the LWDA and
14 Aggrieved Employees, costs of settlement administration, a modest service award to Plaintiff, and
15 reasonable attorney's fees and costs.² After payment of settlement administration costs, service
16 award and reasonable attorney's fees and costs from the GSA, Plaintiff presently estimates about
17 \$207,648.25 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about
18 \$155,736.19) will go to the LWDA, and the remaining 25% (about \$51,912.06) will be distributed
19 to the Aggrieved Employees in proportion to the total number of Eligible Pay Periods each
20 individual worked during the PAGA Period. The average award currently is estimated at about
21 \$250. [Saunders Decl., ¶ 12.]

22 **B. Payment and Notice**

23 The Parties propose using Apex Class Action LLC. ("Apex") as the Settlement
24 Administrator. Apex has extensive experience administering PAGA settlements, and has agreed to
25 cap its fees at \$3,990. Within 30 calendar days of the Settlement's Effective Date, Defendant will
26 fund the settlement. Within 14 days thereafter, Apex will mail a Notice and settlement check to all

27 ² As discussed below, Plaintiff's Counsel seeks a fee equal to one-third (\$113,333.33) of the GSA, and
28 reimbursement of actual litigation costs of \$10,028.42. Plaintiff requests a service award in the amount of \$5,000.00.

1 PAGA Members via regular First-Class U.S. Mail, using the most current, known mailing addresses
2 identified in Defendant’s records. Recipients need not submit claim forms and will automatically
3 receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after
4 which time any unclaimed residual funds will be forwarded to the State Controller’s Unclaimed
5 Property Fund. [Saunders Decl., ¶ 13; Declaration of Sean Hartranft, ¶¶ 2-6; Exhs. A-B.]

6 **C. The Release**

7 The release in the Settlement Agreement narrowly releases only civil penalty claims brought
8 under PAGA, as asserted in Plaintiff’s PAGA notice to the LWDA and the operative Complaint.
9 The Settlement Agreement protects the rights of the alleged aggrieved employees to bring their
10 own individual claims should they wish. For these reasons, the Parties contend the release narrowly
11 applies only to the PAGA claims alleged or that could have been alleged, based on the factual and
12 legal allegations pled in the operative Complaint. [Saunders Decl., ¶ 14.]

13 **IV. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE, FURTHERS**
14 **THE PURPOSES UNDERLYING PAGA, AND WARRANTS APPROVAL**

15 PAGA requires the Court “review and approve any settlement of any civil action filed
16 pursuant to this part.” Labor Code § 2699(l)(2). Recently, the appellate court in Moniz v. Adecco
17 USA, Inc. (2021) 72 Cal.App.5th 56, defined the standard for courts to apply when reviewing
18 settlements under PAGA. The court held a trial court must ensure that the settlement is “fair,
19 reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations,
20 deter future ones, and to maximize enforcement of state labor laws.” Id.

21 In so holding, Moniz noted many federal district courts had imported class action settlement
22 approval principles, demanding that PAGA settlements be “fair, reasonable, and adequate,” and
23 weighing factors such as “the strength of the plaintiff’s case, the risk, the stage of the proceeding,
24 the complexity and likely duration of further litigation, and the settlement amount[.]” Id. (collecting
25 cases). Observing that “PAGA’s purpose” is to “protect the public interest” – especially the
26 allegedly aggrieved employees – the Moniz Court agreed with these federal authorities, concluding
27 the same principles that ensure fairness in class action settlements likewise serve the public interest
28 in the PAGA context. These factors are more or less identical to those California courts use to

1 evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116
2 and, consistent with Moniz, Plaintiff submits they should inform the Court’s analysis as well. For
3 the reasons below, the proposed settlement is fair, reasonable and adequate, advances the purposes
4 underlying PAGA, and should be approved.

5 **A. Nature of the Alleged Violations**

6 Plaintiff alleges claims for civil penalties for unpaid wages, meal/rest break violations, and
7 failure to reimburse expenses, as well as derivative wage statement and waiting time penalty claims.
8 First, Plaintiff contends Defendant failed to pay Plaintiff and other allegedly aggrieved employees
9 for all hours worked because Defendant instructed Plaintiff and other Aggrieved Employees to
10 record only the scheduled beginning and end times of Plaintiff’s shifts rather than the actual times
11 Plaintiff began and stopped working, resulting in Plaintiff consistently performing off-the-clock
12 work outside of those office shift start and stop times. For example, Defendant required Plaintiff to
13 attend early-morning training sessions, to compile documents and generate reports after hours, and
14 to drive to clients’ homes to perform notary services outside of her scheduled shift times. None of
15 this unrecorded time outside her shift was compensated. Per Plaintiff, the same holds true of other
16 Aggrieved Employees as well. This regular performance of off-the-clock work resulted in
17 Defendant underpaying both minimum wages and overtime wages owed to Plaintiff and Aggrieved
18 Employees. [Saunders Decl., ¶ 15.]

19 Plaintiff also contends Defendant failed to maintain proper meal and rest break policies and
20 that she and other Aggrieved Employees did not receive all required breaks on a fully compliant
21 basis. For example, Plaintiff and other employees typically had to log exactly 30 minutes for the
22 meal breaks despite not being relieved of their duties – in essence Raymond James had an “auto
23 deduct” policy whereby all lunch breaks are for 30 minutes regardless of actual length. Donohue v.
24 AMN Servs. (2021) 11 Cal.5th 58, 61 (meal period times may not be rounded). Plaintiff also claims
25 Defendant required Plaintiff to take her meal periods at her desk and tend to incoming phone calls
26 from clients and financial advisors. Plaintiff and other employees had to remain on the work
27 premises, or be otherwise available, for the duration of their shifts, including during meal periods,
28 rendering any meal periods on duty and noncompliant. Plaintiff also claims second meal periods

1 were never provided when she worked more than ten hours in a workday. Plaintiff further alleges
2 that during the PAGA period, Defendant failed to provide Plaintiff and the alleged aggrieved
3 employees with rest periods for the same reasons, and she and other employees essentially remained
4 “on duty” for phone calls from clients, assisting financial advisors, etc. [Saunders Decl., ¶ 16.]

5 On the expense reimbursement claims, Plaintiff alleges Defendant failed to reimburse
6 Plaintiff and the Aggrieved Employees for expenses such as cell phone expenses, data or internet
7 access charges, and other costs associated with use of their personal computers, tablet or similar
8 devices for company business. Per Plaintiff, she and other Aggrieved Employees were regularly
9 required to use their personal cell phones and computers/tablets to perform their job duties,
10 including but not limited to, to communicate with clients and financial advisors. [Saunders Decl.,
11 ¶ 17.]

12 Lastly, Plaintiff also brings derivative claims for inaccurate wage statements and failure to
13 pay all wages due and owing upon separation of employment under Labor Code §§ 201-203.
14 [Saunders Decl., ¶ 17.]

15 **B. Number of Alleged Violations and Potential Penalties**

16 For mediation, Defendant indicated there are approximately 198 individuals who fit within
17 Plaintiff’s definition of alleged aggrieved employees in California during the relevant PAGA
18 period, and these individuals worked approximately 7,300 pay periods. Based on the data and
19 information provided by Defendant, and with their expert’s assistance and analysis, Plaintiff
20 estimated Defendant’s theoretical maximum PAGA exposure at about \$3.65 million. Plaintiff,
21 however, substantially discounted that number to account for Defendant’s procedural and merits
22 defenses, of which there are many. [Saunders Decl., ¶¶ 18-19.]

23 **C. The Settlement Meets the Moniz/Kullar Factors and is Fair, Reasonable and**
24 **Adequate**

25 In response to Plaintiff’s wage claims Defendant argued its time keeping policies are legally
26 compliant, that it accurately tracked all hours worked and paid the allegedly aggrieved employees
27 for all hours worked at the correct rates consistent with its compliant payroll policies. It further
28 argued that “off the clock” work by employees was strictly prohibited. Thus, per Raymand James,

1 if any such off the clock work occurred it was against company policy and done without the
2 employer's knowledge. White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d 1080,
3 1083 (employer must have actual or constructive knowledge of the off the clock work). Per
4 Defendant, resolution of this claim on a representative basis would be unmanageable because it
5 necessarily would entail numerous individualized inquiries. [Saunders Decl., ¶ 20.]

6 For the meal and rest break claims, Defendant offered multiple defenses. First, Defendant
7 emphasized that the written meal and rest break policy generally was compliant, that they
8 authorized and permitted all necessary breaks, and that alleged aggrieved employees received full
9 30 minute lunch periods as reflected in the time records. Defendant also argued that even to the
10 extent missed/non-compliant breaks occurred, it was in violation of company policy and would
11 require significant individual inquiries to determine the reasons underlying any such alleged
12 violations and whether it was by employee choice or some other reason. Thus, per Defendant, any
13 trial would be unmanageable on a representative basis because of these individualized issues.
14 [Saunders Decl., ¶ 21.]

15 As with meal breaks, Defendant argued the applicable rest break policies complied with
16 California law and authorized and permitted employees to take all required breaks. Defendant
17 further contended that, in light of the fact that recording rest periods is not required, any evidence
18 of failure to authorize rest periods and/or discouragement from taking rest periods would be purely
19 anecdotal and individual issues would predominate on liability. Defendant also contended that they
20 are only liable if Plaintiff can prove, on a shift-by-shift basis, that each alleged aggrieved employee
21 actually did not receive a fully-compliant rest break. This arguably would once again make a trial
22 unmanageable since the instances an employee missed a rest break would have to be tested on a
23 case by case basis to determine compliance. [Saunders Decl., ¶ 22.]

24 For the expense reimbursement claims, Raymond James argued it provided Plaintiff and all
25 employees with all devices necessary to perform their jobs and, accordingly, to the extent they used
26 their own phones it was strictly for personal convenience rather than business necessity. As such,
27 any such expenses are not reimbursable. [Saunders Decl., ¶ 22.]

28 On the wage statement and waiting time waiting time penalty claims, Defendant

1 emphasized that, to the extent they are derivative then they will rise or fall along with the primary
2 claims, in addition to being subject to “good faith” and other defenses available to Defendant.
3 Accordingly, Plaintiff had to discount the value of these claims significantly in light of these
4 multiple potential defenses. Defendant also contended a substantial discount should be applied to
5 the civil penalties for these derivative (i.e., “stacked”) violations, as it would be unfair to penalize
6 Defendant multiple times for the same violation. [Saunders Decl., ¶ 23.]

7 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
8 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise would
9 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
10 2699(e)(2). This is particularly true here where the claims essentially are premised on “de facto”
11 violations and that could prove difficult to establish on a representative basis, and in light of many
12 cases that have imposed substantial discounts on PAGA penalties awarded after trial. In Fleming
13 v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court
14 reduced the potential penalties by over 82% after a bench trial. More recently, in Carrington v.
15 Starbucks Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of
16 just \$5 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell
17 Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties
18 denied after trial). Additionally, no information came to light suggesting that any violations were
19 knowing and willful by Defendant. For these reasons, Plaintiff believes there is a high likelihood
20 the Court would find imposition of significantly more in penalties would be “unjust, arbitrary, or
21 confiscatory.” [Saunders Decl., ¶ 24.]

22 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims, any
23 one of which, if successful, could have decimated Plaintiff’s case. And Defendant vowed to raise
24 all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with this
25 litigation, and it could have taken years to realize any recovery in this action along with the
26 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be
27 unmanageable, Defendant also intended to raise additional defenses on damages, including the
28 proper measure of civil penalties and the appropriate discount to place on any assessment of such

1 penalties. [Saunders Decl., ¶ 25]

2 Although Plaintiff and his counsel believe they could have prevailed, there was no such
3 guarantee. When the risks of overcoming a manageability defense and prevailing at trial on the
4 merits are factored into the equation, the settlement value is reasonable and supported. Indeed, to
5 recover maximum penalties Plaintiff would have to shoot the moon and win on liability as to all
6 claims and convince the Court to award full penalties, which outcome is highly unlikely. Given
7 Defendant's procedural and merits defenses, as well as the substantial penalty reductions ordered
8 in the cases above – which occurred after trial – the proposed settlement is eminently reasonable.
9 [Saunders Decl., ¶ 26.]

10 Importantly, the mere fact that a settlement does not provide the same recovery as might
11 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
12 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
13 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
14 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
15 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
16 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
17 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
18 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
19 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
20 fundamentally fair . . . is different from the question whether the settlement is perfect in the
21 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
22 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable
23 even though it represented 99% discount off the maximum value of the claims).

24 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
25 the probability of appeal of a favorable judgment, and the Court's substantial discretion to reduce
26 any penalty award all are accounted for, it is clear a settlement amount of \$340,000 for the PAGA
27 claim is within the ballpark of reasonableness, and approval is appropriate.

28 /////

1 **V. SUBMISSION TO THE LWD**

2 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
3 notified the LWDA of this approval hearing. [Saunders Decl., ¶ 27; Exh. 3.] Accordingly, the
4 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
5 approval if the LWDA ultimately declines to offer any comment or objection to a proposed
6 PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017
7 WL 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
8 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
9 4773057, at *9; Jordan v NCI Grp., Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at
10 *7 (“Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to
11 the proposed settlement and no comment or objection has been received.”).

12 **VI. THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE**

13 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
14 that benefits the LWDA and aggrieved employees, one-third of the gross settlement, or
15 \$113,333.33, is allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation
16 costs. These fees are warranted under the law and within the range of fees commonly awarded in
17 similar cases.

18 **A. Plaintiff’s Counsel Are Entitled to Recover Attorney’s Fees Under the**
19 **Common Fund Doctrine**

20 PAGA provides a plaintiff is entitled to recover reasonable attorney’s fees, expenses, and
21 costs under Labor Code § 2699(g)(1): “Any employee who prevails in any action shall be entitled
22 to an award of reasonable attorney’s fees and costs,” Reasonable attorney’s fees and costs are
23 typically awarded under the common fund doctrine in a *qui tam* such as this one, where, as here,
24 the litigation creates a common fund of money in a specific amount for the benefit of others.

25 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
26 private attorney general to recover damages or penalties, all or part of which will be paid to the
27 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
28 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute

1 allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to
2 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
3 only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th
4 73; Iskanian v. CLS Transportation of Los Angeles, 59 Cal.4th at 380-82 (“[a] PAGA
5 representative action is therefore a type of *qui tam* action”). Indeed, the majority of the civil
6 penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to the
7 aggrieved employees (e.g. 75% paid to the state; 25% paid to the aggrieved employees). Lab. Code
8 § 2699(i). Where a common fund is created in a *qui tam* action by the successful litigation of a
9 plaintiff, the plaintiff's attorneys are entitled to recover their fees from the common fund. Bank of
10 America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

11 Through the efforts of Plaintiff and his attorneys here, a common fund was created in the
12 amount of \$340,000 for the benefit of the allegedly aggrieved employees and the State. Thus, these
13 beneficiaries should bear their share of the costs and attorney's fees out of the overall recovery
14 under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6)
15 Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

16 Not long ago, the California Supreme Court upheld the use of the common fund theory of
17 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Cal.5th 480, 506. There,
18 the Court upheld an award of attorney's fees of one-third of the \$19 million gross settlement (e.g.,
19 awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent
20 with prior decisions recognizing “when a number of persons are entitled in common to a specific
21 fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or
22 preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund.” Serrano
23 v. Priest (1977) 20 Cal.3d 25, 34; Boeing, 444 U.S. at 478 (“[A] lawyer who recovers a common
24 fund ... is entitled to reasonable attorneys' fees from the fund as a whole”; Lealao v. Beneficial
25 California, Inc. (2000) 82 Cal.App.4th 19, 26 (“[f]ee spreading occurs when a settlement or
26 adjudication results in the establishment of a separate or so-called common fund for the benefit of
27 the class”).

28 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a

percentage of the total fund created when the fund consists of a “certain or easily calculable sum of money,” and California law has long applied the percentage of the recovery method for awarding attorney’s fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins. Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney’s fee based on percentage of recovery).

Awarding attorney’s fees of one-third of gross common fund amount is favored by California courts when a fund established for the common benefit of others is involved, such as here. Accordingly, awarding fees on this basis out of the \$340,000 GSA, for a total of \$113,333.33, is reasonable and appropriate. [Saunders Decl., ¶¶ 28-47.]

B. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award

Despite the recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar “cross-check” when assessing a proposed percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the “lodestar multiplier” method of cross-checking proposed fee awards, the court first ascertains counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney’s reasonable hourly rate, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-96; Lealao, 82 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”).

Here, Crosner Legal’s lodestar is approximately \$190,630, based on 238.3 attorney hours spent litigating the case. [Saunders Decl., ¶¶ 31-47; Exh. 4.] On a lodestar basis, the fee request of \$113,333.33 results in an amount that is less than the unadorned lodestar, and accordingly there is no request for a multiplier. Plaintiff’s counsel submits this effectively operates to show the percentage fee request is reasonable considering the requested fees are less than the value of the services rendered when valued via traditional hourly billing. [Saunders Decl., ¶¶ 28-47.]

1 **C. The Requested Costs Are Reasonable**

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

12 Plaintiff's Counsel's actual costs presently are \$10,028.42. This includes filing fees, service
13 of process, mediation costs, costs of notice to the aggrieved employees, postage, and expert
14 consultant fees, while waiving photocopying costs and legal research charges. These costs are
15 reasonable and uncontested, and were necessary to the successful prosecution of the action. The
16 costs should be approved in full. [Saunders Decl., ¶¶ 48-49.]

17 **VII. PLAINTIFF'S ENHANCEMENT AWARD**

18 Under the Settlement Agreement, Plaintiff seeks an incentive awards of \$5,000. This
19 request is reasonable given her efforts in this case and the risks she undertook on behalf of the
20 Aggrieved Employees and State. Additionally, by contacting and retaining counsel to pursue
21 these claims, Plaintiff made this settlement possible for the other Aggrieved Employees and the
22 LWDA, while shouldering the risk of being liable for Defendant's litigation costs. Plaintiff also
23 exposed herself to unwanted notoriety related to filing a public lawsuit (discoverable even
24 through a simple google search) for the benefit of other employees, placing her at risk of
25 discrimination by future prospective employers. Among taking many other actions assisting in the
26 successful litigation of this case, Plaintiff provided substantial factual information to my office,
27 attended numerous meetings with my office to discuss the case, and generally participated in all
28 phases of the litigation. Accordingly, the requested enhancement payments to Plaintiff is

1 appropriate and justified as part of the Settlement for her service and risks undertaken. [Saunders
2 Decl., ¶ 50; Declaration of Nancy Etemad, ¶¶ 2-9.]

3 **VIII. CONCLUSION**

4 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement
5 under PAGA, approve the requested award of reasonable attorney's fees and costs, approve Apex
6 as the settlement administrator and approve its fees in the amount of \$3,990, approve Plaintiff's
7 enhancement award in the amount of \$5,000, approve the proposed distributions to the LWDA and
8 Aggrieved Employees, and enter its Order of final approval and judgment thereon.

9
10 Dated: December 13, 2023

CROSNER LEGAL, P.C.

11
12 

13 Jamie K. Serb
14 Chad Saunders
15 Zachary Crosner
16 Attorneys for Plaintiff Nancy Etemad
17
18
19
20
21
22
23
24
25
26
27
28