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

JUAN DIAZ, on behalf of all Aggrieved
Employees and the State of California;

Plaintiff,

vs.

LEGACY TILE AND STONE, INC., a
California Corporation; and DOES 1 through
20, inclusive;

Defendant.

Case No.: CVRI2104520

*[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; DECLARATIONS IN
SUPPORT THEREOF; [PROPOSED]
ORDER**

Hearing

Date: July 7, 2022

Time: 8:30 a.m.

Dept.: 1

Reservation #: 102220112985

Complaint filed: October 4, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 7, 2022, at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 1 of the Riverside County Superior Court, located at 4050 Main Street, Riverside, CA 92501, Plaintiff Juan Diaz will move this Court for an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (the

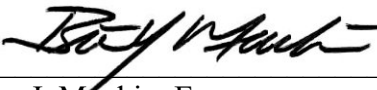
1 “PAGA”).

2 This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities;
3 the Declarations of Plaintiff’s counsel (Brian Mankin and Peter Carlson of Lauby Mankin Lauby LLP)
4 and Settlement Administrator (Jonathan Paul of ILYM Settlement Administrators in support thereof;
5 the PAGA Representative Settlement Agreement and Release of PAGA Claim (the “Settlement
6 Agreement”); the proposed Order granting Approval of the PAGA Settlement and entry of Judgment
7 thereon; and all other records, pleadings, and papers filed in this action; and upon such other evidence
8 or argument as may be presented to the Court at the hearing of this Motion.

9
10 Dated: June 14, 2022

LAUBY, MANKIN & LAUBY LLP

11
12 BY:



13 Brian J. Mankin, Esq.
14 Attorneys for Plaintiff, on behalf of the State of
15 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 Juan Diaz – serving as the representative for the State of
4 California – and his counsel sought civil penalties against Defendant Legacy Tile and Stone, Inc.
5 (“Defendant” or “Legacy”) under the Labor Code Private Attorneys General Act of 2004, California
6 Labor Code § 2698 *et seq.* (commonly referred to as “PAGA”) on behalf of all similarly situated non-
7 exempt employees who worked for Defendant in California (the “Aggrieved Employees”) at any time
8 during the period of October 4, 2020, through the February 13, 2022 (the “Statutory Period” or
9 “PAGA Release Period”). The PAGA action is a type of *qui tam* action filed on behalf of the State to
10 assist it with labor law enforcement. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348,
11 380-382. As such, the State is the real party in interest in a PAGA action. *Id.* at 382. Here, the State
12 of California was timely served with a copy of the Settlement Agreement and this Motion to Approve
13 the Settlement.

14 Defendant Legacy is a tile contractor serving commercial and residential customers in
15 California. Plaintiff was employed as a tile installer and brought this PAGA-only matter for wage and
16 hour claims. More specifically, Plaintiff brought unpaid wage claims arising out of Defendant’s
17 practice of paying the workers on a piece-rate basis, but not separately paying the workers for non-
18 piece rate tasks (i.e., meetings, travel, rest breaks, etc.), and for not paying overtime wages. Plaintiff
19 also brought claims for meal and rest period violations, wage statement violations and other penalties.
20 Due to the limited size and scope of the case, the Parties agreed to an early mediation. Thus, following
21 an exchange of information and documents, the Parties mediated with the Hon. Jonathan Cannon
22 (Ret.) and reached a settlement of the alleged PAGA claims, all of which were heavily disputed.

23 Now with a comprehensive Settlement Agreement that resolves the claims alleged in this case,
24 Plaintiffs seek this Court’s approval of a \$190,000 PAGA-only settlement on behalf of approximately
25 65 current and former employees employed by Defendant in California at any time during the
26 Statutory Period (“Aggrieved Employees”). The settlement merits full approval because it fulfills the
27 purpose of PAGA (i.e., to deter violations of the Labor Code and secure obedience to California’s
28 labor laws; to end ongoing violations of the Labor Code either through injunctive relief or a

1 defendant's voluntary policy change in light of a PAGA action; and to provide relief that is genuine,
2 meaningful, and consistent with California's goal of benefitting the public through enforcement of
3 labor laws).

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

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

14 **II. BACKGROUND**

15 **A. PROCEDURAL HISTORY**

16 On July 29, 2021, Plaintiff Diaz submitted a certified letter to the California Labor Workforce
17 Development Agency (the "LWDA") notifying it of Plaintiff's claims under the PAGA. (Mankin
18 Decl., ¶ 7, Exhibit "A"). Defendant immediately retained counsel who reached out to Plaintiff's
19 counsel to discuss the claims, the financial condition of the company and to propose an early
20 mediation. The Parties scheduled a mediation even before the action was filed. (Mankin Decl., ¶ 8).

21 Meanwhile, the LWDA did not assert jurisdiction over the PAGA claims. On October 4, 2021,
22 Plaintiff filed a PAGA only action that alleged several causes of action, including: (a) failure to pay
23 minimum wages, (b) failure to pay for rest and recovery periods and nonproductive time, (c) failure to
24 pay overtime wages, (d) failure to provide meal periods, (e) failure to provide rest breaks, (f) failure to
25 pay vested vacation, (g) failure to timely pay wages each period, (h) failure to timely pay wages upon
26 separation of employment, (i) failure to provide accurate itemized wage statements (the "PAGA
27 Claims.") (Mankin Decl., ¶ 9).

28 ///

1 In preparation for the mediation, the Parties exchanged documents and information that
2 allowed both sides to calculate the potential damages and evaluate potential risk, including policies
3 and procedures, timekeeping and payroll records, as well as Defendant's financial records (including
4 profit and loss statements, and balance sheets). This analysis enabled both parties to take a good look
5 into the claims, in particular allegations relating to the failure to pay proper regular and overtime
6 wages, and failure to provide compliant meal and rest periods, among other things. During this
7 process, Plaintiff evaluated a sampling of employees' timekeeping and payroll data and determined
8 that there were approximately 1,550 pay periods at issue through mediation. This information enabled
9 Plaintiff and his counsel to analyze, research, and investigate the potential claims, including matters
10 related to the calculation of damages, trial, and appellate issues and risks. (Mankin Decl. ¶ 10).

11 On December 15, 2021, the Parties mediated with the Hon. Jonathan Cannon, a retired judge
12 who sat in the Orange County Complex Division for many years and ruled upon countless class action
13 wage and hour cases like this one, and now serves as a well-respected class action and PAGA
14 mediator. After a full day of mediation, Judge Cannon issued a mediator's proposal that both Parties
15 accepted, resulting in a settlement of all PAGA claims alleged in the action, as well as Plaintiff's
16 individual claims. The Parties entered into a Memorandum of Understanding, and then memorialized
17 the terms of the settlement. The long-form Settlement Agreement is now presented to this Court for
18 approval. (Mankin Decl. ¶ 11, Exhibit "B"). Pursuant to the Court's CMO, Plaintiff's separate
19 individual settlement is discussed in the Mankin Declaration at ¶¶ 40-54.

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

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

24 *First*, Plaintiff claimed that Defendant paid the Aggrieved Employees on a piece-rate basis,
25 calculated based on the square footage of tile installed on each project. And Plaintiff claimed that,
26 under this pay plan, the Aggrieved Employees were paid a set amount of compensation – regardless of
27 how many hours were actually spent on the task – and which resulted in unpaid wages since (1) they
28 did not receive any compensation for time spent under Defendant's control that did not involve laying

1 tile (*i.e.*, meetings, travel time between work locations, among other compensable tasks), and (2) they
2 did not receive any overtime compensation for hours above 8 per day and 40 per week. But Defendant
3 strongly opposed this claim and argued that it did not pay on a piece-rate basis at all. Instead,
4 Defendant argued (and produced documents showing) that it paid on an hourly basis plus “bonuses” to
5 account for piece-rate compensation. (Mankin Decl. ¶ 15-16).

6 *Second*, Plaintiff claimed that the Aggrieved Employees were often denied compliant meal and
7 rest breaks due to the nature of the work. However, Defendant argued that it provided and made
8 available meal and rest breaks to all employees, and any employee who did not take a meal or rest
9 break did so entirely of his or her own volition. As such, Defendant argued that these claims were
10 without merit because, for each violation, a fact-finder would have to determine why a break was
11 noncompliant/nonexistent, because if it was by the employee’s choice, no liability attaches to
12 Defendant. (Mankin Decl. ¶ 17).

13 Plaintiff also claimed, among other things, that Defendant failed to timely pay final wages,
14 failed to provide accurate itemized wage statements, failed to pay all vested vacation owing to
15 departing employees, and various other PAGA claims arising out of the claimed violations mentioned
16 above. However, Defendant argued that many claims were derivative of other claims and had no merit
17 since Defendant could not face two PAGA penalties for a single violation. (Mankin Decl. ¶ 18-20).

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
22 of 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
26 public interest to allow aggrieved employees to act as “private attorneys general” to enforce and
27 recover civil penalties on behalf of the State of California for Labor Code violations committed by
28 employers. *Id.* As the Legislature that adopted PAGA observed, “the only meaningful deterrent to

1 unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor
2 Code.” Stats. 2003 ch. 906, § 1(b). Moreover, the Labor Code’s primary purpose is to “ensure
3 employees are not required or permitted to work under substandard unlawful conditions ... and to
4 protect employers who comply with the law from those who attempt to gain a competitive advantage at
5 the expense of their workers by failing to comply with minimum labor standards.” Labor Code §
6 90.5(a). Therefore, the Legislature determined that “adequate financing of labor law enforcement was
7 necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law
8 enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor
9 market, and that it was therefore in the public interest to allow aggrieved employees, acting as private
10 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
11 labor law enforcement agencies were 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
19 opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf if
20 the LWDA fails to respond to the notice within 65 days, responds that it does not intend to investigate,
21 or investigates and does not issue a citation within 185 days. Labor Code §§ 2699.3(a)(2), 2699(h). In
22 this case, Plaintiff provided the LWDA with notice letters advising it of the alleged Labor Code
23 violations, but the LWDA deferred the prosecution of these violations to Plaintiff and his attorneys.
24 Accordingly, the Settlement and the common fund created by it for the benefit of the State and
25 Aggrieved Employees, is solely the 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

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

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

IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES

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

A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES

The settlement provides that Defendant will pay a non-reversionary settlement amount of One Hundred Ninety Thousand Dollars (\$190,000) (the "Settlement Amount"), inclusive of payments for Attorneys' Fees and Attorneys' Costs¹, and Settlement Administration Costs.² (Settlement Agreement ¶ 35, which is attached as Exhibit "B" to the Mankin Decl.) After these payments, approximately \$115,979.08 will remain as the estimated PAGA Award for payment to the LWDA and Aggrieved Employees.

Pursuant to Labor Code § 2699(i), 75 percent of the PAGA Award shall be paid to the LWDA (which shall be used to assist in the enforcement of labor laws and education of employers and employees about their rights and responsibilities under the Labor Code), and the remaining 25 percent being paid to the Aggrieved Employees on a pro rata basis based the number of work weeks each Aggrieved Employee worked during the Statutory Period. (*Id.*) A following chart reflects the

¹ Plaintiff's Counsel will seek a standard fee of one-third (\$63,333.33) of the Settlement Amount, and reimbursement of actual attorney costs of \$7,187.59. Since the Settlement Agreement authorized up to \$10,000 for costs, the savings will be placed in the PAGA Award and paid to the LWDA and Aggrieved Employees.

² The Parties selected ILYM Group as the Settlement Administrator, and its costs shall not exceed \$3,500, which will be deducted from the Settlement Amount.

estimated payments from the Settlement Amount:

	Total Amount
<i>Settlement Amount</i>	\$190,000
Attorneys' Fees (1/3)	\$63,333.33
Actual Litigation Costs	\$7,187.59
Administrator Costs	\$3,500
<i>PAGA Award</i>	\$115,979.08
• 75% to the LWDA	\$86,984.31
• 25% to the Aggrieved Employees	\$28,994.77
<i>Balance</i>	\$0

As such, the LWDA will receive approximately \$86,984.31 and the Aggrieved Employees will receive \$28,994.77. Assuming 65 employees, the average payment will be \$446.07. The portion of 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. (*Id.*, at ¶ 35(d).)

B. PAYMENT AND THE NOTICE LETTER

Defendant has agreed to issue payment in two installations with the first installment on approximately December 1, 2022 which will include the 25% share of PAGA Penalties to the Aggrieved Employees, Settlement Administration Costs and Attorneys Fees and Costs, and the second payment on about December 1, 2023, which includes the 75% portion of PAGA Penalties to the LWDA. (Settlement Agreement ¶ 40.) The Settlement Administrator will then issue payments to the LWDA, Aggrieved Employees, Plaintiff and their counsel within 10 of receiving each payment from Defendant. (*Id.* at ¶ 41.) 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 the LWDA. (*Id.* at ¶ 42).

A Notice will be sent to the Aggrieved Employees advising of the settlement and payment. (Settlement Agreement at ¶ 15, and attached to the Mankin Decl. at Exhibit F).

C. SETTLEMENT ALLOCATION TO THE AGGRIEVED EMPLOYEES.

As noted, twenty-five (25) percent of the PAGA Award (totaling \$28,994.77) will be paid to the Aggrieved Employees on a pro rata basis. (*Id.* at ¶ 35(c).) Approximately 65 Aggrieved Employees will share in this fund on a pro rata basis. The Settlement Agreement provides a very fair

1 and equitable means of allocating this fund based on the number of pay periods each Aggrieved
2 Employee worked during the Statutory Period. (*Id.* at ¶ 35(c)(i).) The twenty-five (25) percent of the
3 PAGA Award will be paid to all Aggrieved Employees on a pro-rata basis (based on the number of
4 pay periods worked during the Statutory Period) to each such Aggrieved Employee. The portion of
5 the PAGA Award allocated to each Aggrieved Employee shall be referred to as the Aggrieved
6 Employee’s “Individual Share.” The Aggrieved Employees will receive \$446.07 on average while
7 preserving all potential claims for unpaid wages and statutory penalties, if any exist.

8 **D. THE RELEASE**

9 The California Supreme Court has explained that a judgment in “a representative action
10 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004... is
11 binding not only on the named employee plaintiff but also on government agencies and any aggrieved
12 employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 985-986. The release in the Settlement
13 Agreement at Paragraph 44 binds the named Plaintiff only for civil penalty claims brought in the
14 Action, as follows:

15
16 On the date that the Court enters a Final Order, Plaintiff, standing in the shoes of
17 the Labor Commissioner/LWDA, and on behalf of the State of California and all
18 Aggrieved Employees, will forever completely release and discharge the Released
19 Parties from any and all of the Released Claims. The time period governing the
20 Released Claims shall be the Statutory Period.

21 The Settlement Agreement at Paragraph 19 defines “Released Claims” as follows:

22 [A]ny and all rights and claims for civil penalties that Plaintiff alleged against
23 Defendant, on behalf of Aggrieved Employees and State of California, based on
24 the facts stated in the operative Complaint in the Action and in the LWDA notice
25 letter sent on July 29, 2021, including all PAGA claims seeking civil penalties
26 premised upon (a) failure to pay minimum wages, (b) failure to pay for rest and
27 recovery periods and nonproductive time, (c) failure to pay overtime wages, (d)
28 failure to provide meal periods, (e) failure to provide rest breaks, (f) failure to pay
vested vacation, (g) failure to timely pay wages each period, (h) failure to timely
pay wages upon separation of employment, (i) failure to provide accurate
itemized wage statements, and (j) all other claims for civil penalties recoverable
under the Private Attorneys General Act, Labor Code §§ 2698 *et seq.* that were
stated in the Complaint and based solely upon the facts alleged in the Complaint
and the notice sent by Plaintiff to the LWDA.

1 Separate and apart from Plaintiff's PAGA claims, Plaintiff also alleged individual claims for
2 the underlying wage claims. Therefore, subject to the Court's approval, Defendant agrees to pay
3 Plaintiff separately, in full and complete resolution of any and all such claims, and subject to a
4 confidential settlement agreement and a complete and general release and waiver of claims under
5 California Civil Code section 1542, a total sum of Twenty Thousand Dollars (\$20,000), less applicable
6 withholdings. After one-third attorneys' fees, Plaintiff will receive \$3,333.34 for alleged unpaid on
7 IRS Form W-2, and \$10,000 for statutory penalties on an IRS Form 1099. The Parties have agreed
8 that the individual settlement agreement with Plaintiff is confidential, and thus will not be filed.
9 (Settlement Agreement ¶ 46).

10 For these reasons, the Parties contend that the release in the Settlement Agreement narrowly
11 applies only to the claims alleged, and only binds the named Plaintiff as is consistent with the
12 California Supreme Court's ruling in *Arias v. Sup. Court*, 46 Cal.4th 969, 986 (2009).

13 **V. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT**
14 **APPROVAL**

15 In 2016, PAGA was amended to require the Court to "review and approve any settlement of
16 any civil action filed pursuant to this part." (Labor Code § 2699(1)(2).) The amendment also required
17 that the "proposed settlement shall be submitted to the agency at the same time that it is submitted to
18 the court." As such, the Settlement Agreement and this Motion have been concurrently submitted to
19 the LWDA in accordance with this section. (Mankin Decl. ¶ 59; Exhibit E).

20 On April 22, 2022, this Court issued its PAGA Case Management Order #1, which seeks
21 information regarding the settlement. To the extent not already discussed herein, the Mankin
22 Declaration contains the requested information, as follows:

- 23 1. Violations and Penalties (CMO ¶ D(2)) - see ¶¶ 14-33;
- 24 2. Plaintiff's Individual Settlement (CMO ¶ D(4)) - see ¶ 40-54;
- 25 3. Dismissal of the Action (CMO ¶ D(6)) - see ¶ 55-56;

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1 **THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR AND**
2 **REASONABLE**

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

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

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

17 A PAGA action is a qui tam action because the statute allows the employee plaintiff, acting
18 as the proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code
19 violations and recover civil penalties that otherwise would have been assessed and collected by the
20 Labor and Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC*
21 (2014) 59 Cal.4th 348, 380. "A PAGA representative action is therefore a type of *qui tam* action." *Id.*
22 at p. 382. Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state,
23 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
24 aggrieved employees). See Lab. C. 2699(i).

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

1 Affirming the award, the Court stated:

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

9 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common
10 fund was created in the amount of \$190,000 for the benefit of the employees and the State of
11 California. Thus, these beneficiaries must bear their share of the costs and attorney’s fees, which
12 fees and costs must be deducted from the \$190,000 settlement amount under the common fund
13 theory. *Id.* Moreover, such fees are deducted as a percentage of the settlement amount. *Boeing Co. v.*
14 *Van Gemert* (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th
15 Cir. 1990) 904 F.2d 1301, 1311; *Williams v. MGM-Pathe Communicatioins Co.* (9th Cir. 1997) 129
16 F.3d 1026, 1027; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.

17 The California Supreme Court upheld the use of the common fund theory of recovery for
18 attorney’s fees in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480, 506, approving attorney’s fees
19 of \$6.33M on a \$19M settlement. This ruling is consistent with the Court’s prior rulings recognizing
20 that “when a number of persons are entitled in common to a specific fund, and an action brought
21 by...plaintiffs for the benefit of all results in the creation or preservation of that fund, such...plaintiffs
22 may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing*
23 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] lawyer who recovers a common fund...is entitled
24 to reasonable attorneys’ fees from the fund as a whole;” *Mills v. Electric Auto-Lite Co.* (1970) 396
25 U.S. 375, 393-394 [discussing the acceptance of awarding attorneys’ fees and expenses from a
26 settlement where “litigation has conferred a substantial benefit on the members of an ascertainable
27 class”]; see also *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26 “[f]ee spreading
28 occurs when a settlement or adjudication results in the establishment of a separate or so-called
common fund for the benefit of the class.”].).

Accordingly, the common fund doctrine allows a court to award attorneys’ fees based upon a
percentage of the total fund that is created for the satisfaction of beneficiaries’ claims when the fund

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

6 California law has long upheld, and continues to uphold, the percentage of the recovery
7 method for awarding attorneys’ fees where a fund is established. See e.g., *Serrano v. Priest* (1977) 20
8 Cal.3d 25, 34; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v.*
9 *Netflix, Inc.* (2008) 162 Cal.App.4th 43, 563 [“fees based on a percentage of the benefits are in fact
10 appropriate in large class actions...”]; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 263
11 [affirming award of attorneys’ fee based on percentage of recovery]; *Chavez v. Netflix, Inc., supra*,
12 162 Cal.App.4th at pp. 65-66; see also *Consumer Cause, Inc. v. Mrs. Gooch’s Natural Food Markets,*
13 *Inc.* (2005) 127 Cal.App.4th 387, 397 [the common fund doctrine is “frequently applied in class
14 actions when the efforts of the attorney for the named class representatives produce monetary benefits
15 for the entire class”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254 [“courts
16 recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method
17 and the percentage of recovery”].

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

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

21 Despite recognized limitations of the so-called lodestar method, some California and federal
22 courts acknowledge the utility of a lodestar “cross-check.”³ (*Lealao, supra*, 82 Cal.App.4th at 46-47.)
23 Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class
24 actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of
25

26
27 ³ In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of
28 manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been
expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); See also *In re Activision* (N.D. Cal 1989) 723
F.Supp 1373.

hours reasonably expended by each attorney or legal staff member by their hourly rates, 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; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 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”].)

The actual aggregated lodestar between the attorneys that worked on this case is approximately \$77,940.00. This results in a **negative** multiplier, which clearly demonstrates that the requested fee is justified, reasonable and appropriate. The aggregated lodestar is summarized in the following table, and in the submitted declaration of Plaintiff’s counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner)	Trial Counsel	21	\$775	53.9⁴	\$41,772.50
Peter Carlson (Senior Associate)	Handling Attorney	8	\$575	62.9	\$36,167.50
Grand Total for All Attorneys				116.8	\$77,940.00

(See Mankin Decl., ¶ 37; Carlson Decl. ¶ 7.) 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 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 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer’s ELM Solutions, Inc., 2017
2 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly
3 rates for partners and associates in major metropolitan areas. For the southern California area, which is
4 based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a)
5 the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper
6 quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the
7 median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate
8 Report is not based on self-reported numbers, surveys, sampling, or reviews or other publications –
9 instead, the Real Rate Report is based on the actual hours and fees billed by law firms.

10 Thus, not only are Plaintiff’s Counsel’s rates reasonable and typical, but the attorneys’ fees
11 requested are in line with Plaintiff’s Counsel’s lodestar, all of which confirms that the fee request is
12 fair and reasonable.

13 **C. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

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

24 The Settlement Agreement authorized Plaintiff’s Counsel to recover litigation costs not to
25 exceed \$10,000. (Settlement Agreement ¶¶ 5, 35(a)). Plaintiff’s Counsels’ actual costs are \$7,187.59
26 through the conclusion of this matter, which includes costs of filing, serving and attending the
27 approval hearing. (Mankin Decl. ¶ 39, Exhibit D.) The savings will be placed in the PAGA Award
28 and paid to the LWDA and Aggrieved Employees based on the percentages set forth above. These

1 costs include mediation fees, filing fees, and other costs that include Attorney Service charges, expert
2 discovery fees, CourtCall charges, and process service fees. These costs are reasonable and
3 uncontested, and should be approved.

4 **VI. SUBMISSION TO THE LWDA**

5 As set forth in the Mankin Declaration at ¶ 59, the settlement and this motion are concurrently
6 being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic
7 submission is attached as Exhibit “F” to the Mankin Declaration.

8 **VII. THE COURT SHOULD APPOINT ILYM GROUP AS THE ADMINISTRATOR**

9 Subject to the Court’s approval, the parties stipulated to ILYM Group serving as the Settlement
10 Administrator who will process the settlement payments and provide notice to the Aggrieved
11 Employees. (Settlement Agreement ¶ 23). ILYM Group is highly experienced in administering
12 class/PAGA settlements, and provided an all-in proposal to administer the settlement for \$3,500. (Paul
13 Decl., ¶ 9, Exhibit “B”).

14 **VIII. CONCLUSION**

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

16
17 Dated: June 14, 2022

LAUBY, MANKIN & LAUBY LLP

18
19 BY:



20 Brian J. Mankin, Esq.
21 Attorneys for Plaintiff, on behalf of the State of
22 California and Aggrieved Employees
23
24
25
26
27
28

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 4590 Allstate Drive, Riverside, California 92501.

On June 14, 2022, I caused to be served the foregoing document(s) described as follows:

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

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 14, 2022, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Tracie Chiarito, Declarant

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