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7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SACRAMENTO**

10 DARWIN VASQUEZ, individually and on
11 behalf of all aggrieved employees,

12 Plaintiff,

13 v.

14 ANTON DEVCO, INC., a California
15 Corporation; and DOES 1 to 100,

16 Defendants.

Case No. 34-2021-00310326

**PLAINTIFF DARWIN VASQUEZ'S
NOTICE OF MOTION AND MOTION TO
APPROVE PAGA SETTLEMENT AND
DISMISS ACTION WITH PREJUDICE;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
ADAM ROSE; PROPOSED ORDER**

Date: March 8, 2024

Time: 9:00 a.m.

Dept: 22

Res ID: A-310326-001

Filing Date: October 28, 2021

Assigned to Hon. Lauri Damrell

21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
22

23 Please take notice that on March 8, 2024 at 9:00 a.m. in Dept. 22 of the Sacramento County
24 Superior Court, located at 720 Ninth St., Sacramento, CA 95814, plaintiff Darwin Vasquez will
25 move the court pursuant to Labor Code section 2699(1)(2) to approve the proposed PAGA
26 settlement. The motion is based on this notice, the memorandum of points and authorities, the
27 declaration of Adam Rose, pleadings on file, and arguments at the hearing.

28 Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this
matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative ruling may

1 be downloaded off the court's website. If the party does not have online access, they may call the
2 dedicated phone number for the department as referenced in the local telephone directory between
3 the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative
4 ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the
5 hearing, no hearing will be held.

6
7 Date: January 18, 2024

FRONTIER LAW CENTER

8 *Adam Rose*

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10 Adam Rose
11 Attorney for Plaintiff
12 Darwin Vasquez
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 This Motion is brought seeking approval of a Private Attorneys General Act (“PAGA”)
4 settlement in the total gross amount of \$195,000.00.

5 Defendant is a developer, builder, owner and operator of market rate and affordable housing
6 throughout the West coast. Plaintiff worked as a nonexempt maintenance technician at Devco’s
7 Menlo Park location from on or about September 6, 2018, through on or around November 12,
8 2021. On July 26, 2021, Plaintiff gave written notice to the LWDA, uploaded the notice to the
9 LWDA website, and Defendant providing facts and the legal basis for claims that are being resolved
10 under the proposed PAGA settlement The PAGA notice was also sent via certified mail to
11 Defendant. *Id.* Thereafter, the case for PAGA penalties was filed on October 28, 2021. Devco then
12 file a motion to compel arbitration, which was granted on October 20, 2022.

13 Vasquez initiated arbitration for the individual claims with Hon. Nickolas Dibiaso (Ret.) in
14 Fresno. The parties settled the individual claims on May 23, 2023. A stipulation to lift the stay was
15 filed on July 28, 2023. A case management conference was held on September 21, 2023, where the
16 PAGA trial was set for July 22, 2024.

17 Defendant has denied all of Plaintiff’s allegations and any liability or wrongdoing of any
18 kind. However, subject to approval by the court, plaintiff and defendant have been able to
19 compromise and settle all asserted PAGA claims for monetary compensation as a result of extensive
20 investigations, and formal document and data exchanges, a mediation session with an experienced
21 wage and hour mediator, in negotiations relating to all aspects of the asserted claims.

22 Plaintiff requests that the Court: (1) make a finding that Plaintiff has exhausted all
23 administrative remedies and is authorized to enter into the proposed PAGA settlement on behalf of
24 the California Labor and Workforce Development Agency (“LWDA”); (2) approve the proposed
25 settlement agreement; (3) set dates for and direct distribution of payment and the notice of
26 settlement to similarly situated employees affected by this settlement as set forth in the agreement;
27 (4) adopt the implementation schedule as set forth in the settlement agreement; and (5) dismiss the
28 PAGA claims with prejudice.

1 **II. Delineation of Settlement Terms**

2 The gross settlement amount is \$195,000. From this amount, the following deductions will
3 be made: 1) attorney fees of \$65,000, 2) attorney costs of \$10,500, 3) settlement administration of
4 \$4,000, and 4) service enhancement of \$10,000. This will leave a net settlement amount of
5 \$105,500. From the net settlement amount, 75% or \$79,125 will go to the LWDA, and 25% or
6 \$26,375 will go to the aggrieved employees.

7 Since there are 185 aggrieved employees, the average recovery per person is \$142.57, which
8 relatively speaking, is an excellent recovery all around. As explained below, the gross settlement of
9 \$195,000 is within the range of reasonableness and should be approved.

10 **III. The Settlement Should be Approved**

11 **I. NEGOTIATION AND PROPOSED SETTLEMENT**

12 **a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations**

13 The final settlement occurred only after substantial, and sometimes contentious, arm's
14 length negotiations, and following mediation with Jason Marisili on December 12, 2023.

15 **b. The Terms of the Settlement**

16 Under the settlement agreement, Defendant has agreed to the following:

17 1. The scope of individuals falling within the PAGA settlement would include Plaintiff
18 and all nonexempt employees employed by Defendant in California at any time between July 26,
19 2020, and February 20, 2024. Defendant has represented that there are approximately 185 PAGA
20 Group members, who worked approximately 5,168 pay periods in the PAGA Period.

21 2. Pay the total gross sum of \$195,000 to resolve and release the PAGA claims alleged
22 in the operative Complaint.

23 3. The parties agree that Phoenix Group will perform the administration of the PAGA
24 settlement. Phoenix Group has submitted a not to exceed quote for settlement administration costs
25 of \$4,000 based on the PAGA member group size of 185 members.

26 4. The parties agree that up to \$65,000 of the total gross settlement, will be paid for
27 Plaintiff's attorneys' fees incurred in the litigation.

28 5. In addition to their settlement share, Aggrieved Employees will receive a Notice that
provides them with information concerning all material terms of the settlement.

1 6. For any portion of the Net Settlement Sum allocated to Similarly Situated Employees
2 that is not claimed by them by cashing their respective settlement checks within 180 days, the
3 remaining amount shall be paid to the State Controller under the Unclaimed Property Law, Code of
4 Civil Procedure section 1500, *et seq.*

5 **c. Allocation of Settlement Funds**

6 Under the terms of the PAGA settlement, a Net Settlement Amount will be the fund
7 available for distribution to Similarly Situated Employees. The Net Settlement Amount will equal
8 the total gross settlement (\$195,000.00), less Plaintiff's attorneys fees and costs, the PAGA
9 Representative Enhancement payment, and administration costs. The Net Settlement Amount will
10 be allocated as follows: 75% to the LWDA and 25% to the PAGA Group members on a pro-rata
11 basis, specifically based on the number of pay periods worked within the operative PAGA period.
12

13 **IV. ARGUMENT**

14 **a. PAGA Settlements Are Subject to Court Review and Approval.**

15 A PAGA settlement is not effective unless the statutory requirements for becoming an
16 authorized representative of the LWDA have been complied with and the Court has reviewed and
17 approved the terms of the settlement. *See* Cal. Lab. Code §§ 2699(l)(2), 2699.3(a), 2699.3(c).
18 Although the statutory text does not set forth the particular standards against which a PAGA
19 settlement should be evaluated, the LWDA has provided guidance for approval that mirrors the
20 standards for evaluating class action settlements. *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017
21 U.S. Dist. LEXIS 14971, *6, n.4–5 (E.D. Cal. 2017) (explaining that, based on the LWDA's
22 guidance, approval of PAGA settlements may be had where the statutory requirements of the PAGA
23 are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The
24 established standards for evaluating whether class action settlements are fair, reasonable, and
25 adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and have
26 been adopted by several courts. *See id.*; *Juarez v. Villafan*, 2017 U.S. Dist. LEXIS 137205, *5 n. 4
27 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*,
28 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS
137272, *8-9 (N.D. Cal. 2017) (*citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v.*

1 *H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast Tomato*
2 *Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

3 In making the determination whether a settlement taken as a whole is fair, reasonable, and
4 adequate, the Court should be careful to still give “proper deference to the private consensual
5 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
6 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
7 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
8 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
9 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
10 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents of*
11 *Univ. of Cal.*, 3 Cal. 4th 273, 277–81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095, 1101
(9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal. App. 4th 344, 382 (1995).

12 **b. The Terms of The Settlement Are Fair, Reasonable, and Adequate.**

13 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the
14 Court may consider several factors, including:

15 the strength of the Plaintiff’s case, the risk, expense, complexity and
16 likely duration of further litigation, the risk of maintaining class action
17 status through trial, the amount offered in settlement, the extent of
discovery completed and the stage of the proceedings, and the
experience and views of counsel

18 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
19 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8–9; *Gutilla*, 2017 U.S. Dist. LEXIS
20 41655, *7, n. 4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
21 *6.

22 This Court should begin its analysis with a presumption that the proposed settlement is fair.
23 A presumption of fairness exists where: (1) the settlement is reached through arm’s length
24 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
25 intelligently; (3) counsel is experienced in similar litigation” *Dunk*, 48 Cal. App. 4th at 1802.

26 **i. The Settlement is a Result of Extensive, Non-Collusive Arm’s Length**
27 **Negotiations Between the Parties.**

28 Settlement in this case was reached only after extensive litigation and discovery, exchanges
with respect to the PAGA notice and claims asserted therein and negotiations by the parties,

1 including a mediation session. At all times, the negotiations were adversarial and contentious,
2 although still professional in nature.

3 **c. The Extent of Investigation and Discovery Completed Provided Ample**
4 **Information to Enter into an Informed and Reasonable Settlement.**

5 The parties were in possession of all necessary information during the negotiations. The
6 parties engaged in informal discovery and exchanged information regarding the Similarly Situated
7 Employees to ensure they could determine both liability and create an accurate damages model for
8 all PAGA claims. This not only included general information about the content and implementation
9 of relevant policies by Defendant, but also specific time and payroll data belonging to a sampling of
10 the Aggrieved Employees. Plaintiff was in possession of this information prior to calculating the
11 potential range of liability in this case. As a result, Plaintiff was able to make a reasonable
12 estimation of Defendant's potential liability. For these reasons, the settlement now before the Court
13 was reached at a stage where "the parties certainly have a clear view of the strengths and
14 weaknesses of their cases" sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F. Supp.
15 610, 617 (N.D. Cal. 1979).

16 **d. Plaintiff's Counsel is Experienced in Similar Litigation**

17 Plaintiff's counsel has considerable experience in class and PAGA actions and wage and
18 hour litigation. Plaintiff's counsel has brought and is currently bringing several class and PAGA
19 actions involving employment law generally and wage and hour issues specifically, including issues
20 unique to the PAGA. Thus, Plaintiff's counsel is qualified to evaluate the PAGA claims, the value
21 of settlement versus moving forward with litigation, and viability of possible affirmative defenses.
22 Plaintiff's counsel believes that the settlement is fair, reasonable, and adequate in light of the risks
23 associated with the merits of Plaintiff's claims, the uncertainties of complex litigation, the Court's
24 discretion to lower the amount of penalties ultimately awarded, the secured benefit to the State of
25 California, the incentive to compliance to Defendant, and the benefit of the Aggrieved Employees.

26 **e. The Settlement is Fair and Reasonable Based on the Strengths and the Risks**
27 **and Costs of Further Litigation.**

28 A review of the proposed settlement agreement's terms does not give rise to any doubts
about its fairness. Plaintiff secured a gross recovery of approximately 29% of the total likely civil

1 penalties, without any discounts for risk of loss, unmanageability of the PAGA claim, or the Court's
2 discretion to lower the maximum penalty. Plaintiff believes this settlement to be a reasonable
3 compromise of the PAGA claims, and believes it exceeds approved settlement ranges in other cases
4 comparing either absolute numbers or as a percentage of total available damages in a class action
5 context. *See Davis v. Cox Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal.
6 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness*
7 *Int'l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation
8 when attorneys' fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S.
9 Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000
10 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010)
11 (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009
12 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving \$1,500 PAGA allocation in \$1,026,000
13 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving
14 \$100,000 PAGA allocation in a \$3,950,000 settlement even though PAGA exposure was calculated
15 at \$53,600,000); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal.
16 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Wershba v. Apple*
17 *Computer, Inc.*, 91 Cal. App. 4th at 246, 250 (2001); *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d
18 1117, 1139 (1990); *Officers for Justice*, 688 F.2d at 628 (9th Cir. 1982); *see also In re Omnivision*
19 *Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that the median percentage for
recoveries in shareholder class action settlements averaged 2.2%-3% from 2000 through 2002).

20 **f. The Proposed Settlement is a Reasonable Compromise of Claims.**

21 The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) required
22 additional information be presented to the Court in representative action settlements "to ensure that
23 the recovery represents a reasonable compromise, given the magnitude and apparent merit of the
24 claims being released, discounted by the risks and expenses of attempting to establish and collect on
25 those claims by pursuing the litigation" *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of*
26 *Los Angeles*, 186 Cal. App. 4th 399 (2010), clarified that *Kullar* does not require the parties to
27 submit an illusory prediction of the outer reaches of exposure without taking into account the actual
28 risks associated with the litigation such as dispositive motions and trial. *Kullar* also does not
require an explicit statement of the maximum amount to be recovered if Plaintiff prevailed on all

1 the claims, provided there is a record that allows “an understanding of the amount that is in
2 controversy and the realistic range of outcomes of the litigation.” *Id.* at 409. The *Munoz* court
3 found the record before the trial court was sufficient, having included the number of class members,
4 payroll data, declarations describing hours and overtime worked, as well as variances in duties and
5 rest and meal period experience, and a companion action alleging less than \$5,000,000 in damages.
6 This information constituted “an adequate basis from which to garner a reasonably adequate
7 understanding of the amount that is in controversy within the meaning of *Kullar*.” *Id.*

8 In this case, Plaintiff relied on payroll data, time punch data, and information related to
9 relevant policies to determine key factual issues relevant to damages exposure and the data relevant
10 to the PAGA Group to determine the maximum exposure of Defendant based on the alleged
11 violations. Ultimately, Plaintiff secured a percentage of the total demand for the aggrieved
12 employees that is well within, and in fact exceeds, the range of what has been found to be sufficient
13 in several other cases. *See, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed*
14 *v. 1-800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of
15 \$11.7 million where the maximum range of damages was \$5,000 for each of the alleged 300,000
16 instances of unlawful recording violations (\$1.5 billion), equaling approximately .78% of the total
demand and approximately \$800 per class member).

17 Also, the settlement is a reasonable compromise and fulfills an important public policy in
18 providing recovery for the Aggrieved Employees and the LWDA. The amount allocated for the
19 administration of \$4,000 is also reasonable for 185 aggrieved employees. Thus, the settlement is
20 within the range of reasonableness.

21 **g. The Requested Attorneys’ Fees as a Percentage of the Common Fund are**
22 **Reasonable and Customarily Approved by Courts.**

23 PAGA allows a plaintiff to obtain attorneys’ fees and costs. (Lab. Code, § 2699(g).)
24 In class actions, California state and federal courts have recognized that an appropriate method for
25 determining an award of attorney fees is based on a percentage of the total value of benefits to class
26 members by the settlement, also called the common fund. (*Wershba v. Apple Computer, Inc.*, 91
27 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“Serrano III”); *Vincent*
28 *v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). One of the purposes of this equitable
doctrine is to “spread litigation costs proportionally among all the beneficiaries so that the active

beneficiary does not bear the entire burden alone.” (*Vincent, supra*, 557 F. 2d at p. 769.) Although this is not a class action, the same logic holds true since a PAGA case is also a representative action.

The Common Fund doctrine is based on the principle that when a litigant’s efforts create or preserve a fund from which others derive benefits, he or she may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. (*Serrano III, supra*, 20 Cal. 3d at p. 35; *Vincent, supra*, 557 F.2d at p. 769.) Indeed, the California Supreme Court held that the award of attorney fees in common fund wage and hour class action settlements should start with the percentage method. (*Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund”))

Thus, the requested fees of \$65,000 is reasonable, as it represents a third of the common fund. Furthermore, Plaintiff’s counsel has spent a significant amount of time litigating this case, including time spent communicating with the client, evaluating the relevant legal theories, drafting the PAGA letter, drafting and filing the complaint, engaging in discovery, lifting the stay, and successfully moving the case to mediation and settlement. Further, Frontier Law Center has already incurred costs of \$10,189, and future costs are expected with the filing of this motion and subsequent filings, which brings the amount to \$10,500.

h. The Requested Service Enhancement is Reasonable

Plaintiff participated in this case for over two years and spent several hours on the phone answering questions about the case, including the arbitration, and participated in the mediation. It is because of Vasquez’s willingness to participate that ultimately resulted in this settlement.

Courts have held that a named plaintiff in class, or private attorney general actions can request a service award. (*Rodriguez v. W. Publ’g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-959 (explaining that service awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general”).)

1 In *Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785, the Court of
2 Appeal acknowledged the longstanding rule that class action plaintiffs may be entitled to an
3 enhancement where such compensation may be necessary to induce them to participate in the suit.
4 (*Id.* at p.804.) Other factors include the actions plaintiff has taken to protect the interest of the class,
5 the degree to which the class has benefitted from those actions, and the amount of time and effort
6 the plaintiff expended in pursuing the litigation. (*Ibid.*) The LWDA and aggrieved employees will
7 benefit from the settlement. The average amount per aggrieved employee is \$142.57. Given the
8 successful result, a service enhancement of \$10,000 should be granted.

9
10 **V. CONCLUSION**

11 The PAGA settlement applies to all Devco's nonexempt workers throughout the PAGA
12 period. The gross settlement of \$195,000 is within the range of reasonableness and is the result of
13 informed, arm's length negotiations with a neutral's assistance.

14 Further, the settlement is fair in view of PAGA's purposes and policies. (*Moniz v. Adecco*
15 *USA, Inc.* (2021) 72 Cal.App.5th 56, 77, citing *O'Connor v. Uber Technologies, Inc.* (N.D. Cal.
16 2016) 201 F.Supp.3d 1110, 1132-1134.) The settlement agreement attached to the declaration of
17 Adam Rose will be uploaded to the LWDA website at the same time this motion is filed.

18 The case presented a good faith dispute about rounding of time worked, rounding of meal
19 periods, on-duty rest periods, and derivative waiting time and wage statement penalties. With the
20 assistance of skilled employment law mediator Jason Marsili, the parties reached an agreement to
21 settle the PAGA claims.

22 For the reasons outlined above, Vasquez respectfully requests the court to approve the
23 PAGA settlement and to sign the order, which will have the preclusive effect of all PAGA
24 settlements as stated in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986, and will allow the
25 disbursements delineated above.

26 Date: January 18, 2024

FRONTIER LAW CENTER

Adam Rose

Adam Rose
Attorney for Plaintiff
Darwin Vasquez