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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SANTA CLARA**

9 VIDALIA GOMEZ, on behalf of others
10 similarly aggrieved,

11 Plaintiff,

12 v.

13 GIULIETTA ITALIAN FOODS, INC., a
14 California corporation; and DOES 1-10,
15 inclusive,

16 Defendants.

Case No.: 22CV392988

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF SETTLEMENT UNDER
THE PRIVATE ATTORNEY'S GENERAL
ACT

[Filed concurrently with Notice of Motion and
Motion; Declarations of J. Kirk Donnelly and
Vidalia Gomez; [Proposed] Order]

Date: TBD
Time: 10:00 a.m.
Dept: 6

1 **I. INTRODUCTION**

2 Plaintiff Vidalia Gomez hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Giulietta Italian
4 Foods, Inc. (“Giulietta” or “Defendant”). Consistent with PAGA, the proposed settlement releases
5 claims under PAGA only and has no impact on the individual claims of any allegedly aggrieved
6 employee other than Plaintiff Gomez. Since the settlement of representative claims resolves nothing
7 more than claims under PAGA, it requires only a one-step review and approval process by the Court,
8 and for the reasons discussed below, Plaintiff respectfully requests the Court approve the Settlement
9 in its entirety.

10 **II. BACKGROUND**

11 Giulietta has been in business since 1982, and operates three casual Italian restaurants in the
12 South Bay Area, including locations in San Jose, Sunnyvale, and Los Altos. It also operates a
13 catering business, such as providing trays of pasta for businesses and preparing and serving box
14 lunches for schools. Plaintiff worked for Giulietta for a few months in and around August to October
15 2021. Her base rate of pay was \$19/hour paid bi-weekly, and she generally worked a 30-hour week
16 consisting of five 6-hour shifts, Monday to Friday. She worked in the catering department making
17 and delivering box lunches for local schools. Even though she typically worked over five hours per
18 shift, and thus was entitled to a meal period, she alleges she never received a meal period, was not
19 even offered the opportunity to take one, and typically only received a short 10-15 break at the very
20 end of her shift. [Declaration of J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

21 After appropriate notice¹ to the Labor & Workforce Development Agency (“LWDA”),
22 Plaintiff filed her PAGA-only complaint on January 4, 2022, seeking civil penalties for the
23 following alleged wage and hour violations: (a) failure to provide meal and rest periods; (b) failure
24 to provide complete and accurate wage statements; and (c) waiting time penalties. Plaintiff filed the
25 matter on behalf of allegedly Aggrieved Employees (hereafter “Aggrieved Employees”) defined to
26 include all non-exempt employees of Giulietta during the relevant PAGA time frame of January 4,
27 2021 to March 31, 2023. [Donnelly Decl., ¶ 5.]

28 ¹ Plaintiff’s October 15, 2021 PAGA notice letter is attached to the Donnelly Declaration as Exhibit 3.

1 Giulietta has at all times denied Plaintiff's allegations and maintains its meal and rest break
2 and payroll policies and procedures comply with California and federal law, and that it provided the
3 Aggrieved Employees with required meal and rest breaks on a fully compliant basis. Additionally,
4 Giulietta strongly contends the case cannot be maintained as a representative action as, to the extent
5 Aggrieved Employees missed meal and/or rest breaks, it was against company policy, was
6 intermittent and infrequent and evidence of such missed breaks would be purely anecdotal, and
7 therefore individualized issues predominate, which would render a trial under PAGA
8 unmanageable. [Donnelly Decl., ¶ 6.]

9 After Plaintiff filed her Complaint, upon discussing the merits of the case and engaging in
10 several meet and confer sessions regarding prospective law and motion and discovery issues, the
11 Parties agreed to mediation. The Parties further agreed to a protocol for exchanging additional
12 documents and information before the mediation. Through this informal discovery, Defendant
13 provided Plaintiff with information including, inter alia, the number of potential Aggrieved
14 Employees, the number of aggregate pay periods, pay stubs and time records for a sampling of the
15 Aggrieved Employees, and relevant policy documents regarding Defendant's time keeping and
16 reporting policies and meal and rest break policies. [Donnelly Decl., ¶ 7.]

17 The Parties then mediated the case with the Hon. Ronald D. Prager (Ret.), a respected
18 mediator with extensive class action/wage and hour experience, on January 27, 2023. Before and
19 during the mediation, Plaintiff and her counsel analyzed, researched, and investigated the potential
20 issues, including matters related to the calculation of damages, trial, and appellate issues and risks.
21 During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on a
22 representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and Defendant's
23 defenses, and the Parties' data analyses and conclusions based on data provided by Defendant. After
24 a contentious day of negotiations, the Parties reached agreement and subsequently formalized their
25 tentative settlement in the Settlement Agreement now before the Court for approval. [Donnelly
26 Decl., ¶ 8.] A fully executed, true, and correct copy of the Parties' PAGA Settlement Agreement
27 ("Settlement Agreement") is attached to the Donnelly Declaration as Exhibit 1.

28 ////

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 **A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES**

3 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$80,000
4 (the “Gross Settlement Amount” or “GSA”). The GSA is inclusive of payments to the LWDA and
5 Aggrieved Employees, costs of settlement administration, a service award to Plaintiff Gomez, and
6 reasonable attorney’s fees and costs. After payment of settlement administration costs, Plaintiff’s
7 service award, and reasonable attorney’s fees and costs from the GSA, Plaintiff presently estimates
8 about \$37,124.83 will remain (the “Net Settlement Amount” or “NSA”). 75% of the NSA (about
9 \$27,844.37) will go to the LWDA, and the remaining 25% (about \$9,281.46) will be distributed to
10 the Aggrieved Employees in proportion to the total number of Pay Periods each individual worked
11 during the PAGA Period of January 4, 2021 to March 31, 2023, with an average award currently
12 estimated at about \$52 per individual. [Donnelly Decl., ¶ 9.]

13 **B. PAYMENT AND THE NOTICE**

14 The Parties propose using Simpluris, Inc., as the Settlement Administrator. Simpluris has
15 extensive experience administering PAGA settlements and has agreed to cap its fees at \$4,000.00.
16 Giulietta will fund the GSA within 21 days of approval, and within 14 calendar days of receipt,
17 Simpluris will mail a Notice and settlement check to all Aggrieved Employees via regular First-
18 Class U.S. Mail, using the most current, known mailing addresses identified in Giulietta’s records.
19 Aggrieved Employees need not submit claim forms and will automatically receive a Notice and
20 settlement check. Settlement checks will be negotiable for 120 days, after which time any unclaimed
21 residual funds will be forwarded as *cy pres* to Second Harvest of Silicon Valley. [Donnelly Decl.,
22 ¶ 10; Exhs. 2, 5.]

23 **C. THE RELEASE**

24 The California Supreme Court has explained that a judgment in “a representative action
25 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
26 is binding not only on the named employee plaintiff but also on government agencies and any
27 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
28 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty

1 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
2 to be “binding not only on the named employee plaintiff but also on government agencies and any
3 aggrieved employee not a party to the proceeding.” While Plaintiff is entering into a general release
4 of any and all claims against Defendant, the Settlement Agreement protects the rights of the
5 Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the
6 Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement
7 Agreement specifically provides the Release is inapplicable to any claims other than those brought
8 under PAGA. [Donnelly Decl., ¶ 11.]

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

11 PAGA requires the Court to “review and approve any settlement of any civil action filed
12 pursuant to this part.” Labor Code § 2699(l)(2). Recently, the appellate court in Moniz v. Adecco
13 USA, Inc. (2021) 72 Cal.App.5th 56, defined the standard for courts to apply when reviewing
14 settlements under PAGA. The court held a trial court must ensure that the settlement is “fair,
15 reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations,
16 deter future ones, and to maximize enforcement of state labor laws.” Id. at 77.

17 In so holding, Moniz noted many federal district courts had imported class action settlement
18 approval principles when evaluating PAGA settlements, demanding that PAGA settlements be “fair,
19 reasonable, and adequate,” and weighing factors such as “the strength of the plaintiff’s case, the
20 risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the
21 settlement amount[.]” Id. at 75-76 (collecting cases). Observing that “PAGA’s purpose” is to
22 “protect the public interest”—especially the allegedly Aggrieved Employees—the Court agreed
23 with this district court authority, concluding that much the same principles that ensure fairness in
24 class action settlements serve the public interest in the PAGA context. Essentially, these factors are
25 more or less identical to those California courts use to evaluate class action settlements per Kullar
26 v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiff submits they
27 should inform the Court’s analysis as well. For the reasons below, the proposed settlement is fair,
28 reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

1 **A. NATURE OF THE ALLEGED VIOLATIONS**

2 Plaintiff primarily contends Defendant failed to provide Aggrieved Employees with
3 compliant meal periods and failed to implement any written policies that complied with California
4 law. Plaintiff alleges she and other employees did not receive compliant meal periods, were not
5 offered the opportunity to take meal periods when required, and if they even received one, they
6 frequently were late, interrupted, and/or or lasted less than 30 minutes. Further, she noted Giulietta
7 did not record the start and end times for meal periods as Plaintiff contends is required by the Labor
8 Code and Wage Orders and, while she doesn't contend meal periods were not provided at all, she
9 alleges compliance was haphazard at best. Plaintiff similarly contends Defendant failed to provide
10 Plaintiff and the Aggrieved Employees with compliant rest periods for essentially the same reasons,
11 and that she typically did not receive a rest break until the very end of her shift after she had been
12 working for around 5:45 hours straight. Plaintiff also brings claims derivative of the foregoing
13 claims, including a derivative wage statement claim based on the failure to pay all wages due, and
14 failure to pay all wages due and owing upon separation of employment under Labor Code §§ 201-
15 203. [Donnelly Decl., ¶ 12.]

16 **B. NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES**

17 For mediation, Giulietta indicated it employed approximately 179 non-exempt employees in
18 California during the relevant time frame, and these individuals worked approximately 3,920 pay
19 periods during that time. Based on the data and information provided by Defendant, Plaintiff
20 estimated Defendant's maximum PAGA exposure at approximately \$583,200 including
21 approximately \$182,300 on the meal period claims, \$196,000 on the rest period claims, \$196,000
22 on the wage statement claims, and about \$8,900 in civil penalties for failing to timely pay wages on
23 separation of employment. [Donnelly Decl., ¶¶ 13-14.]

24 **C. THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE**
25 **STRENGTH OF PLAINTIFF'S CASE, THE DISCOVERY PERFORMED,**
26 **AND AMOUNT OFFERED IN SETTLEMENT**

27 In response to Plaintiff's meal break claims, Giulietta offered multiple defenses. First, it
28 emphasized it authorized and permitted all necessary breaks, and that employees received full
uninterrupted lunch periods. Defendant further argued that even to the extent meal or rest breaks

1 were missed or arguably non-complaint, it was in violation of company policy and aberrational, and
2 would require significant individual inquiries to determine the reasons underlying any such alleged
3 violations and whether it was by employee choice or some other reason. Thus, per Defendant, any
4 trial on this issue would be unmanageable because of these individualized issues. [Donnelly Decl.,
5 ¶ 15.]

6 As with meal breaks, Defendant argued the applicable rest break policies complied with
7 California law, and that it authorized and permitted employees to take all required breaks.
8 Defendant further contended that, in light of the fact that it is not required to maintain a record of
9 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
10 rest periods would be purely anecdotal and individual issues would predominate on liability. This
11 arguably would once again make a trial unmanageable since the number of instances an employee
12 missed a rest break would have to be tested on a case-by-case basis to determine compliance via
13 hundreds of mini-trials. [Donnelly Decl., ¶ 16.]

14 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
15 violations) and §§ 201-203 (waiting time penalties). Both claims, since they are entirely
16 derivative, will rise or fall along with the primary claims, in addition to being subject to “good
17 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
18 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
19 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to
20 pay living wages). Accordingly, Plaintiff had to discount the value of these claims significantly in
21 light of these multiple potential defenses. Defendant also contended a substantial discount should
22 be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be
23 unfair to penalize Defendant multiple times for the same violation. [Donnelly Decl., ¶ 17.]

24 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
25 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
26 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
27 2699(h). Several state and federal courts in California have applied significant reductions to
28 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.

1 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
2 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
3 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
4 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
5 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
6 trial). [Donnelly Decl., ¶ 18.]

7 Finally, Defendant raised an “ability to pay” defense, emphasizing it is still recovering
8 from the effects of the COVID-19 pandemic (as are many restaurants), struggling with staffing,
9 and generally has limited present ability to satisfy a large judgment. In support of its position,
10 Defendant shared current financials such as profit and loss statements and balance sheets with the
11 mediator, and Judge Prager in turn was able to provide his take on the issue and advise Plaintiff
12 that Defendant’s “ability to pay” had to be accounted for in reaching any potential settlement.
13 [Donnelly Decl., ¶ 19.]

14 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims,
15 any one of which, if successful, could have derailed Plaintiff’s case. And Defendant vowed to
16 raise all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with this
17 litigation, and it could have taken years to realize any recovery in this action along with the
18 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be
19 unmanageable, Defendant also intended to raise additional defenses on damages, including the
20 proper measure of civil penalties and the appropriate discount to place on any assessment of such
21 penalties. Finally, even if Plaintiff succeeded at trial, any judgment might well be uncollectible
22 given Giulietta rather precarious finances. [Donnelly Decl., ¶ 20.]

23 Although Plaintiff’s counsel believes they could have prevailed, there was no such
24 guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits
25 on all claims, securing the theoretical civil penalties, and Giulietta’s financial situation all are
26 factored into the equation, the settlement value is reasonable and supported. Of course, to recover
27 anywhere near the maximum penalties Plaintiff would have to shoot the moon and win both
28 liability and maximum penalties on all claims, which outcome, for the reasons discussed, is

1 unlikely. Given Defendant’s various procedural and merits defenses, as well as the substantial
2 penalty reductions ordered in the cases above – which occurred after trial – the proposed
3 settlement is eminently reasonable. [Donnelly Decl., ¶ 21.]

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

18 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
19 the probability of appeal of a favorable judgment, the Court’s substantial discretion to reduce any
20 penalty award all are accounted for, it is clear a settlement amount of \$80,000 for the PAGA
21 claims is within the ballpark of reasonableness, and approval is appropriate.

22 **V. SUBMISSION TO THE LWDA**

23 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion and
24 notified the LWDA of this approval hearing. [Donnelly Decl., ¶ 22; Exh. 4.] Accordingly, the
25 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
26 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
27 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
28 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the

1 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
2 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
3 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
4 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
5 no comment or objection has been received.”).

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

7 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
8 that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or \$26,666.67, is
9 allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation costs. These fees
10 are warranted under the law and within the range of fees commonly awarded in similar cases.

11 **A. PLAINTIFF’S COUNSEL IS ENTITLED TO RECOVER ATTORNEY’S**
12 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
13 **ACTION**

14 PAGA provides a Plaintiff is entitled to recover reasonable attorney’s fees, expenses, and
15 costs under Labor Code § 2699(g)(l): “Any employee who prevails in any action shall be entitled to
16 an award of reasonable attorney’s fees and costs,” As discussed below, reasonable attorney’s
17 fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one,
18 where, as here, the litigation creates a common fund of money in a specific amount for the benefit
19 of others.

20 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
21 private attorney general to recover damages or penalties, all or part of which will be paid to the
22 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
23 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
24 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to
25 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
26 only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th
27 73; Iskanian, 59 Ca1.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*
28 action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state; 25% paid to the

1 Aggrieved Employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui*
2 *tam* action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are
3 entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164
4 Cal.App.3d 66, 89-91.

5 Through the successful efforts of Plaintiff and her attorneys here, a common fund was
6 created in the amount of \$80,000 for the benefit of the Aggrieved Employees and the State. Thus,
7 these beneficiaries should bear their share of the costs and attorney's fees out of the overall \$80,000
8 in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472,
9 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

10 Not long ago, the California Supreme Court upheld the use of the common fund theory of
11 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Ca1.5th 480, 506. In
12 Laffitte, the Supreme Court upheld an award of attorney's fees of one-third of the \$19 million gross
13 settlement (*e.g.*, awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte
14 is consistent with prior decisions recognizing "when a number of persons are entitled in common to
15 a specific fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or
16 preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." Serrano
17 v. Priest (1977) 20 Ca1.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who recovers a common
18 fund ... is entitled to reasonable attorneys' fees from the fund as a whole"; Lealao v. Beneficial
19 California, Inc. (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when a settlement or
20 adjudication results in the establishment of a separate or so-called common fund for the benefit of
21 the class").

22 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
23 percentage of the total fund created when the fund consists of a "certain or easily calculable sum of
24 money," and California law has long applied the percentage of the recovery method for awarding
25 attorney's fees where a common fund is established. Serrano, 20 Ca1.3d at 34; Bell v. Farmers Ins.
26 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
27 1809; Sanders v. City of Los Angeles (1970) 3 Ca1.3d 252, 261-63 (affirming award of attorney's
28 fee based on percentage of recovery).

1 Awarding attorney's fees of one-third of gross common fund amount is favored by California
2 courts when a fund established for the common benefit of others is involved, such as here.
3 Accordingly, awarding fees on this basis out of the \$80,000 GSA, for a total of \$26,666.67, is
4 reasonable and appropriate. [Donnelly Decl., ¶¶ 23-35.]

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

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

17 Here, Plaintiff's counsel's lodestar is approximately \$37,205.00, based on 49.7
18 attorney/paralegal hours spent litigating the case. [Donnelly Decl., ¶¶ 23-35; Exh. 6.] This results in
19 a lodestar that is higher than the fees requested on a percentage of the recovery basis and,
20 accordingly, there is no request for a multiplier. It also is important to note this fact serves to
21 highlight the reasonableness of the fees sought on a percentage basis, as it shows the requested fees
22 are lower than the market rate for those services when valued via traditional hourly billing.

23 **C. The Requested Costs Are Fair And Reasonable**

24 Plaintiff's Counsel requests reimbursement of actual out-of-pocket expenses incurred to
25 prosecute this action. These expenses were incidental and necessary to the effective representation
26 of the employees, and Plaintiff's Counsel is permitted to recover their litigation costs and expenses
27 under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common
28 fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego

1 (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity,
2 and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees
3 by ... [Plaintiffs’] attorneys”). Furthermore, Plaintiff’s Counsel is entitled to recover “those out-of-
4 pocket expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th
5 Cir. 1994) 24 F.3d 16, 19.

6 While the Settlement Agreement authorizes litigation costs not to exceed \$7,500, Plaintiff’s
7 Counsel’s actual costs presently are \$7,207.50. [Donnelly Decl., ¶¶ 36-37.] This includes filing fees,
8 service of process, Courtcall charges, mediation costs, and postage, while waiving photocopying
9 costs and legal research charges. These costs are reasonable, uncontested, and should be approved.

10 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
11 **REASONABLE**

12 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$5,000. This
13 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
14 Plaintiff’s efforts in this case and the risks she undertook on behalf of the Aggrieved Employees.
15 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
16 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk
17 of being liable for Defendant’s litigation costs if he were unsuccessful. Plaintiff also exposed herself
18 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
19 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
20 prospective employers. Among taking many other actions assisting in the successful litigation of
21 this case, Plaintiff provided substantial factual information to Plaintiff’s Counsel, participated in
22 numerous phone calls and meetings with counsel to discuss the case, attended the mediation, and
23 general kept up to speed and informed on the case’s progress. The incentive payment to Plaintiff is
24 appropriate and justified as part of the Settlement. [Donnelly Decl., ¶ 38; Declaration of Vidalia
25 Gomez, ¶¶ 2-9.]

26 Accordingly, Plaintiff submits the amount sought is well within the range of
27 reasonableness for such awards in other wage and hour actions. Nelson v. Avon 5 Prod., Inc.
28 (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *7 (approving incentive award of \$10,000

1 where plaintiff "appeared for an all-day deposition, searched for documentation relating to the
2 class action, reviewed documents and settlement papers, attended the mediation and
3 subsequent negotiations, and aided Class Counsel with negotiation efforts."); Torchia v.
4 W.W. Grainger, Inc. (E.D. Cal. 2014) 304 F.R.D. 256 (approving \$7,500 incentive award).

5 **VIII. CONCLUSION**

6 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
7 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
8 service award to Plaintiff in the amount of \$5,000, approve Simpluris as the settlement administrator
9 and approve is fees in the amount of \$4,000, approve the proposed distributions to the LWDA and
10 Aggrieved Employees, and enter judgment.

11
12 Dated: 4/3/23

LAW OFFICES OF J. KIRK DONNELLY, APC

14 By: J. Kirk Donnelly
15 J. Kirk Donnelly
16 Attorneys for Plaintiff VIDALIA GOMEZ
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