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8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
11

12
13 DAVID JOSEPHSON, as an individual on behalf
of himself and on behalf of all others similarly
14 situated,

15 Plaintiff,

16 v.

17 LAMON CONSTRUCTION COMPANY INC., a
California Corporation,

18 Defendant.
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Case No.: 2:23-cv-00043-DAD-AC

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF SETTLEMENT
UNDER PRIVATE ATTORNEYS
GENERAL ACT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: December 18, 2024

Time: 10:00 a.m.

Place: Courtroom 26, 8th Floor

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on December 18, 2024, at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, in Courtroom 26, 8th Floor of the above-captioned Court, located at 501 I
4 Street, Sacramento, California, the Hon. Allison Claire presiding, plaintiff David Josephson, on
5 behalf of himself and the State of California by and through the Labor Workforce & Development
6 Agency, will and hereby does move the Court for an order granting approval of the proposed
7 settlement under the Private Attorneys General Act, Labor Code sections 2698, *et seq.* ("PAGA").
8 The terms of the settlement are contained within the PAGA Settlement Agreement ("Settlement
9 Agreement"), filed concurrently herewith as Exhibit A to the Declaration of Chad Saunders. Plaintiff
10 further requests the Court approve the payment of civil penalties to the State of California and the
11 Aggrieved Employees, approve Phoenix Settlement Administrators as the Settlement Administrator
12 and payment of its fees in the amount of \$2,750, approve a service award to Plaintiff in the amount
13 of \$5,000, and approve payment of Plaintiff's counsel's attorney's fees in the amount of \$87,657.90
14 (33.33% of the gross settlement amount) and actual litigation costs in the amount of \$7,981.71.

15 This motion is brought under California Labor Code section 2699(l)(2), and on the grounds
16 that the settlement is fair, reasonable and adequate and meets all requirements for approval under
17 PAGA, and the requested service award and attorney's fees and costs are fair and reasonable under
18 the circumstances of the case.

19 This motion is based upon this Notice of Motion and Motion, the accompanying
20 memorandum of points and authorities, the accompanying declarations of Chad Saunders, David
21 Josephson, and Eric Springer, the Settlement Agreement, the entire Court file in this matter, and on
22 such other argument and evidence as may be presented at or before the hearing.

23
24 Dated: November 13, 2024

CROSNER LEGAL, P.C.

25
26 /s/ Chad Saunders
Chad Saunders, Esq.

27 Attorneys for Plaintiff,
28 DAVID JOSEPHSON

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff David Josephson hereby seeks Court approval of a proposed settlement of claims
4 brought under the California Private Attorneys General Act, California Labor Code sections 2698, *et*
5 *seq.* (“PAGA”) against defendant Lamon Construction Company, Inc. (“Lamon” or “Defendant”).
6 Consistent with PAGA, the proposed settlement releases claims under PAGA only and has no impact
7 on the individual claims of any allegedly aggrieved employee other than Plaintiff. Since the settlement
8 resolves nothing more than claims under PAGA, it requires only a one-step review and approval
9 process by the Court, and for the reasons discussed below, the proposed settlement is fair, reasonable,
10 and adequate, and advances the statutory purposes of PAGA. Plaintiff respectfully requests the Court
11 approve the Settlement in its entirety.

12 **II. BACKGROUND**

13 Defendant Lamon provides construction services, primarily paving and dirt hauling, in and
14 around Sutter County. Plaintiff Josephson worked for Defendant doing paving construction jobs from
15 around August 2020 through February 2022. Plaintiff and other allegedly aggrieved employees were
16 unionized and worked under various applicable collective bargaining agreements. [Declaration of
17 Chad Saunders (“Saunders Decl.”), ¶ 4.]

18 While employed with Defendant, Plaintiff alleges he and other employees were not paid for
19 all of their work but instead were paid based on their scheduled hours rather than their actual hours
20 worked. Per Plaintiff, he and other employees regularly performed “off the clock” both before and
21 after their scheduled shifts that went unrecorded and uncompensated. Plaintiff further alleges Lamon
22 did not provide employees with all required meal and rest breaks and that, as with their work hours,
23 employees’ meal periods were recorded by Crew Managers “auto deducted” to show timely and
24 precise 30-minute meals regardless of when the meal break started or whether it lasted a full and
25 uninterrupted thirty minutes. Plaintiff likewise alleges he and other employees consistently were
26 unable to take timely, off duty, ten-minute rest periods. Finally, Plaintiff alleges he and other aggrieved
27 employees had to drive their personal vehicles to/from Defendant’s facility to gather and return
28

1 equipment prior to the start of his shifts but were not reimbursed for their mileage or use of their
2 personal vehicles on company business. [Saunders Decl., ¶ 5.]

3 Based on these allegations, on November 8, 2022, Plaintiff filed a complaint against Defendant
4 in the Sutter County Superior Court, alleging both class claims and individual statutory claims asserted
5 by Plaintiff. Defendant removed the Class Action Complaint to this Court on January 9, 2023. Plaintiff
6 subsequently filed a first amended complaint to the Class Action Complaint. On January 18, 2023,
7 Plaintiff filed a separate representative PAGA Complaint against Defendant, also in Sutter County
8 Superior Court. Defendant likewise removed the PAGA Complaint to this Court on February 22, 2023,
9 and the Parties stipulated to consolidate the two matters, and they were consolidated for all pre-trial
10 purposes under case number 2:23-cv-00043. The PAGA Complaint is the “Operative Complaint” for
11 the purposes of this Settlement. [Saunders Decl., ¶ 6.]

12 On April 7, 2023, Defendant filed motions to dismiss and motions to compel arbitration as to
13 both Complaints based on section 301 of the Labor Management Relations Act and a collective
14 bargaining agreement covering Plaintiff’s employment. Plaintiff filed a motion to remand. On
15 February 1, 2024, the Court granted Defendant’s motions to compel arbitration as to the amended
16 Class Action Complaint and as to Plaintiff’s individual PAGA claims under the PAGA Complaint,
17 and the representative PAGA claims were stayed. The Parties agreed that that class action component
18 of the Class Action Complaint, as amended, was no longer viable by virtue of the operative collective
19 bargaining agreement containing a class action waiver. Accordingly, only Plaintiff’s individual claims
20 in the Class Action Complaint proceeded to arbitration. [Saunders Decl., ¶ 7.]

21 On or about February 27, 2024, the Parties commenced arbitration before Barry Winograd,
22 Esq. as to all of Plaintiff’s individual claims under both complaints. On March 13, 2024, Defendant
23 renewed its motions to dismiss before Mr. Winograd and, after the motions were fully briefed and a
24 hearing was held, Arbitrator Winograd issued a decision denying both motions on April 9, 2024.
25 [Saunders Decl., ¶ 8.]

26 Following denial of the motions to dismiss, the Parties met and conferred and agreed to attempt
27 mediation, and further agreed on a protocol for an informal exchange of discovery and information to
28 facilitate the mediation. Accordingly Plaintiff reviewed information including, inter alia, Plaintiff’s

1 personnel file, the number of potential Aggrieved Employees, the number of aggregate pay periods,
2 pay stubs and time records for a sampling of the Aggrieved Employees, and relevant policy documents
3 regarding Defendants' time keeping and reporting policies, among other pertinent materials. [Saunders
4 Decl., ¶ 9.]

5 The Parties then retained the Hon. George C. Hernandez, Jr. (Ret.), a respected neutral with
6 extensive experience mediating wage and hour matters, and on June 7, 2024, the Parties participated
7 in an all-day mediation presided over by Judge Hernandez. Before and during the mediation, Plaintiff
8 and counsel analyzed, researched, and investigated the potential issues, including matters related to
9 the calculation of damages, trial, and appellate issues and risks. During mediation, the Parties
10 vigorously debated the likelihood of Plaintiff's ability to proceed on a representative basis as to the
11 PAGA claims, the legal grounds for Plaintiff's claims and Defendants' defenses, and the Parties' data
12 analyses and conclusions based on data provided by Defendants. After a contentious day of
13 negotiations, the Parties reached agreement and subsequently formalized their tentative settlement in
14 the Settlement Agreement now before the Court for approval. [Saunders Decl., ¶ 10.] A fully executed,
15 true and correct copy of the PAGA Settlement Agreement ("Settlement Agreement") is attached to the
16 Saunders Declaration as Exhibit 1.

17 **III. SUMMARY OF SETTLEMENT TERMS**

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

19 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$263,000
20 (the "Gross Settlement Amount" or "GSA"). The GSA is inclusive of all payments to the LWDA and
21 Aggrieved Employees, a modest service award to Plaintiff for his service as the named Plaintiff on the
22 PAGA claims, costs of settlement administration (estimated at no more than \$2,750), and reasonable
23 attorney's fees and costs.¹ After payment of settlement administration costs, Plaintiff's service award,
24 and reasonable attorney's fees and costs from the GSA, Plaintiff presently estimates about
25 \$159,610.39 will remain (the "Net Settlement Amount" or "NSA"). Seventy-five percent of the NSA
26 (about \$119,709.79) will go to the LWDA, and the remaining 25% (about \$39,902.60) will be
27

28 ¹ Plaintiff's counsel requests 33.33% of the GSA (\$87,657.90) in fees and costs of \$7,981.71. Plaintiff requests a service award of \$5,000 for his service as the named PAGA plaintiff.

1 distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each
2 individual worked during the PAGA Period of November 14, 2021, to August 5, 2024. Plaintiff
3 estimates the average award will be about \$170 per individual. [Saunders Decl., ¶ 11.]

4 **B. PAYMENT AND THE NOTICE**

5 The Parties propose using Simpluris, Inc. as the Settlement Administrator. Simpluris has
6 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$2,750.
7 [Declaration of Eric Springer, ¶¶ 2-9; Exhs. A-C.] Lamon will fund the GSA within 35 days of
8 Effective Date, and within 14 days of funding Simpluris will mail a Notice and settlement check to all
9 Aggrieved Employees via regular First-Class U.S. Mail, using the most current, known mailing
10 addresses identified in Lamon’s records. Aggrieved Employees need not submit claim forms and will
11 automatically receive a Notice and settlement check. Settlement checks will be negotiable for 180
12 days, after which time any unclaimed residual funds will be forwarded to the California State
13 Controller’s Unclaimed Property Fund. [Saunders Decl., ¶ 12.]

14 **C. THE RELEASE**

15 The California Supreme Court has explained that a judgment in “a representative action
16 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is
17 binding not only on the named employee plaintiff but also on government agencies and any aggrieved
18 employee not a party to the proceeding.” Arias v. Superior Court, 46 Cal.4th 969, 985-86 (2009).
19 Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty claims
20 brought under PAGA. Under Arias, the order the Parties request the Court enter is intended to be
21 “binding not only on the named employee plaintiff but also on government agencies and any aggrieved
22 employee not a party to the proceeding.” The Settlement Agreement protects the rights of the
23 Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the
24 Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement
25 Agreement specifically provides the PAGA Release is inapplicable to any claims other than those
26 brought under PAGA. Only the named plaintiff is entering into a general release of claims and waiver
27 of California Civil Code § 1542. [Saunders Decl., ¶ 13.]

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

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

9 In so holding, Moniz noted many federal district courts had imported class action settlement
10 approval principles when evaluating PAGA settlements, demanding that PAGA settlements be “fair,
11 reasonable, and adequate,” and weighing factors such as “the strength of the plaintiff’s case, the risk,
12 the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement
13 amount[.]” Id. at 75-76 (collecting cases). Observing that “PAGA’s purpose” is to “protect the public
14 interest” - especially the allegedly Aggrieved Employees – the Court agreed with this district court
15 authority, concluding that much the same principles that ensure fairness in class action settlements
16 serve the public interest in the PAGA context. Essentially, these factors are more or less identical to
17 those California courts use to evaluate class action settlements per Kullar v. Foot Locker Retail, Inc.,
18 168 Cal.App.4th 116 (2008), and used by federal courts in the Ninth Circuit to evaluate settlements
19 under Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998).

20 Thus, a number of district courts in the Ninth Circuit have applied a Rule 23-like standard
21 when evaluating PAGA settlements, asking whether “the settlement terms are fundamentally fair,
22 adequate, and reasonable in light of PAGA’s policies and purposes.” Jordan v. NCI Grp., Inc., No.
23 EDCV 16-1701-JVS (SPx), 2018 WL 1409590, at *2 (C.D. Cal. Jan. 5, 2018) (collecting cases). In
24 making this determinations, courts have considered a variety of factors, including (1) whether the
25 settlement accounts for a small percentage of the total value of a PAGA claim (e.g., less than 1
26 percent); (2) whether the LWDA has expressed any views on the settlement; (3) whether the courts
27 would be likely to exercise their discretion under California Labor Code § 2699(e)(2) to reduce the
28 amount of PAGA penalties, were those claims to be litigated through judgment; and (4) whether the

1 settlement provides additional non-monetary relief. Haralson v. U.S. Aviation Servs. Corp., 383 F.
2 Supp. 3d 959, 971 (N.D. Cal. 2019)

3 Accordingly, Plaintiff submits these various factors should inform the Court’s analysis of the
4 proposed settlement as well and, for the reasons below, the proposed settlement is fair, reasonable and
5 adequate, advances the purposes underlying PAGA, and should be approved.

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

7 Plaintiff first alleges Lamon’s time records produced show a systemic practice of recording
8 hours worked by Aggrieved Employees according to their scheduled shifts, rather than recording their
9 actual hours. Per Plaintiff, crew managers or other supervisory employees recorded Aggrieved
10 Employees’ shifts on their timesheets in precise 30-minute increments, and record precise 30-minute
11 meal periods. Plaintiff alleges this practice violates California law because Lamon is required to pay
12 Aggrieved Employees for all hours worked, not only for their scheduled hours, and to keep track of
13 their actual time, and Plaintiff asserts for example that he and other employees had to spend up to an
14 hour of time off the clock per shift to gather equipment from Lamon’s facility in Yuba City, and then
15 to report to their assigned locations before starting their shifts, and to return the equipment at the end
16 of their shifts. [Saunders Decl., ¶ 14.]

17 For the meal and rest break claims, Plaintiff again alleges Lamon’s time records show that
18 meal breaks were “auto deducted” by Crew Chiefs to show meals were both timely and lasted precisely
19 30 minutes regardless of the actual amount of time the meal break lasted. The California Supreme
20 Court recently held that inaccurate or incomplete time records showing noncompliant meal periods
21 due to rounding create a rebuttable presumption of liability for meal period violations, Donohue v.
22 AMN Servs., 11 Cal.5th 58, 74-77 (2021). Plaintiff alleges this presumption will apply here because
23 Defendant’s pay records show that they recorded thirty minutes for meal periods regardless of how
24 long breaks actually lasted, and “[s]hortening or delaying a meal period by even a few minutes may
25 exacerbate risks associated with stress or fatigue, especially for workers who are on their feet most of
26 the day or who perform manual labor or repetitive tasks.” Id. at 69. Per Plaintiff, meal breaks regularly
27 did not last a full 30 minutes or otherwise were non-compliant, or not ever provided at all and
28 especially regarding second meal breaks on shifts of 10+ hours. For the same reasons, Plaintiff also

1 alleges Defendant failed to provide compliant 10 minute rest breaks and that aggrieved employees
2 consistently worked through rest periods to meet work deadlines or otherwise complete the day's
3 work. [Saunders Decl., ¶ 15.]

4 On the expense reimbursement claim, Plaintiff alleges he and the aggrieved employees had to
5 drive personal vehicles to/from Defendant's main facility to gather and return equipment prior to the
6 start of shifts or at the end of a shift without any reimbursement. Stuart v. Radio Shack Corp., 641 F.
7 Supp. 2d 901, 903 (N.D. Cal. 2009) (mileage owed when employees drove personal vehicles for inter-
8 store transfers). Plaintiff further alleges employees had to use their personal cell phones on company
9 business as well, for tasks such as communicating with supervisors or other employees while on the
10 job. Cochran v. Schwan's Home Service, Inc., 228 Cal. App. 4th 1137, 1144 (2014). Per Plaintiff,
11 Lamon did not reimburse employees for any of these claimed expenses. [Saunders Decl., ¶ 16.]

12 Plaintiff also brings claims derivative of the foregoing claims, including a derivative wage
13 statement claim based on the failure to pay all wages due, and she alleges a failure to pay all wages
14 due and owing upon separation of employment under Labor Code §§ 201-203 based on the unpaid
15 wage and break violation claims. [Saunders Decl., ¶ 17.]

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

17 For mediation, Lamon indicated it employed approximately 234 non-exempt employees in
18 California during the relevant time frame (including 140 former employees), and these individuals
19 worked approximately 10,315 pay periods during that time. Based on the data provided by Defendant,
20 Plaintiff estimated Defendant's maximum PAGA exposure at approximately \$5,297,500 including
21 approximately \$1,031,500 on the unpaid wage claims, about \$1,031,500 on the meal break claims,
22 \$1,031,500 on the rest break claims, \$1,031,500 on the wage statement claims, \$1,031,500 on the
23 expense reimbursement claims, and about \$140,000 in civil penalties for failing to timely pay wages
24 on separation of employment. [Saunders Decl., ¶¶ 18-19.]

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

28 In response to Plaintiff's unpaid wage/off the clock claim, Lamon argued its time keeping
policies are entirely consistent with California law and did not deprive employees of compensable

1 hours worked. Per Lamon, all hours worked were tracked and recorded accurately and paid at the
2 appropriate rate. Defendant further argued its written policies strictly prohibited any off the clock
3 work, and to the extent any such work occurred, it was against company policy and done without the
4 employer's knowledge. White v. Starbucks Corp. 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007)
5 (employer must have actual or constructive knowledge of the off the clock work). As such, Lamon
6 argued any alleged "off the clock" work was not compensable and did not give rise to any potential
7 civil penalties. [Saunders Decl., ¶ 20.]

8 On the meal and rest break claims, Defendant emphasized its written policies are compliant
9 and that it authorized and permitted employees to take all required breaks required under California
10 law and the CBAs, and thus met its obligations under the law. Defendant further argued its time
11 records accurately reflect that employees took timely and compliant meal breaks, and that its meal
12 and rest break policies and practices comported with the flexibility the California Supreme Court
13 held is integral to California's meal and rest period requirements. Finally, Defendant argued that
14 Plaintiff's meal and rest break claims are not susceptible to common proof, as the claims would
15 require individualized inquiry, including whether there was an unlawful companywide policy,
16 whether employees had the opportunity to take meal and rest periods, whether they voluntarily chose
17 to forego their meal and rest periods, and whether Defendants ever prevented them from taking meal
18 and rest periods. [Saunders Decl., ¶ 21.]

19 Defendant further argued that, since is not required to record rest periods, any evidence of a
20 failure to authorize rest periods and/or discouragement from taking rest periods would be purely
21 anecdotal and not susceptible to common proof. Defendant also contended it is only liable for break
22 violations if Plaintiff can prove, on a shift-by-shift basis, that Aggrieved Employees actually did not
23 take a rest break or receive a compliant break. This arguably would have made trial of these claims
24 unmanageable. Therefore, a sharp compromise was in order on this claim [Saunders Decl., ¶ 22.]

25 On the expense reimbursement claims, Defendant argued there would be no conceivable
26 need for employees to use their phones for work while working in the field on a construction job,
27 and that employee weren't supposed to use personal devices unless they were on a break. Thus, per
28 Lamon, any use of employee phones while working was against company policy and, to the extent it

1 occurred, was purely for personal convenience and therefore not reimbursable as a “reasonable and
2 necessary” business expense. Similarly, Lamon argued that all equipment needed for a project was
3 provided and available at the job site and there would be no need for employees to transport
4 company equipment in their personal vehicles. [Saunders Decl., ¶ 23.]

5 On the alleged derivative violations of Labor Code § 226 (wage statement violations) and
6 §§ 201-203 (waiting time penalties), Defendant emphasized both claims, since they are entirely
7 derivative, will rise or fall along with the primary unpaid wage claims and break violation claims, in
8 addition to being subject to “good faith” and other defenses available to Defendants. Amaral v.
9 Cintas Corp. No. 2, 163 Cal.App.4th 1157, 1203-04 (2008) (holding employer did not willfully fail
10 to pay wages under Labor Code § 203 even though the class prevailed on the merits on the
11 underlying claim for failing to pay living wages). Accordingly, Plaintiff discounted these claims
12 significantly in light of these multiple potential defenses. Defendants also contend a substantial
13 discount should be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it
14 would be unfair to penalize Defendant multiple times for the same violation. [Saunders Decl., ¶ 24.]

15 Defendant likewise emphasized PAGA gives courts wide latitude to reduce the amount of
16 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise would
17 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code
18 § 2699(e)(2). Several state and federal courts in California have applied significant reductions to
19 PAGA civil penalties even after plaintiffs prevailed on the merits. In Fleming v. Covidien, 2011
20 U.S. Dist. LEXIS 154590, *8-9 (C.D. Cal. 2011), for instance, the district court reduced the potential
21 penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks Corp., 30
22 Cal.App.5th 504 (2018), after a bench trial, the trial court awarded penalties of just \$5 per pay
23 period, a 90% reduction, which decision was upheld on appeal. See also In re Taco Bell Wage and
24 Hour Actions, 2016 U.S. Dist. Lexis 48557 (E.D. Cal. Apr. 8, 2016) (PAGA penalties denied after
25 trial). Here, no evidence came to light suggesting any of the alleged violations were deliberate or
26 willful, or that Defendant was not operating under a good faith belief that its wage and hour policies
27 and procedures complied with the law and/or resulted in employees being paid for all time worked.
28

1 Consequently, Plaintiff had to account for a high probability that the Court would apply substantial
2 deductions to any penalties awarded after trial under Section 2699(e)(2). [Saunders Decl., ¶ 25.]

3 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff's claims,
4 anyone of which, if successful, could have derailed Plaintiff's case. Defendant vowed to raise all of
5 these defenses at trial even assuming Plaintiff prevailed in his individual arbitration and qualified as
6 an "aggrieved employee" with standing to pursue these claims on a representative basis.

7 Accordingly, Plaintiff faced risky issues going forward with the litigation, and it could have taken
8 years to realize any recovery in this action along with high likelihood of post-trial appeals. In
9 addition to the merits defenses and arguing trial would be unmanageable, Defendant also intended to
10 raise additional defenses on damages, including the proper measure of civil penalties and the
11 appropriate discount to place on any assessment of such penalties. [Saunders Decl., ¶ 26.]

12 Although Plaintiff and his counsel believe they could have prevailed, there was no such
13 guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits
14 on all claims, securing the maximum theoretical civil penalties, and appellate risks all are factored
15 into the equation, the settlement value is reasonable and supported. Of course, to recover anywhere
16 near the maximum penalties Plaintiff would have to shoot the moon and win both liability and
17 maximum penalties on all claims as to each and every pay period at issue, which outcome, for the
18 reasons discussed, is unlikely. Given Defendant's various procedural and merits defenses, as well as
19 the substantial penalty reductions ordered in the cases above – which occurred after trial – the
20 proposed settlement is reasonable. [Saunders Decl., ¶ 27.]

21 Importantly, under both California and federal precedents, the mere fact that a settlement
22 does not provide the same recovery as might be achieved at trial is not a proper indicator of whether
23 the settlement is fair, reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 ("even if the
24 relief afforded by the proposed settlement is substantially narrower than it would be if the suits were
25 to be successfully litigated, this is no bar to a class settlement because the public interest may indeed
26 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
27 litigation"); 7-Eleven Owners for Fair Franchising v. Southland Corp., 85 Cal.App.4th 1135, 1150
28 (2000) ("The fact that a proposed settlement may amount to only a fraction of the potential recovery

1 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
2 disapproved"); Lane v. Facebook, Inc. 696 F.3d 811, 819 (9th Cir. 2012) ("[T]he question whether a
3 settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in
4 the estimation of the reviewing court"); White v. Experian Information Solutions, Inc., 803
5 F.Supp.2d 1086, 1098 (C.D. Cal. 2011) (rejecting contention settlement was not fair and reasonable
6 even though it represented 99% discount off the maximum value of the claims).

7 In sum, when the risks of litigation, the burdens of proof necessary to establish liability, the
8 probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any
9 penalty award all are accounted for, it is clear a settlement amount of \$263,000 for the PAGA claims
10 is within the ballpark of reasonableness, furthers the purposes underlying PAGA, and approval is
11 appropriate.

12 **V. SUBMISSION TO THE LWDA**

13 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
14 notified the LWDA of this approval hearing. [Saunders Decl., ¶ 28; Exh. 4.] Accordingly, the
15 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
16 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
17 settlement. Echavez v. Abercrombie & Fitch Co., Inc., 2017 WL 3669607, at *3 (C.D. Cal. Mar. 23,
18 2017) (court inferred the LWDA's non-response as "tantamount to its consent to the proposed
19 settlement terms, namely the proposed PAGA penalty amount."); Jennings v. Open Door Mktg.,
20 LLC, 2018 U.S. Dist. LEXIS 171356, at *27 (N. D Cal. Oct. 3, 2018) ("Plaintiffs submitted the
21 settlement agreement to the LWDA, and the LWDA has not objected to the settlement."); Jordan,
22 2018 WL 1409590, at *7 ("Additionally, the Court finds it persuasive that the LWDA was permitted
23 to file a response to the proposed settlement and no comment or objection has been received.").

24 **VI. PLAINTIFF'S ENHANCEMENT IS REASONABLE**

25 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$5,000. This
26 request is reasonable given Plaintiff's efforts in this case and the risks he undertook on behalf of the
27 Aggrieved Employees. By contacting and retaining counsel to pursue these claims, Plaintiff made this
28 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk of

1 being liable for Defendants' litigation costs if unsuccessful. Plaintiff also exposed himself to unwanted
2 notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the
3 benefit of other employees, placing Plaintiff at risk of discrimination by future prospective employers.
4 Among taking many other actions assisting in the successful litigation of this case, Plaintiff provided
5 substantial factual information to counsel, participated in numerous phone calls and meetings with
6 counsel to discuss the case, and generally was kept up to speed and informed on the case's progress.
7 The modest incentive payment to Plaintiff is appropriate and justified as part of the Settlement.
8 [Saunders Decl., ¶ 29; Declaration of David Josephson, ¶¶ 2-9.] Plaintiff submits the amount sought
9 is well within the range of reasonableness for such awards in other wage and hour actions. Staton
10 v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding service and incentive payments
11 ranging from \$2,000 to \$25,000).

12 **VII. THE REQUESTED ATTORNEYS FEES AND COSTS ARE FAIR AND**
13 **REASONABLE**

14 For their efforts and the contingent risk undertaken in obtaining a common fund settlement that
15 benefits the LWDA and Aggrieved Employees, 33.33% of the Gross Settlement Amount, or
16 \$87,657.90, is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs
17 not to exceed \$10,000.00 (only \$7,981.71 is requested). These fees and costs are warranted under the
18 law and within the range of fees commonly awarded in similar cases.

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

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

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

1 California Supreme Court affirmed, a PAGA action is a *qui tam* action because the statute allows the
2 employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to sue his or her
3 employer for Labor Code violations and recover civil penalties that otherwise could only be assessed
4 and collected by the LWDA. Kim v. Reins Int’l California, Inc., 9 Cal.5th 73 (2020); Iskanian v. CLS
5 Transp. L.A., LLC, 59 Cal.4th 348, 380-82 (2014) (“[a] PAGA representative action is therefore a
6 type of *qui tam* action”). Indeed, the majority of the civil penalties recovered in a PAGA action are
7 paid to the State, with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state;
8 25% paid to the Aggrieved Employees). Lab. Code § 2699(i). Under California law, as here, where a
9 common fund is created in a *qui tam* action by the successful litigation of a plaintiff and his attorneys,
10 the plaintiff’s attorneys are entitled to recover their fees from the common fund. Bank of America v.
11 Cory, 164 Cal.App.3d 66, 89-91 (1985).

12 Through the successful efforts of Plaintiff and her attorneys here, a common fund was created
13 in the amount of \$263,000 for the benefit of the Aggrieved Employees and the State. Thus, these
14 beneficiaries should bear their share of the costs and attorney’s fees out of the overall \$263,000 in
15 civil penalties under the common fund theory. Boeing Co. v. Van Gemert, 444 U.S. 472, 478-482
16 (1980); Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

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., 1 Cal.5th 480, 506 (2016). In Laffitte, the Supreme
19 Court upheld an award of attorney’s fees of one-third of the \$19 million gross settlement (e.g., awarded
20 \$6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent with prior
21 decisions recognizing “when a number of persons are entitled in common to a specific fund, and an
22 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund,
23 such ... plaintiffs may be awarded attorneys’ fees out of the fund.” Serrano v. Priest, 20 Cal.3d 25, 34
24 (1977); Boeing, 444 U.S. at 478 (“[A] lawyer who recovers a common fund ... is entitled to reasonable
25 attorneys’ fees from the fund as a whole”; Lealao v. Beneficial California, Inc., 82 Cal.App.4th 19,
26 26 (2000) (“[f]ee spreading occurs when a settlement or adjudication results in the establishment of a
27 separate or so-called common fund for the benefit of the class”).
28

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

8 Awarding attorney's fees of one-third of gross common fund amount is favored by California
9 courts when a fund established for the common benefit of others is involved, as is the case here. Indeed,
10 the California Supreme Court approved application of a 1/3 fee in wage and hour cases in Laffitte.
11 Further, the Ninth Circuit has held that in cases where state law claims predominate, state law governs
12 the method of calculating fee awards. Mangold v. Cal. Pub. Utils, Comm'n, 67 F.3d 1470, 1478 (9th
13 Cir. 1995) (Ninth Circuit has "applied state law in determining not only the right to fees, but also in
14 the method of calculating the fees").

15 As noted by one district court, "California courts routinely award attorneys' fees of one-third
16 of the common fund." Beaver v. Tarsadia Hotels, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707,
17 at *9 (S.D. Cal. Sept. 28, 2017) (approving a fee award of one-third of the \$15,150,000 settlement
18 fund in a class action settlement); Martin v. AmeriPride Servs., Inc., No. 08cv440-MMA (JMA), 2011
19 WL 2313604 at *8 (S.D. Cal. June 9, 2011) (one-third of the common fund is in line with California
20 precedent in wage and hour cases). Consistent with this observation, in wage and hour cases with
21 resolutions very similar to this one, district courts in California often award attorney's fees of 33% of
22 the value of the common fund. Oliveira, et al. v. AMN Healthcare Language Services, Inc., Case No.
23 22-cv-00003-JES-SBC, Doc. Nos. 56-57 (S.D. Cal. 2023) (approving attorneys' fee award of
24 \$1,000,000 out of a gross settlement of \$3,000,000); Lewis v. Wendy's Intl., Inc., No. 09-07193 MMM
25 (JCx), 2011 WL 13176648 at *13 (C.D. Cal. Jun. 30, 2011) ("Courts regularly award attorneys' fees
26 equal to 30-40% of a settlement fund in wage and hour class actions that result in recovery of less than
27 \$10 million."); Deaver v. Compass Bank, No. 13-cv-00222-JSC, 2015 WL 8526982, at *11-12 (N.D.
28 Cal. Dec. 11, 2015) (approving attorneys' fees totaling 33% of the settlement fund); Vasquez v. Coast

1 Valley Roofing, Inc. 266 F.R.D. 482 (E.D. Cal. 2010) (fee award of 33.3% in a claims-made \$300,000
2 settlement); Romero v. Producers Dairy Foods, Inc., 2007 WL 3492841 (E.D. Cal. 2007) (fee award
3 of 33% from a \$240,000 settlement); Alvarado v. Rex Nederend, WL 1883188 (E.D. Cal. May 17,
4 2011) (33.33% fee award from a \$496,569 settlement).

5 Accordingly, awarding fees on this basis out of the \$263,000 Gross Settlement Amount, for a
6 total of \$87,657.90, is reasonable and appropriate. [Saunders Decl., ¶¶ 30-56.]

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

9 Despite the recognized limitations of the so-called lodestar method, some California and
10 federal courts acknowledge the utility of a lodestar “cross-check” when assessing a proposed
11 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Vizcaino v. Microsoft Corp., 290 F.3d
12 1043, 1050-51 (9th Cir. 2002) (“Calculation of the lodestar, which measures the lawyers’ investment
13 of time in the litigation, provides a check on the reasonableness of the percentage award.”). Under
14 the “lodestar multiplier” method of cross-checking proposed fee awards, the court first ascertains
15 counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each
16 attorney’s reasonable hourly rate, and then enhances or reduces this lodestar figure by a “multiplier”
17 to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature,
18 and the degree of success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-96;
19 Lealao, 82 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded
20 is within the range of fees freely negotiated in the legal marketplace in comparable litigation”); In re
21 Chiron Corp. Secs. Litig., 2007 WL 4249902, at *7-8 (N.D. Cal. Nov. 30, 2007) (surveying fee
22 awards in class action suits and finding courts award multipliers ranging between 1 and 4).

23 Here, Plaintiff’s counsel’s lodestar is approximately \$155,625 based on 209.1 attorney hours
24 spent litigating the case. [Saunders Decl., ¶¶ 33-56; Exh. 5.] On a lodestar basis, the fee request of
25 \$87,657.90, results in the base lodestar that is actually higher than the actual fee request, and
26 accordingly there is no request to apply a lodestar enhancement. Plaintiff submits the lodestar
27 crosscheck effectively operates to show the “percentage of the recovery” fee request is in the
28

1 ballpark of the “market” rate for the work performed, and in fact shows the value work
2 performed is higher than the actual fee request when valued via traditional hourly billing.

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

4 Plaintiff’s counsel requests reimbursement of actual out-of-pocket expenses incurred to
5 prosecute this action. These expenses were incidental and necessary to the effective representation of
6 the employees, and Plaintiff’s counsel is permitted to recover their litigation costs and expenses under
7 the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common fund
8 doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11
9 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for
10 precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by ...
11 [Plaintiffs’] attorneys”). Furthermore, Plaintiff’s Counsel is entitled to recover “those out-of-pocket
12 expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th Cir. 1994)
13 24 F.3d 16, 19.

14 While the Settlement Agreement authorizes litigation costs not to exceed \$10,000 Plaintiff’s
15 Counsel’s actual costs presently are \$7,981.71. [Saunders Decl., ¶¶ 57-58.] This includes filing fees
16 and service of process, expert witness fees, mediation costs, postage, PACER charges, and arbitration
17 filing fees, while waiving photocopying costs and legal research charges. These costs are reasonable
18 and uncontested, and should be approved.

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1 **VIII. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
3 PAGA, approve Plaintiff's enhancement award of \$5,000, approve the requested award of reasonable
4 attorney's fees and costs, approve Simpluris, Inc. as the settlement administrator and approve its fees
5 in the amount of \$2,750.00, approve the proposed distributions to the LWDA and Aggrieved
6 Employees, and enter judgment.

7 Dated: November 13, 2024

CROSNER LEGAL, P.C.

8
9 /s/ Chad Saunders
10 Chad Saunders, Esq.

11 Attorneys for Plaintiff,
12 DAVID JOSEPHSON
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