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9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SAN DIEGO**

12 FREDDIE SOLIS, on behalf of himself and
13 others similarly situated and aggrieved,

14 Plaintiff,

15 v.

16
17 NEUTRON HOLDINGS, INC., dba LIME a
18 Delaware Corporation; WMBE
19 PAYROLLING, INC., dba TARGETCW, a
20 California Corporation; and DOES 1 to 100,
21 inclusive,

22 Defendants.

Case No.: 37-2020-00015614-CU-OE-CTL

Assigned for All Purposes to:
Hon. James A. Mangione
Dept. C-75

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

[Filed Concurrently with Notice of Motion
and Motion; Declaration of Zachary M.
Crosner; [Proposed] Order]

Date: March 9, 2022
Time: 9:00 a.m.
Dept. C-75

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1 **I. INTRODUCTION**

2 Plaintiff Freddie Solis (“Plaintiff”) hereby seeks Court approval of a proposed settlement of
3 claims brought under the Private Attorneys General Act (“PAGA”) against defendants Neutron
4 Holdings, Inc. dba Lime (“Lime”) and WMBE Payrolling, Inc. dba TargetCW (“Target CW,” and
5 together with Lime the “Defendants”). Consistent with PAGA, the proposed settlement releases
6 claims under PAGA only and has no impact on the individual claims of any alleged aggrieved
7 employee. Since the settlement resolves nothing more than claims under PAGA, it requires only a
8 one-step review and approval process by the Court, and for the reasons discussed below, Plaintiff
9 respectfully requests that the Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 As relevant to this lawsuit, Lime is a micromobility company that connects consumers with
12 electric bicycles and scooters. Customers rent vehicles on the Lime application. Plaintiff alleges
13 he was hired directly by Lime in 2017 as a mechanic based in Los Angeles, and while he worked as
14 a Lime direct hire he was classified and compensated as an independent contractor. Plaintiff alleges
15 that in and around March 2019, Lime began using defendant TargetCW, a contingent workforce and
16 payroll services provider, and TargetCW became the employer of record for Plaintiff and others
17 similarly situated. Plaintiff alleges that from March 2019 to October 2021 TargetCW was the
18 employer of record for Plaintiff and he was engaged to work for Lime as the client employer, with
19 little or no change in duties. During this time, Plaintiff was promoted from Mechanic I to Lead
20 Mechanic. [Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶ 4.]

21 Plaintiff alleges that during his employment with Defendants, he and others similarly
22 situated were subject to a number of Labor Code violations. First, he contends that he and other
23 employees were not paid for all hours worked, particularly due to an “auto deduct” policy whereby
24 Defendants deducted 30 minutes from employee time regardless of whether a meal period was taken
25 and/or lasted a full 30 minutes, as well for attending virtual shift meetings “off the clock.” Plaintiff
26 further contends Defendants did not maintain a compliant written meal and rest break policy and,
27 even if they did, review of Defendants’ own records suggests substantial “de facto” violations for
28 missed, late, and/or short breaks, especially as to second meal periods on shifts exceeding 10 hours.

1 Plaintiff believes review of Defendants' records also indicates Plaintiff and the other alleged
2 aggrieved employees never received premium wages for missed or non-compliant breaks. Lastly,
3 Plaintiff contends Defendants required employees to use their personal mobile devices for work
4 purposes but did not provide any reimbursement. [Crosner Decl., ¶ 5.]

5 Based on these allegations, and after appropriate notice to the Labor & Workforce
6 Development Agency ("LWDA"),¹ Plaintiff filed his PAGA-only complaint on May 26, 2020,
7 seeking civil penalties for the following alleged wage and hour violations: (a) failure to pay wages,
8 including overtime wages; (b) failure to provide meal and rest periods; (c) failure to provide
9 complete and accurate wage statements; (d) waiting time penalties; and (e) failure to reimburse for
10 business expenses. Plaintiff filed the matter on behalf of alleged aggrieved employees defined as
11 "Mechanics or similar position, however titled, in the State of California", for the time period of
12 March 22, 2019 to March 31, 2020. [Crosner Decl., ¶ 6.]

13 Defendants have at all times denied Plaintiff's allegations and maintained they complied
14 with all relevant provisions of the Labor Code and wage orders. Specifically, Defendants contend
15 that among other things Plaintiff and all alleged aggrieved employees were appropriately classified,
16 that Plaintiff and all alleged aggrieved employees were timely paid for all hours worked in
17 conformance with all applicable laws, that they authorized and permitted Plaintiff and the alleged
18 aggrieved employees to take meal and rest periods in accordance with all applicable laws, that
19 Plaintiff and the alleged aggrieved employees received accurate and complete itemized wage
20 statements, and that Plaintiff and the alleged aggrieved employees either had no need to use personal
21 phones on the job because they were provided with the appropriate electronic devices, tools and
22 equipment necessary to perform their work functions, and/or received appropriate reimbursement.
23 Defendants also strongly contend the case cannot be maintained as a representative action because
24 among other things Plaintiff's off the clock, missed/interrupted/late/short meal and rest period, and
25 reimbursement allegations necessarily require detailed individualized assessments. Defendants
26 contend that Plaintiff will not be able to base his theory of recovery on any alleged unlawful common
27 policies or practices of Defendants. Defendants further assert that their policies and practices

28 ¹ Plaintiff's PAGA notice letter is attached as Exhibit 2 to the Crosner Declaration.

1 including those regarding timekeeping, payment of wages, meal periods and rest periods, and
2 reimbursement of expenses are lawful. Per Defendants, individualized issues predominate and a trial
3 under PAGA would be unmanageable. [Crosner Decl., ¶ 7.]

4 After Plaintiff filed his complaint, the Parties engaged in formal, written discovery and, upon
5 discussing the merits of the case and engaging in several meet and confer sessions regarding
6 prospective law and motion and discovery issues, agreed to attempt early mediation. The Parties
7 further agreed to a protocol for exchanging additional documents and information before the
8 mediation. Through this formal and informal discovery, Defendants provided Plaintiff with
9 information including, inter alia, the number of potential alleged aggrieved employees, the number
10 of aggregate pay periods, sample pay stubs and time records for around 20% of the alleged aggrieved
11 employees, employee handbooks and manuals, and relevant policy documents on Defendants' time
12 keeping and reporting policies, etc. Plaintiff had that information reviewed by Berger Consulting
13 Group to assist with evaluating potential violation rates, potential damages, etc. [Crosner Decl., ¶ 8;
14 Exh. 3.]

15 The parties then attended a full day mediation before highly-regarded mediator Deborah
16 Saxe, Esq., who has extensive experience mediating wage and hour class and PAGA actions. Before
17 and during the mediation, Plaintiff and his counsel analyzed, researched, and investigated the
18 potential issues, including matters related to the calculation of damages, trial, and appellate issues
19 and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to
20 proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and
21 Defendants' defenses, and the parties' data analyses and conclusions based on data provided by
22 Defendant. After a contentious full day of negotiations, the Parties were able to reach agreement on
23 all major issues. The Parties then reduced their agreement to an MOU and subsequently formalized
24 the tentative settlement in the settlement agreement now before the Court. [Crosner Decl., ¶ 9.]

25 A true and correct copy of the Settlement Agreement is attached to the Crosner Declaration as
26 Exhibit 1.

27 ////

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1 **III. SUMMARY OF SETTLEMENT TERMS**

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

3 Under the settlement, Defendants jointly (i.e., 50/50) will pay a non-reversionary settlement
4 amount of \$467,500 (the “Gross Settlement Amount” or “GSA”), inclusive of payments to the
5 LWDA and alleged aggrieved employees, costs of settlement administration, and reasonable
6 attorney’s fees and costs.² After payment of settlement administration costs and reasonable
7 attorney’s fees and costs from the GSA, Plaintiff presently estimates about \$281,666.67 will remain
8 (the “Net Settlement Amount” or “NSA”). 75% of the NSA (about \$211,250.00) will go to the
9 LWDA, and the remaining 25% (about \$70,416.67) will be distributed to the alleged aggrieved
10 employees in proportion to the total number of Eligible Pay Periods each individual worked during
11 the PAGA Period. The average award currently is estimated at about \$150. [Crosner Decl., ¶ 10.]

12 **B. Payment and Notice**

13 The Parties propose using CPT Group, Inc. as the Settlement Administrator. CPT has
14 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$7,250.00
15 (although the Parties have allocated \$10,000 for administration as necessary). True and correct
16 copies of CPT’s firm CV and administration bid are attached hereto as Exhibit 4. Within 20 business
17 days of the Settlement’s Active Date, Defendants will fund the settlement and then CPT will mail a
18 Notice and settlement check to all allegedly aggrieved employees via regular First-Class U.S. Mail,
19 using the most current, known mailing addresses identified in Defendants’ records. Recipients need
20 not submit claim forms and will automatically receive a Notice and settlement check. Settlement
21 checks will be negotiable for 90 days, after which time any unclaimed residual funds will be
22 forwarded to the California State Controller’s Unclaimed Property Fund. [Crosner Decl., ¶ 11; Exh.
23 4.]

24 ////

25 ////

26 ² As discussed below, Plaintiff’s Counsel seeks a fee equal to one-third (\$155,833.33) of the GSA, and reimbursement
27 of actual litigation costs of \$10,724.20. Plaintiff is also entering into a separate settlement of his individuals claims
28 against Defendants. In light of the concurrent settlement of his individual claims, Plaintiff is not seeking an
enhancement payment for his service as the PAGA representative.

1 **C. The Release**

2 The release in the PAGA Settlement Agreement narrowly releases only civil penalty claims
3 brought under PAGA, as asserted in Plaintiff’s PAGA notice to the LWDA and the operative
4 Complaint. While Plaintiff is separately entering into a general release of any and all claims against
5 Defendants, the PAGA Settlement Agreement protects the rights of the alleged aggrieved employees
6 to bring their own individual claims should they wish. For these reasons, the Parties contend the
7 release narrowly applies only to the PAGA claims alleged or that could have been alleged, based on
8 the factual and legal allegations pled in the operative Complaint. [Crosner Decl., ¶ 12.]

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

11 PAGA requires the Court “review and approve any settlement of any civil action filed
12 pursuant to this part.” Labor Code § 2699(1)(2). Recently, in November 2021, the appellate court
13 in Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 2021 WL 5578298, defined the standard
14 for courts to apply when reviewing settlements under PAGA. The court held a trial court must
15 ensure that the settlement is “fair, reasonable, and adequate in view of PAGA’s purposes to
16 remediate present labor law violations, deter future ones, and to maximize enforcement of state labor
17 laws.” WL 5578298, at *9.

18 In so holding, Moniz noted many federal district courts had imported class action settlement
19 approval principles, demanding that PAGA settlements be “fair, reasonable, and adequate,” and
20 weighing factors such as “the strength of the plaintiff’s case, the risk, the stage of the proceeding,
21 the complexity and likely duration of further litigation, and the settlement amount[.]” Id. at *8-9
22 (collecting cases). Observing that “PAGA’s purpose” is to “protect the public interest”—especially
23 the allegedly aggrieved employees—the Court agreed with this district court authority, concluding
24 that much the same principles that ensure fairness in class action settlements serve the public interest
25 in the PAGA context. Essentially, these factors are more or less identical to those California courts
26 use to evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168
27 Cal.App.4th 116 and, accordingly, Plaintiff submits they should inform the Court’s analysis as well.

1 For the reasons below, the proposed settlement is fair, reasonable and adequate, advances the
2 purposes underlying PAGA, and should be approved in its entirety.

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

4 Plaintiff alleges claims for unpaid wages, meal and rest break violations, and unreimbursed
5 business expenses, as well as derivative wage statement and waiting time penalty claims. First,
6 Plaintiff contends Defendants failed to pay Plaintiff and other allegedly aggrieved employees for all
7 hours worked by (a) maintaining an auto deduct policy whereby 30 minutes were deducted from
8 employee time each shift regardless of whether a meal period was taken or lasted a full 30 minutes,
9 and (b) by requiring various “virtual meetings” and phone calls regarding scheduling and other
10 issues before or after a shift such that the work was done “off the clock.” [Crosner Decl., ¶ 13.]

11 Plaintiff also contends Defendants failed to maintain proper meal and rest break policies and
12 instead merely provided the employees with a link to a government website with information on
13 meal and rest break laws. Further, regardless of any written policies, or lack thereof, Plaintiff alleges
14 there are numerous “de facto” violations where Defendants’ own records show missed and non-
15 compliant meal periods. This is especially prevalent as to second meal periods on shifts lasting
16 more than 10 hours. Plaintiff further alleges that during the PAGA period, Defendants failed to
17 provide Plaintiff and the alleged aggrieved employees with compliant rest periods. Plaintiff alleges
18 that he and the alleged aggrieved employees were frequently not relieved for rest periods and had
19 rest periods interrupted by their managers due to the nature of the work, and the mechanics
20 frequently were under significant time pressure to repair scooters and keep enough available to meet
21 demand. [Crosner Decl., ¶ 14.]

22 On the expense reimbursement claim, Plaintiff alleges he and other mechanics had to use
23 their personal cell phones to, inter alia, call in their hours worked, communicate with supervisors,
24 and attend virtual meetings and calls regarding scheduling and work assignments. Plaintiff asserts
25 that he and other alleged aggrieved employees did not receive any reimbursement for using their
26 own phones to conduct company business. [Crosner Decl., ¶ 15.]

1 Lastly, Plaintiff also brings claims derivative of the foregoing claims, including a derivative
2 wage statement claim based on the failure to pay all wages due, and failure to pay all wages due and
3 owing upon separation of employment under Labor Code §§ 201-203. [Crosner Decl., ¶ 16.]

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

5 For mediation, Defendants indicated there are approximately 466 individuals who fit within
6 Plaintiff's definition of alleged aggrieved employees in California during the relevant PAGA period,
7 and these individuals worked approximately 7,474 pay periods. Based on the data and information
8 provided by Defendants, and with his expert's assistance and analysis, Plaintiff estimated
9 Defendants' maximum PAGA exposure at approximately \$2,421,000. This estimate includes
10 approximately approximately \$553,000 in civil penalties for the meal and rest period claims,
11 approximately \$747,000 in civil penalties on the inaccurate wage statement claim, approximately
12 \$747,000 in civil penalties on the unpaid wage claims, and approximately \$374,000 on the expense
13 reimbursement claim. [Crosner Decl., ¶¶ 17-18.]

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

16 In response to Plaintiff's unpaid wage claims for the alleged "auto deduct" policy and off
17 the clock work, Defendants took the position that their time keeping policies are legally compliant,
18 that they accurately tracked all hours worked, and paid the allegedly aggrieved employees for all
19 hours worked consistent with those policies. Lastly, Defendants argued any trial of this issue on a
20 representative basis would be unmanageable since it would depend entirely on a myriad of
21 individualized inquiries as to each employee regarding any discrepancies in actual time worked
22 versus what was reported and paid for. [Crosner Decl., ¶ 19.]

23 For the meal and rest break claims, Defendants offered multiple defenses. First, Defendants
24 emphasized that the written meal and rest break policy generally was compliant, that they authorized
25 and permitted all necessary breaks, and that alleged aggrieved employees received full uninterrupted
26 lunch periods as reflected in the time records. While Plaintiff's review of the time records suggested
27 a substantial violation rate for late and short meal breaks as well as missed second meal periods,
28 Defendants countered that even to the extent this occurred, it was in violation of company policy

1 and would require significant individual inquiries to determine the reasons underlying any such
2 alleged violations and whether it was by employee choice or some other reason. Thus, per
3 Defendants, any trial would be unmanageable as held recently in Wesson v. Staples The Office
4 Superstore LLC (2021) 68 Cal.App.5th 746, because of these individualized issues. [Crosner Decl.,
5 ¶ 20.]

6 As with meal breaks, Defendants argue the applicable rest break policies complied with
7 California law and authorized and permitted employees to take all required breaks. Defendants
8 further contended that, in light of the fact that recording rest periods is not required, any evidence
9 of failure to authorize rest periods and/or discouragement from taking rest periods would be purely
10 anecdotal and individual issues would predominate on liability. Defendants also contend that they
11 are only liable if Plaintiff can prove, on a shift-by-shift basis, that each alleged aggrieved employee
12 actually did not receive a fully-compliant rest break. This arguably would once again make a trial
13 unmanageable since the number of instances an employee missed a rest break would have to be
14 tested on a case by case basis to determine compliance. [Crosner Decl., ¶¶ 21.]

15 On the expense reimbursement claim, Defendants argued there was little , if any need for
16 employees to use their own phones while on the job and accordingly reimbursement was not
17 required since such use was not “necessary.” Plaintiff also alleged derivative violations of Labor
18 Code § 226 (wage statement violations) and §§ 201-203 (waiting time penalties). The derivative
19 wage statement claims and the waiting time penalties claim are based on the primary unpaid wage
20 and meal/rest break claims, and will rise or fall along with the primary claims, in addition to being
21 subject to “good faith” and other defenses available to Defendants. Accordingly, Plaintiff had to
22 discount the value of these claims significantly in light of these multiple potential defenses.
23 Defendants also contended a substantial discount should be applied to the civil penalties for these
24 derivative (i.e., “stacked”) violations, as it would be unfair to penalize Defendants multiple times
25 for the same violation. [Crosner Decl., ¶ 22.]

26 Finally, Defendants emphasized PAGA gives the Court wide latitude to reduce the amount
27 of civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
28 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” This is particularly

1 true here where both the unpaid wage and meal and rest break claims essentially are premised on
2 “de facto” violations and that could prove difficult to establish on a representative basis. [Crosner
3 Decl., ¶ 23.]

4 Thus, Defendants raised various and multi-layered defenses to each of Plaintiff’s claims, any
5 one of which, if successful, could have decimated Plaintiff’s case. And Defendants vowed to raise
6 all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with this litigation,
7 and it could have taken years to realize any recovery in this action along with the possibility of post-
8 trial appeals. In addition to its merits defenses and arguing trial would be unmanageable, which
9 argument was reinforced by the recent Wesson decision, Defendants also intended to raise additional
10 defenses on damages, including the proper measure of civil penalties and the appropriate discount
11 to place on any assessment of such penalties. [Crosner Decl., ¶ 24]

12 Although Plaintiff’s counsel believes they could have prevailed, there was no such
13 guarantee. When the risks of overcoming a manageability defense and prevailing at trial on the
14 merits are factored into the equation, the settlement value is reasonable and supported. Notably, the
15 proposed settlement equates to around 20% of the estimated maximum theoretical liability, as
16 discussed above. Of course, to recover those sums Plaintiff would have to shoot the moon and win
17 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is
18 unlikely. Given Defendants’ procedural and merits defenses, as well as the substantial penalty
19 reductions ordered in the cases above – which occurred after trial – the proposed settlement is
20 eminently reasonable. [Crosner Decl., ¶ 25.]

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

1 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
2 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
3 fundamentally fair . . . is different from the question whether the settlement is perfect in the
4 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
5 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
6 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,
8 the probability of appeal of a favorable judgment, and the Court’s substantial discretion to reduce
9 any penalty award all are accounted for, it is clear a settlement amount of \$467,500 for the PAGA
10 claim is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open Door
11 Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *9 (approving settlement
12 with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement agreement to the
13 LWDA, and the LWDA has not objected to the settlement”).

14 **V. SUBMISSION TO THE LWDA**

15 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
16 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 26; Exh. 5.] Accordingly, the
17 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
18 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
19 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
20 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
21 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
22 4773057, at *9; Jordan v NCI Grp., Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at
23 *7 (“Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to
24 the proposed settlement and no comment or objection has been received.”).

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

26 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
27 that benefits the LWDA and aggrieved employees, one-third of the gross settlement, or \$155,833.33,
28

1 is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs. These
2 fees are warranted under the law and within the range of fees commonly awarded in similar cases.

3 **A. Plaintiff's Counsel Are Entitled to Recover Attoreny's Fees Under the Common**
4 **Fund Doctrine**

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

10 "A *qui tam* action is one brought under a statute that allows a private person to sue as a
11 private attorney general to recover damages or penalties, all or part of which will be paid to the
12 government." People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
13 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
14 allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to
15 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
16 only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th
17 73; Iskanian, 59 Cal.4th at 380-82 ("[a] PAGA representative action is therefore a type of *qui tam*
18 action"). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
19 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
20 aggrieved employees). Lab. Code § 2699(i). Where a common fund is created in a *qui tam* action
21 by the successful litigation of a plaintiff, the plaintiff's attorneys are entitled to recover their fees
22 from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

23 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
24 in the amount of \$467,500 for the benefit of the allegedly aggrieved employees and the State. Thus,
25 these beneficiaries should bear their share of the costs and attorney's fees out of the overall recovery
26 under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6)
27 Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

1 Not long ago, the California Supreme Court upheld the use of the common fund theory of
2 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Cal.5th 480, 506. There,
3 the Court upheld an award of attorney's fees of one-third of the \$19 million gross settlement (*e.g.*,
4 awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent
5 with prior decisions recognizing "when a number of persons are entitled in common to a specific
6 fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation
7 of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." Serrano v. Priest
8 (1977) 20 Cal.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who recovers a common fund ... is
9 entitled to reasonable attorneys' fees from the fund as a whole"; Lealao v. Beneficial California, Inc.
10 (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when a settlement or adjudication results in
11 the establishment of a separate or so-called common fund for the benefit of the class").

12 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
13 percentage of the total fund created when the fund consists of a "certain or easily calculable sum of
14 money," and California law has long applied the percentage of the recovery method for awarding
15 attorney's fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
16 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
17 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney's
18 fee based on percentage of recovery).

19 Awarding attorney's fees of one-third of gross common fund amount is favored by California
20 courts when a fund established for the common benefit of others is involved, such as here.
21 Accordingly, awarding fees on this basis out of the \$467,500 GSA, for a total of \$155,833.33, is
22 reasonable and appropriate. [Crosner Decl., ¶¶ 27-44.]

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

24 Despite the recognized limitations of the so-called lodestar method, some California and
25 federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed
26 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier"
27 method of cross-checking proposed fee awards, the court first ascertains counsel's total "lodestar"
28 amount by multiplying the number of hours reasonably expended by each attorney's reasonable

1 hourly rate, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range
2 of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of
3 success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-96; Lealao, 82
4 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within
5 the range of fees freely negotiated in the legal marketplace in comparable litigation”).

6 Here, Crosner Legal’s lodestar is approximately \$149,230.00, based on 194.2 attorney hours
7 spent litigating the case. [Crosner Decl., ¶¶ 31-44; Exh. 6.] This results in a modest lodestar
8 multiplier of 1.04, which is justified, reasonable and appropriate. Indeed, California courts
9 routinely approve multipliers in the in the 2-4 range to compensate for the time and contingent
10 risk of these types of cases. Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 (affirming
11 attorney’s fee award including an upward multiplier of 2.5); Wershba v. Apple Computer, Inc.
12 (2001) 91 Cal.App.4th at 255 (“Multipliers can range from 2 to 4 or even higher”); City of
13 Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).

14 It also is important to note this fact serves to highlight the reasonableness of the fees
15 requested on a percentage-of-the-recovery basis, as it shows the requested fees are within striking
16 distance of the market rate for the services rendered if those services are valued via traditional hourly
17 billing, and that the nominal enhancement requested adequately compensates counsel for the
18 contingent risk assumed and the delay in payment, and represents a fair return on the contingency.
19 [Crosner Decl., ¶¶ 27-44.]

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

21 Plaintiff’s Counsel requests reimbursement of actual out-of-pocket expenses incurred to
22 prosecute this action. These expenses were incidental and necessary to the effective representation
23 of the employees, and Plaintiff’s Counsel is permitted to recover their litigation costs and expenses
24 under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common
25 fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego
26 (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity,
27 and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees
28 by ... [Plaintiffs’] attorneys”). Furthermore, Plaintiff’s Counsel is entitled to recover “those out-of-

1 pocket expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th
2 Cir. 1994) 24 F.3d 16, 19.

3 While the Settlement Agreement authorizes litigation costs not to exceed \$20,000, Plaintiff’s
4 Counsel’s actual costs presently are \$10,724.20. This includes filing fees, service of process,
5 mediation costs, postage, and expert consultant fees, while waiving photocopying costs and legal
6 research charges. These costs are reasonable and uncontested, and should be approved. [Crosner
7 Decl., ¶¶ 45-46.]

8 **VII. CONCLUSION**

9 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
10 PAGA, approve the requested award of reasonable attorney’s fees and costs, approve CPT Group,
11 Inc. as the settlement administrator and approve its fees in the amount of \$7,250, approve the
12 proposed distributions to the LWDA and alleged aggrieved employees, and enter its Order of final
13 approval and judgment thereon.

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15 Dated: February 8, 2022

CROSNER LEGAL, PC

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17 By: 
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