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10  
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF LOS ANGELES**  
13

14 RICHARD RAMIREZ, on behalf of himself  
15 and others similarly situated and aggrieved,

16 Plaintiff,

17 vs.

18 GENESIS LOGISTICS, INC., a Delaware  
19 corporation; SCOTT SUREDDIN, an  
20 individual; and DOES 1 to 100, inclusive,

21 Defendants.

Case No.: 20STCV22055

Assigned for All Purposes to:  
Hon. Maren Nelson  
Dept. SSC-17

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

Date: November 24, 2021  
Time: 9:00 a.m.  
Dept.: SSC-17

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1 **I. INTRODUCTION**

2 Plaintiff Richard Ramirez hereby seeks Court approval of a proposed settlement of claims  
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Genesis Logistics,  
4 Inc. (“Genesis”). Although Plaintiff filed this matter as a putative class action, the Parties have  
5 settled only the PAGA claims and Plaintiff’s individual claims, as described in more detail below.  
6 Consistent with PAGA, the proposed settlement releases these claims only and has no impact on the  
7 individual claims of any other employee. Since the settlement resolves only claims under PAGA,  
8 it requires only a one-step review and approval process by the Court, and for the reasons discussed  
9 below, the Plaintiff now seeks the Court’s approval of the Settlement.

10 **II. BACKGROUND**

11 Defendant Genesis is third party logistics management, warehousing and transportation  
12 company that serves small and large companies, with locations across the country, including in  
13 California. Plaintiff Ramirez was a non-exempt employee of Genesis working as a truck driver for  
14 approximately from October 2018–April 2019. As a driver, Plaintiff primarily was responsible for  
15 delivering products to 7-11 stores in Los Angeles County. Plaintiff and the other aggrieved  
16 employees are unionized, and worked under two separate but largely identical collective bargaining  
17 agreements (“CBA(s)”) in effect during the relevant time period. [Declaration of Zachary M.  
18 Crosner (“Crosner Decl.”), ¶ 4.]

19 Genesis paid Plaintiff and the aggrieved employees on a piece rate system, referred to as  
20 “Activity Based Compensation” in the CBAs. Plaintiff contends this pay scheme did paid only for  
21 actual drive time and not properly compensate employees for time spent at the truck yard both before  
22 and after the actual trip, as drivers had to be present while the truck was loaded and inspected before  
23 departure and while it was inspected after they return. Plaintiff typically took a 30-minute meal  
24 period each day regardless of shift length, and he also contends the delivery schedules imposed  
25 tough time constraints and made it difficult if not impossible to take rest breaks. Even though  
26 Defendant required drivers to indicate on their Route Sheets that they had received all “required rest  
27

1 periods,” Plaintiff contends Defendant was fully aware the aggrieved employees did not always  
2 receive rest periods as its monitors trucks via a GPS system [Crosner Decl., ¶ 5.]

3 After appropriate notice to the Labor & Workforce Development Agency (“LWDA”),  
4 Plaintiff filed his complaint as both a class action and PAGA representative action against Defendant  
5 on June 5, 2020, seeking damages and civil penalties for the following alleged wage and hour  
6 violations: (a) failure to pay wages, including overtime wages; (b) failure to provide meal and rest  
7 periods; (c) failure to provide complete and accurate wage statements; and (d) waiting time  
8 penalties. Plaintiff filed the matter on behalf of a putative class/aggrieved employees defined to  
9 include all non-exempt employees of Genesis during the relevant class and PAGA time frames.  
10 [Crosner Decl., ¶ 6.]

11 Genesis has at all times denied Plaintiff’s allegations and maintained it properly calculated  
12 and paid all wages due per the applicable CBAs, that its meal and rest break and payroll policies  
13 and procedures under the CBAs comply with California law, and that it provided the class members  
14 with required meal and rest breaks. Additionally, Genesis strongly contends the case cannot be  
15 maintained as a class action for several reasons. First and foremost, Genesis has emphasized the  
16 vast majority of the putative class members entered into valid pre-dispute arbitration agreements  
17 with class action waivers. As a result, per Defenant there are only a handful of individuals even  
18 eligible to participate in a class action and therefore the “class” is insufficiently numerous to secure  
19 certification. Genesis further contends most of Plaintiff’s class claims are subject to preemption  
20 under federal law. It also argues the piece rate compensation scheme agreed to via the CBAs  
21 properly paid the employees at the appropriate pay rate for all hours worked, and that to the extent  
22 class members missed meal and/or rest breaks, it was intermittent and infrequent and evidence of  
23 such missed breaks would be purely anecdotal, and therefore individualized issues predominate,  
24 which would render class certification inappropriate and also make any trial under PAGA  
25 unmanageable. [Crosner Decl., ¶ 7.]

26 After Plaintiff filed his complaint, upon discussing the merits of the case and the arbitration  
27 issue, and engaging in several meet and confer sessions regarding prospective law and motion and  
28 discovery issues, including a potential motion to compel arbitration, the Parties agreed to an early

1 mediation as to PAGA liability only. The Parties further agreed to a protocol for exchanging  
2 additional documents and information before the mediation. Through this formal and informal  
3 discovery, Defendant provided Plaintiff with information including, inter alia, the number of  
4 potential aggrieved employees, the number of aggregate pay periods, sample pay stubs and time  
5 records, the applicable CBAs, a sampling of “Route Sheets,” employee handbooks and manuals,  
6 arbitration agreements, relevant policy documents regarding Defendant’s time keeping and  
7 reporting policies, etc. [Crosner Decl., ¶ 8.]

8 The parties then attended a full day mediation before highly-regarded mediator Marc Feder,  
9 Esq., who has extensive experience mediating wage and hour class and PAGA actions. Before and  
10 during the mediation, Plaintiff and his counsel analyzed, researched, and investigated the potential  
11 issues, including matters related to the calculation of damages, trial, and appellate issues and risks.  
12 During mediation, the Parties vigorously debated the impact of the arbitration agreements on the  
13 class claims, the viability of the putative class claims, the likelihood of Plaintiff’s ability to proceed  
14 on a representative basis as to the PAGA claims, the legal grounds for Plaintiff’s claims and  
15 Defendant’s defenses, and the parties’ data analyses and conclusions based on data provided by  
16 Defendant. After a contentious full day of negotiations, the parties reached a tentative settlement on  
17 all issues, and subsequently formalized their agreement in the Settlement Agreement now before the  
18 Court for approval, as well as a separate settlement agreement addressing Plaintiff’s individual  
19 claims. [Crosner Decl., ¶ 9.] A fully executed, true and correct copy of the Parties’ Settlement  
20 Agreement and Release of Claims under Private Attorneys General Act (“Settlement Agreement”) is  
21 attached to the Crosner Declaration as Exhibit 1. Mr. Ramirez’s individual settlement is  
22 confidential and will be made available to the Court for *in camera* review as the Court deems  
23 necessary.

### 24 **III. SUMMARY OF SETTLEMENT TERMS**

#### 25 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA** 26 **PENALTIES**

27 Under the settlement, Defendants will pay a non-reversionary settlement amount of  
28 \$565,000 (the “Settlement Amount”), inclusive of payments to the LWDA and Aggrieved

1 Employees, costs of settlement administration, and reasonable attorney's fees and costs.<sup>1</sup> After  
2 payment of both settlement administration costs as well as reasonable attorney's fees and costs from  
3 the PAGA Settlement Amount, Plaintiff presently estimates about \$365,562.08 will remain, referred  
4 to as the "Net Settlement Amount."<sup>2</sup> 75% of the Net Settlement Amount (about \$274,171.56) will  
5 go to the LWDA, and the remaining 25% (about \$91,390.52) will go to the Aggrieved Employees  
6 in proportion to the total number of eligible pay periods each individual worked during the Statutory  
7 Period, with an average award currently estimated at about \$179. [Crosner Decl., ¶ 10.]

8 **B. PAYMENT AND THE NOTICE**

9 The Parties propose using Simpluris, Inc. as the Settlement Administrator. Simpluris has  
10 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$3,500.00.  
11 Within 30 calendar days of the Settlement's Effective Date, Genesis will fund the settlement and  
12 then Simpluris will mail a Notice and settlement check to all Aggrieved Employees via regular First-  
13 Class U.S. Mail, using the most current, known mailing addresses identified in Genesis's records.  
14 Aggrieved Employees need not submit claim forms and will automatically receive a Notice and  
15 settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed  
16 residual funds will be forwarded to the California State Controller's Unclaimed Property Fund.  
17 [Crosner Decl., ¶ 11; Exh. 2.]

18 **C. THE RELEASE.**

19 The California Supreme Court has explained that a judgment in "a representative action  
20 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...  
21 is binding not only on the named employee plaintiff but also on government agencies and any  
22 aggrieved employee not a party to the proceeding." Arias v. Superior Court (2009) 46 Cal.4th 969,  
23 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty  
24

25 <sup>1</sup> As discussed below, Plaintiff's Counsel seeks a fee equal to 33 1/3% (\$188,314.50) of the Net PAGA  
26 Settlement Amount, and reimbursement of actual litigation costs of \$7,623.42. In light of the concurrent  
27 settlement of his individual claims, Plaintiff is not seeking an enhancement payment for his service as the  
28 PAGA representative.

<sup>2</sup> This number differs slightly from the amount referenced in the Settlement Agreement based on the actual  
amounts requested in attorney costs and administration fees versus the "not to exceed" estimates in the  
Settlement Agreement.

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 entered into a general release  
4 any and all claims against Defendant, the Settlement Agreement protects the rights of the Aggrieved  
5 Employees to bring their own individual claims should they wish. For these reasons, the Parties  
6 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. [Crosner Decl., ¶ 12.] In order to fully effectuate the settlement, Plaintiff requests  
9 the Court dismiss all class claims without prejudice under California Rule of Court 3.770.

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

12 PAGA requires the Court “review and approve any settlement of any civil action filed  
13 pursuant to this part.” Labor Code § 2699(l)(2). Since there is no authority setting forth any specific  
14 standard for reviewing a PAGA settlement, most courts apply the standards applicable to review  
15 and approval of a class action settlement and look to whether, under all the circumstances, the  
16 settlement is fair, reasonable and adequate. “[T]he Court adopts the standard for evaluating PAGA  
17 settlements recently employed by a number of other district courts in the Ninth Circuit—that is, the  
18 Court will approve the PAGA settlement upon a showing that the settlement terms are  
19 fundamentally fair, adequate, and reasonable in light of PAGA's policies and purposes.” Jordan v.  
20 NCI Group, Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at \*7. A court may also  
21 examine if the relief under PAGA is “genuine and meaningful” and furthers the purposes of the  
22 statute. Salazar v. Sysco Central California, Inc. (E.D. Cal. 2017) 2017 WL 1135801, at \*3-4.

23 To evaluate whether a PAGA settlement is fair, reasonable and adequate, these same district  
24 courts have looked to the factors identified in Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir.  
25 1998). “Given the lack of an express standard, several courts, including this Court, have applied  
26 several of the factors in [Hanlon] to evaluate a PAGA settlement.” Delgado, 2019 U.S. Dist. LEXIS,  
27 at \*10 (collecting cases). These may include the strength of the plaintiffs’ case; the risk, expense,  
28 complexity, and likely duration of further litigation; the risk of maintaining class action status

1 throughout the trial; the amount offered in settlement; the extent of discovery completed and the  
2 stage of the proceedings; the experience and views of counsel; the presence of a governmental  
3 participant; and the reaction of the class members to the proposed settlement, and “[m]any of these  
4 factors are not unique to class action lawsuits and bear on whether a settlement is fair and has been  
5 reached through an adequate adversarial process. Thus, the Court finds that these factors are useful  
6 in evaluating a PAGA settlement. However, three of the Hanlon factors—risk of maintaining class  
7 action status, presence of a governmental participant, and reaction of class members—are not  
8 relevant to a PAGA settlement that is not a class action and in which the LWDA is not involved.”  
9 Id. at \*10-11. Importantly, these factors are more or less identical to those California courts use to  
10 evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116  
11 and, accordingly, Plaintiff submits they should inform the Court’s analysis as well. For the reasons  
12 below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying  
13 PAGA, and should be approved in its entirety.

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

15       Plaintiff alleges claims for unpaid wages, meal and rest break violations, and derivative wage  
16 statement and waiting time penalty claims. On the unpaid wage claims, Defendant paid Plaintiff and  
17 the aggrieved employees for an hour of non-productive time (i.e., non-driving time) per shift at the  
18 minimum wage rate. Plaintiff contends this amount did not sufficiently account for all of the non-  
19 driving time employees spent each shift, including waiting for the trucks to be loaded, performing  
20 pre-inspections, and performing post-trip activities and inspections. Defendant also paid Plaintiff  
21 and the aggrieved employees for two 15-minute rest periods each shift at the appropriate rate,  
22 consistent with Labor Code § 226.2(a)(3)(A). Plaintiff contends, however, failed to pay for third  
23 rest periods when employees worked shifts in excess of 10 hours. [Crosner Decl., ¶ 13.]

24       Plaintiff also contends Defendant failed to provide Plaintiff and the Drivers with compliant  
25 meal periods, and that its written policy failed to inform the drivers if, when, how long or how many  
26 meal periods they were to receive. Although Plaintiff and the Drivers typically received thirty-  
27 minute first meal periods, Plaintiff argues they were untimely because Defendant was not recording  
28 or paying Drivers for the first hour of load time. In addition, the Drivers were not permitted to leave

1 their trucks during meal periods, and therefore remained under Defendant’s control and their meal  
2 periods were not free from all job duties. Next, Plaintiff’s review of the same time records suggested  
3 minimal records for second lunch breaks, even though Plaintiff and the class members frequently  
4 worked shifts longer than 10 or even 12 hours. While Genesis argued most employees waived  
5 second meal periods on these longer shifts, and provided sample written meal period waivers,  
6 Plaintiff’s analysis suggested there were quite a few 12+ hour shifts where the second lunch cannot  
7 be waived. [Crosner Decl., ¶ 14.]

8 Likewise, Plaintiff contends he and the Drivers did not receive compliant rest periods, as  
9 Genesis’s written policies failed to notify the drivers if, when, how long or how many rest periods  
10 they were to receive. More importantly, the Drivers simply did not have enough time to take  
11 required rest periods and complete their routes in the allotted time, and Plaintiff contends Genesis  
12 was fully aware the Drivers did not receive rest periods based on GPS records. a Nevertheless,  
13 Defendant required Plaintiff and the drivers to affirm on their Route Sheets that they had received  
14 “required rest periods.” Plaintiff and the Drivers were incapable of verifying compliant rest periods  
15 in the absence of policies informing them of their rights to take them. [Crosner Decl., ¶ 15.]

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

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

21 For mediation, Genesis indicated it employed approximately 504 non-exempt employees in  
22 California during the relevant PAGA period, with 221 of that total being former employees.  
23 Defendants also provided data establishing these individuals worked approximately 28,728 weekly  
24 pay periods during the PAGA period. Based on the data and information provided by Defendants,  
25 Plaintiff estimated Defendants’ maximum PAGA exposure at approximately \$7,377,000. This  
26 estimate includes approximately \$2,040,000 in civil penalties for the unpaid wage claims,  
27 approximately \$3,275,000 in civil penalties for the meal and rest period claims, approximately  
28

1 \$2,040,000 in civil penalties on the wage statement claim, and approximately \$22,100 in civil  
2 penalties for failing to timely pay wages on separation of employment. [Crosner Decl., ¶¶ 17-18.]

3 C. **THE SETTLEMENT MEETS THE HANLON AND KULLAR FACTORS,**  
4 **INCLUDING THE STRENGTH OF PLAINTIFF’S CASE, THE DISCOVERY**  
5 **PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT**

6 Genesis contends its compensation policies, as expressed in the CBAs, fully and properly  
7 compensated Plaintiff and the Drivers for all hours worked, including all time spent on non-piece  
8 producing activities such as down time during the loading process, all rest breaks, fuel stops, etc.,  
9 and is otherwise legal under the California Supreme Court’s recent decision in Oman v. Delta  
10 Airlines, Inc. (2020) 9 Cal.5th 762. To the extent third breaks erroneously weren’t paid for, Genesis  
11 further argued the total amount owed would be minimal, and that fact likely would support a  
12 substantial reduction in any penalty award, as saddling Defendant with tens of thousand in penalties  
13 could be deemed unjust, confiscatory, etc. [Crosner Decl., ¶ 19.]

14 For the meal and rest break claims, Defendant offered multiple defenses to these claims.  
15 First, it emphasized its written meal and rest break policy generally was compliant, and it  
16 authorized and permitted all necessary breaks. While Plaintiff’s review of the time records  
17 suggested a substantial violation rate for late and short meal breaks, Defendants countered that  
18 even to the extent this occurred, it was in violation of company policy and would require  
19 significant individual inquiries to determine the reasons underlying any such alleged violations  
20 and whether it was by employee choice or some other reason. Thus, per Defendants, any trial on  
21 this issue would be unmanageable because of these individualized issues. [Crosner Decl., ¶ 20.]

22 As with meal breaks, Defendant argues its rest break policies complied with California law  
23 and authorized, permitted employees to take all required breaks, and that the Drivers affirmed they  
24 took their breaks. Defendant further contended that, in light of the fact that it is not required to  
25 maintain a record of rest periods, any evidence of failure to authorize rest periods and/or  
26 discouragement from taking rest periods would be purely anecdotal and individual issues would  
27 predominate on liability. Defendant also may contend that it is only liable if Plaintiff can prove, on  
28 a shift-by-shift basis, the aggrieved employees actually did not receive a fully compliant rest

1 break. This arguably would once again make a trial unmanageable since the number of instances  
2 an employee missed a rest break would have to be tested on a case by case basis to determine  
3 compliance. [Crosner Decl., ¶ 21.]

4 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement  
5 violations) and §§ 201-203 (waiting time penalties). The derivative wage statement claims (based  
6 on the unpaid wage and meal/rest claims). The waiting time penalties claim, also is entirely  
7 derivative and will rise or fall along with the primary claims, in addition to being subject to “good  
8 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163  
9 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor  
10 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to  
11 pay living wages). Accordingly, Plaintiff had to discount the value of this claim significantly in  
12 light of these multiple potential defenses. Defendant also contended a substantial discount should  
13 be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be  
14 unfair to penalize Defendants multiple times for the same violation. [Crosner Decl., ¶ 22.]

15 Finally, Defendants emphasized PAGA gives the Court wide latitude to reduce the amount  
16 of civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise  
17 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §  
18 2699(h). Several state and federal courts in California have applied significant reductions to  
19 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.  
20 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, \*8-9, for instance, the district court reduced the  
21 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks  
22 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5  
23 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and  
24 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after  
25 trial). [Crosner Decl., ¶ 23.]

26 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims,  
27 anyone of which, if successful, could have decimated Plaintiff’s case. And Defendant vowed to  
28 raise all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with this

1 litigation, and it could have taken years to realize any recovery in this action along with the  
2 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be  
3 unmanageable, Defendants also intended to raise additional defenses on damages, including the  
4 proper measure of civil penalties and the appropriate discount to place on any assessment of such  
5 penalties. [Crosner Decl., ¶ 24.]

6 Although Plaintiff's counsel believes they could have prevailed, there was no such  
7 guarantee. When the risks of overcoming a manageability defense and prevailing at trial on the  
8 merits are factored into the equation, the settlement value is reasonable and supported. Notably,  
9 the proposed settlement equates to around 7-8% of the estimated maximum theoretical liability, as  
10 discussed above. Of course, to recover those sums Plaintiff would have to shoot the moon and win  
11 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is  
12 unlikely. Given Defendant's procedural and merits defenses, as well as the substantial penalty  
13 reductions ordered in the cases above – which occurred after trial – the proposed settlement is  
14 eminently reasonable. [Crosner Decl., ¶ 25.]

15 Importantly, the mere fact that a settlement does not provide the same recovery as might be  
16 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and  
17 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed  
18 settlement is substantially narrower than it would be if the suits were to be successfully litigated,  
19 this is no bar to a class settlement because the public interest may indeed be served by a voluntary  
20 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven  
21 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that  
22 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of  
23 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane  
24 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is  
25 fundamentally fair . . . is different from the question whether the settlement is perfect in the  
26 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.  
27 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even  
28 though it represented 99% discount off the maximum value of the claims).

1 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,  
2 the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any  
3 penalty award all are accounted for, it is clear a settlement amount of \$565,000 for the PAGA  
4 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open  
5 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at \*27 (approving  
6 settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement  
7 agreement to the LWDA, and the LWDA has not objected to the settlement").

8 **V. SUBMISSION TO THE LWDA**

9 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and  
10 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 27; Exh. 3] Accordingly, the  
11 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of  
12 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA  
13 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL  
14 3669607, at \*3 (court inferred the LWDA's non-response as "tantamount to its consent to the  
15 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings v. Open Door  
16 Mktg. (N.D. Cal. Oct. 3, 2018) 2018 WL 4773057, at \*9 ("Plaintiffs submitted the settlement  
17 agreement to the LWDA, and the LWDA has not objected to the settlement."); Jordan, 2018 U.S.  
18 Dist. LEXIS at \*7 ("Additionally, the Court finds it persuasive that the LWDA was permitted to  
19 file a response to the proposed settlement and no comment or objection has been received.").

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

21 For their efforts and the contingent risk undertaken in obtaining a common fund settlement  
22 that benefits the LWDA and Aggrieved Employees, 33 1/3% of the GSA, or \$188,314.50, is  
23 allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs. These fees  
24 are warranted under the law and within the range of fees commonly awarded in similar cases.

1           A.     **PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S**  
2                   **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**  
3                   **ACTION**

4           PAGA provides a Plaintiff is entitled to recover reasonable attorney’s fees, expenses, and  
5 costs under Labor Code § 2699(g)(l): “Any employee who prevails in any action shall be entitled to  
6 an award of reasonable attorney’s fees and costs, . . . .” As discussed below, reasonable attorney’s  
7 fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one,  
8 where, as here, the litigation creates a common fund of money in a specific amount for the benefit  
9 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 Ca1.4th 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). As here, where a common fund is created in a *qui tam*  
21 action by the successful litigation of a plaintiff and his attorneys, the plaintiff’s attorneys are entitled  
22 to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66,  
23 89-91.

24           Through the successful efforts of Plaintiff and his attorneys here, a common fund was created  
25 in the amount of \$565,000 for the benefit of the Aggrieved Employees and the State. Thus, these  
26 beneficiaries should bear their share of the costs and attorney’s fees out of the overall \$565,000  
27 allocated to PAGA civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980)

1 444 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904  
2 F.2d 1301, 1311.

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

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

22 Awarding attorney's fees of 33 1/3% of gross common fund amount is favored by California  
23 courts when a fund established for the common benefit of others is involved, such as here.  
24 Accordingly, awarding fees on this basis out of the \$565,000 Net PAGA Settlement Amount, for a  
25 total of \$188,314.50, is reasonable and appropriate. [Crosner Decl., ¶¶ 28-46.]

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

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

13           Here, Crosner Legal’s lodestar is approximately \$93,370.00, and is summarized in the  
14 accompanying Crosner Declaration and Exhibit 4 thereto. This results in a modest lodestar  
15 multiplier of 2.02, which is justified, reasonable and appropriate. [Crosner Decl., ¶¶ 32-46; Exh. 4.]  
16 Indeed, California courts routinely approve multipliers in the in the 2-4 range to compensate  
17 for the time and contingent risk of these types of cases. Chavez v. Netflix, Inc. (2008) 162  
18 Cal.App.4th 43, 66 (affirming attorney’s fee award including an upward multiplier of 2.5);  
19 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th at 255 (“Multipliers can range from  
20 2 to 4 or even higher”); City of Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85  
21 (affirming a multiplier of 2.34).

22           It also is important to note this fact serves to highlight the reasonableness of the fees  
23 requested on a percentage-of-the-recovery basis, as it shows the requested fees are within striking  
24 distance of the market rate for the services rendered if those services are valued via traditional hourly  
25 billing, and that the reasonable enhancement requested adequately compensates counsel for the  
26 contingent risk assumed and the delay in payment, and constitutes a fair return on the contingency.

1           **C.     THE REQUESTED COSTS ARE FAIR AND REASONABLE**

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

12           While the Settlement Agreement authorizes litigation costs not to exceed \$10,000, Plaintiff's  
13 counsel's actual costs presently are \$7,623.42. [Crosner Decl., ¶¶ 47-48.] This includes filing fees,  
14 service of process, and mediation costs, while waiving legal research and photocopying charges.  
15 These costs are reasonable and uncontested, and should be approved.

16           **VII.   CONCLUSION**

17           For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under  
18 PAGA, approve the requested award of reasonable attorney's fees and costs, approve Simpluris,  
19 Inc. as the settlement administrator and approve its fees in the amount of \$3,500.00, approve the  
20 proposed distributions to the LWDA and Aggrieved Employees, and enter its Order dismissing  
21 Plaintiff's individual claims and the PAGA claims with prejudice and dismissing all class claims  
22 without prejudice.

23  
24 Dated: October 14, 2021

**CROSNER LEGAL, P.C.**

25  
26   
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28 Zachary Crosner  
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