

1 BLAKE JONES (SBN 211221)
blake@crosnerlegal.com
2 ZACHARY CROSNER (SBN 272295)
zach@crosnerlegal.com
3 MICHAEL CROSNER (SBN 41294)
mike@crosnerlegal.com
4 CROSNER LEGAL, P.C.
9440 Santa Monica Blvd., Suite 301
5 Beverly Hills, CA 90210
Tel. (310) 496-5818
6 Fac. (818) 700-9973

7 Attorneys for Plaintiff
JUAN CALDERON
8

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

12 JUAN CALDERON, on behalf of all others
similarly aggrieved,

13 Plaintiff,

14 vs.

15 PHYSICIANS FOR HEALTHY HOSPITALS,
INC., a Delaware corporation; PETER
16 BARONOFF, an individual; and DOES 1-50,
Inclusive,

17 Defendants.
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CASE NO. MCC2001482

Assigned for All Purposes to:
Hon. Harold Hopp
Dept. 10

SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR APPROVAL
OF SETTLEMENT UNDER PRIVATE
ATTORNEYS GENERAL ACT

Date: September 15, 2022
Time: 8:30 a.m.
Dept.: 10

1 Following the initial hearing on August 11, 2022, Plaintiff Juan Calderon submits the
2 following supplemental memorandum of points and authorities in support of his motion for
3 approval of the PAGA-only settlement.

4 **I. Evaluation and Approval of a Proposed PAGA Settlement**

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

11 Observing that “PAGA’s purpose” is to “protect the public interest”—especially the
12 allegedly aggrieved employees—the Court concluded that much the same principles that ensure
13 fairness in class action settlements serve the public interest in the PAGA context. Id. Essentially,
14 these factors are more or less identical to those California courts use to evaluate class action
15 settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly,
16 Plaintiff submits they should inform the Court’s analysis as well.

17 Further, the reviewing trial court is tasked with ensuring the State’s interest in enforcing
18 the law is upheld, Sakkab v. Luxottica Retail N. Am., Inc. (9th Cir. 2015) 803 F.3d 425, 435,
19 while remaining mindful that a settlement is not judged against what plaintiff might recover had
20 she prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be
21 fair and reasonable. Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012) (“[T]he question
22 whether a settlement is fundamentally fair . . . is different from the question whether the
23 settlement is perfect in the estimation of the reviewing court.”).

24 For the reasons below as well as those discussed in Plaintiff’s initial memorandum, the
25 proposed settlement is fair, reasonable and adequate, advances the purposes underlying PAGA,
26 and should be approved in its entirety.

27 **A. The LWDA Did Not Comment or Object to the Proposed Settlement**

28 In addition to submitting any proposed PAGA settlement for court review, a party seeking

1 approval must simultaneously submit the proposed settlement to the LWDA to allow it an
2 opportunity to comment on the settlement if it so desires. Labor Code § 2699(l)(2) ("The
3 proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the
4 court."). Importantly, when evaluating PAGA settlements many federal district courts look to the
5 LWDA's reaction to the settlement, since the State, by and through the LWDA, is the real party
6 in interest asserting the PAGA claims.

7 Consequently, multiple district courts have found it strongly persuasive of approval where
8 the LWDA declined to weigh in on a proposed settlement. Echavez v. Abercrombie & Fitch Co.
9 (C.D. Cal. March 23, 2017) 2017 U.S. Dist. LEXIS 141134, at *10 ("The Court infers LWDA's
10 non-response is tantamount to its consent to the proposed settlement terms, namely the proposed
11 PAGA penalty amount"); Jennings v. Open Door Mktg., LLC (N.D. Cal. Oct. 3, 2018) 2018 U.S.
12 Dist. LEXIS 171356, at *27 (approving PAGA settlement where "[p]laintiffs [have] submitted the
13 settlement agreement to the LWDA, and the LWDA has not objected to the settlement"); Jordan v
14 NCI Grp., Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at *7 ("Additionally, the
15 Court finds it persuasive that the LWDA was permitted to file a response to the proposed
16 settlement and no comment or objection has been received"); but see O'Connor v. Uber Techs.,
17 Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 (district court took into account LWDA's
18 comments questioning proposed settlement amounting to a 99.9% reduction from a potential
19 verdict).

20 Here, Plaintiff submitted the Settlement Agreement and the motion for approval to the
21 LWDA via its online portal on April 22, 2022, the same day she filed both documents with the
22 Court. [Declaration of Zachary M. Crosner, ¶ 25, Exh. 5, filed April 22, 2022.] He also provided
23 the LWDA with notice of the August 11, 2022 hearing through the online portal, is submitting
24 this supplemental brief and providing notice of the September 15, 2022 continued approval
25 hearing. [Supplemental Declaration of Zachary M. Crosner ("Suppl. Crosner Decl."); Exh. A.]
26 As of the filing of this supplemental brief, no comments or objection had been submitted to the
27 proposed settlement from the LWDA. Consistent with Echavez and the other authorities above,
28 this Court may and should take the LWDA's silence as tacit approval.

1 **B. The Proposed PAGA-Only Settlement is Fair, Reasonable and Adequate in**
2 **light of PAGA's Policies and Purposes**

3 Here, each applicable Kullar factor weighs in favor of approving the PAGA-only portion
4 of the settlement for the reasons set forth in detail in Plaintiff's initial motion. Plaintiff
5 respectfully submits the opening brief also addresses the issues required to be discussed per the
6 standard Riverside Superior Court case management order, which likewise are covered in more
7 detail below. Briefly, as to each Kullar factor:

8 a) **Strength of Plaintiff's Case:** Plaintiff detailed the nature of the alleged violations at
9 pages 6-7 of the initial Motion, and then addressed in detail, at pages 6-10 of the Motion, the
10 strength of his case vis-à-vis those alleged violations. As discussed, Defendant possesses a
11 number of viable defenses on the merits, there is the risk the Court might find a PAGA trial
12 unmanageable, and the Court retains substantial discretion to reduce any award of civil penalties
13 even if Plaintiff prevailed on one or more claims.

14 Further, as the Court no doubt is aware, since the Parties mediated and tentatively settled
15 this matter the United States Supreme Court issued its seminal decision in Viking River Cruises,
16 Inc. v. Moriana (2022) 142 S.Ct. 1906, and held that PAGA claims can be compelled to
17 arbitration. As discussed in the opening brief, plaintiff Calderon and the vast majority of
18 allegedly aggrieved employees signed arbitration agreements, and those agreements contain
19 PAGA waivers similar to the one found enforceable in Viking. [Suppl. Crosner Decl., ¶ 3.]
20 Accordingly, if this matter proceeds any further the Defendant most assuredly will seek to compel
21 arbitration of plaintiff Calderon's claims, which will significantly delay any recovery on behalf
22 the State and the aggrieved employees.¹ Plaintiff respectfully submits this factor alone justifies
23 settlement on the present terms.

24 b) **Risk, Expense, Complexity and Likely Duration of Further Litigation:** as
25 addressed at page 9 of Plaintiff's Motion, and in light of the likelihood of the matter being
26 compelled to arbitration under Viking, this factor weighs heavily in favor of approval. Even if

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¹ And may derail the case entirely depending the California Supreme Court's decision in Adolph v. Uber Techs., No.
28 S274671, which will decide what happens with the representative component of a PAGA claim when the named
plaintiff is compelled to arbitrate their individual claim.

1 Plaintiff were to prevail in arbitration and then is able to pursue the representative claims in court
2 (assuming a favorable decision in Adolph v Uber), further litigation undoubtedly will delay
3 resolution of this matter, and potential recovery by the State and aggrieved employees, for years
4 to come.

5 c) **Amount Offered in Settlement:** discussed at page 7 of Plaintiff's Motion in
6 Paragraphs 18-22 of the supporting Crosner Declaration, Plaintiff estimated Defendant's likely
7 maximum, theoretical exposure at approximately \$18 million in potential civil penalties As
8 explained further, Plaintiff discounted the potential PAGA penalties in consideration of multiple
9 risk factors, as touched at length in Plaintiff's Motion and below.

10 First, as to Plaintiff's unpaid wage claims for the alleged "rounding" or "time shaving"
11 policy, Defendant took the position that their time keeping policies are legally compliant, that
12 they accurately tracked all hours worked, and paid the allegedly aggrieved employees for all
13 hours worked consistent with those policies. Defendant further emphasized a time rounding
14 policy is not *per se* illegal under California law and accordingly it was acting in good faith and
15 within the confines of the law by instituting a rounding policy. Further it would be a difficult and
16 expensive "battle of the experts" to resolve this issue, as each side's experts would need to review
17 and analyze thousands of time punches to attempt to determine if overall the time punches were
18 more or less neutral or if they favored the employee at the expense of the employees. Defendant
19 also argued any trial of this issue on a representative basis would be unmanageable since it would
20 depend entirely on a myriad of individualized inquiries as to each employee regarding any
21 discrepancies in actual time worked versus what was reported and paid for, i.e., whether an
22 employee voluntarily punched in early, whether an employee was actually working if they
23 punched in early or late, and so on. Finally, in Plaintiff's counsel's experience, even where
24 rounding favors the employer over the employees, the typical amount of time lost is on the order
25 of 1-2 minutes per shift and in this case, might amount to a few hundred thousand dollars at most
26 for all employees. In other words, the actual damages likely are nominal. Thus, it is highly likely
27 the Court would impose a substantial reduction in any PAGA penalties awarded since imposing
28 \$4 million or more in potential penalties could be deemed confiscatory or otherwise improper

1 when the actual damages are at most a tenth of that amount. [Suppl. Crosner Decl., ¶ 4.]

2 On the unpaid overtime/regular rate issue, Defendant contended it properly calculated and
3 paid for all overtime hours worked, including correctly calculating employee regular and
4 overtime rates. While Plaintiff believes this is one of his stronger claims he also notes this is
5 probably his smallest claim given that the issue arises only in pay periods where an employee
6 both works overtime and receives some kind of non-hourly, non-discretionary pay, such as a
7 bonus or a shift differential, that must be included in the regular rate. As noted in Plaintiff's
8 damages analysis, this was a somewhat uncommon occurrence – at most about 25% of the pay
9 periods may have this issue – and consequently the total penalties aren't great even assuming a
10 violation occurred in each and every potential pay period. Beyond that, resolution of this
11 question again would necessitate extensive expert analysis of thousands of regular rate
12 calculations to determine if Defendant did it correctly in the first instance. Lastly, as with the
13 rounding claim, the typical damages on this claim usually are just a few dollars per pay period
14 (i.e., the OT rate may increase by a dollar or two per hour) so millions in civil penalties again
15 could be deemed confiscatory or otherwise improper when the actual damages are nowhere near
16 that large. [Suppl. Crosner Decl., ¶ 5.]

17 For the meal and rest break claims, Defendant offered multiple defenses. First, Defendant
18 emphasized that the written meal and rest break policy generally was compliant, that it authorized
19 and permitted all necessary breaks, and that alleged aggrieved employees received full
20 uninterrupted lunch periods as reflected in the time records. Defendant also argued that even to
21 the extent missed/non-compliant breaks occurred, it was in violation of company policy and
22 would require significant individual inquiries to determine the reasons underlying any such
23 alleged violations and whether it was by employee choice or some other reason. Thus, per
24 Defendant, any trial would be unmanageable because of these individualized issues. Further,
25 Defendant noted they paid at least some meal period premiums when missed breaks were
26 documented. Thus, Plaintiff's theory of liability was essentially "de facto" only and such claims
27 can prove difficult to establish on a representative basis. [Suppl. Crosner Decl., ¶ 6.]

28 As with meal breaks, Defendant argued the applicable rest break policies complied with

1 California law and that it authorized and permitted employees to take all required breaks.
2 Defendant further contended that, in light of the fact that recording rest periods is not required,
3 any evidence of failure to authorize rest periods and/or discouragement from taking rest periods
4 would be purely anecdotal and individual issues would predominate on liability. Thus, proving
5 liability on this claim likely would be even more problematic than the meal period claim, where
6 the time records suggested at least some violations occurred. Here, there are no such records.
7 [Suppl. Crosner Decl., ¶ 7.]

8 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
9 violations) and §§ 201-203 (waiting time penalties). These two claims are derivative of the
10 primary unpaid wage and meal/rest break claims, and will rise or fall along with the primary
11 claims, in addition to being subject to “good faith” and other defenses available to Defendant.
12 Accordingly, Plaintiff had to discount the value of these claims significantly in light of these
13 multiple potential defenses. Defendant also contended a substantial discount should be applied to
14 the civil penalties for these derivative (i.e., “stacked”) violations, as it would be unfair to penalize
15 Defendant multiple times for the same violation. [Suppl. Crosner Decl., ¶ 8.]

16 As discussed in Plaintiff’s opening brief, he and his counsel applied an 80% risk discount
17 to these claims, suggesting a possible result after trial might be around \$3.6 million. After
18 accounting for the Court’s discretion to reduce any such award based on, inter alia, (1) the
19 argument that the civil penalties are excessive in comparison to actual damages, (b) Defendant’s
20 “good faith” arguments regarding its wage and hour policies, and (c) the argument that “stacked”
21 penalties should not be imposed, Plaintiff respectfully submits a further 80% discount is justified
22 on both these facts and the law, as many courts have imposed substantially similar discounts even
23 after trial. *E.g., Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 U.S. Dist. LEXIS
24 154590, at *4, 8-9 (court awarded \$500,000 out of a \$2.8 million maximum, or 17.85%, in civil
25 penalties under PAGA); *Aguirre v. Genesis Logistics* (C.D. Cal. Nov. 5, 2012) 2012 U.S. Dist.
26 LEXIS 189820, at *4-7 (district court awarded \$500,000 in civil penalties under PAGA, out of a
27 \$1.8 million maximum penalty, or 27.78%). Thus, the proposed recovery of \$750,000 in civil
28 penalties, which amount to approximately 21% of the potential recovery after trial, is more or less

1 in line with Plaintiff's assessments of both risk and the high likelihood that the Court would
2 significantly reduce any penalty award under Labor Code section 2699I(e)(2). [Suppl. Crosner
3 Decl., ¶ 9.]

4 At bottom, settlement of the PAGA claims on the proposed terms, without further lengthy
5 and costly litigation, avoids the substantial risks posed by Viking and provides meaningful relief.
6 Even on a risk discounted basis the settlement amount plainly furthers the policies and
7 purposes underlying PAGA. Defendant will pay substantial civil penalties of \$750,000 to
8 resolve the PAGA claims, and the "primary purpose of PAGA, i.e., the empowerment of
9 aggrieved employees to act as private attorneys general to collect civil penalties from their
10 employers for Labor Code violations, is served by the proposed PAGA penalty in the parties'
11 settlement agreement." Jordan, 2018 U.S. Dist. LEXIS 25297, at *7-8 ("The proposed settlement
12 imposes a substantial penalty payment of \$150,000, paid in exchange for a release of only those
13 claims pled in the notice to the LWDA and the Complaint. This penalty has a substantial deterrent
14 effect . . . [and] encourages compliance with the specific requirements of the Labor Code, which
15 has the effect of protecting workers from unlawful employment practices and working
16 conditions").

17 Similarly here, Plaintiff respectfully submits the proposed \$750,000 civil penalty
18 advances the purposes underlying PAGA and is appropriately punitive to deter Defendant and to
19 protect employees from any future Labor Code violations by encouraging Defendant to comply
20 fulling with the relevant Labor Code provisions.

21 d) **Extent of Discovery:** as discussed in Plaintiff's motion at pages 3-4, through formal
22 and informal discovery, Plaintiff obtained the relevant policies and procedures regarding
23 Defendant's payroll, timekeeping, and meal and rest break policies, number of potentially
24 aggrieved employees, as well as a representative sampling of payroll and time records. With the
25 help of a consulting expert, Plaintiff and his counsel developed estimates as to work weeks/pay
26 periods, number of shifts, estimated violation rates on all theories of liability.

27 e) **Experience and Views of Counsel:** addressed at pages 9-10 of Plaintiff's Motion and
28 in Paragraphs 26-44 of the Crosner Declaration, Plaintiff's counsel has extensive experience in

1 wage and hour class and PAGA actions, and are qualified to evaluate the propriety of the
2 proposed PAGA settlement. Based on this combined experience, and after factoring in the risks
3 articulated above, Plaintiff's counsel are confident the proposed settlement accords with the
4 prevailing sense of "fair, adequate, and reasonable" in the PAGA context, and that it furthers the
5 purposes underlying the PAGA statutes.

6 **C. Reason for Two Installment Payments**

7 In order to resolve this matter on a representative basis, the company represented it needed
8 to make two payments due to cash flow issues and ongoing financial hardship the company
9 suffered since the pandemic. Plaintiff understands the company continues to struggle financially
10 in 2022 and the payment plan will allow the company to continue making payroll and paying
11 other obligations on a timely basis and without interruptions, including payroll to many of the
12 employees who are part of the proposed settlement. [Suppl. Crosner Decl., ¶ 10.]

13 With respect to the timing of the payments, although the Court initially observed the
14 Parties agreement delays final payment by "a year," that is not entirely accurate. Based on the
15 terms of the Settlement Agreement the earliest the first installment could be due is November 14,
16 2022 (assuming approval is granted at the September 15, 2022 hearing). The second installment
17 payment then will be due June 1, 2023 regardless, which is only 6.5 months after the first
18 installment and approximately 8.5 months from the September 15, 2022 continued hearing.
19 [Suppl. Crosner Decl., ¶ 11.]

20 Given the agreement for two payments allowed Plaintiff to secure a larger overall
21 settlement, Plaintiff respectfully submits the modest delay for full payment is reasonable.

22 **II. Plaintiff's Counsel's Fees**

23 As touched on briefly at the August 11, 2022 hearing, Plaintiff's counsel provided a
24 significant amount of information in support of its attorney's fee request. In particular, at
25 Paragraph 42 of the Crosner Declaration, the declaration summarizes the lodestar analysis and
26 indicates Counsel's lodestar was \$236,915.00, based on 288.6 attorney hours spent litigating the
27 case, exclusive of time for attending the hearing on the approval motion and time to be incurred
28 thereafter to implement and administer the settlement, as well as time for preparing this

1 supplemental submission and attending continued hearing. The analysis and information
2 justifying the lodestar calculation can be found in Paragraphs 26-44 of the Crosner Declaration,
3 while a summary of tasks performed and hours expended is attached as Exhibit 6 to the Crosner
4 Declaration.

5 The requested fees will be paid from the Gross Settlement Amount, and will be paid on a
6 pro rata basis from each of the two installment payments, as set forth in Section 27.g., at Page 4,
7 of the Settlement Agreement. Plaintiff Calderon has been informed of all details related to the
8 proposed attorney's fee award and payment of same. [Supp. Crosner Decl., ¶ 12.]

9 **III. Settlement Administration**

10 Filed concurrently herewith is the Declaration of Jonathan Paul, President of Sales and
11 Marketing for the proposed administrator, ILYM Group, Inc., attesting the ILYM's qualifications
12 and experience to act as the administrator in this matter, and explaining its fee structure.

13 Plaintiff sought three bids for administration of the settlement. While ILYM did not have
14 the lowest bid, the Parties agreed to propose ILYM because its bid was reasonable in comparison
15 and, importantly, based on past experience ILYM has demonstrated it is extremely diligent and
16 efficient in its services. Although it occurred after Plaintiff solicited the bids, his counsel has
17 become aware that other Riverside County Superior Court judges have expressed concerns over
18 the abilities of the two other firms from whom bids were obtained, and either declined to approve
19 those firms or reduced the final amount of fees approved for their services. [Suppl. Crosner
20 Decl., ¶ 11.]

21 Plaintiff respectfully submits that, based on the foregoing, ILYM is an appropriate
22 selection as its bid is reasonable in amount and it provides superior service.

23 **IV. Conclusion**

24 For the foregoing reasons, as well as those set forth in the opening brief, Plaintiff submits
25 the proposed settlement is "fair, reasonable, and adequate" and furthers the purposes underlying
26 PAGA. He therefore requests the Court approve the proposed settlement under PAGA, approve
27 the requested award of reasonable attorney's fees and costs, approve ILYM Group, Inc. as the
28 settlement administrator and approve its fees in the amount of \$20,000, approve Plaintiff's

1 enhancement award in the amount of \$5,000, approve the proposed distributions to the LWDA
2 and alleged aggrieved employees, and enter its Order of final approval and judgment thereon.

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4 Dated: September 7, 2022

CROSNER LEGAL, P.C.

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7 Zachary Crosner
8 Attorneys for Plaintiff JUAN CALDERON
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