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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

AGUSTIN MERINO,
on behalf of himself and all others similarly
aggrieved,

Plaintiff,

v.

STERLING MOTORS, LTD dba STERLING
BMW OF NEWPORT BEACH, a California
Corporation; WAYNE MORRIS MINOR, an
individual, and DOES 1-100, inclusive,

Defendants.

Case No. 30-2020-01175391-CU-OE-CX

Assigned for All Purposes to:
Hon. Randol Sherman
Dept. CX-105

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

[Filed concurrently with Notice of Motion
and Motion; Declarations of Zachary M.
Crosner, Eric Springer and Agustin Merino;
[Proposed] Order]

Date: September 16, 2022
Time: 10:00 a.m.
Dept.: CX-105
Reservation Number: 73832552

Complaint filed: December 18, 2020

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1 **I. INTRODUCTION**

2 Plaintiff Agustin Merino hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Sterling Motors, Ltd.
4 dba Sterling BMW of Newport Beach and Wayne Morris Minor (together “Sterling” or
5 “Defendant”). Consistent with PAGA, the proposed settlement releases claims under PAGA only
6 and has no impact on the individual claims of any aggrieved employee other than Plaintiff Merino.
7 Since the settlement resolves nothing more than claims under PAGA, it requires only a one-step
8 review and approval process by the Court, and for the reasons discussed below, Plaintiff requests
9 that the Court approve the settlement in its entirety.

10 **II. BACKGROUND**

11 Defendant Sterling owns and operates the Sterling BMW dealership in Newport Beach,
12 California. Plaintiff Agustin Merino was employed by Sterling as a non-exempt car washer from
13 around January 2016 through March 20, 2020, when he was terminated. Plaintiff was paid an hourly
14 wage as well as with non-discretionary bonuses. [Declaration of Zachary M. Crosner (“Crosner
15 Decl.”), ¶ 4.]

16 During his employment, Plaintiff was routinely denied the opportunity to take all required
17 rest and meal periods on a fully compliant basis. First, he alleges Sterling placed numerous
18 restrictions on how employees spent their meal/rest periods, including prohibiting napping while on
19 break, prohibiting employees from leaving the premises during rest breaks, and counting bathroom
20 breaks as “break time.” In other words, under this policy, Defendant impermissibly imposes its
21 control over how employees spend their meal and rest break time. Plaintiff also alleges Sterling
22 failed to authorize and provide full rest breaks that lasted a “net” ten minutes. Beyond that, Plaintiff
23 further alleges review of Sterling’s time and payroll records suggest numerous “de facto” violations
24 for missed, late and/or short meal breaks. [Crosner Decl., ¶ 5.]

25 Plaintiff also alleges he and other allegedly aggrieved employees received non-discretionary
26 bonuses, commissions, spiffs, and other non-hourly compensation, which was not incorporated into
27 the regular rate for purposes of calculating overtime, meal/rest break premiums, or sick pay. Failure
28 to include such payments in the regular rate of pay calculation led to an underpayment of overtime

1 and other wages to employees. As to commissioned employees, Plaintiff also alleges Defendant
2 failed to pay all required “Rest & Recovery Hrs” because it only paid for such time once per month,
3 and also paid such wages at the incorrect “regular rate.” Finally, Plaintiff alleged derivative claims
4 for inaccurate wage statements and failure to pay wages due on separation of employment.
5 [Crosner Decl., ¶ 6.]

6 Based on these allegations, and after appropriate notice to the Labor & Workforce
7 Development Agency (“LWDA”),¹ Plaintiff filed his PAGA-only complaint on December 18, 2020,
8 2020, seeking civil penalties for the following alleged wage and hour violations: (a) failure to pay
9 wages, including overtime wages; (b) failure to provide meal and rest periods, on compensation in
10 lieu; (c) failure to provide complete and accurate wage statements; and (d) waiting time penalties.
11 Plaintiff filed the matter on behalf of aggrieved employees defined to include all non-exempt
12 employees of Sterling during the relevant PAGA time frame (October 14, 2019 to May 27, 2022).
13 [Crosner Decl., ¶ 7.]

14 Sterling has at all times denied Plaintiff’s allegations and maintained it properly calculated
15 and paid all wages due, that its meal and rest break and payroll policies and procedures comply with
16 California law, that it provided the class members with required meal and rest breaks, and that its
17 wage statements accurately reflect all information required by the Labor Code. Additionally,
18 Sterling strongly contends the case cannot be maintained as a representative action as, to the extent
19 aggrieved employees missed meal and/or rest breaks, it was intermittent and infrequent and evidence
20 of such missed breaks would be purely anecdotal, and therefore individualized issues predominate,
21 which would render a trial under PAGA unmanageable. [Crosner Decl., ¶ 8.]

22 After Plaintiff filed his complaint, upon discussing the merits of the case and engaging in
23 several meet and confer sessions regarding prospective law and motion and discovery issues, the
24 Parties agreed to an early mediation. The Parties further agreed to a protocol for exchanging
25 additional documents and information before the mediation. Through this formal and informal
26 discovery, Defendant provided Plaintiff with information including, inter alia, the number of
27 potential aggrieved employees, the number of aggregate pay periods, a sampling of pay stubs and
28

¹ A copy of Plaintiff’s PAGA notice letter is attached to the Crosner Declaration as Exhibit 2.

1 time records for approximately 20% of the allegedly aggrieved employees, employee handbooks
2 and manuals, and relevant policy documents on Defendant's time keeping and reporting policies,
3 etc. Plaintiff had that information reviewed by Berger Consulting Group to assist with evaluating
4 potential violation rates, potential damages, etc. [Crosner Decl., ¶ 9; Exh. 3.]

5 The parties then attended a full day mediation before highly-regarded mediator Lisa
6 Klerman, Esq., who has extensive experience mediating wage and hour class and PAGA actions.
7 Before and during the mediation, Plaintiff and his counsel analyzed, researched, and investigated
8 the potential issues, including matters related to the calculation of damages, trial, and appellate
9 issues and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability
10 to proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims
11 and Defendant's defenses, and the parties' data analyses and conclusions based on data provided by
12 Defendant. After a contentious full day of negotiations, the Parties were able to reach agreement on
13 all major issues. [Crosner Decl., ¶ 10.] A fully executed, true and correct copy of the Parties' Joint
14 Stipulation and Settlement Agreement ("Settlement Agreement") is attached to the Crosner
15 Declaration as Exhibit 1.

16 **III. SUMMARY OF SETTLEMENT TERMS**

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

18 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$300,000
19 (the "Gross Settlement Amount" or "GSA"), inclusive of payments to the LWDA and Settlement
20 Group Members, costs of settlement administration, a service award to Plaintiff Merino, and
21 reasonable attorney's fees and costs.² After payment of settlement administration costs, Plaintiff's
22 service award, and reasonable attorney's fees and costs from the GSA, Plaintiff presently estimates
23 about \$170,239.17 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about
24 \$127,679.37) will go to the LWDA as the "LWDA Payment," and the remaining 25% (about
25 \$42,559.80) will be distributed to the Settlement Group Members as the "Payout Fund" in
26 proportion to the total number of eligible pay periods each individual worked during the PAGA

27 ² As discussed below, Plaintiff's Counsel seeks a fee equal to one-third (\$100,000.00) of the GSA, and reimbursement
28 of actual litigation costs of \$14,760.83, while Plaintiff requests a service award of \$10,000.00

1 Period. The average award currently is estimated at about \$202, while awards will range from a
2 low of around seven dollars to a high of about \$317. [Crosner Decl., ¶ 11.]

3 **B. Payment and Notice**

4 The Parties propose using Simpluris, Inc. as the Settlement Administrator. Simpluris has
5 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$5,000.00.
6 Within 14 calendar days of the Settlement’s Active Date, Sterling will fund the settlement and then
7 Simpluris will mail a Notice and settlement check to all Settlement Group Members via regular
8 First-Class U.S. Mail, using the most current, known mailing addresses identified in Sterling’s
9 records. Simpluris will perform a “skip trace” or other search for notices returned as undeliverable.
10 Settlement Group Members need not submit claim forms and will automatically receive a Notice
11 and settlement check. Settlement checks will be negotiable for 180 days (with a reminder
12 postcard mailed after 90 days), after which time any unclaimed residual funds will be forwarded
13 to the California State Controller’s Unclaimed Property Fund. [Crosner Decl., ¶ 12; Declaration of
14 Eric Springer, ¶¶ 2-10; Exhs. A-C.]

15 **C. The Release**

16 The California Supreme Court has explained that a judgment in “a representative action
17 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
18 is binding not only on the named employee plaintiff but also on government agencies and any
19 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
20 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
21 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
22 to be “binding not only on the named employee plaintiff but also on government agencies and any
23 aggrieved employee not a party to the proceeding.” While Plaintiff is entering into a general release
24 any and all claims against Defendant, the Settlement Agreement protects the rights of the Settlement
25 Group Members to bring their own individual claims should they wish. For these reasons, the Parties
26 contend the release narrowly applies only to the PAGA claims alleged or that could have been
27 alleged, based on the facts alleged in the operative complaint. [Crosner Decl., ¶ 13.]

28 /////

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

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

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

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

22 Plaintiff alleges claims for unpaid wages, meal and rest break violations, and derivative wage
23 statement and waiting time penalty claims. First, Plaintiff contends that while he and other allegedly
24 aggrieved employees received non-discretionary bonuses, commissions, spiffs, and other non-
25 hourly compensation, Sterling failed to incorporate those wages into the “regular rate of pay” as
26 required under Californi law and Ferra v. Loews Hollywood Hotel, LLC (2021) 11 Cal. 5th 858 (2021).
27 As a result, per Plaintiff, Sterling underpaid overtime hours, meal premiums and, for commissioned
28 employees, pay for non-commission producing time. As to commissioned employees, Plaintiff also

1 alleges Defendant failed to pay all required “Rest & Recovery Hrs” because it only paid for such
2 time once per month. [Crosner Decl., ¶ 14.]

3 On the meal period issue, Plaintiff contends Sterling maintained an improper policy that
4 improperly restricted how employees could spend their meal break time, and further that Sterling
5 committed numerous de fact violations, primarily for late and short meal breaks and completely
6 failed to provide second meal periods on shifts over 10 hours. Similarly, for rest beaks, Plaintiff
7 contends he and other employees could not leave the premises per Augustus v. ABM Security
8 Services, Inc. (2016) 2 Cal. 5th 257, 272-273, and therefore the breaks were not fully compliant.
9 Plaintiff also argued Sterling’s written break policy did not provide for “net” 10 minute breaks.
10 [Crosner Decl., ¶ 15.]

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

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

15 For mediation, Sterling indicated it employed approximately 210 non-exempt employees in
16 California during the relevant PAGA period of October 14, 2019 to May 27, 2022 (with
17 approximately 118 former employees and 31 commissioned employees), and these individuals
18 worked approximately 5,768 pay periods. Based on the data and information provided by Defendant,
19 and with his expert’s assistance and analysis, Plaintiff estimated Defendant’s maximum PAGA
20 exposure at approximately \$1,802,000. This estimate includes approximately approximately
21 \$833,700 in civil penalties for the meal and rest period claims, approximately \$576,800 in civil
22 penalties on the inaccurate wage statement claim, approximately \$371,000 in civil penalties on the
23 unpaid wage claims, and approximately \$11,800 on the unpaid final wages claim.. [Crosner Decl.,
24 ¶ 17-18.]

25 **C. The Settlement Meets The Kullar Factors**

26 In response to Plaintiff’s claims for unpaid wages, Sterling argued in properly calculated
27 and fully paid all wages due, including overtime and break premiums. It also contended that in
28 fully compensated all commissioned employees for non-productive time consistent with cases

1 such as Vaquero v. Stoneledge Furniture, LLC (2017) 9 Cal.App.5th 98. Further, even to the extent
2 Ferra “changed” the law, Sterling noted at best minimal penalties should be awarded. [Crosner
3 Decl., ¶ 19.]

4 For the meal break claims, Defendant offered multiple defenses. First, it emphasized its
5 written meal and rest break policy generally was compliant, that it authorized and permitted all
6 necessary breaks, that employees received full uninterrupted lunch periods, and that it placed no
7 restrictions on how employees spent their breaks. While Plaintiff’s review of the time records
8 suggested a substantial violation rate for late and short meal breaks, Defendant countered that even
9 to the extent this occurred, it was in violation of company policy and would require significant
10 individual inquiries to determine the reasons underlying any such alleged violations and whether it
11 was by employee choice or some other reason. Thus, per Defendant, any trial would be
12 unmanageable as held in recently held in Wesson v. Staples The Office Superstore LLC (2021) 68
13 Cal.App.5th 746, because of these individualized issues. Latly, Defendant emphasized it paid
14 hundreds of meal period premiums during the PAGA period. [Crosner Decl., ¶ 20.]

15 As with meal breaks, Defendant argues its rest break policies complied with California law
16 and authorized and permitted employees to take all required breaks on a compliant basis and
17 without restriction. Defendant further contended that, in light of the fact that it is not required to
18 maintain a record of rest periods, any evidence of failure to authorize rest periods and/or
19 discouragement from taking rest periods would be purely anecdotal and individual issues would
20 predominate on liability. Defendant also may contend that it is only liable if Plaintiff can prove, on
21 a shift-by-shift basis, the aggrieved employees actually did not receive a fully compliant rest
22 break. This arguably would once again make a trial unmanageable since the number of instances
23 an employee missed a rest break would have to be tested on a case by case basis to determine
24 compliance. [Crosner Decl., ¶ 21.]

25 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
26 violations) and §§ 201-203 (waiting time penalties). The derivative wage statement claims and the
27 waiting time penalties claim are based on the primary unpaid wage and meal/rest break claims,
28 and will rise or fall along with the primary claims, in addition to being subject to “good faith” and

1 other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
2 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even
3 though the class prevailed on the merits on the underlying claim for failing to pay living wages).
4 Accordingly, Plaintiff had to discount the value of these claims significantly in light of these
5 multiple potential defenses. Defendant also contended a substantial discount should be applied to
6 the civil penalties for these derivative (i.e., “stacked”) violations, as it would be unfair to penalize
7 Defendant multiple times for the same violation. [Crosner Decl., ¶ 22.]

8 Finally, Defendants emphasized PAGA gives the Court wide latitude to reduce the amount
9 of civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
10 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
11 2699(e)(2). This is particularly true here where, for instance, the break claims essentially are
12 premised on “de facto” violations and that could prove difficult to establish on a representative
13 basis. [Crosner Decl., ¶ 23.] Further, several state and federal courts in California have applied
14 significant reductions to PAGA civil penalties even after plaintiff prevailed on the merits. In
15 Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the
16 district court reduced the potential penalties by over 82% after a bench trial. More recently, in
17 Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court
18 awarded penalties of just \$5 per pay period, a 90% reduction, which decision was upheld on
19 appeal. See also In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist.
20 Lexis 48557 (PAGA penalties denied after trial). [Crosner Decl., ¶ 24.]

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

1 Although Plaintiff and his counsel believe they could have prevailed, there was no such
2 guarantee. When the risks of overcoming a manageability defense and prevailing at trial on the
3 merits are factored into the equation, the settlement value is reasonable and supported. Notably,
4 the proposed settlement equates to around 16-17% percent of the estimated maximum theoretical
5 liability, as discussed above. Of course, to recover those sums Plaintiff would have to shoot the
6 moon and win both liability and maximum penalties on all claims, which outcome, for the reasons
7 discussed, is unlikely. Given Defendant's procedural and merits defenses, as well as the
8 substantial penalty reductions ordered in the cases above – which occurred after trial – the
9 proposed settlement is eminently reasonable. [Crosner Decl., ¶ 25.]

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

24 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
25 the difficulty of overcoming a manageability argument, the probability of appeal of a favorable
26 judgment, and the Court's substantial discretion to reduce any penalty award all are accounted for,
27 it is clear a settlement amount of \$425,000 for the PAGA claims is within the ballpark of
28 reasonableness, and approval is appropriate. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3,

1 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving settlement with PAGA penalties of 0.6%
2 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
3 not objected to the settlement").

4 **V. SUBMISSION TO THE LWDA**

5 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
6 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 26; Exh. 4.] Accordingly, the
7 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
8 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
9 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
10 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the
11 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL
12 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
13 not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court
14 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
15 no comment or objection has been received.").

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

17 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
18 that benefits the LWDA and Aggrieved Employees, one-third of the gross settlement, or \$100,000,
19 is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs. These
20 fees are warranted under the law and within the range of fees commonly awarded in similar cases.

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

23 PAGA provides a Plaintiff is entitled to recover reasonable attorney's fees, expenses, and
24 costs under Labor Code § 2699(g)(l): "Any employee who prevails in any action shall be entitled to
25 an award of reasonable attorney's fees and costs," Reasonable attorney's fees and costs are
26 typically awarded under the common fund doctrine in a *qui tam* such as this one, where, as here, the
27 litigation creates a common fund of money in a specific amount for the benefit of others.
28

1 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
2 private attorney general to recover damages or penalties, all or part of which will be paid to the
3 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
4 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
5 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to
6 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
7 only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th
8 73; Iskanian, 59 Cal.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*
9 action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
10 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
11 aggrieved employees). Lab. Code § 2699(i). Where a common fund is created in a *qui tam* action
12 by the successful litigation of a plaintiff, the plaintiff’s attorneys are entitled to recover their fees
13 from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

14 Through the successful efforts of Plaintiff and her attorneys here, a common fund was
15 created in the amount of \$300,000 for the benefit of the Aggrieved Employees and the State. Thus,
16 these beneficiaries should bear their share of the costs and attorney’s fees out of the overall recovery
17 under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6)
18 Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

19 Not long ago, the California Supreme Court upheld the use of the common fund theory of
20 recovery for attorney’s fees in Laffitte v. Robert Half Int’l Inc. (2016) 1 Cal.5th 480, 506. There,
21 the Court upheld an award of attorney’s fees of one-third of the \$19 million gross settlement (e.g.,
22 awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent
23 with prior decisions recognizing “when a number of persons are entitled in common to a specific
24 fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation
25 of that fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” Serrano v. Priest
26 (1977) 20 Cal.3d 25, 34; Boeing, 444 U.S. at 478 (“[A] lawyer who recovers a common fund ... is
27 entitled to reasonable attorneys’ fees from the fund as a whole”; Lealao v. Beneficial California, Inc.
28

1 (2000) 82 Cal.App.4th 19, 26 (“[f]ee spreading occurs when a settlement or adjudication results in
2 the establishment of a separate or so-called common fund for the benefit of the class”).

3 Accordingly, the common fund doctrine allows a court to award attorney’s fees based on a
4 percentage of the total fund created when the fund consists of a “certain or easily calculable sum of
5 money,” and California law has long applied the percentage of the recovery method for awarding
6 attorney’s fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
7 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
8 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney’s
9 fee based on percentage of recovery).

10 Awarding attorney’s fees of one-third of gross common fund amount is favored by California
11 courts when a fund established for the common benefit of others is involved, such as here.
12 Accordingly, awarding fees on this basis out of the \$300,000 GSA, for a total of \$100,000, is
13 reasonable and appropriate. [Crosner Decl., ¶¶ 27-46.]

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

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

25 Here, Crosner Legal’s lodestar is approximately \$153,940.00, based on 199.45 attorney
26 hours spent litigating the case. [Crosner Decl., ¶¶ 27-46; Exh. 5.] This results in a base lodestar
27 multiplier that is actually larger than the fee requested on a percentage of the recovery basis, and
28 accordingly there is no request for a lodestar modifier. This fact serves to highlight the

1 reasonableness of the fees requested on a percentage-of-the-recovery basis, as it shows the requested
2 fees are considerably less than the market rate for the services rendered if those services are valued
3 via traditional hourly billing.

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

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

15 While the Settlement Agreement authorizes litigation costs not to exceed \$20,000, Plaintiff's
16 Counsel's actual costs presently are \$14,760..83. [Crosner Decl., ¶¶ 47-48; Exh. 6.] This includes
17 filing fees, service of process, mediation costs, postage, and expert consultant fees, while waiving
18 photocopying costs and legal research charges. These costs are reasonable and uncontested, and
19 should be approved.

20 **VIII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
21 **REASONABLE**

22 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$10,000. This
23 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
24 Plaintiff's efforts in this case and the risks he undertook on behalf of the Settlement Group.
25 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
26 settlement possible for the Settlement Group and the LWDA, while shouldering the risk of being
27 liable for Defendant's litigation costs if he were unsuccessful. Plaintiff also exposed himself to
28 unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google

1 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
2 prospective employers. Among taking many other actions assisting in the successful litigation of
3 this case, Plaintiff provided substantial factual information to Plaintiff's Counsel, participated in
4 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
5 and informed on the case's progress. The incentive payment to Plaintiff is appropriate and justified
6 as part of the Settlement. [Crosner Decl., ¶ 49; Declaration of Agustin Merino, ¶¶ 2-10.]

7 The service payment provided to Plaintiff as the class representative is typical in class
8 action cases and the amount requested, \$10,000, is reasonable and in line with amounts awarded in
9 other cases. Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class
10 representatives service and incentive payments ranging from \$2,000 to \$25,000). Accordingly, it
11 is respectfully requested that the Court approve the service payment as provided for in the
12 Settlement Agreement.

13 **VII. CONCLUSION**

14 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
15 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
16 service award to Plaintiff in the amount of \$10,000, approve Simpluris, Inc. as the settlement
17 administrator and approve its fees in the amount of \$15,000, approve the proposed distributions to
18 the LWDA and Aggrieved Employees, and enter its Order of final approval and judgment thereon.

19
20 Dated: August 24, 2022

CROSNER LEGAL, PC

21
22 By: _____



23 Michael Crosner, Esq.
24 Zach Crosner, Esq.
25 Attorneys for Plaintiff
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