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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

CAMILLE CUEVAS MARTINEZ, on behalf of
herself and others similarly situated and
aggrieved;

Plaintiff,

v.

C&R RESTAURANT GROUP, LLC DBA
TACO BELL, a California Corporation; and
DOES 1 TO 50, inclusive,

Defendants.

CASE NO. 30-2020-01156478-CU-OE-CXC

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

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

[Filed Concurrently with Memorandum of
Points and Authorities; Declarations of
Zachary M. Crosner and Camille Cuevas
Martinez; [Proposed] Order]

Date: January 21, 2022
Time: 10:00 a.m.
Dept. CX-105

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1 **I. INTRODUCTION**

2 Plaintiff Camille Cuevas Martinez hereby seeks Court approval of a proposed settlement of
3 claims brought under the Private Attorneys General Act (“PAGA”) against defendant C&R
4 Restaurant Group, L.P. (“C&R”). Consistent with PAGA, the proposed settlement releases claims
5 under PAGA only and has no impact on the individual claims of any aggrieved employee other than
6 Plaintiff Cuevas Martinez. Since the settlement resolves nothing more than claims under PAGA, it
7 requires only a one-step review and approval process by the Court, and for the reasons discussed
8 below, Plaintiff now seeks the Court’s approval of the Settlement.

9 **II. BACKGROUND**

10 Defendant C&R owns and operates over forty Taco Bell restaurants in California. Plaintiff
11 Camille Cuevas Martinez was employed by C&R at its La Mirada and La Habra locations for
12 approximately one year, from July 2018-June 2019, initially as a line cook and then she was
13 promoted to a non-exempt Manager/Team Lead position. [Declaration of Zachary M. Crosner
14 (“Crosner Decl.”), ¶ 4.]

15 During her employment, Plaintiff was routinely denied the opportunity to take rest and meal
16 periods. Plaintiff was constantly interrupted during her breaks and asked to perform work while off
17 the clock. Plaintiff was also prohibited from leaving the restaurant for her meal and rest periods
18 when she was the only Team Lead or manager on duty, which occurred approximately three to four
19 time per week. Plaintiff was required to be available during her rest and meal periods to address
20 any issues that would arise during this time. Plaintiff was required to clock in and out each day using
21 a POS system, and contends managers frequently edited her time cards to avoid paying her meal
22 period premiums and overtime. Plaintiff’s inability to verify that she was being paid for all hours
23 that she worked was further hampered by Defendant’s issuance of facially inaccurate wage
24 statements. In particular, the wage statements (1) overstate the regular hours by including overtime
25 hours therein, and (2) list the overtime hours twice under Regular hours and Overtime Premium,
26 resulting in an overstatement of the total hours worked when added together. [Crosner Decl., ¶ 5.]

1 Based on these allegations, and after appropriate notice to the Labor & Workforce
2 Development Agency (“LWDA”),¹ Plaintiff filed her PAGA-only complaint on August 21, 2020,
3 seeking civil penalties for the following alleged wage and hour violations: (a) failure to pay wages,
4 including overtime wages; (b) failure to provide meal and rest periods; (c) failure to provide
5 complete and accurate wage statements; and (d) waiting time penalties. Plaintiff filed the matter on
6 behalf of aggrieved employees defined to include all non-exempt employees of C&R during the
7 relevant PAGA time frame (June 15, 2019 to November 9, 2021). [Crosner Decl., ¶ 6.]

8 C&R has at all times denied Plaintiff’s allegations and maintained it properly calculated and
9 paid all wages due, that its meal and rest break and payroll policies and procedures comply with
10 California law, that it provided the class members with required meal and rest breaks, and that its
11 wage statements accurately reflect all information required by the Labor Code. Additionally, C&R
12 strongly contends the case cannot be maintained as a representative action as, to the extent aggrieved
13 employees missed meal and/or rest breaks, it was intermittent and infrequent and evidence of such
14 missed breaks would be purely anecdotal, and therefore individualized issues predominate, which
15 would render a trial under PAGA unmanageable. [Crosner Decl., ¶ 7.]

16 After Plaintiff filed her complaint, upon discussing the merits of the case and engaging in
17 several meet and confer sessions regarding prospective law and motion and discovery issues, the
18 Parties agreed to an early mediation. The Parties further agreed to a protocol for exchanging
19 additional documents and information before the mediation. Through this formal and informal
20 discovery, Defendant provided Plaintiff with information including, inter alia, the number of
21 potential aggrieved employees, the number of aggregate pay periods, a 10% sampling of pay stubs
22 and time records, employee handbooks and manuals, and relevant policy documents on Defendant’s
23 time keeping and reporting policies, etc. Plaintiff had that information reviewed by Berger
24 Consulting Group to assist with evaluating potential violation rates, potential damages, etc. [Crosner
25 Decl., ¶ 8; Exh. 3.]

26 The parties then attended a full day mediation before highly-regarded mediator Jeffrey
27 Krivis, Esq., who has extensive experience mediating wage and hour class and PAGA actions.

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

1 Before and during the mediation, Plaintiff and her counsel analyzed, researched, and investigated
2 the potential issues, including matters related to the calculation of damages, trial, and appellate
3 issues and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability
4 to proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims
5 and Defendant's defenses, and the parties' data analyses and conclusions based on data provided by
6 Defendant. After a contentious full day of negotiations, the Parties were able to reach agreement on
7 all major issues. The Parties then reduced their agreement to an MOU and subsequently formalized
8 the tentative settlement in the settlement agreement now before the Court. [Crosner Decl., ¶ 9.] A
9 fully executed, true and correct copy of the Parties' Settlement Agreement and Release of PAGA
10 Claim ("Settlement Agreement") is attached to the Crosner Declaration as Exhibit 1.

11 **III. SUMMARY OF SETTLEMENT TERMS**

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

13 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$425,000
14 (the "Gross Settlement Amount" or "GSA"), inclusive of payments to the LWDA and Aggrieved
15 Employees, costs of settlement administration, a service award to Plaintiff Cuevas Martinez, and
16 reasonable attorney's fees and costs.² After payment of settlement administration costs, Plaintiff's
17 service award, and reasonable attorney's fees and costs from the GSA, Plaintiff presently estimates
18 about \$246,180.04 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about
19 \$184,635.03) will go to the LWDA, and the remaining 25% (about \$61,545.01) will be distributed
20 to the Aggrieved Employees in proportion to the total number of Eligible Pay Periods each
21 individual worked during the PAGA Period. The average award currently is estimated at about \$24,
22 while awards will range from a low of around a dollar to a high of about \$66. [Crosner Decl., ¶ 10.]

23 **B. Payment and Notice**

24 The Parties propose using Simpluris, Inc. as the Settlement Administrator. Simpluris has
25 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$15,000.00.
26 Within 20 business days of the Settlement's Active Date, C&R will fund the settlement and then

27 ² As discussed below, Plaintiff's Counsel seeks a fee equal to one-third (\$141,666.67) of the GSA, and reimbursement
28 of actual litigation costs of \$12,153.29.

1 Simpluris will mail a Notice and settlement check to all Aggrieved Employees via regular First-
2 Class U.S. Mail, using the most current, known mailing addresses identified in C&R's records.
3 Aggrieved Employees need not submit claim forms and will automatically receive a Notice and
4 settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed
5 residual funds will be forwarded to the California State Controller's Unclaimed Property Fund.
6 [Crosner Decl., ¶ 11; Exh. 4.]

7 **C. The Release**

8 The California Supreme Court has explained that a judgment in "a representative action
9 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
10 is binding not only on the named employee plaintiff but also on government agencies and any
11 aggrieved employee not a party to the proceeding." Arias v. Superior Court (2009) 46 Cal.4th 969,
12 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
13 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
14 to be "binding not only on the named employee plaintiff but also on government agencies and any
15 aggrieved employee not a party to the proceeding." While Plaintiff is entering into a general release
16 any and all claims against Defendant, the Settlement Agreement protects the rights of the Aggrieved
17 Employees to bring their own individual claims should they wish. For these reasons, the Parties
18 contend the release narrowly applies only to the PAGA claims alleged or that could have been
19 alleged, based on the facts alleged in the operative complaint. [Crosner Decl., ¶ 12.]

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

22 PAGA requires the Court "review and approve any settlement of any civil action filed
23 pursuant to this part." Labor Code § 2699(1)(2). Since there is no authority setting forth any specific
24 standard for reviewing a PAGA settlement, most courts apply the standards applicable to review
25 and approval of a class action settlement and look to whether, under all the circumstances, the
26 settlement is fair, reasonable and adequate. "[T]he Court adopts the standard for evaluating PAGA
27 settlements recently employed by a number of other district courts in the Ninth Circuit – that is, the
28 Court will approve the PAGA settlement upon a showing that the settlement terms are

1 fundamentally fair, adequate, and reasonable in light of PAGA's policies and purposes.” Jordan v.
2 NCI Group, Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at *7. A court may also
3 examine whether the relief provided for under PAGA is “genuine and meaningful” and furthers the
4 purposes of the statute. Salazar v. Sysco Central California, Inc. (E.D. Cal. 2017) 2017 WL 1135801,
5 at *3-4.

6 To evaluate whether a PAGA settlement is fair, reasonable and adequate, these same district
7 courts have looked to the factors identified in Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir.
8 1998). “Given the lack of an express standard, several courts, including this Court, have applied
9 several of the factors in [Hanlon] to evaluate a PAGA settlement.” Delgado, 2019 U.S. Dist. LEXIS,
10 at *10 (collecting cases). These may include the strength of the plaintiffs’ case; the risk, expense,
11 complexity, and likely duration of further litigation; the risk of maintaining class action status
12 throughout the trial; the amount offered in settlement; the extent of discovery completed and the
13 stage of the proceedings; the experience and views of counsel; the presence of a governmental
14 participant; and the reaction of the class members to the proposed settlement, and “[m]any of these
15 factors are not unique to class action lawsuits and bear on whether a settlement is fair and has been
16 reached through an adequate adversarial process. Thus, the Court finds that these factors are useful
17 in evaluating a PAGA settlement. However, three of the *Hanlon* factors—risk of maintaining class
18 action status, presence of a governmental participant, and reaction of class members—are not
19 relevant to a PAGA settlement that is not a class action and in which the LWDA is not involved.”
20 Id. at *10-11. Importantly, these factors are more or less identical to those California courts use to
21 evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116
22 and, accordingly, Plaintiff submits they should inform the Court’s analysis as well. For the reasons
23 below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying
24 PAGA, and should be approved in its entirety.

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

26 Plaintiff alleges claims for unpaid wages, meal break violations, and facial wage statement
27 violations, as well as derivative wage statement and waiting time penalty claims. [Crosner Decl., ¶
28 13.] First, Plaintiff contends Defendant provided its employees with facially inaccurate wage

1 statements. In its wage statemetns Defendant combined overtime hours and regular hours into one
2 total of “regular hours” at the regular rate nd then listed the the OT hours again under the line item
3 “OT PREM WK” with the 0.5 hour premium, such that the total hours worked are overstated
4 because overtime hours are counted twice. For example, for the pay period from May 1-14, 2019,
5 Plaintiff actually worked 68.17 hours, including 67.82 regular hours and 0.35 overtime hours.
6 Plaintiff’s wage statement for this period lists her total Regular Wages Hours as 68.17 (i.e., 67.82 +
7 0.35), which is inaccurate. In addition, the wage statement identifies 0.35 hours of “OT PREM
8 WEEK,” such that when Plaintiff adds the regular hours and overtime hours together, the total hours
9 work on the wage statement is overstated at 68.52 hours. [Id.] A number of courts have found this
10 practice results in a violation of Section 226 on the face of wage statements and triggers PAGA
11 violations. McKenzie v. Fed Ex. Corp. (C.D. Cal. 2011) 765 F. Supp.2d 1222, 1229 (“[unlike
12 *Morgan*, the total regular and overtime hours listed in [Defendant’s] wage statements, when added
13 together, do not sum up to the total hours worked by the employee during the pertinent time
14 period.”); Raines v. Coastal Pacific Food Distributors, Inc. (2018) 23 Cal. App.5th 667 (failure to
15 include all required information in wage statements results is a violation of Labor Code section
16 226(a), and citing McKenzie with approval); Lopez v. Friant & Associates, LLC (2017) 15
17 Cal.App.5th 773 (same).

18 Plaintiff also contends Defendant failed to provide aggrieved employees with compliant
19 meal periods and utilized a policy that failed to comply with California law. In particular,
20 Defendant’s managers were responsible for scheduling meal periods and frequently failed to timely
21 relieve the employees for meal periods. On other occasions, Defendant’s managers would interrupt
22 Plaintiff and the Aggrieved Employees and require them to perform work during their meal periods
23 due to the press of business. Finally, Plaintiff and other managers were not permitted to leave the
24 premises for her meal periods approximately 3-4 times per week if she was the only supervisor on
25 duty. Plaintiff is informed and believes that other non-exempt supervisors were subject to the same
26 restrictions. At some point during the PAGA period, Defendant claims it began requiring its
27 employees to attest to receipt of compliant meal periods and rest breaks by signing their time cards,
28 but has not been able to produce any such records, calling into question whether the breaks actually

1 occurred. As with the meal periods, Defendant also failed to provide Plaintiff and aggrieved
2 employees with compliant rest periods, as they either were not provided or regularly were
3 interrupted by management due to the nature of the work, and the fact that the restaurants were
4 frequently short staffed, especially at night. [Crosner Decl., ¶ 14.]

5 Next, Plaintiff and the aggrieved employees claim managers frequently edited time cards to
6 avoid paying meal period premiums and overtime, resulting in minimum wage and overtime
7 violations. Defendant's employees were required to clock in and out each day using a POS system,
8 and Plaintiff contends review of all such records in a native format will establish numerous such
9 changes. Finally, as previously discussed, Plaintiff and the aggrieved employees were also
10 frequently interrupted during their meal periods and asked to perform work off the clock. [Crosner
11 Decl., ¶ 15.]

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

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

16 For mediation, C&R indicated it employed approximately 2,550 non-exempt employees in
17 California during the relevant PAGA period of June 15, 2019 to November 9, 2021 (with
18 approximately 1,750 former employees), and these individuals worked approximately 57,600 pay
19 periods. Based on the data and information provided by Defendant, and with her expert's assistance
20 and analysis, Plaintiff estimated Defendant's maximum PAGA exposure at approximately
21 \$6,858,500. This estimate includes approximately approximately \$4,066,000 in civil penalties for
22 the meal and rest period claims, approximately \$2,209,000 in civil penalties on the inaccurate wage
23 statement claim, approximately \$576,000 in civil penalties on the unpaid wage claims, and
24 approximately \$17,500 on the unpaid final wages claim.. [Crosner Decl., ¶¶ 17-18.]

25 **C. THE SETTLEMENT MEETS THE HANLON AND KULLAR FACTORS,**
26 **INCLUDING THE STRENGTH OF PLAINTIFF'S CASE, THE DISCOVERY**
27 **PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT**
28

1 In response to Plaintiff's facial Section 226 violation claim, C&R countered that its wage
2 statements contain all information necessary under Section 226 and the employees can determine
3 their hours, wages, etc. from the four corners of the document. It also argued no injury occurred
4 and any violations were not knowing and intentional, and therefore there is no actionable violation
5 or at best minimal penalties should be awarded. [Crosner Decl., ¶ 19.]

6 For the meal and rest break claims, Defendant offered multiple defenses. First, it emphasized
7 its written meal and rest break policy generally was compliant, that it authorized and permitted all
8 necessary breaks, and that employees received full uninterrupted lunch periods. While Plaintiff's
9 review of the time records suggested a substantial violation rate for late and short meal breaks,
10 Defendant countered that even to the extent this occurred, it was in violation of company policy and
11 would require significant individual inquiries to determine the reasons underlying any such alleged
12 violations and whether it was by employee choice or some other reason. Thus, per Defendant, any
13 trial would be unmanageable as held in recently held in Wesson v. Staples The Office Superstore
14 LLC (2021) 68 Cal.App.5th 746, because of these individualized issues. [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. Defendant further contended
17 that, in light of the fact that it is not required to maintain a record of rest periods, any evidence of
18 failure to authorize rest periods and/or discouragement from taking rest periods would be purely
19 anecdotal and individual issues would predominate on liability. Defendant also may contend that it
20 is only liable if Plaintiff can prove, on a shift-by-shift basis, the aggrieved employees actually did
21 not receive a fully compliant rest break. This arguably would once again make a trial
22 unmanageable since the number of instances an employee missed a rest break would have to be
23 tested on a case by case basis to determine compliance. [Crosner Decl., ¶ 21.]

24 On the unpaid wage/time card manipulation claim, Defendant took the position that its
25 time keeping policies are legally compliant, that it paid the aggrieved employees for all hours
26 worked consistent with those policies. It also emphatically denied any employee time sheets were
27 manipulated in any way, and if it happened at all it was done by "rogue" managers completely
28 without any authorization and without the company's knowledge. Lastly, C&R argued any trial of

1 this issue on a representative basis would be unmanageable since it would depend entirely on a
2 myriad of individualized inquiries as to each employee and/or manager regarding any
3 discrepancies in actual time worked versus what was reported and paid for. [Crosner Decl., ¶ 22.]

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 and the
6 waiting time penalties claim are based on the primary unpaid wage and meal/rest break claims,
7 and will rise or fall along with the primary claims, in addition to being subject to “good faith” and
8 other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
9 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even
10 though the class prevailed on the merits on the underlying claim for failing to pay living wages).
11 Accordingly, Plaintiff had to discount the value of these claims significantly in light of these
12 multiple potential defenses. Defendant also contended a substantial discount should be applied to
13 the civil penalties for these derivative (i.e., “stacked”) violations, as it would be unfair to penalize
14 Defendant multiple times for the same violation. [Crosner Decl., ¶ 23.]

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). This is particularly true here where the wage statement claim probably is Plaintiff’s
19 strongest claims but is somewhat technical in nature, while the unpaid wage and break claims,
20 while weightier, essentially are premised on “de facto” violations and that could prove difficult to
21 establish on a representative basis. [Crosner Decl., ¶ 24.] Further, several state and federal courts
22 in California have applied significant reductions to PAGA civil penalties even after plaintiff
23 prevailed on the merits. In Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590,
24 *8-9, for instance, the district court reduced the potential penalties by over 82% after a bench trial.
25 More recently, in Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the
26 trial court awarded penalties of just \$5 per pay period, a 90% reduction, which decision was
27 upheld on appeal. See also In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016
28 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). [Crosner Decl., ¶ 24.]

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

9 Although Plaintiff's counsel believes they could have prevailed, there was no such
10 guarantee. When the risks of overcoming a manageability defense and prevailing at trial on the
11 merits are factored into the equation, the settlement value is reasonable and supported. Notably,
12 the proposed settlement equates to around six percent of the estimated maximum theoretical
13 liability, as discussed above. Of course, to recover those sums Plaintiff would have to shoot the
14 moon and win both liability and maximum penalties on all claims, which outcome, for the reasons
15 discussed, is unlikely. Given Defendant's procedural and merits defenses, as well as the
16 substantial penalty reductions ordered in the cases above – which occurred after trial – the
17 proposed settlement is eminently reasonable. [Crosner Decl., ¶ 26.]

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

1 estimation of the reviewing court"); White v. Experian Information Solutions, Inc. (C.D. Cal.
2 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
3 though it represented 99% discount off the maximum value of the claims).

4 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
5 the difficulty of overcoming a manageability argument, the probability of appeal of a favorable
6 judgment, and the Court's substantial discretion to reduce any penalty award all are accounted for,
7 it is clear a settlement amount of \$425,000 for the PAGA claims is within the ballpark of
8 reasonableness, and approval is appropriate. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3,
9 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving settlement with PAGA penalties of 0.6%
10 where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has
11 not objected to the settlement").

12 **V. SUBMISSION TO THE LWDA**

13 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
14 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 27; Exh. 5.] Accordingly, the
15 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
16 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
17 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
18 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the
19 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL
20 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
21 not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court
22 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
23 no comment or objection has been received.").

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

25 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
26 that benefits the LWDA and Aggrieved Employees, one-third of the gross settlement, or
27 \$141,666.67, is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation
28

1 costs. These fees are warranted under the law and within the range of fees commonly awarded in
2 similar cases.

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

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

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

23 Through the successful efforts of Plaintiff and her attorneys here, a common fund was
24 created in the amount of \$425,000 for the benefit of the Aggrieved Employees and the State. Thus,
25 these beneficiaries should bear their share of the costs and attorney's fees out of the overall recovery
26 under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6)
27 Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

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

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

19 Awarding attorney's fees of one-third of gross common fund amount is favored by California
20 courts when a fund established for the common benefit of others is involved, such as here.
21 Accordingly, awarding fees on this basis out of the \$425,000 GSA, for a total of \$141,666.67, is
22 reasonable and appropriate. [Crosner Decl., ¶¶ 28-44.]

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

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

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

6 Here, Crosner Legal’s lodestar is approximately \$131,245.00, based on 190.6 attorney hours
7 spent litigating the case. [Crosner Decl., ¶¶ 31-44; Exh. 6.] This results in a modest lodestar
8 multiplier of 1.08, which is justified, reasonable and appropriate. [Id.] Indeed, California courts
9 routinely approve multipliers in the in the 2-4 range to compensate for the time and contingent
10 risk of these types of cases. Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 (affirming
11 attorney’s fee award including an upward multiplier of 2.5); Wershba v. Apple Computer, Inc.
12 (2001) 91 Cal.App.4th at 255 (“Multipliers can range from 2 to 4 or even higher”); City of
13 Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).

14 It also is important to note this fact serves to highlight the reasonableness of the fees
15 requested on a percentage-of-the-recovery basis, as it shows the requested fees are within striking
16 distance of the market rate for the services rendered if those services are valued via traditional hourly
17 billing, and that the nominal enhancement requested adequately compensates counsel for the
18 contingent risk assumed and the delay in payment, and represents a fair return on the contingency.
19 [Crosner Decl., ¶¶ 28-44.]

20 C. The Requested Costs Are Reasonable

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

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

3 While the Settlement Agreement authorizes litigation costs not to exceed \$20,000, Plaintiff’s
4 Counsel’s actual costs presently are \$12,153..29. [Crosner Decl., ¶¶ 45-46; Exh. 7.] This includes
5 filing fees, service of process, mediation costs, postage, and expert consultant fees, while waiving
6 photocopying costs and legal research charges. These costs are reasonable and uncontested, and
7 should be approved.

8 **VIII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
9 **REASONABLE**

10 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$10,000. This
11 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
12 Plaintiff’s efforts in this case and the risks she undertook on behalf of the Aggrieved Employees.
13 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
14 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk
15 of being liable for Defendant’s litigation costs if he were unsuccessful. Plaintiff also exposed himself
16 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
17 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
18 prospective employers. Among taking many other actions assisting in the successful litigation of
19 this case, Plaintiff provided substantial factual information to Plaintiff’s Counsel, participated in
20 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
21 and informed on the case’s progress. The incentive payment to Plaintiff is appropriate and justified
22 as part of the Settlement. [Crosner Decl., ¶ 47; Declaration of Camille Cuevas Martinez, ¶¶ 2-10.]

23 Accordingly, Plaintiff submits the amount sought is well within the range of
24 reasonableness for such awards in other wage and hour actions. Nelson v. Avon 5 Prod., Inc.
25 (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *7 (approving incentive award of \$10,000
26 where plaintiff "appeared for an all-day deposition, searched for documentation relating to the
27 class action, reviewed documents and settlement papers, attended the mediation and
28

1 subsequent negotiations, and aided Class Counsel with negotiation efforts."); Torchia v.
2 W.W. Grainger, Inc. (E.D. Cal. 2014) 304 F.R.D. 256 (approving \$7,500 incentive award).

3 **VII. CONCLUSION**

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

9
10 Dated: December 17, 2021

CROSNER LEGAL, PC

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12 By: 
13 Michael Crosner, Esq.
14 Zach Crosner, Esq.
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16 ESTEBAN DOMINGUEZ
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