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9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ORANGE**
12

13 WENDY SGONTZ, as an individual and
on behalf of all others similarly
14 aggrieved employees,

15 Plaintiffs,

16 vs.
17

18 CROSSMARK, INC., a Delaware
19 corporation; and DOES 1 to 50,
20 inclusive,

21 Defendants.
22
23
24
25

Case No.: 30-2021-01204377-CU-OE-CXC

Assigned for All Purposes to:
Hon. Randall J. Sherman
Dept. CX105

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

Date: August 9, 2024
Time: 10:00 a.m.
Dept.: CX-105

Reservation No.: 74284280

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1 **I. INTRODUCTION**

2 Plaintiffs Wendy Sgontz, Vicky Wright, Nicole Gregory, and Jennifer Shellenbaum hereby
3 seek Court approval of a proposed settlement of claims brought under the Private Attorneys
4 General Act (“PAGA”) against defendant CROSSMARK, Inc. (“CROSSMARK” 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 allegedly aggrieved employee other than the
7 four named Plaintiffs. Since the settlement resolves nothing more than claims under PAGA, it
8 requires only a one-step review and approval process by the Court, and for the reasons discussed
9 below, Plaintiffs respectfully request the Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 Defendant CROSSMARK is a sales and marketing service company that operates within
12 the consumer goods industry. According to its website, Defendant has over 25,000 employees
13 throughout North America. Plaintiff Sgontz worked for Defendant from October 2018 through
14 April 15, 2020, as a non-exempt event specialist. Her duties included preparing and serving food
15 samples at grocery stores, including the Sam’s Club in Fountain Valley. Plaintiff Wright worked
16 for Defendant as a retail merchandiser from 2014 through March 2023. Plaintiff Gregory also
17 worked for Defendant as a retail merchandiser from March 2023 through May 2023, and their
18 duties included setting up and restocking displays at grocery stores and other retail stores for
19 different retail brands, reporting on service visits, and uploading photos of their work through
20 Defendant’s mobile application. Both were also required to use their personal vehicles to drive
21 between store locations during a shift. Plaintiff Shellenbaum worked for CROSSMARK in
22 California from about February of 2017 to February of 2021. [Declaration of Sepideh Ardestani
23 (“Ardestani Decl.”), ¶ 8.]

24 On June 3, 2021, after exhausting her administrative remedies with the LWDA,¹ Plaintiff
25 Sgontz filed a representative complaint seeking PAGA civil penalties for (1) failure to provide
26 written notice that sets forth the amount of paid sick leave available to employees on the

27 ¹ On July 10, 2020 and May 28, 2021, Plaintiff Sgontz filed two PAGA notices with the LWDA.
28 [Ardestani Decl. Exhs. 3-4.]

1 employee's wage statements, in violation of Labor Code sections 246(i), and (2) failure to issue
2 accurate itemized wage statements in accordance with Labor Code section 226(a)(9), as the wage
3 statements do not provide an accurate overtime rate because instead of multiplying the regular rate
4 of pay by one and one-half, the wage statements provide two overtime rate categories and they
5 each provide corresponding rates that are either the same as the regular rate or half the regular rate,
6 requiring employees to perform extensive calculations to determine what their pay rates were for
7 each corresponding hour worked. The wage statements also violate Labor Code section 226(a)(2)
8 by failing to provide an accurate total number of hours worked during the pay period. [Ardestani
9 Decl., ¶ 9.]

10 After filing her complaint, Plaintiff Sgontz initiated written discovery. On March 4, 2022,
11 the Court granted Defendant's Motion to Stay the matter pending the U.S. Supreme Court's
12 decision in Viking River Cruises, Inc. v Moriana (2022) 142 S. Ct. 1906, and stayed the case
13 through July 15, 2022. Thereafter, on November 18, 2022, the Court denied Defendant's Motion
14 to Compel Arbitration of Plaintiff Sgontz's individual PAGA claim and dismiss the non-individual
15 PAGA claims. Defendant appealed that ruling in December 2022, and the Parties proceeded with
16 briefing the appeal. In and around May 2023, After Plaintiff Sgontz filed her responsive brief, the
17 Parties met and conferred to discuss the implications of Adolph v. Uber Technologies (2023) 14
18 Cal.App.5th 1104 on the Sgontz action and pending appeal. Following those discussions, the
19 Parties agreed to explore private mediation and subsequently stipulated to say the matter pending
20 mediation. [Ardestani Decl., ¶ 10.]

21 On July 26, 2023, Plaintiffs Wright and Gregory each submitted separate PAGA notices of
22 claims to the LWDA, alleging that Defendant failed to pay all minimum wages, overtime wages,
23 premium wages in lieu of late, short, or denied meal and rest periods, failed to pay all wages due
24 upon separation of employment, failed to furnish accurately itemized wage statements, and failed
25 to reimburse business expenses. [Ardestani Decl., ¶ 11; Exhs. 5-6.]

26 On August 16, 2021, Plaintiff Shellenbaum filed with the LWDA and served on Defendant
27 a notice under Labor Code section 2699.3, stating she intended to serve as a proxy of the LWDA
28 to recover civil penalties on behalf of aggrieved employees for alleged Labor Code violations. On

1 November 18, 2021, after sixty-five days had passed since service of the Shellenbaum PAGA
2 Notice, without any action by the LWDA with respect to the alleged Labor Code violations,
3 Plaintiff Shellendaum filed a separate representative action in the Orange County Superior Court,
4 Case No. 30-3021-01232903, seeking PAGA civil penalties against Defendant for Labor Code
5 violations alleged in her PAGA Notice (the “Shellenbaum Action”). [Nordrehaug Decl., ¶¶ 6-7,
6 Exh. 2.]

7 After further and extensive meeting and conferring between all Parties to both matters, the
8 Parties agreed to mediate on a global basis all claims alleged by Plaintiffs Wright, Gregory and
9 Shellenbaum in their respective PAGA notices in addition to the claims alleged in the Sgontz
10 Action. The Parties further agreed to a protocol for exchanging additional documents and
11 information on all claims before the mediation. Through this informal discovery, Defendant
12 provided Plaintiffs with information including, inter alia, the number of potential Aggrieved
13 Employees, the number of aggregate pay periods, pay stubs and time records for a sampling of the
14 allegedly Aggrieved Employees, employee handbooks and manuals, and other policy documents
15 regarding Defendant’s time keeping and reporting policies. [Ardestani Decl., ¶ 12.]

16 The Parties then mediated the case with Lisa Klerman, Esq., a respected mediator with
17 extensive class action/wage and hour experience, in August 2023. Before and during the
18 mediation, Plaintiffs and their counsel analyzed, researched, and investigated the potential issues,
19 including matters related to the calculation of damages, trial, and appellate issues and risks.
20 During mediation, the Parties vigorously debated the likelihood of Plaintiffs' ability to proceed on
21 a representative basis as to the PAGA claims, the legal grounds for Plaintiffs' claims and
22 Defendant’s defenses, and the parties' data analyses and conclusions based on data provided by
23 Defendant. After a contentious full day of negotiations, the Parties reached agreement on all major
24 issues and subsequently formalized their tentative settlement in the Settlement Agreement now
25 before the Court for approval. [Ardestani Decl., ¶ 13; Nordrehaug Decl., ¶ 8.] A fully executed,
26 true and correct copy of the Parties’ Private Attorneys General Act Settlement Agreement
27 (“Settlement Agreement”) is attached to the Ardestani Declaration as Exhibit 1.

28 /////

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 **A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES**

3 Under the settlement, Defendant will pay a non-reversionary settlement amount of
4 \$1,170,000 (the “Gross Settlement Amount” or “GSA”). The GSA is inclusive of payments to the
5 LWDA and Aggrieved Employees, costs of settlement administration, service awards to the
6 Plaintiffs, and reasonable attorney’s fees and costs.² After payment of settlement administration
7 costs, Plaintiffs’ service awards, and reasonable attorney’s fees and costs from the GSA, Plaintiffs
8 presently estimate about \$710,539 will remain (the “Net Settlement Amount” or “NSA”).
9 Seventy-five percent of the NSA (about \$532,904.25) will go to the LWDA, and the remaining
10 25% (about \$177,634.75) will be distributed to the Aggrieved Employees in proportion to the total
11 number of Pay Periods each individual worked during the PAGA Period, with an average award
12 currently estimated at about \$45.20 per Aggrieved Employee. [Ardestani Decl., ¶ 14.]

13 **B. PAYMENT AND THE NOTICE**

14 The Parties propose using ILYM Group, Inc. as the Settlement Administrator. Atticus has
15 extensive experience administering PAGA settlements, and has agreed to cap its fees at
16 \$19,500.00. [Declaration of Lisa Mullins, ¶¶ 2-7; Exhs. A-C.] CROSSMARK will fund the GSA
17 within 30 days of the Effective Date, and within 15 days thereafter ILYM will mail a Notice and
18 settlement check to all Aggrieved Employees via regular First-Class U.S. Mail, using the most
19 current, known mailing addresses identified in Defendant’s records. Aggrieved Employees need
20 not submit claim forms and will automatically receive a Notice and settlement check. Checks will
21 be negotiable for 180 days, after which time any unclaimed residual funds will be forwarded to the
22 California State Controller’s Unclaimed Property Fund. [Ardestani Decl., ¶ 15; Exh. 2.]

23 **C. THE RELEASE**

24 The California Supreme Court has explained that a judgment in “a representative action
25 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
26 is binding not only on the named employee plaintiff but also on government agencies and any
27

28 ² Plaintiffs’ counsel requests fees of 33.33% of the GSA, or \$389,961.00 and costs in the amount of \$25,000, while
Plaintiffs request service awards of \$10,000.00 each (\$40,000.00 total)

1 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
2 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
3 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
4 to be “binding not only on the named employee plaintiff but also on government agencies and any
5 aggrieved employee not a party to the proceeding.” The Settlement Agreement protects the rights
6 of the Aggrieved Employees to bring their own individual claims should they wish. For these
7 reasons, the Parties contend the release narrowly applies only to the PAGA claims alleged, and the
8 Settlement Agreement specifically provides the Release is inapplicable to any claims other than
9 those brought under PAGA. [Ardestani Decl., ¶ 16.]

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

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

18 In so holding, Moniz noted many federal district courts had imported class action settlement
19 approval principles when evaluating PAGA settlements, demanding that PAGA settlements be “fair,
20 reasonable, and adequate,” and weighing factors such as “the strength of the plaintiff’s case, the
21 risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the
22 settlement amount[.]” Id. at 75-76 (collecting cases). Observing that “PAGA’s purpose” is to
23 “protect the public interest”—especially the allegedly Aggrieved Employees—the Court agreed
24 with this district court authority, concluding that much the same principles that ensure fairness in
25 class action settlements serve the public interest in the PAGA context. Essentially, these factors are
26 more or less identical to those California courts use to evaluate class action settlements per Kullar
27 v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiffs submit they
28

1 should inform the Court’s analysis as well. For the reasons below, the proposed settlement is fair,
2 reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

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

4 First, Plaintiffs alleged Defendant failed to pay all minimum and overtime wages, as per
5 Plaintiffs CROSSMARK required employees to answer phone calls and read/respond to text messages
6 from supervisors outside of scheduled shift times to discuss work-related issues (i.e., whether a display
7 was properly set up in a grocery store, etc.). Plaintiffs estimate they and other employees averaged 15
8 minutes per week on these “off the clock” communications with supervisors. [Ardestani Decl., ¶ 17.]

9 As far as alleged meal break violations, Plaintiffs contend employees were required to clock out
10 for their meal periods when entering their personal vehicles to drive to another store location and as a
11 result received a meal break while driving to their next assignment. Further, Plaintiffs review of the
12 sample time records produced suggests numerous de facto violations for missed, untimely, or short meal
13 periods, and Plaintiffs allege around a 15% violation rate based on their expert’s analysis. Plaintiffs
14 similarly allege numerous “de facto” violations for rest breaks, and argued that due to the nature of the
15 job duties employees could not simply stop work and take a rest period but had to continue working to
16 be able to meet certain expectations on a timely basis. [Ardestani Decl., ¶ 18.]

17 Plaintiffs next alleged CROSSMARK failed to reimburse necessary business expenses such
18 as personal cell phones, as supervisors would contact Plaintiffs and other employees on their
19 personal phones regarding work-related issues. [Ardestani Decl., ¶ 19.]

20 Plaintiffs further allege Defendant’s wage statements fail to provide an accurate overtime
21 rate, in violation of Labor Code section 226(a)(9), as wage statements break overtime pay into two
22 separate overtime line items (OVT 0.5x and OVT 1.0x), with neither one accurately reflecting the
23 actual rate. Per Plaintiffs, these wage statements are nearly identical to those found non-compliant
24 in McKenzie v. Fed. Express Corp. (C.D. Cal. 2011) 765 F. Supp.2d 1222, 2336, where the subject
25 wage statements similarly divided overtime pay into multiple line items that did not correctly reflect
26 the true premium for overtime. Plaintiffs also allege the wage statements failed to provide required
27 information regarding available sick pay per Labor Code section 246(i). [Ardestani Decl., ¶ 20.]

1 Lastly, Plaintiffs also allege derivative wage statement claims based on the failure to pay all
2 wages due, and derivative claims for failure to pay all wages due and owing upon separation of
3 employment under Labor Code §§ 201-203. [Ardestani Decl., ¶ 21.]

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

5 For mediation, CROSSMARK indicated it employed approximately 3,930 non-exempt
6 employees in California during the applicable PAGA period, and these individuals worked
7 approximately 159,859 pay periods during that time. Based on the data and information provided
8 by Defendant, Plaintiffs estimated Defendant's maximum PAGA exposure at approximately \$72
9 million. [Ardestani Decl., ¶¶ 22-23.]

10 **C. THE SETTLEMENT MEETS THE KULLAR/MONIZ FACTORS,**
11 **INCLUDING THE STRENGTH OF PLAINTIFFS' CASE, THE DISCOVERY**
PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT

12 In response to Plaintiffs' unpaid wage claims for alleged "off the clock work," Defendant
13 took the position that its time keeping policies are legally compliant, that it accurately tracked all
14 hours worked, that employees were required by company policy to accurately track the exact shift
15 start/end times and are prohibited from working off the clock, and that it paid the Aggrieved
16 Employees for all hours worked consistent with those policies. Defendant further emphasized to the
17 extent any off the clock work such as phone calls or texts, may have happened, it was intermittent,
18 against company policy, and done without company authorization or knowledge. White v. Starbucks
19 Corp., 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (employer must have actual or constructive
20 knowledge of off the clock work for liability to attach). [Ardestani Decl., ¶ 24.]

21 For the meal and rest break claims, CROSSMARK offered multiple defenses. First, it
22 emphasized its written meal and rest break policy generally was compliant, that it authorized and
23 permitted all necessary breaks, and that employees received full uninterrupted lunch periods free
24 from employer control and that employees were never compelled to take lunch break while driving
25 between job assignments. Defendant also asserted that even to the extent any late or short meal
26 periods occurred, it was in violation of company policy and aberrational, and would require
27 significant individual inquiries to determine the reasons underlying any such alleged violations and
28 whether it was by employee choice or some other reason. [Ardestani Decl., ¶ 25.]

1 As with meal breaks, Defendant argued the applicable rest break policies complied with
2 California law, and that it authorized and permitted employees to take all required breaks.
3 Defendant further contended that, in light of the fact that it is not required to maintain a record of
4 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
5 rest periods would be purely anecdotal and individual issues would predominate on liability. This
6 arguably would once again make a trial unmanageable since the number of instances an employee
7 missed a rest break would have to be tested on a case by case basis to determine compliance.
8 [Ardestani Decl., ¶ 26.]

9 For the expense reimbursement claim, CROSSMARK countered there typically would be
10 no need for employees to communicate via phone or text while performing their job duties at the
11 various stores they serviced. Per Defendant, to the extent Plaintiffs or other Aggrieved Employees
12 used their individual phones for work purposes, it was done purely for personal convenience and
13 was neither required nor necessary in order to perform their job duties. Thus, per Defendant, no
14 reimbursement was required. [Ardestani Decl., ¶ 27.]

15 On the alleged wage statement violations, Defendant contended its wage statements are
16 fully compliant and employees can discern all required information from the face of a wage
17 statement. Morgan v. United Retail, Inc. (2010) 86 Cal.App.4th 1136, 1147 (no violation where
18 employees could simply add straight and overtime hours together to get their total hours). Plaintiffs
19 also alleged derivative wage statement violations and derivative Labor Code §§ 201-203 (waiting
20 time penalties). Such derivative claims will rise or fall along with the primary claims for unpaid
21 wages and are subject to the same merits defenses, in addition to being subject to “good faith” and
22 other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
23 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even
24 though the class prevailed on the merits on the underlying claim for failing to pay living wages).
25 Accordingly, Plaintiffs discounted the value of this claim significantly in light of these multiple
26 potential defenses. Defendant also contended a substantial discount should be applied to the civil
27 penalties for these derivative (i.e., “stacked”) violations, as it would be unfair to penalize
28 Defendant multiple times for the same violation. [Ardestani Decl., ¶ 28.]

1 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
2 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
3 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
4 2699(h). Several state and federal courts in California have applied significant reductions to
5 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
6 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
7 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
8 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
9 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
10 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
11 trial). [Ardestani Decl., ¶ 21.]

12 Thus, Defendant raised various and multi-layered defenses to each of Plaintiffs’ claims,
13 anyone of which, if successful, could have decimated Plaintiffs’ case. And Defendant vowed to
14 raise all these defenses at trial. Accordingly, Plaintiffs faced risky issues going forward with this
15 litigation, and it could have taken years to realize any recovery in this action along with the
16 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be
17 unmanageable, Defendant also intended to raise additional defenses on damages, including the
18 proper measure of civil penalties and the appropriate discount to place on any assessment of such
19 penalties. [Ardestani Decl., ¶ 29.]

20 Although Plaintiffs and their counsel believe they could have prevailed, there was no such
21 guarantee. When the risks of overcoming Defendant’s multiple defenses and prevailing at trial on
22 the merits on all claims, and securing 100% of the theoretical civil penalties, all are factored into
23 the equation, the settlement value is reasonable and supported. Of course, to recover anywhere
24 near the maximum penalties Plaintiffs would have to shoot the moon and win both liability and
25 maximum penalties on all claims, which outcome, for the reasons discussed, is unlikely. Given
26 Defendant’s various procedural and merits defenses, as well as the substantial penalty reductions
27 ordered in the cases above – which occurred after trial – the proposed settlement is eminently
28 reasonable. [Ardestani Decl., ¶¶ 30-31; Nordrehaug Decl., ¶ 9.]

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

15 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
16 the probability of appeal of a favorable judgment, the Court’s substantial discretion to reduce any
17 penalty award all are accounted for, it is clear a settlement amount of \$1,170,000 for the PAGA
18 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open
19 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving
20 settlement with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement
21 agreement to the LWDA, and the LWDA has not objected to the settlement”).

22 **V. SUBMISSION TO THE LWDA**

23 Plaintiffs timely served the LWDA with the Settlement Agreement and this Motion, and
24 notified the LWDA of this approval hearing. [Ardestani Decl., ¶ 32; Exh. 7.] Accordingly, the
25 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
26 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
27 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
28 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the

1 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
2 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
3 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
4 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
5 no comment or objection has been received.”).

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

7 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
8 that benefits the LWDA and Aggrieved Employees, 33.33% of the gross settlement, or \$389,961.00,
9 is allocated to Plaintiffs’ counsel for reasonable attorney’s fees, plus actual litigation costs up to a
10 cap of \$25,000. These fees are warranted under the law and within the range of fees commonly
11 awarded in similar cases.

12 **A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S**
13 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
14 **ACTION**

15 PAGA provides a plaintiff is entitled to recover reasonable attorney’s fees, expenses, and
16 costs under Labor Code § 2699(g)(l): “Any employee who prevails in any action shall be entitled to
17 an award of reasonable attorney’s fees and costs,” As discussed below, reasonable attorney’s
18 fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one,
19 where, as here, the litigation creates a common fund of money in a specific amount for the benefit
20 of others.

21 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
22 private attorney general to recover damages or penalties, all or part of which will be paid to the
23 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
24 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
25 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to
26 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
27 only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th
28 73; Iskanian, 59 Cal.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*
action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,

1 with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state; 25% paid to the
2 Aggrieved Employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui*
3 *tam* action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are
4 entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164
5 Cal.App.3d 66, 89-91.

6 Through the successful efforts of Plaintiffs and their attorneys here, a common fund was
7 created in the amount of \$1,170,000 for the benefit of the Aggrieved Employees and the State. Thus,
8 these beneficiaries should bear their share of the costs and attorney's fees out of the overall
9 \$1,170,000 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert
10 (1980) 444 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990)
11 904 F.2d 1301, 1311.

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

24 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
25 percentage of the total fund created when the fund consists of a "certain or easily calculable sum of
26 money," and California law has long applied the percentage of the recovery method for awarding
27 attorney's fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
28 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,

1 1809; Sanders v. City of Los Angeles (1970) 3 Ca1.3d 252, 261-63 (affirming award of attorney's
2 fee based on percentage of recovery).

3 Awarding attorney's fees of one-third of gross common fund amount is favored by California
4 courts when a fund established for the common benefit of others is involved, such as here.
5 Accordingly, awarding fees on this basis out of the \$1,170,000 GSA, for a total of \$391,961.00, is
6 reasonable and appropriate. [Ardestani Decl., ¶¶ 33-51; Nordrehaug Decl., ¶¶ 3-5, 10-12, Exh. 1;
7 Declaration of Glenn Danas ("Danas Decl."), ¶ 2-8, Exh. 1.]

8 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF**
9 **THE FEE AWARD**

10 Despite the recognized limitations of the so-called lodestar method, some California and
11 federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed
12 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier"
13 method of cross-checking proposed fee awards, the court first ascertains counsel's total "lodestar"
14 amount by multiplying the number of hours reasonably expended by each attorney's reasonable
15 hourly rate, and then enhances or reduces this lodestar figure by a "multiplier" to account for a range
16 of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of
17 success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Ca1.4th 1084, 1095-96; Lealao, 82
18 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the "fee awarded is within
19 the range of fees freely negotiated in the legal marketplace in comparable litigation").

20 Here, Plaintiffs' counsels' collective lodestar is \$358,528.00, based on 475.8 attorney
21 hours spent litigating the case. [Ardestani Decl., ¶¶ 36-50; Exh. 8; Nordrehaug Decl., ¶¶ 10-12,
22 Exhs. 3-4; Danas Decl., ¶ 8; Exh. 1.] On a lodestar basis, the fee request of \$389,961,000.00
23 results in a multiplier of 1.09, which is a modest enhancement entirely in line with California
24 law. Indeed, California courts routinely approve multipliers in the in the 2-4 range to
25 compensate for the time and risk of class action cases. Chavez v. Netflix, Inc. (2008) 162
26 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward multiplier of 2.5);
27 Wershba, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); City of
28 Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).)

1 Class Counsel submits that the requested 1.09 multiplier effectively operates to show that the
2 percentage fee request is reasonable considering the challenges presented in this contingency
3 fee matter, and appropriately compensates Class Counsel for the contingent risk assumed and
4 delay in payment during the nearly four years counsel have represented Plaintiffs. [Ardestani
5 Decl., ¶¶ 30-31, 51.] Thus, the multiplier results in a fee constituting a fair return on the
6 contingency.

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

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

18 While the Settlement Agreement authorizes litigation costs not to exceed \$25,000, Plaintiffs'
19 Counsels' actual costs presently are \$25,021.29, including \$21,065.85 for Crosner Legal and
20 \$3,955.44 for the Blumenthal firm. [Ardestani Decl., ¶¶ 52-54; Nordrehaug Decl., ¶ 13; Exhs. 3-4.]
21 This includes filing fees, service of process, expert witness fees, mediation costs, and postage. These
22 costs are reasonable and uncontested, and should be approved up to the cap of \$25,000.00.

23 **VII. THE PROPOSED SERVICE AWARDS FOR PLAINTIFFS ARE FAIR AND**
24 **REASONABLE**

25 Pursuant to the Settlement Agreement, Plaintiffs seek incentive awards of \$10,000 each.
26 These requests are reasonable given the much broader release each Plaintiff is agreeing to, as well
27 as their respective efforts in this case and the risks each undertook on behalf of the Aggrieved
28 Employees and the State. Additionally, by contacting and retaining counsel to pursue these claims,

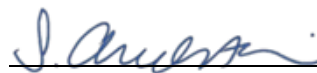
1 Plaintiffs made this settlement possible for the other Aggrieved Employees and the LWDA, while
2 shouldering the risk of being liable for Defendant's litigation costs if they were unsuccessful.
3 Plaintiffs also exposed themselves to unwanted notoriety related to filing a public lawsuit
4 (discoverable even through a simple google search) for the benefit of other employees, placing
5 Plaintiffs at risk of discrimination by future prospective employers. Among taking many other
6 actions assisting in the successful litigation of this case, Plaintiffs all provided substantial factual
7 information to their counsel, participated in numerous phone calls and meetings with counsel to
8 discuss the case, and general kept up to speed and informed on the case's progress. The incentive
9 payments to Plaintiffs are appropriate and justified as part of the Settlement. [Ardestani Decl., ¶ 55;
10 Declaration of Wendy Sgontz, ¶¶ 2-6; Declaration of Vicky Wright, ¶¶ 2-9; Declaration of Nicole
11 Gregory, ¶¶ 2-9; Declaration of Jennifer Shellenbaum, ¶¶ 2-10.] Plaintiffs submit further the
12 amount sought is well within the range of reasonableness for such awards in other wage and
13 hour actions. Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding service
14 and incentive payments ranging from \$2,000 to \$25,000).

15 **VIII. CONCLUSION**

16 For the foregoing reasons, Plaintiffs request the Court approve the proposed settlement under
17 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
18 service award to Plaintiffs in the amount of \$10,000 each, approve ILYM Group, Inc. as the
19 settlement administrator and approve its fees in the amount of \$19,500, approve the proposed
20 distributions to the LWDA and Aggrieved Employees, and enter judgment.

21
22 Dated: May 1, 2024

CROSNER LEGAL, P.C.

23
24 

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