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10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF RIVERSIDE**
13

14 ASHLEY MCCORD, individually, and on
15 behalf of all similarly situated,

16 Plaintiff,

17 vs.

18 DEVELOPMENTAL CLIENT CARE,
19 INDUSTRIES, INC., and DOES 1 through
20 100, inclusive,

21 Defendants.
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CASE NO. RIC1612928

Assigned for All Purposes To:
Hon. Sunshine Sykes
Dept. 6

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

[Filed concurrently with Notice of Motion and
Motion; Declaration of Zachary M. Crosner;
[Proposed] Order and Judgment]

DATE: June 6, 2019
TIME: 8:30 a.m.
DEPT.: 6

Reservation No.:

1 **I. INTRODUCTION**

2 Plaintiff Ashley McCord hereby seeks Court approval of a proposed \$151,137
3 settlement in this PAGA representative action against defendant Developmental Client Care
4 Industries, Inc. (“DCCI” or “Defendant”). This PAGA-only settlement requires a one-step
5 review and approval process by the Court, and for the reasons discussed below, the Parties now
6 respectfully request that the Court approve the Settlement under Labor Code section 2699(l)(2).

7 **II. BACKGROUND**

8 Plaintiff worked as non-exempt employees for Defendant during the statutory PAGA
9 period. After appropriate notice to the LWDA, Plaintiff filed her PAGA representative action
10 against Defendant on October 4, 2016. Plaintiff alleged the following Labor Code violations: :
11 (1) Failure to Pay Minimum Wages/Split Shift Wages; (2) Failure to Pay on a Timely Bi-
12 Weekly Basis; (3) Failure to Maintain Accurate Records; (4) Failure to Provide Accurate and
13 Itemized Wage Statements; and (5) other derivative violations of the California Labor Code, as
14 described herein. Defendant has at all times denied these allegations and vigorously defended
15 against them. [Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶¶ 2-3.]

16 Upon further discussing the merits of the case and engaging in multiple meet and confer
17 sessions, and in lieu of engaging in formal discovery practice, the Parties agreed to an early
18 mediation and a protocol for exchanging documents and information before the mediation.
19 Prior to mediation, the Parties exchanged legal briefs, documents, and information enabling
20 both sides to evaluate potential liability, calculate potential civil penalties, and evaluate
21 potential risks posed by continuing with the litigation. [Crosner Decl., ¶ 3.]

22 The Parties then attended a full day of mediation before reputable wage and hour
23 mediator Jeff Winikow, Esq. Before and during the mediation, Plaintiff and her counsel
24 analyzed, researched, and investigated the potential issues, including matters related to the
25 calculation of damages, as well as trial and appellate issues and risks. During mediation, the
26 parties vigorously debated the likelihood of Plaintiff’s ability to proceed on a representative
27 basis, the legal bases for Plaintiff’s claims and Defendant’s defenses, and the Parties’ data
28 analyses and conclusions based on the information and data provided by Defendant. After a
 contentious full day of negotiations, the parties reached a tentative settlement and thereafter
 formalized their agreement in the Settlement Agreement. [Crosner Decl., ¶ 4.] Based on the
 Court’s specific instructions and prior tentative rulings, the Case Management Order (“CMO”),
 and multiple meet and confer sessions, the Parties executed two amendments to the Settlement

1 Agreement and revised the notice letter (“Notice”) to be mailed to the Aggrieved Employees.
2 [Crosner Decl., ¶¶ 5-11.] Fully executed, true and correct copies of the Settlement Agreement,
3 Amendment to the PAGA Settlement Agreement, and Amendment No. 2 of the PAGA
4 Settlement Agreement (collectively, “Settlement Agreement”) are attached collectively to the
5 Crosner Declaration as Exhibit A, and a true and correct copy of the revised Notice is attached
6 as Exhibit B.

7 Per the Court’s most recent tentative ruling (issued March 18, 2019), the Amendment
8 No. 2 addresses the following: (a) it amends the Settlement Agreement to provide any
9 unclaimed funds will be forwarded to the California State Controller’s Unclaimed Property
10 Fund instead of the Dept. of Industrial Relations Unclaimed Wage Fund; and (b) it modifies
11 Paragraph 36 of the Settlement Agreement to eliminate any language speculating as to the
12 admissibility of evidence in other claims of other parties in proceedings over which this Court
13 is not presiding. [Crosner Decl., Exh. A.] Additionally, the proposed Notice letter has been
14 revised to state the release and dismissal of this Action in no way affects the ability of any
15 aggrieved employee to bring his or her own individual claims against the Defendant for any
16 alleged Labor Code violations. [Crosner Decl., Exh. B.]

17 **III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

18 **A. TERMS OF THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

19 Under the settlement, Defendant will pay a non-reversionary settlement amount of
20 \$151,137 (the “Settlement Amount”), inclusive of payments to the LWDA and Aggrieved
21 Employees, attorney’s fees and costs, and settlement administration costs. After payment of
22 these amounts, Plaintiff estimates about \$88,364.98 will remain (“Net Settlement Amount”).
23 75% (about \$66,273.73) to be paid to the LWDA, and the remaining 25% (about \$22,091.25)
24 will be distributed to the allegedly Aggrieved Employees in proportion to the total number of
25 pay periods each individual worked during the Statutory Settlement Period. [Crosner Decl., ¶
26 12.]

27 **B. PAYMENT AND THE NOTICE**

28 Defendant will pay the Settlement Amount in one lump sum payment. No later than 7
calendar days following the date when the Court enters the Order, Defendant will send the
Settlement Administrator a list of all Aggrieved Employees (“Aggrieved Employee List”) and
the number of pay periods each worked during the Settlement Period. Within ten calendar days

1 after the Court enters the Order, Defendant will deposit the Settlement Amount into a qualified
2 settlement fund (“QSF”) to be established by the Settlement Administrator. No later than
3 twenty-one (21) calendar days after entry of the Order, the Settlement Administrator shall mail
4 a Notice and Settlement Check to all Aggrieved Employees via regular First-Class U.S. Mail,
5 using the most current, known mailing addresses from the Aggrieved Employee List. The
6 Settlement Administrator shall also remit payment to the LWDA, Plaintiff, and Plaintiff’s
7 counsel, and itself for administration costs, at this time. Aggrieved Employees need not submit
8 claim forms and will automatically receive a Notice and Settlement Check. Settlement Checks
9 will be negotiable for 180 days, after which time the Settlement Administrator will forward any
unclaimed funds to the State Controller’s Unclaimed Property Fund. [Crosner Decl., ¶ 13.]

10 C. THE RELEASE

11 Per the Court’s CMO, the Settlement Agreement narrowly releases only Plaintiff and the
12 State for civil penalty claims under Labor Code §§ 558 and 2699. The release does not bind
13 other aggrieved employees. The Release binds Plaintiff and the State for all claims brought in
14 the Action, and bars any future claims under PAGA as to those released claims. [Crosner Decl.,
¶ 14.]

15 While Plaintiff is separately releasing any and all claims against Defendant, as part of
16 the resolution of her individual (non-PAGA) claims, the Settlement Agreement and release
17 protects the rights of the aggrieved employees to bring their own individual claims should they
18 wish. For these reasons, the Parties contend the release narrowly applies only to the claims
19 alleged, and only binds the named Plaintiff and State as to the PAGA claims. [Id.]

20 **IV. THE SETTLEMENT IS FAIR AND REASONABLE, AND WARRANTS COURT
APPROVAL**

21 PAGA requires the Court “review and approve any settlement of any civil action filed
22 pursuant to this part.” Labor Code § 2699(I)(2). Per the Court’s CMO, § E, Plaintiff provides the
23 following analysis of the facts and claims underlying this proposed PAGA settlement.

24 A. NATURE OF THE ALLEGED VIOLATIONS [CMO ¶ E.2.a]

25 Plaintiff alleges three sets of claims in action, as follows: Split Shift Claims, Late
26 Payment Claims and Derivative Claims (i.e., derivative penalties). First, Plaintiff brought
27 claims for failure to pay one-hour premiums for split shifts (“Split Shift Claims”). These claims
28 are based on significant interruptions in the Aggrieved Employees’ work schedules during the

1 same 24-hour work day. Plaintiff alleges these interruptions, which generally occurred during
2 the middle of the 24-hour work day, amount to a bona fide split shift as they were well in
3 excess of one hour and did not relate to meal or rest periods. Plaintiff also alleges Defendant
4 failed to pay split shift premiums when Aggrieved Employees worked overnight shifts in which
5 a small portion of the shift occurred within the same 24-hour work day as a subsequent shift.

6 Second, Plaintiff brings claims entirely derivative of the alleged split shift violations.
7 Specifically, Plaintiff characterizes split shift premiums as a “wage” and alleges Defendant’s
8 failure to pay split shift premiums is tantamount to a minimum wage violation, resulting in
9 violation of Labor Code § 558, failure to provide accurate itemized wage statements pursuant to
10 Labor Code § 226(a), failure to maintain time keeping records for the start and stop times of
11 split shifts as required by Labor Code section 1174 and the applicable IWC Wage Order, and
12 failure to pay all wages due and owing upon separation of employment (the “Derivative
13 Claims”). Third, Plaintiff also alleged a violation of Labor Code section 204 for late payment of
14 wages due to its policy and/or practice of compensating the PAGA Employees thirteen days
15 after the close of a pay period. This is directly evidenced by the wage statements issued by
16 Defendant which always displayed a pay date approximately thirteen days following the end of
17 the previous pay period, resulting in a systematic late payment of wages.

18 **B. NUMBER OF ALLEGED VIOLATIONS AND TOTAL POTENTIAL PAGA**
19 **PENALTIES [CMO § E.2.b AND c]**

20 During settlement negotiations, Defendant provided information that it has employed
21 221 individuals in California since September 1, 2015 who worked a total of 4,798 pay periods,
22 and who qualify as Aggrieved Employees under the Settlement. Defendant also provided data
23 indicating there were approximately 1,540 pay periods with prospective split shift violations,
24 and Defendant’s standard practice was to pay its employees bi-weekly or semi-monthly.
25 [Crosner Decl., ¶ 15.] Based on the foregoing data, Plaintiff evaluated Defendant’s maximum
26 total exposure is \$3,619,600 as follows:

27 As to the Split Shift Claims, there were approximately 1,819 pay periods with split shift
28 violations, resulting in a maximum exposure of \$363,600 in PAGA penalties (\$100 maximum
initial PAGA penalty + 1,818 pay periods * \$200 maximum subsequent PAGA penalty); as to
the Late Payment Claims, based on the total pay periods in the statutory PAGA period (4,798),
Defendant may be liable for up to \$959,500 (\$100 maximum initial PAGA penalty + 4,797 pay
periods * \$200 maximum subsequent PAGA penalty); and, as to the Derivative Claims,

1 Defendant's maximum exposure for record keeping violations (Labor Code section 1174) and
2 wage statement violations (Labor Code section 226) would also be \$959,500 respectively (\$100
3 maximum initial PAGA penalty + 4,797 pay periods * \$200 maximum subsequent PAGA
4 penalty). Lastly, the waiting time penalties would likely be assessed as a one-time penalty
5 amounting to \$13,900 as it only impacts the final paycheck (70 total former employees; \$100
6 max. initial exposure + 69 former employees * 200 subsequent max. exposure). [Crosner Decl.,
¶ 16.]

7 C. ANTICIPATED TRIAL RESULT, WEIGHT OF EVIDENCE, CLARITY OF
8 CONTROLLING LAW, AND DEFENDANT'S DEFENSES [CMO , E.2.d]

9 **1. THE SPLIT SHIFT CLAIMS**

10 Plaintiff's strongest claim is for unpaid split shift premiums and it has a maximum value
11 of \$363,600 (a total of 1,818 pay periods with split shifts * \$200 maximum subsequent PAGA
12 penalty) but, as noted, Defendant raised several defenses, including that Plaintiff's exposure
13 analysis presumed split shift violations for any interruptions in a 24-hour work day without due
14 regard to conflicting authority and the actual offset credited for payments in excess of minimum
15 wage. As previously indicated, Defendant argues that any interruption in the work day that was
16 a result of an overnight shift does not amount to a bona fide split shift. Defendant points to
17 *Securitas Security Services USA, Inc. v. Superior Court (Holland)* (2011) 197 Cal.App.3d 115,
18 in support of its defense. While Plaintiff is confident in prevailing on liability at trial for overall
19 split shifts, based on the defense put forth by Defendant, Plaintiff believes her odds of proving
20 split shift violations relating to the overnight shifts are significantly lower (estimate 20% to
21 30% chance of prevailing). Regardless, Plaintiff also believes any penalty that might be
22 assessed will likely be reduced in the Court's discretion under Labor Code § 2699(e)(2) and
23 cases such as *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, largely because the
24 violation arose out of a previously unsettled legal obligation. [Crosner Decl., ¶ 17.] In *Cotter*,
25 the district court found a "significant" reduction in the amount of civil penalties was
26 "appropriate" because (i) the employer did not "deliberately evad[e] a clear obligation to
27 provide legally required pay and benefits to employees," (ii) the employer did not "negligently
28 fail to learn about its obligations under the wage and hour laws," and (iii) the employer's
disclosure obligations were "genuinely unclear" because "there is no straight answer to the
question.")

2. THE LATE PAYMENT CLAIMS

Plaintiff's late payment claim points to the "pay date" on the wage statements Defendant's issued as evidence that Defendant systematically compensated its employees thirteen days after the end of the applicable pay period, resulting in late payment violations under Labor Code section 204. However, Defendant puts forth three arguments attacking both the substantive and procedural aspects of this claim: (1) its "pay date" on the wage statement was automated and did not represent the actual date checks and/or direct deposits were issued, and Plaintiff cannot point to any authority affording them a presumption on the basis of the pay date on the wage statement; (2) to meet its burden Plaintiff would have to obtain proof of actual dates of payment which would require incredibly fact-intensive and individualized inquiries that render this claim unmanageable for the Court to administer an efficient trial; and (3) any violations would be tempered by the high probability that the Court will not characterize these as subsequent violations for any time period prior to when the PAGA Notice, which would limit PAGA penalties to \$100 for at least half the statutory period, notwithstanding the possibility of additional reductions in the penalties amount. For these reasons, Plaintiff believes there is a risk factor of at least 65% to 75% off the maximum exposure amount. [Crosner Decl., ¶ 18.]

3. THE DERIVATIVE CLAIMS

The Derivative Claims are true to their name, and either live or die by the result of the Split Shift Claims. However, there is additional risk factors to consider in assessing the waiting time and wage statement violations claims. As explained above, Defendant offers persuasive authority that split shift premiums should not be characterized as "wages" and therefore do not meet the criteria necessary to trigger section 203 or 226 penalties. *Ling v. P.F. Chang's China Bistro, Inc.* and *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244. Therefore, Plaintiff anticipates a 30% or less likelihood of success on the Derivative Claims at trial, assuming that Plaintiff prevails in the above-described Split-Shift Claims. [Crosner Decl., ¶ 19.]

In regard to CMO ¶ E(2)(f) and whether Labor Code § 226 violations were knowing and intentional, Defendant argued these violations were not knowing or intentional because they are based on one-hour premium penalties not "wages", and many of these penalties are for overnight split-shifts which arise out of a conflicting interpretation of the law. [Id.]

D. FACTORS SUPPORTING A REDUCTION IN TOTAL PENALTY AMOUNT [CMO, E.2.h AND k]

1 The PAGA affords courts wide latitude to reduce the amount of civil penalties “based on
2 the facts and circumstances of a particular case” and if “to do otherwise would result in an
3 award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(h). Some
4 factors courts have considered in reducing the amount of PAGA civil penalties include whether
5 (1) the violation arises from an unsettled legal obligation, *Cotter*, 193 F.Supp.3d at 1037; and
6 (2) the employer’s willingness to fix the violation. *Fleming v. Covidien* (C.D. Cal. 2011) 2011
7 U.S.. Dist. LEXIS 154590, at *8-9. For instance, in *Cotter*, the Court found that a \$1 million
8 PAGA settlement was fair and reasonable in light of the unsettled nature of the law, which
9 awarded \$2.52 per pay period (397,110 pay periods/\$1 million PAGA settlement), which was a
10 97.5% reduction from the maximum penalty. In *Fleming*, the Court reduced the potential
11 penalties by over 82 percent, awarding \$500,000 for 28,742 pay periods at issue. Similarly, in
12 *Sanchez v. McDonald’s Restaurants of California*, Los Angeles Superior Court Case No.
13 BC499888, the Court entered summary adjudication against McDonald’s for violating the
overtime laws, but then awarded only \$750,000 in PAGA penalties despite a substantial number
of violations.

14 Here, Defendant argues each of these factors weigh in favor of the Court applying a
15 significant reduction to any civil penalties assessed. Regarding the Split-Shift Claims, if
16 Plaintiff prevailed on her theory, she anticipates the Court would apply a discount because a
17 portion of the violations are based on an unsettled area of the law, and Defendant’s obligations
18 were (and are) genuinely unclear regarding payment of a one-hour premium to employees
19 working overnight shifts. Plaintiff acknowledges that *Securitas Security Services* provides
20 strong arguments in defense of the Split-Shift Claims. Defendant points out there is no clear
21 authority outside of the statutory language within the Wage Order supporting Plaintiff’s theory
22 that one-hour premiums shall be applied to overnight shifts which slightly bleed into a
23 subsequent workday. Since this is an unsettled area of the law, Plaintiff applied a 50% discount
in civil penalties based on the Court’s discretion. [Crosner Decl., ¶ 20.]

24 Plaintiff also anticipates the Court may exercise discretion and discount the Late
25 Payment Claims. Of course, Defendant will likely offer witnesses and declarations at trial or
26 prior thereto in order to show that all employee payments, or a portion thereof, were actually
27 paid on different dates than those depicted on the issued wage statements. If Defendant is able
28 to produce adequate proof, Plaintiff believes there is a serious risk that the Court would
consider this Claim too individualized to manage in the context of a trial. Any such proof would

1 also potentially reduce the amount of violations, in addition to the strong possibility that the
2 \$100 initial and/or \$200 subsequent PAGA civil penalty amounts are reduced by the discretion
3 of the Court. Based on these facts, Plaintiff believes that the Court may apply approximately a
4 65% reduction in civil penalties for Plaintiff's Late Payment Claims. [Crosner Decl., ¶ 21.]

5 Finally, the Derivative Claims are subject to the defenses and arguments for reduction as
6 the primary claims discussed above, as well as several additional defenses/arguments, as
7 discussed above. Therefore, Plaintiff believes the Court would find that the majority of claims
8 arise out of an unsettled legal obligation and would discount the Derivative Claims by
9 approximately 85% in line with the other cases noted herein, potentially considering arguments
10 by Defendant that it should not be assessed as strongly since it was already assessed for the
11 direct violations. [Crosner Decl., ¶ 22.]

12 E. MAXIMUM POTENTIAL PAGA PENALTIES AT TRIAL [CMO, E.2.g]

13 Applying all defenses and risks of litigation discussed above, and factoring in the
14 Court's discretion to reduce the civil penalties, Plaintiff assesses a realistic trial value as
15 requested in the Court's CMO, which assumes that Plaintiff prevails on each claim and
16 establishes a violation for nearly every bi-weekly pay period, as follows:

17 Split-Shift Claims: \$45,450 (75% reduction for risk of prevailing on liability and
18 additional 50% for potential reduction in PAGA civil penalties); Late Payment Claims:
19 \$143,925 (70% reduction for risk in prevailing on liability and additional 50% for potential
20 reduction in PAGA civil penalties); and Derivative Claims: \$86,980 (70% reduction for risk in
21 prevailing on liability and additional 85% for potential reduction in PAGA civil
22 penalties). Therefore, Plaintiff's estimation of the total potential penalties for trial assessment is
23 \$276,355. Of course, if Plaintiff lost any claim or did not establish a violation every period,
24 then the amount would be reduced further, plus the Court could further reduce the penalties in
25 its discretion. For instance, if the Court elected to adopt Defendant's argument that derivative
26 penalties should not be stacked, and then the total assessment would only be \$232,552.
27 [Crosner Decl., ¶ 23.]

28 Considering these issues, defenses, and the risks, a \$151,137 settlement is a very good
result, particularly in light of the Defendant's substantial liabilities and inability to allocate a
significantly larger amount towards settlement and remain solvent. Plaintiff's counsel retained
an expert, Van Dichoso, CPA, to evaluate the financial condition of the Defendant and to
express an opinion as to the realistic range in which Defendant could potentially settle this case

1 based on its available financial resources, and in a manner that would also allow Defendant to
2 continue in operation such that class members currently employed by Defendants' entities
3 would not also lose their employment. Mr. Dichoso has significant experience in the area of
4 financial statement auditing, which is an area of expertise not all CPAs can perform. Mr.
5 Dichoso had the opportunity to review a range of Defendant's financial documents and tax
6 filings, which included: 2015 Unaudited Balance Sheet, Unaudited Income Statement and
7 Corporate Tax Returns for the year ended; 2016 Unaudited Balance Sheet, Unaudited Income
8 Statement and Corporate Tax Returns for the year ended; 2017 Unaudited Balance Sheet,
9 Unaudited Income Statement for the period ending 8/31/17; 2017 Bank Reconciliation Report
10 and Wells Fargo Bank Statement (#2878937214) ending 8/31/17; Wells Fargo Business
11 Credit/Loan Agreement dated 2/3/16; and 2017 Business Loan Billing Statements as of 8/15/17.
12 Mr. Dichoso's review of Defendant's financial documents confirmed Defendant has substantial
13 liabilities that compromise its ability to allocate a significant amount of cash towards settlement
14 and remain solvent. Based on his professional opinion, Mr. Dichoso concluded that a settlement
15 in excess of \$151,157 paid no earlier than July 2018 may result in financial harm to Defendant,
16 including but not limited to its ability to continue in operation, and if this case were to continue
17 and Plaintiff were to secure a verdict for damages in excess of this amount, it is likely that
18 Defendants would become insolvent and efforts by Plaintiff to collect on the verdict would be
19 very difficult, and would likely require significant time and additional expenditure of resources.
20 [Crosner Decl., ¶ 24; Declaration of Van Dichoso, filed on or about June 17, 2018, at ¶¶ 4-8.]

18 **V. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE**
19 **FAIR AND REASONABLE**

20 For their efforts and the substantial risk they undertook in obtaining a large common
21 fund settlement that benefits the LWDA and Aggrieved Employees, the Parties allocated one-
22 third of the Settlement Amount to Plaintiff's Counsel for reasonable attorney's fees, plus actual
23 litigation costs. These fees are warranted under the law and within the range of fees commonly
24 awarded in similar cases.

25 **A. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY'S FEES**
26 **UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM ACTION**

26 PAGA provides a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and
27 costs, under Labor Code section 2699(g)(1): "Any employee who prevails in any action shall be
28 entitled to an award of reasonable attorney's fees and costs" As discussed below, in a qui tam

1 action, reasonable attorney's fees and costs are typically awarded under the common fund doctrine
2 where, as here, the litigation creates a common fund of money in a specific amount for the benefit
3 of others.

4 "A *qui tam* action is one brought under a statute that allows a private person to sue as a
5 private attorney general to recover damages or penalties, all or part of which will be paid to the
6 government." *People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-
7 492. "A *qui tam* action 'is a type of private attorney general lawsuit' [citation], in which 'the *qui*
8 *tam* plaintiff stands in the shoes of the state or political subdivision [citation]." *Id.* at 501. As the
9 name of the PAGA statute makes clear (e.g. "Labor Code Private Attorneys General Act"), a PAGA
10 action is a *qui tam* action because the statute allows the employee-plaintiff, acting as the proxy of
11 the state's labor law enforcement agency, to sue his or her employer for Labor Code violations and
12 recover civil penalties that otherwise could only be assessed and collected by the Labor and
13 Workforce Development Agency (LWDA). *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59
14 Cal.4th 348, 380. "A PAGA representative action is therefore a type of *qui tam* action." *Id.* at 382.
15 Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State, with a
16 smaller portion paid to the aggrieved employees (e.g., 75% paid to the state; 25% paid to the
17 aggrieved employees). Lab. Code § 2699(i).

18 As here, where a common fund is created in a *qui tam* action by through the successful
19 efforts of a plaintiff and his or her attorneys, the plaintiff's attorneys are entitled to recover their
20 fees from the common fund. *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91. In *Bank*
21 *of America*, California taxpayers compelled the State Controller to enforce the Unclaimed Property
22 Law against banks who were retaining accounts that should have been turned over to the State.
23 Because of the success of the taxpayers' lawsuit, a common fund was created in favor of some
24 depositors and the State of California. *Id.* When the taxpayers' attorneys sought recovery of their
25 attorney's fees from the judgment under the common fund doctrine, the Controller opposed the
26 request. The Court of Appeal affirmed the trial court's fee award to the taxpayers' counsel under
27 the common fund doctrine.

28 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a
common fund was created in the amount of \$151,137 for the benefit of the Aggrieved Employees
and the State. Thus, these beneficiaries should bear their share of the costs and attorney's fees out
of the overall \$151,137 settlement amount under the common fund theory. *Id.* Moreover, such fees
are deducted as a percentage of the overall settlement amount, which in this case is \$151,137.

1 *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona*
2 *Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311.

3 The California Supreme Court recently upheld the use of the common fund theory of
4 recovery for attorney's fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480. In *Laffitte*,
5 the Supreme Court upheld an award of attorney's fees of one-third of the \$19 million gross
6 settlement (e.g. awarded \$6.33 million in fees) under the common fund theory. This ruling is
7 consistent with the Court's prior rulings recognizing "when a number of persons are entitled in
8 common to a specific fund, and an action brought by ... plaintiffs for the benefit of all results in the
9 creation or preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of the
10 fund." *Serrano III v. Priest* (1977) 20 Cal.3d 25, 34; *Boeing*, 444 U.S. at 478 ("[A] lawyer who
11 recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole");
12 *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when
a settlement or adjudication results in the establishment of a separate or so-called common fund for
the benefit of the class").

13 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
14 percentage of the total fund created when the fund consists of a "certain or easily calculable sum
15 of money," *Dunk v. Ford Motor, Co.* (1996) 48 Cal.App.4th 1794, 1809, and California law has
16 long applied the percentage of the recovery method for awarding attorney's fees where a common
17 fund is established. *Serrano*, 20 Cal.3d at 34; *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th
18 715, 726; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261-63 (affirming award of
19 attorneys' fee based on percentage of recovery); *Consumer Cause, Inc. v. Mrs. Gooch's Natural*
20 *Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397 (the common fund doctrine is "frequently
21 applied in class actions when the efforts of the attorney for the named class representatives produce
monetary benefits for the entire class").

22 A one-third common fund attorney fee award is also consistent with what courts have
23 awarded Plaintiff's counsel in other representative actions. [Crosner Decl., ¶ 25.] Awarding
24 attorneys' fees of one-third of a gross settlement amount is favored by California courts when a
25 fund established for the common benefit of others is involved, such as here. Accordingly, awarding
26 fees on this basis of one-third of the \$151,137 gross settlement amount is reasonable and
appropriate. [Crosner Decl., ¶¶ 25-33.]

27 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF THE**
28 **FEE AWARD**

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

11 Here, Crosner Legal’s lodestar is approximately \$63,092, and Plaintiff’s Counsel’s
12 efforts are summarized in the accompanying Crosner Declaration and Exhibit C thereto. This
13 results in a lodestar in excess of the requested percentage-based attorney’s fee award and
14 accordingly Counsel are not requesting a lodestar enhancement. [Crosner Decl., ¶¶ 34-37; Exh.
15 C.] It is important to note, however, this fact serves to highlight the reasonableness of the fees
16 requested on a percentage-of-the-recovery basis, as it shows the requested fees are below the
market rate for the services rendered if those services are valued via traditional hourly billing.

17 **VI. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

18 Plaintiff’s Counsel requests reimbursement of actual out-of-pocket expenses incurred to
19 prosecute this action. These expenses were incidental and necessary to the effective representation
20 of the employees, and Plaintiff’s Counsel is permitted to recover their litigation costs and expenses
21 under the common fund doctrine. *Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits
22 recovery of fees and costs from the fund); *Rider v. Cty. of San Diego* (1992) 11 Cal.App.4th 1410,
23 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same
24 reasons discussed above with respect to the recovery of attorneys’ fees by ... [Plaintiffs’]
25 attorneys”). Furthermore, Plaintiff’s Counsel is entitled to recover “those out-of-pocket expenses
that would normally be charged to a fee-paying client.” *Harris v. Marhoefer* (9th Cir. 1994) 24
F.3d 16, 19.

26 Plaintiff’s counsel accordingly requests reimbursement of \$6,093.02 in actual costs.
27 [Crosner Decl., ¶¶ 38-39; Exh. D.] These costs and expenses include mediation fees, filing fees,
28 online research, parking charges, Courtcall fees, and service of process fees, while waiving

1 convenience and/or courier fees charged by Counsel's attorney service. These costs are reasonable
2 and uncontested, and should be approved. [Id.]

3 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
4 **REASONABLE**

5 Although there is no authority approving a "service award" to a named plaintiff in a
6 PAGA action separate from their share of the assessed civil penalties, the rationale of awarding
7 service awards to lead plaintiffs in the context of class actions is equally applicable in the
8 context of an aggrieved employee bringing a PAGA action, an award under the circumstances
9 of this case would be justified. *Clark v. American Residential Services, LLC* (2009) 175
10 Cal.App.4th 785, 804 ("an incentive award is appropriate if it is necessary to induce an
individual to participate in the suit").

11 In this matter, Plaintiff McCord, at considerable risk to her livelihood, made significant
12 efforts to protect the interests of the state labor agencies and ensure her non-party coworkers
13 were no longer forced to work under unlawful conditions. Plaintiff was critical in identifying
14 potential witnesses to Defendant's labor code violations and she spent many hours assisting her
15 counsel in providing facts, identifying witnesses, and reviewing documents and fields in order
16 to litigate this case. Plaintiff has never been a PAGA plaintiff in any other matter. [Crosner
Decl., ¶ 41; Declaration of Ashley McCord, filed or or about April 25, 2018, at ¶¶ 2-13.]

17 As a result of Plaintiff's efforts, the Defendant has changed their practices to comply
18 with California's labor laws, benefitting Defendant's current employees. In addition, the
19 LWDA will receive approximately \$66,273.73 as its 75 percent share of the Net Settlement
20 Amount to educate other California employers to comply with law, benefitting the public at
large. [Id.]

21 In light of the foregoing and upon the Court's own discretion, in its tentative ruling the
22 Court indicated its approval of a service award in an amount of \$3,000, which has been
23 requested in the Parties' revised [Proposed] Order concurrently filed herewith.

24 **VIII. SUBMISSION TO THE LWDA**

25 Plaintiff timely served the LWDA with the Settlement Agreement and this Renewed
26 Motion, and notified the LWDA of the continued hearing. [Crosner Decl., ¶ 42; Exh. F.]

27 **IX. THE COURT SHOULD APPOINT PHOENIX AS ADMINISTRATOR**

28 Subject to the Court's approval, the parties stipulated to Phoenix Settlement
Administrators ("Phoenix") to serve as the Settlement Administrator. Phoenix is highly

1 experienced in administering class/PAGA settlements. Phoenix provided an all-in proposal to
2 administer the settlement for \$3,300.00. The Court confirmed in its tentative ruling it would
3 approve a settlement administration fee not to exceed \$3,300.00, which is reflected in the
4 Parties' revised [Proposed] Order. [Crosner Decl., ¶ 40; Exh. E.]

5 **X. CONCLUSION**

6 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement
7 under PAGA, approve the requested awards of attorney's fees and costs, the requested
8 administration fees, the requested enhancement to Plaintiff Ashely McCord, and approve the
9 proposed distributions to the LWDA and Aggrieved Employees.

10 Dated: May 14, 2019

CROSNER LEGAL, P.C.

11 BY:



12 Zachary Crosner, Esq.
13 Attorneys for Plaintiff
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