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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

GINA DILLARD, on behalf of all other Aggrieved Employees only; Plaintiff, vs. HOMESITE SERVICES, INC., a California Stock Corporation, and DOES 1 through 50, inclusive, Defendants.	Case No.: CIVSB2418616 Assigned for All Purposes to: Hon. David E. Driscoll Dept. S22 MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT UNDER PRIVATE ATTORNEYS GENERAL ACT Date: September 17, 2025 Time: 9:00 a.m. Dept.: S22

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I. INTRODUCTION

Plaintiffs Gina Dillard and Kenneth Davis hereby seek Court approval of a proposed settlement of claims brought under the Private Attorneys General Act ("PAGA") against defendant Homesite Services, Inc. ("Homesite" or "Defendant"). Consistent with PAGA, the proposed settlement releases claims under PAGA only and has no impact on the individual claims of any allegedly aggrieved employee other than Plaintiffs. Since the settlement resolves nothing more than claims under PAGA and Plaintiffs' individual claims, it requires only a one-step review and approval process by the Court, and for the reasons discussed below, the proposed settlement is fair, reasonable, and adequate, and advances the statutory purposes of PAGA. Plaintiffs respectfully request the Court approve the Settlement in its entirety.

II. BACKGROUND

Defendant Homesite is a residential, commercial, and retail service company that provides new home interior design, flooring, and cabinetry in both Northern and Southern California. Plaintiff Dillard was formerly employed by Homesite as a non-exempt hourly employee from about June 2023 to March 2024, as a customer service representative for the tile department out of Homesite's corporate offices in Livermore, California. Plaintiff Davis also was employed by Homesite as a non-exempt hourly employee, and worked as a warehouse associate for Homesite's San Bernardino, California location from around 2018 to November 2023. [Declaration of Sepideh Ardestani ("Ardestani Decl."), ¶ 4.]

After notice to the LWDA and Defendant, and exhausting administrative remedies Plaintiff Dillard filed a complaint against Homesite on June 7, 2024 seeking PAGA civil penalties for, inter alia, the following alleged wage and hour violations: (a) failure to pay all wages due, including minimum and overtime wages; (b) failure to provide meal and rest periods; (c) failure to provide complete and accurate wage statements; (d) failure to reimburse expenses, and (e) failure to pay wages due on separation of employment. Plaintiff Dillard filed the matter on behalf of herself and the "Aggrieved Employees" defined to include all individuals employed by Homesite as non-exempt employees in California during the relevant PAGA time frame of March 27, 2023 through the date of judgment. On July 1, 2024, and after notice to the LWDA and

Defendant and exhausting administrative remedies, Plaintiff Davis filed a separate PAGA-only complaint alleging substantially similar Labor Code violations. [Ardestani Decl., ¶ 5; Exh. 2.]

Once the cases were at issue, the Parties initiated discovery and began meeting and conferring regarding discovery, potential law and motion, and other case management issues, and eventually agreed to attempt an early global mediation. They also agreed to and did informally exchange information to permit both sides to evaluate Plaintiffs' allegations. Through this informal discovery, Defendant provided Plaintiffs with information including, inter alia, Plaintiffs' personnel files, the number of potential Aggrieved Employees, the number of aggregate pay periods, pay stubs and time records for a representative sampling of about 15% of the Aggrieved Employees, and relevant policy documents regarding Defendant's time keeping and reporting policies and meal and rest break policies, among other pertinent materials. [Ardestani Decl., ¶ 6.]

In April 2025, the Parties mediated both cases with Chris Barnes, Esq., a respected professional neutral with extensive class action/wage and hour experience. Before and during the mediation, Plaintiffs and their counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiffs' ability to proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiffs' claims and Defendant's defenses, and the Parties' data analyses and conclusions based on data provided by Defendant. After a contentious day of negotiations, the Parties reached agreement and subsequently formalized their tentative settlement in the Settlement Agreement now before the Court for approval. A fully executed, true and correct copy of the PAGA Settlement Agreement ("Settlement Agreement") is attached to the Ardestani Declaration as Exhibit 1. Finally, in order to fully effectuate the tentative global settlement, the Parties filed a stipulation for an amended compliant and Plaintiff Dillard filed a First Amended Complaint adding Plaintiff Davis as a party-plaintiff and otherwise conforming the operative complaint's allegations to the terms of the settlement. [Ardestani Decl., ¶ 7.]

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III. SUMMARY OF SETTLEMENT TERMS

A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES

Under the settlement, Defendant will pay a non-reversionary settlement amount of $575,000 (the "Gross Settlement Amount" or "GSA"). The GSA is inclusive of payments to the LWDA and Aggrieved Employees, costs of settlement administration (estimated at no more than $4,000), a modest service award to each Plaintiff, and reasonable attorney's fees and costs.[1] After payment of settlement administration costs, Plaintiffs' service awards, and reasonable attorney's fees and costs from the GSA, Plaintiffs presently estimate about $334,556.65 will remain (the "Net Settlement Amount" or "NSA"). Seventy-five percent of the NSA (about $250,917.49) will go to the LWDA, and the remaining 25% (about $83,639.16) will be distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each individual worked during the PAGA Period of March 27, 2023 to April 15, 2025. The average award currently is estimated at about $217 per individual, while awards are estimated to range from about $6.29 to $340. [Ardestani Decl., ¶ 8.]

B. PAYMENT AND THE NOTICE

The Parties propose using Simpluris, Inc. ("Simpluris") as the Settlement Administrator. Simpluris has extensive experience administering PAGA settlements, and has agreed to cap its fees at $4,000. [Declaration of Denise Islas, ¶¶ 2-9; Exhs. A-C.] Homesite will fund the GSA within 21 days of the Effective Date, and within 14 days of funding Simpluris will mail a Notice and settlement check to all Aggrieved Employees via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in Homesite's records. Aggrieved Employees need not submit claim forms and will automatically receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed residual funds will be forwarded to the California State Controller's Unclaimed Property Fund in the name of the Aggrieved Employee/s that did not cash his or her check/s. [Ardestani Decl., ¶ 9.]

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[1] Plaintiffs' counsel request 1/3 of the GSA ($191,666.67) in fees and costs of 24,776.68. Plaintiffs each request a modest service award of $10,000.00 per named Plaintiff.

C. THE RELEASE

The California Supreme Court has explained that a judgment in "a representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." Arias v. Superior Court (2009) 46 Cal.4th 969, 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended to be "binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." The Settlement Agreement protects the rights of the Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement Agreement specifically provides the Release is inapplicable to any claims other than those brought under PAGA. [Ardestani Decl., ¶ 10.]

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

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

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

A. NATURE OF THE ALLEGED VIOLATIONS

Plaintiffs first contend Defendant failed to pay at least the applicable minimum wage for all hours worked in that Defendant "synthetically" paid employees based on their scheduled hours instead of the actual hours worked, resulting in "off the clock" work that went uncompensated. Here, Plaintiffs' experts' analysis of the time records showed that 97.7% of shifts started or ended on the whole-hour or 30-minute intervals, suggesting a policy to generate synthetic entries tied to scheduled start/stop times rather than the actual hours of work. As are result of this policy, Plaintiffs allege employees typically lost as much as 15 minutes per shift in pay due working "off the clock." [Ardestani Decl., ¶ 11.]

Plaintiffs next contend Defendant failed to pay all wages due because it did not pay overtime and sick pay wages based on the correct "regular rate" of pay, and instead paid for overtime based on employees' base hourly wage without accounting for bonuses and other non-discretionary pay. Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804, 807 (holding that bonuses must be included in the calculation of an employee's regular rate of pay); Alvarado v. Dart Container Corp. of Cal. (2018) 4 Cal. 5th 542 549 (holding that bonuses should be factored into the employee's regular rate of pay so the regular rate reflects all forms of regular compensation that the employee earned). Here, Plaintiffs contend employees regularly received modest (i.e., $150-300) non-discretionary bonuses for meeting various goals and quotas, and this non-discretionary income was not factored into the "regular rate" of pay. Per Plaintiffs, this resulted in the underpayment of overtime for all pay periods where an employee both worked overtime hours and earned any kind of non-discretionary bonus pay. [Ardestani Decl., ¶ 12.]

On the meal break claims, Plaintiffs allege that even though Defendant's written meal and rest period policies seem facially compliant, as applied there were substantial “de facto” violations for lunches that either were missed completely, untimely, or cut short. Per Plaintiffs’ experts’ review, the data suggested about at least a 30.4% unique violation rate for pay periods with missed or non-compliant breaks, as well as a complete absence of meal period premium payments in the pay records. On top of the “de facto” violations, Plaintiffs also contended Homesite had a policy that required employees to record lunches at exactly 30 minutes regardless of how long the lunch break actually lasted or whether it was interrupted by work. On the rest break claims, Plaintiffs likewise allege employees did not receive all required rest breaks and argued that Plaintiffs and other Aggrieved Employees regularly worked through rest periods in order to meet the demands of their jobs. [Ardestani Decl., ¶¶ 13-14.]

On the expense reimbursement claim, Plaintiffs allege employees had to use personal cell phones for work-related reasons, and estimate that around 87.9% of the employees regularly used their own phones on the job but did not receive any reimbursement. An employer must reimburse employees for use of personal devices, and if the employee has an unlimited monthly plan then the employer must reimburse an amount that equates to the employee’s percentage of use for work. Cochran v. Schwan’s Home Serv. (2014) 228 Cal.App.4th 1137. [Ardestani Decl., ¶ 15.]

Finally, Plaintiffs also allege claims derivative of the foregoing claims, including a derivative wage statement claim based on the failure to pay all wages due, and failure to pay all wages due and owing upon separation of employment under Labor Code §§ 201-203. [Ardestani Decl., ¶ 16.]

Defendant disagrees with the alleged violations, the alleged violation rates, and the alleged evidence which Plaintiffs used to support their claims, many of which were disputed by Plaintiffs themselves in their depositions.

B. NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES

For mediation, Homesite indicated it employed approximately 386 non-exempt employees in California during the relevant time frame, and these individuals worked approximately 13,300 pay periods during that time. Based on the data provided by Defendant, Plaintiffs estimated Defendant’s maximum PAGA exposure at approximately $6,691,800, including around

$1,333,000 on the unpaid wage/off the clock claim, approximately $13,300 on the unpaid wage/regular rate claims, about $1,333,000 on the meal period claims, $1,333,000 on the rest period claims, $1,333,000 on the wage statement claims, $1,333,000 on the expense reimbursement claims, and about $13,500 in civil penalties for failing to timely pay wages on separation of employment. [Ardestani Decl., ¶¶ 17-18.] Plaintiffs, however, substantially discounted these estimates in light of Defendant's many procedural and merit-based defenses and testimony provided by Plaintiffs themselves regarding the extent of alleged violations.

C. <u>THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE STRENGTH OF PLAINTIFFS' CASE, THE DISCOVERY PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT</u>

On Plaintiffs' unpaid wage/off the clock claim, Defendant argued its time keeping policies accurately tracked and paid for all hours worked by its employees, and did not deprive class members of compensable hours worked. Homesite also emphasized that its policies strictly prohibited any "off the clock work," that employees were not required to arrive at work early or otherwise work "off the clock," and to the extent it happened it was done without management's knowledge or consent. <u>White v. Starbucks Corp.</u> (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1083 (employer must have actual or constructive knowledge of the off the clock work). Defendant further argued proving this claim would require hundreds of individualized inquiries and would be impossible to resolve on a representative basis. [Ardestani Decl., ¶ 19.]

In response to Plaintiffs' unpaid wage/regular rate claim, Defendant argued that the bonuses Plaintiffs claim should have been included in the "regular rate" actually were discretionary and therefore were not included in the regular rate calculation. Consequently, per Defendant, these "bonuses" did not influence the employees' regular rate of pay when calculating the overtime rates and that employees received all required overtime pay at the correct hourly rate. [Ardestani Decl., ¶ 20.]

On the meal break claims, Homesite offered multiple defenses. First, it emphasized it authorized and permitted all necessary breaks, and that employees received full uninterrupted lunch periods as reflected in its time records. Defendant further argued that even to the extent meal or rest breaks were missed or arguably non-compliant, it was in violation of company policy and aberrational, and would require significant individual inquiries to determine the reasons underlying any such alleged violations and whether it was by employee choice or some other reason. Thus, per Defendant, any trial on this issue would be unmanageable because of these individualized issues. [Ardestani Decl., ¶ 21.] This is particularly true where Plaintiffs themselves were not aware of any company wide unlawful practices relating to meal or rest periods.

As with meal breaks, Defendant argued the applicable rest break policies complied with California law, and that it authorized and permitted employees to take all required breaks, that such breaks were a net 10 minutes and otherwise fully compliant, and employees could leave the premises. Further, per Defendant, in light of the fact that it is not required to maintain a record of rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking rest periods would be purely anecdotal and individual issues would predominate on liability. This arguably would once again make a trial unmanageable since the number of instances an employee missed a rest break would have to be tested on a case by case basis to determine compliance. [Ardestani Decl., ¶ 22.]

For Plaintiffs' expense reimbursement claim, Homesite emphasized its written policies prohibited employees from using their own phones while on the clock and working. Beyond that, Defendant argued there were no need for employees to use their phones while working, and if they did it was purely for personal convenience and therefore it was not reimbursable as a "necessary" business expense. [Ardestani Decl., ¶ 23.] Additionally, Defendants allege that the Company's employees who did need to use their phones for work purposes were given Company phones or were reimbursed for their phone use.

Plaintiffs also alleged derivative violations of Labor Code § 226 (wage statement violations) and §§ 201-203 (waiting time penalties). Both claims, since they are entirely derivative, will rise or fall along with the primary claims, in addition to being subject to "good faith" and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay living wages). Accordingly, Plaintiffs had to discount the value of these claims significantly in light of these multiple potential defenses. Defendant also contended a substantial discount should be applied to the civil penalties for these derivative (i.e., "stacked") violations, as it would be unfair to penalize Defendant multiple times for the same violation. [Ardestani Decl., ¶ 24.]

Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of civil penalties "based on the facts and circumstances of a particular case" if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(h). Several state and federal courts in California have applied significant reductions to PAGA civil penalties even after plaintiffs prevailed on the merits. In Fleming v. Covidien (C.D. Cal. 2011) 2011 U.S. Dist. LEXlS 154590, *8-9, for instance, the district court reduced the potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just $5 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). [Ardestani Decl., ¶ 25.]

Thus, Defendant raised various and multi-layered defenses to each of Plaintiffs' claims, any one of which, if successful, could have derailed Plaintiffs' case. And Defendant vowed to raise all these defenses at trial. Accordingly, Plaintiffs faced risky issues going forward with litigation, and it could have taken years to realize any recovery in this action along with the possibility of post-trial appeals. In additional to its merit-based defenses and arguing trial would be unmanageable, Defendant also intended to raise additional defenses on damages, including the proper measure of civil penalties and the appropriate discount to place on any assessment of such penalties. [Ardestani Decl., ¶¶ 26-27.]

Moreover, the recovery is in line with a number of other PAGA settlements approved by California courts. The amount further is in line with many other PAGA settlements that have received approval from courts in California. McLeod v. Bank of Am., N.A., No. 16-CV-03294-EMC, 2018 U.S. Dist. LEXIS 195314, 2018 WL 5982863, at *4 (N.D. Cal. Nov. 14, 2018) (finding $50,000 PAGA allocation for claims estimated at $4.7 million — approximately 1.1%

— adequate); Smith v. Kaiser Found. Hosps., 2020 WL 5064282, at *17 (S.D. Cal. Aug. 26, 2020) (finding that PAGA award that was 2.4% of maximum estimated value of PAGA claims was not "unfair, inadequate, or unreasonable given the risks of continued litigation"); Gilmore v. McMillan-Hendryx Inc., 2022 WL 184004, at *4 (E.D. Cal. Jan. 20, 2022) (PAGA award of 4.2% of the maximum estimated value of PAGA claims and 2.3% of the total settlement amount was "not unreasonable and weighs in favor of settlement"); Hartley v. On My Own, Inc., 2020 WL 5017608, * 4 (E.D. Cal. Aug. 25, 2020) (approving settlement at 3.47% of verdict value of PAGA penalty, resulting in average payment per employee of $61); North v. Superior Hauling & Fast Transit, Inc., No. EDCV 18-2564 JGB (KKx), 2020 WL 12967997, at *4 (C.D. Cal. May 29, 2020) (approving settlement that included PAGA average payout of $21.01).

Although Plaintiffs and their counsel believe they could have prevailed, there was no such guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits on all claims, securing the maximum theoretical civil penalties, and appellate risks all are factored into the equation, the settlement value is reasonable and supported. Of course, to recover anywhere near the maximum penalties Plaintiffs would have to shoot the moon and win both liability and maximum penalties on all claims for every single pay period at issue, which outcome, for the reasons discussed, is unlikely. Given Defendant's various procedural and merits defenses, as well as the substantial penalty reductions ordered in the cases above – which occurred after trial – the proposed settlement is reasonable. [Ardestani Decl., ¶ 27; Declaration of Haig Kazandjian ("Kazandjian Decl."), ¶¶ 5-9.]

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

In sum, when the risks of litigation, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any penalty award all are accounted for, it is clear a settlement amount of $575,000 for the PAGA claims is within the ballpark of reasonableness, furthers the purposes underlying PAGA, and approval is appropriate.

V. SUBMISSION TO THE LWDA

Plaintiffs timely provided the LWDA with the Settlement Agreement and this Motion, and notified the LWDA of this approval hearing via the LWDA's online portal. [Ardestani Decl., ¶ 28; Exh. 3.] Accordingly, the LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and no comment or objection has been received.").

VI. PLAINTIFFS' ENHANCEMENTS

A modest incentive award for each Plaintiff is appropriate under applicable law. See Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000). Both devoted time and resources to the litigation, provided documents, assisted counsel with investigating the claims asserted and in preparing for mediation. The service payments provided to Plaintiffs as the PAGA representative is typical in representative action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.").

Here, the Settlement Agreement provides for an enhancement of up to $10,000.00 to each Plaintiff. The requests are reasonable given the risks they undertook on behalf of the Aggrieved Employees and State. By contacting and retaining counsel to pursue these claims, Plaintiffs helped make this settlement possible for the absent employees, while shouldering the risk of being liable for Defendant's litigation costs. Plaintiffs also exposed themselves to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing themselves at risk of discrimination by future prospective employers. As stated in their respective declarations filed herewith, among taking many other actions assisting in the successful litigation of this case, Plaintiffs provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Ardestani Decl., ¶ 29; Kazandjian Decl., ¶¶ 15-20; Declaration of Kenneth Davis, ¶¶ 2-9; Declaration of Gina Dillard, ¶¶ 2-13.]

VII. THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE

For their efforts and the contingent risk undertaken in obtaining a common fund settlement that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or $191,666.67, is allocated to Plaintiffs' counsel for reasonable attorney's fees, plus actual litigation costs which amount to $ 24,776.68. These fees and costs are warranted under the law and within the range of fees commonly awarded in similar cases, and counsel will split any fees awarded on a 50/50 basis, which fee split has been approved by both Plaintiffs in writing.

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

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

"A *qui tam* action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government." People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491- 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to sue his or her employer for Labor Code violations and recover civil penalties that otherwise could only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th 73; Iskanian, 59 Ca1.4th 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, with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state; 25% paid to the Aggrieved Employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui tam* action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

Through the successful efforts of Plaintiffs and their attorneys here, a common fund was created in the amount of $575,000 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 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

Not long ago, the California Supreme Court upheld the use of the common fund theory of recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Ca1.5th 480, 506. In Laffitte, the Supreme Court upheld an award of attorney's fees of one-third of the $19 million gross settlement (*e.g*., awarded $6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent with prior decisions recognizing "when a number of persons are entitled in common to a specific fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." Serrano v. Priest (1977) 20 Ca1.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole]; 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").

Accordingly, the common fund doctrine allows a court to award attorney's fees based on a percentage of the total fund created when the fund consists of a "certain or easily calculable sum of money," and California law has long applied the percentage of the recovery method for awarding attorney's fees where a common fund is established. Serrano, 20 Ca1.3d at 34; Bell v. Farmers Ins. Exch. *(*2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1809; Sanders v. City of Los Angeles (1970) 3 Ca1.3d 252, 261-63 (affirming award of attorney's fee based on percentage of recovery).

Awarding attorney's fees of one-third of gross common fund amount is favored by California courts when a fund established for the common benefit of others is involved, such as here. Accordingly, awarding fees on this basis out of the $575,000 GSA, for a total of $191,666.67, is reasonable and appropriate. [Ardestani Decl., ¶¶ 30-48; Kazandjian Decl., ¶¶ 10-13.]

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

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

Here, Plaintiffs' counsel's lodestar is approximately $256,916, based on 356.35 attorney/paralegal hours spent litigating the case. [Ardestani Decl., ¶¶ 34-48; Exh. 4; Kazandjian Decl., ¶¶ 2-4, 12-13; Exh. 1.] On a lodestar basis, the fee request of $191,666.67 results in a base lodestar that is larger than the fees requested on a percentage basis, and therefore there is no request for a lodestar modifier. Plaintiffs submit, however, that this fact highlights the reasonableness of the fees requested on a percentage basis since the actual request is less than the value of services rendered when valued via traditional hourly billing.

C. The Requested Costs Are Fair And Reasonable

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

While the Settlement Agreement authorizes litigation costs not to exceed $25,000, Plaintiffs' Counsels' actual costs presently are $24,776.68 [Ardestani Decl., ¶¶ 49-50; Kazandjian

Decl., ¶ 14; Exh. 2.] This includes filing fees, service of process, mediation costs, and expert witness fees. These costs are reasonable and uncontested, and should be approved.

VIII. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiffs request the Court approve the proposed settlement under PAGA, approve the requested service awards, approve the requested award of reasonable attorney's fees and costs, approve Simpluris as the settlement administrator and approve its fees in the amount of $4,000, approve the proposed distributions to the LWDA and Aggrieved Employees, and enter judgment.

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