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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ELITIA MATTHEWS, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

CROSSOVER HEALTH MEDICAL GROUP, APC, a professional corporation; and DOES 1 through 10, inclusive,

Defendants

Case No.: CIVSB2414306

REPRESENTATIVE ACTION

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT

[Filed with the Declaration of Kane Moon, the Declaration of Plaintiff, the Declaration of Jodey Lawrence, [Proposed] PAGA Approval Order, and [Proposed] Judgment]

PAGA APPROVAL HEARING:
Date: October 13, 2026
Time: 8:30 a.m.
Dept.: S35
Judge: Hon. Michael A. Dauber

Action filed: May 10, 2024
FAC filed: August 20, 2024
Trial date: Not set

TO THIS HONORABLE COURT, TO ALL PARTIES, AND TO COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 13, 2026, at 8:30 a.m. in Department S35 of this Court located at the San Bernardino Justice Center at 247 West Third Street, San Bernardino, California 92415, Plaintiff Elitia Matthews ("Plaintiff") will, and hereby does, move the Court for an Order and Judgment, pursuant to California Labor Code sections 2698, *et seq.*, as follows:

1. Approving the PAGA Settlement Agreement ("Settlement") between Plaintiff and Defendant Crossover Health Medical Group, APC.;
2. Approving the requested PAGA Counsel Fees Payment of $38,333.33;
3. Approving the requested PAGA Counsel Litigation Expenses Payment of $9,059.95;
4. Appointing Phoenix Class Action Administration Solutions as the Administrator and approving $5,250.00 as the Administrator Expenses Payment;
5. Approving the scope of the Released PAGA Claims and Released Parties;
6. Approving a non-reversionary Gross Settlement Amount of $115,000.00;
7. Approving approximately $62,356.72 for PAGA Penalties as settlement of the Released PAGA Claims, to be distributed as 75% ($46,767.54 to the LWDA) and 25% ($15,589.18 to Aggrieved Employees);
8. Directing consummation of the Settlement pursuant to its terms and provisions;
9. Entering Judgment and dismissing the above-captioned action with prejudice; and
10. Retaining jurisdiction over the Parties, this action, and this Settlement, including following any entry of Judgment for purposes of enforcement, interpretation, settlement administration, and any post-Judgment issues that arise.

This Motion is based upon this notice, the attached Memorandum of Points and Authorities, the declarations and exhibits filed concurrently herewith, the records and files in this action, and any other further records or argument that the Court may properly receive at or before the hearing.

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As this Motion is unopposed, the Parties respectfully request relief from the page limit requirement set by California Rules of Court, Rule 3.1113(d).

Respectfully submitted,

DATED: July 9, 2026 **MOON LAW GROUP, PC**

By:______________________________________

Kane Moon
Allen Feghali
Mariam Ghazaryan
Mitchell H. Millet
Attorneys for Plaintiff

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I. INTRODUCTION

Plaintiff Elitia Matthews ("Plaintiff") seeks approval of a non-reversionary $115,000.00 gross settlement of claims for civil penalties alleged pursuant to the California Private Attorneys General Act, Labor Code sections 2698, *et seq.* ("PAGA"). Although the Parties did not participate in a formal mediation, they engaged in arm's length settlement negotiations and reached a resolution with Defendant Crossover Health Medical Group, APC ("Defendant") (collectively, Plaintiff and Defendant are the "Parties"). The Parties have executed a Joint Stipulation and Settlement Agreement (the "Settlement"), a true and correct copy of which is attached as **Exhibit 1** to the Declaration of Kane Moon in Support of Motion for Approval of PAGA Settlement Agreement ("Moon Decl.") submitted concurrently herewith. Pursuant to Labor Code section 2699(s)(2), Plaintiff now files this motion seeking an order approving the proposed Settlement.

The Settlement resolves all claims for civil penalties under PAGA that arose during the PAGA Period and that were alleged in the above-captioned matter ("Action"). (Settlement, ¶ 1.1.) For purposes of settlement, the "PAGA Period" is May 5, 2023, to August 5, 2025. (*Id.* at ¶ 1.25.) This Settlement is on behalf of the California Labor and Workforce Development Agency (the "LWDA"), Plaintiff, and all persons employed by Defendant in California and classified as a non-exempt employee who worked for Defendant during the PAGA Period ("Aggrieved Employees"). (*Id.* at ¶ 1.4.) Plaintiff is unaware of any other pending litigation involving similar claims against Defendant that may be impacted by approval of the Settlement, nor has Defendant pointed to any. (Moon Decl., ¶ 23.) Plaintiff came to this conclusion after a reasonable inquiry and review of the LWDA's PAGA Case Search website, this Court's case search website, and other information reasonably available online. (*Id.*)

Settlement of a PAGA claim requires court approval. Pursuant to the operative PAGA statute, the "court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part." (Lab. Code § 2699(s)(2).) In deciding whether to grant approval of a proposed settlement, the primary issue to be decided is whether the settlement is fair, adequate, and reasonable. Specifically, the issue is whether the PAGA penalties to which the parties have agreed provide "genuine and meaningful" relief that is "consistent with the underlying purpose of the statute to benefit the public," and whether the penalties are reasonable in light of the potential verdict value in this case. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal. July 22, 2015) No. CV 12-2615 PSG (JEMx), 2015 WL 12732709, at *5; *see also O'Connor v. Uber Techn., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135.)

As set forth herein, the proposed Settlement embodies all the features of a settlement that is fair, adequate, and reasonable, as (1) it is the product of an arm's-length negotiation, (2) negotiated by attorneys experienced in wage and hour litigation, (3) following sufficient investigation necessary to evaluate the relative strength and value of the PAGA claims, and (4) reflects a reasoned compromise based directly on the relative strength and value of the PAGA claims, as well as the risks, expense, complexity, and likely duration of further litigation.

The meaningful value achieved by the Settlement at issue may be gleaned from the fact that the LWDA and the estimated **287** Aggrieved Employees will, cumulatively, receive no less than **$62,356.72** as PAGA Penalties. (Moon Decl., ¶ 20.) This is a significant recovery, not only because further litigation may have resulted in a net-zero recovery based on the facts of the case and defenses asserted by Defendant, but also because an investigation by experienced PAGA counsel and analysis of discovery revealed minimal identifiable violations, the discretionary nature of awarding PAGA penalties, and the risk of not being able to proceed on a representative basis at all due to the potential manageability issues and current state of the law. For these reasons, as set forth more fully below, Plaintiff respectfully requests the Court enter the proposed order and proposed judgment submitted concurrently herewith.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims and Procedural Background

Defendant is a healthcare service provided. (Moon Decl., ¶ 4.) Plaintiff worked for Defendant during the statutory period. (*Id.*) Throughout her employment, Plaintiff was classified as non-exempt and paid on an hourly basis. (*Id.*) Plaintiff contends she and her former co-workers were subjected to the same or similar unlawful labor practices during their employment by Defendant, including failure to pay all wages. (*Id.*)

Plaintiff's claims for unpaid wages stem from allegations that Defendant failed to pay all wages owed for all hours worked, including overtime, and failed to incorporate all remuneration into employees' regular rate of pay for purposes of calculating overtime, meal period premiums, and sick pay. (*Id.* at ¶ 5.) Plaintiff's meal and rest period claims are based on allegations that due to the nature of their work and Defendant's employment practices, employees regularly experienced missed, untimely, or interrupted breaks, and that Defendant failed to provide any premiums for non-compliant rest breaks or all premiums for non-compliant meals. (*Id.*) Plaintiff also alleges that Defendant failed to maintain accurate time and meal period records, failed to reimburse necessary business expenses, including personal cellphone and work from home expenses. (*Id.*) Plaintiff further alleges she and other employees did not receive all wages owed at the time of termination nor accurate itemized wage statements due to Defendant's failure to pay all wages and premiums. (*Id.*) Accordingly, Plaintiff alleges Defendant is liable for civil penalties under PAGA. (*Id.*)

Because of the foregoing alleged violations of the Labor Code, Plaintiff filed a Class Action Complaint on May 10, 2024, alleging Defendant systematically: (1) failed to pay minimum wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest breaks, (5) failure to indemnify necessary business expenses, (6) failed to timely pay final wages at termination, (7) failed to provide accurate itemized wage statements, and (8) engaged in unfair business practices. (*Id.* at ¶ 6.)

Pursuant to PAGA, on May 5, 2024, Plaintiff submitted notice of the alleged Labor Code violations to the California Labor and Workforce Development Agency (the "LWDA"), with certified mail service on Defendant, and paid the required filing fee. (*Id.* at ¶ 7, Ex. 2.) The administrative exhaustion period under PAGA expired without the LWDA indicating any intent to investigate the allegations. (*Id.* at ¶ 7.) On August 6, 2024, the Court granted the Parties' stipulation for leave to file the First Amended Complaint, and Plaintiff subsequently filed the First Amended Complaint adding a ninth cause of action for civil penalties under PAGA. (*Id.*)

In compliance with Labor Code section 2699(s)(1), Plaintiff subsequently submitted to the LWDA a file-stamped copy of the First Amended Complaint containing the Court-assigned case number. (*Id.* at ¶ 8.) To date, the LWDA has not sought to intervene in this action. (*Id.* at ¶ 8.) To date, the LWDA has not sought to intervene in this action. (*Id.*)

Plaintiff dismissed the class claims without prejudice based on an arbitration agreement with a class action waiver. (*Id.* at ¶ 9.) The Court granted dismissal of the class claims on July 26, 2024, and again on October 4, 2024, after the filing of the First Amended Complaint. (*Id.*) The First Amended Complaint, with the remaining representative claims under PAGA, is the operative complaint in the Action (the "Operative Complaint"). (*Id.*)

Defendant ardently opposes the merits of this case and denies Plaintiff's factual allegations. (*Id.* at ¶ 10.) Defendant argues all employees were properly paid for all hours worked and that it did not require or permit employees to work off-the-clock. (*Id.*) As for the regular rate claim, Defendant argues there was no issue with paying employees the proper regular rate of pay because any additional renumeration was discretionary and thus, not required to be incorporated into the regular rate of pay. (*Id.*) Defendant maintains all employees were provided with the opportunity to take all their code-compliant meal and rest breaks and that missed breaks, if any, were solely the result of employees' voluntary choice. (*Id.*) As for the unreimbursed business expenses, Defendant maintains it did not require employees to incur any business-related expenses. (*Id.*) To the extent employees received wage statements that were allegedly inaccurate, Defendant argues penalties are not warranted because employees suffered no actual damage or harm as a result. (*Id.*; *see, e.g.*, *Angeles v. U.S. Airways, Inc.* (N.D. Cal. Feb. 19, 2013) No. C 12–05860 CRB, 2013 WL 622032, at *10 ["A plaintiff must adequately plead an injury arising from an employer's failure to provide full and accurate wage statements, and the omission of the required information alone is not sufficient."].) Additionally, Defendant alleges its good-faith belief that it paid all wages precludes the imposition of waiting time penalties because Plaintiff would be unable to show Defendant's alleged conduct was done willfully or knowingly. (Moon Decl., ¶ 10; *see, e.g.*, *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) No. ED CV 11–298 GHK (DTBx), 2012 WL 9506073, *5.) For these reasons, Defendant claims it did not engage in any unfair business practices and denies liability under PAGA. (Moon Decl., ¶ 10.) Defendant also maintains the claims are not susceptible to proof on a representative basis because of the individualized and varying nature of each employee's experience, making this matter unmanageable. (*Id.*)

B. Discovery and Investigation

Following the filing of the complaint, the Parties agreed to meet and confer regarding settlement negotiations. (*Id.* at ¶ 11.) Prior to settlement negotiations, the Parties engaged in an informal exchange of information and documents to evaluate the representative PAGA claims. (*Id.*) Defendant produced information and records sufficient for PAGA Counsel to investigate Plaintiff's allegations, including timekeeping and payroll records, and PAGA Counsel retained an expert to review and analyze the available data for settlement evaluation purposes. (*Id.*)

PAGA Counsel reviewed the information produced by Defendant, including the time and payroll records, together with information provided by Plaintiff. (*Id.* at ¶ 12.) PAGA Counsel also retained an expert to analyze the records and prepare a damages and exposure analysis. (*Id.*) Plaintiff's expert reviewed the time and payroll records, which represented 25% of the estimated PAGA Pay Periods, which allowed Plaintiff's expert to prepare an analysis with a reasonable degree of certainty. (*Id.*) Based on this investigation, the expert's analysis, and PAGA Counsel's review of the applicable law and Defendant's defenses, PAGA Counsel were able to evaluate the strengths and risks of the representative PAGA claims and Defendant's maximum and realistic monetary exposure. (*Id.*) Thus, Plaintiff's and PAGA Counsel's familiarity with the facts of the case and the legal issues raised allowed them to negotiate the Settlement on an informed basis. (*Id*.)

C. Settlement Negotiations

The Parties participated in arm's length settlement negotiations. (*Id.* at ¶ 13.) The negotiations were conducted professionally but remained adversarial, with both sides evaluating the strengths and weaknesses of the claims and defenses. (*Id.*) The Parties went into the negotiations willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position if a settlement had not been reached. (*Id.*) After a full discussion regarding the strengths and weakness of Plaintiff's claims and Defendant's defenses, the Parties reached an agreement, the material terms of which are set forth in the Settlement. (*Id*.)

In reaching a resolution, the Parties recognized that the issues presented in this action are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that further litigation will lead to inconvenience, distraction, disruption, delay, and expense disproportionate to the potential benefits of litigation. (*Id.* at ¶ 14.) Plaintiff and her Counsel also considered the risk and uncertainty of the outcome inherent in any litigation when determining whether this Settlement was the correct option. (*Id.*) In sum, Plaintiff and her Counsel believe the proposed Settlement is in the best interests of Aggrieved Employees and the LWDA. (*Id.*) In compliance with Labor Code section 2699(s)(2), notice of settlement and a copy of the proposed Settlement has been submitted to the LWDA along with a copy of Plaintiff's motion and the hearing date. (*Id.* at ¶ 15, Ex. 3.) To date, the LWDA has not indicated any objection to the Settlement. (*Id.* at ¶ 15.)

D. <u>Key Terms of the Proposed Settlement</u>

The Settlement's key financial and other terms include:

1. <u>Gross Settlement Amount, Funding, Disbursement, and Uncashed Checks</u>. The Gross Settlement Amount ("GSA") is a non-reversionary $115,000.00. (Settlement, ¶¶, 1.12, 3.1.) Defendant shall fully fund the GSA by transmitting the funds to the Administrator no later than fifteen (15) calendar days after the Effective Date. (*Id.* at ¶ 4.1.) Within fourteen (14) calendar days after receipt of the Aggrieved Employee Data per Section 7.3 of the Settlement, the Administrator will mail checks for all Individual PAGA Payments, the LWDA PAGA Payment, the Administrator Expenses Payment, the PAGA Counsel Fee Payment, and the PAGA Counsel Litigation Expenses Payment. (*Id.* at ¶ 4.2.) Any funds remaining uncashed after 180 days from issuance will be transmitted to the California State Controller's Office, to be held pursuant to the Unclaimed Property Law in the name of each individual who failed to cash his or her check prior to the void date. (*Id.* at ¶¶ 4.2.1, 4.2.3.)

2. <u>Escalator Clause</u>: The GSA was negotiated based on an estimate that there are 5,337 Pay Periods worked by the Aggrieved Employees. (*Id.* at ¶ 8.) The Settlement includes an Escalator Clause whereby should the actual number of pay periods should exceed 5,337 by more than ten percent (10%) (i.e. greater than 5,871), then the GSA shall be proportionally increased by the percentage that the actual number exceeds 5,871 (i.e. if the actual count is 6,458 pay periods, a ten percent (10%) increase above the threshold, the GSA would increase by ten percent (10%). (*Id.*)

3. <u>PAGA Counsel Fees Payment and Litigation Expenses Payment</u>. The Settlement includes PAGA Counsel Fees Payment of not more than 33 1/3% of the GSA (i.e., $38,333.33), and

a PAGA Counsel Litigation Expenses Payment of not more than $15,000.00. (*Id.* at ¶ 3.2.1.) PAGA Counsel has incurred $9,059.95 in litigation costs. (*Id.*, Ex. 4)

4. Administrator Expenses Payment. The Settlement provides an Administrator Expenses Payment not to exceed $6,000.00 to the Settlement Administrator, payable from the GSA, except for a showing of good cause and as approved by the Court. (*Id.* at ¶ 3.2.2.) The Parties jointly selected Phoenix Class Action Administration Solutions ("Phoenix") as the neutral entity to administer this Settlement with a bid for $5,250.00. (*Id.* at ¶ 1.2; Moon Decl., ¶ 19, Ex. 5; Declaration of Jodey Lawrence on Behalf of Phoenix: Qualifications and Costs for Settlement Administration, ¶ 22, Ex. B.)

5. Net Settlement Amount. The Net Settlement Amount" constitutes the amount available from the Gross Settlement Amount to distribute as PAGA Penalties. The Net Settlement Amount is equal to the Gross Settlement Amount, less the following payments in the amounts approved by the Court: PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, and the Administration Expenses Payment. (*Id.* at ¶ 1.17.) The remainder is to be paid to the LWDA as the LWDA PAGA Payment and to the Aggrieved Employees as Individual PAGA Payments. (*Id.*) Accordingly, the Net Settlement Amount is estimated to be no less than **$62,356.72**,[1] which will be distributed 75% (i.e., no less than 75% * $62,356.72= **$46,767.54**) to the LWDA and 25% (i.e., no less than 25% * $62,356.72= **$15,589.18**) to Aggrieved Employees pursuant to PAGA law governing Plaintiff's claims.[2] (Moon Decl., ¶ 20.)

6. Individual PAGA Payments. Individual PAGA Payment means the Aggrieved Employee's pro rata share of 25% of the PAGA Penalties calculated according to the number of Pay

[1] The estimated Net Settlement Amount was calculated by deducting the following amounts from the GSA ($115,000.00): $38,333.33 for the PAGA Counsel Fees Payment, $9,059,95 for the PAGA Counsel Litigation Expenses Payment, $5,250.00 for the Administrator Expenses Payment. (*See* Settlement, ¶ 1.17.)

[2] On July 1, 2024, new legislation was enacted to amend PAGA in several respects, including as to the recovery split for civil penalties. (Stats. 2024, ch. 44 (Assem. Bill No. 2288), § 1, eff. Jul. 1, 2024).) As amended, PAGA now provides for a 65%-LWDA/35%-aggrieved employee split. (Lab. Code § 2699(m).) However, this provision does not apply retroactively prior to June 19, 2024. (*Id.* at § 2699(v)(1).) In other words, because Plaintiffs' PAGA Notices were submitted prior to June 19, 2024, any civil penalties recovered in this action will be split according to prior PAGA law (i.e., 75% to the LWDA and 25% to Aggrieved Employees). (Moon decl., ¶ 20, n.2.)

Periods the Aggrieved Employee worked during the PAGA Period. (*Id.* at ¶ 1.13.) This results in an average Individual PAGA Payment of roughly **$54.32** for each of the estimated 287 Aggrieved Employees ($15,589.18 / 287), and a PAGA Pay Period value of **$2.92** for each of the 5,337 estimated PAGA Pay Periods ($15,589.18 / 5,337). Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. (*See id.* at ¶ 3.2.3.a.)

7. Releases of Claims. Effective on the date when Defendant fully funds the entire GSA, Plaintiff, the State of California, and the Aggrieved Employees will release claims against all Released Parties as follows: (*Id.* at ¶ 5.)

> Release by Plaintiff, the State of California, and Aggrieved Employees: Upon approval by the Court of the Settlement and as of the Effective Date, Plaintiff, the State of California and all Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, administrators, successors, and assigns, the Released Parties from all claims, rights, demands, liabilities, causes of action, and theories of liability for PAGA penalties that were pled or could have been pled based on the factual allegations contained in the PAGA Notice and Operative Complaint during the PAGA Period, including any alleged violations of California Labor Code §§ 201-203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 227.3, 246, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2698 et seq., 2699 et seq., 2699(a), 2699(f), 2699.3, 2699.5, and 2802, and the specific factual theories alleged in the Operative Complaint: failure to pay minimum wages, failure to pay overtime, failure to provide meal periods, failure to authorize and permit rest breaks, failure to indemnify business expenses, failure to timely pay final wages including vacation, failure to maintain accurate records of the hours that employees worked, and failure to provide accurate wage statements. This release applies only to PAGA claims under Labor Code § 2698 et seq. Aggrieved Employees are not releasing any individual non-PAGA claims. Plaintiff's individual claims, whether pled or not, are excluded from this release and specifically preserved. (*Id.* at ¶ 5.1.)
>
> The "Released Parties" means Defendant and its present and future subsidiaries, parents, affiliated and related companies, divisions, successors, predecessors or assigns; and its past,

present, and future officers, directors, attorneys, shareholders, partners, agents, insurers, employees, advisors, accountants, representatives, trustees, heirs, executors, administrators, predecessors, successors or assigns. (*Id.* at ¶ 1.29.)

8. No Related Cases. To the best of the Plaintiff's knowledge, there is no other pending litigation involving similar claims against Defendant that may be impacted by approval of the Settlement at issue, nor has Defendant pointed to any. (Moon Decl., ¶ 23.) PAGA Counsel came to this conclusion after a reasonable inquiry and review of the LWDA's PAGA Case Search website, this Court's case search website, and other information reasonably available online. (*Id.*)

III. DISCUSSION

A. Availability of Civil Penalties

The LWDA and its constituent departments and divisions are authorized to assess and collect civil penalties for specified violations of the Labor Code committed by an employer. With a stated goal of improving enforcement of existing Labor Code obligations, the California Legislature adopted the Private Attorneys General Act of 2004, permitting, as an alternative, an aggrieved employee to initiate a private civil action on behalf of him- or herself and other current or former employees." (Lab. Code § 2699(a).) Before an employee may file an action seeking to recover civil penalties for violations of any of the Labor Code provisions enumerated in Labor Code section 2699.5, he or she must comply with the Act's administrative procedures as set forth in Labor Code section 2699.3, subdivision (a), which include providing notice to the LWDA and the employer of the alleged Labor Code violations, and then waiting a prescribed period of time to permit the LWDA to investigate and to decide whether to cite the employer for the alleged violations. (*Id.* at §§ 2699.3, 2699.5; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370; *see also Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330.)

Here, in compliance with Labor Code section 2699.3, Plaintiff submitted notice of the Labor Code violations at issue to the LWDA, and she exhausted the administrative remedies without the LWDA providing notice of intent to investigate the claims. (Moon Decl., ¶ 7, Ex. 2.) Accordingly, Plaintiff is duly authorized to act as a private attorney general pursuant to PAGA. (*Id.* at ¶ 7.)

B. The Settlement Merits Approval

Settlement of PAGA claims must be approved by a Court. (Lab. Code § 2699(s)(2).) Here, the circumstances weigh heavily in favor of approval, as explained below.

1. The Relief Is Genuine, Meaningful, and Consistent with the Dual Statutory Purposes of Deterrence and Punishment under PAGA

The $115,000.00 GSA amounts to "genuine and meaningful" relief "consistent with the underlying purpose of the statute to benefit the public." (Moon Decl., ¶ 33; *see O'Connor*, 201 F.Supp.3d at 1133–35 [denying settlement approval where allocation for PAGA claims was 0.1% of the estimated full worth].) This is an excellent result, particularly because, under the Settlement, Aggrieved Employees and the LWDA will receive timely, guaranteed relief and will avoid the risk of not being able to recover anything at all. (*Moon Decl.,* ¶ 33.)

The Settlement is a fair and reasonable resolution that satisfies PAGA's dual statutory purposes of deterrence and punishment, on the one hand, and providing Aggrieved Employees with genuine and meaningful relief, on the other. (Lab. Code §§ 2698, *et seq.*) As a result of this litigation, Defendant has had to hire legal counsel, engage in employee-wide discovery, and participate in mediation. (Moon Decl., ¶ 34.) Assuming approval is granted, Defendant will also have to pay civil penalties pursuant to PAGA. (*Id.*) Not including its own attorneys' fees and costs, Defendant will pay at least $115,000.00 to resolve this matter—of which at least $62,356.72 is allocated toward PAGA Penalties and will be distributed as 75% to the LWDA and 25% to Aggrieved Employees, in compliance with PAGA law governing the claims in this Action. (*See* Settlement, ¶ 3.2.3.). This amount represents roughly **47%** of the realistic exposure for the claims ($62,356.72 / $133,425.00), as discussed below. (Moon Decl., ¶ 34.) Additionally, the release obtained under the Settlement does not preclude Aggrieved Employees from pursuing any individual (non-PAGA) claims they may have against Defendant or the other Released Parties. (*See id.* at ¶ 5.1.)

2. The Settlement Amount Provides a Realistic Value for the Claims that is within the "Ballpark" of Reasonableness

There can be no doubt that this Settlement is the result of vigorous, adversarial, non-collusive, and arm's-length negotiations between the Parties. (Moon Decl., ¶ 13.) PAGA Counsel performed an extensive investigation into the facts, claims, and defenses at issue and Defendant's potential liability, including a review of governing law and analysis of informal discovery, including Defendant's written policies and time/pay data for a majority of Aggrieved Employees. (*Id.* at ¶¶ 11–12.) PAGA Counsel used the foregoing discovery and investigation to prepare for mediation and, with the assistance of a statistics expert, assessed the probability of success on the merits and Defendant's monetary exposure, discussed the strengths and weaknesses of the claims and defenses in depth at mediation and months of continued negotiations, and ultimately negotiated the resulting Settlement. (*Id.* at ¶¶ 11–14.)

Based on PAGA Counsel's analysis of the arguments and information provided by Defendant, on an expert analysis of the time/pay records, and on information from Plaintiff, PAGA Counsel evaluated Defendant's both maximum (*optimistic*) and risk-adjusted (*realistic*) potential exposure in preparation for mediation. (*Id.* at ¶ 24.) Although the expert's analysis revealed that the time and pay records supported several violations by Defendant, those identifiable violations were primary limited to the regular rate and meal period claims. (*Id.*) The records themselves did not provide strong support for the off-the-clock work, rest period, and expense reimbursement claims, and derivative penalties for those claims, as these claims are predominantly testimony based. (*Id.*) In other words, Plaintiff's analysis revealed that certain claims were not as strong as originally believed. (*Id.*)

Because Defendant did not require employees to record rest periods, nor is Defendant required to record rest periods under California law, there are no records to establish the rest period claim on the merits. (*Id.* at ¶ 25.) Additionally, there are no records to establish the off-the-clock work claim on the merits. (*Id.*) Rather, proof of these claims would need to be supported by declarations from Aggrieved Employees regarding missed rest periods and off-the-clock work as the records themselves cannot demonstrate what breaks were missed, when, and why and they cannot demonstrate the time, if any, Aggrieved Employees spent working off the clock. (*Id.*)

Indeed, the exposure figures that were calculated for negotiations were based on assumed high violation rates that would not likely be demonstrated at trial, as they assume either the participation of all Aggrieved Employees, or alternatively, the use of surveys or statistical data as a surrogate (which would still require the participation of a majority of Aggrieved Employees to establish a sound representation of all non-exempt employees). (*Id.* at ¶ 26.) The reality is that many employees would be unwilling to participate due to fear of retaliation. (*Id.*) However, even assuming those employees would be willing to participate, obtaining such declarations would potentially reveal that each Aggrieved Employee had a different experience. (*Id.*) The individualized nature of their employment experience and the numerosity of employees affected present significant risk with manageability and proof on the merits. (*Id.*)

Even as to the regular rate and meal period claims, our analysis found that Defendant's exposure is less than initially believed. As to meal periods, a review of the time/pay records shows 15.1% violation rate for Defendant. (*Id.* at ¶ 27.) However, approximately 1.9% of the violations were accompanied by a meal waiver, and Defendant made meal premium payments for 12.5% of the violations. (*Id.*) After considering the meal waivers and the meal premium payments, the meal period violation rate is reduced to 0.7%. (*Id.*) As to the regular rate issue, Plaintiffs' expert identified 167 total payments that were not factored into the regular rate of pay for purposes of paying sick pay, meal break premiums, and overtime, resulting in a 36.9% violation rate for unpaid overtime, 5.0% violation rate for unpaid meal break premiums, and 6.6% violation rate for unpaid sick pay. (*Id.*) However, these violation rates assume Plaintiffs would be able to show the bonus payments were non-discretionary payments that should have been factored into the regular rate. (*Id.*) Indeed, Defendant contends that it complied with all of its compensation obligations and that it did not fail to incorporate any non-discretionary bonuses into the regular rate of pay. (*Id.*)

The likelihood that Defendant could assert viable legal defenses would likely further reduce its overall exposure. (*Id.* at ¶ 28.) For example, the individualized and testimony-intensive nature of the claims could bar manageability of this representative action or otherwise significantly reduce Defendant's overall liability. (*Id.*) Further, the maximum exposure analysis involved a claim-by-claim penalty calculation, which is overly optimistic as it presumes Plaintiff would be able to stack the penalties, although penalty stacking is not expressly permitted by PAGA. (*Id.* at ¶ 29.) Rather, without either (i) a prior finding by the LWDA or a court within the past five years that the employer violated PAGA or (ii) evidence that the employer's conduct was malicious, fraudulent, or oppressive, PAGA only provides for a maximum $100 penalty for each pay period. (Lab. Code § 2699(f)(2)(A)–

(B).) Moreover, PAGA Counsel believe it would be unrealistic to expect the Court would award the full (penalty-stacked) exposure given the discretionary nature of awarding penalties and given Defendant's defenses, including that any failure to pay premiums, regular rate wages, or for off-the-clock work was not knowingly or willfully done, and additionally, to the extent employees received wage statements that were allegedly inaccurate, employees suffered no actual resulting damage or harm. (Moon Decl., ¶ 29.) Moreover, awarding the full penalties amount would likely raise Due Process concerns. (*Id.*) For the foregoing reasons, the *realistic* exposure is thus far below the *optimistic* maximum estimate. (*Id.* at ¶ 30.)

Based on the foregoing, PAGA Counsel believe it is more reasonable to assess penalties on a $100.00 civil penalty per pay period basis pursuant to Labor Code § 2699(f)(2)(A) for each of the estimated 5,337 pay periods at issue, as opposed to a claim-by-claim approach. (*Id.* at ¶ 31.) Accordingly, PAGA Counsel estimate Defendant's maximum PAGA exposure to be **$533,700.00** ($100.00 x 5,337). (*Id.*) However, based on the discovery, Defendant's arguments at mediation and continued settlement discussions, an understanding that the claims are heavily dependent on the unlikely participation by Aggrieved Employees and their varying employment experience, and other important considerations discussed above, it is reasonable to assume a violation occurred in at most one-fourth of all pay periods, which results in a realistic (*risk-adjusted*) exposure of **$133,425.00** ($533,700.00 / 4). (*Id.*) As a result, the GSA of $115,000.00 represents approximately **86%** of the realistic exposure ($115,000.00 / $133,425.00). (*Id.*)

The proposed Settlement therefore represents a substantial recovery when compared to the reasonably forecasted recovery. (*Id.* at ¶ 32.) When considering the risks of litigation, the uncertainties involved in continued litigation, the burdens of proof necessary to establish liability, and the probability of appeal, it is clear the GSA of $115,000.00 is within the "ballpark" of reasonableness, and that settlement approval is appropriate. (*Id.*; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133; *see Munoz v. BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal.App.4th 399, 408–09 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims," but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation"].)

3. The Settlement Is a Fair and Reasonable Result Following a Thorough Investigation and Accounting of Various Litigation Risks

PAGA Counsel have conducted a thorough investigation into the facts of the allegations. (Moon Decl., ¶ 35.) Based on the foregoing discovery and on their own independent investigation and evaluation, PAGA Counsel are of the opinion that the proposed Settlement is fair, reasonable, and adequate. (*Id.*) Furthermore, considering all known facts and circumstances, the risk of significant delay, trial risk, appellate risk, the defenses that could be asserted by Defendant on the merits, the Settlement is in the best interests of the Aggrieved Employees and the State of California. (*Id.*)

Although PAGA Counsel believe there is merit to Plaintiff's allegations, they also acknowledge a legitimate controversy exists as to each allegation. (*Id.* at ¶ 36.) PAGA Counsel also recognize that proving the amounts of penalties owed to each Aggrieved Employee would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Moreover, PAGA Counsel are also of the opinion that because the issues here are fairly contested, there is a possibility of the Court not awarding PAGA penalties even if Plaintiff prevailed on the merits due to the largely discretionary nature of awarding PAGA penalties. (*Id.* at ¶ 37.) Indeed, a Court may reduce PAGA penalties "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Lab. Code § 2699(e)(2).) In other words, were this matter to go to trial, any award granted would be at the discretion of the Court and subject to a substantial reduction. (Moon Decl., ¶ 37.) While PAGA Counsel believe there would be no persuasive grounds to reduce penalties, they recognize that the Court could determine otherwise and significantly reduce any award of penalties. (*Id.* at ¶ 38.) This wide range of potential recovery and additional delays and risks of trial provide justification to settle for a reasonable amount of recovery at this point in the litigation. (*Id.*) In all, based on the investigation and analysis of the claims in preparation for mediation, the maximum exposure did not comport with the realistic exposure that Defendant faced, as discussed above. (*Id.*)

PAGA Counsel took into account the risk of not being able to proceed on a representative basis at all due to the potential manageability issues, the risk of not prevailing at trial, and the risk that even if Plaintiff prevailed at trial, the penalties would be limited due to the largely discretionary nature of awarding PAGA penalties. (*Id.* at ¶ 39.) The provisions of the Labor Code triggering PAGA penalties in this case include Labor Code sections 203, 210, 226, 1197.1, and 2802. (*Id.*) However, PAGA penalties are not mandatory, but rather, permissive. (Lab. Code § 2699(e)(2).) Accordingly, it is entirely possible that even if Plaintiff would be successful at trial, assuming she is first able to win on the merits regarding her individual claims at arbitration and then defeat the manageability issues presented at litigation by the large number of Aggrieved Employees in this action, Plaintiff may still be awarded substantially less than what was obtained through the Settlement. (Moon Decl., ¶ 39.)

The Settlement avoids the significant risks, burdens, and the accompanying expense of further litigation. (*Id.* at ¶ 40.) Though the Parties have engaged in a significant amount of investigation, informal discovery, and employee data analysis, they have not participated in formal discovery procedures, including depositions and expert discovery. (*Id.*) Moreover, Plaintiff would have to proceed with arbitration of her individual claims and win on the merits before proceeding with litigation of the representative PAGA claims. (*Id.*) Preparation for trial and the prospect of appeals in the wake of any summary judgment ruling would remain for the Parties. (*Id.*) As a result, the Parties would incur considerably more attorneys' fees and costs through trial, a lengthy and uncertain process that could result in recovering less than was settled for. (*Id.*)

C. The Requested Attorneys' Fees/Costs Are Reasonable and Should Be Approved

In line with the Settlement, my firm requests an award of attorneys' fees in an amount of one-third of the GSA (i.e., $38,333.33), plus reimbursement for actual litigation costs in the amount of $9,059.95. (Moon Decl., ¶ 65; *see* Settlement, ¶ 3.2.1.)

1. PAGA Counsel Request an Award of Fees Based on the Common Fund Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. (*See, e.g.*, *Serrano v. Priest* (1977) 20 Cal.3d 25.) The California Supreme Court has held, "when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund." (*Id.* at p. 34.)

Here, PAGA Counsel seek an award of attorneys' fees on the "percentage of recovery/common fund" theory. (Moon Decl., ¶ 66.) The purpose of this approach is to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air W., Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of Cal.* (1975) 15 Cal.3d 162, the California Supreme Court stated, "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons[ ] are entitled to share." (*Id.* at pp. 110–11 [pincite omitted].) The reasons for applying this doctrine include:

> fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

(*Id.* at p. 111.)

Several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp.1373:

> **This court is compelled to ask, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!"** Not only do the *Lindy* and *Kerr–Johnson* analyses consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members.

(*Id.* at p. 1375 [emphasis added].) The percentage approach is preferable to the lodestar because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on judicial resources. (*Id*. at pp. 1378–79.) California Courts now routinely use the percentage of the common fund approach to determine the award of attorney's fees. (*See*, *e.g.*, *In re Pac. Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 378–79 [approving attorneys' fee award of 33%].)

2. The Matter Involves a Fee and Cost Shifting Provision under PAGA

Labor Code section 2699 provides for the recovery reasonable attorney's fees as well as costs of suit. (Lab. Code § 2699(k)(1).) Specifically, it states: "Any employee who prevails in any [PAGA] action shall be entitled to an award of reasonable attorney's fees and costs . . ." (*Id.*) Under this provision, Plaintiff would be permitted to recover her actual attorneys' fees, even if those fees were larger than the total recovery for the Aggrieved Employees at the conclusion of this case. (*Id.*) This fee/cost-shifting provision reflects the understanding that PAGA Counsel must accept significant risk of substantial expenses and consumption of time, energy, and other resources in litigating a PAGA claim, and thus, that PAGA Counsel is not only permitted, but entitled, to recover reasonable attorneys' fees and costs if successful in litigating a PAGA claim.

The Settlement at issue is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding PAGA Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for PAGA Counsel who undertook this matter on a contingent basis, with no guarantee of recovery. (Moon Decl., ¶¶ 66–75.) Once PAGA Counsel undertook this litigation on behalf of the Aggrieved Employees, they committed to pursue it to its conclusion, and were accordingly precluded from focusing on, or taking on, other cases which could have resulted in a larger, and less risky, monetary gain. (*Id.* at ¶ 71.)

3. Counsel's Experience, Reputation, and Ability Support the Requested Fee Award

As demonstrated by their prior experience in pursuing class and representative actions on behalf of employees, PAGA Counsel possess considerable expertise in litigating class action and representative matters. (*Id.* at ¶¶ 41–60.) PAGA Counsel have been involved as lead counsel or co-counsel in a multitude of class and representative actions resulting in beneficial results to class members and aggrieved employees in California. (*Id.*) Because it is reasonable to compensate PAGA Counsel commensurate with their skill, reputation, and experience, the requested fee award is supported here.

PAGA Counsel's experience in wage-and-hour class and representative actions was integral in evaluating the strengths and weaknesses of the case against Defendant and the reasonableness of this Settlement. (*Id.* at ¶ 61.) Practice in the narrow field of wage-and-hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of representative action litigation. (*Id.* at ¶ 59.) Based on these and other factors, PAGA Counsel have frequently received fee awards of this percentage from the gross recovery for aggrieved employees. (*See id.* at ¶¶ 45, 50, 55.) Thus, the requested fee award is reasonable and fair.

4. While the Lodestar Method Is Not Necessary in Common Fund Cases, the Court May Perform a Cross-Check to Award Fees

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." (*Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the lodestar method as a drain on the judicial system and a disincentive on attorneys to take on high-risk, challenging cases. (*Id.* at p. 29.) Indeed, the lodestar approach: "(1) 'increases the workload of an already overtaxed judicial system,' (2) is 'insufficiently objective and produce[s] results that are far from homogenous,' (3) 'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,' (4) 'is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount,' (5) 'encourages lawyers to expend excessive hours, and . . . engage in duplicative and unjustified work,' (6) 'creates a disincentive for the early settlement of cases,' (7) deprives trial courts of 'flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered,' (8) 'works to the particular disadvantage of the public interest bar,' and (9) results in 'confusion and lack of predictability.'" (*Id.* [quoting Third Circuit Task Force, *Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 246–49].)

Although California Courts support the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to 'cross-check' or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 [quoting *Lealao*, *supra*, 82 Cal.App.4th at pp. 49–50].) Applying the lodestar method is a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate, and the second step is to apply a multiplier to the lodestar to account for various factors. (*Id.* at p. 556.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.*) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id*. at pp. 556–57.)

Further, "California case law permits fee awards in the absence of detailed time sheets." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255.) The Court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.) Generally, hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 431.)

Here, PAGA Counsel current lodestar is *no less than* **$49,617.50**, which is based on *no less than* **59.1 hours** of attorney time spent to-date at their customary hourly rates. (Moon Decl., ¶ 67.) Thus, in comparison to this lodestar, the fee request represents a **0.77 multiplier**, such that a multiplier is *not requested*. (*Id.* at ¶¶ 69-70.) In other words, PAGA Counsel are requesting less than what they are reasonably entitled to. (*Id.* at ¶ 70(c).) Further, the foregoing lodestar does not reflect additional works that will be devoted to this litigation, including to monitor approval of the Settlement and requested awards, oversee the settlement administration process and distribution of funds, respond to inquiries, and communicate with Plaintiff regarding the case. (*Id.* at ¶ 68.) The amount of fees requested under the Settlement is warranted based on the contingent risk that PAGA Counsel incurred, the difficulty of the questions involved, the substantial benefit conferred on the Aggrieved Employees and State of California as a result of the Settlement, and the skill displayed by PAGA

Counsel. (*Id.* at ¶ 70.) PAGA Counsel also bear the risk of taking whatever actions are necessary if Defendant fails to pay. (*Id.* at ¶ 68.) Thus, the request for attorneys' fees is more than reasonable under a lodestar check.

5. PAGA Counsel's Costs Were Actually and Reasonably Incurred

Winning counsel are entitled to recover the out-of-pocket costs and expenses they reasonably incurred in investigating, prosecuting, and settling a case. (*Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 974; Lab. Code § 2699(k)(1).) Here, PAGA Counsel seek reimbursement in the total amount of $9,059.95 for expenses that were actually and reasonably incurred in this litigation. (Moon Decl., ¶ 75, Ex. 4.) Moreover, this amount is below the maximum allocation under the Settlement and thus, the remainder ($5,940.05) will revert to the PAGA Penalties. (*Id.* at ¶ 76; Settlement, ¶ 3.2.1.) Thus, costs should be reimbursed in full.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant approval of the Settlement and enter the proposed approval order and proposed judgment submitted herewith.

Respectfully submitted,

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