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9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SAN LUIS OBISPO**
11

12 JESSE MCCAULEY, as an individual and on
13 behalf of and others similarly situated and
14 aggrieved,

15 Plaintiff,

16 vs.
17

18 MULLAHEY FORD, INC., a California
19 corporation; MT. MULLAHEY, INC., a
20 California corporation; MULLAHEY
21 CHRYSLER DODGE RAM JEEP, a
California business; MICHAEL J.
22 MULLAHEY, an individual; TIMOTHY J.
23 MULLAHEY, an individual; and DOES 1 to
100, inclusive,

24 Defendants.
25
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27
28

CASE NO. 21CV0001

Assigned for All Purposes to:
Hon. Tana L. Coates
Dept. 9

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

[Filed Concurrently with Memorandum of
Points and Authorities; Declarations of
Zachary M. Crosner and Jesse McCauley;
[Proposed] Order]

Date: January 25, 2023
Time: 9:00 a.m.
Dept. 9

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1 **I. INTRODUCTION**

2 Plaintiff Jesse McCauley hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant MT Mullahey, Inc.
4 and its ownwers, Michael Mullahey and Timothy Mullahey (together, “Mullahey” or “Defendant”).
5 Consistent with PAGA, the proposed settlement releases claims under PAGA only and has no
6 impact on the individual claims of any aggrieved employee other than Plaintiff Gilbert. Since the
7 settlement resolves nothing more than claims under PAGA, it requires only a one-step review and
8 approval process by the Court, and for the reasons discussed below, Plaintiff respectfully requests
9 the Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 Defendant is a full-service car dealership operating out of one location in Paso Robles,
12 California. Plaintiff was employed by Defendant from March 2019 to November 2019. During his
13 employment with Defendant, Plaintiff held several positions, including sales associate (parts) and
14 shuttle bus driver, among others. [Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶ 4.]

15 After appropriate notice¹ to the Labor & Workforce Development Agency (“LWDA”),
16 Plaintiff filed her PAGA-only complaint on January 4, 2021, seeking civil penalties for the
17 following alleged wage and hour violations: (a) failure to pay wages, including overtime wages; (b)
18 failure to provide meal and rest periods; (c) failure to reimburse business expenses, (d) provide
19 complete and accurate wage statements; and (e) waiting time penalties. Plaintiff filed the matter on
20 behalf of aggrieved employees defined to include all non-exempt employees of Mullahey during the
21 relevant PAGA time frame of November 1, 2019 through August 25, 2022. [Crosner Decl., ¶ 5.]

22 Mullahey has at all times denied Plaintiff’s allegations and maintained it properly calculated
23 and paid all wages due, that its meal and rest break and payroll policies and procedures comply with
24 California law, that it provided the class members with required meal and rest breaks, and that no
25 expense reimbursement was necessary. Additionally, Mullahey strongly contends the case cannot
26 be maintained as a representative action as, to the extent aggrieved employees missed meal and/or
27 rest breaks, it was intermittent and infrequent and evidence of such missed breaks would be purely

28 _____
¹ Plaintiff’s PAGA notice letter is attached to the Crosner Declaration as Exhibit 3.

1 anecdotal, and therefore individualized issues predominate, which would render a trial under PAGA
2 unmanageable. [Crosner Decl., ¶ 6.]

3 After Plaintiff filed the complaint, the Parties began propounding and responding to
4 discovery and, upon discussing the merits of her allegations and engaging in several meet and confer
5 sessions regarding prospective law and motion and discovery, the Parties agreed to mediation. The
6 Parties further agreed to a protocol for exchanging additional documents and information before the
7 mediation. Through this informal discovery, Defendant provided Plaintiff with information
8 including, inter alia, the number of potential aggrieved employees, the number of aggregate pay
9 periods, pay stubs and time records for a sampling of the allegedly aggrieved employees, employee
10 handbooks and manuals, and other relevant policy documents regarding Defendant's time keeping
11 and reporting policies. Plaintiff had this information reviewed and analyzed by a consulting expert
12 to assist with calculating, inter alia, potential violation rates and assist with formulating a damages
13 model. [Crosner Decl., ¶ 7.]

14 The Parties then engaged Todd Smith, Esq., a respected mediator with extensive class
15 action/wage and hour experience, and mediated with Mr. Smith on January 27, 2022. Before and
16 during the mediation, Plaintiff and his counsel analyzed, researched, and investigated the potential
17 issues, including matters related to the calculation of damages, trial, and appellate issues and risks.
18 During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on a
19 representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and Defendants'
20 defenses, and the parties' data analyses and conclusions based on data provided by Defendant. After
21 a contentious full day of negotiations, the Parties reached agreement and subsequently formalized
22 their tentative settlement in the Settlement Agreement now before the Court for approval. [Crosner
23 Decl., ¶ 8.] A fully executed, true and correct copy of the Joint Stipulation and PAGA Settlement
24 Agreement ("Settlement Agreement") is attached to the Crosner Declaration as Exhibit 1.

25 **III. SUMMARY OF SETTLEMENT TERMS**

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

27 Under the settlement, Defendant will pay a non-reversionary settlement amount of
28 \$137,500.00 (the "Gross Settlement Amount" or "GSA"). The GSA is inclusive of payments to the

1 LWDA and Aggrieved Employees, costs of settlement administration, a service award to Plaintiff
2 Gilbert, and reasonable attorney's fees and costs. After payment of settlement administration costs,
3 Plaintiff's service award, and reasonable attorney's fees and costs from the GSA, Plaintiff presently
4 estimates about \$66,234.89 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA
5 (about \$49,676.17) will go to the LWDA, and the remaining 25% (about \$16,558.72) will be
6 distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each
7 individual worked during the PAGA Period, with an average award currently estimated at about
8 \$254 per Aggrieved Employee. [Crosner Decl., ¶ 9.]

9 **B. PAYMENT AND THE NOTICE**

10 The Parties propose using ILYM Group, Inc. as the Settlement Administrator. ILYM has
11 extensive experience administering PAGA settlements, and has agreed to cap its fees at \$5,500.00.
12 Defendants will fund the the settlement within 7 days of the Effective Date, and within 14 business
13 days of receipt ILYM will mail a Notice and settlement check to all Aggrieved Employees via
14 regular First-Class U.S. Mail, using the most current, known mailing addresses identified in
15 Mullahey's records. Aggrieved Employees need not submit claim forms and will automatically
16 receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after
17 which time any unclaimed residual funds will be forwarded, subject to Court approval, to the State
18 Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 10; Exhs. 2, 4.]

19 **C. THE RELEASE**

20 The California Supreme Court has explained that a judgment in "a representative action
21 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
22 is binding not only on the named employee plaintiff but also on government agencies and any
23 aggrieved employee not a party to the proceeding." Arias v. Superior Court (2009) 46 Cal.4th 969,
24 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
25 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
26 to be "binding not only on the named employee plaintiff but also on government agencies and any
27 aggrieved employee not a party to the proceeding." While Plaintiff is entering into a general release
28 any and all claims against Defendants, the Settlement Agreement protects the rights of the

1 Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the
2 Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement
3 Agreement specifically provides the Release is inapplicable to any claims other than those brought
4 under PAGA. [Crosner Decl., ¶ 11.]

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

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

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

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

26 First, Plaintiff alleged Defendant failed to pay all minimum and overtime wages by
27 subjecting employees to “off the clock” work, as he contends he and other employees were required
28 to frequently work off the clock during their meal periods. Specifically, Defendant told employees

1 that they must remain on the work site and perform work related duties during meal periods,
2 including, but not limited to, responding to inquiries from customers, completing sales transactions,
3 and completing paperwork. Plaintiff also alleges Defendant failed to pay overtime at the correct
4 rate because they did not incorporate certain non-hourly, non-discretionary pay, such as bonuses
5 and commissions, into employee's "regular rate of pay." As result, overtime was underpaid at the
6 incorrect premium rate. [Crosner Decl., ¶ 12.]

7 Next, Plaintiff contends Defendant failed to provide Aggrieved Employees with compliant
8 meal periods by requiring them to work during meal periods, as described above. Further, analysis
9 of the timecards and payroll records suggests "de facto" violations for late, short, and missing meal
10 periods for around 30% of all shifts worked, and that no second meal periods were provided on
11 shifts over 10 hours. Plaintiff similarly contends Defendant failed to provide Plaintiff and the
12 Aggrieved Employees with compliant rest periods due to the press of business requiring them to
13 work through without a break or with a break lasting less than 10 minutes, and that no third breaks
14 were provided on 10+ hour shifts. [Crosner Decl., ¶ 13.]

15 Plaintiff also contends she and other Aggrieved Employees had to use their personal cell
16 phones for business purposes, and that Mullahey paid no reimbursement for these expenses. Lastly,
17 Plaintiff also brings claims derivative of the foregoing claims, including a derivative wage statement
18 claim based on the failure to pay all wages due, and failure to pay all wages due and owing upon
19 separation of employment under Labor Code §§ 201-203. [Crosner Decl., ¶ 14.]

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

21 For mediation, Mullahey indicated it employed approximately 65 non-exempt employees in
22 California during the relevant time frame of November 1, 2019 to August 25, 2022, and these
23 individuals worked approximately 2,153 pay periods. Based on the data and information provided
24 by Defendant, Plaintiff estimated Defendant's maximum PAGA exposure at approximately
25 \$895,300 in civil penalties. This estimate includes approximately \$176,400 in civil penalties for the
26 unpaid wage/off the clock claims, \$27,600 in civil penalties on the regular rate/overtime claims,
27 \$150,100 for the meal period claims, \$215,300 in civil penalties on the rest period claims,
28 approximately \$107,800 in civil penalties on the expense reimbursement claim, approximately

1 \$215,300 in civil penalties on the inaccurate wage statement claim, and approximately \$2,800 in
2 civil penalties for failing to timely pay wages on separation of employment. [Crosner Decl., ¶¶ 15-
3 16.]

4 C. **THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE**
5 **STRENGTH OF PLAINTIFF’S CASE, THE DISCOVERY PERFORMED,**
6 **AND AMOUNT OFFERED IN SETTLEMENT**

7 In response to Plaintiff’s unpaid wage claims for alleged “off the clock work” Mullahey took
8 the position that its time keeping policies are legally compliant, that it accurately tracked all hours
9 worked, and paid the allegedly aggrieved employees for all hours worked consistent with those
10 policies. Defendant further contends there was no de facto policy of any kind whereby employees
11 were required to work “off the clock” during their meal breaks. Defendant argued any trial of this
12 issue on a representative basis would be unmanageable since it would depend entirely on a myriad
13 of individualized inquiries as to each employee regarding any time worked off the clock and the
14 reason therefore. [Crosner Decl., ¶ 17.]

15 For the meal and rest break claims, Mullahey offered multiple defenses. First, it emphasized
16 its written meal and rest break policy generally was compliant, that it authorized and permitted all
17 necessary breaks, that employees received full uninterrupted lunch periods, as reflected in its
18 records, and that . While Plaintiff’s review of the time records suggested a substantial violation rate
19 for late and short meal breaks, Defendant countered that even to the extent this occurred, it was in
20 violation of company policy and aberrational, and would require significant individual inquiries to
21 determine the reasons underlying any such alleged violations and whether it was by employee choice
22 or some other reason. Thus, per Defendant, any trial on this issue would be unmanageable because
23 of these individualized issues. [Crosner Decl., ¶ 18.]

24 As with meal breaks, Defendants argued the applicable rest break policies complied with
25 California law, that they authorized and permitted employees to take all required breaks.
26 Defendant further contended that, in light of the fact that it is not required to maintain a record of
27 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
28 rest periods would be purely anecdotal and individual issues would predominate on liability. This

1 arguably would once again make a trial unmanageable since the number of instances an employee
2 missed a rest break would have to be tested on a case by case basis to determine compliance.

3 [Crosner Decl., ¶ 19.]

4 For the expense reimbursement claim, Mullahey countered that it provided employees with
5 everything they needed to perform their job duties, and to the extent Plaintiff or other Aggrieved
6 Employees used their individual phones for work purposes, it was done purely for personal
7 convenience and was neither required or necessary in order to perform their job duties. Thus, per
8 Mullahey, no reimbursement was required. [Crosner Decl., ¶ 20.]

9 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
10 violations) and §§ 201-203 (waiting time penalties). The derivative wage statement claims (based
11 on the unpaid wage and meal/rest claims). The waiting time penalties claim, also is entirely
12 derivative and will rise or fall along with the primary claims, in addition to being subject to “good
13 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
14 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
15 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to
16 pay living wages). Accordingly, Plaintiff had to discount the value of this claim significantly in
17 light of these multiple potential defenses. Defendant also contended a substantial discount should
18 be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be
19 unfair to penalize Defendant multiple times for the same violation. [Crosner Decl., ¶ 21.]

20 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
21 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
22 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
23 2699(h). Several state and federal courts in California have applied significant reductions to
24 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
25 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
26 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
27 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
28 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and

1 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
2 trial). [Crosner Decl., ¶ 22.]

3 Finally, although the decision had not yet come down by the time of the mediation,
4 potential applicability of the U.S. Supreme Court’s decision in Viking River Cruises v Mariana
5 (2022) 142 S.Ct. 1906, creates a high probability that the claims at issue would be subject to
6 arbitration following that decision. As the Court is well aware, at this point, Plaintiff’s “individual”
7 PAGA claim most probably would be compelled to arbitration and the “representative” PAGA claims
8 dismissed for want of standing or, at best, subject to stay. [Crosner Decl., ¶ 23.]

9 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims,
10 anyone of which, if successful, could have decimated Plaintiff’s case. And Defendant vowed to
11 raise all these defenses at trial, even assuming Plaintiff overcame Viking River Cruises going
12 forward. Accordingly, Plaintiff faced risky issues going forward with this litigation, and it could
13 have taken years to realize any recovery in this action along with the possibility of post-trial
14 appeals. In addition to its merits defenses and arguing trial would be unmanageable, Defendant
15 also intended to raise additional defenses on damages, including the proper measure of civil
16 penalties and the appropriate discount to place on any assessment of such penalties. [Crosner
17 Decl., ¶ 24.]

18 Although Plaintiff’s counsel believes they could have prevailed, there was no such
19 guarantee. When the risks of overcoming a motion to compel arbitration, a manageability defense,
20 prevailing at trial on the merits on all claims, and securing 100% of the theoretical civil penalties
21 all are factored into the equation, the settlement value is reasonable and supported. Of course, to
22 recover anywhere near the maximum penalties Plaintiff would have to shoot the moon and win
23 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is
24 unlikely. Given Defendant’s various procedural and merits defenses, the Viking River Cruises
25 decision, and the substantial penalty reductions ordered in the cases above – which occurred after
26 trial – the proposed settlement is eminently reasonable. [Crosner Decl., ¶¶ 25-26.]

27 Importantly, the mere fact that a settlement does not provide the same recovery as might be
28 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 \$137,500 for the PAGA claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving settlement with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement”).

V. SUBMISSION TO THE LWDA

Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and notified the LWDA of this approval hearing. [Crosner Decl., ¶ 27; Exh. 5.] 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

1 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
2 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
3 no comment or objection has been received.”).

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

5 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
6 that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or \$45,833.33, is
7 allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation costs. These fees
8 are warranted under the law and within the range of fees commonly awarded in similar cases.

9 **A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S**
10 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
11 **ACTION**

12
13 PAGA provides a Plaintiff is entitled to recover reasonable attorney’s fees, expenses, and
14 costs under Labor Code § 2699(g)(1): “Any employee who prevails in any action shall be entitled to
15 an award of reasonable attorney’s fees and costs,” As discussed below, reasonable attorney’s
16 fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one,
17 where, as here, the litigation creates a common fund of money in a specific amount for the benefit
18 of others.

19 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
20 private attorney general to recover damages or penalties, all or part of which will be paid to the
21 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
22 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
23 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to
24 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
25 only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th
26 73; Iskanian, 59 Ca1.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*
27 action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
28 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the

1 aggrieved employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui tam*
2 action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are entitled
3 to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66,
4 89-91.

5 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
6 in the amount of \$137,500.00 for the benefit of the Aggrieved Employees and the State. Thus, these
7 beneficiaries should bear their share of the costs and attorney's fees out of the overall settlement
8 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
9 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
10 1301, 1311.

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

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

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

3 Awarding attorney's fees of one-third of gross common fund amount is favored by California
4 courts when a fund established for the common benefit of others is involved, such as here.
5 Accordingly, awarding fees on this basis out of the \$137,500 gross settlement, for a total of
6 \$45,833.33, is reasonable and appropriate. [Crosner Decl., ¶¶ 28-43.]

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

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

19 Here, Crosner Legal's lodestar is approximately \$94,707.00, based on 133.77 attorney hours
20 spent litigating the case. [Crosner Decl., ¶¶ 29-43; Exh. 6.] This results in a lodestar that is higher
21 than the fees requested on a percentage of the recovery basis and, accordingly, there is no request
22 for a multiplier. It also is important to note this fact serves to highlight the reasonableness of the
23 fees sought on a percentage-of-the-recovery basis, as it shows the requested fees are actually lower
24 than the market rate for the services rendered if those services are valued via traditional hourly
25 billing.

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

27 Plaintiff's Counsel requests reimbursement of actual out-of-pocket expenses incurred to
28 prosecute this action. These expenses were incidental and necessary to the effective representation

1 of the employees, and Plaintiff's Counsel is permitted to recover their litigation costs and expenses
2 under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common
3 fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego
4 (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity,
5 and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees
6 by ... [Plaintiffs'] attorneys"). Furthermore, Plaintiff's Counsel is entitled to recover "those out-of-
7 pocket expenses that would normally be charged to a fee-paying client." Harris v. Marhoefer (9th
8 Cir. 1994) 24 F.3d 16, 19.

9 Plaintiff's Counsel's actual costs presently are \$12,431.78, including filing fees, service of
10 process, mediation costs, expert fees, and postage, while waiving photocopying costs and legal
11 research charges. [Crosner Decl., ¶¶ 44-45.] Since these costs are reasonable and uncontested, the
12 full amount of \$12,431.78 should be approved.

13 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
14 **REASONABLE**

15 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$7,500.00. This
16 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
17 Plaintiff's efforts in this case and the risks he undertook on behalf of the Aggrieved Employees.
18 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
19 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk
20 of being liable for Defendants' litigation costs if he were unsuccessful. Plaintiff also exposed himself
21 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
22 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
23 prospective employers. Among taking many other actions assisting in the successful litigation of
24 this case, Plaintiff provided substantial factual information to counsel, participated in numerous
25 phone calls and meetings with counsel to discuss the case, and general kept up to speed and informed
26 on the case's progress. The incentive payment to Plaintiff is appropriate and justified as part of the
27 Settlement. [Crosner Decl., ¶ 46; Declaration of Jesse McCauley, ¶¶ 2-9.]

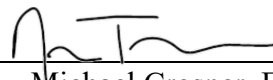
1 Accordingly, Plaintiff submits the amount sought is well within the range of
2 reasonableness for such awards in other wage and hour actions. Nelson v. Avon 5 Prod., Inc.
3 (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *7 (approving incentive award of \$10,000
4 where plaintiff "appeared for an all-day deposition, searched for documentation relating to the
5 class action, reviewed documents and settlement papers, attended the mediation and
6 subsequent negotiations, and aided Class Counsel with negotiation efforts."); Torchia v.
7 W.W. Grainger, Inc. (E.D. Cal. 2014) 304 F.R.D. 256 (approving \$7,500 incentive award).

8 **VIII. CONCLUSION**

9 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
10 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
11 service award to Plaintiff in the amount of \$7,500, approve ILYM Group, Inc. as the settlement
12 administrator and approve its fees in the amount of \$5,500.00, approve the proposed distributions to
13 the LWDA and Aggrieved Employees, and enter judgment.

14
15 Dated: December 13, 2022

CROSNER LEGAL, PC

16
17 By: 
18 Michael Crosner, Esq.
19 Zach Crosner, Esq.
20 Nikki Trenner, Esq.
21 Attorneys for Plaintiff JESSE MCCAULEY
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