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10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF LOS ANGELES**

12 RIDEL LOPEZ, on behalf of himself all others
13 similarly aggrieved,

14 Plaintiff,
15 vs.

16 FRITO-LAY, INC., a Delaware corporation;
17 and DOES 1-50, Inclusive,

18 Defendant.

CASE NO. 21STCV01652

Assigned for All Purposes to:
Hon. Richar L. Fruin
Dept. 15

NOTICE OF MOTION AND MOTION FOR
APPROVAL OF SETTLEMENT UNDER
PRIVATE ATTORNEYS GENERAL ACT

[Filed Concurrently with Memorandum of
Points and Authorities; Declarations of
Zachary M. Crosner, Ridel Lopez, and
Michael Moore; [Proposed] Order]

Date: December 13, 2022
Time: 9:15 a.m.
Dept. 15

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1 **I. INTRODUCTION**

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

9 **II. BACKGROUND**

10 Defendant Frito-Lay, Inc., the well-known snack food company, owns and operates multiple
11 facilities in California, including but not limited to, warehouse and distribution centers in
12 Bakersfield, Modesto, and Rancho Cucamonga. Frito-Lay employed Plaintiff Lopez at its Kern
13 County warehouse from approximately March-November 2019. During his employment with
14 Defendant, Plaintiff typically worked 4 days per week for approximately 30 hours per week.
15 Plaintiff was paid an hourly rate of \$18.39 plus shift differential pay. [Declaration of Zachary M.
16 Crosner (“Crosner Decl.”), ¶ 4.]

17 After appropriate notice¹ to the Labor & Workforce Development Agency (“LWDA”),
18 Plaintiff filed his PAGA-only complaint on January 14, 2021, and subsequently filed the operative
19 First Amended Complaint on March 18, 2021. The FAC seeks civil penalties for the following
20 alleged wage and hour violations: (1) temperature/reasonable comfort violations; (2) wage statement
21 violations; (3) paid sick leave violations; (4) meal period violations; (5) rest period violations; (6)
22 minimum wage violations; (7) overtime violations; (8) recordkeeping violations; (9) timely payment
23 violations; (10) statutory wage violations; (11) refusal to make payment; (12) standard conditions
24 of labor violations; and (13) final pay violations Plaintiff filed the matter on behalf of aggrieved
25 employees defined to include all non-exempt employees of Frito-Lay in California during the
26 applicable PAGA time period of October 26, 2019 to present. [Crosner Decl., ¶ 5.]

27 _____
28 ¹ Plaintiff’s PAGA October 26, 2020 PAGA notice letter is attached to the Crosner Declaration as Exhibit 3, and his
December 21, 2020 amended notice letter is attached to the Crosner Declaration as Exhibit 4.

1 Frito-Lay has at all times denied Plaintiff's allegations and maintains that it properly
2 calculated and paid all wages due, that its meal and rest break and payroll policies and procedures
3 comply with California law, and that it provided the class members with required meal and rest
4 breaks. Additionally, Frito-Lay strongly contends the case cannot be maintained as a representative
5 action as, to the extent aggrieved employees missed meal and/or rest breaks in violation of Frito-
6 Lays compliant policies, it was intermittent and infrequent and evidence of such missed breaks
7 would be purely anecdotal, and therefore individualized issues predominate, which would render a
8 trial under PAGA unmanageable. [Crosner Decl., ¶ 6.]

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

19 The Parties then retained Deborah Saxe, Esq., a respected mediator with extensive class
20 action/wage and hour experience, and mediated with Ms. Saxe on March 28, 2022. Before and
21 during the mediations, Plaintiff and his counsel analyzed, researched, and investigated the potential
22 issues, including matters related to the calculation of damages, trial, and appellate issues and risks.
23 During mediations, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on
24 a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and
25 Defendant's defenses, and the parties' data analyses and conclusions based on data provided by
26 Defendant. After a full day of contentious and arms-length negotiations, as well as further follow
27 up negotiations, the Parties finally reached agreement and subsequently formalized their tentative
28 settlement in the Settlement Agreement now before the Court for approval. [Crosner Decl., ¶ 8.] A

1 fully executed, true and correct copy of the Parties' Settlement Agreement and General Release of
2 Claims ("Settlement Agreement") is attached to the Crosner Declaration as Exhibit 1.

3 **III. SUMMARY OF SETTLEMENT TERMS**

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

5 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$990,000
6 (the "Maximum Settlement Fund" or "MSF"). The MSF is inclusive of payments to the LWDA and
7 Aggrieved Employees, costs of settlement administration, a service award to Plaintiff Lopez, and
8 reasonable attorney's fees and costs. After payment of settlement administration costs, Plaintiff's
9 service award, and reasonable attorney's fees and costs from the MSF, Plaintiff presently estimates
10 about \$600,381.48 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about
11 \$450,286.12) will go to the LWDA, and the remaining 25% (about \$150,095.36) will be distributed
12 to the Settlement Group Members in proportion to the total number of Pay Periods each individual
13 worked during the PAGA Period, with an average award currently estimated at about \$44 net per
14 individual. [Crosner Decl., ¶ 9.]

15 **B. PAYMENT AND THE NOTICE**

16 The Parties propose using Phoenix Settlement Administrators as the Settlement
17 Administrator. Phoenix has extensive experience administering PAGA settlements, and has agreed
18 to cap its fees at \$15,000.00. Frito-Lay will fund the settlement within seven calendar days of the
19 Effective Date, and within ten calendar days of receipt Phoenix will mail a Notice and settlement
20 check to all Aggrieved Employees via regular First-Class U.S. Mail, using the most current, known
21 mailing addresses identified in Frito-Lay's records, and will conduct a skip-trace or other similar
22 search for all notices and checks returned as undeliverable. Settlement Group Members need not
23 submit claim forms and will automatically receive a Notice and settlement check. Settlement checks
24 will be negotiable for 90 days, after which time any unclaimed residual funds will be forwarded to
25 the California State Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 10.]

26 **C. THE RELEASE**

27 The California Supreme Court has explained that a judgment in "a representative action
28 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...

1 is binding not only on the named employee plaintiff but also on government agencies and any
2 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
3 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
4 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
5 to be “binding not only on the named employee plaintiff but also on government agencies and any
6 aggrieved employee not a party to the proceeding.” While Plaintiff is entering into a general release
7 any and all claims against Defendant, the Settlement Agreement protects the rights of the Aggrieved
8 Employees to bring their own individual claims should they wish. For these reasons, the Parties
9 contend the release narrowly applies only to the PAGA claims alleged, and the Settlement
10 Agreement specifically provides the Release is inapplicable to any claims other than those brought
11 under PAGA. [Crosner Decl., ¶ 11.]

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

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

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

1 Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiff submits they should
2 inform the Court's analysis as well. For the reasons below, the proposed settlement is fair,
3 reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

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

5 First, Plaintiff alleged Defendant failed to comply with requirements of the IWC Wage
6 Orders that an employer must use all feasible means to provide employees with reasonable comfort
7 from extreme heat, humidity, and cold temperatures in the workplace. *E.g.*, Wage Order 1, § 15. In
8 particular, Plaintiff alleged Defendant failed to take all feasible means to reduce excessive heat in the
9 warehouses during the summer months to provide reasonable comfort to the employees with
10 temperatures often exceeding 100 degrees. Additionally, per Plaintiff, during the winter months
11 temperatures would often get as low as 40 degrees or lower and Defendant similarly failed to provide a
12 heated room for employees to take a break from the cold and warm up. [Crosner Decl., ¶ 12.]

13 Next, Plaintiff contends Defendant violated Labor Code section 226 by issuing Plaintiff and
14 other allegedly aggrieved employees inaccurate wage statements. Among other things, Plaintiff claims
15 the wage statements failed to accurately state the employee's gross wages earned, total hours worked,
16 net wages earned, all applicable hourly rates in effect during each pay period, and all hours worked at
17 each applicable hourly rate. Specifically, Plaintiff alleged the wage statements failed to provide an
18 accurate overtime rate because instead of multiplying the regular rate by 1.5, the wage statements
19 provide two overtime rate categories, with each providing corresponding rates that are either the same
20 as the regular rate or list no separate rate for overtime, thus requiring Plaintiff and other employees to
21 perform extensive calculations to determine the pay rate for each respective hour worked. [Crosner
22 Decl., ¶ 13.]

23 Plaintiff also alleged Defendant failed to accurately calculate and pay meal and rest period
24 premiums at the employees' regular rate of pay as required under Ferra v. Loews Hollywood Hotel, LLC
25 (2021) 11 Cal.5th 858. Instead, per Plaintiff, Frito-Lay improperly paid meal/rest premium pay at the
26 base hourly rate of pay, resulting in violations of Labor Code section 226 for meal and rest period
27 violations as well as further rendering corresponding wage statements inaccurate. Plaintiff further
28

1 contended Frito-Lay paid sick pay at the base hourly rate of pay rather than the regular rate, as required
2 under Labor Code section 246. [Crosner Decl., ¶ 14.]

3 Lastly, Plaintiff also brought claims derivative of the foregoing claims, including a
4 derivative claim for failure to pay all wages due and owing upon separation of employment under
5 Labor Code §§ 201-203. [Crosner Decl., ¶ 15.]

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

7 For mediation, Frito-Lay indicated it employed approximately 3,443 non-exempt employees
8 in California during the relevant time frame of of December 29, 2019 to July 15, 2022, and these
9 individuals worked approximately 195,000 pay periods during that time. Based on the data and
10 information provided by Defendant, Plaintiff estimated Defendant's maximum PAGA exposure at
11 approximately \$22,876,000. This estimate includes approximately approximately \$9,750,000 in
12 civil penalties for the temperature/reasonable working conditions claim, \$6,474,000 in civil
13 penalties for the several "regular rate" claims, approximately \$6,474,00 in civil penalties on the
14 inaccurate wage statement claims, and approximately \$178,000 in civil penalties for failing to timely
15 pay wages on separation of employment. [Crosner Decl., ¶¶ 16-17.]

16 **C. THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE**
17 **STRENGTH OF PLAINTIFF'S CASE, THE DISCOVERY PERFORMED,**
18 **AND AMOUNT OFFERED IN SETTLEMENT**

19 In response to Plaintiff's working conditions claims, Defendant contends it complied will all
20 requirements for maintaining proper temperatures and working conditions in its facilities at all times.
21 Defendant alleges it provided access to shade and water, had cooling fans in the warehouses, and overall
22 utilized a formal Heat Illness Program to address these issues in conformance with the Wage Orders
23 and applicable law. [Crosner Decl., ¶ 18.]

24 Similarly, Defendant contends it properly calculated and paid Plaintiff and other employees
25 for all wages due, and paid all wages at the correct regular rates of pay after accounting for shift
26 differentials, bonus pay, etc., consistent with Ferra and Marin v. Costco Wholesale Corp. (2009)
27 169 Cal.App.4th 804. For the same reasons, Frito-Lay maintains its wage statements complied Labor
28 Code section 226 and accurately reflected employee hours worked, rates of pay, etc. Further,

1 Defendant insists that all the necessary information needed for employees to understand their hours
2 and pay can be found on the wage statements consistent with Labor Code section 226(e)(2)(B) and
3 (C), accordingly it is Defendant's position that there were no cognizable violations. [Crosner Decl.,
4 ¶ 19.]

5 Plaintiff also alleged derivative violations of Labor Code sections 201-203 (waiting time
6 penalties), which will rise or fall along with the primary claims, in addition to being subject to
7 "good faith" and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
8 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
9 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to
10 pay living wages). Accordingly, Plaintiff had to discount the value of this claim significantly in
11 light of these multiple potential defenses. Defendant also contends a substantial discount should
12 be applied to the civil penalties for these derivative (i.e., "stacked") violations, as it would be
13 unfair to penalize Defendant multiple times for the same violation. [Crosner Decl., ¶ 20.]

14 Defendant also maintains that PAGA gives the Court wide latitude to reduce the amount of
15 civil penalties "based on the facts and circumstances of a particular case" if "to do otherwise
16 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code §
17 2699(h). Several state and federal courts in California have applied significant reductions to
18 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
19 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
20 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
21 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
22 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
23 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
24 trial). [Crosner Decl., ¶ 21.]

25 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff's claims,
26 anyone of which, if successful, could have decimated Plaintiff's case. And Defendant vowed to
27 raise all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with this
28 litigation, and it could have taken years to realize any recovery in this action along with the

1 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be
2 unmanageable, Defendant also intended to raise additional defenses on damages, including the
3 proper measure of civil penalties and the appropriate discount to place on any assessment of such
4 penalties. [Crosner Decl., ¶ 22.]

5 Although Plaintiff's counsel believes they could have prevailed, there was no such
6 guarantee. When the risks of overcoming a motion to compel arbitration, a manageability defense,
7 prevailing at trial on the merits on all claims, and securing 100% of the theoretical civil penalties
8 all are factored into the equation, the settlement value is reasonable and supported. Of course, to
9 recover anywhere near the maximum penalties Plaintiff would have to shoot the moon and win
10 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is
11 unlikely. Given Defendant's various procedural and merits defenses, as well as the substantial
12 penalty reductions ordered in the cases above – which occurred after trial – the proposed
13 settlement is eminently reasonable. [Crosner Decl., ¶ 22-23.]

14 Importantly, the mere fact that a settlement does not provide the same recovery as might be
15 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
16 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
17 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
18 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
19 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
20 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
21 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
22 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
23 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
24 fundamentally fair . . . is different from the question whether the settlement is perfect in the
25 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
26 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
27 though it represented 99% discount off the maximum value of the claims).

1 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
2 the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any
3 penalty award all are accounted for, it is clear a settlement amount of \$990,000 for the PAGA
4 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open
5 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving
6 settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement
7 agreement to the LWDA, and the LWDA has not objected to the settlement").

8 **V. SUBMISSION TO THE LWDA**

9 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
10 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 24; Exh. 5.] Accordingly, the
11 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
12 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
13 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
14 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the
15 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL
16 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
17 not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court
18 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
19 no comment or objection has been received.").

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

21 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
22 that benefits the LWDA and Settlement Group, 35% of the gross settlement, or \$346,500.00, is
23 allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs. These fees
24 are warranted under the law and within the range of fees commonly awarded in similar cases.

25 **A. PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY'S**
26 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
27 **ACTION**
28

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

7 "A *qui tam* action is one brought under a statute that allows a private person to sue as a
8 private attorney general to recover damages or penalties, all or part of which will be paid to the
9 government." People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
10 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
11 allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to
12 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
13 only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th
14 73; Iskanian, 59 Cal.4th at 380-82 ("[a] PAGA representative action is therefore a type of *qui tam*
15 action"). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
16 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
17 aggrieved employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui tam*
18 action by the successful litigation of a plaintiff and his attorneys, the plaintiff's attorneys are entitled
19 to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66,
20 89-91.

21 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
22 in the amount of \$990,000 for the benefit of the Settlement Group and the State. Thus, these
23 beneficiaries should bear their share of the costs and attorney's fees out of the overall \$990,000
24 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
25 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
26 1301, 1311.

27 Not long ago, the California Supreme Court upheld the use of the common fund theory of
28 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Cal.5th 480, 506. In

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

11 Accordingly, the common fund doctrine allows a court to award attorney’s fees based on a
12 percentage of the total fund created when the fund consists of a “certain or easily calculable sum of
13 money,” and California law has long applied the percentage of the recovery method for awarding
14 attorney’s fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
15 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
16 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney’s
17 fee based on percentage of recovery).

18 Awarding attorney’s fees of thirty-five percent of a gross common fund amount is allowed
19 by California courts when a fund established for the common benefit of others is involved, such as
20 here. Accordingly, awarding fees on this basis out of the \$990,000 GSA, for a total of \$346,500.00,
21 is reasonable and appropriate. [Crosner Decl., ¶¶ 25-45.]

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

24 Despite the recognized limitations of the so-called lodestar method, some California and
25 federal courts acknowledge the utility of a lodestar “cross-check” when assessing a proposed
26 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the “lodestar multiplier”
27 method of cross-checking proposed fee awards, the court first ascertains counsel’s total “lodestar”
28 amount by multiplying the number of hours reasonably expended by each attorney’s reasonable

1 hourly rate, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range
2 of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of
3 success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-96; Lealao, 82
4 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within
5 the range of fees freely negotiated in the legal marketplace in comparable litigation”).

6 Here, Crosner Legal’s lodestar is approximately \$314,590, based on 420.6 attorney hours
7 spent litigating the case. [Crosner Decl., ¶¶ 25-45; Exh. 6.] On a lodestar basis, the fee request of
8 \$346,500.00 results in a multiplier of 1.10, which is a modest enhancement entirely in line
9 with California law. [Crosner Decl., ¶¶ 43-45.] Indeed, California courts routinely approve
10 multipliers in the in the 2-4 range to compensate for the time and risk of class action cases.
11 Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 (affirming attorneys' fee award
12 including an upward multiplier of 2.5); Wershba, 91 Cal.App.4th at 255 ("Multipliers can
13 range from 2 to 4 or even higher."); City of Oakland Oakland Raiders (1988) 203 Cal.App.3d
14 78, 85 (affirming a multiplier of 2.34.) Class Counsel submits that the requested 1.10
15 multiplier effectively operates to show that the percentage fee request is reasonable
16 considering the challenges presented in this contingency fee matter, and appropriately
17 compensates Class Counsel for the contingent risk assumed and delay in payment during the
18 2+ years counsel has been representing Plaintiff. It also is important to note this fact serves to
19 highlight the reasonableness of the fees sought on a percentage-of-the-recovery basis, as it shows
20 the requested fees are close to the market rate for the services rendered if those services are valued
21 via traditional hourly billing. Thus, the multiplier results in a fee constituting a fair return on
22 the contingency.

23 C. THE REQUESTED COSTS ARE FAIR AND REASONABLE

24 Plaintiff’s Counsel requests reimbursement of actual out-of-pocket expenses incurred to
25 prosecute this action. These expenses were incidental and necessary to the effective representation
26 of the employees, and Plaintiff’s Counsel is permitted to recover their litigation costs and expenses
27 under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common
28 fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego

1 (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity,
2 and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees
3 by ... [Plaintiffs’] attorneys”). Furthermore, Plaintiff’s Counsel is entitled to recover “those out-of-
4 pocket expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th
5 Cir. 1994) 24 F.3d 16, 19.

6 Plaintiff’s Counsel’s actual costs presently are \$18,118.52. [Crosner Decl., ¶¶ 45-46.] This
7 includes filing fees, service of process, mediation costs, expert fees, and postage, while waiving
8 photocopying costs and legal research charges. These costs are reasonable and uncontested, and
9 should be approved.

10 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
11 **REASONABLE**

12 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$10,000. This
13 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
14 Plaintiff’s efforts in this case and the risks he undertook on behalf of the Settlement Group.
15 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
16 settlement possible for the Settlement Group Members and the LWDA, while shouldering the risk
17 of being liable for Defendant’s litigation costs if he were unsuccessful. Plaintiff also exposed himself
18 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
19 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
20 prospective employers. Among taking many other actions assisting in the successful litigation of
21 this case, Plaintiff provided substantial factual information to Plaintiff’s Counsel, participated in
22 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
23 and informed on the case’s progress. The incentive payment to Plaintiff is appropriate and justified
24 as part of the Settlement. [Crosner Decl., ¶ 47; Declaration of Ridel Lopez, ¶¶ 2-9.]

25 Accordingly, Plaintiff submits the amount sought is well within the range of
26 reasonableness for such awards in other wage and hour actions. Staton v. Boeing (9th Cir.
27 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive
28 payments ranging from \$2,000 to \$25,000).

1 **VIII. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
3 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
4 service award to Plaintiff in the amount of \$10,000, approve Phoenix as the settlement administrator
5 and approve its fees in the amount of \$15,000, approve the proposed distributions to the LWDA and
6 Settlement Group Members, and enter judgment.

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8 Dated: November 15, 2022

CROSNER LEGAL, PC

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10 By: 
11 Michael Crosner.
12 Zach Crosner
13 Jonathan Stilz
14 Attorneys for Plaintiff RIDEL LOPEZ
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