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

12 AMANDA GILBERT on behalf of herself, the
13 State of California, and others similarly situated
14 and aggrieved,

15 Plaintiff,

16 vs.

17
18 PIRATE COVE MANAGEMENT, LLC a
19 California limited liability company; and
20 DOES 1 to 100, inclusive,

21 ,

22 Defendants.

CASE NO. CIVSB2212283

Assigned for All Purposes to:
Hon. David Cohn
Dept. S26

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

[Filed Concurrently with Notice of Motion
and Motion; Declarations of Zachary M.
Crosner and Amanda Gilbert; [Proposed]
Order]

Date: January 25, 2023
Time: 10:00 a.m.
Dept. S26

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1 **I. INTRODUCTION**

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

9 **II. BACKGROUND**

10 PCM owns/operates a resort on the Colorado River near Needles, California. The resort
11 offers riverside cabins, an RV park, a marina and boat ramp, and related amenities. Plaintiff Gilbert
12 worked for PCM as a reservations agent for several months in 2021, and her duties included
13 checking guests into the resort, and handling reservations via email and telephone. [Declaration of
14 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 July 18, 2022, seeking civil penalties for the following
17 alleged wage and hour violations: (a) failure to pay wages, including overtime wages; (b) failure to
18 provide meal and rest periods; (c) failure to reimburse business expenses, (d) provide complete and
19 accurate wage statements; and (e) waiting time penalties. Plaintiff filed the matter on behalf of
20 aggrieved employees defined to include all non-exempt employees of PCM during the relevant
21 PAGA time frame of March 21, 2021 through August 16, 2022. [Crosner Decl., ¶ 5.]

22 PCM has at all times denied Plaintiff’s allegations and maintained it properly calculated and
23 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, PCM strongly contends the case cannot be
26 maintained as a representative action as, to the extent aggrieved employees missed meal and/or rest
27 breaks, it was intermittent and infrequent and evidence of such missed breaks would be purely

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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. Lastly, PCM contends the case should be sent to arbitration following the U.S.
3 Supreme Court’s decision in Viking River Cruises v. Mariana (2022) 142 S.Ct. 1906. [Crosner
4 Decl., ¶ 6.]

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

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

27 ////

28 ////

1 **III. SUMMARY OF SETTLEMENT TERMS**

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

3 Under the settlement, Defendant will pay a non-reversionary settlement amount of
4 \$49,270.00 (the “Maximum Payment” or “MP”). The MP is inclusive of payments to the LWDA
5 and Aggrieved Employees, costs of settlement administration, a service award to Plaintiff Gilbert,
6 and reasonable attorney’s fees and costs. After payment of settlement administration costs,
7 Plaintiff’s service award, and reasonable attorney’s fees and costs from the MA, Plaintiff presently
8 estimates about \$17,846.67 will remain (the “Net Settlement Amount” or “NSA”). 75% of the NSA
9 (about \$13,385.00) will go to the LWDA, and the remaining 25% (about \$4,461.67) will be
10 distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each
11 individual worked during the PAGA Period, with an average award currently estimated at about \$52
12 net per Aggrieved Employee and \$5.89 net per Pay Period. [Crosner Decl., ¶ 9.]

13 **B. PAYMENT AND THE NOTICE**

14 The Parties propose using Phoenix Settlement Administrators as the Settlement
15 Administrator. Phoenix has extensive experience administering PAGA settlements, and has agreed
16 to cap its fees at \$5,000.00. PCM will fund the the settlement within 30 days of the Effective Date,
17 and within calendar days of receipt Phoenix will mail a Notice and settlement check to all Aggrieved
18 Employees via regular First-Class U.S. Mail, using the most current, known mailing addresses
19 identified in PCM’s records. Aggrieved Employees need not submit claim forms and will
20 automatically receive a Notice and settlement check. Settlement checks will be negotiable for 180
21 days, after which time any unclaimed residual funds will be forwarded, subject to Court approval,
22 to Justice Gap Fund as *cy pres* beneficiary. [Crosner Decl., ¶ 10; Exhs. 2, 4.]

23 **C. THE RELEASE**

24 The California Supreme Court has explained that a judgment in “a representative action
25 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
26 is binding not only on the named employee plaintiff but also on government agencies and any
27 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
28 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty

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

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

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

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

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

2 First, Plaintiff alleged Defendant failed to pay all minimum and overtime wages by
3 subjecting employees to “off the clock” work, as she contends she and other employees were
4 required to clock out precisely at the scheduled end of a shift but then had to continue working to
5 complete all necessary end of shift duties. Plaintiff estimates she and other employees worked at least
6 some time “off the clock” each and every pay period. [Crosner Decl., ¶ 12.]

7 Next, Plaintiff contends Defendant failed to provide Aggrieved Employees with compliant
8 meal periods by (a) rounding employee time punches off to make short meal periods appear
9 compliant, and (b) that managers had the ability through PCM’s time keeping system to review and
10 “adjust” employee time punches for their meal breaks. Per Plaintiff, review of Defendant’s time
11 records shows frequent instances where the actual time punches are different/shorter than the
12 amount shown on the “Manager Hours Review,” thereby suggesting managers changed the records
13 to make lunch violations appear compliant. Plaintiff similarly contends Defendant failed to provide
14 Plaintiff and the Aggrieved Employees with compliant rest periods due to the press of business
15 requiring them to work through without a break or with a break lasting less than 10 minutes.
16 [Crosner Decl., ¶ 13.]

17 Plaintiff also contends she and other Aggrieved Employees had to use their personal cell
18 phones for business purposes, such as photographing guests’ IDs and boat/RV insurance
19 information at check in and then transmitting the photos to management. Plaintiff alleges this was
20 a required part of the job and that PMC paid no reimbursement for these expenses. [Crosner Decl.,
21 ¶ 14.]

22 Lastly, Plaintiff also brings claims derivative of the foregoing claims, including a derivative
23 wage statement claim based on the failure to pay all wages due, and failure to pay all wages due and
24 owing upon separation of employment under Labor Code §§ 201-203. [Crosner Decl., ¶ 15.]

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

26 For mediation, PCM indicated it employed approximately 85 non-exempt employees in
27 California during the relevant time frame of March 21, 2021 to August 16, 2022, and these
28 individuals worked approximately 658 pay periods during that time. Based on the data and

1 information provided by Defendant, Plaintiff estimated Defendant's maximum PAGA exposure at
2 approximately \$267,000 in civil penalties. This estimate includes approximately \$65,800 in civil
3 penalties for the unpaid wage claims, \$65,800 for the meal and rest period claims, approximately
4 \$65,800 in civil penalties on the expense reimbursement claim, approximately \$65,800 in civil
5 penalties on the inaccurate wage statement claim, and approximately \$4,000 in civil penalties for
6 failing to timely pay wages on separation of employment. [Crosner Decl., ¶¶ 16-17.]

7 **C. THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE**
8 **STRENGTH OF PLAINTIFF'S CASE, THE DISCOVERY PERFORMED,**
9 **AND AMOUNT OFFERED IN SETTLEMENT**

10 In response to Plaintiff's unpaid wage claims for alleged "off the clock work" PCM took the
11 position that its time keeping policies are legally compliant, that it accurately tracked all hours
12 worked, and paid the allegedly aggrieved employees for all hours worked consistent with those
13 policies. Defendant further contends there was no de facto policy of any kind whereby managers
14 required employees to clock but continue to work. Lastly, Defendant argued any trial of this issue
15 on a representative basis would be unmanageable since it would depend entirely on a myriad of
16 individualized inquiries as to each employee regarding any discrepancies in actual time worked
17 versus what was reported and paid for. [Crosner Decl., ¶ 18.]

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

27 As with meal breaks, Defendants argued the applicable rest break policies complied with
28 California law, that they authorized and permitted employees to take all required breaks, and that

1 they provided 15 minutes breaks instead of the required 10 minutes. Thus per Defendants, Plaintiff
2 and Aggrieved Employees always would have received a net 10 minutes on their rest breaks.
3 Defendant further contended that, in light of the fact that it is not required to maintain a record of
4 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
5 rest periods would be purely anecdotal and individual issues would predominate on liability. This
6 arguably would once again make a trial unmanageable since the number of instances an employee
7 missed a rest break would have to be tested on a case by case basis to determine compliance.
8 [Crosner Decl., ¶ 20.]

9 For the expense reimbursement claim, PCM countered that it provided employees with
10 everything they needed to perform their job duties, and to the extent Plaintiff or other Aggrieved
11 Employees used their individual phones for work purposes, it was done purely for personal
12 convenience and was neither required or necessary in order to perform their job duties. Thus, per
13 PCM, no reimbursement was required. [Crosner Decl., ¶ 21.]

14 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
15 violations) and §§ 201-203 (waiting time penalties). The derivative wage statement claims (based
16 on the unpaid wage and meal/rest claims). The waiting time penalties claim, also is entirely
17 derivative and will rise or fall along with the primary claims, in addition to being subject to “good
18 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
19 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
20 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to
21 pay living wages). Accordingly, Plaintiff had to discount the value of this claim significantly in
22 light of these multiple potential defenses. Defendant also contended a substantial discount should
23 be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be
24 unfair to penalize Defendant multiple times for the same violation. [Crosner Decl., ¶ 22.]

25 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
26 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
27 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
28 2699(h). Several state and federal courts in California have applied significant reductions to

1 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
2 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
3 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
4 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
5 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
6 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
7 trial). [Crosner Decl., ¶ 23.]

8 Finally, although the decision had not yet come down by the time of the mediation,
9 Defendant argued for the potential applicability of the U.S. Supreme Court’s decision in Viking
10 River Cruises v Mariana (2022) 142 S.Ct. 1906 and noted the high probability that the claims at
11 issue would be subject to arbitration following that decision. As the Court is well aware, at this
12 point, Plaintiff’s “individual” PAGA claim most probably would be compelled to arbitration and the
13 “representative” PAGA claims dismissed for want of standing or, at best, subject to stay. [Crosner
14 Decl., ¶ 24.]

15 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims,
16 anyone of which, if successful, could have decimated Plaintiff’s case. And Defendant vowed to
17 raise all these defenses at trial, even assuming Plaintiff overcame Viking River Cruises.
18 Accordingly, Plaintiff faced risky issues going forward with this litigation, and it could have taken
19 years to realize any recovery in this action along with the possibility of post-trial appeals. In
20 addition to its merits defenses and arguing trial would be unmanageable, Defendant also
21 intended to raise additional defenses on damages, including the proper measure of civil penalties
22 and the appropriate discount to place on any assessment of such penalties. [Crosner Decl., ¶ 25.]

23 Although Plaintiff’s counsel believes they could have prevailed, there was no such
24 guarantee. When the risks of overcoming a motion to compel arbitration, a manageability defense,
25 prevailing at trial on the merits on all claims, and securing 100% of the theoretical civil penalties
26 all are factored into the equation, the settlement value is reasonable and supported. Of course, to
27 recover anywhere near the maximum penalties Plaintiff would have to shoot the moon and win
28 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is

1 unlikely. Given Defendant's various procedural and merits defenses, the Viking River Cruises
2 decision, and the substantial penalty reductions ordered in the cases above – which occurred after
3 trial – the proposed settlement is eminently reasonable. [Crosner Decl., ¶ 26.]

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

18 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
19 the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any
20 penalty award all are accounted for, it is clear a settlement amount of \$49,270 for the PAGA
21 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open
22 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving
23 settlement with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement
24 agreement to the LWDA, and the LWDA has not objected to the settlement”).

25 **V. SUBMISSION TO THE LWDA**

26 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
27 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 27; Exh. 5.] Accordingly, the
28 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of

1 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
2 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
3 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
4 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
5 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
6 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
7 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
8 no comment or objection has been received.”).

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

10 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
11 that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or \$16,243.33, is
12 allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation costs. These fees
13 are warranted under the law and within the range of fees commonly awarded in similar cases.

14 **A. PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S**
15 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
16 **ACTION**
17

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

24 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
25 private attorney general to recover damages or penalties, all or part of which will be paid to the
26 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
27 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
28 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to

1 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
2 only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th
3 73; Iskanian, 59 Cal.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*
4 action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
5 with a smaller portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the
6 aggrieved employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui tam*
7 action by the successful litigation of a plaintiff and his attorneys, the plaintiff’s attorneys are entitled
8 to recover their fees from the common fund. Bank of America v. Cory (1985) 164 Cal.App.3d 66,
9 89-91.

10 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
11 in the amount of \$49,270.00 for the benefit of the Aggrieved Employees and the State. Thus, these
12 beneficiaries should bear their share of the costs and attorney’s fees out of the overall settlement
13 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
14 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
15 1301, 1311.

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

1 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
2 percentage of the total fund created when the fund consists of a "certain or easily calculable sum of
3 money," and California law has long applied the percentage of the recovery method for awarding
4 attorney's fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
5 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
6 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney's
7 fee based on percentage of recovery).

8 Awarding attorney's fees of one-third of gross common fund amount is favored by California
9 courts when a fund established for the common benefit of others is involved, such as here.
10 Accordingly, awarding fees on this basis out of the \$49,270 maximum amount, for a total of
11 \$16,243.33, is reasonable and appropriate. [Crosner Decl., ¶¶ 28-45.]

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

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

24 Here, Crosner Legal's lodestar is approximately \$53,370.00, based on 83.83 attorney hours
25 spent litigating the case. [Crosner Decl., ¶¶ 31-45; Exh. 6.] This results in a lodestar that is higher
26 than the fees requested on a percentage of the recovery basis and, accordingly, there is no request
27 for a multiplier. It also is important to note this fact serves to highlight the reasonableness of the
28 fees sought on a percentage-of-the-recovery basis, as it shows the requested fees are actually lower

1 than the market rate for the services rendered if those services are valued via traditional hourly
2 billing.

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

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

14 Plaintiff's Counsel's actual costs presently are \$5,812.77, including filing fees, mediation
15 costs, expert fees, and postage, while waiving photocopying costs and legal research charges. Since
16 the Settlement Agreement authorizes litigation costs not to exceed \$5,000, only the maximum of
17 \$5,000 is requested. [Crosner Decl., ¶¶ 46-47.] Since these costs are reasonable and uncontested,
18 the full amount of \$5,000 should be approved.

19 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
20 **REASONABLE**

21 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$5,000. This
22 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
23 Plaintiff's efforts in this case and the risks he undertook on behalf of the Aggrieved Employees.
24 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
25 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk
26 of being liable for Defendant's litigation costs if he were unsuccessful. Plaintiff also exposed himself
27 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
28 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future

1 prospective employers. Among taking many other actions assisting in the successful litigation of
2 this case, Plaintiff provided substantial factual information to Plaintiff's Counsel, participated in
3 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
4 and informed on the case's progress. The incentive payment to Plaintiff is appropriate and justified
5 as part of the Settlement. [Crosner Decl., ¶ 48; Declaration of Amanda Gilbert, ¶¶ 2-9.]

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

13 **VIII. CONCLUSION**

14 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
15 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
16 service award to Plaintiff in the amount of \$5,000, approve Phoenix as the settlement administrator
17 and approve is fees in the amount of \$5,000, approve the proposed distributions to the LWDA and
18 Aggrieved Employees, and enter judgment.

19
20 Dated: December 14, 2022

CROSNER LEGAL, PC

21
22 By: 

Michael Crosner, Esq.

Zach Crosner, Esq.

Attorneys for Plaintiff AMANDA GILBERT