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13 **SUPERIOR COURT OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF LOS ANGELES**

15 MARIA AMADOR, an individual, on
16 behalf of herself and on behalf of all
17 persons similarly situated,

18 Plaintiff,

19 v.

20 COLONIAL CARE CENTER, INC., a
21 California Corporation; LONGWOOD
22 MANAGEMENT CORP., a California
23 Corporation; and DOES 1-100, Inclusive,

24 Defendants.

CASE NO. Case No.: 22STCV21067

Assigned for All Purposes to:
Hon. William Fahey
Dept. 69

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, Maria Amador, and Chris Longley;
[Proposed] Order]

Date: April 7, 2023
Time: 9:30 a.m.
Dept.: 69

Reservation No.: 111956908906

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	SUMMARY OF SETTLEMENT TERMS.....	3
A.	SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES.....	3
B.	PAYMENT AND THE NOTICE	3
C.	THE RELEASE	3
IV.	THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE, FURTHERS THE PURPOSES UNDERLYING PAGA, AND WARRANTS APPROVAL.....	4
A.	NATURE OF THE ALLEGED VIOLATIONS	5
B.	NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES	6
C.	THE SETTLEMENT MEETS THE KULLAR FACTORS, INCLUDING THE STRENGTH OF PLAINTIFF’S CASE, THE DISCOVERY PERFORMED, AND AMOUNT OFFERED IN SETTLEMENT.....	6
V.	SUBMISSION TO THE LWDA	9
VI.	THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE	10
A.	PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM ACTION.....	10
B.	THE LODESTAR CROSS-CHECK VALIDATES THE REASONABLENESS OF THE FEE AWARD	12
C.	THE REQUESTED COSTS ARE FAIR AND REASONABLE	13
VII.	THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND REASONABLE	13
VIII.	CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

CASES

<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135	9
<u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157	7
<u>Arias v. Superior Court</u> (2009) 46 Cal.4th 969	3, 4
<u>Bank of America v. Cory</u> (1985) 164 Cal.App.3d 66	11
<u>Bell v. Farmers Ins. Exch.</u> (2004) 115 Cal.App.4th 715	12
<u>Boeing Co. v. Van Gemert</u> (1980) 444 U.S. 472	11
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504	8
<u>Dunk v. Ford Motor Co.</u> (1996) 48 Cal.App.4th 1794	12
<u>Echavez v. Abercrombie & Fitch Co., Inc.</u> (C.D. Cal. Mar. 23, 2017) 2017 WL 3669607	10
<u>Fleming v. Covidien</u> (C.D. Cal. 2011) 2011 U.S.	8
<u>Harris v. Marhoefer</u> (9th Cir. 1994) 24 F.3d 16	13
<u>Jennings v. Open Door Mktg. Inc.</u> (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356	9, 10
<u>Kim v. Reins Int'l California, Inc.</u> (2020) 9 Cal.5th 73	11
<u>Kullar v. Foot Locker Retail, Inc.</u> (2008) 168 Cal.App.4th 116	4

1	<u>Laffitte v. Robert Half Int’l Inc.</u>	
2	(2016)	11
3	<u>Lane v. Facebook, Inc.</u>	
4	(9th Cir. 2012) 696 F.3d 811	9
5	<u>Lealao v. Beneficial California, Inc.</u>	
6	(2000) 82 Cal.App.4th 19	11, 12
7	<u>Moniz v. Adecco USA, Inc.</u>	
8	(2021) 72 Cal.App.5th 56	4
9	<u>Nelson v. Avon 5 Prod., Inc.</u>	
10	(N.D. Cal. Feb. 24, 2017) 2017 WL 733145	14
11	<u>PLCM Group, Inc. v. Drexler</u>	
12	(2000)	12
13	<u>Rider v. County of San Diego</u>	
14	(1992) 11 Cal.App.4th 1410	13
15	<u>Sanders v. City of Los Angeles</u>	
16	(1970)	12
17	<u>Serrano v. Priest</u>	
18	(1977)	11, 12, 13
19	<u>Six (6) Mexican Workers v. Arizona Citrus Growers</u>	
20	(9th Cir. 1990) 904 F.2d 1301	11
21	<u>People ex rel. Stratham v. Acacia Research Corp.</u>	
22	(2012) 210 Cal.App.4th 487	10
23	<u>In re Taco Bell Wage and Hour Actions</u>	
24	(E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 . [Crosner Decl.]	8
25	<u>Torchia v. W.W. Grainger, Inc.</u>	
26	(E.D. Cal. 2014) 304 F.R.D. 256	14
27	<u>Viking River Cruises v. Mariana</u>	
28	(2022) 142 S.Ct. 1906. [Crosner Decl.]	2, 8, 9
	<u>White v. Experian Information Solutions, Inc.</u>	
	(C.D. Cal. 2011) 803 F.Supp.2d 1086	9

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STATUTES

Lab. Code § 2699(i).....	11
Labor Code §§ 201-203	6, 7
Labor Code § 203	7
Labor Code § 226	7
Labor Code § 2699(g)(l).....	10
Labor Code § 2699(h).....	8
Labor Code § 2699(l)(2).....	4
Labor Code section 2802.....	5

1 **I. INTRODUCTION**

2 Plaintiff Maria Amador hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendants Colonial Care
4 Center, Inc. and Longwood Management Corp. (together “Colonial” or “Defendant”). Consistent
5 with PAGA, the proposed settlement releases claims under PAGA only and has no impact on the
6 individual claims of any Covered Employee other than Plaintiff Amador. Since the settlement
7 resolves nothing more than claims under PAGA, it requires only a one-step review and approval
8 process by the Court, and for the reasons discussed below, Plaintiff respectfully requests the
9 Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 Colonial is a 24-hour skilled nursing facility located in Long Beach, California and offers
12 its residents rehabilitation, nursing, behavioral and sub-acute services. Defendant Longwood
13 Management Corp. owns and operates Colonial along with 27 other skilled nursing facilities in
14 California. Plaintiff has worked at Colonial as a Restorative Nurse Aide since 2011. [Declaration
15 of Zachary M. Crosner (“Crosner Decl.”), ¶ 4.]

16 After appropriate notice¹ to the Labor & Workforce Development Agency (“LWDA”),
17 Plaintiff filed her PAGA-only complaint on June 8, 2022, seeking civil penalties for the following
18 alleged wage and hour violations: (a) failure to pay wages, including minimum wages and
19 overtime wages; (b) failure to provide meal and rest periods; (c) failure to provide complete and
20 accurate wage statements; (d) failure to reimburse business expenses; and (e) waiting time
21 penalties. Plaintiff filed the matter on behalf of Covered Employees defined to include all current
22 and former non-exempt employees that were employed by Colonial in California at any time from
23 April 24, 2021 to the present (“PAGA Period”). [Crosner Decl., ¶ 5.]

24 Colonial has at all times denied Plaintiff’s allegations and maintained it accurately tracked
25 all employee hours worked, properly calculated and paid all wages due, that its meal and rest
26 break and payroll policies and procedures comply with California law, that it provided the class
27 members with required meal and rest breaks, and that it reimbursed all necessary business

28

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

1 expenses. Additionally, Defendant strongly contends the case cannot be maintained as a
2 representative action as, to the extent Covered Employees worked off the clock, or missed meal
3 and/or rest breaks, it was intermittent and infrequent and evidence of such missed breaks would
4 be purely anecdotal, and therefore individualized issues predominate, which would render a trial
5 under PAGA unmanageable. Lastly, Defendant contends the case should be sent to arbitration
6 following the U.S. Supreme Court's decision in Viking River Cruises v. Mariana (2022) 142
7 S.Ct. 1906. [Crosner Decl., ¶ 6.]

8 After Plaintiff submitted her PAGA notice, upon discussing the merits of her allegations
9 engaging in several meet and confer sessions regarding prospective discovery, law and motion,
10 etc., the Parties agreed to an early mediation. The Parties further agreed to a protocol for
11 exchanging additional documents and information before the mediation. Through this informal
12 discovery, Defendant provided Plaintiff with information including, inter alia, the number of
13 potential Covered Employees, the number of aggregate pay periods, pay stubs and time records
14 for a sampling of about 25% of the allegedly Covered Employees, employee handbooks and
15 manuals, and other relevant policy documents regarding Defendant's time keeping and reporting
16 policies. [Crosner Decl., ¶ 7.]

17 The mediation took place on December 22, 2022 with Louis Marlin, Esq., a well-
18 respected neutral with extensive wage and hour experience. Before and during the mediation,
19 Plaintiff and her counsel analyzed, researched, and investigated the potential issues, including
20 matters related to the calculation of damages, trial, and appellate issues and risks. During
21 mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on a
22 representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and
23 Defendant's defenses, and the Parties' data analyses and conclusions based on data provided by
24 Defendant. After a contentious full day of negotiations, the Parties reached agreement and
25 subsequently formalized their tentative settlement in the Settlement Agreement now before the
26 Court for approval. [Crosner Decl., ¶ 8.] A fully executed, true and correct copy of the Parties'
27 PAGA Settlement Agreement ("Settlement Agreement") is attached to the Crosner Declaration as
28 Exhibit 1.

1 **III. SUMMARY OF SETTLEMENT TERMS**

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

3 Under the settlement, Defendants will pay a non-reversionary settlement amount of
4 \$175,000 (the “Gross Settlement Amount” or “GSA”). The GSA is inclusive of payments to the
5 LWDA and Covered Employees, costs of settlement administration, a service award to Plaintiff,
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 GSA, Plaintiff
8 presently estimates about \$101,216.70 will remain (the “Net Settlement Amount” or “NSA”).
9 75% of the NSA (\$75,912.53) will go to the LWDA, and the remaining 25% (\$25,304.17) will be
10 distributed to the Covered 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
12 \$53 per Covered Employee. [Crosner Decl., ¶ 9.]

13 **B. PAYMENT AND THE NOTICE**

14 The Parties propose using Atticus Administration, LLC as the Settlement Administrator.
15 Atticus has extensive experience administering PAGA settlements and has agreed to cap its fees
16 at \$5,000.00. Defendant shall fully fund the Gross Settlement Amount by transmitting the funds
17 to the Administrator no later than fourteen (14) days after the Effective Date. Within 14 days of
18 receipt of the payment, Atticus will mail a Notice and settlement check to all Covered Employees
19 via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in
20 Defendant’s records. Covered Employees need not submit claim forms and will automatically
21 receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after
22 which time any unclaimed residual funds will be forwarded to the California State Controller’s
23 Unclaimed Property Fund. [Crosner Decl., ¶ 10; Exh. 2; Declaration of Chris Longley, ¶¶ 2-10.]

24 **C. THE RELEASE**

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

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

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

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

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

below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

A. NATURE OF THE ALLEGED VIOLATIONS

First, Plaintiff alleged Defendant failed to pay all minimum and overtime wages by subjecting employees to employer control while requiring them to form a line and undergo temperature screenings, log their temperature, and obtain a mask before entering Defendants' facility at the start of a shift and before clocking in. Plaintiff also alleges Defendant required employees to undergo Covid testing outside of their scheduled shift times without compensating them for the travel time to and from the testing site, the time spent waiting for the test to be performed, and the time spent undergoing testing, resulting in significant off-the-clock work. She also alleges meal periods were interrupted by residents or shift charge nurses and employees were required to attend to facility residents' strict feeding, exercise, hydration and toileting schedules at any time during a shift, even during her meal periods. [Crosner Decl., ¶ 12.]

Next, Plaintiff contends Defendants failed to provide Covered Employees with compliant meal and rest periods and utilized a policy that failed to comply with California law. Due to the nature of the work, Plaintiff contends she and the Covered Employees could not simply stop work and take a full meal or rest period, as their job required their full attention to the health and well-being of their residents at all times during their shifts. As a result, Plaintiff claims meal periods regularly were cut short, started late, or not received at all. Plaintiff and Covered Employees oftentimes had to take quick breaks less than ten minutes in length and return back to the attending to their residents. [Crosner Decl., ¶ 13.]

Plaintiff also contends that she and Covered Employees had to use their personal cellular phones to make and receive calls and text messages from the shift charge nurse related to their patients. Plaintiff would also use her personal cellular phone to contact her patients' social workers to order Lyft or Uber to transport patients. Defendants did not reimburse Plaintiff and Covered Employees for use of their cellular phones, in violation of Labor Code section 2802. [Crosner Decl., ¶ 14.]

Lastly, Plaintiff also brings claims derivative of the foregoing claims, including a

1 derivative wage statement claim based on the failure to pay all wages due, and failure to pay all
2 wages due upon separation of employment under Labor Code §§ 201-203. [Crosner Decl., ¶ 15.]

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

4 For mediation, Defendants indicated that during the PAGA Period, they employed 473
5 non-exempt employees in California who worked an aggregate 8,500 pay periods during that
6 time. Based on the data and information provided by Defendants, Plaintiff estimated Defendant's
7 maximum PAGA exposure at approximately \$4,271,000 assuming a 100% violation rate on all
8 claims. This estimate includes approximately \$850,000 in civil penalties for the unpaid wage
9 claims, \$1,700,000 for the meal and rest period claims, approximately \$850,000 in civil penalties
10 on the inaccurate wage statement claim, \$850,000 in civil penalties for the unreimbursed business
11 expenses claim, and approximately \$21,000 in civil penalties for failing to timely pay wages on
12 separation of employment. [Crosner Decl., ¶¶ 16-17.]

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

15 In response to Plaintiff's unpaid wage claims for alleged "off the clock work," Colonial
16 took the position that its time keeping policies are legally compliant, that it accurately tracked all
17 hours worked, paid the allegedly Covered Employees for all hours worked consistent with those
18 policies. It further argued that off the clock work was strictly prohibited and if any employee did
19 work off the clock, they were in violation of company policy and defendant had no knowledge of
20 it. Lastly, Defendant argued any trial of this issue on a representative basis would be
21 unmanageable since it would depend entirely on a myriad of individualized inquiries as to each
22 employee regarding any discrepancies in actual time worked versus what was reported and paid
23 for. [Crosner Decl., ¶ 18.]

24 For the meal and rest break claims, Colonial likewise offered multiple defenses. First, it
25 emphasized its written meal and rest break policy generally was compliant, that it authorized and
26 permitted all necessary breaks, and that employees received full uninterrupted lunch periods.
27 While Plaintiff's review of the time records suggested a substantial violation rate for late and
28 short meal breaks, Defendant countered that even to the extent this occurred, it was in violation of

1 company policy and aberrational, and would require significant individual inquiries to determine
2 the reasons underlying any such alleged violations and whether it was by employee choice or
3 some other reason. Thus, per Defendant, any trial on this issue would be unmanageable because
4 of these individualized issues. [Crosner Decl., ¶ 19.]

5 As with meal breaks, Colonial argued the applicable rest break policies complied with
6 California law, and that it authorized and permitted employees to take all required breaks.
7 Defendant further contended that, in light of the fact that it is not required to maintain a record of
8 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
9 rest periods would be purely anecdotal and individual issues would predominate on liability. This
10 arguably would once again make a trial unmanageable since the number of instances an employee
11 missed a rest break would have to be tested on a case by case basis to determine compliance.
12 [Crosner Decl., ¶ 20.]

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

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

1 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
2 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
3 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
4 2699(h). Several state and federal courts in California have applied significant reductions to
5 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
6 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
7 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
8 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
9 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
10 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
11 trial). [Crosner Decl., ¶ 23.]

12 Finally, Defendant argued for the potential applicability of the U.S. Supreme Court’s
13 decision in Viking River Cruises v Mariana (2022) 142 S.Ct. 1906 and noted the high probability
14 that the claims at issue would be subject to arbitration following that decision and the
15 “representative” PAGA claims dismissed for want of standing or, at best, subject to stay. [Crosner
16 Decl., ¶ 24.]

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

25 Although Plaintiff and her counsel believes they could have prevailed, there was no such
26 guarantee. When the risks of overcoming a motion to compel arbitration, a manageability
27 defense, prevailing at trial on the merits on all claims, and securing 100% of the theoretical civil
28 penalties all are factored into the equation, the settlement value is reasonable and supported. Of

1 course, to recover anywhere near the maximum penalties Plaintiff would have to shoot the moon
2 and win both liability and maximum penalties on all claims, which outcome, for the reasons
3 discussed, is unlikely. Given Defendant's various procedural and merits defenses, the Viking
4 River Cruises decision, and the substantial penalty reductions ordered in the cases above – which
5 occurred after trial – the proposed settlement is eminently reasonable. [Crosner Decl., ¶ 26.]

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

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

27 **V. SUBMISSION TO THE LWDA**

28 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and

1 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 27; Exh. 4.] Accordingly, the
2 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
3 approval if the LWDA ultimately declines to offer any comment or objection to a proposed
4 PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017
5 WL 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
6 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
7 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
8 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
9 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
10 no comment or objection has been received.”).

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

12 For their efforts and the contingent risk undertaken in obtaining a common fund
13 settlement that benefits the LWDA and Covered Employees, 1/3 of the gross settlement, or
14 \$58,333.33, is allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation
15 costs. These fees are warranted under the law and within the range of fees commonly awarded in
16 similar cases.

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

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

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

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

11 Through the successful efforts of Plaintiff and his attorneys here, a common fund was
12 created in the amount of \$175,000.00 for the benefit of the Covered Employees and the State.
13 Thus, these beneficiaries should bear their share of the costs and attorney's fees out of the overall
14 settlement amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert
15 (1980) 444 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir.
16 1990) 904 F.2d 1301, 1311.

17 Not long ago, the California Supreme Court upheld the use of the common fund theory of
18 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Cal.5th 480, 506. In
19 Laffitte, the Supreme Court upheld an award of attorney's fees of one-third of the \$19 million
20 gross settlement (e.g., awarded \$6.33 million in fees) under the common fund theory of recovery.
21 Lafitte is consistent with prior decisions recognizing “when a number of persons are entitled in
22 common to a specific fund, and an action brought by ... plaintiffs for the benefit of all results in
23 the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of
24 the fund.” Serrano v. Priest (1977) 20 Cal.3d 25, 34; Boeing, 444 U.S. at 478 (“[A] lawyer who
25 recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole”;
26 Lealao v. Beneficial California, Inc. (2000) 82 Cal.App.4th 19, 26 (“[f]ee spreading occurs when
27 a settlement or adjudication results in the establishment of a separate or so-called common fund
28 for the benefit of 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
3 of money," and California law has long applied the percentage of the recovery method for
4 awarding attorney's fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v.
5 Farmers Ins. Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48
6 Cal.App.4th 1794, 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming
7 award of attorney's fee based on percentage of recovery).

8 Awarding attorney's fees of one-third of gross common fund amount is favored by
9 California courts when a fund established for the common benefit of others is involved, such as
10 here. Accordingly, awarding fees on this basis out of the \$175,000 GSA, for a total of \$58,333.33,
11 is reasonable and appropriate. [Crosner Decl., ¶¶ 28-47.]

12 **B. THE LODESTAR CROSS-CHECK VALIDATES THE**
13 **REASONABLENESS OF 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
20 range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree
21 of 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
23 within the range of fees freely negotiated in the legal marketplace in comparable litigation").

24 Here, Crosner Legal's lodestar is approximately \$74,745.00, based on 93.0 attorney hours
25 spent litigating the case. [Crosner Decl., ¶¶ 32-47; Exh. 5.] 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

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

14 Plaintiff's Counsel's actual costs presently are \$8,449.47, including filing fees, mediation
15 costs, expert fees, and postage, while waiving photocopying costs and legal research charges.
16 [Crosner Decl., ¶¶ 48-49.] Since these costs are reasonable and uncontested, the full amount of
17 \$8,449.47 should be approved.

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

20 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$2,000. This
21 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
22 Plaintiff's efforts in this case and the risks he undertook on behalf of the Covered Employees.
23 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
24 settlement possible for the other Covered Employees and the LWDA, while shouldering the risk
25 of being liable for Defendant's litigation costs if he were unsuccessful. Plaintiff also exposed
26 himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a
27 simple google search) for the benefit of other employees, placing Plaintiff at risk of
28 discrimination by future prospective employers. Among taking many other actions assisting in the

1 successful litigation of this case, Plaintiff provided substantial factual information to Plaintiff's
2 Counsel, participated in numerous phone calls and meetings with counsel to discuss the case, and
3 general kept up to speed and informed on the case's progress. The incentive payment to Plaintiff
4 is appropriate and justified as part of the Settlement. [Crosner Decl., ¶ 50; Declaration of Maria
5 Amador, ¶¶ 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
10 the 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
15 under PAGA, approve the requested award of reasonable attorney's fees and costs, approve the
16 requested service award to Plaintiff in the amount of \$2,000, approve Atticus Administration as
17 the settlement administrator and approve its fees in the amount of \$5,000, approve the proposed
18 distributions to the LWDA and Covered Employees, and enter judgment.

19
20
21 Dated: March 13, 2023

CROSNER LEGAL, P.C.

22 

23 _____
24 Zachary Crosner
25 Jamie Serb
26 Sepideh Ardistani
27 Attorneys for Plaintiff MARIA AMADOR
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