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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SANTA BARBARA**
10

11 MATT DEL CAMPO, on behalf of
12 himself, the State of California, and others
similarly situated and aggrieved,

13
14 Plaintiff,

15 v.

16
17 VENTURA INVESTMENT CO., a
California corporation; and DOES 1-100,
18 inclusive,

19 Defendants.
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Case No.: 22CV-02147

Assigned for All Purposes to:
Hon. Colleen K. Sterne
Dept. 5

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF SETTLEMENT
UNDER THE PRIVATE ATTORNEY'S
GENERAL ACT**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Zachary M. Crosner,
Matt Del Campo, and Jodey Lawrence;
[Proposed] Order]

Date: May 8, 2023
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Dept: 5

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1 **I. INTRODUCTION**

2 Plaintiff Matt Del Campo hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Ventura Investment
4 Co. (“Ventura” 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 Del Campo. Since the settlement resolves nothing more than claims under PAGA, it
7 requires only a one-step review and approval process by the Court, and for the reasons discussed
8 below, Plaintiff respectfully requests the Court approve the Settlement in its entirety.

9 **II. BACKGROUND**

10 Ventura is a real property asset management company that acquires, develops, and manages
11 commercial and residential properties in the Southwestern United States. VIC is located in
12 Camarillo, California. VIC provides a wide range of management and investment services for
13 commercial and residential properties in California and is also a licensed general building
14 contractor. Plaintiff worked for Ventura as a property manager May 2019 and worked as an
15 Assistant Manager until June 2020 when he was promoted to a Manager and remained employed
16 with VIC until around April 2021. Plaintiff was paid by salary in both positions but, as discussed
17 below, alleges he was misclassified as an exempt employee. [Declaration of Zachary M. Crosner
18 (“Crosner Decl.”), ¶ 4.]

19 After appropriate notice¹ to the Labor & Workforce Development Agency (“LWDA”),
20 Plaintiff filed his PAGA-only complaint on June 7, 2022, seeking civil penalties for the following
21 alleged wage and hour violations: (a) failure to pay wages, including overtime wages; (b) failure to
22 provide meal and rest periods; (c) failure to provide complete and accurate wage statements; and (d)
23 waiting time penalties. Plaintiff filed the matter on behalf of PAGA Group Members defined to
24 include all non-exempt employees of Ventura during the relevant PAGA time frame of April 3, 2021
25 to December 1, 2022. [Crosner Decl., ¶ 5.]

26 Ventura has at all times denied Plaintiff’s allegations and maintained it properly calculated
27 and paid all wages due, that its meal and rest break and payroll policies and procedures comply with

28 ¹ Plaintiff’s March 24, 2022 PAGA notice letter is attached to the Crosner Declaration as Exhibit 3.

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

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

17 The Parties then mediated the case with Craig J. Ackerman, Esq., a respected mediator with
18 extensive class action/wage and hour experience, on November 15, 2022. Before and during the
19 mediation, Plaintiff and his counsel analyzed, researched, and investigated the potential issues,
20 including 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 Defendant's
23 defenses, and the parties' data analyses and conclusions based on data provided by Defendant. After
24 a contentious full day of negotiations, the Parties reached agreement and subsequently formalized
25 their tentative settlement in the Settlement Agreement now before the Court for approval. [Crosner
26 Decl., ¶ 9.] A fully executed, true and correct copy of the Parties' PAGA Settlement Agreement
27 ("Settlement Agreement") is attached to the Crosner Declaration as Exhibit 1.

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 \$80,000
4 (the “Gross Settlement Amount” or “GSA”). The GSA is inclusive of payments to the LWDA and
5 PAGA Group Members, costs of settlement administration, a service award to Plaintiff Del Campo,
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 presently
8 estimates about \$38,503.45 will remain (the “Net Settlement Amount” or “NSA”). 75% of the NSA
9 (about \$28,877.59) will go to the LWDA, and the remaining 25% (about \$9,625.86) will be
10 distributed to the PAGA Group Members 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 \$100 net per Aggrieved Employee and about \$4.65 net per Pay Period. [Crosner Decl., ¶ 10.]

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 \$2,800.00. [Declaration of Jodey Lawrence, ¶¶ 2-16; Exhs.1-2.] Ventura will fund
17 the first installment payment within 21 days of approval, and within 14 calendar days of receipt
18 Phoenix will mail a Notice and settlement check to all PAGA Group Members via regular First-
19 Class U.S. Mail, using the most current, known mailing addresses identified in Ventura’s records.
20 PAGA Group Members need not submit claim forms and will automatically receive a Notice and
21 settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed
22 residual funds will be forwarded to the California State Controller’s Unclaimed Property Fund.
23 [Crosner Decl., ¶ 11; Exh. 2.]

24 **C. THE RELEASE**

25 The California Supreme Court has explained that a judgment in “a representative action
26 brought by an aggrieved 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 aggrieved 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 penalty
2 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
3 to be “binding not only on the named employee plaintiff but also on government agencies and any
4 aggrieved employee not a party to the proceeding.” While Plaintiff is entering into a general release
5 any and all claims against Defendant, the Settlement Agreement protects the rights of the PAGA
6 Group Members to bring their own individual claims should they wish. For these reasons, the Parties
7 contend the release narrowly applies only to the PAGA claims alleged, and the Settlement
8 Agreement specifically provides the Release is inapplicable to any claims other than those brought
9 under PAGA. [Crosner Decl., ¶ 12.]

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

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

4 First, Plaintiff alleged Defendant failed to pay all minimum and overtime wages by
5 misclassifying certain employees as exempt employees and paying them a set salary regardless of
6 hours worked, and further rounding time clock entries to the benefit of Defendant by inserting the
7 employees’ schedules in the time cards instead of actual hours worked. Plaintiff also contends that he
8 and the PAGA Group Members frequently had to work during the meal periods but were not paid for
9 such time. Finally, he alleges Ventura failed to calculate overtime/sick/vacation wages using the correct
10 “regular rate of pay” during pay periods when employees received non-discretionary
11 bonuses/commissions in addition to their overtime/sick/vacation wages. [Crosner Decl., ¶ 13.]

12 Next, Plaintiff contends Defendant failed to provide PAGA Group Members with compliant
13 meal periods and utilized a policy that failed to comply with California law. Plaintiff alleges he and
14 other employees did not receive compliant meal periods as meal periods frequently were late,
15 interrupted, and/or or lasted less than 30 minutes. He contends further that company policy
16 prohibited them from leaving the premises on meal periods without authorization, prohibited certain
17 activities during meal periods, and required employees to monitor their phones at all times and, as
18 a result, Plaintiff and other employees were not entirely free from employer control while on their
19 meal periods. Plaintiff similarly contends Defendant failed to provide Plaintiff and the PAGA Group
20 Members with compliant rest periods for essentially the same reasons. [Crosner Decl., ¶ 14.]

21 Plaintiff next alleges Ventura failed to reimburse necessary business expenses such as work
22 tools, work uniforms and clothing, personal cell phones, and use of personal vehicles while on the job
23 and in performance of necessary job duties. [Crosner Decl., ¶ 14.]

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

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

2 For mediation, Ventura indicated it employed approximately 96 non-exempt employees in
3 California during the relevant time frame, and these individuals worked approximately 2,062 pay
4 periods during that time. Based on the data and information provided by Defendant, Plaintiff
5 estimated Defendant's maximum PAGA exposure at approximately \$1,040,000 assuming a 100%
6 violation rate on all claims. This estimate includes approximately \$206,200 in civil penalties for the
7 unpaid wage claims, \$412,400 for the meal and rest period claims, approximately \$206,200 in civil
8 penalties on the inaccurate wage statement claim, about \$206,200 and approximately \$4,700 in civil
9 penalties for failing to timely pay wages on separation of employment. [Crosner Decl., ¶¶ 16-17.]

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

13 In response to Plaintiff's unpaid wage claims for alleged rounding and "off the clock work,"
14 Ventura took the position that its time keeping policies are legally compliant, that it accurately
15 tracked all hours worked, and paid the PAGA Group Members for all hours worked consistent with
16 those policies. Ventura also contends it paid overtime, sick time, and vacation time at the correct
17 hourly rates. It further argued all employees were properly classified and noted non-exempt
18 employees may be paid by salary under California law for forty hours of straight time work. Lastly,
19 Defendant argued any trial of this issue on a representative basis would be unmanageable since it
20 would depend entirely on a myriad of individualized inquiries as to each employee regarding any
21 discrepancies in actual time worked versus what was reported and paid for. [Crosner Decl., ¶ 18.]

22 For the meal and rest break claims, Ventura offered multiple defenses to these claims. First,
23 it emphasized its written meal and rest break policy generally was compliant, that it authorized and
24 permitted all necessary breaks, and that employees received full uninterrupted lunch periods. While
25 Plaintiff's review of the time records suggested a substantial violation rate for late and short meal
26 breaks, Defendant countered that even to the extent this occurred, it was in violation of company
27 policy and aberrational, and would require significant individual inquiries to determine the reasons
28 underlying any such alleged violations and whether it was by employee choice or some other reason.

1 Thus, per Defendant, any trial on this issue would be unmanageable because of these individualized
2 issues. [Crosner Decl., ¶ 19.]

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

10 [Crosner Decl., ¶ 20.]

11 For the expense reimbursement claim, Ventura countered that it provided employees with
12 everything they needed to perform their job duties, and to the extent Plaintiff or other PAGA
13 Group Members used their individual phones, vehicles, or tools for work purposes, it was done
14 purely for personal convenience and was neither required nor necessary in order to perform their
15 job duties. Thus, per Defendant, no reimbursement was required. [Crosner Decl., ¶ 20.]

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

27 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
28 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise

1 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
2 2699(h). Several state and federal courts in California have applied significant reductions to
3 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
4 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
5 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
6 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
7 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
8 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
9 trial). [Crosner Decl., ¶ 22.]

10 Finally, Defendant emphasized the potential applicability of the U.S. Supreme Court’s
11 recent decision in Viking River Cruises v Mariana (2022) 142 S.Ct. 1906. In particular, Ventura
12 argued the arbitration agreement signed by Plaintiff contains the necessary elements outlined by
13 Viking River Cruises to compel arbitration, namely: (1) it provides for the arbitration of wage and hour
14 claims, like Plaintiff’s pending claims in the PAGA lawsuit, (2) it does not allow for an employee to
15 bring a class or representative claim in arbitration, and (3) it contains a “severability” clause stating
16 that if any terms of the Agreement are unenforceable, the remainder of the Agreement is still valid.
17 Thus, per Ventura, Plaintiff’s “individual” PAGA claim must be compelled to arbitration and the
18 “representative” PAGA claims dismissed for want of standing. [Crosner Decl., ¶ 23.]

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

27 Although Plaintiff’s counsel believes they could have prevailed, there was no such
28 guarantee. When the risks of overcoming a motion to compel arbitration, a manageability defense,

1 prevailing at trial on the merits on all claims, and securing 100% of the theoretical civil penalties
2 all are factored into the equation, the settlement value is reasonable and supported. Of course, to
3 recover anywhere near the maximum penalties Plaintiff would have to shoot the moon and win
4 both liability and maximum penalties on all claims, which outcome, for the reasons discussed, is
5 unlikely. Given Defendant's various procedural and merits defenses, as well as the substantial
6 penalty reductions ordered in the cases above – which occurred after trial – the proposed
7 settlement is eminently reasonable. [Crosner Decl., ¶ 25.]

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

22 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
23 the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any
24 penalty award all are accounted for, it is clear a settlement amount of \$80,000 for the PAGA
25 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open
26 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving
27 settlement with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement
28 agreement to the LWDA, and the LWDA has not objected to the settlement”).

1 **V. SUBMISSION TO THE LWDA**

2 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
3 notified the LWDA of this approval hearing. [Crosner Decl., ¶ 26; Exh. 5.] Accordingly, the
4 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
5 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
6 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
7 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
8 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
9 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
10 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
11 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
12 no comment or objection has been received.”).

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

14 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
15 that benefits the LWDA and PAGA Group Members, 1/3 of the gross settlement, or \$26,666.67, is
16 allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation costs. These fees
17 are warranted under the law and within the range of fees commonly awarded in similar cases.

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

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

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

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

12 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
13 in the amount of \$80,000 for the benefit of the PAGA Group Members and the State. Thus, these
14 beneficiaries should bear their share of the costs and attorney’s fees out of the overall \$80,000
15 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
16 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
17 1301, 1311.

18 Not long ago, the California Supreme Court upheld the use of the common fund theory of
19 recovery for attorney’s fees in Laffitte v. Robert Half Int’l Inc. (2016) 1 Cal.5th 480, 506. In
20 Laffitte, the Supreme Court upheld an award of attorney’s fees of one-third of the \$19 million gross
21 settlement (e.g., awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte
22 is consistent with prior decisions recognizing “when a number of persons are entitled in common to
23 a specific fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or
24 preservation of that fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” Serrano
25 v. Priest (1977) 20 Cal.3d 25, 34; Boeing, 444 U.S. at 478 (“[A] lawyer who recovers a common
26 fund ... is entitled to reasonable attorneys’ fees from the fund as a whole”; Lealao v. Beneficial
27 California, Inc. (2000) 82 Cal.App.4th 19, 26 (“[f]ee spreading occurs when a settlement or
28

1 adjudication results in the establishment of a separate or so-called common fund for the benefit of
2 the class”).

3 Accordingly, the common fund doctrine allows a court to award attorney’s fees based on a
4 percentage of the total fund created when the fund consists of a “certain or easily calculable sum of
5 money,” and California law has long applied the percentage of the recovery method for awarding
6 attorney’s fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.
7 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
8 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney’s
9 fee based on percentage of recovery).

10 Awarding attorney’s fees of one-third of gross common fund amount is favored by California
11 courts when a fund established for the common benefit of others is involved, such as here.
12 Accordingly, awarding fees on this basis out of the \$80,000 GSA, for a total of \$26,666.67, is
13 reasonable and appropriate. [Crosner Decl., ¶¶ 27-44.]

14 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS OF**
15 **THE FEE AWARD**

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

26 Here, Crosner Legal’s lodestar is approximately \$91,975.00, based on 138.1 attorney hours
27 spent litigating the case. [Crosner Decl., ¶¶ 27-44; Exh. 6.] This results in a lodestar that is higher
28 than the fees requested on a percentage of the recovery basis and, accordingly, there is no request

1 for a multiplier. It also is important to note this fact serves to highlight the reasonableness of the
2 fees sought on a percentage-of-the-recovery basis, as it shows the requested fees are actually lower
3 than the market rate for the services rendered if those services are valued via traditional hourly
4 billing.

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

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

16 While the Settlement Agreement authorizes litigation costs not to exceed \$5,500, Plaintiff's
17 Counsel's actual costs presently are \$4,529.88. [Crosner Decl., ¶¶ 45-46.] This includes filing fees,
18 service of process, mediation costs, and postage, while waiving photocopying costs and legal
19 research charges. These costs are reasonable and uncontested, and should be approved.

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

22 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$7,500. This
23 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
24 Plaintiff's efforts in this case and the risks he undertook on behalf of the PAGA Group Members.
25 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
26 settlement possible for the other PAGA Group Members and the LWDA, while shouldering the risk
27 of being liable for Defendant's litigation costs if he were unsuccessful. Plaintiff also exposed himself
28 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google

1 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
2 prospective employers. Among taking many other actions assisting in the successful litigation of
3 this case, Plaintiff provided substantial factual information to Plaintiff's Counsel, participated in
4 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
5 and informed on the case's progress. The incentive payment to Plaintiff is appropriate and justified
6 as part of the Settlement. [Crosner Decl., ¶ 47; Declaration of Matt Del Campo, ¶¶ 2-9.]

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

14 **VIII. CONCLUSION**

15 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
16 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
17 service award to Plaintiff in the amount of \$7,500, approve Phoenix as the settlement administrator
18 and approve is fees in the amount of \$2,800, approve the proposed distributions to the LWDA and
19 PAGA Group Members, and enter judgment.

20
21 Dated: February 10 2023

CROSNER LEGAL, PC

22
23 By: 

24 Michael R. Crosner

Zachary M. Crosner

25 Jonathan Stilz

26 Attorneys for Plaintiff MATT DEL CAMPO
27
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