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14 **SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF ALAMEDA**

16 EUGENE FRITZ, on Behalf of the State of
17 California and Aggrieved Employees,

18 Plaintiffs,

19 v.

20 WELLS FARGO & COMPANY and WELLS
21 FARGO BANK, NATIONAL
22 ASSOCIATION D/B/A WELLS FARGO
23 BANK, N.A.,

24 Defendants.

Case No. RG20069677

25 **MEMORANDUM OF POINTS AND
26 AUTHORITIES IN SUPPORT OF
27 MOTION FOR APPROVAL OF
28 SETTLEMENT PURSUANT TO
PRIVATE ATTORNEYS GENERAL ACT
OF 2004**

Date: March 30, 2023

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1 representative enhancement for his service as the PAGA representative. For the reasons set forth
2 herein, Plaintiff respectfully requests that the Court approve the Settlement.

3 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

4 Plaintiff Eugene Fritz filed his PAGA notice with the Labor & Workforce Development
5 Agency (“LWDA”) on May 18, 2020. (Cottrell Decl., ¶ 9, Ex. 2). After waiting the requisite 65-day
6 period without notice from the LWDA of their intent to investigate his claims, on August 4, 2020,
7 Plaintiff filed this action (hereinafter the “Complaint”) seeking penalties under PAGA for Defendants’
8 alleged wage and hour violations. (*Id.*, ¶ 10).

9 Pursuant to the Complaint, Plaintiff sought civil penalties for Wells Fargo’s alleged policies
10 and practices of: (1) misclassifying Plaintiff and PAGA Group Members as independent contractors
11 instead of employees; (2) failing to authorize and permit Plaintiff and PAGA Group Members to take
12 meal and rest breaks to which they would be entitled as employees; (3) failing to pay Plaintiff and
13 PAGA Group Members overtime wages; (4) failing to provide Plaintiff and PAGA Group Members
14 accurate, itemized wage statements; and (5) failing to reimburse Plaintiff and PAGA Group Members
15 for necessary business expenses. (*Id.*, ¶ 11).

16 Thereafter, the Parties engaged in extensive formal discovery. (*Id.*, ¶ 12). On or about
17 September 8, 2020, Wells Fargo served on Plaintiff its first set of Requests for Production of
18 Documents. (*Id.*) Plaintiff served his responses to the same on November 12, 2020 and a verification
19 thereof on December 4, 2020. (*Id.*) On or about December 21, 2020, Plaintiff served on Wells Fargo
20 his first set of Requests for Production of Documents and Special Interrogatories. (*Id.*) Wells Fargo
21 responded to the same on or about January 22, 2021. (*Id.*)

22 On February 8, 2021, Plaintiff sent Wells Fargo a meet and confer letter outlining a number of
23 alleged deficiencies in its discovery responses. (*Id.*, ¶ 13). Plaintiff provided Supplemental Responses
24 to Wells Fargo’s first Request for Production on or about February 8, 2021 and his Second
25 Supplemental Responses to this same request on February 12, 2021. (*Id.*) During a telephonic
26 conference on February 25, 2021, the parties discussed who the correct defendant should be in this
27

1 case. (*Id.*) Defendants’ counsel stated that the correct Defendant should be the Bank. (*Id.*) On March
2 3, 2021, Plaintiff filed an amended PAGA notice adding the Bank as a Defendant. Prior to this the
3 only named Defendant was Wells Fargo. (*Id.*, ¶ 14).

4 On March 3, 2021, Plaintiff served on Wells Fargo his second set of Requests for Production of
5 Documents and his first set of Form Interrogatories – Employment Law. (*Id.*, ¶ 15). Wells Fargo responded to
6 the same on or about April 13, 2021. (*Id.*) On or about April 16, 2021, Wells Fargo served supplemental
7 responses to Plaintiff’s first set of Requests for Production of Documents and Special Interrogatories. (*Id.*, ¶
8 16).

9 On May 17, 2021, Plaintiff filed a First Amended Complaint (“FAC”) adding the Bank as a Defendant
10 just as in the amended PAGA notice. (*Id.*, ¶ 17). On or about May 27, 2021, Wells Fargo served amended
11 supplementary responses to Plaintiff’s first set of Requests for Production of Documents and Special
12 Interrogatories. (*Id.*, ¶ 18.)

13 On or about June 2, 2021, Plaintiff served on the Bank his first set of Requests for Production of
14 Documents, Special Interrogatories, and Form Interrogatories – Employment Law. (*Id.*, ¶ 19.) On or about June
15 25, 2021, the Bank served on Plaintiff its first set of Requests for Production of Documents. (*Id.*) The Bank
16 responded to Plaintiff on or about July 21, 2021. (*Id.*) Plaintiff served his responses on July 27, 2021. (*Id.*) On
17 or about August 18, 2021, Plaintiff served on the Bank his second set of Special Interrogatories. (*Id.*, ¶ 20). The
18 Bank responded to the same on or about September 21, 2021. (*Id.*) On or about October 12, 2021, the Bank
19 provided its Second Supplemental Response to Plaintiff’s first of Form Interrogatories – Employment Law.
20 (*Id.*) On January 11, 2022, this Court issued a tentative ruling designating a trial date and ordering the Plaintiff
21 and Defendants to complete private mediation by July 12, 2022. (*Id.*, ¶ 21) Thereafter, the Bank provided a
22 number of supplemental responses to Plaintiff’s first set of Special Interrogatories, Requests for Production,
23 and Form Interrogatories – Employment Law. (*Id.*) On or about May 19, 2022, the Bank provided its final and
24 Sixth Supplemental Response to Plaintiff’s first set of Special Interrogatories, and its final and Eighth
25 Supplemental Response to Plaintiff’s first set of Requests for Production. (*Id.*)

26 Through discovery, Defendants produced documents and data, including but not limited to written
27

1 policies and procedures, job descriptions, Plaintiff’s personnel file and time and pay records, and PAGA Group
2 Members’ contact information after a *Belaire-West* notice was sent to the PAGA Group Members. (*Id.*, ¶ 22).

3 In addition to the written discovery described above, Plaintiff was deposed by Defendants on three
4 separate occasions. (*Id.*, ¶ 23.) These depositions took place on January 27, 2021, February 18, 2021, and June
5 17, 2021. (*Id.*) Throughout discovery, Plaintiff and Defendants also met and conferred approximately eight
6 times to settle discovery disputes. (*Id.*, ¶ 24.) Additionally, Plaintiff and Defendants attended three Informal
7 Discovery Conferences to continue to iron out discovery issues. (*Id.*)

8 On July 5, 2022, Defendants filed a motion for summary judgment or, in the alternative, summary
9 adjudication. (*Ibid.*) The motion was noticed to be heard on October 6, 2022. (*Ibid.*,.)

10 On July 7, 2022, the parties participated in a remote mediation before Deborah C. Saxe, an experienced
11 and respected wage and hour mediator. (*Id.*, ¶ 25). The mediation involved serious and intensive arms-length
12 negotiations. (*Id.*) The mediation was successful, and the Parties reached an agreement in principle during the
13 mediation session to settle both the PAGA action and Plaintiff’s individual claims. (*Id.*) Plaintiff filed a Notice
14 of Settlement on July 11, 2022, and thereafter the Court vacated all pending dates in the Action. (*Id.*, ¶ 26). The
15 Parties thereafter worked together to jointly draft the Settlement Agreement, exchanging several drafts in the
16 process, and fully executing the Agreement as of December 2, 2022. (*Id.*, ¶ 26). Plaintiff now brings this motion
17 seeking Court approval of the proposed Settlement.

18 **III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

19 **A. Terms of the PAGA Settlement and Distribution of PAGA Penalties**

20 The Settlement provides that Defendants will pay a settlement amount of \$460,000.00 (the
21 “Gross Settlement Amount”). (*Id.*, ¶ 27; Settlement Agreement, ¶ 2.15). From the Gross Settlement
22 Amount, payments will be made to the LWDA and the PAGA Group Members, to Plaintiff’s counsel
23 for fees and litigation costs, and to the Settlement Administrator for settlement administration costs.
24 (*Id.*) The Parties reached a separate Settlement of \$20,000.00 for the Named Plaintiff in exchange for
25 his general release of all individual claims against Defendant. (Cottrell Decl., ¶ 28; Settlement
26 Agreement, ¶ 3.1). The Parties have agreed upon a Second Amended Complaint to be filed for
27

1 settlement purposes only which includes Plaintiff’s individual claims. (Cottrell Decl., ¶ 28; Settlement
2 Agreement, ¶ 3.1 & Ex. A). Plaintiff’s counsel will seek a standard fee award, not to exceed 33 1/3%
3 of the Gross Settlement Fund, along with reimbursement of actual litigation costs. (Cottrell Decl., ¶
4 29; Settlement Agreement, ¶ 3.3). The costs incurred at this time are \$37,299.51. (Cottrell Decl., ¶
5 29). The Settlement Administrator is Phoenix Class Action Administration Solutions. (Cottrell Decl.,
6 ¶ 30; Settlement Agreement, ¶ 2.34). The Settlement Administrator’s estimated total costs are not to
7 exceed \$4,000. (*Id.*; Settlement Agreement ¶ 2.33).

8 After distributions for the attorneys’ fees and costs and Settlement Administrator costs, it is
9 estimated that approximately \$265,367.16 will be available as estimated net proceeds² (the “Net
10 Settlement Fund”). (Cottrell Decl., ¶ 31). 75% of the Net Settlement Fund will be paid to the LWDA
11 and the remaining 25% will be paid to the PAGA Group Members. (*Id.*; Settlement Agreement, ¶¶
12 2.17, 2.22). Accordingly, the LWDA will receive approximately \$199,025.37 from the Settlement.
13 (Cottrell Decl., ¶ 32). The employees will receive approximately \$66,341.79 from the Settlement. (*Id.*)
14 These allocations will result in an average payment amount of \$340.21 per Aggrieved Employee,³
15 based on the figures provided during the mediation. (*Id.*)

16 The PAGA Group Members include Plaintiff and all other commercial real estate panel
17 appraisers who contracted with Bank as independent contractors to perform one or more appraisals in
18 the State of California from May 31, 2019 to August 21, 2022 (the “PAGA Period”). (*Id.*, ¶ 33;
19 Settlement Agreement, ¶¶ 2.21, 2.23.) Defendants have represented that there were approximately 195
20 PAGA Group Members during the time period from May 31, 2019 through late June 2022. (Cottrell
21 Decl., ¶ 33).

22 Within ten business days from the Effective Date⁴, Defendants will remit the Settlement Fund

23 _____
24 ² Calculated by subtracting from the Gross Settlement Amount (\$460,000) Class Counsel’s fees (\$153,333.33), Class
25 Counsel’s costs (\$37,299.51) and the Settlement Administrator costs (\$4,000), which is \$265,367.16.

26 ³ Calculated by dividing the Net Settlement Fund by number of PAGA Group Members: \$66,341.79 / 195 = \$340.21.

27 ⁴ “Effective Date” means either: (a) the date 60 days after entry of the Approval Order and Judgment, if no motions for
28 reconsideration and no appeals or other efforts to obtain review have been filed, or (b) in the event a motion for
reconsideration, an appeal, or other effort to obtain review of the Approval Order and Judgment, the date 60 days after
such reconsideration, appeal, or review has been finally concluded and is no longer subject to review, whether by appeal,
petition for rehearing, petition for review, or otherwise. (Settlement Agreement, ¶ 2.12).

1 Amount to the Settlement Administrator for the establishment of the Settlement Fund, which shall be
2 in full and final satisfaction of: the PAGA Group Members Payment, the LWDA Payment, the Fee
3 and Expense Award, and the Settlement Administration Costs (*Id.*, ¶ 34; Settlement Agreement, ¶
4 4.6.1.) Within ten business days after the Effective Date, Defendants will provide to Settlement
5 Administrator, in a secure fashion, the following information with respect to each PAGA Group
6 Member, as reflected in the Bank's records: (i) name, (ii) last known mailing address, and (iii) the
7 number of appraisals performed for the Bank and associated with the PAGA Group Member during
8 the PAGA Period, as determined by Defendants according to the Bank's records. (Cottrell Decl., ¶ 35;
9 Settlement Agreement, ¶ 4.2.) Within ten business days after Defendants' remittance to the Settlement
10 Administrator of the Settlement Fund Amount, the Settlement Administrator will distribute (a) the
11 LWDA Payment, (b) the Settlement Payments to PAGA Group Members with the accompanying
12 Notice of Settlement, (c) the Fee and Expense Award, and (d) the Settlement Administration Costs.
13 (Cottrell Decl., ¶ 36; Settlement, ¶ 4.6.2). Also within ten business days after Defendants' remittance
14 of the Settlement Fund Amount, the Settlement Administrator shall provide Plaintiff's Counsel and
15 Defendants' Counsel a written report listing each PAGA Group Member and the amount of the
16 Settlement Payment to be made to each of them. (*Id.*)

17 The Settlement Administrator will allocate 25% of the Net Settlement Fund to the PAGA
18 Group Members. (Cottrell Decl., ¶ 37; Settlement Agreement, ¶ 2.22). The Settlement Payment for
19 each PAGA Group Member shall be the PAGA Group Member's pro-rata share of the PAGA Group
20 Member payment, calculated as follows: The Settlement Administrator shall calculate the total number
21 of appraisals in California associated with all PAGA Group Members during the PAGA Period.
22 (Settlement Agreement, ¶ 4.4.2). The Settlement Administrator will then divide the PAGA Group
23 Member Payment by the total number of appraisals, resulting in a dollar value per appraisal. (*Id.*) The
24 Settlement Administrator will then take this per Appraisal dollar value and multiply it by the number
25 of Appraisals associated with each individual PAGA Group Member in California during the PAGA
26 Period. (*Id.*)

1 Each PAGA Group Member is responsible for paying applicable taxes on any amounts they
2 receive pursuant to the Settlement. (Cottrell Decl., ¶ 38; Settlement Agreement, ¶ 4.5). The Settlement
3 Administrator will timely prepare the necessary tax documents to all necessary parties and report all
4 necessary information as required by law. (*Id.*) All payments shall be reported on the IRS 1099-
5 MISC.(*Id.*)

6 Settlement checks will remain valid for 180 days from the date of issuance. (Cottrell Decl., ¶
7 39; Settlement Agreement, ¶ 4.6.3). If there are funds attributable to uncashed settlement checks after
8 the 180-day period, the funds will be remitted to the *cy pres* recipient that is approved by the Court.
9 (*Id.*) The parties propose the Legal Aid Association of California as the *cy pres* recipient. (*Id.*)

10 **B. The Releases for the PAGA Group Members and Plaintiff, and Plaintiff’s**
11 **Separate Individual Settlement and Release**

12 Under the Settlement, PAGA Group Members release certain PAGA claims. (Cottrell Decl., ¶
13 40; Settlement Agreement, ¶ 2.29.) These “Released Claims” include:

14 all claims under PAGA that are alleged in the Second Amended Complaint and/or Amended
15 PAGA Notice, or that could have been alleged based on the facts alleged in the Second
16 Amended Complaint and/or Amended PAGA Notice, based on alleged violations of Labor
17 Code sections 225.5, 226, 226.3, 226.7, 226.8, 256, 510, 512, 558, 2698 et seq., and 2802; and
18 the applicable Wage Order(s) promulgated by the Industrial Welfare Commission, that arose
19 during the PAGA Period in connection with the PAGA Group Members’ work with
20 Defendants, or either of them. The Released Claims are released by both the State of California
21 and the PAGA Group Members as part of this Settlement.
22 (*Id.*)

23 California courts routinely approve PAGA settlements that include release of claims language
24 similar to the release language in the Agreement here. For example, in *Hernandez v. Best Buy Stores,*
25 *LP*, the Southern District approved a PAGA settlement under which the aggrieved employees released
26 the PAGA claims brought, but were not barred from pursuing their underlying claims under the Labor
27 Code. *Hernandez v. Best Buy Stores, LP.*, 2017 U.S. Dist. LEXIS 86859, *6 (S.D. Cal., 2017). The
28 court approved a settlement that “releases Best Buy from PAGA liability for any and all claims by
similarly situated general managers that were asserted or reasonably could have been asserted based

1 on the facts of this case.” (*Id.*) A similar settlement was approved in *Mancini v. W. & S. Life Ins. Co.*
2 “The settlement does not bar the employees other than Mancini from pursuing other (non-PAGA)
3 Labor Code claims against Defendants should they violate those, which leaves open the possibility of
4 additional compensation.” *Mancini v. W. & S. Life Ins. Co.*, 2018 U.S. Dist. LEXIS 160320, *6 (S.D.
5 Cal. 2018).

6 Other courts have frequently approved releases or other similar language binding the State and
7 nonparty employees from pursuing civil penalties for the settled PAGA claims. *See, e.g., Ramirez v.*
8 *Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS 137272, *3 (N.D. Cal. 2017) (approving PAGA
9 settlement, which provided \$40,700 in compensation for Plaintiff's individual damages, \$27,500 in
10 civil penalties under the PAGA, injunctive relief, and \$41,800 in attorney's fees, for a total settlement
11 amount of \$110,000); *Echavez v. Abercrombie & Fitch Co.*, 2017 U.S. Dist. LEXIS 141134, at *7
12 (C.D. Cal. 2017) (approving settlement with a release of PAGA claims); *Jordan v. NCI Grp., Inc.*,
13 2018 U.S. Dist. LEXIS 25297, * 5 (C.D. Cal. 2018) (approving PAGA settlement that provides
14 penalties to LWDA “paid in exchange for a release only for those claims pled in the notice to the
15 LWDA and the Complaint”).

16 Additionally, Plaintiff Fritz has agreed to a broader, general release of individual claims in the
17 Second Amended Complaint memorialized in a separate agreement. (Cottrell Decl., ¶ 41; Settlement
18 Agreement, ¶ 3.1). Plaintiff will file an agreed upon Second Amended Complaint for settlement
19 purposes which includes his individual claims (Cottrell Decl., ¶ 28, Settlement Agreement, ¶ 3.1 &
20 Ex. A). The general release of these claims is in exchange for \$20,000.00, which is not part of the
21 Gross Settlement Amount. (Cottrell Decl., ¶ 42). Plaintiff worked with his attorneys to prepare the
22 complaint, provided documents and information to respond to discovery, sat for his deposition,
23 participated in the mediation process and settlement decisions, incurred risks associated with future
24 work prospects, and otherwise remained in constant contact with his attorneys, spending
25 approximately 30-40 hours in the litigation of the claims. (*See* Declaration of Eugene Fritz, ¶ 5-15.)
26 This release of his individual claims does not affect the other PAGA Group Members.
27

1 **IV. PAGA AND ITS REQUIREMENTS**

2 PAGA provides an enforcement mechanism for California’s Labor Code by enlisting individual
3 plaintiffs as private attorneys general to recover civil penalties for the state, with a share also going to the
4 individual plaintiffs and other employees. Prior to PAGA, the recovery of civil penalties for violations of certain
5 Labor Code provisions were solely the province of the California Department of Labor. *See Arias v. Superior*
6 *Court*, 46 Cal.4th 969 (Cal. 2009)

7 The Labor Code’s primary purpose is to “ensure employees are not required or permitted to
8 work under substandard unlawful conditions ... and to protect employers who comply with the law
9 from those who attempt to gain a competitive advantage at the expense of their workers by failing to
10 comply with minimum labor standards.” Labor Code § 90.5 subd. (a). In enacting the PAGA, the
11 legislature expressly stated that “the only meaningful deterrent to unlawful conduct is the vigorous
12 assessment and collection of civil penalties as provided in the Labor Code.” Stats. 2003 ch. 906, § 1(b).
13 The legislature determined it is “in the public interest to allow aggrieved employees, acting as private
14 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
15 labor law enforcement agencies were to retain primacy over private enforcement efforts.” *Arias*, 46
16 Cal.4th 969, 980.

17 Under this regime, Plaintiff, acting as private attorney general and proxy for the State, filed
18 this action seeking civil penalties for Defendants’ alleged violations of the Labor Code.

19 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND WARRANTS APPROVAL**

20 Within this framework, the Parties have consummated and structured the Settlement. Plaintiff
21 has extensively analyzed the facts and claims to evaluate the Settlement’s fairness and reasonableness.
22 (Cottrell Decl., ¶¶ 43-55.) Plaintiff’s counsel conducted extensive formal and informal discovery,
23 including the following: Plaintiff propounded on Wells Fargo, and Wells Fargo responded to, two sets
24 of requests for production of documents, one set of special interrogatories, and one set of general
25 interrogatories-employment. (Settlement Agreement, ¶ 1.8). Plaintiff propounded on Bank, and Bank
26 responded to, one set of requests for production of documents, one set of special interrogatories, and
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1 one set of general interrogatories-employment. (*Id.*) Defendants propounded on Plaintiff one set of
2 requests for production of documents and took Plaintiff’s deposition. (*Id.*) In addition, pursuant to a
3 Court-approved *Belaire-West* notice and opt-out procedure, Bank provided the contact information for
4 commercial panel appraisers who performed commercial appraisal services for Bank in California
5 from May 31, 2019 through October 8, 2021, and Plaintiff’s counsel used such information to further
6 investigate the claims alleged in this case. (*Id.*)

7 **A. Judicial Review of PAGA Settlements**

8 Court approval is required for PAGA settlements. Labor Code § 2699 (1)(2). However, PAGA
9 does not establish any standards for the review of PAGA settlements. “[N]either the California
10 legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA]
11 has provided any definitive answer’ as to what the appropriate standard is for approval of a PAGA
12 settlement.” *Jordan*, 2018 U.S. Dist. LEXIS 25297, at *5 (quoting *Flores v. Starwood Hotels &*
13 *Resorts Worldwide*, 253 F. Supp. 3d 1074, 1075 (C.D. Cal. 2017)).

14 Courts have recognized that PAGA settlements must be viewed in light of the PAGA’s public
15 purpose, namely augmenting the state’s enforcement capabilities, encouraging compliance with Labor
16 Code provisions, and deterring noncompliance with California’s labor laws. *See, e.g., Vargas v. Cent.*
17 *Freight Lines, Inc.*, 2017 U.S. Dist. LEXIS 157976 (S.D. Cal., 2017); *Ramirez*, 2017 U.S. Dist. LEXIS
18 137272. “[T]he Court will approve the PAGA settlement upon a showing that the settlement terms are
19 fundamentally fair, adequate, and reasonable in light of PAGA’s policies and purposes.” *Jordan*, 2018
20 U.S. Dist. LEXIS 25297 at *5. For the reasons herein, the Settlement here is fair and reasonable in
21 light of the purposes of the PAGA and authority cited herein finding similar PAGA settlements to
22 warrant approval.

23 **B. Nature of Alleged Violations and Total Potential PAGA Penalties**

24 Plaintiff alleges two causes of action for civil penalties pursuant to PAGA, premised on alleged
25 (1) willful independent contractor misclassification (Lab. Code, § 226.8), (2) failure to provide meal
26 and rest periods (Lab. Code, §§ 226.7, 512), (3) failure to provide accurate itemized wage statements
27

1 (Lab. Code, § 226, subd. (a), (e)), (4) unpaid wages (Lab. Code, § 558, subd. (a)), (5) unpaid overtime
2 (Lab. Code, § 510, subd. (a)), and (6) failure to reimburse necessary business expenses (Lab. Code,
3 § 2802). (Cottrell Decl., ¶ 44).

4 The California Labor Code provides for statutory penalties of \$100 per employee, per pay
5 period for each initial violation and \$200 per employee, per pay period for each subsequent violation.
6 (Lab. Code § 2699 (f)(2)). Under California law, however, courts have held that employers are not
7 subject to heightened penalties for subsequent violations unless and until a court or commissioner
8 notifies the employer that it is in violation of the Labor Code. (*Amaral v. Cintas Corp. No. 2*, 163
9 Cal.App.4th 1157 (Cal. App. 2008); *see also Amalgamated Transit Union Local 1309 v. Laidlaw*
10 *Transit Servs.*, 2009 U.S. Dist. LEXIS 69842 (S.D. Cal., 2009); *Trang v. Turbine Engine Components*
11 *Techs. Corp.*, 012 U.S. Dist. LEXIS 179710, *14 (C.D. Cal. Dec. 19, 2012). Plaintiff performed an in-
12 depth analysis of interviews conducted with PAGA Group Members, data provided by Defendants,
13 and the underlying state law provisions to assess Defendants' potential exposure. (Cottrell Decl., ¶
14 45). As there are no known findings by a court or the Labor Commissioner that Defendants have
15 violated the Labor Code, Plaintiff applies the \$100 penalty amount for all violations. (*Id.*, ¶ 46).

16 Based on records provided by Defendants before mediation, Plaintiff assumed there are
17 approximately 195 PAGA Group Members with which the Bank contracted in California during the
18 relevant time period. (*Id.*, ¶ 47). In anticipation of mediation, Plaintiff estimated based on Defendants'
19 representations that there were 4,684 pay periods at issue during the relevant time period. (*Id.*, ¶ 48).

20 Based on the analysis of the data Defendants provided and the interviews with PAGA Group
21 Members, Plaintiff assumed that he could prove the misclassification of all PAGA Group Members as
22 independent contractors, which was the predicate for the other claims for the meal and rest period,
23 wage statement violations, unpaid wages and unpaid overtime violations, and expense reimbursement
24 violations. (*Id.*, ¶ 49).

25 Based on these figures, Plaintiff calculated that Defendant's total exposure is approximately
26 \$1,619,317.50. (*Id.*, ¶ 50). However, Plaintiff determined that further, additional discounting factors
27

1 were appropriate to account for the risk that the Court would find that Plaintiff and PAGA Group
2 Members were properly classified as independent contractors, the risk that Plaintiff would not be able
3 to proceed on a representative basis as to all PAGA Group Members based on manageability issues,
4 the risk that Plaintiff may not be able to prove the violate rate at the rates specified above, and the risk
5 that the Court may reduce the penalties as unjust, arbitrary and oppressive, or confiscatory. (*Id.*)

6 The case ultimately settled for \$460,000.00, which is approximately 28.4% of \$1,619,317.50,
7 the anticipated exposure on all claims, without accounting for risk, that Plaintiff's Counsel estimated
8 it could recover. (*Id.*, ¶ 51). This amount assumes that Plaintiff prevails on liability and proves up the
9 violations at the levels described above for every single PAGA Group Member and every pay period.
10 (*Id.*, ¶ 52). In light of these risks discussed below, and analysis of similar PAGA settlements,
11 \$460,000.00 constitutes a material percentage of the total damage exposure and is a reasonable overall
12 settlement sum. (*Id.*, ¶ 53).

13 C. Litigation Risks

14 Plaintiff was confronted with uncertainty in proceeding to trial on the PAGA claims because
15 of the legal defenses available to Defendants. (*Id.*, ¶ 54). This case was primarily based on the alleged
16 misclassification of real estate appraisers as independent contractors. Plaintiff began his investigation
17 into the potential claims based on the ABC misclassification test set forth in *Dynamex Operations W.*
18 *v. Superior Court*, 4 Cal.5th 903 (2018). Almost exactly one month after this case was filed, on
19 September 4, 2020, California put into effect Labor Code § 2778, which created and exemption to the
20 ABC test for certain types of employment. Under Labor Code § 2778(b)(2)(N), if an employer can
21 make demonstrate certain factors, then services provided by an appraiser⁵ are evaluated based on the
22 multi-factor test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d
23 341, 351 (Cal. 1989), not the ABC test.

24 The ABC test provided Plaintiff with a stronger legal basis for his claims than the *Borello* test.
25 Under the ABC test, Defendant had to prove all factors showing he was properly classified. Under

26 _____
27 ⁵

1 *Borello*, Plaintiff would have to overcome numerous arguments to show that Defendants exercised
2 sufficient control over an appraiser’s work to be considered an employee.

3 Specifically, Defendants would argue that it does not exercise enough control over the
4 appraiser’s manner of work such that the appraisers legally qualify as employees. As they did in their
5 motion for summary judgment, Defendants would apply the factors articulated in *Borello* to argue that
6 Plaintiff was properly classified as an independent contractor. These factors include: (a) whether the
7 one performing services is engaged in a distinct occupation or business; (b) the kind of occupation,
8 with reference to whether, in the locality, the work is usually done under the direction of the principal
9 or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether
10 the principal or the worker supplies the instrumentalities, tools, and the place of work for the person
11 doing the work; (e) the length of time for which the services are to be performed; (f) the method of
12 payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business
13 of the principal; and (h) whether or not the parties believe they are creating the relationship of
14 employer-employee. *Id.*

15 While Plaintiff believes that he would have prevailed on this issue and should have been
16 classified as an employee, Plaintiff recognizes the risk that a fact finder may have found for Defendants
17 on this issue and/or found penalties to be significantly less than what Plaintiff claims. (*Id.*, ¶ 55).

18 **VI. THE REQUESTED ATTORNEYS’ FEES AND LITIGATION COSTS ARE FAIR**
19 **AND REASONABLE**

20 For Plaintiff counsel’s efforts and the substantial risk that they undertook in obtaining a large
21 common fund settlement to benefit the LWDA and the PAGA Group Members, the Parties allocated
22 33 1/3% of the Gross Settlement Amount to Plaintiff’s counsel for reasonable attorneys’ fees, plus
23 actual litigation costs which at this time are \$37,299.51. (*Id.*, ¶ 56). These fees and costs are warranted
24 under the law and within the range commonly awarded in similar cases.

25 PAGA provides that a plaintiff is entitled to recover reasonable attorneys’ fees, expenses, and
26 costs. Labor Code section 2699 (g)(1) provides that “[a]ny employee who prevails in any action shall
27

1 be entitled to an award of reasonable attorney’s fees and costs.” As discussed below, in a qui tam
2 action, reasonable attorneys’ fees and costs are typically awarded under the common fund doctrine
3 where, as here, litigation creates a common fund of money in a specific amount for others’ benefit.

4 **A. Plaintiff’s Counsel are Entitled to Recover Attorneys’ Fees of One-Third Under**
5 **the Common Fund Doctrine in this Qui Tam Action**

6 A qui tam action allows a private person to sue to recover damages or penalties, all or part of
7 which will be paid to the government. “A qui tam action ‘is a type of private attorney general lawsuit’,
8 in which ‘the qui tam plaintiff stands in the shoes of the state or political subdivision.’” *People ex rel.*
9 *Strathmann v. Acacia Research Corp.*, 210 Cal.App.4th 487, 501 (Cal. App. 2012). A PAGA action is
10 a qui tam action because the statute allows the plaintiff, acting as the proxy of the State’s labor law
11 enforcement agency, to sue their employer for Labor Code violations and recover civil penalties that
12 otherwise would have been assessed and collected by the LWDA. *See Iskanian v. CLS Transportation*
13 *Los Angeles, LLC*, 59 Cal.4th 348, 382 (Cal. 2014) (“A PAGA representative action is therefore a type
14 of qui tam action.”). Indeed, a majority of the civil penalties recovered in a PAGA action are paid to
15 the State, with a smaller portion paid to the employees. *See Cal Lab. Code § 2699(i)*.

16 As here, where a common fund is created in a qui tam action by the successful litigation of a
17 plaintiff, the plaintiff’s attorneys are entitled to recover their fees from the common fund:

18 Those benefiting from the recovery of the fund, in this case some depositors and
19 eventually the People of the State of California, must bear their share of the cost of
20 litigation. Fees for taxpayers’ attorneys will be deducted from the judgment, and each
21 claimant’s share reduced proportionately. To the extent the judgment relies upon
section 1021.5 for recovery of attorney fees, it must be modified to confine the award
of fees to the common fund theory.

22 *Bank of America v. Cory*, 164 Cal.App.3d 66, 91 (Cal. App. 1985) (authorizing common fund fees in
23 a qui tam taxpayer suit against certain banks.)

24 Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common
25 fund was created in the amount of \$460,000.00 for the benefit of the employees and the State. Thus,
26 these beneficiaries must bear their share of the costs and attorneys’ fees, to be deducted from the Gross
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1 Settlement Amount under the common fund theory. *See id.* Such fees are deducted as a percentage of
2 the settlement amount. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 772, 478-482 (1980); *Staton v.*
3 *Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003).

4 The California Supreme Court upheld the use of the common fund theory of recovery for
5 attorneys' fees in *Laffitte v. Robert Half Internat. Inc.*, 1 Cal.5th 480, 506 (Cal. 2016). In *Laffitte*, the
6 settlement created a common fund of \$19,000,000.00. The Court approved attorneys' fees in the
7 amount of one-third of the gross settlement (*e.g.*, \$6.33 million) under the common fund theory. (*Id.*)
8 By awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the
9 common fund method encourages attorneys to efficiently litigate to achieve the best results possible
10 for the class. *See Laffitte*, 1 Cal. 5th 480,492-94. Indeed, the "percentage-of-recovery method is
11 generally favored in common fund cases because it allows courts to award fees from the fund 'in a
12 manner that rewards counsel for success and penalizes it for failure.'" *Id.* at 493 (quoting *In re Rite*
13 *Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)).

14 California state and federal courts routinely award attorneys' fees equaling approximately 33
15 1/3% of the common fund. *See, e.g., Laffitte*, 1 Cal.5th at 506 ("33 1/3 percent of the common fund is
16 consistent with, and in the range of, awards in other class action lawsuits"); *Chavez v. Netflix, Inc.*,
17 162 Cal.App.4th 43,66 (Cal. App. 2008); Eisenberg & Miller, *Attorney Fees in Class Action*
18 *Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at
19 35 (independent studies of class action litigation nationwide conclude that fees representing one-third
20 of the total recovery is consistent with market rates).

21 A one-third common fund attorneys' fee award is also consistent with what courts have
22 awarded in PAGA cases. *See, e.g., Vorise v. 24 Hour Fitness USA, Inc.*, Contra Costa County Superior
23 Court, Case No. C 15-02051 (33.33% fee awarded on \$11,000,000 settlement of a PAGA-only case);
24 *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007 (33.33% fee
25 awarded on \$12,500,000 settlement of a PAGA-only case); *Garcia v. Pep Boys Manny Moe & Jack*,
26 2016 Cal. Super. LEXIS 15556 (33.33% fee awarded on a \$1,030,000 settlement of a PAGA-only
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1 case); *Brewer v. Connell Chevrolet*, 2017 Cal. Super. LEXIS 15031 (33.33% fee awarded on a PAGA-
2 only case); *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No.
3 MCC1401137 (33.33% fee awarded on a \$650,000 settlement of a PAGA- only case.)

4 Based on the foregoing, awarding attorneys' fees based on one-third of the Gross Settlement
5 Amount is favored by California courts when a fund established for the common benefit of others is
6 involved, as is the case here. Accordingly, awarding fees on this basis in the amount of one-third of
7 the \$460,000.00 Gross Settlement Amount (or \$153,333.33) is appropriate.

8 **B. A Fee of 33 1/3% of the Gross Settlement Amount is Fair and Reasonable**

9 Among the factors considered in determining whether the requested fee percentage is
10 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
11 plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature
12 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.
13 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). For the reasons below, all these
14 factors support an award here of 33 1/3% of the common fund.

15 Plaintiff's counsel's efforts resulted in a Gross Settlement Amount of \$460,000.00. (Cottrell
16 Decl., ¶ 57). This is a fair and reasonable settlement and an especially favorable result in light of the
17 size of the PAGA group and the challenges Plaintiff may have faced at trial. (*Id.*) This result was
18 achieved by the work and success of Plaintiff's counsel, who negotiated the Settlement after extensive
19 preparation. (*Id.*)

20 Second, Plaintiff faced risks going forward with this litigation, as described above. (*Id.*, ¶ 58).

21 Third, Plaintiff's counsel are experienced representative action litigators. (*Id.*, ¶¶ 6-8, 59) This
22 experience and expertise, combined with the high quality of work performed in this case by Plaintiff's
23 counsel, resulted in the Settlement achieved. (*Id.*)

24 Fourth, Plaintiff's counsel have been representing Plaintiff and the State in this matter on
25 strictly contingency basis, and had to forego opportunities to litigate other cases. (*Id.*, ¶ 60). Plaintiff's
26 counsel incurred the risk of non-recovery after a substantial investment of time, money, and resources,
27

1 and have done so since the inception of the case without any payment or compensation. (*Id.*)

2 Fifth, as discussed and cited above, the requests for attorneys' fees in the amount of 33 1/3%
3 of the Gross Settlement Amount falls well within the range found acceptable by state and federal courts
4 in California in comparable wage and hour actions. The award of a one-third fee recovery under the
5 common fund doctrine was approved by the California Supreme Court in *Laffitte*, 1 Cal.5th at p. 503.

6 For the above reasons, a fee award in the amount of 33 1/3% of \$460,000.00 (or \$153,333.33)
7 is fair and reasonable. The attorneys' fee award requested in reference to the lodestar confirms that the
8 award is reasonable under the circumstances.⁶ Here, the lodestar for Plaintiff's counsel in this Action
9 is over \$961,702.40. (Cottrell Decl., ¶ 61, Exh. 4.) The attorneys' fees requested represent
10 approximately 16% of the lodestar incurred by Plaintiff's counsel. (Cottrell Decl., ¶ 62) Plaintiff's
11 counsel has agreed to accept this compromise and reduction in an effort to resolve the case and obtain
12 a fair settlement for Plaintiff and the PAGA Group Members. (*Id.*) A cross-check of Plaintiff's
13 counsel's lodestar confirms that a fee award of 33 1/3 % of the \$460,000.00 Gross Settlement Amount
14 (or \$153,333.33) is a reasonable and fair payment.

15 **C. The Litigation Costs are Fair and Reasonable**

16 Plaintiff's counsel also requests reimbursement of their actual out-of-pocket expenses incurred to
17 prosecute the Action, which are approximately \$37,299.51 as of the filing of this Motion. (Cottrell
18 Decl., ¶ 67, Ex. 3.) Attorneys are permitted to recover their litigation costs and expenses under PAGA
19 and the common fund doctrine. Labor Code § 2699 subd. (g)(1); *Rider v. County of San Diego*, 11
20 Cal.App.4th 1410, 1424 (Cal. App. 1992). Plaintiff's counsel incurred costs including filing and
21 service fees, costs for remote appearances, document retrieval, deposition costs, and mediation fees.

22 _____
23 ⁶ The trial court may use an abbreviated lodestar cross-check for common fund awards if the court considers it useful.
24 *Laffitte*, 1 Cal. 5th at 504-05. However, under *Laffitte*, this is not meant to displace the percentage analysis, but rather to
25 act as a backstop. Indeed, the Supreme Court expressly instructed that "the lodestar calculation, when used in this
26 manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus
27 does not impose an absolute maximum or minimum on the fee award." *Id.* at 505. Critically, the Court in *Laffitte*
emphasized that only where the "multiplier calculated by means of a lodestar cross-check is extraordinarily high or low"
should the court "consider whether the percentage should be adjusted so as to bring the imputed multiplier within a
justifiable range." *Id.* Furthermore, in conducting a lodestar cross-check, courts are not "required to closely scrutinize
each claimed attorney-hour." *Id.* at 505. An evaluation may be done by reviewing "counsel declarations summarizing
overall time spent." *Id.*

1 These expenses were incidental and necessary to the effective representation of the PAGA Group
2 Members. (Cottrell Decl., ¶ 68). They are reasonable and uncontested and should be approved.

3 **VII. CONCLUSION**

4 The proposed PAGA Settlement provides a reasonable and efficient result for both the State
5 and the PAGA Group. For all the reasons herein, Plaintiff respectfully requests the Court approve the
6 Settlement.

7
8 Dated: January 4, 2022

Respectfully submitted,

9
10 

11 _____
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13 Caroline N. Cohen
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17 *Attorneys for Plaintiff, on behalf of the State of*
18 *California and Aggrieved Employees*

PROOF OF SERVICE

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to the within action or proceeding. I am employed at Schneider Wallace Cottrell Konecky LLP located at 2000 Powell Street, Suite 1400, Emeryville, California 94608.

On February 17, 2023 I served the following document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT PURSUANT TO PRIVATE ATTORNEYS GENERAL ACT OF 2004

on the following person(s) listed below, as follows:


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BY ELECTRONIC SERVICE: Eugene Huffman, Paralegal, has submitted an electronic version of the above-referenced document to the person(s) whose email address(es) are known to me as listed above.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on February 17, 2023, in North Hollywood, California.


Eugene Huffman