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10 and all similarly aggrieved employees
11

12 **SUPERIOR COURT OF CALIFORNIA**

13 **COUNTY OF MONTEREY**

14 JOSE LUIS LOPEZ GARCIA, on behalf of
15 himself and all similarly aggrieved
16 employees,

17 Plaintiff,

18 v.

19 SMITH PACKING, INC.; and DOES 1
20 through 50, inclusive,

21 Defendants.

Case No. 20CV002559

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO APPROVE
SETTLEMENT AGREEMENT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: February 10, 2023

Time: 8:30 a.m.

Dept.: 15

Complaint Filed: September 24, 2020

Trial Date: Vacated

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 10, 2023, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Thomas W. Wills, judge presiding, in Department 15 of the above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Jose Luis Lopez Garcia (“Plaintiff”) will seek an Order approving the PAGA Settlement Agreement pursuant to the Private Attorneys General Act, Cal. Labor Code, § 2698, *et seq.*

This motion will be based on this notice of motion, the memorandum of points and authorities, the accompanying declarations of B. James Fitzpatrick, Laura L. Franklin, and Plaintiff, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

Dated: November 18, 2022

FITZPATRICK & SWANSTON

By: 
B. James Fitzpatrick
Attorney for Plaintiff,
JOSE LUIS LOPEZ GARCIA, on
behalf of himself and all similarly
aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the Private Attorneys General Act, Labor Code § 2698, *et. seq.*, (the
4 “PAGA”), Plaintiff Jose Luis Lopez Garcia (“Plaintiff”) hereby moves the Court for an order
5 approving the non-reversionary PAGA settlement as set forth in the PAGA Settlement
6 Agreement (the “Settlement Agreement” or “Settlement”) attached as Exhibit A to the
7 concurrently filed declaration of B. James Fitzpatrick (“Fitzpatrick Decl.”). The sole cause of
8 action in Plaintiff’s Complaint alleges that Defendant Smith Packing, Inc. (“Defendant”) owes
9 civil penalties under the PAGA for alleged violations of the California Labor Code, including
10 but not limited to failure to provide compliant meal periods, failure to authorize and permit
11 off-duty rest periods, failure to record all hours worked, failure to pay at least minimum wage
12 for all hours worked, failure to provide accurate wage statements, failure to timely pay final
13 and other wages, and failure to reimburse expenses. Plaintiff seeks to recover such alleged
14 civil penalties on behalf of the State of California and other similarly aggrieved employees.

15 As will be explained in further detail below, based on the California Supreme Court’s
16 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
17 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as
18 called for under PAGA on behalf of the State of California and other similarly situated
19 aggrieved employees without seeking class certification or meeting the requirements of class
20 certification (i.e., numerosity, typicality, commonality, and adequacy). As such, while the
21 PAGA settlement reached herein is on behalf of the State of California and other aggrieved
22 employees, the usual two-step preliminary and final approval process that is required with
23 class action settlements is not required here. Rather, as called for under Labor Code section
24 2699, subdivision (l), all that is required is an approval by this Court of any settlement of the
25 PAGA claims by the Parties. The Parties have reached such a settlement and now seek this
26 Court’s approval of their settlement.

27 Pursuant to the terms of the Parties’ proposed Settlement Agreement, Defendant will
28 pay the gross amount of one-hundred thousand dollars (\$100,000) (the “Maximum Settlement

Amount”). This amount encompasses a settlement of PAGA claims, a payment to Plaintiff in the amount of \$5,000 for a general release of his individual claims, and in recognition of his effort and work in prosecuting this action on behalf of the State of California and similarly aggrieved employees (“Plaintiff’s Individual Payment”); attorneys’ fees in the amount of \$33,333.33 (1/3 of the Maximum Settlement Amount), reimbursement of litigation costs of up to \$10,000.00, and settlement administration costs not to exceed \$15,000.00. The PAGA Penalties Fund includes a payment of approximately \$27,500 in civil penalties to the Labor and Workforce Development Agency (“LWDA”).

The proposed settlement constitutes an adequate, fair, and reasonable settlement on behalf of the LWDA and the Aggrieved Employees and accomplishes the goals of the PAGA.

II. RELEVANT BACKGROUND

A. Procedural History

On September 24, 2020, Plaintiff, through his attorneys, sent a letter to the LWDA (electronically) and Defendants (via certified mail) providing notice of alleged violations of the California Labor Code, including but not limited to alleged violations of Labor Code sections 201, 202, 203, 204, 210, 216, 218, 221, 223, 225.5, 226(a), 226.7, 510, 512(a), 558, 1194, 1197, 1197.1, 1198, and 2699. (Fitzpatrick Decl. ¶ 3.) The LWDA elected not to investigate the alleged violations. (*Ibid.*) Accordingly, by operation of law (Labor Code § 2699(a) and § 2699.3(a)), Plaintiff was “deputized” to proceed with a civil lawsuit for civil penalties on behalf of himself, the LWDA, and other allegedly “aggrieved employees.”

On September 24, 2020, Plaintiff filed the current lawsuit on behalf of himself, the LWDA, and other allegedly “aggrieved employees.” In his Complaint, Plaintiff sought to recover civil penalties for Defendant’s alleged violations, as set forth above. On February 19, 2021, Defendant filed an Answer denying all allegations in the Complaint.

Over the course of the following year, the Parties engaged in discovery and litigation, and trial was set to begin on July 25, 2022. On April 4, 2022, Defendant filed its Motion to Compel Individual Arbitration and Stay Proceedings (“Motion to Compel Arbitration”), which was scheduled to be heard before this Court on May 27, 2022. Based on the then anticipated U.S.

Supreme Court ruling in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906 (“*Viking River*”), Defendant’s motion sought dismissal of the PAGA claims and an order compelling Plaintiff to arbitrate his individual claims or, alternatively, for the matter to be stayed pending the *Viking River* decision.

B. The Parties Agree to Mediation and This Settlement

On April 22, 2022, the Parties participated in a full-day mediation with Scott Radovich of Radovich Mediation Group LLC. (Fitzpatrick Decl. ¶ 4.) Prior to mediation, Defendant produced time and pay records and related data for the Aggrieved Employees, as well as various policy documents, all of which enabled Plaintiff’s thorough assessment of the claims, liability, and estimated maximum penalty exposure under PAGA. (Fitzpatrick Decl. ¶ 5.) With the help of Mr. Radovich, the Parties were able to reach the present Settlement. (Fitzpatrick Decl. ¶ 6.)

III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT

The material terms of the settlement are described below and set forth in detail in the Settlement Agreement. (*See* Ex. A to Fitzpatrick Decl.)

A. The Aggrieved Employees

The aggrieved employees affected by this Settlement are defined as “all non-exempt current and former employees employed by Defendant in California at any time from September 24, 2019, through the Effective Date (“Aggrieved Employees”). (Settlement ¶ 1.) The Settlement covers the period from September 24, 2019, until final approval of this agreement by the Court and the occurrence of the Effective Date. (Settlement ¶ 2.) The “Effective Date” will be the date the Court or any Party serves notice of the Court’s order and judgment approving this settlement. (Settlement ¶ 3.)

B. Settlement Sum and Allocation

The Settlement Agreement requires Defendant to pay the gross amount of One Hundred Thousand Dollars (\$100,000) (the “Maximum Settlement Amount”). (Settlement ¶ 4.) The “PAGA Penalties Fund”, which is the Maximum Settlement Amount less any Court-approved attorneys’ fees, litigation costs, Plaintiff’s Individual Payment, and Settlement

1 Administration Costs, will be available for distribution to the LWDA and Aggrieved
2 Employees. (Settlement ¶ 8.) (Fitzpatrick Decl. ¶ 8.) Pursuant to the PAGA, seventy-five
3 percent (75%) of the PAGA Penalties fund, or approximately \$27,500 will be paid to the
4 LWDA for PAGA penalties. The remaining twenty-five percent or \$9,166.67 will be paid to
5 all Aggrieved Employees. (Settlement ¶ 8.) (Fitzpatrick Decl. ¶ 9.)

6 The portion of the PAGA Penalties Fund distributed to Aggrieved Employees will be
7 distributed in proportion to the number of pay periods employed in non-exempt positions in
8 California during the Settlement Period. (Settlement ¶ 8.) (Fitzpatrick Decl. ¶ 10.) This is
9 fair, as it directly allocates greater penalties to individual Aggrieved Employees who have
10 allegedly suffered greater harm.

11 As part of the Settlement Agreement, Defendant does not object to Plaintiff's
12 Counsel's request for attorneys' fees of one-third of the PAGA Penalties Fund (\$33,333.33),
13 plus reimbursement of litigation costs (up to \$10,000), subject to the Court approving this
14 Settlement. Also, as part of the Settlement Agreement, Defendant does not object to Plaintiff's
15 request for an Individual Payment of Five Thousand Dollars (\$5,000) in exchange for a
16 general release of claims and in recognition of Plaintiff's effort and work as the representative
17 plaintiff in this action. (Settlement ¶ 7.)

18 Finally, the Settlement Agreement provides for payment of the fees and expenses
19 reasonably incurred by the Settlement administrator. The Settlement Administration Costs will
20 be paid from the Maximum Settlement Amount, including, if necessary, any such costs in
21 excess of the amount represented by the Settlement Administrator as being the maximum
22 necessary to administer the Settlement, which is currently anticipated to be no greater than
23 Fifteen Thousand Dollars (\$15,000). (Settlement ¶ 10.)

24 **C. Scope of the Released Claims by Aggrieved Employees**

25 In exchange for the payments described above, Plaintiff, the State of California, and
26 Aggrieved Employees will release Defendant and Released Parties from any and all claims
27 against the Released Parties arising during the Settlement Period for civil penalties under
28 PAGA that were asserted or could reasonably have been asserted based on the facts alleged in

1 the Action and/or the PAGA letter submitted by Plaintiff to the LWDA (the “Released
2 Claims”). (Settlement ¶ 14.)

3 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

4 **A. PAGA Overview**

5 Prior to the enactment of PAGA, many of the penalties provided against employers for
6 violations of certain Labor Code provisions were solely within the province of the California
7 Department of Labor to seek, enforce, and assess. (*Arias v. Superior Court, supra*, 46 Cal.4th
8 969, 980.) However, due to the lack of financing to California’s agencies and the potential
9 number of Labor Code violations by California employers, the California Legislature found
10 that it was in the public interest to allow aggrieved employees to act as private attorneys
11 general and to enforce and recover penalties on behalf of other similarly situated aggrieved
12 employees for Labor Code violations committed by their employers. (*Ibid.*) As such, PAGA
13 was enacted to allow such enforcement and recovery by private individuals who have been
14 aggrieved by their employers. Under the PAGA, 75% of any penalties recovered under PAGA
15 by an aggrieved employee is to be paid to the state agency, the LWDA, and the remaining
16 25% is to be shared amongst the aggrieved employees. (Cal. Lab. Code § 2699, subd. (i).)

17 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
18 employee must first provide written notice to the LWDA and the employer of the particular
19 Labor Code violation(s) alleged to have been violated by the employer. (*See* Cal. Labor Code
20 § 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not
21 intend to investigate the alleged violations, or the time for the LWDA to investigate the
22 violations passes, the aggrieved employee is allowed to proceed in a civil action against the
23 employer on behalf of all other similarly aggrieved employees. (*See* Cal. Labor Code § 2699.3,
24 subd. (a)(2)(A).)

25 In 2009, the California Supreme Court considered the issue of whether an aggrieved
26 employee who brings a PAGA claim needs to meet class certification requirements. (*Arias*,
27 *supra*, 46 Cal. 4th 969, 976.) After a substantial review of the legislative history of PAGA, the
28 California Supreme Court held that an aggrieved employee’s representative action brought on

1 behalf of other similarly aggrieved employees against an employer for PAGA violations does
2 not need to meet the requirements for class certification. (*Id.* at pp. 975; 980-88.) As held by
3 the California Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or
4 agent of California’s labor law enforcement agencies. (*Id.* at p. 986.) Because an employee’s
5 PAGA action functions as a substitute for an action brought by the government itself, a
6 judgment in the PAGA action binds all those who would be bound by a judgment in an action
7 brought by the government. (*Ibid.*)

8 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
9 Superior Court must “review and approve any settlement of any civil action filed pursuant to”
10 PAGA. (Cal. Lab. Code § 2699, subd. (l)(2).) As the Parties to this current PAGA action have
11 reached such an agreement, the Parties now seek this Court’s approval as to the settlement of
12 the penalties amount.

13 **B. Class Action Settlement Standards Do Not Govern the Settlement Approval**
14 **Process for PAGA Claims**

15 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
16 is to determine whether it is within the “range of reasonableness,” and thus whether notice to
17 the class of the terms and conditions of the settlement, and the scheduling of a formal fairness
18 hearing, are worthwhile. (*See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions*
19 § 11.25 *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004).) The “judge must make a
20 preliminary determination on the fairness, reasonableness, and adequacy of the settlement
21 terms and must direct the preparation of notice of the certification, proposed element, and date
22 of the “final fairness hearing.” (*Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud.
23 Ctr., 4th ed. 2004).) To make the preliminary fairness determination for a class action
24 settlement, courts may consider several relevant factors, including “the strength of the
25 plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the risk
26 of maintaining class action status through trial; the amount offered in settlement; the extent of
27 discovery completed and the stage of the proceedings; [and] the experience and views of
28 counsel. . .” (*See Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

By contrast, court approval of PAGA settlements is governed by Section 2699(1) of the

1 Labor Code, which provides, in relevant part: “The court shall review and approve any
2 penalties sought as part of a proposed settlement agreement pursuant to this part.” The Parties
3 are not obligated to “satisfy class action requirements.” Including the standards for class action
4 settlement approval. (*Arias, supra*, 46 Cal.4th at 980-988 (affirming lower court’s holding that
5 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).)

6 Notably, unlike the class action settlement approval process, there is also no statutory
7 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
8 2699(1).) In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor
9 do they have the ability to opt-out of the representative PAGA claim” or “contest a settlement,
10 if any, reached between the parties.” (*Ochoa-Hernandez v. CJADERS Foods, Inc.* (N.D.Cal.
11 Apr. 2, 2010) 2010 WL 1340777 at *13.)

12 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives**

13 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
14 ultimately receive as a result of a settlement, but instead, on whether the total settlement
15 amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
16 supplement agency funding for education and enforcement purposes. (*See* Lab. Code §
17 2699(i).) Here, the Settlement of \$100,000 represents a substantial recovery for the Aggrieved
18 Employees and the State, and thus the Settlement effectuates PAGA’s purpose.

19 Here, the Settlement accomplishes PAGA’s primary objective to enforce the Labor
20 Code. (*See O’Connor v. Uber Techs, Inc.* (N.D. Cal. August 18, 2016) 2016 WL 4398271, at
21 *18 (noting that deterring noncompliance with the Labor Code is one of PAGA’s objectives).)
22 The Settlement is also consistent with the State’s public policy favoring resolution of disputes.
23 “California law favors the settlement of disputes as our high court clarified in *Neary*[].
24 Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. []
25 The parties are best positioned to understand their interests and resolve a dispute in a mutually
26 beneficial manner without court intervention into the settlement.” (*Consumer Advocacy*
27 *Group, Inc. v. Kintestu* (2006) 141 Cal.App.4th 46, 62-63 (citing *Neary v. Regents of Univ. of*
28 *Cal.* (1992) 3 Cal.4th 273, 277-282).)

1 **D. The Scope of the Release is Appropriately Limited**

2 A PAGA settlement and release cannot include claims outside of the “facts and
3 theories” disclosed in the PAGA notice. (*Uribe v. Crown Building Maintenance Co.* (2021) 70
4 Cal.App.5th 986, 1005.) Here, the Released Claims are appropriately limited to claims against
5 the Released Parties “arising during the Settlement Period for civil penalties under PAGA that
6 were asserted or could reasonably have been asserted based on the facts alleged in the Action
7 and/or the PAGA letter submitted by Plaintiff to the LWDA.” (Settlement ¶ 14.) Plaintiff,
8 alone, grants a general release of his individual claims to Defendant and the Released Parties.
9 (See Settlement ¶ 15.)

10 **E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk**
11 **of Litigation, including the Court’s Discretion to Reduce PAGA Penalties**
12 **and the Potential Dismissal of the Action Following Viking River**

13 Plaintiff alleges an assortment of Labor Code violations under the ambit of PAGA.
14 Specifically, the Complaint alleges that Defendant failed to provide compliant meal periods,
15 failed to authorize and permit off-duty rest periods, failed to record all hours worked, failed to
16 pay at least minimum wage for all hours worked, failed to provide accurate wage statements,
17 failed to timely pay final and other wages, and failed to reimburse expenses. Defendant denies
18 these allegations. Per Labor Code section 2699, the penalty for a violation of the PAGA is
19 \$100.00 per pay period per employee. Accordingly, Plaintiff estimated that Defendant could
20 face civil penalties of up to a maximum of approximately \$6 million if Plaintiff was successful
21 at trial. (Fitzpatrick Decl. ¶ 11.) However, this analysis “stacks” PAGA penalties, and Plaintiff
22 would expect a more modest maximum civil penalty recovery of \$1,479,500 if these civil
23 penalties were not assessed at a rate of multiple violations per employee pay period.
(Fitzpatrick Decl. ¶ 11.)

24 Even assuming Plaintiff were to ultimately prevail on his PAGA claims, the Court still
25 has discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court
26 can decline to award PAGA penalties where “if, based on the facts and circumstances of the
27 particular case, to do otherwise, would result in an award that is unjust, arbitrary and
28 oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington*

1 v. *Starbucks Corp.* (2018) 30 Cal.App.5th 504, while the plaintiff there prevailed on his PAGA
2 claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
3 employer's good faith attempt at complying with the law. (*Id.* at p. 517.) Upon review, the
4 Court of Appeal found such reduction to be proper. (*Id.* at p. 539.)

5 Defendant has disputed throughout the litigation that it is liable for any amount
6 (including the estimated exposure figures above), has asserted that it complied with the law,
7 and has raised several defenses to the claims. Thus, even if Plaintiff was to successfully prove
8 his claims at trial, which Defendant refutes, there is a possibility that the Court may only
9 award a small percentage of PAGA penalties, as the Court has discretion to do. As Defendant
10 emphasized during mediation, Plaintiff's counsel recently represented another plaintiff at trial
11 in Monterey Superior Court who was awarded reduced PAGA penalties of just \$10 per pay
12 period for rest break violations and just \$20 per pay period for meal break violations.
13 (Fitzpatrick Decl. ¶ 12.) The Maximum Settlement Amount was premised with this substantial
14 risk in mind. (Fitzpatrick Decl. ¶ 12.)

15 Lastly, and most importantly, Plaintiff's entire action faced the threat of dismissal in
16 connection with Defendant's Motion to Compel Arbitration and the then anticipated *Viking*
17 *River* ruling. (*Viking River, supra*, 142 S. Ct. 1906.) In its ruling that was ultimately released
18 June 15, 2022, the U.S. Supreme Court determined "whether the Federal Arbitration Act, 9
19 U.S.C. § 1 et seq., preempts a rule of California law that invalidates contractual waivers of the
20 right to assert representative claims under [the PAGA]." The Supreme Court held that
21 California's "prohibition on wholesale waivers of PAGA claims is not preempted by the
22 FAA." 142 S. Ct. at 1, leaving intact the California Supreme Court's decision in *Iskanian v.*
23 *CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014) to the extent it held that "pre-
24 dispute agreements to waive the right to bring representative PAGA claims are invalid as a
25 matter of public policy." *Viking River*, 142 S. Ct. at 1916. Nevertheless, the Supreme Court
26 dismissed Moriana's non-individual PAGA claim because she purportedly "lack[ed] statutory
27 standing to continue to maintain her non-individual claims in court...." *Viking River*, 142 S.
28 Ct. at 1925.

1 Here, it is undisputed that Plaintiff had been required to sign an Arbitration Agreement
2 as part of his onboarding process with Defendant, and that the Arbitration Agreement purports
3 to cover any dispute arising out of or related to his employment with Defendant. (Fitzpatrick
4 Decl. ¶ 13.) In anticipation of an imminent ruling in *Viking River*, Defendant sought dismissal
5 of the PAGA claims, contending that Plaintiff had waived any right to file a class or
6 representative action. While Plaintiff's counsel believes that it would have successfully
7 opposed Defendant's Motion to Compel Arbitration, Plaintiff had to contend with the
8 substantial risk that his PAGA action could be dismissed entirely just two months prior to its
9 scheduled trial date, potentially leaving him with zero recovery for his claims.

10 Given the substantial risks outlined above, Plaintiff and his counsel believe that the
11 Settlement is fair and reasonable. (Fitzpatrick Decl. ¶ 7; Declaration of Laura L. Franklin ¶ 2.)

12 **F. The Attorneys' Fees are Reasonable**

13 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. (Cal. Lab. Code
14 § 2699, subd. (g).) Similar to awarding fees in a class action, California state and federal
15 courts have recognized that an appropriate method for determining award of attorneys' fees for
16 representative actions is to use a percentage of the total value of benefits to class members by
17 the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano v.*
18 *Priest* (1977) 20 Cal. 3d 25, 34 ("Serrano III"); *Boeing Co. v. Van Gemert* (1980) 444 U.S.
19 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose of
20 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
21 proportionally among all beneficiaries so that the active beneficiary does not bear the entire
22 burden alone." (*Vincent*, 557 F. 2d at p. 769.)

23 The Common Fund doctrine is predicated on the principle of preventing unjust
24 enrichment. When a litigant's efforts create or preserve a fund from which others derive
25 benefits, he may require the passive beneficiaries to compensate those who created the fund.
26 Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d
27 at p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet*
28 (1995) 12 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund

1 doctrine has been applied “consistently in California when an action brought by one party
2 creates a fund in which other persons are entitled to share.” The reasons for applying the
3 common fund doctrine include: “fairness to the successful litigant, who might otherwise
4 receive no benefit because his recovery might be consumed by the expenses; correlative
5 prevention of an unfair advantage to the others who are entitled to share in the fund and who
6 should bear their share of the burden of its recovery; encouragement of the attorney for the
7 successful litigant who will be more willing to undertake and diligently prosecute proper
8 litigation for the protection or recovery of the fund if he is assured that he will be properly and
9 directly compensated should his efforts be successful.” (*Ibid.*)

10 The California Supreme Court has also held that the award of attorneys’ fees in common
11 fund wage and hour class action settlements should start with the percentage method. (*See*
12 *Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (“We join the overwhelming majority
13 of federal and state courts in holding that when class action litigation establishes a monetary
14 fund for the benefit of the class members, and the trial court in its equitable powers awards
15 class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by
16 choosing an appropriate percentage of the fund created.”).)

17 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
18 percent of the fund. (*Laffitte*, 1 Cal.5th at p. 506.) And this was based on a lodestar amount
19 that required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier
20 is “extraordinarily high or low [should] the trial court [] consider whether the percentage
21 method should be adjusted so as to bring the imputed multiplier within a justifiable range.”
22 (*Id.* at p. 505.)

23 As a secondary support for the percentage of the fund method, when fees are allocated
24 by percentage method, courts have discretion to “cross-check” the fees awarded through the
25 lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation,
26 when used in this manner, does not override the trial court’s primary determination of the fee
27 as a percentage of the common fund and thus does not impose an absolute maximum or
28 minimum on the potential fee award.” (*Laffitte*, 1 Cal.5th at p. 505 (emphasis added); *In re*

1 *Rite Aid Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check
2 does not trump the primary reliance on the percentage of common fund method”).)

3 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
4 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
5 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
6 range, but the court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a
7 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
8 required; in many cases, performing a cross-check “undermines” one of the primary reasons
9 for using the percentage method: aligning counsel’s incentives with the benefits delivered to
10 the class and discouraging protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the
11 discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
12 *Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao*, 82 Cal.App.4th 19, pp. 29-30
13 (citing the recommendations of the Third Circuit Task Force with approval and observing that
14 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
15 authorities, who have been most vocal about the manner in which it exacerbates the problem
16 of ‘cheap settlements’ and burdens already overworked trial judge”).)

17 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
18 to 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see*
19 *also, e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying
20 a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60
21 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*
22 (1988) 203 Cal.App.3d 78 (affirming a 2.34 multiplier without remand).)

23 Here, as set forth in the concurrently filed Declaration of B. James Fitzpatrick,
24 Plaintiff’s counsel has already spent 103.8 hours in litigating and settling this action. Based on
25 the hourly rates of Plaintiff’s counsel, the lodestar equates to \$57,578.50. (Fitzpatrick Decl. ¶
26 14, Exhibit B.) Thus, the fee request of \$33,333.33 is 0.65 of the lodestar amount. Plaintiff’s
27 counsel has prosecuted this litigation up to this point, taking the risk that they ultimately could
28 be faced with not receiving any compensation for their work. For all of these reasons, the

1 requested fee amount of \$33,333.33 that has been agreed upon by the Parties is fair and
2 reasonable.

3 **G. The Costs are Reasonable**

4 Additionally, Plaintiff's Counsel's reimbursement of actual litigation costs in the
5 amount of no greater than \$10,000.00 is also reasonable. Plaintiff's counsel has, at their own
6 risk, directly incurred such costs in the prosecution of this action. For example, costs were
7 incurred to file this instant action and other pleadings in the case, effect service of process,
8 participate in mediation, and advance other litigation-related costs. (Fitzpatrick Decl. ¶¶ 15-
9 17.) Mediation costs are a reimbursement expense, even when the mediation is voluntary and not
10 court-ordered. (*Berkeley Cement, Inc. v. Regents of the University of California* (2019) 30 Cal.
11 App. 5th 1133, 1140.) Here, it was only through the assistance of the mediator that this matter was
12 settled, as the Parties both needed a disinterested third-party to get them to soften their stance.
13 (Fitzpatrick Decl. ¶ 16.)

14 If the actual costs are less than \$10,000, the remainder will become part of the PAGA
15 Penalties Fund for distribution to the LWDA and Aggrieved Employees. (Fitzpatrick Decl. ¶
16 18.) Based on the foregoing, the requested costs should be awarded as fair and reasonable.

17 **H. The Settlement Administrator's Fees Should be Approved**

18 The Parties have agreed to pay from the Maximum Settlement Amount actual costs of
19 administration, which will not exceed \$15,000.00, to the Settlement Administrator, Phoenix
20 Settlement Administrators, to administer this Settlement. The Parties believe that the
21 administration fee is reasonable and should be approved.

22 **I. Plaintiff's Individual Payment Should Be Approved**

23 Courts have held that named plaintiffs in class or private attorney general actions can
24 request a service award. (*Rodriguez v. W. Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59
25 (explaining that service awards "are intended to compensate class representatives for work
26 done on behalf of the class to make up for financial or reputational risk undertaken in bringing
27 the action, and sometimes, to recognize their **willingness to act as a private attorney**
general") (emphasis added).)

28 Here, Plaintiff seeks \$5,000.00 for the service award, which is intended to compensate

1 Plaintiff for his time and effort spent on the case, and it is further provided in exchange for a
2 full release of Plaintiff's individual claims. This requested enhancement is consistent with
3 awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901
4 F.Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet*
5 *Credit Servs. Customer Litg.*, 130 F.R.D 366, 374 (S.D. Ohio 1990) (two incentive awards of \$
6 55,000, and three incentive awards of \$35,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907,
7 913-914 (S.D. Ohio 2001) (granting \$50,000 incentive award); *Enter. Energy Corp. v.*
8 *Columbia Gas Transportation Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000
9 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007 U.S.
10 Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan 27, 2007) (awarding \$25,000 incentive award in
11 FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
12 (affirming \$25,000 Incentive award to class representative in ERISA case).

13 **J. Notice to the LWDA Has Been Provided**

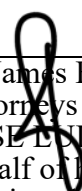
14 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion, the
15 Settlement Agreement, and Proposed Order to the LWDA's website. (Fitzpatrick Decl. ¶ 22.)

16 **V. CONCLUSION**

17 Based on the above, Plaintiff requests that the Court approve the current PAGA
18 settlement.

19 Dated: November 18, 2022

FITZPATRICK & SWANSTON

20 By: 
21 B. James Fitzpatrick
22 Attorneys for Plaintiff,
23 JOSE ENRIQUE LOPEZ GARCIA, on
24 behalf of himself and all similarly
25 aggrieved employees
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On the date written below, I served the foregoing document(s), described as **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action as indicated below and by the following means:

Brian Daly (SBN: 298731)
Mullen & Henzell L.L.P.
 112 E Victoria St,
 Santa Barbara, CA 93101
 Telephone: (805) 966-1501
 Facsimile (805) 966-9204
bdaly@mullenlaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 18, 2022, at Salinas, California.

Josie Favila