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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES**

12 RODNEY JOHNSON, as an individual and
on behalf of all others similarly situated,

13 PLAINTIFF,
14

15 V.
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17 SUSHI NOZAWA, a Delaware limited
liability company and DOES 1-100
18 INCLUSIVE,

19 DEFENDANTS.
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Case No.: 22STCV08949

Assigned for All Purposes to:
Hon. Timothy P. Dillon
Dept. 73

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

[Filed Concurrently with Notice of Motion and
Motion; Declarations of Sepideh Ardestani and
Chris Longley; [Proposed] Order

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1 **I. INTRODUCTION**

2 Plaintiff Rodney Johnson hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Sushi Nozawa
4 (“Nozawa” or “Defendant”). Consistent with PAGA, the proposed settlement releases claims under
5 PAGA only and has no impact on the individual claims of any alleged aggrieved employee. Since
6 the settlement resolves nothing more than claims under PAGA, it requires only a one-step review
7 and approval process by the Court, and for the reasons discussed below, the proposed settlement is
8 fair, reasonable, adequate, and advances the purposes underlying PAGA. Plaintiff respectfully
9 requests the Court approve the Settlement in its entirety.

10 **II. BACKGROUND**

11 Defendant Nozawa is a Los Angeles based restaurant group operating various restaurants
12 under the Sugarfish, Nozawa Bar and KazuNori names. Plaintiff Johnson was employed by
13 Defendant as a non-exempt dishwasher from September 2020 through February 2021, and worked
14 at the Sugarfish restaurant in Calabasas, California. Plaintiff’s duties included washing dishes and
15 generally cleaning the restaurant. [Declaration of Sepideh Ardestani (“Ardestani Decl.”), ¶ 4.]

16 Plaintiff contends Defendant violated California wage and hour laws in several respects.
17 First, he alleges Nozawa failed to pay all wages due by failing to pay required premium wages when
18 employees worked a split shifts worked, and by failing to incorporate bonuses into the regular rate
19 of pay when calculating the overtime rate and sick pay rate, resulting in an underpayment of
20 overtime wages. He next contends he and other Aggrieved Employees were “on duty” during their
21 meal and rest periods because they were required to be available by phone to respond to calls and
22 texts from the restaurant, and thus were not fully relieved of all duties while on a break. For the
23 same reason, Plaintiff alleges a failure to reimburse business expenses for the use of personal phones
24 to receive and respond to work-related calls and texts. [Ardestani Decl., ¶ 5.]

25 Based on these allegations, on December 29, 2021, Plaintiff filed a class action complaint
26 against Nozawa. Defendant then successfully moved to compel arbitration of Plaintiff’s individual
27

1 claims. After appropriate notice to the Labor & Workforce Development Agency (“LWDA”),¹
2 Plaintiff filed a PAGA-only complaint on March 14, 2022, seeking civil penalties for the following
3 alleged wage and hour violations: (a) failure to pay wages, including split shift premiums and
4 overtime wages; (b) failure to provide meal and rest periods; (c) failure to reimburse expenses, (d)
5 failure to provide complete and accurate wage statements; and (e) waiting time penalties, all on
6 behalf of all individuals employed by Nozawa as non-exempt employee in California during the
7 PAGA Period of January 8, 2021 to present. [Ardestani Decl., ¶ 6.]

8 Defendant has at all times denied Plaintiffs’ allegations and maintained it complied with all
9 relevant provisions of the Labor Code and Wage Orders. Specifically, Defendant contends among
10 other things that Plaintiff and all alleged aggrieved employees were timely paid for all hours worked
11 at the correct hourly rates in conformance with all applicable laws, that it authorized and permitted
12 Plaintiff and the alleged aggrieved employees to take fully compliant meal and rest periods in
13 accordance with all applicable laws, and that Plaintiff and the alleged aggrieved employees received
14 accurate and complete itemized wage statements. Defendant also strongly contends the case cannot
15 be maintained as a representative action because among other things Plaintiff’s
16 missed/interrupted/late/short meal and rest period allegations necessarily require detailed
17 individualized assessments and accordingly individualized issues predominate and a trial under
18 PAGA would be unmanageable. [Ardestani Decl., ¶ 7.]

19 After Plaintiff filed the initial PAGA complaint, the Parties began engaging in discovery
20 and, upon discussing the merits of the case and holding several meet and confer sessions regarding
21 prospective law and motion and discovery issues, the Parties agreed to attempt mediation. The
22 Parties further agreed to a protocol for exchanging additional documents and information before the
23 mediation. Through this formal and informal discovery, Defendant provided Plaintiff with
24 information including, inter alia, the number of potential alleged aggrieved employees, the number
25 of aggregate pay periods, sample pay stubs and time records for around 25% of the alleged aggrieved
26 employees, employee handbooks and manuals, and relevant policy documents on Defendant’s time

27 ¹ Plaintiff’s January 3, 2022 and August 11, 2023 PAGA notice letters are attached as Exhibits 3 and 4
28 respectively to the Ardestani Declaration.

1 keeping and reporting policies, etc. Plaintiff had that information reviewed by Berger Consulting
2 Group to help evaluate potential violation rates, potential damages, etc. [Ardestani Decl., ¶ 8.]

3 The parties then attended a full day mediation before highly-regarded mediator Ann
4 Klotarski, Esq., who has extensive experience mediating wage and hour class and PAGA actions.
5 Before and during the mediation, Plaintiff and counsel analyzed, researched, and investigated the
6 potential issues, including matters related to the calculation of damages, trial, and appellate issues
7 and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to
8 proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and
9 Defendant's defenses, and the parties' data analyses and conclusions based on data provided by
10 Defendant. After a contentious full day of negotiations, the Parties were able to reach agreement on
11 all major issues. The Parties then formalized the tentative settlement in the settlement agreement
12 now before the Court. [Ardestani Decl., ¶ 9.] A true and correct copy of the Settlement Agreement
13 is attached to the Ardestani Declaration as Exhibit 1.

14 Lastly, in order to fully effectuate the proposed settlement, Plaintiff submitted an Amended
15 PAGA Notice and filed a First Amended Complaint adding allegations regarding the alleged split
16 shift violations and to otherwise conform the allegations with the terms of settlement, and the FAC
17 is the operative pleading for purposes of the settlement. [Ardestani Decl., ¶ 9.]

18 **III. SUMMARY OF SETTLEMENT TERMS**

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

20 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$325,000
21 (the "Gross Settlement Amount" or "GSA"), which is inclusive of payments to the LWDA and
22 Aggrieved Employees, costs of settlement administration, and reasonable attorney's fees and costs.²
23 After payment of settlement administration costs, service award and reasonable attorney's fees and
24 costs from the GSA, the Parties presently estimate about \$193,862.27 will remain (the "Net
25 Settlement Amount" or "NSA"). 75% of the NSA (about \$145,396.70) will go to the LWDA, and

26 ² As discussed below, Plaintiffs' Counsel seeks a fee equal to one-third (\$108,333.33) of the GSA, and
27 reimbursement of actual litigation costs of \$13,614.40. Plaintiff entered into a separate and confidential
28 individual settlement agreement and accordingly is not requesting a service award. [Ardestani Decl., ¶ 10.]

1 the remaining 25% (about \$48,465.57) will be distributed to the Aggrieved Employees in proportion
2 to the total number of Eligible Pay Periods each individual worked during the PAGA Period. The
3 average award currently is estimated at about \$28. [Ardestani Decl., ¶ 10.]

4 **B. Payment and Notice**

5 The Parties propose using Atticus Administration, LLC (“Atticus”) as the Settlement
6 Administrator. Atticus has extensive experience administering PAGA settlements, and has agreed
7 to cap its fees at \$9,190.00. Within 21 calendar days of the Settlement’s Effective Date, Defendant
8 will fund the settlement and Atticus thereafter will mail a Notice and settlement check to all PAGA
9 Members via regular First-Class U.S. Mail, using the most current, known mailing addresses
10 identified in Defendant’s records. Recipients need not submit claim forms and will automatically
11 receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after
12 which time any unclaimed residual funds will be forwarded to the State Controller’s Unclaimed
13 Property Fund. [Ardestani Decl., ¶ 11; Exh. 2; Declaration of Chris Longley, ¶¶ 2-12, Exhs. A-C.]

14 **C. The Release**

15 The release in the Settlement Agreement narrowly releases only civil penalty claims brought
16 under PAGA, as asserted in Plaintiff’s PAGA notice to the LWDA and the operative Complaint.
17 While Plaintiff is separately entering into a general release of any and all claims against Defendant,
18 the Settlement Agreement protects the rights of the alleged aggrieved employees to bring their own
19 individual claims should they wish. For these reasons, the Parties contend the release narrowly
20 applies only to the PAGA claims alleged or that could have been alleged, based on the factual and
21 legal allegations pled in the operative Complaint. [Ardestani Decl., ¶ 12.]

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

24 PAGA requires the Court “review and approve any settlement of any civil action filed
25 pursuant to this part.” Labor Code § 2699(l)(2). Recently, the appellate court in Moniz v. Adecco
26 USA, Inc. (2021) 72 Cal.App.5th 56, 2021 WL 5578298, defined the standard for courts to apply
27 when reviewing settlements under PAGA. The court held a trial court must ensure that the

1 settlement is “fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor
2 law violations, deter future ones, and to maximize enforcement of state labor laws.” Id.

3 In so holding, Moniz noted many federal district courts had imported class action settlement
4 approval principles, demanding that PAGA settlements be “fair, reasonable, and adequate,” and
5 weighing factors such as “the strength of the plaintiff’s case, the risk, the stage of the proceeding,
6 the complexity and likely duration of further litigation, and the settlement amount[.]” Id. at *8-9
7 (collecting cases). Observing that “PAGA’s purpose” is to “protect the public interest” – especially
8 the allegedly aggrieved employees – the Moniz Court agreed with these federal authorities,
9 concluding the same principles that ensure fairness in class action settlements likewise serve the
10 public interest in the PAGA context. These factors are more or less identical to those California
11 courts use to evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168
12 Cal.App.4th 116 and, consistent with Moniz, Plaintiffs submit they should inform the Court’s
13 analysis as well. For the reasons below, the proposed settlement is fair, reasonable and adequate,
14 advances the purposes underlying PAGA, and should be approved.

15 **A. Nature of the Alleged Violations**

16 Plaintiff alleges claims for civil penalties for unpaid wages, meal/rest break violations, and
17 facial wage statement violations, as well as derivative wage statement and waiting time penalty
18 claims. First, Plaintiff contends Defendant failed to pay employees appropriate premiums when they
19 worked a split shift (defined under Wage Order 5-2001 as “a work schedule which is interrupted by
20 non-paid non-working periods established by the employer, other than bona fide rest or meal
21 periods”). When an employee works a split shift, one hour's pay at the minimum wage shall be paid
22 in addition to the minimum wage for that workday, and Plaintiff’s expert found Defendant’s
23 employees worked over 86,000 total split shifts during the PAGA Period without any corresponding
24 payment of a split shift premium. [Ardestani Decl., ¶ 13.]

25 Plaintiff next alleges Defendant underpaid overtime wages due by failing to incorporate non-
26 discretionary bonuses in the “regular rate of pay.” Alvarado v. Dart Container Corp. of California
27 (2018) 4 Cal.5th 542, 554. 573 (confirming certain bonuses should be factored into an employee’s

1 regular rate of pay before determining the employee's overtime pay rate). Per Plaintiff, by failing to
2 properly recalculate the regular rate of pay for those pay periods where employees both worked
3 overtime and received bonus pay, Defendant underpaid overtime wages. [Ardestani Decl., ¶ 14.]

4 Plaintiff also contends Defendant failed to provide proper meal and rest break policies
5 because Nozawa had “de facto” policy requiring on duty meal periods because Plaintiff and other
6 aggrieved employees regularly received work-related phone calls and texts while on their breaks. If
7 work obligations intrude on any portion of an employee’s break time, it results in a violation no
8 matter how small the intrusion. L’Chaim House, Inc. v. Dep’t of Indus. Relations (2019) 38
9 Cal.App.5th 141. For the same reason, by contacting employees on their personal phones for work
10 purposes, defendant also became obligated to pay expense reimbursement under Cochran v.
11 Schwan’s Home Serv., Inc. (2014) 228 Cal.App.4th 1137, 1143-1144. Lastly, Plaintiff also brings
12 derivative claims for inaccurate wage statements and failure to pay all wages due and owing upon
13 separation of employment under Labor Code §§ 201-203. [Ardestani Decl., ¶¶ 15-17.]

14 **B. Number of Alleged Violations and Potential Penalties**

15 For mediation, Defendant indicated there are approximately 1,690 individuals who fit within
16 Plaintiff’s definition of alleged aggrieved employees in California during the relevant PAGA period,
17 and these individuals worked approximately 28,890 pay periods. Based on the data and information
18 provided by Defendant, and with their expert’s assistance and analysis, Plaintiff estimated
19 Defendant’s theoretical maximum PAGA exposure at over \$13,480,000. Plaintiff, however,
20 substantially discounted that number to account for Defendant’s procedural and merits defenses, of
21 which there are many. [Ardestani Decl., ¶¶ 18-19.]

22 **C. The Settlement Meets the Moniz/Kullar Factors and is Fair, Reasonable and**
23 **Adequate**

24 In response to Plaintiff’s split shift claim, Defendant emphasized employees are not
25 automatically entitled to one hour of pay for a split shift, but rather only entitled to the difference
26 between his or her actual pay at the regular rate and the applicable minimum wage multiplied by the
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1 number of hours actually worked.³ Thus, per Nozawa, even if employees worked split shifts they
2 were not entitled to any additional pay because they earned substantially more at their regular rate
3 than they would have received at the minimum wage plus the additional hour of minimum wage pay
4 for the number of hours worked. On the overtime wage claims, Defendant argued its time keeping
5 and payroll policies are legally compliant, that it accurately tracked all hours worked and paid the
6 allegedly aggrieved employees for all hours worked at the correct rates, including the correct
7 overtime rates, consistent with its compliant policies. [Ardestani Decl., ¶ 20.]

8 For the meal and rest break claims, Defendant offered multiple defenses. First, Defendant
9 emphasized that the written meal and rest break policy generally was compliant, that they authorized
10 and permitted all necessary breaks, and that alleged aggrieved employees received full 30 minute
11 lunch periods without interruption as reflected in the time records. Defendant also argued that even
12 to the extent missed/non-compliant breaks occurred, whether for a phone call/text or some other
13 reason, it was in violation of company policy and would require significant individual inquiries to
14 determine the reasons underlying any such alleged violations and whether it was by employee choice
15 or some other reason. Thus, per Defendant, any trial would be unmanageable on a representative
16 basis because of these individualized issues. [Ardestani Decl., ¶ 21.]

17 As with meal breaks, Defendant argued the applicable rest break policies complied with
18 California law and authorized and permitted employees to take all required breaks. Defendant
19 further contended that, in light of the fact that recording rest periods is not required, any evidence
20 of failure to authorize rest periods and/or discouragement from taking rest periods would be purely
21 anecdotal and individual issues would predominate on liability. Defendant also contended that they
22 are only liable if Plaintiff can prove, on a shift-by-shift basis, that each alleged aggrieved employee
23 actually did not receive a fully-compliant rest break. This arguably would once again make a trial
24

25 ³ For example, if the minimum wage is \$10/hour and the employee regularly earns \$11/hour, over an 8 hour day the
26 employee earns \$8.00 more than he or she would earn at the minimum wage. If the employee works a split shift, he or
27 she receives the difference between the minimum wage and the amount over the minimum working at the regular
28 wage would have yielded, i.e. \$10-\$8, or \$2.00 as a split shift premium. If the employee earned \$15/hour regularly, he
or she would not receive a split shift premium at all because he or she would earn \$40 more than at the minimum
wage.

1 unmanageable since the instances an employee missed a rest break would have to be tested on a
2 case by case basis to determine compliance. [Ardestani Decl., ¶ 22.]

3 For the expense reimbursement claim, Defendant argued it there would be no conceivable need
4 for employees to use their phones for work while at the restaurant and, to the extent they did it was
5 purely for personal convenience and therefore neither required nor reasonable. Labor Code § 2802. Thus,
6 per Nozawa it owed no reimbursement for cell phone use. [Ardestani Decl., ¶ 23.]

7 On the wage statement and waiting time waiting time penalty claims, Defendant emphasized
8 that, to the extent they are derivative then they rise or fall along with the primary claims, in addition
9 to being subject to “good faith” and other defenses available to Defendant. Accordingly, Plaintiff
10 had to discount the value of these claims significantly in light of these multiple potential defenses.
11 Defendant also contended a substantial discount should be applied to the civil penalties for these
12 derivative (i.e., “stacked”) violations, as it would be unfair to penalize Defendant multiple times for
13 the same violation. [Ardestani Decl., ¶ 24.]

14 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
15 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise would
16 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2).
17 This is particularly true here where the claims essentially are premised on “de facto” violations and
18 that could prove difficult to establish on a representative basis, and in light of many cases that have
19 imposed substantial discounts on PAGA penalties awarded after trial. In Fleming v. Covidien (C.D.
20 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the potential
21 penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks Corp. (2018)
22 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5 per pay period, a
23 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and Hour Actions (E.D.
24 Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). Additionally,
25 no information came to light suggesting that any violations were knowing and willful by Defendant
26 and thus Plaintiff believes there is a high likelihood the Court would find imposition of significantly
27 more in penalties would be “unjust, arbitrary, or confiscatory.” [Ardestani Decl., ¶ 25.]

1 Thus, Defendant raised various and multi-layered procedural and merits defenses to
2 Plaintiff's claims, any one of which, if successful, could have decimated Plaintiff's case. And
3 Defendant vowed to raise all these defenses at trial. Accordingly, Plaintiff faced risky issues going
4 forward with this litigation, and it could have taken years to realize any recovery in this action along
5 with the possibility of post-trial appeals. In addition to its merits defenses and arguing trial would
6 be unmanageable, Defendant also intended to raise additional defenses on damages, including the
7 proper measure of civil penalties and the appropriate discount to place on any assessment of such
8 penalties. [Ardestani Decl., ¶ 26.]

9 Although Plaintiff and his counsel believe they could have prevailed, there was no such
10 guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits
11 on all claims, and securing maximum civil penalties all are factored into the equation, the settlement
12 value is reasonable and supported. Indeed, to recover maximum penalties Plaintiff would have to
13 shoot the moon and win on liability as to all claims and convince the Court to award full penalties,
14 which outcome is highly unlikely. Given Defendant's procedural and merits defenses, as well as the
15 substantial penalty reductions ordered in the cases above – which occurred after trial – the proposed
16 settlement is eminently reasonable. [Ardestani Decl., ¶ 27.]

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

4 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
5 the probability of appeal of a favorable judgment, and the Court's substantial discretion to reduce
6 any penalty award all are accounted for, it is clear a settlement amount of \$325,000 for the PAGA
7 claim is within the ballpark of reasonableness, and approval is appropriate.

8 **V. SUBMISSION TO THE LWDA**

9 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
10 notified the LWDA of this approval hearing. [Ardestani Decl., ¶ 28; Exh. 5.] Accordingly, the
11 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
12 approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA
13 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
14 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the
15 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL
16 4773057, at *9; Jordan v NCI Grp., Inc. (C.D. Cal. Jan. 5, 2018) 2018 U.S. Dist. LEXIS 25297, at
17 *7 ("Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to
18 the proposed settlement and no comment or objection has been received.").

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

20 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
21 that benefits the LWDA and aggrieved employees, one-third of the gross settlement, or \$108,333.33,
22 is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs. These
23 fees are warranted under the law and within the range of fees commonly awarded in similar cases.
24 [Ardestani Decl., ¶ 29.]

25 **A. Plaintiff's Counsel Are Entitled to Recover Attorney's Fees Under the Common** 26 **Fund Doctrine**

27 PAGA provides a plaintiff is entitled to recover reasonable attorney's fees, expenses, and
28 costs under Labor Code § 2699(g)(l): "Any employee who prevails in any action shall be entitled to

1 an award of reasonable attorney's fees and costs," Reasonable attorney's fees and costs are
2 typically awarded under the common fund doctrine in a *qui tam* such as this one, where, as here, the
3 litigation creates a common fund of money in a specific amount for the benefit of others.

4 "A *qui tam* action is one brought under a statute that allows a private person to sue as a
5 private attorney general to recover damages or penalties, all or part of which will be paid to the
6 government." People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
7 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
8 allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to
9 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
10 only be assessed and collected by the LWDA. Kim v. Reins Int'l California, Inc. (2020) 9 Cal.5th
11 73; Iskanian v. CLS Transportation of Los Angeles, 59 Cal.4th at 380-82 ("[a] PAGA representative
12 action is therefore a type of *qui tam* action"). Indeed, the majority of the civil penalties recovered in
13 a PAGA action are paid to the State, with a smaller portion paid to the aggrieved employees (e.g.
14 75% paid to the state; 25% paid to the aggrieved employees). Lab. Code § 2699(i). Where a common
15 fund is created in a *qui tam* action by the successful litigation of a plaintiff, the plaintiff's attorneys
16 are entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164
17 Cal.App.3d 66, 89-91.

18 Through the efforts of Plaintiff and his attorneys, a common fund was created in the amount
19 of \$325,000 for the benefit of the allegedly aggrieved employees and the State. Thus, these
20 beneficiaries should bear their share of the costs and attorney's fees out of the overall recovery under
21 the common fund theory. Boeing Co. v. Van Gemert (1980) 444 U.S. 472, 478-482; Six (6) Mexican
22 Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d 1301, 1311.

23 Not long ago, the California Supreme Court upheld the use of the common fund theory of
24 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Cal.5th 480, 506. There,
25 the Court upheld an award of attorney's fees of one-third of the \$19 million gross settlement (e.g.,
26 awarded \$6.33 million in fees) under the common fund theory of recovery. Lafitte is consistent
27 with prior decisions recognizing "when a number of persons are entitled in common to a specific
28

1 fund, and an action brought by ... plaintiffs for the benefit of all results in the creation or preservation
2 of that fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." Serrano v. Priest
3 (1977) 20 Ca1.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who recovers a common fund ... is
4 entitled to reasonable attorneys' fees from the fund as a whole"; Lealao v. Beneficial California, Inc.
5 (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when a settlement or adjudication results in
6 the establishment of a separate or so-called common fund for the benefit of the class").

7 Accordingly, the common fund doctrine allows a court to award attorney's fees based on a
8 percentage of the total fund created when the fund consists of a "certain or easily calculable sum of
9 money," and California law has long applied the percentage of the recovery method for awarding
10 attorney's fees where a common fund is established. Serrano, 20 Ca1.3d at 34; Bell v. Farmers Ins.
11 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
12 1809; Sanders v. City of Los Angeles (1970) 3 Ca1.3d 252, 261-63 (affirming award of attorney's
13 fee based on percentage of recovery).

14 Awarding attorney's fees of one-third of gross common fund amount is favored by California
15 courts when a fund established for the common benefit of others is involved, such as here.
16 Accordingly, awarding fees on this basis out of the \$325,000 GSA, for a total of \$108,333.33, is
17 reasonable and appropriate. [Ardestani Decl., ¶¶ 29-46.]

18 **B. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award**

19 Despite the recognized limitations of the so-called lodestar method, some California and
20 federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed
21 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier"
22 method of cross-checking proposed fee awards, the court first ascertains counsel's total "lodestar"
23 amount by multiplying the number of hours reasonably expended by each attorney's reasonable
24 hourly rate, and then enhances or reduces this lodestar figure by a "multiplier" to account for a range
25 of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of
26 success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Ca1.4th 1084, 1095-96; Lealao, 82
27

1 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is within
2 the range of fees freely negotiated in the legal marketplace in comparable litigation”).

3 Here, Crosner Legal’s lodestar is approximately \$131,745.00, based on 184.2 attorney hours
4 spent litigating the case. [Ardestani Decl., ¶¶ 33-46; Exh. 6.] On a lodestar basis, the fee request
5 of \$108,333.33 results in a lodestar that is higher than the fees requested on a percentage of the
6 recovery basis and, accordingly, there is no request for a multiplier. It also is important to note this
7 fact serves to highlight the reasonableness of the fees sought on a percentage-of-the-recovery basis,
8 as it shows the requested fees are actually lower than the market rate for the services rendered if
9 those services are valued via traditional hourly billing.

10 **C. The Requested Costs Are Reasonable**

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

21 Plaintiff’s Counsel’s actual costs presently are \$13,614.40. This includes filing fees, service
22 of process, mediation costs, postage, and expert consultant fees, while waiving photocopying costs
23 and legal research charges. These costs are reasonable and uncontested, and should be approved.
24 [Ardestani Decl., ¶¶ 47-48.]

25 **VII. CONCLUSION**

26 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
27 PAGA, approve the requested award of reasonable attorney’s fees and costs, approve Atticus

1 Administration, Inc. as the settlement administrator and approve its fees in the amount of \$9,190.00,
2 approve Plaintiff's enhancement award in the amount of \$5,000, approve the proposed distributions
3 to the LWDA and Aggrieved Employees, and enter its Order of final approval and judgment thereon.
4

5 Dated: August 23, 2023

CROSNER LEGAL, P.C.

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8 Zachary Crosner

9 Jamie K. Serb

Sepideh Ardestani

10 Attorneys for Plaintiff Rodney Johnson
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