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8 **SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF MERCED**
10

11 JUAN QUINTERO on behalf of all others
12 similarly aggrieved,

13 Plaintiff,

14 vs. GREG MARKARIAN AG
15 ENTERPRISES, INC., a California
corporation, and DOES 1 through 20,
inclusive,

16 Defendants.
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CASE NO. 23CV-00106

Assigned for All Purposes to:
Hon. Brian McCabe
Dept. 8

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

Date: March 8, 2024
Time: 8:15 a.m.
Dept. 8

1 **I. INTRODUCTION**

2 Plaintiffs Juan Quintero and Miguel Avila hereby seek Court approval of a proposed
3 settlement of claims brought under the Private Attorneys General Act (“PAGA”) against
4 defendant Greg Markarian Ag Enterprises, Inc. (“Markarian” or “Defendant”). Consistent with
5 PAGA, the proposed settlement releases claims under PAGA only and has no impact on the
6 individual claims of any allegedly aggrieved employee other than Plaintiffs. Since the settlement
7 resolves nothing more than claims under PAGA, it requires only a one-step review and approval
8 process by the Court, and for the reasons discussed below, the proposed settlement is fair,
9 reasonable, and adequate, and advances the statutory purposes of PAGA. Plaintiff respectfully
10 requests the Court approve the Settlement in its entirety.

11 **II. BACKGROUND**

12 Markarian is a trucking company headquartered in Fresno that provides trucking services
13 in the Central Valley and Central Coast for the agricultural industry. Plaintiff Quintero worked for
14 Markarian as a driver for several years until his termination in June 2022. Plaintiff Avila also
15 worked as a driver from about August 2019 to May 2021. Both Plaintiffs and other aggrieved
16 employees drove “big rigs” weighing more than 26,001 pounds and accordingly were subject to
17 California CHP and federal Department of Transportation regulations regarding driving hours,
18 overtime, and meal/rest breaks. While employed with Markarian, Plaintiffs alleged they were
19 required to perform work “off the clock” for which they were not properly compensated, and
20 further required to use their personal cell phones for work purposes without reimbursement.
21 [Declaration of J. Kirk Donnelly (“Donnelly Decl.”), ¶ 4.]

22 On or about September 14, 2022, Plaintiff Quintero submitted appropriate notice¹ to the
23 Labor & Workforce Development Agency (“LWDA”) regarding the alleged Labor Code
24 violations at issue in this matter, and later submitted an amended PAGA notice on November 18,
25 2022, adding claims alleged by Plaintiff Avila. Having exhausted administrative remedies,
26 Plaintiff Quintero filed a PAGA-only complaint on January 10, 2023, seeking civil penalties for

27
28 ¹ Plaintiffs’ PAGA notice letters and proof of submission are attached to the Donnelly Declaration as Exhibits 2 and 3 respectively.

1 the alleged: (a) failure to pay all wages due, including minimum wages; (b) failure to provide
2 meal and rest periods; (c) failure to provide complete and accurate wage statements; and (d)
3 failure to pay wages due on separation of employment. Plaintiffs filed the matter on behalf of
4 Aggrieved Employees defined to include all individuals employed by Markarian as non-exempt
5 employees during the relevant PAGA time frame of November 6, 2021 to November 30, 2023.
6 On February 3, 2023, Plaintiffs filed a first amended complaint adding Avila as a party-plaintiff,
7 and further alleging individual wage and hour claims on behalf of the two Plaintiffs in addition to
8 the pending PAGA claims. [Donnelly Decl., ¶ 5.]

9 Markarian has at all times denied Plaintiff's allegations and maintained its timekeeping
10 and payroll policies accurately tracked and paid for all hours worked by its employees, that its
11 meal and rest break and payroll policies and procedures comply with applicable federal law (and
12 that California meal and rest break requirements are preempted by federal law), and that there
13 would be no need for Plaintiffs or other employees to use their personal phones for work
14 purposes. Additionally, Markarian strongly contends the case cannot be maintained as a
15 representative action as, to the extent Aggrieved Employees lost pay due to alleged "off the clock
16 work," or used personal phones on company business, it was against company policy, was
17 intermittent and infrequent and evidence of such violations would be purely anecdotal, and
18 therefore individualized issues predominate, which would render a trial under PAGA
19 unmanageable. [Donnelly Decl., ¶ 6.]

20 After filing their complaint, Plaintiffs served an initial round of written discovery.
21 Thereafter, upon discussing the merits of the case and engaging in several meet and confer
22 sessions, the Parties agreed to mediation. The Parties further agreed to an informal exchange of
23 documents and information before the mediation. Through this informal discovery, Defendant
24 provided Plaintiff with information including, inter alia, Plaintiffs' personnel files, the number of
25 potential Aggrieved Employees, the number of aggregate pay periods, pay stubs and time records
26 for a sampling of the Aggrieved Employees, and relevant policy documents regarding
27 Defendant's time keeping and reporting policies, among other pertinent materials. [Donnelly
28 Decl., ¶ 7.]

On November 30, 2023, the Parties mediated the case with Laurie Saldana, Esq., a respected professional neutral with extensive class action/wage and hour experience. Before and during the mediation, Plaintiffs and their counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks. During mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on a representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and Defendant's defenses, and the Parties' data analyses and conclusions based on data provided by Defendant. After a contentious day of negotiations, the Parties reached agreement and subsequently formalized their tentative settlement in the Settlement Agreement now before the Court for approval. [Donnelly Decl., ¶ 8.] A fully executed, true and correct copy of the Individual and PAGA Settlement Agreement ("Settlement Agreement") is attached to the Donnelly Declaration as Exhibit 1.

III. SUMMARY OF SETTLEMENT TERMS

A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES

Under the settlement, Defendant will pay a non-reversionary settlement amount of \$30,000 (the "Gross Settlement Amount" or "GSA"). The GSA is inclusive of payments to the two named Plaintiffs in resolution of their individual claims alleged in the FAC, a PAGA Allocation of \$15,000, which is inclusive of all payments to the LWDA and Aggrieved Employees, modest service awards to each Plaintiff, costs of settlement administration (estimated at no more than \$1,550), and reasonable attorney's fees and costs.² After payment of the individual settlements, settlement administration costs, and reasonable attorney's fees and costs from the GSA, Plaintiff presently estimates about \$3,950 will remain (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about \$2,962.50) will go to the LWDA, and the remaining 25% (about \$987.50) will be distributed to the Aggrieved Employees in proportion to the total number of Pay Periods each individual worked during the PAGA Period of November 6, 2021 to November 30, 2023, with an average award currently estimated at about \$34 per

² Plaintiff's counsel is requesting 1/3 of the PAGA Allocation (\$5,000.00) in fees and costs of \$4,000.00. Plaintiffs each are requesting a service award of \$250 (or \$500 total) for their service as the named PAGA plaintiffs.

individual. [Donnelly Decl., ¶ 9.]

B. PAYMENT AND THE NOTICE

The Parties propose using ILYM Group, Inc. as the Settlement Administrator. ILYM has extensive experience administering PAGA settlements, and has agreed to cap its fees at \$1,550. [Declaration of Lisa Mullins, ¶¶ 2-7; Exhs. A-C.] Markarian will fund the GSA within 15 days of approval, and within 10 days of funding ILYM will mail a Notice and settlement check to all Aggrieved Employees via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in Markarian’s records. Aggrieved Employees need not submit claim forms and will automatically receive a Notice and settlement check. Settlement checks will be negotiable for 120 days, after which time any unclaimed residual funds will be forwarded to the California State Controller’s Unclaimed Property Fund. [Donnelly Decl., ¶ 10.]

C. THE RELEASE

The California Supreme Court has explained that a judgment in “a representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969, 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended to be “binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” The Settlement Agreement protects the rights of the Aggrieved Employees to bring their own individual claims should they wish. For these reasons, the Parties contend the release narrowly applies only to the PAGA claims alleged, and the Settlement Agreement specifically provides the PAGA Release is inapplicable to any claims other than those brought under PAGA. Only the two named plaintiffs are entering into a general release of claims and waiver of Civil Code § 1542. [Donnelly Decl., ¶ 11.]

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

PAGA requires the Court to “review and approve any settlement of any civil action filed

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

6 In so holding, Moniz noted many federal district courts had imported class action
7 settlement approval principles when evaluating PAGA settlements, demanding that PAGA
8 settlements be “fair, reasonable, and adequate,” and weighing factors such as “the strength of the
9 plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely duration of further
10 litigation, and the settlement amount[.]” Id. at 75-76 (collecting cases). Observing that “PAGA’s
11 purpose” is to “protect the public interest” - especially the allegedly Aggrieved Employees – the
12 Court agreed with this district court authority, concluding that much the same principles that
13 ensure fairness in class action settlements serve the public interest in the PAGA context.
14 Essentially, these factors are more or less identical to those California courts use to evaluate class
15 action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and,
16 accordingly, Plaintiff submits they should inform the Court’s analysis as well. For the reasons
17 below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying
18 PAGA, and should be approved.

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

20 Plaintiff primarily contends Defendant failed to pay all wages due because it required
21 employees to work “off the clock” both before and after their scheduled shift start/stop times,
22 which resulted in the Aggrieved Employees losing a few minutes of compensable hours worked
23 on many shifts. They further allege Markarian required them to use their personal cell phones for
24 work purposes, such as navigating to while driving, communicating with headquarters, and
25 receiving dispatch to their next job. Per Plaintiffs, they did not receive any reimbursement for
26 this. Plaintiffs also bring claims derivative of the foregoing claims, including a derivative wage
27 statement claim based on the failure to pay all wages due, and failure to pay all wages due and
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owing upon separation of employment under Labor Code §§ 201-203.³ [Donnelly Decl., ¶ 12.]

B. NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES

For mediation, Markarian indicated it employed approximately 29 non-exempt employees in California during the relevant time frame, and these individuals worked approximately 600 pay periods at during that time. Based on the data provided by Defendant, Plaintiffs estimated Defendant's maximum PAGA exposure at approximately \$181,200 including approximately \$60,000 on the unpaid wage/off the clock claims, about \$60,000 on expense reimbursement claims, \$60,000 on the wage statement claims, and about \$1,200 in civil penalties for failing to timely pay wages on separation of employment. [Donnelly Decl., ¶ 13.]

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

In response to Plaintiff's unpaid wage/off the clock claim, Markarian argued its time keeping policies are entirely consistent with California law and did not deprive class members of compensable hours worked. Per Markarian, its timekeeping and payroll policies accurately recorded and paid for all hours worked, and it also noted it paid Plaintiffs and other employees for their 30 minute lunches and, accordingly, even if employees lost a few minutes before or after a shift it was more than offset by the extra 30 minutes of pay for the meal breaks. Defendant also contends to the extent any off the clock work occurred, it was against company policy and done without company knowledge. Accordingly Defendant argued the issue would not be amenable to representative treatment since it would require individualized inquiries whether any compensable "off the clock" work occurred and why it was or was not documented and paid for. White v. Starbucks Corp., 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (employer must have actual or constructive knowledge of the off the clock work for liability to attach). [Donnelly Decl., ¶ 14.]

On the expense reimbursement claim, Plaintiffs alleged that throughout their employment, they had to use their personal cell phones in order to communicate with supervisors and dispatch

³ While Plaintiffs alleged claims for unpaid meal and rest breaks, Plaintiffs' investigation confirmed Markarian and the Aggrieved Employees engaged in "interstate commerce" such that federal law completely preempts application of California's meal and rest break requirements. Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin. (9th Cir. 2021) 986 F.3d 841, 858 (California meal and rest break requirements preempted by federal law for certain truck drivers); Garcia v. Superior Court (2022) 80 Cal.App.5th 63, 68 (same).

1 in order to receive work orders, and to navigate to and from pick up/drop off locations. However,
2 Defendants did not reimburse Plaintiffs and other employees for this expense. Cochran v.
3 Schwan's Home Serv., Inc. (2014) 228 Cal.App.4th 113. On the other hand, Defendant argued its
4 trucks contained whatever electronics were needed to perform the job, and there would be no
5 conceivable need for employees to use their phones for work. Thus, per Markarian, any use of
6 employee phones was purely for personal convenience and therefore not reimbursable. [Donnelly
7 Decl., ¶ 15.]

8 Plaintiffs also alleged derivative violations of Labor Code § 226 (wage statement
9 violations) and §§ 201-203 (waiting time penalties). Both claims, since they are entirely
10 derivative, will rise or fall along with the primary unpaid wage claims, in addition to being
11 subject to “good faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2
12 (2008) 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages
13 under Labor Code § 203 even though the class prevailed on the merits on the underlying claim for
14 failing to pay living wages). Accordingly, Plaintiffs discounted these claims significantly in light
15 of these multiple potential defenses. Defendant also contended a substantial discount should be
16 applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be unfair
17 to penalize Defendant multiple times for the same violation. [Donnelly Decl., ¶ 16.]

18 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
19 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
20 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
21 2699(h). Several state and federal courts in California have applied significant reductions to
22 PAGA civil penalties even after plaintiffs prevailed on the merits. In Fleming v. Covidien (C.D.
23 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
24 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
25 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
26 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
27 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
28 trial). [Donnelly Decl., ¶ 17.]

1 Thus, Defendant raised various and multi-layered defenses to each of Plaintiffs' claims,
2 anyone of which, if successful, could have derailed Plaintiff's case. And Defendant vowed to
3 raise all these defenses at trial. Accordingly, Plaintiffs faced risky issues going forward with
4 litigation, and it could have taken years to realize any recovery in this action along with the
5 possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be
6 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. [Donnelly Decl., ¶ 18.]

9 Although Plaintiffs and their counsel believes they could have prevailed, there was no
10 such guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the
11 merits on all claims, securing the maximum theoretical civil penalties, and appellate risks all are
12 factored into the equation, the settlement value is reasonable and supported. Of course, to recover
13 anywhere near the maximum penalties Plaintiffs would have to shoot the moon and win both
14 liability and maximum penalties on all claims, which outcome, for the reasons discussed, is
15 unlikely. Given Defendant's various procedural and merits defenses, as well as the substantial
16 penalty reductions ordered in the cases above – which occurred after trial – the proposed
17 settlement is reasonable. [Donnelly Decl., ¶ 19.]

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

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
3 even 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, the Court's substantial discretion to reduce any
6 penalty award all are accounted for, it is clear a settlement amount of \$15,000 for the PAGA
7 claims is within the ballpark of reasonableness, furthers the purposes underlying PAGA, and
8 approval is appropriate.

9 **V. SUBMISSION TO THE LWDA**

10 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
11 notified the LWDA of this approval hearing. [Donnelly Decl., ¶ 20; Exh. 4.] Accordingly, the
12 LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of
13 approval if the LWDA ultimately declines to offer any comment or objection to a proposed
14 PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017
15 WL 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the
16 proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings, 2018 WL
17 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
18 not objected to the settlement."); Jordan, 2018 U.S. Dist. LEXIS at *7 ("Additionally, the Court
19 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
20 no comment or objection has been received.").

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

22 For their efforts and the contingent risk undertaken in obtaining a common fund
23 settlement that benefits the LWDA and Aggrieved Employees, 1/3 of the PAGA Allocation, or
24 \$5,000.00, is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation
25 costs not to exceed \$4,000.00. These fees and costs are warranted under the law and within the
26 range of fees commonly awarded in similar cases.

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

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

10 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
11 private attorney general to recover damages or penalties, all or part of which will be paid to the
12 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487,
13 491- 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because
14 the statute allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement
15 agency, to sue his or her employer for Labor Code violations and recover civil penalties that
16 otherwise could only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc.
17 (2020) 9 Cal.5th 73; Iskanian, 59 Ca1.4th at 380-82 (“[a] PAGA representative action is therefore
18 a type of *qui tam* action”). Indeed, the majority of the civil penalties recovered in a PAGA action
19 are paid to the State, with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to
20 the state; 25% paid to the Aggrieved Employees). Lab. Code § 2699(i). As here, where a
21 common fund is created in a *qui tam* action by the successful litigation of a plaintiff and his
22 attorneys, the plaintiff’s attorneys are entitled to recover their fees from the common fund. Bank
23 of America v. Cory (1985) 164 Cal.App.3d 66, 89-91.

24 Through the successful efforts of Plaintiff and her attorneys here, a common fund was
25 created in the amount of \$15,000 for the benefit of the Aggrieved Employees and the State. Thus,
26 these beneficiaries should bear their share of the costs and attorney’s fees out of the overall
27 \$172,500 in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
28 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
1301, 1311.

1 Not long ago, the California Supreme Court upheld the use of the common fund theory of
2 recovery for attorney's fees in Laffitte v. Robert Half Int'l Inc. (2016) 1 Ca1.5th 480, 506. In
3 Laffitte, the Supreme Court upheld an award of attorney's fees of one-third of the \$19 million
4 gross settlement (*e.g.*, awarded \$6.33 million in fees) under the common fund theory of recovery.
5 Lafitte is consistent with prior decisions recognizing "when a number of persons are entitled in
6 common to a specific fund, and an action brought by ... plaintiffs for the benefit of all results in
7 the creation or preservation of that fund, such ... plaintiffs may be awarded attorneys' fees out of
8 the fund." Serrano v. Priest (1977) 20 Ca1.3d 25, 34; Boeing, 444 U.S. at 478 ("[A] lawyer who
9 recovers a common fund ... is entitled to reasonable attorneys' fees from the fund as a whole");
10 Lealao v. Beneficial California, Inc. (2000) 82 Cal.App.4th 19, 26 ("[f]ee spreading occurs when
11 a settlement or adjudication results in the establishment of a separate or so-called common fund
12 for the benefit of the class").

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

20 Awarding attorney's fees of one-third of gross common fund amount is favored by
21 California courts when a fund established for the common benefit of others is involved, such as
22 here. Accordingly, awarding fees on this basis out of the \$15,000 PAGA Allocation, for a total of
23 \$5,000, is reasonable and appropriate. [Donnelly Decl., ¶¶ 21-33.]

24 **B. A LODESTAR CROSS-CHECK CONFIRMS THE REASONABLENESS**
25 **OF THE FEE AWARD**

26 Despite the recognized limitations of the so-called lodestar method, some California and
27 federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed
28 percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier"

1 method of cross-checking proposed fee awards, the court first ascertains counsel’s total “lodestar”
2 amount by multiplying the number of hours reasonably expended by each attorney’s reasonable
3 hourly rate, and then enhances or reduces this lodestar figure by a “multiplier” to account for a
4 range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree
5 of success achieved. PLCM Group, Inc. v. Drexler (2000) 22 Ca1.4th 1084, 1095-96; Lealao, 82
6 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the “fee awarded is
7 within the range of fees freely negotiated in the legal marketplace in comparable litigation”).

8 Here, Plaintiff’s counsel’s lodestar is approximately \$25,705.00, based on 33.1
9 attorney/paralegal hours spent litigating the case. [Donnelly Decl., ¶¶ 24-32; Exh. 6.] On a
10 lodestar basis, the fee request of \$5,000 is less than the base lodestar, and accordingly there
11 is no request for a lodestar enhancement.

12 **C. The Requested Costs Are Fair And Reasonable**

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

23 While the Settlement Agreement authorizes litigation costs not to exceed \$4,000
24 Plaintiff’s Counsel’s actual costs presently are \$4,000. [Donnelly Decl., ¶¶ 34-35.] This includes
25 filing fees, mediation costs, and postage, while waiving photocopying costs and legal research
26 charges. These costs are reasonable and uncontested, and should be approved.

27 **VIII. CONCLUSION**

28 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement

1 under PAGA, approve the requested award of reasonable attorney's fees and costs, approve Apex
2 Class Action as the settlement administrator and approve is fees in the amount of \$1,550.00,
3 approve the proposed distributions to the LWDA and Aggrieved Employees, and enter judgment.
4

5 Dated: February 1, 2024

LAW OFFICES OF J. KIRK DONNELLY, APC

7 
8 J. Kirk Donnelly
9 Attorneys for Plaintiffs JUAN QUINTERO and
MIGUEL AVILA