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Attorneys for Plaintiff
GUADALUPE HERNANDEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY

GUADALUPE HERNANDEZ, on behalf of
himself, and all others similarly situated,

Plaintiff,

v.

AUTOMATED HARVESTING, LLC; and
DOES 1 through 50, inclusive,

Defendants.

Case No: 22CV002717

REPRESENTATIVE ACTION

**SUPPLEMENTAL DECLARATION OF
ROBERT SPENCER IN SUPPORT OF
MOTIONS FOR AN ORDER APPROVING
SETTLEMENT OF PAGA ACTION AND
DISMISSING ACTION WITH
PREJUDICE AND FOR AN ORDER
AWARDING ATTORNEYS' FEES AND
COSTS, ENHANCEMENT PAYMENT,
AND SETTLEMENT ADMINISTRATION
FEES**

[Assigned for all purposes to The Honorable
Thomas A. Wills, Dept. 15]

Date: December 15, 2023
Time: 8:30 a.m.
Dept. 15

Complaint filed: September 13, 2022
FAC Filed: November 15, 2022
SAC Filed: December 20, 2022

1 I, ROBERT SPENCER, declare as follows:

2 1. I am an attorney duly admitted to the practice of law in the State of California and
3 before this Court. I am a senior associate in the law firm Keller Grover LLP, counsel for
4 Representative Plaintiff Guadalupe Hernandez (“Plaintiff”) in this action. I have personal
5 knowledge of the facts stated herein and, if called as a witness, I could and would testify
6 competently to the facts set forth below.

7 **Strengths and Weaknesses of the Case:**

8 2. The Court requested additional information regarding the strengths and
9 weaknesses of this case.

10 3. This case is brought as a representative action pursuant to the Labor Code Private
11 Attorneys’ General Act of 2004, Labor Code §§ 2698, *et. seq.* (“PAGA”).¹ The operative Second
12 Amended Complaint alleges four causes of action: 1) unpaid overtime, 2) failure to provide
13 accurate, itemized wage statements, 3) failure to timely pay wages within applicable pay periods
14 as required by Labor Code § 204b, and 4) failure to pay final pay as required by Labor Code §§
15 201-203.²

16 4. The main factual issue leading to Plaintiff bringing this action are the wage
17 statements Defendant issues to aggrieved employees. These wage statements are complex and
18 Plaintiff contends are indecipherable. The unpaid overtime allegations derive from issues with
19 Defendant’s wage statements as Plaintiff contends it is impossible to know if aggrieved
20 employees are properly paid. Plaintiff’s allegations for violations of Labor Code §§ 201-203 and
21 204b are in turn based on the unpaid overtime claim.

22 //

23 //

24
25 ¹ Declaration of Robert Spencer in Support of Motions for an Order Approving Settlement of
26 PAGA Action and Dismissing Action with Prejudice and for an Order Awarding Attorneys’ Fees
27 and Costs, Enhancement Payment, and Settlement Administration Fees, Filed October 10, 2023
28 (“Spencer Decl.”), Ex. 3 (“Second Amended Complaint”) at ¶ 7. All Exhibits are attached to the
Spencer Decl. unless otherwise noted.

² *Id.* at ¶¶ 7, 22-49.

5. An example of Defendant's wage statements is attached as Exhibit 1 to Plaintiff's PAGA letter.³ From this wage statement, it appears that Mr. Hernandez was not paid overtime at the proper rate. This wage statements shows that Plaintiff was paid overtime on August 21, 2021 at the rate of \$14.2158, which makes no sense because his base rate was \$16.05.⁴

6. While the wage statement attached to the PAGA letter is from outside the PAGA liability period, Defendant provided numerous additional wage statements prior to the mediation that Plaintiff contends have similar issues.⁵ For example, a true and correct copy of Plaintiff's wage statement with the pay date November 11, 2021 is attached hereto as **Exhibit 5**. For work performed on November 5, 2021, it shows a regular rate of \$16.0504.⁶ For the overtime worked that day, it shows a pay rate of \$14.3704.⁷ The additional separate line items for Rest & Recovery Periods make the wage statement even more complicated.⁸ Plaintiff asserts that this wage statement does not make sense and it is not possible to determine if he was paid overtime at the proper rate.

7. Defendant contends that the format of its wage statements are entirely legal. Defendant contends that the wage statements are correct, even though perhaps complicated, because Defendant pays production bonuses. These production bonuses are based on the amount of produce harvested per hour beyond a set amount. Due to the production bonuses, there are numerous different regular rates being paid in a single pay period.

8. In defense of the format of its wage statements, Defendant cites *General Atomics v. Superior Court*.⁹ *General Atomics* examines numerous different formats of wage statements

³ Ex. 3 (PAGA Letter, Exhibit 1, Plaintiff's wage statement).

⁴ Ex. 3 (PAGA Letter, Exhibit 1, Plaintiff's wage statement).

⁵ At the time the PAGA letter was drafted, Plaintiff did not have all of his wage statements in his possession and control. Additional wage statements within the applicable limitations period were produced prior to the mediation.

⁶ Supp. Spencer Decl. Ex. 5.

⁷ *Id.*

⁸ *Id.*

⁹ (2021) 64 Cal. App. 5th 987 ("*General Atomics*").

1 that feature different regular rates during a single pay period.¹⁰ The basic premise of *General*
2 *Atomics* is that wage statements that contain different regular rates within a single pay period
3 may be complicated, but are not necessarily illegal under California law.¹¹

4 9. At the mediation, Defendant walked the mediator and Plaintiff's Counsel through
5 several different wage statement and explained its position as to why its wage statements are
6 legal under *General Atomics*.

7 10. Defendant also contends that it not only properly paid overtime, but actually paid
8 overtime at rates beyond which are required by California law. Thus, Defendant contends it has a
9 complete defense to both the wage statement and overtime claims, which in turn would defeat
10 the remaining Labor Code §§ 201-203 and 204b claims.

11 11. Thus, the strength and weaknesses of Plaintiff's claims all rest on the complexities
12 of the wage statements at issue. Either Defendant will be able to explain the propriety of its wage
13 statements and its overtime calculations to the finder of fact, or it will not. The success or failure
14 of every single claim at issue in this action are based on the wage statements.

15 12. As such, this is a potentially zero-sum case. If Defendant were able to persuade
16 the finder of fact that its wage statements are legal and accurate, there is a real risk of a net-zero
17 recovery. If the wage statement claim fails, the remaining claims would also likely fail as the
18 entire case hinges on the wage statements.

19 13. Additionally, even if Plaintiff was successful, Labor Code § 2699(e)(2) provides
20 that the court sets the amount of PAGA penalties after trial. Plaintiff Counsel's original
21 declaration addresses this in detail and listed numerous examples, including reductions where
22 courts have reduced PAGA penalties awarded to zero.¹²

23 14. As such, the settlement at hand is a reasonable compromise of the claims at issue.
24 The very essence of a settlement is compromise, i.e., the "yielding of absolutes and an
25

26 ¹⁰ *Id* at 983-1002.

27 ¹¹ *Id*.

28 ¹² Spencer Decl. at ¶ 28.

1 abandoning of highest hopes."¹³ Given the potential zero sum nature of this action, the LWDA
2 and the aggrieved employees could potentially receive absolutely nothing.

3 15. Instead, the estimated Net Settlement Fund available for PAGA penalties is now
4 \$266,800.¹⁴ As required by Labor Code § 2699(i), the Settlement Agreement provides that 75%
5 of the net Settlement Fund (\$200,100) and 25% (\$66,700) be paid to PAGA Group, who are the
6 aggrieved employees. Each PAGA Group member will receive, on average \$111.66
7 (\$66,700/600 aggrieved employees). This is a reasonable compromise, considering the risks of
8 that both the LWDA and the aggrieved employees could receive absolutely nothing.

9 **Plaintiff did not Provide a Release of Non-PAGA claims.**

10 16. The Court asked Plaintiff's Counsel to address whether Plaintiff's enhancement is
11 based on the release of any potential individual, non-PAGA claims. The release language is
12 contained in Section V.A of the Labor Code Private Attorneys General Act Settlement Agreement
13 ("Settlement Agreement"), and it does not include any non-PAGA claims.¹⁵ Plaintiff did not
14 provide any type of release whatsoever, including a general release, for non-PAGA claims.

15 **Date of Compliance Hearing:**

16 17. The Court requested the parties provide potential dates for a compliance hearing
17 during which the Court will check on the status of the distribution of funds. Any residual funds
18 from uncashed checks in the action are directed to the California State Controller for deposit in
19 the Unclaimed Property Fund in the name of the name of the applicable aggrieved employee for
20 their individual settlement payment.¹⁶

21 //

22 _____
23 ¹³ *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242.

24 ¹⁴ The prior estimate of the Net Settlement Fund was \$239,583.19. Spencer Decl. at ¶ 21. At the
25 prior hearing on PAGA approval, the Court indicated that it upon successful approval of the
26 settlement, it would award \$106,700 in attorneys' fees (reduced for Plaintiff Counsel's fee
original fee request of \$133,333.33) and \$15,000 in costs (reduced from Plaintiff Counsel's
original request of \$15,583.19). This adds \$27,216.81 to the Net Settlement Fund.

27 ¹⁵ Ex. 1 (Settlement Agreement).

28 ¹⁶ Ex. 1 at Section VIII.B (Settlement Agreement).

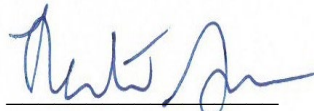
18. I have conferred with opposing counsel regarding the date of the compliance hearing. The State Controller now requires claims administrators to hold onto undistributed funds for a “dormancy period” prior to transferring such funds to the Unclaimed Property Fund. This dormancy period begins after the 180-day check-cashing period expires.¹⁷ Then there are additional reporting requirements that add even more time in addition to the dormancy period. As such, the compliance hearing should be scheduled for over two and half years out. I have met and conferred with Defendant and the parties suggest the compliance hearing be scheduled for July 2026.

Plaintiff’s Counsel Provided Notice to LWDA:

19. Prior to filing this declaration with the Court, I personally uploaded it to the LWDA via its website portal as required by Labor Code § 2699(1)(2).

20. The LWDA has not objected to notice of the parties’ PAGA settlement.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct, and that this Declaration was executed on this December 6, 2023 at San Francisco, California.


ROBERT SPENCER

¹⁷ *Id.*

EXHIBIT 5

Automated Harvesting, LLC
150 Main St, Suite 500
Salinas, CA 93901
831-754-0471

Pay Statement
Period Start Date 11/01/2021
Period End Date 11/07/2021
Pay Date 11/11/2021
Document 35737
Net Pay \$810.67

Pay Details

GUADALUPE DELGADO HERNANDEZ	Employee Number 161013	Pay Group AHL H2A Hourly
10266 S. AVE. 4E	SSN XXX-XX-XXXX	Location AHL California
YUMA, AZ 85385	Job AH Harvester	Department AHOPS - AHL Operations
USA	Pay Rate \$16.0500	Commodity Z - <None>
	Pay Frequency Weekly	Listing Z - <None>

Earnings

Pay Type	Period Start	Period End	Hours	Pay Rate	Current	YTD
Additional Pay					\$5.50	\$242.00
Group Term Life					\$0.19	\$6.19
H2A INBOUND REM			0.0000	\$0.0000	\$0.00	\$117.83
Orientation			0.0000	\$0.0000	\$0.00	\$41.55
Overtime	11/05/2021	11/05/2021	1.3333	\$14.3704	\$19.16	
Overtime	11/06/2021	11/06/2021	1.3333	\$14.3704	\$19.16	\$1,350.58
Production Bonus	11/01/2021	11/01/2021			\$17.68	
Production Bonus	11/02/2021	11/02/2021			\$30.52	
Production Bonus	11/03/2021	11/03/2021			\$23.99	
Production Bonus	11/04/2021	11/04/2021			\$16.90	
Production Bonus	11/05/2021	11/05/2021			\$45.22	\$6,871.17
Regular Pay	11/01/2021	11/01/2021	6.9167	\$16.0496	\$111.01	
Regular Pay	11/02/2021	11/02/2021	5.3334	\$16.0498	\$85.60	
Regular Pay	11/03/2021	11/03/2021	6.1667	\$16.0507	\$98.96	
Regular Pay	11/04/2021	11/04/2021	5.8334	\$16.0507	\$93.63	
Regular Pay	11/05/2021	11/05/2021	9.5001	\$16.0504	\$152.48	
Regular Pay	11/06/2021	11/06/2021	9.5001	\$16.0504	\$152.48	\$30,355.06
Rest & Recovery	11/01/2021	11/01/2021	0.3333	\$19.1719	\$6.39	
Rest & Recovery	11/02/2021	11/02/2021	0.1667	\$19.1362	\$3.19	
Rest & Recovery	11/03/2021	11/03/2021	0.3333	\$19.1719	\$6.39	
Rest & Recovery	11/04/2021	11/04/2021	0.1667	\$19.1362	\$3.19	
Rest & Recovery	11/05/2021	11/05/2021	0.1667	\$9.5981	\$1.60	
Rest & Recovery	11/05/2021	11/05/2021	0.5000	\$19.1600	\$9.58	
Rest & Recovery	11/06/2021	11/06/2021	0.5000	\$19.1600	\$9.58	
Rest & Recovery	11/06/2021	11/06/2021	0.1667	\$9.5981	\$1.60	\$1,580.84
Rest Penalty			0.0000	\$0.0000	\$0.00	\$19.54
Sick			0.0000	\$0.0000	\$0.00	\$131.58

Total Hours 48.2504

Deductions

Deduction	Based On	Pre-Tax	Employee Current	YTD	Employer Current	YTD
Group Term Life	\$0.19	No	\$0.19	\$6.19	\$0.00	\$0.00
H2A MEAL DEDUCT	\$0.00	No	\$92.19	\$4,126.10	\$0.00	\$0.00

Taxes

Tax	Based On	Current	YTD
CA Disability Employee	\$913.83	\$10.97	\$320.60

Paid Time On

Plan	Current	Balance	Account Number	Account Type	Amount
Sick-Arizona	0.0000	40.0000	Check amount		\$810.67
			Total		\$810.67

Pay Summary

	Gross	FIT Taxable Wages	Taxes	Deductions	Net Pay
Current	\$914.02	\$914.02	\$10.97	\$92.38	\$810.67
YTD	\$40,716.34	\$40,598.51	\$320.60	\$4,132.29	\$36,263.45

AH-Hernandez000141

PROOF OF SERVICE

I, JOEY GONZALEZ, am employed in the County of San Francisco, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1965 Market Street, San Francisco, California 94103. On December 6, 2023, in the case of *Hernandez v. Automated Harvesting, LLC, et al.*, Monterey County Superior Court Case Number 22CV002717, I served the foregoing document(s):

SUPPLEMENTAL DECLARATION OF ROBERT SPENCER IN SUPPORT OF MOTIONS FOR AN ORDER APPROVING SETTLEMENT OF PAGA ACTION AND DISMISSING ACTION WITH PREJUDICE AND FOR AN ORDER AWARDING ATTORNEYS' FEES AND COSTS, SERVICE PAYMENT, AND SETTLEMENT ADMINISTRATION FEES

on the interested party(ies) below, using the following means:

Andrew Levin
andy.levin@ogletree.com

Attorneys for Defendant
AUTOMATED HARVESTING, LLC

Michael Wilson
michael.wilson@ogletree.com

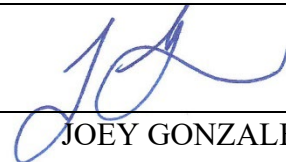
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☒	(BY ELECTRONIC SERVICE) by electronically mailing a true and correct copy in PDF format through our electronic mail system to the email address(es) set forth above, or as stated on the attached service list per agreement between the parties.
☒	(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



JOEY GONZALEZ