

ERIC A. GROVER (SBN 136080)
eagrover@kellergrover.com
ROBERT W. SPENCER (SBN 238491)
rspencer@kellergrover.com
KELLER GROVER LLP
1965 Market Street
San Francisco, California 94103
Telephone: (415) 543-1305
Facsimile: (415) 543-7861

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER AWARDING
ATTORNEYS' FEES, COSTS,
ENHANCEMENT PAYMENT, AND
SETTLEMENT ADMINISTRATION FEES**

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

Date: November 17, 2023
Time: 10:00 a.m. (matter will trail to end of
8:30 a.m. calendar)
Dept. 15

Complaint filed: September 13, 2022
FAC Filed: November 15, 2022

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION	6
4	II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY	6
5	A. Plaintiff’s Counsel’s work in litigating and settling this action.....	7
6	B. The Proposed Settlement.....	8
7	1) Settlement administration.	9
8	2) Attorneys’ fees and costs.	9
9	3) Enhancement award for the named Plaintiff.....	10
10	III. LEGAL ARGUMENT	10
11	A. Standards for approval of a PAGA settlement.....	10
12	B. Plaintiff’s Counsel is entitled to recover its reasonable fees and costs.....	10
13	1) Plaintiff is entitled statutorily to an award of attorneys’ fees and costs.....	10
14	2) Plaintiff’s Counsel is entitled to an award of reasonable fees and costs under the percentage of the common fund doctrine.....	12
15	a. The requested fee amount is within the range of reasonable fee awards under the “percentage of the fund” method.	15
16	3) The requested fees are justified under the lodestar method.	16
17	C. The enhancement payment sought by the named Plaintiff is reasonable.....	20
18	D. The Settlement Administrator’s fee is reasonable and should be paid.	23
19	IV. CONCLUSION	23
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

State Cases	Page(s)
<i>Amaro v. Anaheim Arena Mgmt., LLC</i> (2021) 69 Cal.App.5th 521	14, 17
<i>Arias v. Superior Court</i> (2009) 46 Cal.4th 969	10
<i>Bank of America v. Cory</i> (1985) 164 Cal.App.3d 66	13
<i>Cellphone Termination Fee Cases</i> (2010) 186 Cal.App.4th 1380	20
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	14, 17
<i>Clark v. Am. Residential Services LLC</i> (2009) 175 Cal.App.4th 785	20
<i>Estrada v. FedEx Ground Package System, Inc.</i> (2007) 154 Cal.App.4th 1	12
<i>General Atomics v. Superior Court</i> (2021) 64 Cal.App.5th 987	16, 15
<i>Glendale City Employees' Assoc. v. City of Glendale</i> (1975) 15 Cal.3d 328	13
<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553, 579-580	16
<i>Hernandez v. Restoration Hardware, Inc.</i> (2018) 4 Cal. 5th 260	14, 17
<i>In re Consumer Privacy Cases</i> (2009) 175 Cal.App.4th 545	13, 17
<i>Iskanian v. CLS Transp. L.A., LLC</i> (2014) 59 Cal.4th 348	11, 21
<i>Kim v. Reins Int'l California, Inc.</i> (2020) 9 Cal.5th 73	11
<i>Knoff v. City and County of San Francisco</i> (1969) 1 Cal.App.3d 184	13
<i>Laffitte v. Robert Half Int'l, Inc.</i> (2016) 1 Cal.5th 480	11, 13, 14, 17
<i>Parker v. Los Angeles</i> (1974) 44 Cal.App.3d 556	13
<i>Rider v. County of San Diego</i> (1992) 11 Cal.App.4th 1410	13
<i>Roos v. Honeywell International, Inc.</i> (Nov. 10, 2015) 2015 Cal. App. LEXIS 1004	14
<i>Serrano v. Priest ("Serrano III")</i> (1977) 20 Cal.3d 25	13, 17
<i>Serrano v. Unruh ("Serrano IV")</i> (1982) 32 Cal. 3d 621	18, 19
<i>Troester v. Starbucks Corp.</i> (2018) 5 Cal.5th 829	21
<i>Viking River Cruises, Inc. v. Moriana</i> (2022) 142 S. Ct. 1906	11, 21
<i>Ward v. United Airlines, Inc.</i> (2020) 9 Cal.5th 732	21
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224	17

Federal Cases

<i>Aguilar v. Wawona Frozen Foods</i> (E.D. Cal. May 18, 2017) 2017 U.S. Dist. LEXIS 76751	14
<i>Alvarez v. Farmers Ins. Exch.</i> (N.D. Cal. Jan. 17, 2017) 2017 U.S. Dist. LEXIS 119128	15
<i>Barbosa v. Cargill Meat Solutions Corp.</i> (E.D. Cal. July 2, 2013) 297 F.R.D. 431	14
<i>Basiliali v. Allegiant Air, LLC</i> (C.D. Cal. July 1, 2019) 2019 U.S. Dist. LEXIS 228250	11
<i>Beckman v. KeyBank, N.A.</i> (S.D.N.Y. 2013) 293 F.R.D. 467	17
<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472, 62 L. Ed. 2d 676, 100 S. Ct. 745	12, 13, 14
<i>Bolton v. U.S. Nursing Corp.</i> (N.D. Cal. Oct. 18, 2013) 2013 U.S. Dist. LEXIS 150299	18
<i>Borelli v. Black Diamond Aggregates, Inc.</i> (E.D. Cal. June 8, 2022) 2022 U.S. Dist. LEXIS 103734	14
<i>Buccellato v. AT&T Operations, Inc.</i> (N.D. Cal. June 30, 2011) 2011 U.S. Dist. LEXIS 85699	17
<i>Burden v. SelectQuote Ins. Servs.</i> (N.D. Cal. Aug. 2, 2013) 2013 U.S. Dist. LEXIS 109110	14
<i>Cicero v. DirecTV, Inc.</i> (C.D. Cal. July 27, 2010) 2010 U.S. Dist. LEXIS 86920	14
<i>Cresci v. Cox Auto. Corporate Servs.</i> (C.D. Cal. May 5, 2021) 2021 U.S. Dist. LEXIS 134293	11
<i>Deaver v. Compass Bank</i> (N.D. Cal. Dec. 11, 2015) 2015 U.S. Dist. LEXIS 166484	14
<i>Glass v. UBS Fin. Servs.</i> (9th Cir. 2009) 331 F.App'x 452	17
<i>Gonzalez v. S. Wine & Spirits of Am., Inc.</i> (9th Cir. 2014) 555 F. App'x 704	18
<i>Hawkins v. Kroger Co.</i> (S.D. Cal. Feb. 4, 2022) 2022 U.S. Dist. LEXIS 20956	15
<i>Hefler v. Wells Fargo & Co.</i> (N.D. Cal. Dec. 18, 2018) 2018 U.S. Dist. LEXIS 213045	18
<i>In re GNC Shareholder Litig.</i> (W.D. Pa. 1987) 668 F. Supp. 450	20
<i>In re Sumitomo Copper Litig.</i> (S.D.N.Y. 1999) 74 F.Supp.2d 393, 396-398	14
<i>In re United Energy Corp. Sec. Litig.</i> (C.D. Cal. 1989) 1989 WL 7321 1	20
<i>In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.</i> (N.D. Cal. Mar. 17, 2017) 2017 U.S. Dist. LEXIS 39115	18
<i>Johnson v. United States Bank Nat'l Ass'n</i> (S.D. Cal. Aug. 20, 2020) 2020 U.S. Dist. LEXIS 151168	14
<i>Martin v. AmeriPride Servs.</i> (S.D. Cal. June 9, 2011) 2011 U.S. Dist. LEXIS 61796	15
<i>Mills v. Electric Auto-Lite Co.</i> (1970) 396 U.S. 375, 391-392	13
<i>Moreno v. Capital Bldg. Maint. & Cleaning Servs.</i> (N.D. Cal. Sep. 10, 2021) 2021 U.S. Dist. LEXIS 172633	15
<i>O'Bannon v. NCAA,</i> (N.D. Cal. 2015) 114 F. Supp. 3d 819	18
<i>Parker v. Cherne Contr. Corp.,</i> (N.D. Cal. Dec. 9, 2021) 2021 U.S. Dist. LEXIS 236229	18

1	<i>Ramirez v. Benito Valley Farms, LLC</i> (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272	11
2	<i>Rodriguez v. West Publishing Corp.</i> (9th Cir. 2009) 563 F.3d 948	20
3	<i>Staton v. Boeing Co.</i> (9th Cir. 2003) 327 F.3d 938	12, 14
4	<i>Steiner v. Am. Broad. Co.</i> (9th Cir. 2007) 248 F. App'x 780	17
5	<i>Steinfeld v. Discover Fin. Servs.</i> (N.D. Cal. Mar. 31, 2014) 2014 U.S. Dist. LEXIS 48540	18
6	<i>Stern v. Gambello</i> (9th Cir. 2012) 480 Fed. App'x 867	14
7	<i>United Steel Workers v. Phelps Dodge Corp.</i> (9th Cir. 1990) 896 F.2d 403	18
8	<i>Vasquez v. Coast Valley Roofing, Inc.</i> (E.D. Ca. 2010) 266 F.R.D. 482	14, 15
9	<i>Vedachalam v. Tata Consulting Serv. Ltd.</i> (N.D. Cal. July 18, 2013) 2013 U.S. Dist. LEXIS 100796	18
10	<i>Vizcaino v. Microsoft Corp.</i> (9th Cir. 2002) 290 F.3d 1043	11, 17
11	<i>Williams v. SuperShuttle Int'l, Inc.</i> (N.D. Cal. Feb. 12, 2015) 2015 U.S. Dist. LEXIS 19341	18
12	State Statutes	
13	California Code of Civil Procedure	
	§ 1021.5	12
14	California Labor Code	
	§ 201	7
15	§ 203	7
	§ 204	7
16	§ 226	7
	§ 510	7
17	§ 1194	7
	§ 1197	7
18	§ 1198	7
	§ 1199	7
19	§ 2698	6, 15
	§ 2699	7, 9, 10
20	§ 2699.3	7
21	Treatises	
22	Eisenberg & Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study (2006) 53 UCLA L. Rev. 1303	20
23	Posner, Economic Analysis of Law (4th ed. 1992)	16
24	Newberg, Attorney Fee Awards, § 2.19 (1987)	20
25	4 Newberg on Class Actions (4th ed. 2002)	
	§ 11	20
	§ 14.7	17

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Guadalupe Hernandez (“Plaintiff”) respectfully moves this Court for an order awarding attorney’ fees and costs to Plaintiff’s Counsel, a service payment for Plaintiff, and settlement administration costs to Simpluris, Inc., the Parties’ selected settlement administrator for this action.

Plaintiff and Automated Harvesting, LLC (“Defendant”) reached a proposed settlement of Plaintiff’s representative action brought under the Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*, (“PAGA”) for a total amount of \$400,000, which is the “Settlement Amount.”¹ Plaintiff concurrently has filed a Motion for Order Approving Settlement of PAGA Action and Dismissing Action with Prejudice (“Motion for Approval of PAGA Settlement”), which addresses the details of the settlement terms, including the distribution of the Net Settlement Amount, estimated to be \$239,583.19, to the California Labor and Workforce Development Agency (“LWDA”) and the PAGA Group.²

Through this motion, Plaintiff requests that the Court approve the Settlement Agreement’s terms allocating \$148,916.81.³ for the payment of Plaintiff’s Counsel’s fees and costs, \$5,000 for Plaintiff’s enhancement payment, and settlement administration costs of \$6,500.⁴

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Plaintiff has set forth the details of the case and procedural history in the memorandum

¹ See Declaration of Robert Spencer submitted in support of this motion and Plaintiff’s Motion for Order Approving Settlement of PAGA Action and Dismissing Action with Prejudice (“Spencer Decl.”), Ex. 1 (the Parties’ Labor Code Private Attorneys General Act Settlement Agreement (the “Settlement Agreement”)) at §§ I.O, VIII.B. All “Ex.” references are to Spencer Declaration exhibits unless stated otherwise. Also, all capitalized terms shall have the same meaning as set forth in the Settlement Agreement unless noted otherwise.

² See Ex. 1 at § I.I, *see also*, §§ I.O, VI, X, XI.

³ The Settlement Agreement provides that Plaintiff’s Counsel may request \$133,333.33 in fees and actual litigation costs. Ex. 1 at § X. As discussed below, Plaintiff’s Counsel’s actual lodestar as of August 23, 2023 is \$62,907.50, anticipated loadstar at the end of this litigation is \$69,657.50 and out-of-pocket costs incurred litigating this action total \$15,583.48. Spencer Decl. at ¶¶ 42-42 (discussion of lodestar), 51-53 (discussion of costs).

⁴ See Ex. 1 at §§ VI, X, XI.

1 supporting the Motion for Approval of PAGA Settlement filed concurrently with this motion.
2 For brevity's sake, Plaintiff does not repeat those facts here.

3 **A. Plaintiff's Counsel's work in litigating and settling this action.**

4 Prior to filing this action, Plaintiff's Counsel expended time and effort in investigating and
5 researching Plaintiff's potential Labor Code claims, and preparing this case for litigation. On
6 September 8, 2022, pursuant to Labor Code § 2699.3's exhaustion requirements, Plaintiff's
7 Counsel, on behalf of Plaintiff, gave written notice of his PAGA claims to the LWDA and
8 Defendant.⁵ Plaintiff's Counsel drafted and then filed the initial Complaint on September 13,
9 2022 in Monterey County Superior Court. After the LWDA declined to take action within the
10 statutory time period, Plaintiff's Counsel drafted and then, filed the First Amended Complaint on
11 November 15, 2022 adding the PAGA claims and the operative Second Amended Complaint
12 ("SAC") on December 20, 2022, which alleges only PAGA representative claims based on
13 Defendant's alleged violations of Labor Code §§ 201-203, 204b, 226(a), 510, 1194, 1197, 1198,
14 and 1199 related to its overtime, wage statement issuance, termination pay and timely pay
15 practices.⁶

16 After the filing of the SAC, Plaintiff's Counsel and counsel for Defendant met and
17 conferred regarding the potential for settlement. The Parties agreed to exchange informal
18 discovery and participate in private mediation. In preparation, the Parties exchanged informal
19 discovery, including documents and information relevant to the claims alleged in the SAC, such
20 as timekeeping and payroll records and the number of total pay periods at issue.⁷ Defendant also
21 provided information from its records supporting there are no more than 600 individuals who
22 meet the Settlement Agreement's definition of the PAGA Group.⁸ Plaintiff's Counsel reviewed
23 and analyzed information and documents that Defendant provided, including documents and
24 information relevant to the claims alleged in the SAC, such as timekeeping and payroll records
25

26 ⁵ Spencer Decl. at ¶ 7, Ex. 2 (PAGA letter).

27 ⁶ Spencer Decl. at ¶ 8, Ex. 3 (SAC).

28 ⁷ Spencer Decl. at ¶¶ 10-14.

⁸ *Id.* at ¶ 10.

1 and the number of total pay periods at issue.⁹ Defendant also provided information from its
2 records supporting there are no more than 600 individuals who meet the Settlement Agreement's
3 definition of the PAGA Group.¹⁰

4 The Parties participated in a formal mediation session with Mark S. Rudy, Esq. on July
5 13, 2023.¹¹ At the mediation, Plaintiff's Counsel engaged in arm's-length negotiations with
6 Defense Counsel.¹² Even though the Parties did not reach an agreement at the mediation, they
7 were able to reach a tentative settlement shortly afterwards with the assistance of the mediator
8 and agreed to settle the entire action, subject to approval by the Court.¹³ Plaintiff Counsel's
9 experience in litigating similar representative PAGA actions based on wage and hour claims, the
10 degree of investigation that Plaintiff's Counsel conducted, and the amount of data obtained from
11 Defendant made it possible for Plaintiff's Counsel to determine the potential value and evaluate
12 the strength of the PAGA claims when negotiating the settlement.¹⁴ Working together, Plaintiff's
13 Counsel and Defense Counsel drafted a detailed, formalized Settlement Agreement, which set
14 forth all of the terms of the Parties' settlement agreement, and related exhibits.¹⁵

15 Also, since the mediation, Plaintiff's Counsel has spent time communicating with Defense
16 Counsel. Plaintiff's Counsel expects to spend at least 10 additional hours working with the
17 Settlement Administrator, speaking with PAGA Group members, finalizing and filing this
18 motion, and preparing for and attending the hearing.¹⁶

19 **B. The Proposed Settlement**

20 Plaintiff also refers to the Motion for Approval of PAGA Settlement and accompanying
21 memorandum to avoid repeating the details of the proposed settlement's terms and benefits to the
22 LWDA and the PAGA Group members. In brief summary, the Settlement Agreement provides
23

24 ⁹ *Id.* at ¶¶ 10-14

25 ¹⁰ *Id.* at ¶ 10.

26 ¹¹ *Id.* at ¶¶ 11, 14.

27 ¹² *Id.*

28 ¹³ *Id.* at ¶¶ 11, 14; Ex. 1 at §§ II.A, II.B.

¹⁴ *See* Spencer Decl. at ¶¶ 10-14.

¹⁵ *Id.* at ¶¶ 11, 14, Ex. 1.

¹⁶ Spencer Decl. at 33.

that all PAGA Group members, defined as “All persons within the State of California who are or were employed by Defendant in the State of California as an hourly, non-exempt employee at any time within the PAGA Release Period.”¹⁷ The PAGA Release Period is from September 8, 2021 through August 12, 2023, inclusive.¹⁸ Defendant has identified approximately 600 PAGA Group members.¹⁹ PAGA Group members do not need to submit a claim form to receive a settlement payment.²⁰

If the settlement is approved, the Net Settlement Amount to be distributed to the LWDA and PAGA Group members is estimated to be \$239,583.19.²¹ All PAGA Group members will divide 25% of the Net Settlement Amount, a total of approximately \$59,895.80, based on the formula set forth in the Settlement Agreement.²² The LWDA will receive 75% of the Net Settlement Amount, which is approximately 179,687.39.²³

1) Settlement administration.

The Settlement Agreement provides for the payment of the costs of settlement administration, which are not expected to exceed \$6,500.²⁴ The Parties have selected Simpluris, Inc. (“Simpluris”) to serve as Settlement Administrator and the estimated cost of administrative functions necessary for the distribution of the Settlement Amount is \$6,500.²⁵

2) Attorneys’ fees and costs.

The Settlement Agreement permits Plaintiff’s Counsel to seek an award of attorneys’ fees of \$133,333.33 and actual litigation costs, which are \$15,583.48.²⁶ The request is discussed in Section III.B below.

¹⁷ Ex. 1 at § I.J.

¹⁸ Ex. 1 at § I.K.

¹⁹ Spencer Decl. at ¶ 10.

²⁰ Ex.1 at §§ I.F, VIII.A.

²¹ Spencer Decl. at ¶ 21; Ex. 1 at §§ I.I, I.O, VI, X, XI.

²² Spencer Decl. at ¶¶ 21-23; Ex. 1 at § VIII.A, *see also*, Ex. 1 at §§ I.F, I.I, I.O, VI, X, XI; Lab. Code § 2699(i) (requiring that the LWDA receive 75% and aggrieved employees receive 25% of PAGA penalties awarded).

²³ Spencer Decl. at ¶¶ 21-22; Ex. 1 at §§ I.H, *see also*, I.I, I.O, VI, X, XI; Lab. Code § 2699(i).

²⁴ Ex. 1 at § VI.

²⁵ Spencer Decl. at ¶ 20; Ex. 1 at § VI.

²⁶ Ex. 1 at § X; Spencer Decl. at ¶¶ 21, 31-52.

3) Enhancement award for the named Plaintiff.

The Settlement Agreement also provides that Plaintiff may seek an enhancement payment of \$5,000 for his work bringing this action on behalf of the LWDA and the PAGA Group.²⁷ The service award request is discussed in Section III.C below.

III. LEGAL ARGUMENT

A. Standards for approval of a PAGA settlement

The reasons supporting approval of the main terms of the PAGA settlement are discussed in the memorandum accompanying the Motion for Approval of PAGA Settlement. Here, Plaintiff focuses only on his request for an award of attorneys' fees and costs, Plaintiff's enhancement payment, and payment of the settlement administrator's fees, all of which are requested in accordance with the Settlement Agreement.

B. Plaintiff's Counsel is entitled to recover its reasonable fees and costs.

Pursuant to the Settlement Agreement, Plaintiff's Counsel seeks attorneys' fees and litigation costs in the total amount of \$148,916.81.²⁸ Plaintiff Counsel's entitlement to an award of fees and costs is warranted on multiple independent grounds, which are discussed below.

1) Plaintiff is entitled statutorily to an award of attorneys' fees and costs.

In a PAGA action, the plaintiff's counsel is entitled to recover attorney's fees and costs as a matter of right under PAGA. Labor Code § 2699(g)(1) provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." Given that PAGA's purpose is to allow employees to enforce the Labor Code in order to further the State's law enforcement interest,²⁹ the statute ensures that an individual who performs this law enforcement function is able to recover his or her attorneys' fees and costs.³⁰

"The PAGA does not provide a specific standard for evaluating attorney's fees in

²⁷ Ex. 1 at § XI.

²⁸ Ex. 1 at § X; Spencer Decl. at ¶¶ 21, 31-50.

²⁹ See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.

³⁰ Lab. Code § 2699(g)(1).

1 connection with a settlement of PAGA claims.”³¹ The California Supreme Court has held the
2 percentage of the common fund or the lodestar method may be used when determining attorneys’
3 fees in class action settlements that produce a specific, identifiable common fund.³² “The choice
4 of a fee calculation method is generally one within the discretion of the trial court,” with the goal
5 “being the award of a reasonable fee to compensate counsel for their efforts.”³³

6 To the extent the amount recovered is the basis of the fee award, the court should
7 consider the entire amount recovered, given that the State is the real party in interest and 100%
8 percent of the recovery is the property of the State, regardless of the subsequent distribution
9 arrangement.³⁴ In other words, a lawyer who represents a private attorney general is working to
10 advance law enforcement on behalf of the State and his or her performance should be judged by
11 the total amount recovered in that function. Limiting the calculation of attorneys’ fees to the
12 amount distributed to the affected employees would ignore both the basic structure and intent of
13 PAGA. If the fee award was limited in that manner, it would become economically unfeasible to
14 bring representative PAGA actions, which would frustrate PAGA’s purpose of encouraging
15 private individuals to assist the State in enforcing the Labor Code. Awarding attorneys’ fees
16

17
18 ³¹ *Cresci v. Cox Auto. Corporate Servs.* (C.D. Cal. May 5, 2021) No. 2:20-cv-06832-VAP-SKx,
2021 U.S. Dist. LEXIS 134293, at *13-15, quoting *Ramirez v. Benito Valley Farms, LLC* (N.D.
19 Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, at *18.

20 ³² *Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503, 506 (affirming that trial court did
21 not abuse its discretion in awarding 33.33% fees based on the percentage of the fund method).
22 Ninth Circuit case law holds the same. See e.g., *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290
23 F.3d 1043, 1047 (where a settlement creates a common fund, “the district court has discretion . . .
24 to choose either the percentage-of-the-fund or the lodestar method” to determine an award of
25 attorneys’ fees.”).

26 ³³ *Laffitte, supra*, 1 Cal.5th at 504.

27 ³⁴ See e.g., *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 382 (“The government
28 entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.”),
overruled on another ground by *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906,
1925; *Kim v. Reins Int’l California, Inc.* (2020) 9 Cal.5th 73, 81 (same), quoting *Iskanian, supra*,
59 Cal.4th at 382. See also, e.g., *Basiliali v. Allegiant Air, LLC* (C.D. Cal. July 1, 2019) No. 2:18-
cv-03888-RGK-MRW, 2019 U.S. Dist. LEXIS 228250, at *11 (approving a fee request that was
33% of the total PAGA settlement, citing *Laffitte*’s affirmation of a 33.33% fee award in a class
action settlement. The district court also noted the requested fee award resulted in a 2.02 negative
multiplier under the lodestar method).

1 based on the total recovery obtained allows private attorneys general to engage experienced
2 counsel to advance the State's interests.

3 Even in the class action context, fees are calculated on the total amount recovered, *i.e.*,
4 the gross settlement amount including the amounts that are allocated for fees and costs. "[A]
5 lawyer who recovers a common fund for the benefit of persons other than himself or his client is
6 entitled to a reasonable attorney's fee from the fund as a whole."³⁵ An attorney representing the
7 named plaintiff in a class action settlement involving Labor Code claims would be entitled to a
8 percentage of recovery on the total fund.³⁶ An attorney representing a private attorney general in
9 a representative PAGA action that results in a settlement benefiting the State and aggrieved
10 employees is entitled to fees on the same basis.

11 In addition, California Code of Civil Procedure § 1021.5 also entitles Plaintiff to an
12 award of attorneys' fees and costs. That statute provides for the award of:

13 attorneys' fees to a successful party against one or more opposing parties in
14 any action which has resulted in the enforcement of an important right
15 affecting the public interest if: (a) a significant benefit, whether pecuniary or
16 nonpecuniary, has been conferred on the general public or a large class of
17 persons, (b) the necessity and financial burden of private enforcement, ... are
such as to make the award appropriate, and (c) such fees should not in the
interest of justice be paid out of the recovery, if any.

18 The instant PAGA representative action was, by definition, "for the public benefit" that
19 secured monetary awards for the LWDA and the 600 aggrieved employees who make up the
20 PAGA Group and was authorized due the State's lack of enforcement resources.³⁷

21 **2) Plaintiff's Counsel is entitled to an award of reasonable fees and costs under**
22 **the percentage of the common fund doctrine.**

23 Counsel is entitled to recover attorneys' fees and costs under the "common fund" doctrine

24 _____
25 ³⁵ *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967, citing *Boeing Co. v. Van Gemert*
(1980) 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745.

26 ³⁶ *See id.*

27 ³⁷ *See e.g. Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 16-17
(finding that, because the plaintiff pursued class action not only for himself but on behalf of a
28 class and ultimately obtained awards for 209 drivers, he satisfied "the 'significant benefit,'
'public interest,' and 'large class of persons' requirements of [C.C.P. §] 1021.5.").

1 as a matter of right. As held by the U.S. Supreme Court, “a lawyer who recovers a common fund
2 for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee
3 from the fund as a whole.”³⁸

4 Courts have long recognized the “common fund” or “common benefit” doctrine, under
5 which attorneys who create a common fund or benefit for a group of persons may be awarded
6 their fees and costs to be paid out of the fund.³⁹ In *Laffitte*, the California Supreme Court held
7 that, “when class action litigation establishes a monetary fund for the benefit of the class
8 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
9 the court may determine the amount of a reasonable fee by choosing an appropriate percentage of
10 the fund created.”⁴⁰ The California Supreme Court also noted that the percentage of the fund
11 method “more accurately reflects the results achieved” than the lodestar method, serves as a
12 “better approximation of market conditions in a contingency case,” and encourages “counsel to
13 seek an early settlement and avoid unnecessarily prolonging the litigation.”⁴¹

14 Numerous appellate courts have similarly found.⁴² Moreover, at least eight federal courts
15 of appeal—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and the D.C. Circuit—have
16 endorsed the “percentage fee” method for determining reasonable attorneys’ fees in common
17

18
19 ³⁸ See *Boeing*, *supra*, 444 U.S. at 478.

20 ³⁹ *Id.*; see also, e.g., *Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal.3d 25, 34; *Glendale City*
21 *Employees’ Assoc. v. City of Glendale* (1975) 15 Cal.3d 328, 341, fn.19; *In re Consumer Privacy*
22 *Cases* (2009) 175 Cal.App.4th 545, 557; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478;
23 *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

24 ⁴⁰ *Laffitte*, *supra*, 1 Cal.5th at 503 (providing an extended analysis of California law regarding fee
25 award methodology).

26 ⁴¹ *Id.* at 503-04.

27 ⁴² See e.g., *Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court
28 upheld a “contingent percentage” award of attorneys’ fees in a representative action as the proper
exercise of the court’s broad equitable powers); *Rider v. County of San Diego* (1992) 11
Cal.App.4th 1410, 1423 (attorneys’ fees and expenses properly awarded from common benefit
composed of illegally imposed sales and use tax); *Bank of America v. Cory* (1985) 164 Cal.App.3d
66, 89-92 (fees awarded from common benefit created by action compelling state to claim dormant
bank accounts); *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-68 (court upheld fee award
equal to one-third of the damages to owners of residential property in an inverse condemnation
action).

benefit cases.⁴³ The Ninth Circuit has explained that “attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants.”⁴⁴ Courts may even look at the total fund value in a reversionary settlement, although that is not necessary in this “all-in” (*i.e.*, non-reversionary) settlement.⁴⁵

California courts have recognized that “‘fee awards in class actions average around one-third of the recovery’” regardless of “‘whether the percentage method or the lodestar method is used.’”⁴⁶ When applying the percentage of the fund method, California courts routinely grant fee awards of 33.33% and higher.⁴⁷ Further, courts have recognized that “[f]ee award percentages

⁴³ See, *e.g.*, *In re Sumitomo Copper Litig.* (S.D.N.Y. 1999) 74 F.Supp.2d 393, 396-398 (discussing the overwhelming weight of federal authority in favor of the percentage fee method, citing cases); see also, *Laffitte, supra*, 1 Cal.5th at 503 (stating that the California Supreme Court “join[ed] the overwhelming majority of federal and state courts” that approve the percentage of the fund method).

⁴⁴ *Williams, supra*, 129 F.3d at 1027. See also, *Boeing, supra*, 444 U.S. at 478 (“a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”).

⁴⁵ *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967 (quoting *Boeing v. Van Gemert*); *Williams, supra*, 129 F.3d at 1027 (finding district court abused its discretion by awarding class counsel’s fees based on percentage of claims made rather than the total common fund); see also, *Stern v. Gambello* (9th Cir. 2012) 480 Fed. App’x 867, 870 (finding district court correctly considered the requested fees against the potential recovery, not the claims actually made).

⁴⁶ *Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 545, quoting *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11; see also, *e.g.*, *Cicero v. DirecTV, Inc.* (C.D. Cal. July 27, 2010) No. EDCV 07-1182, 2010 U.S. Dist. LEXIS 86920, at *17-18 (“a review of California [wage and hour] cases in other districts reveals that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.”).

⁴⁷ See *e.g.*, *Laffitte, supra*, 1 Cal.5th at 506 (affirming that trial court did not abuse its discretion in awarding 33.33% fees based on the percentage of the fund method); *Roos v. Honeywell International, Inc.* (Nov. 10, 2015) 2015 Cal. App. LEXIS 1004, at *26, (affirming 37.5% fee award in \$8,150,000 million class settlement), *overruled on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal. 5th 260, 269; *Borelli v. Black Diamond Aggregates, Inc.* (E.D. Cal. June 8, 2022) No. 2:14-cv-02093-KJM-KJN, 2022 U.S. Dist. LEXIS 103734, at *26-27 (granting 33% fee request, citing string of cases that did the same); *Johnson v. United States Bank Nat’l Ass’n* (S.D. Cal. Aug. 20, 2020) No. 19-CV-286 JLS (LL), 2020 U.S. Dist. LEXIS 151168, at *9 (awarding 33% fee award, finding that the percentage “is in line with other attorneys’ fees awards in California and the Ninth Circuit,”) citing *Laffitte, supra*, 1 Cal.5th at 506 and other cases; *Aguilar v. Wawona Frozen Foods* (E.D. Cal. May 18, 2017) No. 1:15-cv-00093-DAD-EPG, 2017 U.S. Dist. LEXIS 76751, at *14-15 (approving one-third fee award); *Deaver v.*

generally are higher in cases where the common fund is below \$10 million.”⁴⁸

- a. The requested fee amount is within the range of reasonable fee awards under the “percentage of the fund” method.

The amount of fees that Plaintiff’s Counsel requests – 33.33% of the Settlement Amount – is reasonable based on standards applicable to the “percentage of the fund” method. “When assessing whether the percentage requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases.”⁴⁹

First, the results achieved are significant, as approximately \$179,687.39 will be paid out to the LWDA and \$59,895.80 will be paid to the PAGA Group — for a total payout of \$239,583.19.⁵⁰ Second, such results were achieved in the face of significant risks. Defendant maintained defenses to Plaintiff’s PAGA claims that would place a serious risk to recover at trial, including that it properly paid overtime to Plaintiff and the aggrieved employees, as well as that its wage statements are proper under *General Atomics v. Superior Court* (2021) 64 Cal.App.5th 987.⁵¹ Third, notwithstanding this risk of loss, Plaintiff’s Counsel undertook representation of the instant PAGA claims for the benefit of the State (and the PAGA Group) on a contingency

Compass Bank (N.D. Cal. Dec. 11, 2015) No. 13-cv-00222-JSC, 2015 U.S. Dist. LEXIS 166484, 2015 WL 8526982, at *9-14 (approving one-third fee award); *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. July 2, 2013) 297 F.R.D. 431, 450 (approving a one-third fee award, citing cases with similar awards); *Burden v. SelectQuote Ins. Servs.* (N.D. Cal. Aug. 2, 2013) No. C 10-5966 LB, 2013 U.S. Dist. LEXIS 109110, at *13 (granting one-third fee award); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Ca. 2010) 266 F.R.D. 482, 491-92 (granting 33.33% fee award, citing cases with similar awards).

⁴⁸ *Alvarez v. Farmers Ins. Exch.* (N.D. Cal. Jan. 17, 2017) No. 3:14-cv-00574-WHO, 2017 U.S. Dist. LEXIS 119128, at *9; *see also, e.g., Hawkins v. Kroger Co.* (S.D. Cal. Feb. 4, 2022 No. 15cv2320 JM (AHG), 2022 U.S. Dist. LEXIS 20956, at *29) (recognizing same); *Moreno v. Capital Bldg. Maint. & Cleaning Servs.* (N.D. Cal. Sep. 10, 2021) No. 19-cv-07087-DMR, 2021 U.S. Dist. LEXIS 172633, at *12 (same); *Martin v. AmeriPride Servs.* (S.D. Cal. June 9, 2011), No. 08cv440-MMA (JMA), 2011 U.S. Dist. LEXIS 61796, at *23 (same); *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18 (same).

⁴⁹ *See Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 492.

⁵⁰ *See Spencer Decl.* at ¶¶ 21-23, Ex. 1 at §§ I.I, I.O, VI, X, XI. Defendant has identified 600 PAGA Group members. *Spencer Decl.* at ¶ 10.

⁵¹ *Spencer Decl.* at ¶ 46.

basis.⁵² This not only required Plaintiff's Counsel to personally assume the risk of nonpayment in securing the financial benefit that the State of California stands to receive, but constitutes a "loan" on Plaintiff's Counsel service—both of which are factors warranting fee enhancement under applicable California Supreme Court authority:

One of the most common fee enhancers ... is for contingency risk. We reaffirmed the propriety of a contingency risk enhancement in *Ketchum*: "The economic rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.'"⁵³

Finally, the percentage requested falls within a typical range, particularly in light of the settlement size.⁵⁴ It is recognized that "courts may award attorney's fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million."⁵⁵ Accordingly, Plaintiff's Counsel's fee request is fair and reasonable and is consistent with other awards in California and the Ninth Circuit.

3) The requested fees are justified under the lodestar method.

Fee calculations under the lodestar method would result in a similar award, demonstrating the fairness of Plaintiff's Counsel's percentage fee request. Because this is a common fund case, the lodestar method, if used at all, serves only to cross check the reasonableness of the fee

⁵² *Id.* at ¶¶ 45-46.

⁵³ *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-580.

⁵⁴ See e.g., *Alvarez, supra*, 2017 U.S. Dist. LEXIS 119128, at *9; *Hawkins, supra*, 2022 U.S. Dist. LEXIS 20956, at *29; *Moreno, supra*, 2021 U.S. Dist. LEXIS 172633, at *12; *Martin, supra*, 2011 U.S. Dist. LEXIS 61796, at *23; *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18.

⁵⁵ See e.g., *Alvarez, supra*, 2017 U.S. Dist. LEXIS 119128, at *9, citing *Cicero, supra*, 2010 U.S. Dist. LEXIS 86920, at *18.

request.⁵⁶

Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. The base amount is then adjusted by use of a multiplier in light of various factors.⁵⁷ According to the treatise Newberg on Class Actions, “courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher.”⁵⁸ “[A] court is not required to reduce a percentage recovery just because it is substantially higher than the lodestar.”⁵⁹

In *Laffitte*, the California Supreme Court “emphasize[d]” that, when used as a cross check, the lodestar calculation ... does not override the trial court’s primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award.⁶⁰

⁵⁶ See e.g., *Glass v. UBS Fin. Servs.* (9th Cir. 2009) 331 F.App’x 452, 456 (approving the district court’s “informal lodestar cross-check” for confirming the reasonableness of the percentage award); *Vizcaino*, *supra*, 290 F.3d at 1050 (similar).

⁵⁷ *Serrano III*, *supra*, 20 Cal. 3d at 48; *Consumer Privacy Cases*, *supra*, 175 Cal.App.4th at 556 (noting some factors may include the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61-67 (considering quality of representation, success achieved and rate of acceptance of the settlement benefits as factors supporting a multiplier).

⁵⁸ *Aguilar*, *supra*, 2017 U.S. Dist. LEXIS 76751, at *14-15, quoting 4 Newberg On Class Actions § 14.7. See also, e.g., *Chavez*, *supra*, 162 Cal.App.4th at 66, citing *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255, *overruled in part on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269 (2018), (noting that multipliers can range from 2 to 4 or even higher); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051-52 and n.6 (affirming fee award with lodestar crosscheck multiplier of 3.65, noting survey of class settlements with multipliers ranging up to 19.6); *Steiner v. Am. Broad. Co.* (9th Cir. 2007) 248 F. App’x 780, 783 (affirming percentage fee award with lodestar crosscheck multiplier of 6.85, finding that it “falls well within the range of multipliers that courts have allowed[.]” citing *Vizcaino*, *supra*, 290 F.3d at 1051-52); *Buccellato v. AT&T Operations, Inc.* (N.D. Cal. June 30, 2011); No. C10-00463-LHK, 2011 U.S. Dist. LEXIS 85699, at *4 (approving fee award applying multiplier 4.3, citing string of cases applying multipliers ranging from 4.4 to 9.3); *Beckman v. KeyBank, N.A.* (S.D.N.Y. 2013) 293 F.R.D. 467, 482 (approving fee award with 6.3 multiplier, citing cases with multipliers from 4.3 to 8.3).

⁵⁹ *Amaro*, *supra*, 69 Cal.App.5th at 545, citing *Laffitte*, *supra*, 1 Cal.5th at 505.

⁶⁰ *Laffitte*, *supra*, 1 Cal.5th at 505.

Plaintiff's Counsel's hourly rates are summarized in the Spencer Declaration filed in support of this motion.⁶¹ Plaintiff's Counsel's hourly rates have been approved in other cases⁶² and are well within the range of those found permissible for attorneys practicing class action litigation in California.⁶³

Plaintiff's Counsel has spent over 87 hours litigating this case through August 23, 2023, as described in further detail in the Spencer Declaration.⁶⁴ Counsel expects to spend another 10 hours completing the work on this motion, preparing for and attending the approval hearing, and dealing with settlement administration issues.⁶⁵ The fee award should include fees incurred to establish and defend the attorneys' fee claim.⁶⁶

⁶¹ Spencer Decl. at ¶¶ 34-38.

⁶² See e.g., *Parker v. Cherne Contr. Corp.*, 2021 U.S. Dist. LEXIS 236229, *20-21 (N.D. Cal. Dec. 9, 2021) (finds that Keller Grover LLP's billing rates used "to calculate the lodestar are reasonable and in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation,") citing *Hefler v. Wells Fargo & Co.* (N.D. Cal. Dec. 18, 2018) No. 16-CV-05479, 2018 U.S. Dist. LEXIS 213045, 2018 WL 6619983, at *14 (finding rates from \$650 to \$1,250 for partners or senior counsel and \$400 to \$650 for associates were reasonable) and *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.* (N.D. Cal. Mar. 17, 2017) No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 39115, 2017 WL 1047834, at *5 (finding rates up to \$1600 for partners and up to \$790 for associates were reasonable). Courts have found that "rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *Cresci, supra*, 2021 U.S. Dist. LEXIS 134293, at *14, quoting *United Steel Workers v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.

⁶³ See cases cited in previous footnote; see also, e.g., *Gonzalez v. S. Wine & Spirits of Am., Inc.* (9th Cir. 2014) 555 F. App'x 704, 704-05 (reversing district court's order reducing attorneys' hourly rates without considering evidence of "prevailing hourly rates for comparable legal services in the community"); *O'Bannon v. NCAA*, (N.D. Cal. 2015) 114 F. Supp. 3d 819, 827 (similar range of rates for Bay Area counsel experienced in complex class actions were reasonable); *Williams v. SuperShuttle Int'l, Inc.* (N.D. Cal. Feb. 12, 2015) No. 12-cv-06493-WHO, 2015 U.S. Dist. LEXIS 19341, at *5 (similar); *Steinfeld v. Discover Fin. Servs.* (N.D. Cal. Mar. 31, 2014) 2014 U.S. Dist. LEXIS 48540, at *4-5 (similar); *Vedachalam v. Tata Consulting Serv. Ltd.* (N.D. Cal. July 18, 2013) 2013 U.S. Dist. LEXIS 100796, at *8 (similar); *Bolton v. U.S. Nursing Corp.* (N.D. Cal. Oct. 18, 2013) 2013 U.S. Dist. LEXIS 150299, at *14-15 (similar); see also, Spencer Decl. at ¶¶ 39-41 (noting range of hourly rates approved in recent Bay Area fee orders).

⁶⁴ Spencer Decl. at ¶ 33.

⁶⁵ *Id.*

⁶⁶ *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 ("Serrano IV").

1 The lodestar for Plaintiff's Counsel through August 23, 2023 is \$62,907.50.⁶⁷ Without
2 counting the additional 10 hours of expected work, the requested fee award of \$133,333.33 thus
3 represents a positive multiplier of 2.12. Including Plaintiff's Counsel anticipated loadstar due to
4 counting an additional 10 hours of expected work on this litigation, Plaintiff's Counsel's loadstar
5 would be a positive multiplier of 1.9 of Keller Grover LLP's anticipated loadstar at the end of this
6 litigation.

7 Plaintiff's Counsel's expertise representing California employees in representative and
8 class actions was crucial to negotiating a settlement with Defendant and obtaining a good
9 monetary result for the PAGA Group and the State. Also, Plaintiff's Counsel undertook the risk
10 of litigating this case on a contingency basis. If this case had proceeded toward trial, it would
11 have required discovery regarding Defendant's overtime, wage statement issuance, termination
12 pay and timely pay practices and substantive motion practice, which would be followed by trial
13 and any subsequent appeals. Plaintiff's Counsel was prepared to finance the litigation through all
14 of that, which likely would have taken years.⁶⁸ Taking that considerable risk to represent he
15 aggrieved employees in this PAGA action supports that a modest multiplier is warranted. Also,
16 because of the resources that this action would require, Plaintiff's Counsel was precluded from
17 taking other cases in order to represent Plaintiff in his PAGA action brought on behalf of the
18 aggrieved employees and the State.⁶⁹ Plaintiff's Counsel's requested costs are reasonable.

19 In the course of this litigation, Plaintiff's Counsel had to (and will) incur out-of-pocket
20 costs of approximately \$15,583.48.⁷⁰ As described in the Spencer Declaration, the incurred costs
21 included filing fees, legal research fees, mediation fees, damage consultant fees, printing
22 charges, and mailing charges.⁷¹ Such costs are appropriate for cost reimbursement in these types
23
24

25
26 ⁶⁷ Spencer Decl. at ¶¶ 42-43.

27 ⁶⁸ *Id.* at ¶ 44.

28 ⁶⁹ *Id.* at ¶¶ 49-50

⁷⁰ *Id.* at ¶¶ 51-53.

⁷¹ *Id.* at ¶ 51.

of cases.⁷²

The costs that Plaintiff's Counsel incurred in this litigation benefited the LWDA, Plaintiff and the PAGA Group members. In light of the costs that Plaintiff's Counsel was required to incur to prosecute this action, Plaintiff's cost request of \$15,383.48 is reasonable and should be granted.

C. The enhancement payment sought by the named Plaintiff is reasonable.

As the Settlement Agreement permits, Plaintiff seeks an enhancement payment in the amount of \$5,000.⁷³ The enhancement payment is intended to recognize the time and efforts that he spent on behalf of the State and other aggrieved employees.⁷⁴

Although PAGA does not address service payments to private attorneys general, the reasoning of case law approving named plaintiffs' service awards in class actions supports that they also are appropriate in PAGA representative actions. Like in class actions, service payments should be awarded to named plaintiffs in representative actions to acknowledge the effort and risk they undertake to obtain a reward on behalf of others.⁷⁵ The California Court of Appeal has found that "incentive awards are fairly typical in class action cases" and "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."⁷⁶ The Ninth Circuit also has recognized that a named plaintiff's "willingness to act as a private attorney general" may justify the award of an incentive payment.⁷⁷

⁷² See e.g., *In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting *Newberg*, Attorney Fee Awards, § 2.19 (1987)); see also, *In re GNC Shareholder Litig.* (W.D. Pa. 1987) 668 F. Supp. 450, 452.

⁷³ Ex. 1 at § XI.

⁷⁴ Declaration of Serena Carnes, submitted herewith.

⁷⁵ See e.g., *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-94, citing *Clark v. Am. Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.

⁷⁶ *Cellphone Termination*, *supra*, 186 Cal.App.4th at 1393-94 (internal citations, quotations and alterations omitted), citing *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, 4 *Newberg on Class Actions* (4th ed. 2002) § 11:38, p. 81, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303.

⁷⁷ *Rodriguez*, *supra*, 563 F.3d at 959.

Further, two separate authorities compel service payments for an employee plaintiff serving as a private attorney general. First, PAGA and its legislative history make clear that its purpose is to incentivize individuals to act on behalf of, and for the benefit of, the State to enforce the Labor Code due to shortage of the State’s law enforcement resources.⁷⁸ With that goal in mind, it is reasonable to conclude that the statute permits compensation for individuals who take on that work. Even if, for example, the statute that enables the State to employ an attorney general did not specify a salary for that position, it would be reasonable to conclude that the State has authority to pay the individual who performs that work. The same must be true for an individual who acts as a private attorney general. The Legislature’s stated purpose of encouraging private law enforcement work necessarily contemplates compensation for individuals who do that work.

It should not be assumed that the share of compensation paid to each aggrieved employee is somehow intended to be the only money available to the individual who takes on the risk and effort of filing and litigating a lawsuit. If that were the rule, each employee who is subjected to an illegal wage and hour practice would be better off waiting for someone else to file a representative claim so that he or she could reap the same reward without taking any risk.

The second authority supporting a service award is the California Supreme Court’s consistent mandate that courts must “liberally construe[]” the Labor Code “in favor of affording workers protection.”⁷⁹ When addressing questions for which there is no specific statutory answer, the California Supreme Court has explained that courts interpreting the Labor Code must “adopt the construction that best gives effect to the purpose of the Legislature” which is “the protection of employees.”⁸⁰ The Court’s mandate weighs in favor of providing service awards because refusing them would dramatically impair the State’s ability to achieve its goal of Labor

⁷⁸ *Iskanian, supra*, 59 Cal.4th at 379 (discussing the goal stated in PAGA and its legislative history to enable private attorneys general to enforce the Labor Code due to the State’s shortage of resources).

⁷⁹ See e.g., *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 754, citing string of California Supreme Court cases stating the same.

⁸⁰ *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839.

1 Code enforcement through private attorneys general. If an employee plaintiff acting as a private
2 attorney general can expect no compensation other than his or her individual share of the
3 recovered penalties, it would be extremely difficult to find anyone willing to undertake the
4 extensive risk and effort involved in bringing a representative PAGA action.

5 Without Plaintiff's efforts, there would be no recovery at all. An incentive award is
6 appropriate to compensate Plaintiff for the risk and expense he incurred in conferring a benefit
7 on other of Defendant's employees and the State of California. As a result of the named
8 Plaintiff's efforts, the State of California will receive more than \$179,000, to be put toward
9 education about, and enforcement of, California's labor laws.⁸¹ The PAGA Group members will
10 receive monetary settlement payments –on average, approximately \$99.83 each.⁸²

11 In this case, the named Plaintiff performed the following tasks, among others: (1) assisted
12 Plaintiff's Counsel in investigating and substantiating the claims alleged in this action, including
13 multiple telephone calls with counsel to review facts, documents, and Automated Harvesting's
14 policies; (2) assisted in the preparation of the complaints in this action; (3) produced evidentiary
15 documents to Plaintiff's Counsel; and (4) assisted in the settlement of this litigation.⁸³ Moreover,
16 as with any plaintiff who files a civil action, the named Plaintiff undertook the financial risk that,
17 in the event of a judgment in favor of Defendant in this action, he could have been personally
18 responsible for any attorneys' fees and costs awarded in its favor.

19 The award of a service payment to the named Plaintiff is especially warranted in a case
20 like this one, involving claims brought to enforce the Labor Code's protections for employees.
21 Plaintiff should be commended for pursuing PAGA claims; a modest service payment like that
22 sought here is an appropriate means of doing so. In light of the work that the named Plaintiff
23 performed on behalf of the State and the PAGA Group, the requested service payment is
24 reasonable and appropriate.

25
26 ⁸¹ Spencer Decl. at ¶¶ 21-22; Ex. 1 at §§ I.H, I.I, I.O, VI, X, XI.

27 ⁸² Spencer Decl. at ¶ 23 (\$59,895.80/600 = \$99.83); Ex. 1 at § VIII.A, *see also*, §§ I.I, I.O, VI, X,
28 XI.

⁸³ *See generally*, Hernandez Declaration.

D. The Settlement Administrator's fee is reasonable and should be paid.

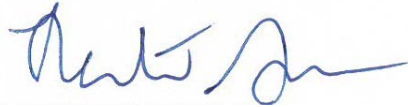
Simpluris has agreed to provide all administrative functions necessary for the distribution of the Settlement Amount for an amount not expected to exceed \$6,500, which is the amount set forth in the Settlement Agreement.⁸⁴ Plaintiff requests that the Court approve payment to Simpluris in the amount of \$6,500. If the amounts are higher it will be deducted from the settlement amount, if the amount is lower it will revert to the Net Settlement Amount.⁸⁵

IV. CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that this Court, as set forth in the proposed Order Approving Settlement submitted herewith, approve Simpluris, Inc. as the Settlement Administrator and approve payment of its administration fees up to \$6,500; approve the award of attorneys' fees and costs to Plaintiff's Counsel in the total amount of \$148,916.81, and approve the award of an enhancement payment to Plaintiff Guadalupe Hernandez in the amount of \$5,000.

Dated: October 10, 2023

KELLER GROVER LLP

By: 

ERIC A. GROVER
ROBERT SPENCER
Counsel for Plaintiff
GUADALUPE HERNANDEZ

⁸⁴ Ex. 1 at § VI; Spencer Decl. at ¶ 20.

⁸⁵ Ex. 1 at § VI.

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 October 10, 2023, in the case *Hernandez v. Automated Harvesting, LLC, et al.*, Monterey County Superior Court Case Number 22CV002717, I served the foregoing document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN ORDER AWARDING ATTORNEYS' FEES, COSTS, ENHANCEMENT 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

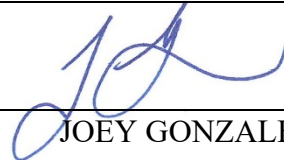
Patricia Hernandez
patricia.hernandez@ogletree.com

Cheyenne Camarena
Cheyenne.camarena@ogletree.com

Diane Cooke
diane.cooke@ogletree.com

OGLETREE DEAKINS
Esplanade Center III
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016
Telephone: 602-778-3711

☒	(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