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on behalf of the State of California,
and others similarly situated and aggrieved

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

DIANA SERMENO, on behalf of the State of California, and others similarly situated and aggrieved, Plaintiff, v. CAFE RIO, INC., a California Corporation; and DOES 1-100, inclusive, Defendants.	Case No.: 30-2023-01304494-CU-OE-CX *Assigned for all purposes to the Hon. Layne H. Melzer; Dept. CX102* MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT UNDER PRIVATE ATTORNEYS GENERAL ACT Date: February 5, 2026 Time: 2:00 p.m. Dept.: CX-102

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I. INTRODUCTION

Plaintiff Diana Sermeno hereby seeks Court approval of a proposed settlement of claims brought under the Private Attorneys General Act ("PAGA") against defendant Cafe Rio, Inc. ("Cafe Rio" or "Defendant").[1] Consistent with PAGA, the proposed settlement releases claims under PAGA only and has no impact on the individual claims of any allegedly aggrieved employee other than Plaintiff. Since the settlement resolves nothing more than claims under PAGA, it requires only a one-step review and approval process by the Court, and for the reasons discussed below, the proposed settlement is fair, reasonable, and adequate, and advances the statutory purposes of PAGA. Plaintiff respectfully requests the Court approve the Settlement in its entirety.

II. BACKGROUND

Defendant Cafe Rio, Inc. owned and operated 24 Cafe Rio Mexican Grill restaurant locations in California during the relevant time period in this case. Plaintiff Sermeno worked for Cafe Rio as an hourly employee until approximately March 2022 at the restaurants in Menifee and Temecula, California. While employed with Cafe Rio, Plaintiff alleges she was subjected to a number of wage and hour violations. [Declaration of Brandon K. Brouillette ("Brouillette Decl."), ¶ 4.]

After notice to the LWDA and Defendant, and exhausting administrative remedies Plaintiff filed a complaint against Cafe Rio on January 27, 2023, seeking both individual relief and PAGA civil penalties for the following alleged wage and hour violations: (a) failure to pay all wages due, including minimum and overtime wages; (b) failure to provide meal and rest periods; (c) failure to provide complete and accurate wage statements; (d) failure to reimburse expenses, and (e) failure to pay wages due on separation of employment. Plaintiff filed the matter on behalf of herself and on behalf of the Aggrieved Employees defined to include all individuals employed by Cafe Rio as non-exempt employees in California during the relevant PAGA time frame. Defendant then successfully moved to compel Plaintiff's individual claims to arbitration, and the

[1] All references to "PAGA" or statutory citations to California Labor Code section 2698, *et seq.* refer to the PAGA statute in effect prior to the July 1, 2024 amendment.

Court stayed the representative PAGA claims pending completion of arbitration. Plaintiff subsequently filed a demand for arbitration of her individual claims. [Brouillette Decl., ¶¶ 5-6; Exh. 3.]

After Plaintiff initiated her individual arbitration, the Parties began meeting and conferring on arbitration management and eventually agreed to attempt mediation before incurring significant effort and expense in the arbitration. They also agreed to and did informally exchange information to permit both sides to evaluate Plaintiff's allegations. Through this informal discovery, Defendant provided Plaintiff with information including, inter alia, Plaintiff's personnel file, the number of potential Aggrieved Employees, the number of aggregate pay periods, pay stubs and time records for a sampling of the Aggrieved Employees, and relevant policy documents regarding Defendant's time keeping and reporting policies and meal and rest break policies, among other pertinent materials. [Brouillette Decl., ¶ 7.]

In June 2024, the Parties mediated the case with David Lowe, Esq., a respected professional neutral with extensive class action/wage and hour experience. Before and during the mediation, Plaintiff and her counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of penalties, 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. [Brouillette Decl., ¶ 8.] A fully executed, true and correct copy of the PAGA Settlement Agreement ("Settlement Agreement") is attached to the Brouillette Declaration as Exhibit 1.

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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 $240,000 (the “Gross PAGA Settlement Amount” or “GPSA”).[2] The GPSA is inclusive of payments to the LWDA and Aggrieved Employees, costs of settlement administration (estimated at no more than $12,000), a modest service award to Plaintiff, and reasonable attorney’s fees and costs.[3] After payment of settlement administration costs, Plaintiff’s service award, and reasonable attorney’s fees and costs from the GPSA, Plaintiff presently estimates about $125,131.47 will remain (the “Net PAGA Settlement Amount” or “NPSA”). Seventy-five percent of the NPSA (about $93,848.60) will go to the LWDA, and the remaining 25% (about $31,282.87) 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 22, 2021, through September 4, 2024. The average award currently is estimated at about $14.31 per individual, and it is estimated that awards will range from about $0.82 to $56. [Brouillette Decl., ¶ 9.]

B. PAYMENT AND THE NOTICE

The Parties propose using Phoenix Settlement Administrators (“Phoenix”) as the Settlement Administrator. Phoenix has extensive experience administering PAGA settlements and has agreed to cap its fees at $12,000. [Declaration of Jodey Lawrence, ¶¶ 2-17; Exhs. A-B.] Cafe Rio will fund the GPSA within 15 days after the Administrator notifies it of the opening of the Qualified Settlement Fund, and within 14 days of funding Phoenix 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 Cafe Rio’s records. Aggrieved Employees need not submit claim forms and will automatically receive a Notice and settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed residual funds will be forwarded to the California State Controller’s Unclaimed Property Fund, subject to Court

[2] The Settlement Agreement defines the term “Gross PAGA Settlement Amount” as “Gross Settlement Amount” and uses the terms interchangeably, but both terms refer to the $240,000 gross settlement amount.

[3] Plaintiff’s counsel is requesting 1/3 of the GPSA ($80,000.00) in fees and costs of $12,868.53. Plaintiff requests a service award of $10,000.00.

approval. [Brouillette Decl., ¶ 10; Exh. 2.]

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 Release is inapplicable to any claims other than those brought under PAGA. [Brouillette 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 pursuant to this part." Labor Code § 2699(*l*)(2). The appellate court in Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, defined the standard for courts to apply when reviewing settlements under PAGA. The court held a trial court must ensure that the settlement is "fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." Id. at 77.

In so holding, Moniz noted many federal district courts had imported class action settlement approval principles when evaluating PAGA settlements, demanding that PAGA settlements be "fair, reasonable, and adequate," and weighing factors such as "the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount[.]" Id. at 75-76 (collecting cases). Observing that "PAGA's purpose" is to "protect the public interest"—especially the allegedly Aggrieved Employees—the

Court agreed with this district court authority, concluding that much the same principles that ensure fairness in class action settlements serve the public interest in the PAGA context. Essentially, these factors are more or less identical to those California courts use to evaluate class action settlements per Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiff submits they should inform the Court's analysis as well. For the reasons below, the proposed settlement is fair, reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

A. NATURE OF THE ALLEGED VIOLATIONS

Plaintiff primarily contends Defendant failed to provide Aggrieved Employees with compliant meal periods on shifts of between 5 and 6 hours because Cafe Rio employees signed a blanket waiver of their right to a meal period on such shifts. Here, per Plaintiff, employees had to electronically sign these waivers as part of the onboarding process before their first scheduled shift (amidst a host of other documents), and that the waivers provided they can only be revoked in advance of working a shift by sending written notice to a designated human resources email. Plaintiff contends these blanket meal waivers are invalid and unenforceable as a matter of law under Brinker Rest. Corp v. Super. Ct. (2012) 53 Cal.4th 1004, 1043 (2012) and according to the DLSE Opinion Letter dated August 13, 2003, and accordingly employees should have been but were not provided with the opportunity to take a meal break on shifts between 5 and 6 hours. [Brouillette Decl., ¶ 12.]

Plaintiff also contends Defendant failed to provide Plaintiff and the Aggrieved Employees with compliant rest periods. While Cafe Rio's written rest break policies generally appeared compliant, Plaintiff contends that in practice Cafe Rio did not provide rest breaks at all. Per Plaintiff, rest breaks were not scheduled, employees were not told when they could take rest breaks, or that they could take rest breaks at all. As a result of these "de facto" practices, Plaintiff contends employees rarely if ever received all of their rest breaks. [Brouillette Decl., ¶ 13.]

On the expense reimbursement claim, Plaintiff contends employees had to use personal cell phones for work purposes. Plaintiff alleges she and other employees were required to download specific mobile applications to complete new hire paperwork and later had to download an app called "Workday" for scheduling and payroll purposes, but never received any reimbursement. An employer must reimburse employees for use of personal devices, and if the employee has an unlimited monthly plan, then the employer must reimburse an amount that equates to the employee's percentage of use for work. Cochran v. Schwan's Home Serv. (2014) 228 Cal.App.4th 1137. [Brouillette Decl., ¶ 14.]

Plaintiff also brings claims derivative of the foregoing claims, including a derivative wage statement claim[4] based on the failure to pay all wages due, and a claim for failure to pay all wages due and owing upon separation of employment under Labor Code §§ 201-203. [Brouillette Decl., ¶ 15.]

Finally, although Plaintiff's complaint alleges claims for unpaid wages, no information came to light supporting those claims. More specifically, the evidence suggested Cafe Rio tracked and paid for hours worked to the minute, accurately accounted and paid for overtime hours at the required premium rates, and there were no apparent violations that potentially could be resolved on a representative basis. Accordingly, these claims were given no weight for settlement purposes. [Brouillette Decl., ¶ 16.]

B. NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES

For mediation, Cafe Rio indicated it employed approximately 2,185 non-exempt employees in California during the relevant time frame, and these individuals worked approximately 37,968 pay periods during that time. Based on the data provided by Defendant, Plaintiff estimated Defendant's maximum PAGA exposure at approximately $15,187,200 including approximately $3,796,800 on the meal break blanket waiver claims, about $3,796,800 on the rest period claims, $3,796,800 on the expense reimbursement claims, and about $3,796,800 on the derivative claims for wage statement violations and for failing to timely pay wages on separation of employment. These figures assumed a 100% violation rate. [Brouillette Decl., ¶¶

[4] Plaintiff also alleged a direct wage statement claim for failing to accurately list the rates of pay and corresponding hours of work during pay periods when employees were paid double time wages, although the number of pay periods with this issue was nominal. [Brouillette Decl., ¶ 15.]

17-18.]

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 meal break claims, Cafe Rio offered multiple defenses. First, it emphasized it authorized and permitted all necessary breaks, and that employees received full uninterrupted lunch periods. Defendant further argued that its meal break waivers were valid and enforceable, and that employees who executed such waivers effectively waived their right to a meal period on shifts of 5 to 6 hours. Furthermore, this claim is now likely worth little give the very recent decision in Bradsbery v. Vicar Operating, Inc. (2025) 110 Cal. App. 5th 899, 332 Cal. Rptr. 3d 73, 90, reh'g denied (May 14, 2025), as modified (May 20, 2025), as modified (May 21, 2025), that essentially found blanket meal waivers, similar to those at issue here, enforceable. [Brouillette Decl., ¶ 19.]

As with meal breaks, Defendant argued the applicable rest break policies complied with California law, that it authorized and permitted employees to take all required breaks, and Cafe Rio was prepared to provide testimony to support its rest break practices. Further, per Defendant, in light of the fact that it is not required to maintain a record of rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking rest periods would be purely anecdotal and individual issues would predominate on liability. This arguably would once again make a trial unmanageable since the number of instances an employee missed a rest break would have to be tested on a case-by-case basis to determine compliance. [Brouillette Decl., ¶ 20.]

For Plaintiff's expense reimbursement claim, Cafe Rio emphasized its written policies prohibited employees from using their own phones while on the clock and working, and that Cafe Rio has never used Workday for any purpose. Rather, schedules and payroll information were readily available from other sources. Thus, per Cafe Rio, use of cell phones was not reimbursable as a "necessary" business expense. [Brouillette Decl., ¶ 21.]

On the alleged derivative violations of Labor Code § 226 (wage statement violations) and §§ 201-203 (waiting time penalties), both claims, since they are entirely derivative, will rise or fall along with the primary claims, in addition to being subject to "good faith" and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay living wages). Accordingly, Plaintiff had to discount the value of these claims significantly in light of these multiple potential defenses. Defendant also contended a substantial discount should be applied to the civil penalties for these derivative (i.e., "stacked") violations, as it would be unfair to penalize Defendant multiple times for the same violation. [Brouillette Decl., ¶ 22.]

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

Thus, Defendant raised various and multi-layered defenses to each of Plaintiff's claims, any one of which, if successful, could have derailed Plaintiff's case. And Defendant vowed to raise all these defenses at trial. Accordingly, Plaintiff faced risky issues going forward with litigation, and it could have taken years to realize any recovery in this action along with the possibility of post-trial appeals. In addition to its merits defenses and arguing trial would be unmanageable, Defendant also intended to raise additional defenses on damages, including the proper measure of civil penalties and the appropriate discount to place on any assessment of such penalties. [Brouillette Decl., ¶ 24.]

Although Plaintiff and her counsel believe they could have prevailed, there was no such guarantee. When the risks of overcoming a manageability defense, prevailing at trial on the merits on all claims, securing the maximum theoretical civil penalties, and appellate risks all are factored into the equation, the settlement value is reasonable and supported. Of course, to recover anywhere near the maximum penalties Plaintiff would have to shoot the moon and win both liability and maximum penalties on all claims for every single pay period at issue, which, for the reasons discussed, is unlikely. Given Defendant's various procedural and merits defenses, as well as the substantial penalty reductions ordered in the cases above – which occurred after trial – the proposed settlement is reasonable. [Brouillette Decl., ¶ 25.]

Moreover, the recovery is in line with a number of other PAGA settlements approved by California courts. McLeod v. Bank of Am., N.A., No. 16-CV-03294-EMC, 2018 U.S. Dist. LEXIS 195314, 2018 WL 5982863, at *4 (N.D. Cal. Nov. 14, 2018) (finding $50,000 PAGA allocation for claims estimated at $4.7 million — approximately 1.1% — adequate); Smith v. Kaiser Found. Hosps., 2020 WL 5064282, at *17 (S.D. Cal. Aug. 26, 2020) (finding that PAGA award that was 2.4% of maximum estimated value of PAGA claims was not "unfair, inadequate, or unreasonable given the risks of continued litigation"); Gilmore v. McMillan-Hendryx Inc., 2022 WL 184004, at *4 (E.D. Cal. Jan. 20, 2022) (PAGA award of 4.2% of the maximum estimated value of PAGA claims and 2.3% of the total settlement amount was "not unreasonable and weighs in favor of settlement"); North v. Superior Hauling & Fast Transit, Inc., No. EDCV 18-2564 JGB (KKx), 2020 WL 12967997, at *4 (C.D. Cal. May 29, 2020) (approving settlement that included PAGA average payout of $21.01).

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 246, 250 ("even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims).

In sum, when the risks of litigation, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, the Court's substantial discretion to reduce any penalty award all are accounted for, it is clear a settlement amount of $240,000 for the PAGA claims is within the ballpark of reasonableness, furthers the purposes underlying PAGA, and approval is appropriate.

V. SUBMISSION TO THE LWDA

Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and notified the LWDA of this approval hearing. [Brouillette Decl., ¶ 26; Exh. 4.] Accordingly, the LWDA will be able to weigh in as necessary and, importantly, many courts find it persuasive of approval if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL 3669607, at *3 (court inferred the LWDA's non-response as "tantamount to its consent to the proposed settlement terms, namely the proposed PAGA penalty amount."); Jennings v. Open Door Marketing, LLC, 2018 WL 4773057, at *9 ("Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement."); Jordan v. NCI Group, Inc., 2018 WL 1409590, at *3 ("Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and no comment or objection has been received.").

VI. PLAINTIFF'S RELEASE AWARD

A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000). She not only devoted time and resources to the litigation, provided documents, and assisted her counsel with investigating the claims asserted and in preparing for mediation, but also is agreeing to dismiss her pending individual arbitration and enter into a full general release of her alleged claims. The service payment provided to Plaintiff as the PAGA representative is typical in representative action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards 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.").

Here, the Settlement Agreement provides for a Named Plaintiff Release payment of up to $10,000.00 to Plaintiff. The request is reasonable given she is dismissing her individual arbitration proceedings and releasing all claims against Cafe Rio, all in addition to the risks she undertook on behalf of the Aggrieved Employees and State. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent employees, while shouldering the risk of being liable for Defendant's litigation costs. Plaintiff also exposed herself to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing herself at risk of discrimination by future prospective employers. As stated in her declaration filed herewith, among taking many other actions assisting in the successful litigation of this case, Plaintiff provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Brouillette Decl., ¶ 27.]

VII. THE REQUESTED FEES AND COSTS ARE FAIR AND REASONABLE

For their efforts and the contingent risk undertaken in obtaining a common fund settlement that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or $80,000.00, is allocated to Plaintiff's counsel for reasonable attorney's fees, plus actual litigation costs which amount to $12,868.53. These fees and costs are warranted under the law and within the range of fees commonly awarded in similar cases.

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A. **<u>PLAINTIFF'S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY'S FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM ACTION</u>**

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

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

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

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

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

Awarding attorney's fees of one-third of gross common fund amount is favored by California courts when a fund established for the common benefit of others is involved, such as here. Accordingly, awarding fees on this basis out of the $240,000 GPSA, for a total of $80,000, is reasonable and appropriate. [Brouillette Decl., ¶¶ 28-51.]

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

Despite the recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar "cross-check" when assessing a proposed percentage-based fee award. Lealao, 82 Cal.App.4th at 46-47. Under the "lodestar multiplier" method of cross-checking proposed fee awards, the court first ascertains counsel's total "lodestar" amount by multiplying the number of hours reasonably expended by each attorney's reasonable hourly rate, and then enhances or reduces this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. <u>PLCM Group, Inc. v. Drexler</u> (2000) 22 Ca1.4th 1084, 1095-96; <u>Lealao</u>, 82 Cal.App.4th at 43 (court has discretion to use a multiplier to ensure that the "fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation").

Here, Plaintiff's counsel's lodestar is approximately $87,900 based on 114.7 attorney hours spent litigating the case. [Brouillette Decl., ¶¶ 32-51; Exh. 6.] On a lodestar basis, the fee request of $80,000 results in a base lodestar that is larger than the fees requested on a percentage basis, and therefore there is no request for a lodestar modifier.

C. <u>The Requested Costs Are Fair And Reasonable</u>

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

While the Settlement Agreement authorizes litigation costs not to exceed $15,000, Plaintiff's Counsel's actual costs are $12,868.53. [Brouillette Decl., ¶¶ 52-53.] This includes filing fees, service of process, court reporter charges, and mediation costs, while waiving photocopying costs, postage, and legal research charges. These costs are reasonable and uncontested, and should be approved.

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VIII. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under PAGA, approve the requested award of reasonable attorney's fees and costs, approve Phoenix as the settlement administrator and approve its fees in the amount of $12,000, approve the proposed distributions to the LWDA and Aggrieved Employees, and enter judgment.

Dated: August 28, 2025

CROSNER LEGAL, PC

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Brandon K. Brouillette
Zachary M. Crosner
Attorneys for Plaintiff DIANA SERMENO