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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA BARBARA**

12 HOMERO PEÑA, on behalf of the State of
13 California, and others similarly situated and
14 aggrieved,

15 Plaintiff,

16 v.

17 SMITH PACKING, INC., a California
18 corporation; SUN COAST FARMS, LLC,
19 a California limited liability company; and
DOES 1-100, inclusive,

20 Defendants.
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Case No.: 23CV00931

Assigned for All Purposes to:
Hon. James Rigali
Dept. SM-2

MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
AND MOTION FOR APPROVAL OF
SETTLEMENT UNDER THE PRIVATE
ATTORNEY'S GENERAL ACT

[Filed concurrently with Notice of Motion and
Motion; Declarations of Jamie K. Serb, Homero
Pena, and Chris Longley; [Proposed] Order]

Date: March 19, 2024
Time: 8:30 a.m.
Dept: SM-2

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1 **I. INTRODUCTION**

2 Plaintiff Homero Pena hereby seeks Court approval of a proposed settlement of claims
3 brought under the Private Attorneys General Act (“PAGA”) against defendant Smith Packing, Inc.
4 (“Smith Packing” or “Defendant”). Consistent with PAGA, the proposed settlement releases claims
5 under PAGA only and has no impact on the individual claims of any aggrieved employee other than
6 Plaintiff Pena. Since the settlement resolves nothing more than claims under PAGA, it requires only
7 a one-step review and approval process by the Court, and for the reasons discussed below, Plaintiff
8 respectfully requests the Court approve the Settlement in its entirety.

9 **II. BACKGROUND**

10 Defendant Smith Packing is a farm labor contractor providing seasonal farm workers to
11 various agricultural producers. Plaintiff worked for Defendant from approximately January 31, 2022
12 to September 10, 2022 as a seasonal irrigator in Monterey County. Plaintiff alleges that he was
13 unlawfully terminated under the pretext of a “seasonal layoff.”¹ [Declaration of Jamie K. Serb
14 (“Serb Decl.”), ¶ 4.] Defendant denies that Plaintiff was unlawfully terminated.

15 Plaintiff initially filed a class action complaint against Defendant² on December 9, 2022,
16 seeking damages and statutory penalties for the following alleged wage and hour violations: (a)
17 failure to pay wages, including overtime wages; (b) failure to provide meal and rest periods; (c)
18 failure to provide complete and accurate wage statements; and (d) waiting time penalties. After
19 appropriate notice to the Labor & Workforce Development Agency (“LWDA”), Plaintiff filed a
20 separate PAGA-only complaint on March 3, 2023, seeking civil penalties based on the same alleged
21 Labor Code violations. Plaintiff filed these matters on behalf of all non-exempt current and former
22 employees employed by Defendant in California. As far as the PAGA claims, the relevant time frame
23 runs from April 28, 2023 through the date the Court enters an order granting final approval of the
24 Settlement.³ [Serb Decl., ¶ 5; Exh. 3.]

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26 _____
¹ Plaintiff is pursuing a wrongful termination lawsuit with separate counsel.

27 ² Sun Coast Farms, LLC, the client employer of Smith Packing, also was named as a defendant and is not a party to
the settlement although it is included as a “Released Party.”

28 ³ Smith Packing settled an earlier PAGA action that released the PAGA claims alleged by Plaintiff in this action
through April 27, 2023.

1 Smith Packing has at all times denied Plaintiff's allegations and maintained it properly
2 calculated and paid all wages due, that its meal and rest break and payroll policies and procedures
3 comply with California law, and that it provided the class members with required meal and rest
4 breaks. Additionally, Smith Packing emphasized Plaintiff and other employees signed arbitration
5 agreements⁴ and contends the case should be sent to arbitration following the U.S. Supreme Court's
6 decision in Viking River Cruises v. Mariana (2022) 142 S.Ct. 1906. And as detailed in the demurrer
7 filed on November 13, 2023, Smith Packing asserts that Plaintiff is barred by the doctrine of res
8 judicata from pursuing his PAGA claims by virtue of the prior settlement and the fact that his entire
9 period of employment with Smith Packing fell within the time period released under that settlement.
10 [Serb Decl., ¶ 6.]

11 After Plaintiff filed his complaints, upon discussing the merits of the case and engaging in
12 several meet and confer sessions regarding prospective law and motion and discovery issues, the
13 Parties agreed to an early mediation. The Parties further agreed to a protocol for exchanging
14 additional documents and information before the mediation. Through this informal discovery,
15 Defendant provided Plaintiff with information including, inter alia, the number of potential
16 Aggrieved Employees, the number of aggregate pay periods, sample pay stubs and time records for
17 a sampling of the allegedly Aggrieved Employees, employee handbooks and manuals, and other
18 policy documents regarding Defendant's time keeping and reporting policies. [Serb Decl., ¶ 7.]

19 The Parties then mediated the case with Henry Bongiovi, Esq., a respected mediator with
20 extensive class action/wage and hour experience, in September 2023. Before and during the
21 mediation, Plaintiff and his counsel analyzed, researched, and investigated the potential issues,
22 including matters related to the calculation of damages, trial, and appellate issues and risks. During
23 mediation, the Parties vigorously debated the likelihood of Plaintiff's ability to proceed on a
24 representative basis as to the PAGA claims, the legal grounds for Plaintiff's claims and Defendant's
25 defenses, and the parties' data analyses and conclusions based on data provided by Defendant. After
26 a contentious full day of negotiations, the Parties did not reach a settlement. However, in the months
27

28 ⁴ In light of the arbitration agreements, Plaintiff ultimately agreed to dismiss the pending class claims as a term of the settlement.

1 that followed and through additional efforts and discussions with the mediator, the parties reached
2 agreement and subsequently formalized their tentative settlement in the Settlement Agreement now
3 before the Court for approval. [Serb Decl., ¶ 8.] A fully executed, true and correct copy of the
4 Parties' PAGA Settlement Agreement ("Settlement Agreement") is attached to the Serb Declaration
5 as Exhibit 1.

6 **III. SUMMARY OF SETTLEMENT TERMS**

7 **A. SETTLEMENT TERMS AND DISTRIBUTION OF PAGA PENALTIES**

8 Under the settlement, Defendant will pay a non-reversionary settlement amount of \$85,000
9 (the "Gross Settlement Amount" or "GSA") in two installments within approximately six months
10 after approval. The GSA is inclusive of payments to the LWDA and Aggrieved Employees, costs
11 of settlement administration, a service award to Plaintiff Pena, and reasonable attorney's fees and
12 costs.⁵ After payment of settlement administration costs, Plaintiff's service award, and reasonable
13 attorney's fees and costs from the GSA, Plaintiff presently estimates about \$29,154.76 will remain
14 (the "Net Settlement Amount" or "NSA"). 75% of the NSA (about \$21,866.07) will go to the
15 LWDA, and the remaining 25% (about \$7,288.69) will be distributed to the Aggrieved Employees
16 in proportion to the total number of Pay Periods each individual worked during the PAGA Period,
17 with an average award currently estimated at \$9.11 per Aggrieved Employee. [Serb Decl., ¶ 9.]

18 **B. PAYMENT AND THE NOTICE**

19 The Parties propose using Atticus Administration, LLC as the Settlement Administrator.
20 Atticus has extensive experience administering PAGA settlements, and has agreed to cap its fees at
21 \$6,100.00. [Declaration of Chris Longley, ¶¶ 2-12; Exhs. 1-2.] Smith Packing will fund the first
22 installment payment within 30 days of the Effective Date (as that term is defined in the Agreement),
23 and the second payment within six months thereafter. Within 21 days of receipt of the full GSA,
24 Atticus will mail a Notice and settlement check to all Aggrieved Employees via regular First-Class
25 U.S. Mail, using the most current, known mailing addresses identified in Smith Packing's records.
26 Aggrieved Employees need not submit claim forms and will automatically receive a Notice and
27

28 ⁵ Plaintiff's counsel requests fees of 1/3 of the GSA, or \$28,333.33 and costs in the amount of \$11,411.91, while Plaintiff requests a service award of \$10,000.00.

1 settlement check. Settlement checks will be negotiable for 180 days, after which time any unclaimed
2 residual funds will be forwarded to the California State Controller’s Unclaimed Property Fund.
3 [Serb Decl., ¶ 10; Exh. 2.]

4 **C. THE RELEASE**

5 The California Supreme Court has explained that a judgment in “a representative action
6 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ...
7 is binding not only on the named employee plaintiff but also on government agencies and any
8 aggrieved employee not a party to the proceeding.” Arias v. Superior Court (2009) 46 Cal.4th 969,
9 985-86. Accordingly, the release in the Settlement Agreement narrowly releases only civil penalty
10 claims brought under PAGA. Under Arias, the order the Parties request the Court enter is intended
11 to be “binding not only on the named employee plaintiff but also on government agencies and any
12 aggrieved employee not a party to the proceeding.” The Settlement Agreement protects the rights
13 of the Aggrieved Employees to bring their own individual claims should they wish. For these
14 reasons, the Parties contend the release narrowly applies only to the PAGA claims alleged, and the
15 Settlement Agreement specifically provides the Release is inapplicable to any claims other than
16 those brought under PAGA. [Serb Decl., ¶ 11.]

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

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

25 In so holding, Moniz noted many federal district courts had imported class action settlement
26 approval principles when evaluating PAGA settlements, demanding that PAGA settlements be “fair,
27 reasonable, and adequate,” and weighing factors such as “the strength of the plaintiff’s case, the
28 risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the

1 settlement amount[.]” Id. at 75-76 (collecting cases). Observing that “PAGA’s purpose” is to
2 “protect the public interest”—especially the allegedly Aggrieved Employees—the Court agreed
3 with this district court authority, concluding that much the same principles that ensure fairness in
4 class action settlements serve the public interest in the PAGA context. Essentially, these factors are
5 more or less identical to those California courts use to evaluate class action settlements per Kullar
6 v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116 and, accordingly, Plaintiff submits they
7 should inform the Court’s analysis as well. For the reasons below, the proposed settlement is fair,
8 reasonable and adequate, advances the purposes underlying PAGA, and should be approved.

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

10 First, Plaintiff alleged Defendant failed to pay all minimum and overtime wages by further
11 rounding time clock entries to the benefit of Defendant such that Plaintiff and the aggrieved
12 employees lost compensable hours worked. Next, Plaintiff contends Defendant failed to provide
13 Aggrieved Employees with compliant meal periods and utilized a policy that failed to comply with
14 California law. Plaintiff alleges he and other employees did not receive compliant meal periods as
15 meal periods frequently were late, interrupted, and/or or lasted less than 30 minutes. He contends
16 further that company policy prohibited them from leaving the premises on meal periods without
17 authorization, prohibited certain activities during meal periods, and required employees to monitor
18 their phones at all times and, as a result, Plaintiff and other employees were not entirely free from
19 employer control while on their meal periods. Plaintiff similarly contends Defendant failed to
20 provide Plaintiff and the Aggrieved Employees with compliant rest periods for essentially the same
21 reasons. [Serb Decl., ¶ 12.]

22 Plaintiff next alleges Smith Packing failed to reimburse necessary business expenses such
23 as personal cell phones, as supervisors would contact Plaintiff and other employees on their personal
24 phones regarding, inter alia, scheduling, informing them when to take a meal/rest break, etc. during
25 a shift. Lastly, Plaintiff also brings claims derivative of the foregoing claims, including a derivative
26 wage statement claim based on the failure to pay all wages due, and failure to pay all wages due and
27 owing upon separation of employment under Labor Code §§ 201-203. [Serb Decl., ¶ 13.]
28

1 Defendant denies all allegations and specifically alleges that it has complied and does
2 comply with all applicable wage and hour laws, including but not limited to: paying all minimum
3 and overtime wages owed in accordance with applicable laws; providing and/or authorizing and
4 permitting all required meals and rest periods; and reimbursing all necessary expenses employees incur
5 in the discharge of the duties.

6 **B. NUMBER OF ALLEGED VIOLATIONS AND POTENTIAL PENALTIES**

7 For mediation, Smith Packing indicated it employed approximately 800 non-exempt
8 employees in California during the applicable PAGA period, and these individuals worked
9 approximately 8,000 pay periods during that time. Based on the data and information provided by
10 Defendant, Plaintiff estimated Defendant's maximum PAGA exposure at approximately \$2,050,000
11 assuming a 50% violation rate on all claims. [Serb Decl., ¶¶ 14-15.]

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

15 In response to Plaintiff's unpaid wage claims for alleged rounding and "off the clock work,"
16 Smith Packing took the position that its time keeping policies are legally compliant, that it accurately
17 tracked all hours worked, that employees were required by company policy to accurately track the
18 exact shift start/end times, and that it paid the Aggrieved Employees for all hours worked consistent
19 with those policies. Defendant further emphasized to the extent any off the clock work may have
20 happened, it was intermittent, against company policy, and done without company authorization or
21 knowledge. White v. Starbucks Corp., 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (employer must
22 have actual or constructive knowledge of off the clock work for liability to attach). [Serb Decl., ¶
23 16.]

24 For the meal and rest break claims, Smith Packing offered multiple defenses. First, it
25 emphasized its written meal and rest break policy generally was compliant, that it authorized and
26 permitted all necessary breaks, and that employees received full uninterrupted lunch periods free
27 from employer control. Defendant also asserted that even to the extent any late or short meal periods
28 occurred, it was in violation of company policy and aberrational, and would require significant

1 individual inquiries to determine the reasons underlying any such alleged violations and whether it
2 was by employee choice or some other reason. [Serb Decl., ¶ 17.]

3 As with meal breaks, Defendant argued the applicable rest break policies complied with
4 California law, and that it authorized and permitted employees to take all required breaks.
5 Defendant further contended that, in light of the fact that it is not required to maintain a record of
6 rest periods, any evidence of failure to authorize rest periods and/or discouragement from taking
7 rest periods would be purely anecdotal and individual issues would predominate on liability. This
8 arguably would once again make a trial unmanageable since the number of instances an employee
9 missed a rest break would have to be tested on a case by case basis to determine compliance. [Serb
10 Decl., ¶ 18.]

11 For the expense reimbursement claim, Smith Packing countered there typically would be
12 no need for employees to communicate via phone or text while performing their job duties in the
13 fields. Per Defendant, to the extent Plaintiff or other Aggrieved Employees used their individual
14 phones for work purposes, it was done purely for personal convenience and was neither required
15 nor necessary in order to perform their job duties. Thus, per Defendant, no reimbursement was
16 required. [Serb Decl., ¶ 19.]

17 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
18 violations) and §§ 201-203 (waiting time penalties). The derivative wage statement claims (based
19 on the unpaid wage and meal/rest claims). The waiting time penalties claim, also is entirely
20 derivative and will rise or fall along with the primary claims, in addition to being subject to “good
21 faith” and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163
22 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
23 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to
24 pay living wages). Accordingly, Plaintiff had to discount the value of this claim significantly in
25 light of these multiple potential defenses. Defendant also contended a substantial discount should
26 be applied to the civil penalties for these derivative (i.e., “stacked”) violations, as it would be
27 unfair to penalize Defendant multiple times for the same violation. [Serb Decl., ¶ 20.]

1 Defendant also emphasized PAGA gives the Court wide latitude to reduce the amount of
2 civil penalties “based on the facts and circumstances of a particular case” if “to do otherwise
3 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code §
4 2699(h). Several state and federal courts in California have applied significant reductions to
5 PAGA civil penalties even after plaintiff prevailed on the merits. In Fleming v. Covidien (C.D.
6 Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9, for instance, the district court reduced the
7 potential penalties by over 82% after a bench trial. More recently, in Carrington v. Starbucks
8 Corp. (2018) 30 Cal.App.5th 504, after a bench trial, the trial court awarded penalties of just \$5
9 per pay period, a 90% reduction, which decision was upheld on appeal. In re Taco Bell Wage and
10 Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after
11 trial). [Serb Decl., ¶ 21.]

12 Defendant also emphasized the potential applicability of the U.S. Supreme Court’s recent
13 decision in Viking River Cruises v Mariana (2022) 142 S.Ct. 1906. In particular, Smith Packing
14 argued the arbitration agreement signed by Plaintiff contains the necessary elements outlined by
15 Viking River Cruises to compel arbitration, namely: (1) it provides for the arbitration of wage and hour
16 claims, like Plaintiff’s pending claims in the PAGA lawsuit, (2) it does not allow for an employee to
17 bring a class or representative claim in arbitration, and (3) it contains a “severability” clause stating
18 that if any terms of the Agreement are unenforceable, the remainder of the Agreement is still valid.
19 Thus, per Smith Packing, Plaintiff’s “individual” PAGA claim must be compelled to arbitration and
20 the “representative” PAGA claims dismissed or stayed. [Serb Decl., ¶ 22.]

21 Finally, Defendant also asserts that Plaintiff’s PAGA Complaint is barred in its entirety by
22 the doctrine of *res judicata* by virtue of a prior court judgment finally resolving and releasing the
23 PAGA claims at issue. As detailed in the demurrer filed on November 13, 2023, on April 28,
24 2023, the Monterey County Superior Court granted final approval of a PAGA settlement in the
25 case captioned *Jose Luis Lopez Garcia v. Smith Packing, Inc.* (Case No. 20CV002559). The
26 *Garcia* settlement resolved the PAGA claims of all non-exempt current and former employees
27 employed by Smith Packing at any time from September 24, 2019 through April 28, 2023. It is
28 undisputed that Plaintiff’s entire period of employment falls within this time period. The release

1 approved by the *Garcia* court encompasses any and all claims for civil penalties under PAGA
2 allegedly arising during this time period that were asserted “or could reasonably have been
3 asserted” in *Garcia*. The release also covers Smith Packing’s affiliated entities. In evaluating the
4 settlement, the *Garcia* court specifically found the settlement to be fair, reasonable, and adequate;
5 entered judgment on the PAGA claims with prejudice; and ordered that all Aggrieved Employees
6 and the State of California would be forever barred from pursuing any claims for the PAGA
7 penalties being released. Defendant asserts that Plaintiff himself has already been paid his portion
8 of the alleged PAGA penalties that he now seeks to (again) recover – he has cashed the check sent
9 by the third-party administrator responsible for administering the *Garcia* settlement. Defendant
10 asserts that he cannot relitigate those claims again here. Defendant asserts that Plaintiff has no
11 legal basis to circumvent the Monterey County judge’s final judgment approving the PAGA
12 settlement and releasing his claims.

13 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff’s claims,
14 anyone of which, if successful, could have decimated Plaintiff’s case. And Defendant vowed to
15 raise all these defenses at trial, even assuming Plaintiff overcame Viking River Cruises.
16 Accordingly, Plaintiff faced risky issues going forward with this litigation, and it could have taken
17 years to realize any recovery in this action along with the possibility of post-trial appeals. In
18 addition to its merits defenses and arguing trial would be unmanageable, Defendant also
19 intended to raise additional defenses on damages, including the proper measure of civil penalties
20 and the appropriate discount to place on any assessment of such penalties, especially considering
21 Defendant just settled another PAGA claim. [Serb Decl., ¶ 23.]

22 Although Plaintiff and his counsel believe they could have prevailed, there was no such
23 guarantee. When the risks of overcoming Defendant’s demurrer, a motion to compel arbitration, a
24 manageability defense, prevailing at trial on the merits on all claims, and securing 100% of the
25 theoretical civil penalties all are factored into the equation, the settlement value is reasonable and
26 supported. Of course, to recover anywhere near the maximum penalties Plaintiff would have to
27 shoot the moon and win both liability and maximum penalties on all claims, which outcome, for
28 the reasons discussed, is unlikely. Given Defendant’s various procedural and merits defenses, as

1 well as the substantial penalty reductions ordered in the cases above – which occurred after trial –
2 the proposed settlement is eminently reasonable. [Serb Decl., ¶ 24.]

3 Importantly, the mere fact that a settlement does not provide the same recovery as might be
4 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
5 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
6 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
7 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
8 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
9 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
10 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
11 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
12 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
13 fundamentally fair . . . is different from the question whether the settlement is perfect in the
14 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
15 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
16 though it represented 99% discount off the maximum value of the claims).

17 In sum, when the risks of litigation, the burdens of proof necessary to establish liability,
18 the probability of appeal of a favorable judgment, the Court’s substantial discretion to reduce any
19 penalty award all are accounted for, it is clear a settlement amount of \$85,000 for the PAGA
20 claims is within the ballpark of reasonableness, and approval is appropriate. Jennings v. Open
21 Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *7 (approving
22 settlement with PAGA penalties of 0.6% where “[p]laintiffs [have] submitted the settlement
23 agreement to the LWDA, and the LWDA has not objected to the settlement”).

24 **V. SUBMISSION TO THE LWDA**

25 Plaintiff timely served the LWDA with the Settlement Agreement and this Motion, and
26 notified the LWDA of this approval hearing. [Serb Decl., ¶ 25; Exh. 4.] Accordingly, the LWDA
27 will be able to weigh in as necessary and, importantly, many courts find it persuasive of approval
28 if the LWDA ultimately declines to offer any comment or objection to a proposed PAGA

1 settlement. Echavez v. Abercrombie & Fitch Co., Inc. (C.D. Cal. Mar. 23, 2017) 2017 WL
2 3669607, at *3 (court inferred the LWDA’s non-response as “tantamount to its consent to the
3 proposed settlement terms, namely the proposed PAGA penalty amount.”); Jennings, 2018 WL
4 4773057, at *9 (“Plaintiffs submitted the settlement agreement to the LWDA, and the LWDA has
5 not objected to the settlement.”); Jordan, 2018 U.S. Dist. LEXIS at *7 (“Additionally, the Court
6 finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and
7 no comment or objection has been received.”).

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

9 For their efforts and the contingent risk undertaken in obtaining a common fund settlement
10 that benefits the LWDA and Aggrieved Employees, 1/3 of the gross settlement, or \$28,333.33, is
11 allocated to Plaintiff’s counsel for reasonable attorney’s fees, plus actual litigation costs. These fees
12 are warranted under the law and within the range of fees commonly awarded in similar cases.

13 A. **PLAINTIFF’S COUNSEL ARE ENTITLED TO RECOVER ATTORNEY’S**
14 **FEES UNDER THE COMMON FUND DOCTRINE IN THIS QUI TAM**
15 **ACTION**

16 PAGA provides a Plaintiff is entitled to recover reasonable attorney’s fees, expenses, and
17 costs under Labor Code § 2699(g)(1): “Any employee who prevails in any action shall be entitled to
18 an award of reasonable attorney’s fees and costs,” As discussed below, reasonable attorney’s
19 fees and costs are typically awarded under the common fund doctrine in a *qui tam* such as this one,
20 where, as here, the litigation creates a common fund of money in a specific amount for the benefit
21 of others.

22 “A *qui tam* action is one brought under a statute that allows a private person to sue as a
23 private attorney general to recover damages or penalties, all or part of which will be paid to the
24 government.” People ex rel. Stratham v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 491-
25 492. As our Supreme Court recently affirmed, a PAGA action is a *qui tam* action because the statute
26 allows the employee plaintiff, acting as the proxy of the State’s labor law enforcement agency, to
27 sue his or her employer for Labor Code violations and recover civil penalties that otherwise could
28 only be assessed and collected by the LWDA. Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th
73; Iskanian, 59 Cal.4th at 380-82 (“[a] PAGA representative action is therefore a type of *qui tam*

1 action”). Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the State,
2 with a smaller portion paid to the Aggrieved Employees (e.g. 75% paid to the state; 25% paid to the
3 Aggrieved Employees). Lab. Code § 2699(i). As here, where a common fund is created in a *qui*
4 *tam* action by the successful litigation of a plaintiff and his attorneys, the plaintiff’s attorneys are
5 entitled to recover their fees from the common fund. Bank of America v. Cory (1985) 164
6 Cal.App.3d 66, 89-91.

7 Through the successful efforts of Plaintiff and his attorneys here, a common fund was created
8 in the amount of \$85,000 for the benefit of the Aggrieved Employees and the State. Thus, these
9 beneficiaries should bear their share of the costs and attorney’s fees out of the overall \$80,000
10 amount in civil penalties under the common fund theory. Boeing Co. v. Van Gemert (1980) 444
11 U.S. 472, 478-482; Six (6) Mexican Workers v. Arizona Citrus Growers (9th Cir. 1990) 904 F.2d
12 1301, 1311.

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

25 Accordingly, the common fund doctrine allows a court to award attorney’s fees based on a
26 percentage of the total fund created when the fund consists of a “certain or easily calculable sum of
27 money,” and California law has long applied the percentage of the recovery method for awarding
28 attorney’s fees where a common fund is established. Serrano, 20 Cal.3d at 34; Bell v. Farmers Ins.

1 Exch. (2004) 115 Cal.App.4th 715, 726; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
2 1809; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-63 (affirming award of attorney's
3 fee based on percentage of recovery).

4 Awarding attorney's fees of one-third of gross common fund amount is favored by California
5 courts when a fund established for the common benefit of others is involved, such as here.
6 Accordingly, awarding fees on this basis out of the \$85,000 GSA, for a total of \$28,333.33, is
7 reasonable and appropriate. [Serb Decl., ¶¶ 26-42.]

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

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

20 Here, Crosner Legal's lodestar is approximately \$64,085, based on 84.0 attorney hours spent
21 litigating the case. [Serb Decl., ¶¶ 29-42; Exh. 6.] This results in a lodestar that is higher than the
22 fees requested on a percentage of the recovery basis and, accordingly, there is no request for a
23 multiplier. It also is important to note this fact serves to highlight the reasonableness of the fees
24 sought on a percentage-of-the-recovery basis, as it shows the requested fees are actually lower than
25 the market rate for the services rendered if those services are valued via traditional hourly billing.

26 **C. THE REQUESTED COSTS ARE FAIR AND REASONABLE**

27 Plaintiff's Counsel requests reimbursement of actual out-of-pocket expenses incurred to
28 prosecute this action. These expenses were incidental and necessary to the effective representation

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

9 While the Settlement Agreement authorizes litigation costs not to exceed \$15,000, Plaintiff's
10 Counsel's actual costs presently are \$11,411.91. [Serb Decl., ¶¶ 43-44.] This includes filing fees,
11 service of process, mediation costs, and postage, while waiving photocopying costs and legal
12 research charges. These costs are reasonable and uncontested, and should be approved.

13 **VII. THE PROPOSED SERVICE AWARD FOR PLAINTIFF IS FAIR AND**
14 **REASONABLE**

15 Pursuant to the Settlement Agreement, Plaintiff seeks an incentive award of \$10,000. This
16 request is reasonable given the much broader release that Plaintiff is agreeing to, as well as
17 Plaintiff's efforts in this case and the risks he undertook on behalf of the Aggrieved Employees.
18 Additionally, by contacting and retaining counsel to pursue these claims, Plaintiff made this
19 settlement possible for the other Aggrieved Employees and the LWDA, while shouldering the risk
20 of being liable for Defendant's litigation costs if he were unsuccessful. Plaintiff also exposed himself
21 to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google
22 search) for the benefit of other employees, placing Plaintiff at risk of discrimination by future
23 prospective employers. Among taking many other actions assisting in the successful litigation of
24 this case, Plaintiff provided substantial factual information to Plaintiff's Counsel, participated in
25 numerous phone calls and meetings with counsel to discuss the case, and general kept up to speed
26 and informed on the case's progress. The incentive payment to Plaintiff is appropriate and justified
27 as part of the Settlement. [Serb Decl., ¶ 45; Declaration of Homero Pena, ¶¶ 2-9.]

28 Accordingly, Plaintiff submits the amount sought is well within the range of

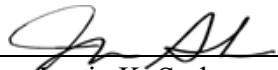
1 reasonableness for such awards in other wage and hour actions. Staton v. Boeing (9th Cir.
2 2003) 327 F.3d 938, 977 (collecting cases awarding service and incentive payments ranging
3 from \$2,000 to \$25,000).

4 **VIII. CONCLUSION**

5 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement under
6 PAGA, approve the requested award of reasonable attorney's fees and costs, approve the requested
7 service award to Plaintiff in the amount of \$10,000, approve Atticus Administration, LLC as the
8 settlement administrator and approve its fees in the amount of \$6,100, approve the proposed
9 distributions to the LWDA and Aggrieved Employees, and enter judgment.

10
11 Dated: February 21, 2024

CROSNER LEGAL, PC

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13 By: 
14 Jamie K. Serb
15 Michael Jones
16 Zachary M. Crosner
17 Attorneys for Plaintiff HOMERO PENA
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