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12 proposed class

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES**

15 TAMARA WHITMER, in a Representative
16 capacity, and on behalf of the proposed class

17 Plaintiff,

18 v.

19 USP MISSION HILLS, INC., a California
20 Corporation, and DOES 1-10, inclusive

21 Defendants

CASE NO. 20CHCV00209

22 **SUPPLEMENTAL BRIEFING IN**
23 **SUPPORT OF PLAINTIFFS' UNOPPOSED**
24 **MOTION FOR CONDITIONAL**
25 **CERTIFICATION OF SETTLEMENT**
26 **CLASS AND PRELIMINARY APPROVAL**
27 **OF GOOD FAITH DETERMINATION OF**
28 **CLASS ACTION SETTLEMENT**

Date: November 8, 2022

Time: 11:00 am

Dept.: 11

Judge: Hon. David S. Cunningham

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1 **I. SUPPLEMENTAL BRIEFING**

2 Plaintiff motion for preliminary approval of a class action settlement was heard by this Court on
3 August 17, 2022. The Court's final ruling asked Plaintiff to make modifications to the settlement
4 agreement and class notice. The parties have made all changes requested by the Court. The Court also
5 asked for additional information which is provided herein.

6 Other than the changes made addressed herein, Plaintiff incorporates by reference all other facts
7 and arguments previously briefed which she maintains support preliminary approval of this settlement.

8 The following sub-headers all track sequentially with the issues raised in the Court's checklist
9 and final ruling from August 17, 2022.

10 **1. Estimated Value of the Waiting Time Penalties Claim**

11 Plaintiff's prior valuation of claims did not explicitly include an estimated value for the waiting
12 time penalties claims. As was previously briefed in the moving papers, it was counsel's position that
13 these penalties were purely derivative and could only be awarded if the other claims were successful.
14 Moreover, they were unlikely to be awarded based on an analysis of relevant law. (See prior Memo.
15 at III(F) pp. 8-9).

16 Moreover, counsel believes that even if it could be proven that unpaid wages were owed, it
17 Plaintiff's counsel would have a very difficult time establishing that the Labor Code violations were
18 "wilful" which is a prerequisite for recovery under the statute. See Labor Code § 203(a). (Yaeckel
19 supp. decl. ¶ 3.)

20 However, counsel now estimates that if a waiting time penalties claim was awarded, it could
21 be worth as much as **\$789,200.50** (\$779,800.50 on a Class basis and \$9,4000 on a PAGA basis). It
22 could be worth as little as **\$0.00**, in the case of a denial of class certification, defense verdict, or finding
23 that violations were not wilful. (Yaeckel supp. decl. ¶ 4.)

24 Even in the unlikely event these additional penalties were awarded, it does not change
25 counsel's prior analysis that the settlement is reasonable and in the best interest of the class. (Yaeckel
26 supp. decl. ¶ 5.)

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1 **2. The Amount Allocated Towards Non-Class Claims (PAGA)**

2 There is a separate PAGA allocation of \$60,000. In line with the statute, 75% (\$45,000) will
3 be distributed to the LWDA and 25% (\$45,000) will go to the aggrieved employees.

4 Plaintiff maintains that this PAGA allocation is fair and reasonable to those affected. It was
5 negotiated by a well respected mediator as a result of arms length negotiations. It also takes into
6 account this matter was originally plead as a PAGA only case, before the parties agreed to attempt to
7 settle both class and PAGA claims. (Yaeckel supp. decl. ¶ 6.)

8 The total allocation amounts 16% of the total settlement amount. This is in line (and actually
9 well above) the percentages approved in other California Court's and takes into consideration that
10 there is a significant risk any penalties awarded would be significantly mitigated, as was previously
11 briefed. (See Memo. at III(F) pp. 8-9).

12 While Labor Code section 2699(l) requires a court to "review and approve any penalties sought
13 as part of a proposed settlement agreement," it does not provide any guidance as to what is considered
14 an 'adequate' allocation of these penalties. However, the California Court of Appeal has held that an
15 allocation of zero dollars to resolve PAGA claims may be appropriate. *Nordstrom Com'n Cases* (2010)
16 186 Cal.App.4th 576, 589.

17 Moreover, District Courts in California have routinely approved settlement agreements which
18 allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v. Wells*
19 *Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1
20 (approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement); see also
21 *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL
22 2117001, at *14 (approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement).

23 While not admitting fault, Defendant, and its counsel, deserve credit for their willingness to
24 consider - and address - the allegations. Specifically, Defense Counsel (who have extensive experience
25 and knowledge in "Wage and Hour" litigation) agreed to early mediation without the need for a lot of
26 litigation. They agreed to voluntarily to produce a substantial amount of documents and information
27 necessary to evaluate the parameters of the class and PAGA settlement. Following the a full day
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1 Mediation and arms-length negotiations, the parties have reached this proposed settlement that
2 includes a payment of penalties under PAGA.

3 Plaintiff submits the above allocation of penalties is fair, reasonable, and adequate in view of
4 PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize
5 enforcement of state labor laws. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77.

6 **3. The Adequacy of the Class Representative**

7 Ms. Whitmer's attached declaration confirms that Ms. Whitmer agrees to act as a class
8 representative and understands her duties to act in the best interest of the class. (Whitmer decl. ¶¶ 2-3,
9 12-13).

10 Plaintiff provided substantial factual information and documents to her counsel, identified
11 potential witnesses, and attended in-person and telephonic meetings with counsel to discuss case
12 strategy and his experiences with the wage and hour practices and policies at issue. (Whitmer decl.
13 ¶¶ 4-9).

14 Moreover, Plaintiff understood she was taking a risk that she could be liable for a large award
15 of costs if the claims were unsuccessful. (Whitmer decl. ¶¶ 10-11).

16 Plaintiff's efforts resulted in a strong result for Settlement Class members, who will be
17 receiving tangible monetary benefits on claims that faced significant obstacles on the merits.

18 Additionally, the fact that Ms. Whitmer was offered an additional severance payment of
19 \$25,000 in exchange for a resignation of her employment does not put her at odds with the class.

20 It was only after the parties had agreed on a figure to settle the class action that the parties
21 negotiated a separate individual release through arms length negotiations with experienced a mediator
22 (Louis Marlin, Esq.) who has vast experience in employment law matters. (Yaeckel supp. decl. ¶ 7;
23 Whitmer decl. ¶ 12.)

24 To confirm, the severance amount being paid to plaintiff is separate and apart from the amount
25 negotiated for the class. This individual package provides a much broader release of claims (and a
26 resignation from a job) in exchange for the additional consideration. Class members were not subjected
27 to a complete release of claims nor asked to resign employment. (Yaeckel supp. decl. ¶ 8.)
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1 The sources of funding are the same in that the named Defendant will be obligated to fund both
2 settlements. (Yaeckel supp. decl. ¶ 9.) However, as set forth above this severance was separately
3 negotiated and did not serve to take anything away from the amount negotiated for the class.

4 Moreover, class members are being notified of this separate payment to plaintiff. See **Exhibit**
5 **3** at IV(p. 2). This further safeguard allows the class to weigh in and object if any class member
6 believes it is warranted .

7 Accordingly, Plaintiff submits there is no conflict and she is adequate to represent the class.

8 **4. Plaintiff's PAGA Notice Letter to the LWDA**

9 Plaintiff's PAGA Notice letter is attached to the operative Third Amended Complaint as
10 Exhibit 1. For the Court's ease of reference, it is also attached to the supplemental declaration of
11 counsel as **Exhibit 5**.

12 **5. Elimination of Any Injunctive Relief**

13 The parties have modified the settlement and proposed orders to remove any language which
14 suggests that class members would be enjoined from filing future claims. See **Exhibit 2** at c VIII p.
15 22; and See **Exhibit 2** at ¶ IX(29)(iv).

16 **6. Changes to the Settlement Agreement**

17 All changes have been made to comply with the Court's instructions in its checklist. A redlined
18 version which tracks the exact changes made is attached as **Exhibit 2**.

19 **a. Changes Made to the Scope of the Release**

20 See **Exhibit 2** at ¶ V(15).

21 **b. The Addition of a Separate PAGA Release**

22 See **Exhibit 2** at ¶ V(16).

23 **c. The Elimination of a Limited "1542" Release for the Class Members**

24 See **Exhibit 2** at p. 12.

25 **d. Modification of the Release Effective Date to be Concurrent with Date of Funding**

26 See **Exhibit 2** at ¶ 15, l. 16-17.

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1 **e. Modification of Confidentiality of Class Data Provisions**

2 See **Exhibit 2** at ¶ IX(27).

3 **7. The Employer’s Payroll Taxes as a Result of the Wage Portion of the Settlement**

4 As part of the negotiations at mediation, Defendant’s requested an “all in” number so they
5 could determine the exact financial amount they would owe if the matter is approved. Given that
6 Defendant “stepped up” for an early mediation, and made a very fair offer that results in a good recover
7 per class member. As a result, Plaintiff acquiesced to this demanded term which was part of the
8 mediator’s final proposal. (Yaeckel supp. decl. ¶ 10.)

9 The parties asked the settlement administrator to review all terms of settlement and estimated
10 that “soaking wet” the maximum estimated amount of employer taxes that would be taken from the
11 net settlement amount would be \$7,705.00. (Yaeckel supp. decl. ¶ 11.)

12 The estimated payroll taxes are being provided to the class. Ask Phoenix if they can confirm.

13 **8. A Separate Payment Formula Was Made for Class Members Who Worked during the**
14 **“PAGA Period”**

15 See Exhibit 2 at ¶ VI(19(h)).

16 **9. Notice Administration**

17 Plaintiff’s counsel sought two separate bids for settlement administration. The settlement
18 administrator Phoenix Settlement Administrators (“PSA”) was the lower of the proposed bids.
19 Moreover, counsel for both parties had routinely worked with PSA and based on that experience felt
20 most comfortable that they would perform all required duties. (Yaeckel supp. decl. ¶ 15.)

21 The Notice Administrator (PSA) has provided a declaration confirming it has the requisite
22 experience administering class and PAGA settlements. (Lawrence decl. ¶¶ 2-7, 10). PSA also has
23 safeguards and insurance in place to protect the class data. (Lawrence decl. ¶¶ 11-13).

24 Phoenix has confirmed that as part of its duties, it will update the class list prior to the initial
25 mailing by use of National Change of Address Registry.(Lawrence decl. ¶ 8).

26 **10. Changes to the Class Notice**

27 The notice has been updated to show each class members workweek amount and estimated
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1 class payment. There will also be pay period counts and estimated PAGA payments for all Class
2 Members who worked during the PAGA limitations period. See **Exhibit 3** at VI(A).

3 The notice was updated to include information about remote appearances and social distancing
4 procedures. See **Exhibit 3** at VII.

5 The agreement and notice were both updated to provide a deadline for the administrator to re-
6 mail any notices that come back as undeliverable. Any Class members who is sent a re-mailed notice
7 will have an additional 14 days to respond after the original 45 day deadline. **Exhibit 2** at VII(22)(c);
8 **Exhibit 3** at V(B), V(C).

9 **11. Changes Made to Responses to Notice**

10 A detailed section on how to dispute the workweek and pay period calculations was added to
11 the notice and agreement. See **Exhibit 2** at VI(19(H)); **Exhibit 3** at V(D).

12 As set forth above, class members who received a re-mailed notice will be given an extension
13 of 14 additional days to respond. **Exhibit 2** at VII(22)(c); **Exhibit 3** at V(B), V(C).

14 The deadline for the notice period has been amended and is now 45 days after the mailing.
15 **Exhibit 2** at I(k), VI(20), VII(22)(d); **Exhibit 3** at V(B).

16 The objection procedure is now the same as the opt-out procedure. Class members only need
17 to mail or fax their objection or opt-out to the administrator to be valid. **Exhibit 3** at V(B), VIII.

18 The parties have also made clear in the agreement and notice that class members may present
19 objections at the final approval hearing, regardless of whether they submitted a written objection.
20 **Exhibit 2** at IV(10); **Exhibit 3** at VIII.

21 **12. Miscellaneous**

22 The Class and PAGA (if applicable) releases in the class notice are verbatim with those in the
23 settlement agreement. **Exhibit 2** at V(15)-(16); **Exhibit 3** at IV.

24 The Agreement no longer contemplates a dismissal of any class claims. **Exhibit 2** at
25 IX(29)(b)(iv). The Court may enter a final judgment consistent with Cal Rule of Court 3.769(h).

26 The operative Third Amended Complaint was filed as a standalone document on September
27 6, 2022. (See Registrar of Actions).
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1 **13. Proof of Service to the LWDA**

2 A proof of service of this entire supplemental submission (including the new hearing date) on
3 the LWDA is being filed concurrently. A proof of service of the original moving papers on the LWDA
4 was submitted with the prior motion. For the Court’s ease of reference, it is attached to the declaration
5 of counsel as **Exhibit 6**.

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8 Dated: September 15, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

Eric Yaeckel

10 _____
11 Eric K. Yaeckel
12 Attorneys for Plaintiff TAMARA WHITMER, in a
13 Representative capacity only, and on behalf of other
14 members of the general public similarly situated
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