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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF LOS ANGELES**

12 ZACHARY KAHN, as an individual and on
behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 LOS ANGELES MAISON, LLC, a California
limited liability company; ACCOR
16 MANAGEMENT US INC.; and DOES 1
through 10, inclusive,

17 Defendants.

Case No.: 20STCV18592

[Assigned for all purposes to the Hon. David
S. Cunningham, Dept. SS-11]

**PLAINTIFF'S ADDITIONAL BRIEFING
IN SUPPORT OF CONTINUED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS AND REPRESENTATIVE
ACTION SETTLEMENT**

Date: October 3, 2022
Time: 10:00 a.m.
Dept.: SS-11

Complaint Filed: May 11, 2020
Fourth Amended Complaint Filed: October 21,
2021

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Zachary Kahn as an individual and on behalf of all others similarly situated
4 (“Plaintiff”), seeks preliminary approval of this class action and Private Attorneys General Act
5 (“PAGA”) settlement. Plaintiff’s initial Motion for Preliminary Approval of Settlement hearing
6 was heard on June 8, 2022. At the hearing, the Court ordered additional briefing to address only the
7 issues checked in the Court’s Preliminary Approval of Class Action Settlement Motion Checklist
8 that was posted by the Court on Case Anywhere on June 7, 2022 and deemed filed on June 8, 2022.
9 Pursuant to the above-described Court order, Plaintiff submits this additional briefing in support of
10 his continued hearing for his Motion for Preliminary Approval of Settlement.

11 **II. CHECKED ITEMS IN THE COURT’S PRELIMINARY APPROVAL OF CLASS**
12 **ACTION SETTLEMENT MOTION CHECKLIST**

13 **A. Summary of the investigation and discovery conducted, including the specific**
14 **documents reviewed prior to agreeing to settle the case. If counsel’s analysis**
15 **was informed by a data sample, show that the sample is statistically reliable.**

16 Over the course of the lawsuit, Plaintiff conducted formal and informal discovery and
17 investigation, including propounding formal discovery and obtaining substantive responses thereto.
18 Specifically, Plaintiff propounded and received responses to the following formal written discovery:

- 19 • Plaintiff’s Request for Production of Documents and Things, Set No. One
20 ○ Defendant Accor Management US Inc. Responses thereto
21 ○ Defendant Accor Management US Inc. First Supplemental Responses thereto
22 ○ Defendant Los Angeles Maison's Responses thereto
23 ○ Defendant Los Angeles Maison's First Supplemental Responses thereto
24 • Plaintiff’s Special Interrogatories, Set No. One
25 ○ Defendant Accor Management US Inc. Responses thereto
26 ○ Defendant Accor Management US Inc. First Supplemental Responses thereto
27 ○ Defendant Los Angeles Maison's Responses thereto
28 ○ Defendant Los Angeles Maison's First Supplemental Responses thereto

(Supplemental Declaration of Dennis Hyun (“Hyun Decl.”) ¶ 7).

26 The above-described formal written discovery responses advised Plaintiff of issues related
27 to this litigation, including but not limited to: class sizes, sub-class sizes, potential for additional
28 liability, issues related to collective bargaining agreements, issues related to a prior court approved

1 classwide release that affected this litigation, and commonality issues such as different employee
2 positions and job titles of individuals within each class and subclasses. (Hyun Decl. ¶ 7).
3 Documents were also produced by Defendants in order to corroborate and add to the above-
4 described information. (Hyun Decl. ¶ 7). These documents include, but are not limited to, various
5 collective bargaining agreements, employment agreements, employee handbooks, overtime, regular
6 rate, meal and rest policies, prior class litigation documentation, Plaintiff's personnel file, stand-
7 alone wage and hour policy documents, and arbitration agreements. (Hyun Decl. ¶ 7).

8 Prior to the mediation conducted in this case, Plaintiff also obtained time records and
9 payroll data for approximately 10% of the class, and pay data for the entire class. (Hyun Decl. ¶ 8).
10 The parties agreed to rely on the provided documents, and relevant data points for purposes of
11 mediation. Specifically, Plaintiff's requested and received the following payroll data prior to
12 mediation in order for Plaintiff's expert to evaluate potential damages:

- 13 • 226(a)(8): Number of individuals paid wages at any time from May 8, 2019, through
14 the present
 - 15 ○ From these, number of wage statements received by each
- 16 • Shift Differential: Number of individuals paid shift differentials/premiums at any time
17 through the present
 - 18 ○ From these, number of stubs received by for the above group
 - 19 ○ Average rate of pay for employee who were paid shift differential
- 20 • Regular Rate: Number of individuals who were paid any non-discretionary
21 remuneration, including without limitation, shift differentials/premiums, covering any
22 time period in which the employee was also paid OT wages at any time from 5/8/16
23 through present
 - 24 ○ For the above, all wages paid (regular, overtime, bonuses, shift differentials,
25 etc.) and all hours worked during these pay periods
- 26 • Off-the-clock Work: Total number of non-exempt employees (OR only as to guards)
27 employed by Defendant at any time from 5/8/16 through present
 - 28 ○ Total number of workweeks worked by this entire group
- Number of former employees whose employment ended at any time from 5/8/17
through present
- Meal and Rest Break Data: for all non-exempts (OR only as to security guards) total
number of shifts longer than 3.5 hours from 5/8/16 through present.
- PAGA: Total number of employees employed at any time from 5/5/19 through present
and total number of pay periods worked during this same timeframe (223 at the time
of mediation).

1 (Hyun Decl. ¶ 8).

2 Per the parties retained expert, the randomized sample size of 10% of the class obtained is
3 considered statistically significant the purposes of a creating a robust damages study in support of
4 settlement talks. (Hyun Decl. ¶ 9).

5 **B. Summary of settlement negotiations, including when the settlement was**
6 **reached, and whether the parties were assisted by a mediator**

7 On December 22, 2021, collectively the parties participated in a private mediation session
8 with well-respected mediator Todd Smith. (Hyun Decl. ¶ 10). Mediation lasted for a full day.
9 (Hyun Decl. ¶ 10). During that day the parties exchanged arguments, offers, and counteroffers
10 with the help of the mediator. (Hyun Decl. ¶ 10). The mediator pointed out weaknesses in
11 Plaintiff's case, including issues related to the Collective Bargaining Agreement(s), arbitration
12 agreements, and Defendants' wage and hour defenses. At the conclusion of the mediation, on
13 December 22, 2021, the Parties came to an agreement that would resolve the case in its entirety.
14 (Hyun Decl. ¶ 10). The mediator memorialized the settlement in a Memorandum of Understanding
15 to the parties, which was executed by the Parties. (Hyun Decl. ¶ 10).

16 **C. Specific information sufficient for the court to make an independent**
17 **determination that the consideration being received for the release of class**
18 **members' claims is reasonable in light of the strengths and weaknesses of the**
19 **claims and the risks of the particular litigation. This discussion should specify**
20 **the maximum realistic recovery of each claim asserted in the operative**
21 **complaint, defenses asserted by Defendant, and any other relevant factors**
22 **justifying the amount offered in settlement**

23 In connection with the above-described mediation, Plaintiff also obtained time records for
24 approximately 10% of the class and pay data for the entire class. (Hyun Decl. ¶ 8). Plaintiff and his
25 retained expert, EconOne, LLC, relied on 10% of time and payroll data for extrapolation purposes
26 for mediation and its calculation of the potential maximum recovery on all claims. (Hyun Decl. ¶
27 9). Plaintiff's counsel and Plaintiff's expert believe that 10% of time and payroll data is
28 statistically reliable in this instance, and properly relied upon for purposes of determining the

1 potential maximum exposure. (Hyun Decl. ¶ 9). Further, Plaintiff's counsel ensured that the sample
2 was randomly selected. (Hyun Decl. ¶ 9).

3 In addition, Plaintiff and Defendants Los Angeles Maison, LLC and Accor Management US
4 Inc. (collectively, the "Defendants") have engaged in significant discussion of the validity of the
5 legal claims at issue and have exchanged extensive documents and information, which have
6 allowed the Parties to fully assess the value of the claims involved. (Hyun Decl. ¶ 11). The Parties
7 agreed to avoid further litigation and to settle and resolve the case, as well as all existing and
8 potential disputes, actions, lawsuits, charges, and claims that are or could have been raised in the
9 case, that the settlement class has or may have against Defendants, to the fullest extent permitted by
10 law and without any admission of liability or wrongdoing by either party. (Hyun Decl. ¶ 11).
11 Plaintiff's counsel calculated the soaking wet exposure at approximately \$176,000 in actual
12 damages, \$1.634 million in Labor Code penalties and \$3.81 million in PAGA penalties. (Hyun
13 Decl. ¶ 11). The values reached by Plaintiff's expert for the specific claims are as follows:

- 14 • First Cause of Action: Labor Code § 226 penalties: \$1,229,870;
- 15 • Second Cause of Action: Regular rate violations for unpaid overtime: \$3,280;
- 16 • Second and Third Cause of Action: Off the clock violations: \$24,645 (claim for
17 overtime premised on regular rate and off the clock allegations);
- 18 • Fourth Cause of Action: Rest period violations: \$141,657;
- 19 • Fifth Cause of Action: Meal period violations: \$6,669;
- 20 • Seventh Cause of Action for PAGA penalties: \$3.81 million;
- 21 • Prayer for Relief for First through Fourth Causes of Action: Labor Code § 203
22 penalties: \$404,162.

23 (Hyun Decl. ¶ 11).

24 However, these numbers are actually lower, as a significant portion of the class are subject
25 to a collective bargaining agreement containing a grievance and arbitration procedure. (Hyun Decl.
26 ¶ 11). Had this Court enforced the arbitration procedures, Plaintiff may not have been able to assert
27 a class action. (Hyun Decl. ¶ 11). Moreover, as this Court knows, the viability of PAGA actions to
28 proceed notwithstanding an arbitration agreement was cast in a gray area due to the U.S. Supreme

1 Court in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL 2135491 (U.S. June 15,
2 2022) (“Viking River”). Thus, Plaintiff believes that the realistic exposure is 50% of the soaking
3 wet exposure, or \$2.18 million, meaning that the \$350,000 comprises 12% of the total realistic
4 exposure, which is consistent with other actions approved by this and other Courts. (Hyun Decl. ¶
5 11). Based upon Defendants’ records, the estimated number of Settlement Class Members is
6 approximately 294 individuals. (Hyun Decl. ¶ 11). Based on a class size of approximately 294
7 Class Members and the \$350,000.00 recovery, Settlement Class Members will each get a raw
8 average of approximately \$529.01, after deducting Plaintiff’s enhancement, settlement
9 administration costs, attorneys’ fees and costs, and the LWDA’s penalties. (Hyun Decl. ¶ 11).

10 **D. If approval of the settlement of class claims is requested together with approval**
11 **of non-class claims (such as claims under the Labor Code’s Private Attorney**
12 **General Act (PAGA)) discuss why the amount allocated to the non-class claims**
13 **is fair to those affected.**

14 As detailed and in the process described above, Plaintiff’s counsel calculated the soaking
15 wet exposure at approximately \$3.81 million in PAGA penalties. (Hyun Decl. ¶ 11). The value was
16 reached by Plaintiff’s expert for Plaintiff’s Seventh Cause of Action for PAGA penalties.
17 (Hyun Decl. ¶ 11).

18 However, these numbers are actually lower, as a significant portion of the class are subject
19 to a collective bargaining agreement containing a grievance and arbitration procedure. (Hyun Decl.
20 ¶ 11). Had this Court enforced the arbitration procedures, Plaintiff may not have been able to assert
21 a class action. (Hyun Decl. ¶ 11). Moreover, as this Court knows, the viability of PAGA actions to
22 proceed notwithstanding an arbitration agreement was cast in a gray area of the U.S. Supreme Court
23 in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL 2135491 (U.S. June 15, 2022)
24 (“Viking River”).

25 Thirty-Five Thousand Dollars (\$35,000.00) from the Gross Settlement Amount shall be
26 allocated as penalties under PAGA, of which seventy-five percent (75%), or Twenty-Six Thousand
27 Two Hundred Fifty Dollars (\$26,250.00), shall be paid by the Settlement Administrator directly to
28 the LWDA. (Amended Settlement Agreement ¶ 48(d)). The remaining twenty-five percent (25%),

1 or Eight Thousand Seven Hundred Fifty Dollars (\$8,750.00) shall be distributed to Settlement Class
2 Members as part of their Individual Settlement Payments Aggrieved Employees regardless of
3 whether they opt-out of the class settlement. (*Id.*).

4 Plaintiff's counsel further believes that a 10% allocation of PAGA penalties is fair, or
5 \$35,000 of the \$350,000 settlement amount. (Hyun Decl. ¶ 11). Courts have approved settlements
6 allocating minimal or zero dollars to the LWDA. *Nordstrom Com. Cases*, 186 Cal. App. 4th 576,
7 589 (2010) (holding that settlement allocating \$0 to the LWDA was fair, adequate and reasonable);
8 *Rodriguez v. Danell Custom Harvesting, LLC*, 293 F. Supp.3d 1117, 1133 (E.D. Cal. 2018)
9 (approving \$10,000 allocation for PAGA of \$1.5 million settlement). As yet another example of
10 the appropriateness of the PAGA penalties, the Court of Appeal's recent decision in *Carrington v.*
11 *Starbucks Corp.*, 30 Cal. App. 5th 504 (2018) is instructive. In *Carrington*, while the plaintiff
12 prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty
13 amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* at 517.
14 Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539. Again, the
15 Carrington decision was after Plaintiff actually prevailed at trial, and even then, the PAGA penalties
16 were reduced by 90%.

17 **E. Numerosity: Total number of PAGA Members**

18 There are 259 PAGA employees employed during the PAGA Period. (Hyun Decl. ¶ 13).

19 **F. Community of Interest: Provide a discussion as to predominant common**
20 **questions of law or fact.**

21 The predominant common questions of fact and law in this case as related to the class and
22 PAGA members includes: effect of various collective bargaining agreements, prior court approved
23 class releases that affected this litigation, different employee positions and job titles and their effect
24 on liability within the class and subclass definitions, application of the handbooks, overtime, regular
25 rate, meal and rest policies, and impact of arbitration agreements and grievance procedures. (Hyun
26 Decl. ¶ 12). Also, common questions regarding the following issues also exist (a) did Defendants
27 fail to provide accurate itemized wage statements in violation of Labor Code § 226; (b) did
28 Defendants fail to include all remuneration, including non-discretionary remuneration, in the

1 regular rate of pay for purposes of paying overtime; (c) did Defendants fail to pay all minimum and
2 overtime wages to security employees for the time spent on call; (d) did Defendants fail to provide
3 off-duty rest and meal breaks to security employees; and (e) did Defendants engage in unfair
4 business practices in violation of the California Labor Code, the applicable IWC Wage Orders and
5 the UCL. (Hyun Decl. ¶ 12).

6 Courts have repeatedly held that regular rate and wage statement cases are aptly suited for
7 class treatment. *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220, 238 (2013)
8 (“whether the work uniform maintenance allowance and gasoline reimbursement must be included
9 in calculating the overtime rate of pay can be decided on a class-wide basis as a legal matter based
10 on common proof”); *Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1305-1307 (2010);.
11 Similarly, courts have held that break claims where employees are required to respond to calls
12 during breaks are also amenable to class treatment. *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th
13 257, 262 (2016). Further, in *Mendiola v. CPS Security Services*, 60 Cal. 4th 833 (2015), the
14 California Supreme Court held that employers must pay all applicable minimum and overtime
15 wages for time spent by employees on-call.

16 **G. If approval of settlement of a PAGA claim is requested, provide a copy of**
17 **Plaintiff’s notice letter to the LWDA.**

18 Attached to the Hyun Decl. as **Exhibit B** is a true and correct copy of Plaintiff’s notices
19 submitted to the LWDA and sent via certified mail to Defendants.

20 **H. Class definition. If a PAGA representative action is settled with a proposed**
21 **Class Settlement consider whether there should be separate definitions for**
22 **Class Members and Aggrieved Employees.**

23 The Parties revised the settlement agreement (redlined settlement agreement is filed
24 concurrently herewith), to include separate definitions for Settlement Class Members and
25 Aggrieved Employees. Amended Settlement Agreement ¶¶ 2, 38. The revised settlement
26 agreement defines the “PAGA Period” for Aggrieved Employees to include any time from May 5,
27 2019, through the date that the Court grants preliminary approval of class action settlement.
28 Amended Settlement Agreement ¶¶ 25-26. Moreover, the revised settlement agreement has a

1 separate release for Aggrieved Employees defined as the “PAGA Released Claims” which includes
2 all claims under California Labor Code §§ 201-203, 226, 226.7, 510, 512, 558, 1194, 1197, and
3 1197.1, arising from, or relating to, the factual allegations pled in the operative complaint and in
4 Plaintiffs’ written notices submitted to the LWDA for any acts occurring during the PAGA Period.
5 *Id.*

6 **I. Class cases which include a PAGA claim should have a separate release for the**
7 **PAGA claim tied to the facts alleged in the notice given to the LWDA**

8 The Parties revised the settlement agreement (redlined settlement agreement is filed
9 concurrently herewith), to include separate definitions for Class Members and Aggrieved
10 Employees. Amended Settlement Agreement ¶¶ 2, 38. The revised settlement agreement defines
11 the “PAGA Period” for Aggrieved Employees to include any time from May 5, 2019, through the
12 date that the Court grants preliminary approval of class action settlement. Amended Settlement
13 Agreement ¶¶ 25-26. Moreover, the revised settlement agreement defines has a separate release for
14 Aggrieved Employees defined as the “PAGA Released Claims” which includes all claims under
15 California Labor Code §§ 201-203, 226, 226.7, 510, 512, 558, 1194, 1197, and 1197.1, arising
16 from, or relating to, the factual allegations pled in the operative complaint and in Plaintiffs’ written
17 notices submitted to the LWDA for any acts occurring during the PAGA Period. *Id.*

18 **J. If PAGA and Class Settlement: The Release should provide an explanation that**
19 **released claims include all PAGA claims that could have been premised on the**
20 **facts alleged in the Plaintiff’s Notice and aggrieved employees will release**
21 **PAGA claims even if class members request exclusion from the class.**

22 The parties revised the settlement agreement (redlined settlement agreement is filed
23 concurrently herewith), which now includes separate PAGA Release that provides an explanation
24 that released claims include all PAGA claims that could have been premised on the facts alleged in
25 the Plaintiff’s Notice and Aggrieved Employees will release PAGA claims even if class members
26 request exclusion from the class. Amended Settlement Agreement ¶ 46(b).

27 **K. Amendments: The Settlement Agreement provides that this Stipulation may be**
28 **amended or modified only by a written instrument signed by counsel for all**

Parties or their successors-in-interest. Please add that Court approval is also required.

The parties revised the settlement agreement (redlined settlement agreement is filed concurrently herewith), which now includes that Court approval is required should the settlement agreement be amended or modified. Amended Settlement Agreement ¶ 56.

L. Indicate how notices returned to the administrator as undeliverable will be handled. Provide a deadline to re-mail notices.

The parties revised the settlement agreement (redlined settlement agreement is filed concurrently herewith), which now includes that any Notice Packet returned to the Settlement Administrator as non-deliverable on or before the Response Deadline shall be re-mailed to the forwarding address affixed thereto within seven (7) calendar days of the Settlement Administrator receiving notice of the non-deliverable Notice Packet. Amended Settlement Agreement ¶ 47(ii).

If no forwarding address is provided, the Settlement Administrator shall promptly attempt to determine a correct address by the use of skip-tracing, or other type of automated search, using the name, address and/or Social Security number of the Settlement Class Member/Aggrieved Employee involved, and shall then perform a re-mailing to the Settlement Class Member/Aggrieved Employee whose Notice Packet was returned as non-deliverable, assuming another mailing address is identified by the Settlement Administrator. *Id.* If a Notice Packet is re-mailed to a Settlement Class Member less than ten (10) days prior to the Response Deadline, the Settlement Class Member shall have his or her Response Deadline extended by ten (10) days from the date the Settlement Administrator re-mails the Notice Packet. *Id.* If these procedures are followed, notice to Settlement Class Members shall be deemed to have been fully satisfied, and if the intended recipient of the Notice Packet does not receive the Notice Packet, the intended recipient shall nevertheless remain a Settlement Class Member and shall be bound by all terms of the Settlement and the Judgment. *Id.*

M. Provide declarations disclosing the interest or involvement (or lack thereof) by any party in the governance or work of the cy pres recipient. There are no declarations from Defendant or defense counsel.

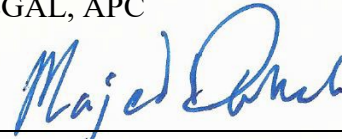
Defendants and Counsel for Defendants have filled concurrently herewith declarations that

1 they have no interest or involvement in the *cy pres* recipient Legal Aid at Work. (Declaration of
2 Ashley Eberhard and Declaration of Lara A.H. Shortz, Esq.).

3
4 Dated: July 19, 2022

KESSELMAN BRANTLY STOCKINGER LLP
HYUN LEGAL, APC

5
6 By: _____



Majed Dakak
Dennis S. Hyun

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8 Attorneys for Plaintiffs and the Putative Class
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