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8

9
10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN BERNARDINO

12 ALIZE SPENCER on behalf of herself and all
13 aggrieved employees,

14 Plaintiff,

15 v.

16 CANADIAN GUYS BURGERS LIMITED, and
17 DOES 1 to 100,

18 Defendants.
19

) NO. CIVDS2020591
)
) PLAINTIFF'S NOTICE OF MOTION AND
) MOTION FOR APPROVAL OF PAGA
) SETTLEMENT; MEMORANDUM OF
) POINTS AND AUTHORITIES;
) DECLARATION OF MANNY STARR IN
) SUPPORT OF MOTION FOR APPROVAL
) OF PAGA SETTLEMENT; [PROPOSED]
) ORDER
)
) Date: April 28, 2021
) Time: 9:00 a.m.
) Dept: S33

20
21 TO ALL PARTIES AND THEIR COUNSEL OF RECORD, AND TO THE LABOR AND
22 WORKFORCE DEVELOPMENT AGENCY:

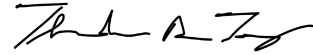
23 PLEASE TAKE NOTICE that on April 28, 2021 at 9:00 a.m. or as soon thereafter as may
24 be heard in Department S33 of the Superior Court of California, County of San Bernardino, located
25 at 247 West 3rd Street, San Bernardino, California, 92415, Plaintiff ALIZE SPENCER will and
26 hereby does move the Court for an order approving the settlement of this PAGA representative
27 action.

28 This motion is based on this Notice, the Memorandum of Points and Authorities and

1 Declaration of Manny Starr filed concurrently herewith, the exhibits attached thereto, the records
2 and documents on file with the Court, and upon any further oral or documentary matters had by the
3 Court at the hearing on this motion.

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5 Date: March 25, 2021

FRONTIER LAW CENTER

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8 Theodore R. Tang
9 Attorney for Plaintiff
10 Alize Spencer
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Private Attorneys General Act (“PAGA”) representative action relates to Plaintiff
4 Alize Spencer (“Plaintiff”) and the Aggrieved Employees’ employment with Canadian Guys
5 Burgers Limited (“Defendant”), a Five Guys Burgers and Fries franchisee. The Aggrieved
6 Employees, as defined herein, were allegedly subject to violations of Labor Code sections 201,
7 202, 203, 226, 226.7, 510, and 1197 regarding: (1) underpayment of overtime wages, (2) the failure
8 to provide Plaintiff and the Aggrieved Employees with compliant rest breaks; (3) the failure to
9 provide premium pay for non-compliant rest periods; (4) failure to provide accurate and complete
10 itemized wage statements; and (5) the failure to pay Plaintiff and the Aggrieved Employees all
11 wages owed at the time of their separation of employment.

12 Plaintiff Alize Spencer worked for Defendant as a Store Manager from November 26, 2019
13 through April 6, 2020.

14 The parties attended a full-day, remote Zoom mediation with experienced employment law
15 mediator Hon. Linda Quinn, Ret., on February 24, 2021. Through arm’s-length negotiations, and
16 after an extensive review of informal discovery and documentation, the parties reached a resolution
17 at mediation to settle the PAGA claim for \$80,000. A separate confidential settlement agreement
18 was reached to address Plaintiff’s individual claims. Plaintiff’s individual settlement did not
19 influence Plaintiff or Plaintiff’s counsel in reaching a settlement on the PAGA cause of action, and
20 both Plaintiff and Plaintiff’s counsel believe the PAGA settlement is fair and reasonable.

21 Under Labor Code section 2699(1)(2), “The superior court shall review and approve any
22 settlement of any civil action filed pursuant to this part.” By this unopposed application, Plaintiff
23 requests the Court to approve the settlement of the PAGA claims asserted in this action.

24 **II. PROCEDURAL HISTORY**

25 On July 15, 2020, Plaintiff filed a PAGA notice letter with the Labor and Workforce
26 Development Agency (“LWDA”) and sent the same via certified mail to the Defendant (LWDA
27 Case No. LWDA-CM-797082-20). In this letter, Plaintiff asserted that Defendant failed to comply
28 with Labor Code sections 201, 202, 203, 226, 226.7, 510, and 1197. (Declaration of Manny Starr

1 (“Starr Decl.”) ¶4.)

2 On September 28, 2020, Plaintiff filed this action in the Superior Court of California,
3 County of San Bernardino, entitled *Alize Spencer v. Canadian Guys Burgers, Limited*, Case No.
4 CIVDS2020591. The complaint alleged five individual causes of action on behalf of Plaintiff, as
5 well as one cause of action seeking recovery of civil penalties under PAGA for Defendant’s
6 alleged Labor Code violations.

7 The “PAGA Period” or “Release Period” is from July 25, 2019 through settlement
8 approval, or May 25, 2021, whichever is sooner. For purposes of this settlement only, “Aggrieved
9 Employees” is defined as “all individuals who are, or previously were, employed by Defendant and
10 classified as non-exempt employees in California during the Release Period.” There are
11 approximately 317 Aggrieved Employees who collectively worked an estimated 4,869 pay periods
12 during the PAGA Period.

13 Through informal discovery, Defendant produced a 20% sampling of time and payroll
14 records for the Aggrieved Employees during the PAGA Period. Plaintiff’s analysis of this data
15 formed the basis of the liability calculations used during settlement negotiations.

16 **III. LEGAL ARGUMENT AND PAGA PENALTY CALCULATION**

17 PAGA permits an aggrieved employee to sue an employer for civil penalties associated
18 with the employer’s alleged violation of various Labor Code provisions. Labor Code section
19 2699(a). Pursuant to the statute, of the amount paid to settle a claim for PAGA penalties, twenty-
20 five percent (25%) is payable to the Aggrieved Employees and seventy-five percent (75%) is
21 payable to the LWDA. Labor Code section 2699(i). The penalties being sought as part of this
22 settlement are derived from the following Labor Code violations.

23 **a) Rest Break Violations**

24 Labor Code section 226.7 and relevant portions of Wage Order 5 require an employer to
25 provide a 10-minute off-duty rest break for each 4 hours worked or major fraction thereof.
26 Pursuant to Labor Code section 226.7(c), if an employer fails to provide a compliant rest break, the
27 employer must pay a penalty of one hour of pay at the employee’s regular rate of pay for each
28 workday that a rest period was not provided.

1 In her Complaint, Plaintiff alleged that the Aggrieved Employees were unable to take
2 compliant rest breaks as a result of inadequate staffing levels and the fact that, for a portion of the
3 PAGA period, Defendant's employee handbook stated that employees could not leave the premises
4 on rest breaks, which therefore deprived Plaintiff and the Aggrieved Employees of compliant rest
5 periods.

6 When an employer fails to relinquish control over their employees during their 10-minute
7 rest breaks, this violates Labor Code section 226.7 and the Wage Orders. (*Augustus v. ABM Sec.*
8 *Servs., Inc.*, 2 Cal. 5th 257, 269 (2016)). Here, as stated above, Plaintiff alleges that she and the
9 Aggrieved Employees were frequently denied the ability to take complaint rest breaks.

10 The PAGA penalties for an employer's failure to provide employees with compliant rest
11 periods in violation of Labor Code section 226.7 are found in Labor Code section 2699(f)(2),
12 which are one hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for
13 each subsequent violation. In her Complaint, Plaintiff alleged that all rest breaks for the Aggrieved
14 Employees were noncompliant due to Defendant's on-premises rest period policy. To support this
15 contention, Plaintiff relied on the holding in *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 269
16 (2016) that an employer must relinquish all control over its employees during rest breaks in
17 asserting that Defendant's on-premises rest break policy constituted employer control during rest
18 breaks. Plaintiff estimated the maximum liability for PAGA penalties attributed to rest break
19 violations is approximately **\$686,020**, based on 2,877 pay periods with initial violations plus 1,992
20 pay periods with subsequent violations.

21 **b) Failure to Pay Overtime Based on Regular Rate of Pay**

22 Labor Code section 510(a) states: "Any work in excess of eight hours in one workday and
23 any work in excess of 40 hours in any one workweek ... shall be compensated at the rate of no less
24 than one and one-half times the **regular rate of pay** for any employee." (emphasis added). When
25 calculating an employee's regular rate of pay, non-discretionary bonuses must be factored in. (See
26 29 USC § 207.)

27 Plaintiff contended the Aggrieved Employees regularly received non-discretionary bonuses
28 that Defendant failed to factor into the Aggrieved Employees' regular rate of pay for purposes of

1 calculating their overtime rates. Plaintiff alleged that, in order to be complaint with Labor Code
2 section 510, Defendant should have recalculated the Aggrieved Employees' regular rate of pay
3 each pay period where a bonus was paid, then paid the difference in overtime based on the new,
4 higher regular rate of pay. As a result of Defendant's failure to recalculate the overtime in this
5 manner, Plaintiff alleged that a PAGA penalty applied to each pay period where a non-
6 discretionary bonus was not factored into the Aggrieved Employee's regular rate of pay.

7 The PAGA penalties for an employer's failure to pay the correct overtime rate to the
8 employees are found in Labor Code section 1197.1, which are one hundred dollars (\$100) for each
9 initial violation and two hundred fifty dollars (\$250) for each subsequent violation. .

10 In the course of investigating the claim, Plaintiff found that the alleged miscalculation of
11 the regular rate for purposes of paying overtime wages occurred in 6.2% of the total payroll
12 periods. (Starr Decl. ¶¶12-13.) Thus, Plaintiff calculated that the PAGA penalties for the
13 underpaid overtime is **\$42,533**, based on approximately 179 initial violations and 124 subsequent
14 violations.

15 **c) Wage Statement Violations**

16 Labor Code section 226(a) requires an employer to provide its employees with wage
17 statements that, among other things, list gross and net wages earned and accurate hourly rates of
18 pay. As noted previously, Plaintiff alleged that Defendant failed to pay overtime at the correct
19 regular rate; thus, Defendant provided the Aggrieved Employees with noncompliant wage
20 statements whenever their overtime rate was miscalculated.

21 The PAGA penalties for an employer's failure to provide the employees with proper wage
22 statements are found in Labor Code section 226.3, which are two hundred fifty dollars (\$250) for
23 each initial violation and one thousand dollars (\$1,000) for each subsequent violation. As noted
24 above, Plaintiff calculated that Defendant violated Labor Code section 226 in 6.2% of the total
25 payroll periods. (Starr Decl. ¶¶ 12-14). Thus, Plaintiff estimates the maximum liability for PAGA
26 penalties attributed to wage statement violations is **\$168,075**, based on approximately 179 initial
27 violations and 124 subsequent violations.

28 **d) Waiting Time Penalties**

1 Labor Code sections 201, 202, and 203 together form a statutory scheme requiring an
2 employer to provide an employee with all wages due and owing at the time of separation, or within
3 seventy-two (72) hours of resignation. Plaintiff alleged that, since the Aggrieved Employees were
4 not paid all overtime wages owed during their employment, it follows that these wages were also
5 not paid at the conclusion of their employment. Based on the sample data provided by Defendant,
6 Plaintiff estimates that there are 181 employees who were not paid overtime at the correct rate, and
7 who are no longer employed by Defendant. (Starr Decl. ¶14). Therefore, there are 181 payroll
8 periods where an employee was not paid all wages at the conclusion of their employment.

9 The PAGA penalties for an employer's failure to provide employees with all wages due and
10 owing at the time of separation are found in Labor Code section 2699(f)(2), which are one hundred
11 dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent
12 violation. Thus, Plaintiff estimated the maximum liability for PAGA penalties attributed to the
13 Labor Code 201 and 202 violations is I.

14 **IV. DESCRIPTION OF THE SETTLEMENT TERMS**

15 The gross amount of the settlement is \$80,000. The settlement is broken down as follows:

- 16 - \$1,500 to Plaintiff as an enhancement payment
- 17 - \$26,666.67 to Plaintiff's counsel, Frontier Law Center, for attorney fees
- 18 - \$4,292.07 to Frontier Law Center as reimbursement for litigation costs
- 19 - \$3,200 to Phoenix Settlement Administrators to administer the settlement
- 20 - \$44,341.26 in PAGA Penalties, of which 75% (\$33,255.94) will go to the LWDA and
21 25% (\$11,085) will be distributed to the Aggrieved Employees on a pro rata basis
22 according to the total pay periods they worked during the PAGA Period.

23 **V. THE SETTLEMENT IS FAIR AND REASONABLE**

24 Labor Code section 2699(e)(2) states: "In any action by an aggrieved employee seeking
25 recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount
26 than the maximum civil penalty amount specified by this part if, based on the facts and
27 circumstances of the particular case, to do otherwise would result in an award that is unjust,
28 arbitrary and oppressive, or confiscatory." Indeed, as shown in the Court of Appeal's decision in

1 *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504 (2018), while the plaintiff prevailed on his
2 PAGA claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing
3 the employer's good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of
4 Appeal found such reduction to be proper. *Id.* at 539.

5 While Plaintiff estimates Defendant's total potential exposure for the above-referenced
6 violations to be approximately \$914,728, the facts and circumstances particular to this case allow
7 for a reduced settlement amount to avoid an award that is unjust, arbitrary, oppressive, or
8 confiscatory.

9 **a) PAGA Penalties Applicable to Wage Statement Violations**

10 There is significant legal debate as to whether the penalties in Labor Code section 226.3
11 apply to the present case, or whether this penalty only apply in cases where the Defendant failed
12 to provide *any* wage statements whatsoever. (See *Lopez v. Friant & Assoc.* (2011) 192
13 Cal.App.4th 75.) Should a Court determine that the penalty amounts set forth in Labor Code
14 section 226.3 do not apply, and applies the penalties set forth in Labor Code section 2699 instead,
15 then Defendant's exposure for wage statement penalties would be reduced from \$168,075 to
16 \$16,807.5.

17 **b)** The settlement of this claim is therefore fair and reasonable recovery given
18 Defendant's defenses to the claim and the difficulty Plaintiff would have had
19 establishing liability. **Rest Break Claim Defenses**

20 If this case were to proceed, Defendant was prepared to argue that neither Plaintiff nor the
21 Aggrieved Employees were ever required to remain on the premises during their rest periods and
22 that the "on-premises" rest period policy was adopted from the prior franchisees' employee
23 handbook, but was never implemented or enforced. Defendant was further prepared to show that
24 employees were not required to remain on premises during their rest with signed employee
25 declarations and video footage from each of the restaurants that supported Defendant's
26 contentions. Finally, Defendant adopted a new written policy after July 2020 that did not include
27 the allegedly offensive language, thereby limiting any potential recovery for the claim to the
28 period before the change in policy.

1 In light of Defendant's potential defenses to the claim, there is a risk that the Defendant
2 could prevail . Furthermore, even if Plaintiff prevailed, the Court could further reduce the
3 penalties attributable to any rest break violations if Defendant could show a good faith attempt to
4 comply with the law.

5 **c) Regular Rate Defenses**

6 If the case were to proceed, Defendant was prepared to argue that the secret shopper
7 bonuses were discretionary, because the rating given by any secret shopper, upon which the bonus
8 is based, is entirely discretionary, as were the frequency, location, and timing of any secret shopper
9 visit. Accordingly, if Defendant was able to prove that the bonus were discretionary, there would
10 be no violations based on Defendant's failure to account for them into the regular rate or pay for
11 purposes of overtime.

12 Defendant, therefore, possessed strong defenses and could prevail on this claim. But even
13 if Plaintiff prevailed, the Court could reduce penalties attributable to the regular rate violations if
14 Defendant could show a good faith attempt to comply with the law.

15 **d) The Court May Choose Not to Stack PAGA Penalties**

16 Courts are hesitant to award full PAGA penalties where those penalties are derivative of
17 other claims that were subject to PAGA penalties in the first instance; the basis for this is the
18 Court's concerns about double-recovery. (See *Naranjo v. Spectrum Security Services, Inc.* (2019)
19 40 Cal.App.5th 444.) In this case, the court may choose not to stack the PAGA penalties
20 attributable to wage statement violations and waiting time penalties, since those penalties are
21 derived from the overtime violation claims. If the Court chooses not to stack these penalties, then
22 these PAGA penalties would be eliminated altogether.

23 **VI. THE COURT SHOULD APPROVE THE PROPOSED PAGA SETTLEMENT**

24 The terms of the parties' settlement are reasonable under the circumstances and serve the
25 purpose of PAGA. (*O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110,
26 1135.) Although Defendant's total maximum liability could result in \$914,728 in penalties, the
27 court has discretion to award a lesser amount than the maximum civil penalty allowed under
28

1 PAGA. Labor Code section 2699(e)(2). Here, the PAGA penalties being recovered are reasonable
2 for the reasons set forth above.

3 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. (Lab. Code, §
4 2699(g).) In class actions, California state and federal courts have recognized that an appropriate
5 method for determining an award of attorneys' fees is based on a percentage of the total value of
6 benefits to class members by the settlement. (*Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
7 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van*
8 *Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir.
9 1997). One of the purposes of this equitable doctrine is to "spread litigation costs proportionally
10 among all the beneficiaries so that the active beneficiary does not bear the entire burden
11 alone." (*Vincent*, 557 F. 2d at 769.) Although this is not a class action, the same logic holds true
12 since a PAGA case is also a representative action.

13 The Common Fund doctrine is predicated on the principle of preventing unjust enrichment.
14 When a litigant's efforts create or preserve a fund from which others derive benefits, he may
15 require the passive beneficiaries to compensate those who created the fund. Both California state
16 and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at
17 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the
18 California Supreme Court recognized that the common fund doctrine has been applied
19 "consistently in California when an action brought by one party creates a fund in which other
20 persons are entitled to share." The reasons for applying the common fund doctrine include:
21 "...fairness to the successful litigant, who might otherwise receive no benefit because his recovery
22 might be consumed by the expenses; correlative prevention of an unfair advantage to the others
23 who are entitled to share in the fund and who should bear their share of the burden of its recovery;
24 encouragement of the attorney for the successful litigant who will be more willing to undertake and
25 diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that
26 he will be properly and directly compensated should his efforts be successful." *Id.*

27 Indeed, the California Supreme Court has also held that the award of attorneys' fees in
28 common fund wage and hour class action settlements should start with the percentage method. *See*

1 *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) (“We join the overwhelming majority of
2 federal and state courts in holding that when class action litigation establishes a monetary fund for
3 the benefit of the class members, and the trial court in its equitable powers awards class counsel a
4 fee out of that fund, the court may determine the amount of a reasonable fee by choosing an
5 appropriate percentage of the fund created.”). The California Supreme Court in *Laffitte* affirmed a
6 fee award representing 33 1/3 percent of the fund.

7 Here, Plaintiff’s counsel’s requested fees of \$26,666.67 is reasonable, as it represents 33
8 1/3 percent of the fund. Furthermore, Plaintiff’s counsel has spent a significant amount of time
9 litigating this case, including time spent communicating with the Aggrieved Employees, evaluating
10 and analyzing the relevant legal theories, drafting and filing various PAGA letters, drafting and
11 filing the complaint, engaging in informal discovery, engaging an expert to perform an analysis on
12 the time and payroll records, and attending mediation. (Starr Decl. ¶16). Plaintiff’s counsel expects
13 to spend additional time on the and administration process as well. (Starr Decl. ¶17).

14 Plaintiff’s counsel has incurred \$4,292.07 in litigation costs this case. (Starr Decl. ¶19).
15 These costs include filing fees, service costs, costs to retain an expert to evaluate the time and
16 payroll records, mediation costs, and various other litigation costs. (Starr Decl. ¶19).

17 Plaintiff’s counsel participated in the informal discovery process, provided numerous
18 documents to counsel for review, and spent several hours on the phone answering questions about
19 the case. (Starr Decl. ¶19). It is because of this willingness to participate in the litigation process
20 which ultimately resulted in this settlement. Therefore, the amount attributed to him as an
21 enhancement payment is reasonable.

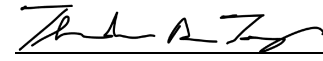
22 While the Court must review and approve any civil penalties sought as part of a proposed
23 settlement agreement pursuant to PAGA, the statute does not require that this be done as part of a
24 noticed motion. Labor Code section 2699(i)(2). The statute does however require Plaintiff to file
25 with the LWDA a copy of the proposed settlement agreement, which Plaintiff did on March 11,
26 2021. (Starr Decl. ¶10). To date, Plaintiff has not received a response from the LWDA. Therefore,
27 approval through application is sufficient.

28 **VII. CONCLUSION**

1 Based on the above facts and arguments, Plaintiff respectfully requests the Court approve
2 this PAGA settlement and enter an order dismissing this action with prejudice.

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4 Date: March 25, 2021

FRONTIER LAW CENTER

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Theodore R. Tang
Manny Starr
Daniel Ginzburg
Attorney for Plaintiff
Alize Spencer