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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ORANGE

13 ROBERTO UMLAS, as an individual and
on behalf of all others similarly situated,

14 Plaintiffs,
15

16 v.

12232 CHAPMAN AVE., INC., a
17 California corporation; and DOES 1
through 50, inclusive,
18

Defendants.
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CASE NO. 30-2020-01175180-CU-OE-CXC

[Assigned for all purposes to the Hon. Randall J.
Sherman, Dept. CX-105]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: May 21, 2021
Time: 9:00 a.m.
Dept.: CX105

Reservation No. 73503626

1 TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that on May 21, 2021, at 9:00 a.m. or as soon thereafter as
3 the matter may be heard in Department CX105 of the Superior Court of the State of California,
4 County of Orange, located at 751 W Santa Ana Blvd, Santa Ana, CA 92701, before the Hon.
5 Randall J. Sherman, Judge presiding, Plaintiff Roberto Umlas ("Plaintiff") will and hereby does
6 move the Court for an order approving a settlement pursuant to the Private Attorney General Act
7 ('PAGA').

8 This motion will be based on this notice of motion, the accompanying declarations of
9 William L. Marder, Dennis S. Hyun, Clinton J. Williams and Plaintiff in support thereof, the
10 attached memorandum of points and authorities, the records and file herein, and on such other
11 evidence as may be presented at the hearing of the motion.

12 Dated: April 6, 2021

POLARIS LAW GROUP, LLP

13 By:



14 William L. Marder

15 Attorney for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Roberto Umlas (“Plaintiff”) brought a representative claim under the Private
4 Attorneys General Act (the “PAGA”), arising from Defendant 12232 Chapman Ave., Inc.
5 (“Defendant”) (Plaintiff and Defendant collectively, the “Parties”) alleged violations of Labor
6 Code §§ 201-203, 227.3, and 226. While Plaintiff asserted a violation of Labor Code §§ 201-203
7 and 227.3, regarding non-payment of vacation wages to separated employees, Defendant
8 produced its vacation policy and the Declaration of Clinton Williams, which show that it is
9 Defendant’s policy and practice to timely pay all accrued vacation wages to separated employees.
10 Nevertheless, as the vacation pay claim was alleged in the notice submitted to the Labor
11 Workforce Development Agency (the “LWDA”) and the operative First Amended Complaint, the
12 Parties included both Sections 201-203, and 227.3 as part of the PAGA release.

13 Accordingly, through this Motion, the Parties respectfully request that the Court approve
14 the settlement of the PAGA claims asserted herein.

15 As will be explained in further detail below, based on the California Supreme Court’s
16 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
17 *Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014), Plaintiff can seek appropriate civil penalties as
18 called for under PAGA on behalf of the State of California and other similarly situated aggrieved
19 employees without seeking class certification or meeting any of the requirements of class
20 certification (i.e., numerosity, typicality, commonality and adequacy). As such, while the PAGA
21 penalties settlement reached herein is on behalf of the State of California and other aggrieved
22 employees, the usual two-step preliminary and final approval process is not required. Rather, as
23 called for under Labor Code § 2699(l), all that is required is an approval by this Court of the
24 PAGA penalties that the Parties have agreed to settle.

25 **II. FACTUAL AND PROCEDURAL BACKGROUND**

26 On or about October 16, 2020, Plaintiff transmitted a letter to the California Labor and
27 Workforce Development Agency (the “LWDA”) asserting that Defendant failed to comply with
28 various provisions of the California Labor Code (the “PAGA Notice”). (Declaration of Dennis S.
Hyun (“Hyun Decl.” ¶ 8, Exhibit “A”). Plaintiff asserted violations of California Labor Code §§

201-203, 226, 226.3, and 227.3. (*Id.*)

On December 18, 2020, Plaintiff filed this action, in which Plaintiff asserted four causes of action for violation of: (1) Labor Code § 226(a); (2) Labor Code §§ 201-203 and 227.3; (3) the PAGA; and (4) Business & Professions Code § 17200. (Hyun Decl. ¶ 9). After the filing of this action, Defendant’s counsel produced an arbitration agreement containing a class action waiver signed by Plaintiff. (*Id.*) Therefore, Plaintiff filed the operative First Amended Complaint asserting a single cause of action for violation of the PAGA on January 8, 2021.

In particular, Plaintiff asserts that Defendant failed to provide accurate itemized wage statements because Defendant did not display the accurate total hours worked whenever it paid overtime and double-time wages in violation of Labor Code § 226(a)(2). Plaintiff also asserted a claim for unpaid vacation wages in violation of Labor Code §§ 201-203 and 227.3.

The Parties agreed to attempt to informally resolve this matter. As part of the Parties’ negotiations, Defendant produced its vacation policy and agreed to provide a declaration regarding its vacation policies and practices, which Plaintiff is submitting herewith. (Hyun Decl. ¶ 10). Defendant also provided the number of aggrieved employees and wage statements at issue, which permitted Plaintiff to calculate maximum exposure at \$820,500.00. (*Id.*) Plaintiff did not assign any value to the vacation wage claim, as Defendant’s policies and practices provide timely payment of all accrued vacation wages to separated employees. (Declaration of Clinton Williams (“Williams Decl.”) ¶¶ 2-3; Hyun Decl. ¶ 10). The Parties then engaged in extensive arms-length negotiations between highly experienced counsel, the Parties have reached a settlement of the Representative PAGA Claims as further detailed in the concurrently filed Settlement Agreement. (*Id.*) As such, this settlement represents approximately 10% of the total potential exposure, which is fair and reasonable. (*Id.*)

III. THE SETTLEMENT TERMS

The current PAGA settlement calls for a total settlement amount of \$82,050 in PAGA civil penalties. From this amount, one-third has been allocated to attorneys’ fees, or \$27,350, and actual costs, \$2,500 shall be paid to Plaintiff as compensation for serving as the PAGA representative and for executing a general release, and \$2,450 will be paid to Phoenix Settlement Administrators (the “Settlement Administrator”) to administer the settlement. (Settlement

1 Agreement at ¶¶ 14-16). Plaintiff's counsel's actual costs are \$2,070.12. (Hyun Decl. ¶ 12;
2 Declaration of William L. Marder ("Marder Decl.") ¶ 12, Exh. B). This results in total
3 deductions of \$39,370.12.

4 The remaining balance of approximately \$42,679.88 shall be split, with 75% being paid to
5 the LWDA, and 25% (the "Aggrieved Employee Portion") being distributed to Aggrieved
6 Employees as follows: Each Aggrieved Employee shall be allocated a proportionate share of the
7 Aggrieved Employee Portion based on the Defendant's data regarding the number of pay periods
8 that the Aggrieved Employee was paid overtime and/or double time wages while employed by
9 Defendant in the State of California at any time during the PAGA Period (October 16, 2019,
10 through November 30, 2020). (Settlement Agreement at ¶ 13). After calculating the pay periods
11 for each individual Aggrieved Employee, the Settlement Administrator shall then compute the
12 sum total of all pay periods to arrive at an "aggregate total of all pay periods" worked by all
13 Aggrieved Employees. (*Id.* at ¶ 13(a)). After calculating the aggregate total of all pay periods
14 worked by all Aggrieved Employees, the amount payable per Aggrieved Employee will then be
15 calculated by dividing the Aggrieved Employee's pay periods by the aggregate total of all pay
16 periods, then multiplied by the Aggrieved Employee Portion. (*Id.* at ¶ 13(b)).

17 Based on the above, and as further detailed below, Plaintiff requests that this Court grant
18 approval of the current PAGA penalties settlement.

19 **IV. PAGA REQUIREMENTS**

20 Prior to the enactment of PAGA, many of the penalties provided against employers for
21 violations of certain Labor Code provisions were solely within the province of the California
22 Department of Labor to seek, enforce and assess. *Arias v. Superior Court*, (2009) 46 Cal.4th 969,
23 980. However, due to the lack of financing to California's agencies, and the substantial number
24 of Labor Code violations by California employers, the California Legislature found that it was in
25 the public interest to allow aggrieved employees to act as private attorneys general, and to enforce
26 and recover penalties on behalf of other similarly situated aggrieved employees for Labor Code
27 violations committed by their employers. *Id.* As such, PAGA was enacted to allow such
28 enforcement and recovery by private individuals who have been aggrieved by their employers.
Moreover, 75% of any penalties recovered under PAGA by an aggrieved employee is to be paid

1 to California's LWDA and the remaining 25% is to be shared amongst the Aggrieved
2 Employees. Cal. Lab. Code § 2699(i).

3 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
4 employee must first provide written notice to the LWDA and the employer of the particular Labor
5 Code violation the aggrieved employee alleges the employer has violated. See Cal. Labor Code §
6 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to
7 investigate the alleged violations, the aggrieved employee is then allowed to proceed in a civil
8 action against the employer on the alleged violations on behalf of all other similarly situated
9 employees. See Cal. Labor Code § 2699.3(a)(2)(A).

10 In 2009, the California Supreme Court considered the issue of whether an aggrieved
11 employee that brings a PAGA claim on behalf of himself and others similarly situated needs to
12 seek the PAGA claim as a class action and meet class certification requirements. *Arias*, 46 Cal.
13 4th at 976. After a substantial review of the legislative history of PAGA, the California Supreme
14 Court held that an aggrieved employee's representative action brought on behalf of other
15 similarly situated employees against an employer for PAGA violations do not need to meet the
16 requirements for class certification. *Id.* at 975; 980-88. As the California Supreme Court held, a
17 plaintiff bringing suit under PAGA does so as the proxy or agent of California's labor law
18 enforcement agencies. *Id.* at 986. Because an employee's PAGA action functions as a substitute
19 for an action brought by the government itself, a judgment in the PAGA action binds all those,
20 who would be bound by a judgment in an action brought by the government. *Id.*

21 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the Superior
22 Court must "review and approve any penalties sought as part of a proposed settlement agreement"
23 relating to PAGA penalties. Labor Code § 2699(l). As the Parties to this current PAGA action
24 have reached such an agreement, the Parties now seek this Court's approval as to the settlement
25 of the penalties amount.

26 **V. PLAINTIFF'S RATIONALE FOR AGREEING TO THE SETTLEMENT**

27 Based on the data provided to Plaintiff prior to mediation, the estimated amount of
28 potential penalties that Defendant could be liable for based on the released claims is
approximately \$820,500.00. (Hyun Decl. ¶ 9).

1 Plaintiff's rationale for agreeing to the settlement is based upon the discretionary nature of
2 any PAGA award. Pursuant to Labor Code § 2699(f)(2) the Court can decline to award PAGA
3 penalties where "...if, based on the facts and circumstances of the particular case, to do
4 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." In
5 other words, were this matter to go to trial, any award granted would be completely at the
6 discretion of the Court. Plaintiff further recognizes that there may be reasons that the Court
7 would be unwilling to issue an award in this matter even if Plaintiff were able to prove the PAGA
8 violation at trial.

9 Further, Defendant contends that it has acted lawfully. With respect to the vacation pay
10 claim, Defendant's policy and practice is to timely pay out all accrued vacation wages to
11 separated employees. (Williams Decl. at ¶¶ 2-3). With respect to the wage claim, Defendant
12 disputes that it is required to provide the total hours worked and that it did not act knowingly and
13 intentionally. Further, Defendant changed its practices as of November 30, 2020, such that
14 Plaintiff would not have been able to seek penalties for the Section 226(a) claim beyond this date.

15 Defendant further contends that Plaintiff's notice submitted to the LWDA failed to
16 contain sufficient specificity as to the claims raised in this lawsuit (while Plaintiff disagrees).
17 Defendant further changed its paystubs within a month or so from receiving the LWDA notice.
18 Defendant also contends that no employees were confused from the paystubs, including with
19 respect to hourly rates and hours worked, which Defendant argues would have supported a
20 reduction in penalties.

21 The Court of Appeal's recent decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th
22 504 (2018) is instructive. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon
23 trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's
24 good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal
25 found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff
26 actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

27 While Plaintiff maintains that there does not exist any reasons for reducing PAGA
28 penalties, Plaintiff is not blind to the fact that Defendant's defenses could be persuasive to the

1 Court at trial. Based on such reasons, the PAGA settlement should be approved as the very
2 purpose of PAGA have been achieved through this lawsuit as Defendant has been assessed a
3 penalty that is of significance to Defendant.

4 **VI. ATTORNEYS' FEES AND COSTS ARE APPROPRIATE**

5 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
6 2699(g). Although this is not a class action, in representative class actions, California state and
7 federal courts have recognized that an appropriate method for determining award of attorneys'
8 fees is based on a percentage of the total value of benefits to Class Members by the settlement.
9 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d
10 25, 34 (1977) ("*Serrano IIP*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v.*
11 *Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine
12 is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all
13 the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*,
14 557 F. 2d at 769.

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

Indeed, most recently, the California Supreme Court has also held that the award of

1 attorneys' fees in common fund wage and hour class action settlements should start with the
2 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
3 overwhelming majority of federal and state courts in holding that when class action litigation
4 establishes a monetary fund for the benefit of the class members, and the trial court in its
5 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
6 of a reasonable fee by choosing an appropriate percentage of the fund created.").

7 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent
8 of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a
9 multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is "extraordinarily
10 high or low [should] the trial court [] consider whether the percentage method should be adjusted
11 so as to bring the imputed multiplier within a justifiable range." *Id.* at 505.

12 Here, Plaintiff's counsel has incurred fees of well over the requested \$27,350.
13 Specifically, Plaintiff's counsel expended 79.1 hours in litigating and settling this current action.
14 (Hyun Decl. ¶ 11, Exh. B; Marder Decl. ¶ 11, Exh. A). Plaintiff's counsel have been approved at
15 hourly rates of \$750 by numerous courts. (*Id.*) Plaintiff's counsel also anticipate expending an
16 additional 10 hours each on administering the settlement through distribution, including
17 communicating with aggrieved employees. Based thereon, and based on Plaintiff's counsel's
18 hourly rate of \$750.00 per hour, the lodestar through approval and on post-approval matters
19 equates to \$74,325.00. (Hyun Decl. ¶ 11, Exh. B; Marder Decl. ¶ 11, Exh. A). Thus, the
20 requested fee amount of \$27,350.00 is fair and reasonable.

21 Similarly, as to Plaintiff's counsel's costs, Plaintiff's counsel has expended \$2,070.12,
22 including filing/service and Court Call fees. (Marder Decl. ¶ 12, Exh. B; Hyun Decl. ¶ 12). As
23 such, the requested costs should be awarded as fair and reasonable.

24 **VII. PLAINTIFF RESPECTFULLY REQUESTS A SERVICE AWARD**

25 Courts have held that named plaintiffs in class, or private attorney general actions can
26 request a service award. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009)
27 (explaining that service awards "are intended to compensate class representatives for work done
28 on behalf of the class, to make up for financial or reputational risk undertaken in bringing the

1 action, and, sometimes, to recognize their willingness to act as a private attorney general")
2 (emphasis added).

3 Here, Plaintiff seeks \$2,500 for his service award, which is intended to compensate
4 Plaintiffs for the time spent on this case, the potential for retaliation, and for executing a general
5 release, including of Civil Code § 1542, which was not required by aggrieved employees.
6 (Declaration of Roberto Umlas ¶¶ 3-5). These requested enhancements are consistent with
7 awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F.
8 Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet*
9 *Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$
10 55,000, and three incentive awards of \$35,000).

11 **VIII. NOTICE WAS PROVIDED TO THE LWDA**

12 As set forth in the Declaration of Plaintiff's counsel, notice was provided to the LWDA.
13 (Hyun Decl. ¶ 13, Exh. C).

14 **IX. CONCLUSION**

15 Based on the above, Plaintiff requests the Court approve the current PAGA settlement.

16 DATED: April 6, 2021

POLARIS LAW GROUP, LLP

17 By: William L. Marder
18 William L. Marder
19 Attorneys for Plaintiff