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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

14 KIMBERLY DIAMOND, an individual,
15
16 Plaintiff,

17 v.

18 VICTOR MARTINEZ AND ASSOCIATES,
19 INC., a California corporation; VICTOR
20 MARTINEZ, an individual; and DOES 1
21 through 100, inclusive,

22 Defendants.

Case No. CIVSB2111766
(Assigned to Hon. John M. Pacheco, S31)

STIPULATED EX-PARTE
APPLICATION FOR AN ORDER TO
VOLUNTARILY DISMISS PAGA
CLAIMS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF MARK
H. WAGNER

DATE: December 20, 2022
TIME: 8:30 a.m.
DEPT: S31

1 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on December 20, 2022, at 8:30 am, or as soon thereafter as
3 counsel may be heard, in S31 of the above-entitled court located at San Bernardino County
4 Superior Court, the Parties hereby apply *ex-parte* for an Order dismissing Plaintiff's representative
5 allegations ("PAGA") **without prejudice**, as contained in Plaintiff's Eleventh Cause of Action in
6 her Second Amended Complaint, entitled "Penalties Pursuant to Labor Code 2699 *et seq.*" Neither
7 the Parties nor any absent former or current employees will incur any undue prejudice. Should any
8 former or current employees wish to pursue their claims against Defendants, including PAGA
9 claims, they will remain free to do so. As the PAGA claims require court approval to be
10 dismissed, the Parties seek court approval to dismiss the PAGA claims so that the matter may soon
11 after be dismissed entirely pursuant to a case settlement.

12 Good cause exists to grant *ex-parte* relief because: (a) approval of the settlement of the
13 PAGA claims will help resolve this case; (b) waiting for the process of a noticed motion will
14 simply delay the resolution of the case for many months; and (c) the parties are operating under
15 the expectation that the matter has been resolved and, thus, are not taking action that otherwise
16 would need to be taken (e.g., discovery, depositions, etc.). Moreover, because all the parties agree,
17 no party would be prejudiced by having this matter heard on an *ex-parte* basis.

18 This *ex-parte* Application is based upon this Notice, the attached Memorandum of Points
19 and Authorities, the attached Declaration of Mark Wagner, all exhibits attached thereto, and all
20 documentary evidence and pleadings contained in the Court's file, and upon such other evidence
21 as may be presented at the hearing of this motion.

22 Dated: December 16 2022

WAGNER LEGAL GROUP, P.C.

23 By: Mark Wagner
24 Mark H. Wagner, Attorneys for Plaintiff

25 Dated: December __ 2022

26 Dated: December 19, 2022

JACKSON LEWIS

27 By: K.
28 KEVIN ERWIN
Attorneys for Defendants

EX-PARTE APPLICATION

I. INTRODUCTION

The Parties hereby requests dismissal of the PAGA claims, which are contained in the Eleventh Cause of Action in Plaintiff's Second Amended Complaint. Plaintiff worked for Defendants for numerous years and alleged individual wage/hour claims and termination related claims. Plaintiff has settled her individual claims against Defendants and, accordingly, the Parties seek an Order dismissing Plaintiff's representative allegations (PAGA) **without prejudice**. Neither the parties nor any absent former or current employees will incur any undue prejudice. Should any former or current employees wish to pursue their claims against Defendants, including PAGA claims, they will remain free to do so. As the PAGA claims require court approval, the parties seek court approval to dismiss the PAGA claims.

II. STATEMENT OF FACTS

Plaintiff worked for Defendants. Plaintiff filed a lawsuit for her individual claims for wage/violations and termination-related claims. Shortly thereafter, Plaintiff amended the complaint to add PAGA violations, to in part, seek individual liability and to examine other potential claims. Defendants asserted that the potential violations only related to Plaintiff. In November 2022, the Court at an IDC gave permission for the parties to continue PAGA discovery. However, a private mediation was already set up for the individual claims. The Parties then settled their individual claims. This is not a wage and hour case where the PAGA penalties represent any portion of the amount of damage being settled. Rather, they are Plaintiff's claims that she has for termination-related claims that give rise to alleged wage loss damages, emotional distress damages, punitive damages and statutory attorney's fees as well as individual wage claims because she was not paid for all breaks and wages according to her. (Wagner Dec. ¶ 2).

Given there was only minimal PAGA discovery, and the Court just recently permitted the potentially expansive discovery, the Parties could not in good faith resolve those claims and prejudice the other workers. The Settlement specifically states that it does not affect claims by any current or former employees, which would be dismissed **without prejudice**. (Wagner Dec. ¶ 3).

Plaintiff's decision to settle her claims, and not attempt to act as a representative, was

1 based on the unique issues in this case as described above and the status of the case. Plaintiff did
2 not receive any additional compensation due to her filing of a representative action complaint and,
3 furthermore, the dismissal of said PAGA complaint will not impact any other current or former
4 employees because it is without prejudice. For the reasons set forth below, the foregoing facts
5 provide reasonable grounds to enter the accompanying Proposed Order dismissing the
6 representative action without prejudice and dismissing Plaintiff's individual claims with prejudice.
7 (Wagner Dec. ¶ 4).

8 **III. TERMS OF SETTLEMENT**

9 As stated above, the settlement terms are confidential pursuant to the parties' agreement.
10 Nonetheless, the agreement provides that nothing is allocated to PAGA penalties and that no other
11 employees, current or former, are affected by this agreement. Defendants' counsel will bring a
12 copy of the Settlement Agreement, in a Sealed Folder for the Court to review at the hearing, if
13 necessary. But again, here, Plaintiff has agreed to release and waive all of her individual claims.
14 Plaintiff seeks to dismiss her claims "with prejudice" and no longer wishes to continue with the
15 lawsuit but for now, needs to dismiss the PAGA claims via the Court. Collectively, this is a fair
16 and sufficient settlement that causes nobody prejudice.

17 **IV. LEGAL ARGUMENT**

18 **A. Plaintiff May Dismiss Representative Allegations.**

19 This Court should grant Plaintiff's request to dismiss the representative PAGA allegations
20 without prejudice because (1) it comports with the strong public interest favoring settlement, (2)
21 Plaintiff has not received unreasonable remuneration, and (3) the absent employees interests will
22 not be compromised. "California law favors the settlement of disputes as our high court clarified
23 in *Neary* []. Settlement is efficient; it reduces costs, saves resources, and minimizes court
24 congestion. [] The parties are best positioned to understand their interests and resolve a dispute in
25 a mutually beneficial manner without court intervention into the settlement." *Consumer Advocacy*
26 *Group, Inc. v. Kintetsu Enterprises of America*, 141 Cal. App. 4th 46, 62-63 (2006) (quoting *v.*
27 *Regents of University of California*, 3 Cal.4th 273, 277-278 (1992)). "[T]here is an overriding
28 public interest in settling and quieting litigation." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943,

1 950 (9th Cir. 1976); and see *Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir.
2 1988). Courts stated that “[d]ue regard should be given to what is otherwise a private consensual
3 agreement between the parties.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
4 Therefore, this inquiry “must be limited to the extent necessary to reach a reasoned judgment that
5 the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
6 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
7 concerned.” *Id.* (quoting *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir.
8 1982). Upon submission of a “declaration setting forth the facts on which the party relies,” courts
9 may dismiss “an entire class action, or of any party or cause of action in a class action.” CRC
10 3.770(a); see also *Arias v. Superior Court*, 46 Cal.4th 969, 977 (2009) (citing CRC, Rules
11 3.769(a) and 3.770(a)) (“[a] class action cannot be settled or dismissed without court approval”).
12 Similarly, Court approval is required for PAGA claims, however, the procedures are more relaxed.

13 A court does not abuse its discretion by approving a settlement that allocates zero of the
14 settlement recovery to the PAGA claims. *Nordstrom Commission Cases* 186 Cal.App.4th 576, 589
15 (2010). *Nordstrom* was a putative wage and hour class action in which the employer agreed to pay
16 up \$6.405 million in cash plus another \$2.5 million in merchandise vouchers to settle all claims
17 (including PAGA claims). Certain class members objected to the settlement, including on the
18 grounds that the complaint alleged PAGA remedies but the class action settlement released those
19 claims without any consideration paid to the LWDA pursuant to them. On appeal, the court held
20 that the trial court did not abuse its discretion in approving the class settlement: it released PAGA
21 claims without any money paid to the LWDA for those claims. (“We find no abuse of discretion in
22 the trial court’s approval of the settlement agreement containing these terms,” even though the
23 agreement released PAGA claims without any consideration paid to the LWDA for those
24 releases). See also *Villacres v. ABM Industries Inc.* 117 Cal.Rptr.3d 398 (2010) (it does not matter
25 that none of the settlement proceeds were allocated to PAGA claims).¹

26
27 ¹ In fact, courts have often approved PAGA payments that are less than a few percent. See, e.g., *Franco v. Rut Food*
28 *Prods., Inc.*, No. 1:10-cv-02354-SKO, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012) (approving PAGA
penalties of \$10,000 (75% to the state) as part of \$2.5 million common-fund settlement); *Garcia v. Gordon Trucking*,
No. 1:10“CV“-0324-AWI-SKO, 2012 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012) (approving PAGA settlement
payment of \$10,000 out of the \$3.7 million common-fund settlement); *Chu v. Wells Fargo Investments, LLC*, No. C

1 The parties' agreement to resolve Plaintiff's individual claims comports with the
2 overarching public policy in favor of settlement. Moreover, neither Plaintiff nor her counsel have
3 received disproportionate compensation in exchange for the release. Most significantly, Plaintiff
4 seeks to dismiss her representative allegations *without prejudice*, so entry of the Proposed Order
5 lodged herewith will not have a binding or dispositive impact on the absent former or current
6 employees, who will remain free to pursue their claims against Defendants. Accordingly, this
7 Court should allow Plaintiff to dismiss this lawsuit.

8 **B. No Notice To Other Employees Is Required.**

9 This Court need not order the parties to disseminate notice of dismissal because the
10 California Supreme Court has held that class action requirements and notice requirements are not
11 required in a PAGA action. *Arias v. Superior Court*, 46 Cal.4th 969, 977 (2009); *see also*
12 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir.) (PAGA has no notice requirements
13 for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a
14 PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to
15 fairly and adequately represent unnamed employees.).² Accordingly, no notice of this settlement
16 is required to other employees. Again, those other employees are not affected in this case.

17 **V. NOTICE OF EX-PARTE**

18 The Parties are doing this as a stipulation and have agreed upon this date for this *ex-parte*
19 to be filed and for Defendants' counsel to appear for the motion.

20 **VI. GOOD CAUSE EXISTS FOR EX-PARTE RELIEF**

21 Good cause exists to grant *ex-parte* relief because: (a) approval of the settlement of the
22 PAGA claims will help resolve this case; (b) waiting for the process of a noticed motion will
23 simply delay the resolution of the case for months; and (c) the parties are operating under the
24 expectation that the matter has been resolved and, thus, are not taking action that otherwise would
25 need to be taken (*e.g.*, discovery, depositions, etc.) if the case is not resolved. Moreover, because

26 05—4526 MHP, C 06-7924 MHP, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA settlement
27 payment of \$7,500 to LWDA out of \$6.9 million common-fund settlement).

28 ² In fact, Courts should approve "dismissal of class allegations without notice, so long as representative plaintiffs do
not receive disproportionate recoveries and the absent class members do not suffer prejudice." *Diaz v. Trust Territory*
of Pacific Islands, 876 F.2d 1401, 1409 (9th Cir. 1989).

1 all the parties agree, no party would be prejudiced by having this matter heard on an *ex-parte*
2 basis. (Wagner Dec. ¶ 5).

3
4 **VII. CONCLUSION**

5 For all of the foregoing reasons, the Parties respectfully requests that this Court endorse the
6 parties' settlement agreement and sign the Proposed Order.

7
8 Dated: December 16 2022

WAGNER LEGAL GROUP, P.C.

9
10 By: Mark H. Wagner
Mark H. Wagner, Attorneys for Plaintiff

11 Dated: December __ 2022

12 Dated: December 19, 2022

JACKSON LEWIS

13
14 By: Kevin Erwin
15 KEVIN ERWIN
16 Attorneys for Defendants
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Declaration of Mark H. Wagner

I, Mark H. Wagner, declare as follows:

1. I am an attorney at law licensed to practice in California. I am with the firm of Wagner Legal Group, P.C. attorneys of record for Plaintiff. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently to these matters. This declaration is in support of the Parties' *ex-parte* application.

2. Plaintiff worked for Defendants. Plaintiff filed a lawsuit for her individual claims for wage/violations and termination-related claims. Shortly thereafter, Plaintiff amended the complaint to add PAGA violations, to in part, seek individual liability and to examine other potential claims. Defendants asserted that the potential violations only related to Plaintiff. In November 2022, the Court at an IDC gave permission for the parties to continue PAGA discovery. However, a private mediation was already set up for the individual claims. The Parties then settled their individual claims. This is not a wage and hour case where the PAGA penalties represent any portion of the amount of damage being settled. Rather, they are Plaintiff's claims that she has for termination-related claims that give rise to alleged wage loss damages, emotional distress damages, punitive damages and statutory attorney's fees as well as individual wage claims because she was not paid for all breaks and wages according to her.

3. Given there was only minimal PAGA discovery and the Court just recently permitted the potentially expansive discovery, the Parties could not in good faith resolve those claims and prejudice the other workers. The Settlement specifically states that it does not affect claims by any current or former employees, which would be dismissed without prejudice.

4. Plaintiff's decision to settle her claims, and not attempt to act as a representative, was based on the unique issues in this case as described above. Plaintiff did not receive any additional compensation due to her filing of a representative action complaint and, furthermore, the dismissal of said PAGA complaint will not impact any other current or former employees because it is without prejudice. For the reasons set forth below, the foregoing facts provide reasonable grounds to enter the accompanying Proposed Order dismissing the representative action without prejudice and dismissing Plaintiff's individual claims with prejudice.

5. Good cause exists to grant *ex-parte* relief because: (a) approval of the settlement of the PAGA claims will fully and entirely resolve this case; (b) waiting for the process of a noticed motion will simply delay the resolution of the case for many months; and (c) the parties are operating under the expectation that the matter has been resolved and, thus, are not taking action that otherwise would need to be taken (*e.g.*, discovery, depositions, etc.) if the case is not resolved. Moreover, because all the parties agree, no party would be prejudiced by having this matter heard on an *ex-parte* basis.

I declare under penalty of perjury under the laws of the U.S.A. the State of California that the foregoing is true and correct. Executed this December 162022 at Santa Monica, California.

Mark Wagner

Mark H. Wagner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

CASE NAME: *Kimberly Diamond v. Victor Martinez and Associates, Inc., et al.*

CASE NUMBER: CIV SB 2111766

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 200 Spectrum Center Drive, Suite 500, Irvine, CA 92618.

On December 19, 2022, I served the foregoing document described as:

**STIPULATED EX-PARTE APPLICATION FOR AN ORDER TO VOLUNTARILY DISMISS
PAGA CLAIMS**

in this action by transmitting a true copy thereof enclosed in a sealed envelope addressed as follows:

Mark H. Wagner
WAGNER LEGAL GROUP, P.C.
2601 Ocean Park Boulevard, Suite 208
Santa Monica, CA 90405
Telephone: (310) 857-5293
E-Mail : mark@wagnerlegalgroup.com

Attorneys for Plaintiff
KIMBERLY DIAMOND

[X] BY E-MAIL OR ELECTRONIC TRANSMISSION

Based on a Court order or on an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) described above to be sent from e-mail address Denise.MacMurray@jacksonlewis.com to the persons at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[XX] STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 19, 2022, at Riverside, California.

/s/ Denise G. S. MacMurray
Denise G. S. MacMurray