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14 ANGEL BRAVO and PABLO FLORES

15 **CALIFORNIA SUPERIOR COURT**
16 **IN AND FOR THE COUNTY OF SANTA CLARA**

17 ANGEL BRAVO and PABLO FLORES

18 Plaintiffs,

19 V.

20 GALLAHER COMPANY AND ROBERT
21 JOHN GALLAHER AND DOES 1
22 THROUGH 50.

23 Defendants.

Case No: 21CV381912

**SUPPLEMENTAL DECLARATION OF
TOMAS E. MARGAIN IN SUPPORT OF
PLAINTIFF'S MOTION FOR APPROVAL OF
PAGA SETTLEMENT**

Date: October 23, 2024

Time: 1:30 p.m.

Dept: 19

Judge: Hon. Theodore C. Zaner

1 I, Tomas E. Margain, declare as follows:

2 1. I am an attorney licensed to practice law in California and one of the attorneys for
3 Plaintiffs in this matter. I have personal knowledge of the facts set forth in this declaration, and,
4 if called as a witness, I could and would testify thereto.

5 2. The Court continued the matter to have Plaintiffs' counsel supplement the record
6 to address the valuation of the claims, broken down by the penalties sought, as well as to better
7 quantify the size of the PAGA pool.

8 3. After the Court's tentative, my co-counsel Xiaoming Liu and I met and conferred
9 with Defendants' counsel Susan K. Hatmaker and Robert W. Branch to address the Court's
10 inquiries.

11 4. The basis for the claims allegations are that Defendants mileage system was not
12 lawful as certain workers would use their personal vehicles both to commute to work, an un-
13 compensable activity, but also to go to stores during the workday to purchase materials. This also
14 lead to certain employees shopping before or after the paid workday, and not being paid for that
15 time. While Plaintiff Angel Bravo, who lives in San Jose, rarely went shopping outside of work
16 hours, employees such as Pablo Flores and Javier Martinez, who lived in Salinas and Gilroy,
17 would shop before reaching the San Jose area on their commute typically shopping at the Gilroy
18 or Morgan Hill Home Depos. This milage and related record keeping policy was changed on
19 June 20, 2021, three months after Plaintiffs filed and served the PAGA letter.

20 5. At mediation, Plaintiffs received data for 91 workers which was used to audit
21 1,292 PAGA periods for an average of 14.2 violations per worker from the one-year PAGA
22 lookback period to June 20, 2021. In the mediation, it was determined that only about 14 workers
23 could have used their vehicles to purchase materials and were named the "handyman" workers.
24 This formed the basis of the 199 projected PAGA pay periods at issue involving the affected
25 workers and projected average.

26 6. Defendants confirmed the PAGA size and weeks in service as a total of Seventeen
27 17 workers (Fourteen (14) plus the Three (3) participating workers) with an actual 429 periods
28 being the PAGA Notice one year lookback and June 20, 2021 the change in the mileage

1 reimbursement policy. This is the actual data for the PAGA pool workers and totals which the
2 parties wish to use for the settlement distribution.

3 7. The PAGA allocation, including Claims Distribution budget of \$2,000, is
4 \$45,600.00.

5 8. The total exposure based on the 199 total was \$295,000 which results in a
6 valuation of \$219.09 per PAGA pay period.

7 9. The new total exposure, based on the actual 429 total, is \$729,150 which results in
8 a valuation of \$106.29 per PAGA pay period.

9 10. As I indicated at paragraph 26 in my original declaration, a PAGA valuation of
10 \$100 to \$150 per pay period is a good to excellent result for PAGA claim settlements. I still
11 believe that a settlement of \$106.29 per PAGA period is an excellent settlement given that
12 Plaintiffs, and the participating worker, were also made whole though they slightly compromised
13 the full value of their claims.

14 11. I also want to emphasize that the settlement was the result of a mediator's proposal
15 based on the parties arms length negotiating position. We accepted the proposal as Plaintiffs
16 would substantially be made whole and there would be a sizeable recovery to the LWDA as part
17 of the PAGA claim.

18 12. I now want to explain the valuation and the Labor Code provisions which we
19 asserted as requested by the Court:

20 (a) *Labor Code* § 204, this is the failure to pay all wages due at least twice each calendar
21 month, at \$100 per pay period for initial violations and a subsequent \$200 penalty.

22 (\$100/\$200 per pay period x 429 pay periods = \$85,700). This was a contested claim and
23 in order to prevail Plaintiffs would have to prove that workers actually performed work
24 before or after the workday in each individual PAGA pay period as this claim could not
25 be based on unreimbursed mileage expenses because that is not a wage.

26 (b) *Labor Code* § 210, calling for a penalty of \$100 per pay period for initial violations and a
27 subsequent \$200 penalty plus 25% of the withheld amount for failure to pay all wages
28

1 each pay period, ($\$100/\200 per pay period x 429 pay periods = $\$85,700$). Again,
2 Plaintiffs would have to prove that workers actually performed work before or after the
3 workday in each individual PAGA pay period as this claim could not be based on
4 unreimbursed mileage expenses as that is not a wage. This penalty is also penalizing the
5 same claim as in the other “failure to pay wage” penalties.

6 (c) *Labor Code* § 510, failure to pay overtime for work in excess of eight hours in a
7 workday, forty hours in a workweek and other definitions of overtime and double
8 overtime compensation. Labor Code § 2699(f)(2) provides for a \$100 civil penalty for
9 each employee per pay period ($\$100$ per pay period x 429 per periods = $\$42,900$). While
10 this is similar to the penalty under *Labor Code* § 210 above, because workers would
11 routinely work 40 hours a week, the only difference is that if the off the clock work
12 occurred, it would be during a period where overtime wages were owed.

13 (d) *Labor Code* § 558, which calls for an initial \$50.00 and subsequent \$100 penalty for a
14 violation of the Chapter in the Labor Code addressing the payment of wages. The
15 valuation of this is $\$42,850$ and again involves wages, not mileage, and is a similar
16 failure to pay wage penalty and needs to be assessed for each PAGA worker during each
17 PAGA pay period.

18 (e) *Labor Code* 1197, failure to pay or cause to be paid any employee wages less than the
19 minimum fixed by an applicable state or local law, in the amount of \$100 per initial
20 violation per pay period and a subsequent penalty of \$250. ($\$100/\250 per pay period x
21 429 pay periods = $\$107,100$). Similarly, this penalty is assessed when there is a violation
22 for each PAGA worker in a PAGA pay period.

23 (f) *Labor Code* 1197.1, failure to pay or cause to be paid any employee wages less than the
24 minimum fixed by an applicable state or local law, \$100 per initial violation per pay
25 period and a subsequent penalty of \$250. ($\$100/\250 per pay period x 429 pay periods =
26 $\$107,100$). Both 1197 and 1197.1 are “minimum wage” violation penalties and are only
27 applicable when there is a violation in a PAGA pay period.
28

- (g) *Labor Code* § 2802, failure to reimburse employees for expenses incurred while performing job duties in the amount of \$100 per initial violation per pay period and a subsequent penalty of \$250. ($\$100/\250 per pay period x 429 pay periods = \$107,100). Here, a violation occurred when a PAGA worker used his personal vehicle to perform job duties in a PAGA period.
- (h) *Labor Code* § 1198, violating the maximum hours of work and the standard conditions fixed by the commission, in the amount of in the amount of \$100 per employee per pay period for the initial violation *Labor Code* § 2699(f)(2) provides for a \$100 civil penalty for each employee per pay period for an initial violation ($\$100$ per pay period x 429 pay periods = \$42,900). A violation occurred when a PAGA worker performed work before and after his workdays that resulted in overtime work in a PAGA period.
- (i) *Labor Code* § 1174, is a payroll records violation penalty which was valued as a \$500.00 penalty (Caped) per worker ($\$500$ per worker x 17 workers = \$8,500).
- (j) *Labor Code* § 226.3, for failing to provide accurate wage stubs which calls for a \$250 penalty per pay period. ($\$250$ per pay period x 429 pay periods = \$107,250).

13. As seen above, the 10 penalties comprise the total valuation of \$729,150, which assumes that Defendants violated each Labor Code section with each PAGA worker in all 429 PAGA pay periods. Such assumption is most likely overly exaggerated because the percentage of days that the three named Plaintiffs worked before or after their workdays were 1.96%, 17.07%, or 66.67%.

14. Put in a chart, the 10 penalties are as follows:

PAGA Civil Penalties	For 17 workers and all 429 PAGA pay periods
LC § 204, failure to pay all wages at least twice each month	\$85,700.00
LC § 210, Failure to pay when wages due	\$85,700.00
LC § 226.3, failure to provide accurate wage statement	\$107,250

1	LC § 510, failure to pay overtime	\$42,900
2	LC § 558, failure to pay wages	\$42,900
3	LC § 1174, failure to maintain accurate payroll records	\$8,500
4	LC § 1197, failure to pay minimum wage	\$85,700.00
5	LC § 1197.1, failure to pay minimum wage	\$85,700.00
6	LC § 1198, employing workers for longer hours than those fixed by wage order	\$42,900
7	LC § 2802, failure to reimburse expense	\$107,100
8	TOTAL	\$729,150.00

15. Again, I am still of the opinion that the PAGA settlement is fair, an excellent result, and should be approved. Over \$100.00 was recovered, after attorneys' fees, as to every period in question.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct, executed on October 14, 2024 in Santa Clara County, California.

Tomas Margain

Tomas E. Margain

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On October 14, 2024, I served the documents described as:

on Interested Parties at the following address(es):

Counsel for Defendants

[X] BY EMAIL: I transmitted the document(s) described above by email to the email address(es) of the attorney(s) for Defendant(s) in this action.

I uploaded the foregoing documents to the LWDA to the following URL for electronic submissions:

[X] STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 14, 2024 at Santa Clara County, California.

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