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Attorneys for Plaintiff and on behalf of the Proposed Class

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

KARINA MORALES, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

VPET USA, LLC, a Delaware Limited
Liability Company; WORKFORCE
PERSONNEL, INC., a California
Corporation; and DOES 1 through 20,
inclusive.

Defendants.

Case No.: CIVSB2108161
*[Assigned to Hon. Judge David Cohn, Dept S26,
for all purposes]*

**DECLARATION OF MISTY LAUBY IN
SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY APPROVAL**

Hearing

Date: July 29, 2022
Time: 10:00 a.m.
Dept.: S26

Complaint filed: March 10, 2021

I, Misty Lauby, state and declare:

1. I am an attorney licensed to practice before all of the courts of the State of California. I am a partner within our firm. I represent Plaintiff Karina Morales in this action and I am thoroughly familiar with and have personal knowledge of all of the facts set forth herein. I submit this declaration in support of Plaintiff's Motion for Preliminary Approval of this Class Action Settlement. If called as a witness, I could and would competently testify thereto.

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1 **COUNSEL'S EXPERIENCE**

2 2. I have been a member, in good standing, of the State Bar of California since 2006.
3 I am licensed to practice before all courts of the State of California and am admitted to practice
4 in the United States District Court for the Central District of California and have litigated cases
5 in various courts and counties throughout California, including successful briefing and argument
6 in the Court of Appeal.

7 3. I began working as an attorney for Fernandez & Lauby LLP in 2006 (Fernandez
8 & Lauby was later renamed to Lauby, Mankin & Lauby LLP). From 2006 through March 2018, I
9 worked in the firm's insurance defense department as the handling attorney in approximately
10 250-350 complex construction defect litigation matters that I successfully managed and settled
11 on behalf of multiple insurance carrier clients.

12 4. In or around March 2018, I transitioned to handling exclusively employee vs.
13 employer litigation matters.

14 5. Leading up to the transition and continuing through the present, I have taken
15 seriously the responsibility of acquiring expertise in the field by participating in numerous
16 continuing legal education seminars specific to the representation of employees in litigated
17 matters, mediation, and complex litigation, including the following non-exhaustive list:

18 California Employment Lawyers Association ("CELA") Wage & Hour Boot
19 Camp in September 2016;

20 CELA 13th Annual Advanced Wage and Hour Seminar in May 2017;

21 CELA 30th Annual Employment Law Conference in October 2017;

22 Castle Publications and SheppardMullin Wage and Hour Laws in March 2018;

23 Bridgeport PAGA Claims 2018 Seminar in March 2018;

24 California Lawyers Association Labor & Employment Law Section 35th Labor &
25 Employment Law Annual Meeting April 2018;

26 Bridgeport Class Action Litigation Conference Seminar in April 2018;

27 Los Angeles County Bar Association 2018 Complex Court Symposium in
28 November 2018;

1 CELA 15th Annual Advanced Wage & Hour Seminar in May 2019;
2 CELA 6th Annual Trial College in May-June 2019;
3 Pepperdine University Strauss Institute for Dispute Resolution - Mediation: The
4 Art of Facilitating Settlement, An Interactive Training Program in June 2019;
5 CELA 32nd Annual Employment Law Conference in October 2019;
6 CELA The Ethics of a PAGA Action in May 2020;
7 CELA Annual Advanced Wage & Hour Update in May 2020;
8 CELA Demystifying Video/Remote Depositions: A Technical and Legal
9 Workshop in June 2020;
10 CELA An Epic Problem: Mass Arbitration and Other Strategies for Responding
11 to Class Action Waivers in June 2020;
12 CELA 9th Annual CELA/Fair Diversity Leadership Summit in June 2020;
13 CELA AB5 and the Future of Independent Contractors In California in June 2020;
14 Trojan Horse, LLC - Various Participatory Case Analysis and Trial Advocacy
15 MCLE programs throughout 2020 and 2021;
16 CELA Advanced Wage & Hour Update in May 2021;
17 Trial Lawyers University Live in October 2021; and
18 CELA Advanced Wage & Hour Update in May 2022.

19 6. The vast majority of my employment cases have been litigated as class actions,
20 representative PAGA actions or a combination of the two.

21 7. I have been the handling attorney on over 30 class action and/or representative
22 PAGA actions. And, on these cases, myself and/or my firm have been appointed Class Counsel
23 on over 13 cases, and have helped recover over \$8,000,000 for my clients, the employees, and
24 the State of California.

25 8. Attached as **Exhibit 1** is a list of 13 resolved and/or settlement class actions,
26 collective actions, and/or PAGA actions that I have handled in the last 4 years (note: this list
27 excludes currently active cases and settlements pending approval).

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1 **BRIEF SUMMARY OF THE CLAIMS AND DEFENSES**

2 9. Plaintiff alleged numerous wage and hour violations on behalf of the Class
3 Members. However, Defendant vigorously contested and denied Plaintiff's material allegations
4 on the merits and as to the propriety of a class action or PAGA representative action. Moreover,
5 Defendant VPET denies that Plaintiff is an adequate class representative as to the claims against
6 it because she was an employee of the staffing company Workforce Personnel, Inc. Still, Plaintiff
7 believed there were several strong claims, which are discussed below.

8 10. First, Plaintiff alleges that she and the Class Members were not provided all
9 minimum, regular, and overtime wages due to Defendants' failure to accurately record and
10 compensate for all hours worked. For instance, Defendant maintained policies and practices that
11 required employees to clock out for lunch periods while still under the control of the Defendant.
12 Nevertheless, Defendant insist that it had compliant policies and it was not the practice for
13 Plaintiff and the Class Members to clock out before being relieved of all duty.

14 11. Second, Plaintiff also argued that the Class Members were often denied compliant
15 meal and rest breaks due to the nature of the work and the distance the employees had to travel
16 while off the clock to get to break rooms where they were required to take their meal periods.
17 However, Defendant argued that it provided and made available meal and rest breaks to all
18 employees, and any employee who did not take a meal or rest break did so entirely of his or her
19 own volition. In this regard, Defendant produced its written policies and practices, which it
20 argued show full compliance with the law. As such, Defendant argued that these claims were
21 without merit because, for each violation, a fact-finder would have to determine why a break was
22 noncompliant/nonexistent, because if it was by the employee's choice, no liability attaches to the
23 Defendant.

24 12. Third, Plaintiff also alleges that she and the Class Members were not paid all
25 wages due and owing each pay period (Labor Code § 204) and upon separation of employment
26 within the time required by Labor Code §§ 201 – 203.

27 13. Fourth, Plaintiff alleged that Defendant issued wage statements to the Class
28 Members that did not comply with the requirements of Labor Code § 226. But Defendant

1 disputed Plaintiff's wage statement claim and specifically disputed that the wage statements were
2 inaccurate or that they otherwise failed to comply with Labor Code § 226. Furthermore,
3 Defendant contended that, even if Plaintiff could identify a technical error in some employees'
4 wage statements, Plaintiff's claims still fail for multiple reasons, including without limitation,
5 because Plaintiff cannot establish a "knowing and intentional" violation or that Plaintiff and
6 other employees suffered an "injury" as required by Labor Code § 226(e).

7 14. Finally, Plaintiff also alleges that Defendants failed to comply with California's
8 mandate to provide employees "with suitable seats when the nature of the work reasonably
9 permits the use of seats."

10 **THE SETTLEMENT IS FAIR, JUST, AND REASONABLE**

11 15. Based upon detailed data obtained through informal discovery and information
12 exchanges, Plaintiff's counsel estimated the following data points through the date of mediation:
13 (1) approximately 143 total Class Members, (2) approximately 7,184 workweeks through
14 mediation for the Class Period, and (3) approximately 3,865 pay periods during the PAGA
15 Period through mediation. From these metrics, and when factoring in claim certification
16 probabilities and liability probabilities, Class Counsel formulated detailed damages models to
17 value the claims in preparation for mediation and to reach a realistic and reasonable resolution.

18 16. Next, Plaintiff calculated the maximum potential value of the unpaid wage claim
19 to be \$104,527.20. After applying appropriate discounts at the class certification stage and on
20 the merits, Plaintiff estimated the risk-adjusted value of the unpaid wage claim to be
21 approximately \$83,622. And these unpaid wage claims also gave rise to Plaintiff's claim for
22 waiting time penalties under Labor Code § 203. In this respect, Plaintiff estimated that there
23 were 53 *former* Class Members during the relevant period, and those individuals earned an
24 average daily wage of \$186.08; therefore, the maximum potential waiting time penalties totaled
25 \$295,867. However, Defendant argued that it would defeat the waiting time penalty claim at the
26 class certification stage and, failing that, it would show that any underpayment of wages was not
27 "willful" and/or that Defendant had a good faith defense to imposition of waiting time penalties.
28 While Plaintiff was confident this claim would ultimately prevail, Plaintiff worked off a risk-

1 adjusted value of \$236,694 for the waiting time penalty claims.

2 17. In terms of the meal and rest break claims, Plaintiff calculated a maximum total
3 value of \$585,136 based on a 50% meal period violation rate (17,960 applicable shifts for
4 \$417,750 in damages) and a 25% rest break violation rate (8,980 applicable shifts for \$167,387
5 in damages). Defendant strongly opposed these claims based on the argument that they fall
6 directly into the category of impermissible “individualized issues” which cannot meet class
7 certification standards since Defendant had compliant written policies the employees had ample
8 latitude regarding whether, when, and how they took their breaks. Therefore, Defendant asserted
9 that a factfinder would have to determine for each Class Member whether a break was missed
10 and why, and why a break was noncompliant/nonexistent, because if it was by the employee’s
11 choice, no liability attaches to the defendant. Moreover, Defendant argued that employees
12 working directly for Workforce, or any other staffing company, were subject to the supervision
13 and policies of the staffing companies and not VPET. As a result, Plaintiff could not adequately
14 represent the VPET employees because she was an employee of Workforce rather than VPET.
15 After factoring in reasonable discounts, Plaintiff’s risk-adjusted value of the combined meal and
16 rest break claims was \$250,722.

17 18. Plaintiff also contends that there were wage statement violations, based on the
18 allegation that Defendant failed to include all information required by Labor Code § 226(a). The
19 maximum potential value of this claim was \$379,350 under the \$50/\$100 formula in § 226(e).
20 Defendant raised many defenses, including that: (a) these violations, if any, did not result in any
21 “injury” under § 226(e), (b) the violations, if any, were not “knowing and intentional” and could
22 not support the assessment of penalties, and (c) “derivative” wage statement claims are without
23 merit. Based on the alleged defenses, Plaintiff assigned a risk-adjusted value for the wage
24 statement claims of \$151,740.

25 19. Plaintiff’s 204 and suitable seating claims are PAGA only claims that are
26 addressed below.

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20. In sum, when factoring in the defenses and risks of ongoing litigation, Plaintiff's estimate the risk-adjusted class recovery as follows:

- | | | |
|---|----------------------|-------------------|
| • | Wage Claim | \$ 83,622 |
| • | 203 Claim | \$ 236,694 |
| • | Meal and Rest Claims | \$ 250,722 |
| • | Wage Statement Claim | \$ <u>151,740</u> |

Plaintiff's Estimate of Total Risk-Adjusted Damages \$ 684,842

21. The reasonableness of the settlement is apparent from the fact that the proposed settlement binds Defendant to pay over 36% of the risk-adjusted class damages and penalties. And while the PAGA civil penalty would have a maximum value in the seven figures, Defendant points out that courts have wide latitude to reduce the amount of civil penalties "based on the facts and circumstances of a particular case" and if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(h). Moreover, Defendant argued against the merits of the underlying claims and particularly that the "willfulness" standard and/or "good faith" defenses mitigated the civil penalty claims and rendered any such penalties as uncertain. Defendant also argued that it is improper to stack civil penalty claims on top of the underlying claim. For these reasons, Plaintiff submits that the agreed-upon settlement is fair and reasonable.

CONCLUSION

22. For the foregoing reasons, it is respectfully requested that the Court grant preliminary approval of the settlement as being fair, reasonable, and in the best interests of the class, as well as preliminarily approve the requested attorneys' fees, costs, and enhancement payment to the Class Representative.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 7, 2022, at Riverside, California.

By: 
Misty M. Lauby, Esq.

EXHIBIT “1”

Completed Class/Collective/PAGA Cases		
Case Name	Venue	Case Number
Castelo v. Millemiaaero	San Bernardino	CIVDS1825783
Constante v. Eddie's Trucking	San Bernardino	CIVDS1902466
Gallardo v. Tee For 2	San Bernardino	CIVDS1719564
Garcia v. Coach	USDC	5:18-cv-01537
Garcia v. Harkins	USDC	5:18-cv-02314
Legorreta v. Paradise	Riverside	RIC1723591
Lepe v. Big Lots	San Bernardino	CIVDS1825693
Lupercio v. Access Exterminator	San Bernardino	CIVDS1921036
McCulloch v. The Gill	Los Angeles	BC722742
Palmer v. Charter	San Bernardino	CIVDS2013037
Redman v. Zenith	San Bernardino	CIVDS1826759
Robertson v. All Care	Los Angeles	20STCV18318
Ruiz v. Unity Courier Service	Los Angeles	BC724435