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7 Attorneys for Plaintiff,
8 DOMINIQUE WHITEHAIR

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO
12

13 DOMINIQUE WHITEHAIR an individual;

14 Plaintiff,

15 vs.

16 PACIFIC BEACH RECOVERY, a California
17 Business; LA JOLLA RECOVERY, a
18 California Business; and DOES 1 through 100,
19 inclusive;

20 Defendants.

CASE NO. 37-2021-00038307-CU-WT-CTL

*Assigned to: Honorable Gregory W. Pollack
Dept. C71*

**NOTICE OF PLAINTIFF'S UNOPPOSED
EX PARTE APPLICATION AND MOTION
FOR COURT APPROVAL OF PAGA
SETTLEMENT; DECLARATION OF
NARAK MIRZAIE, ESQ. IN SUPPORT
THEREOF**

DATE: November 22, 2021
TIME: 8:30 A.M.
PLACE: DEPT. C71

21
22 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on November 22, 2021 8:30 A.M. or as soon thereafter as the
24 matter may be heard in Department C71 of the above-entitled court, located at 330 West
25 Broadway San Diego, CA 92101, the Honorable Gregory W. Pollack presiding, Plaintiff
26 Dominique, in representative capacity, will, and hereby does, apply for a Court order approving
27 the PAGA settlement in this matter.
28

1 The basis for this motion is that the parties have reach and fully executed a settlement of
2 the above-entitled case that disposes of the matter entirely. However, one aspect of Plaintiff's
3 claims included a prayer for remedies under the Private Attorneys General Act, or ("PAGA").
4 Pursuant to statute, settlement of PAGA claims requires court approval. See Labor Code section
5 2699(1). Thus, the parties seek court approval of the PAGA aspect of the settlement so that the
6 matter may be dismissed entirely pursuant to the settlement of the parties.

7 The motion is based on this notice, the attached declaration of Narak Mirzaie, Esq., and all
8 exhibits attached thereto, the attached Memorandum of Points and Authorities, as well as all
9 records on file with this Court and the argument that is presented at the time of the hearing.

10
11 Dated: October 28, 2021

M LAW ATTORNEYS, APC

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13 By: 
14 Narak Mirzaie, Esq.
15 Attorneys for Plaintiff
16 Dominique Whitehair
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **BACKGROUND**

4 Plaintiff DOMINQUE WHITEHAIR (“Plaintiff”) filed his Complaint against Defendants
5 PACIFIC BEACH RECOVERY & LA JOLLA RECOVERY and Does 1 through 100, inclusive,
6 (collectively “Defendants”) on or about September 8, 2021. Prior to filing the Complaint, on
7 April 16, 2021 Plaintiff filed its notice with the Labor and Work Development Agency (“LWDA”)
8 against Defendants for numerous violations of the California Labor Code and violations of the
9 State’s Private Attorneys’ General Act, California Labor Code §2698 *et. Seq.*, (“PAGA”) (the
10 “PAGA Claim”). On June 20, 2021, 65 days elapsed since Plaintiff’s filing of her PAGA Notice,
11 and the LWDA provided no notice about its intention to conduct an investigation. Plaintiff
12 subsequently amended its PAGA notice with the LWDA to incorporate additional allegations.
13 Plaintiff has alleged the following Labor Code Violations: 201-204, 210, 216, 222, 222.5, 223,
14 224, 226, 226.4, 226.6, 226.7, 246, 248.5, 256, 432.5, 510, 512, 558,, 558.1,1174, 1194, 1197,
15 1197.1, 1199, 2698 *et seq.*, 2699, 2802, and their subsections, all applicable IWC Wage Order 9-
16 2001; Cal. Code of Regulations sections 11090(11) and (12). The LWDA has taken no action
17 against Defendants on the PAGA Notices, has not investigated and issued no citations against
18 Defendants on the PAGA Notices and the LWDA has not notified the parties regarding any
19 intention not to investigate, consistent with Labor Code section 2699.3(2)(A) or (2)(B).

20 **II.**

21 **DISCOVERY & SETTLEMENT AGREEMENT REACH BETWEEN PLAINTIFF AND**
22 **ALL DEFENDANTS**

23 The parties engaged in a lengthy exchange of information and informal discovery in which
24 permitted Plaintiff to perform statistical sampling of employee time sheets and pay records.
25 Plaintiff’s counsel carefully reviewed the timecards, paystubs, and prepared a detailed analysis of
26 alleged wage and hour violations.

27 Parties engaged in settlement negotiations for approximately five (5) months. The long-form
28 settlement agreement was executed and finalized on September 29, 2021. Further, Plaintiff’s counsel

1 and Defendants agreed that once the Court approves the PAGA portion of the settlement, Plaintiff's
2 counsel will move to dismiss the matter in its entirety against all parties with prejudice. Approval,
3 of the settlement of the PAGA claims will fully and entirely resolve this case following the arm's-
4 length settlement.

5 Under Labor Code Section 2699(1) "the Superior Court shall review and approve any
6 penalties sought as part of the resolution of a case that involved PAGA claims." Labor Code section
7 2699(1) by this application, the parties jointly request that the Court approve the settlement of the
8 PAGA-related claims asserted in this action.

9 III.

10 **THE COURT SHOULD APPROVE THE PROPOSED SETTLEMENT OF THE PAGA** 11 **PORTION OF THIS CASE** 12

13 **1. The Court's Duty to Review and Approve Any Settlement of PAGA Penalties**

14 PAGA permits fill aggrieved employee to sue an employer for civil penalties associated
15 with the employer's violation of various California Labor Code provisions. Labor Code section
16 2699(a). Pursuant to the statute, of the amount paid to settle a claim for PAGA penalties, twenty
17 five percent (25%) is payable to the employee prosecuting the action and seventy-five percent
18 (75%) is payable to the California Labor and Workforce Development Agency (LWDA). Labor
19 Code section 2699(i). Under Labor Code section 2699(1), "[t]he Superior Court shall review
20 and approve any penalties sought" as part of the resolution of a case that involved PAGA
21 claims." Labor Code section 2699(1).
22

23 **2. The Court Should Approve the Proposed Settlement of the PAGA Penalties Because** 24 **the Settlement is Reasonable Under the Circumstances of this Case**

25 Under the terms of the settlement agreement (**Attached as Exhibit A**), the Parties have
26 stipulated to a gross settlement sum of \$67,500.00 for PAGA claims which will be allocated as
27 follows:
28

- i. Seventy-five percent (75%) of the remainder of the Settlement Amount after

1 the deduction of any award of attorneys' fees, Litigation costs, and
2 Administrative Costs. This amount shall be calculated as follows:
3 Settlement Amount minus (Court approved amounts for attorneys' fees,
4 Litigation costs, and Administrative Costs) times 75%.

5 ii. Twenty-five percent (25%) of the remainder of the Settlement Amount after
6 the deduction of any award of attorneys' fees, Litigation costs, and
7 Administrative Costs. This amount shall be calculated as follows:
8 Settlement Amount minus (Court approved amounts for attorneys' fees,
9 Litigation costs, and Administrative Costs) times 25%.

10 iii. Charges and expenses of the Settlement Administrator, estimated to be no
11 more than Five Hundred Seventy Five Dollars (\$575.00) will be paid from
12 the Settlement Amount. Any charges and expenses of the Settlement
13 Administrator greater than the allocated Five Hundred Seventy Five Dollars
14 (\$575.00) will come from the Settlement Amount.

15 iv. Twenty-Two Thousand Seven Hundred Fifty (\$22,750), less costs to
16 Plaintiff's counsel, which represents 33% of the Settlement Amount for all
17 past and future attorneys' fees necessary to prosecute, settle, and administer
18 the Settlement and final resolution of the matter.
19

20 The settlement should be approved here because it is fair, reasonable, and more than
21 meets the standards set by precedent. Indeed, a trial court does not abuse its discretion in
22 approving the settlement of a case involving PAGA claims even when the settlement allocates
23 none of the settlement payment to PAGA claims, which is not the case here. *Nordstrom*
24 *Commission Cases* (2010) 186 Cal.App.4th 576, 589. *Nordstrom* was a putative wage an hour
25 class action in which the employer agreed to pay up millions in cash plus another \$2.5 million
26 in merchandise vouchers to settle all claims (including PAGA claims). *Nordstrom*, 186
27 Cal.App.4th at 580. Certain class members objected to the settlement that released those claims
28 without any consideration paid to the LWDA pursuant to them. *Id.* at 589. On Appeal, the

1 appellate court held that the trial court did not abuse its discretion in approving the class
2 settlement even though it released PAGA claims without any money paid to the LWDA for
3 those claims. Ibid. ("We find no abuse of discretion in the trial court's approval of the settlement
4 agreement containing these terms," even though the agreement released PAGA claims without
5 any consideration paid to the LWDA for those releases).

6 Here, the parties have allocated a substantial sum of a combined \$67,500 as payment
7 to the LWDA and aggrieved employees to resolve the PAGA claims. Under the circumstances
8 of this case, this is more than fair and reasonable allocation, that was reached after extensive
9 investigation, informal discovery, and good faith mediation efforts by both parties. Thus, the
10 parties request that the Court approve this aspect of the settlement.

11 Even if Plaintiff was able to prove a larger number of violations and resulting PAGA
12 penalties, the Court has discretion to reduce such penalties in its sole discretion, and courts across
13 California have often shown willingness to significantly reduce PAGA penalties to avoid injustice
14 to employers.

15 The unprecedented COVID 19 pandemic poses another significant risk if the PAGA
16 settlement is not approved. Defendants' business may potentially be affected by the pandemic
17 because Defendants' business model and revenue is built on number of patients. Defendants may
18 potentially face financial uncertainty and the viability of Defendants' business may be in question.
19 Thus, the PAGA settlement may be the only realistic way for the LWDA and aggrieved employee
20 to see any recovery.

21 **3. Requested Attorneys' Fees and Costs Are Reasonable**

22 Below is the breakdown of the hours worked by the Plaintiff's Counsel Narak Mirzaie on the
23 matter above:
24

25 <u>Description of the Job Completed</u>	<u>Number of Hours Billed</u>
26 Preparing a demand letter, PAGA Notice and request 27 for production of documents	3.5
28 Analyzing Relating to PAGA Claims	8.0

1	(Including payroll data, sample list, time punch data, and other financial documents)	
2		
3	Draft, review and finalize Complaint for Damages Drafted	4.5
4	Informal Discovery between parties via email and telephonic correspondence	6.0
5	Plaintiff & Defendants substantial arms-length negotiations	8.0
6	Draft, Preparation, Review, and execution of PAGA release	4.0
7		
8	Draft, preparation, and finalizing the PAGA Motion for approval	5.0
9		
10	Prep and Attendance for Ex Parte Hearing for Approval	2.0
11		
12	General calls with client	8.0
13	General Calls with opposing counsel	2.0
14	TOTAL	49.0

17	<u>Description of Cost</u>	<u>Amount for Cost</u>
18	Filing	\$435.00
19	Court Connect	\$90.00
20	PAGA Notice Filing	\$75.00
21	Motion Filing Cost	\$60.00
22	Total Costs	\$660.00

23

24

25 Labor Code section 2699(g)(1) provides that “[a]ny employee who prevails in any action shall

26 be entitled to an award of reasonable attorney’s fees and costs.” (Lab. Code § 2699(g)(1); *see also*

27 *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 765 [holding that attorneys’ fees

28 to prevailing party are mandatory when the statute uses the word “shall”].) It is undisputed that Plaintiff is the prevailing party. (*See, e.g., Graciano v. Robinson Ford Sales, Inc.* (2006) 144

1 Cal.App.4th 140, 153 ["[P]laintiffs may be considered 'prevailing parties' for attorney's fee
2 purposes if they succeed on any significant issue in the litigation that achieves some of the benefit
3 the parties sought in bringing suit."] (internal citation omitted); *DeSaulles v. Cmty. Hosp. of*
4 *Monterey Peninsula* (2016) 62 Cal.4th 1140, 1158 [a plaintiff who settles a lawsuit for payment of
5 money or other tangible benefits may be considered a prevailing party."] (citations omitted).)

6
7 1. Attorneys' Fees under Common Fund Method

8 The Settlement provides for a Maximum Settlement Amount, with no specific amount
9 allocated to attorney's fees. Plaintiff's counsel will receive an amount not to exceed 33% of the
10 Maximum Settlement Agreement. Plaintiffs' request for attorneys' fees as a percentage of the
11 Maximum Settlement Amount is supported by the "common fund doctrine," where "one who
12 expends attorneys' fees in winning a suit which creates a fund from which others derive benefits,
13 may require those passive beneficiaries to bear a fair share of the litigation costs." (*Serrano v. Priest*
14 (1977) 20 Cal.3d 25, 35.) The purpose of the common fund approach is to "spread litigation costs
15 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
16 burden alone." (*Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) The common
17 fund doctrine has been applied "consistently in California when an action brought by one party
18 creates a fund in which other persons are entitled to share." (*City and County of San Francisco v.*
19 *Sweet* (1995) 12 Cal.4th 105, 110; *see Quinn v. State of California* (1975) 15 Cal.3d 162, 167
20 "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive
21 benefits may require those passive beneficiaries to bear a fair share of the litigation costs."].)

22 A number of courts have recognized the advantages of awarding fees as a percentage of the
23 common fund. (*See, e.g., In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373,
24 1375.) The percentage approach is preferable because: (1) it provides predictability to counsel; (2)
25 encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable,
26 settlement; and (3) reduces the demands on judicial resources. (*Id.* at 1378-79; *see also Lealao v.*
27 *Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 28 [discussing findings of task force
28 commissioned by the Third Circuit, which "concluded that the lodestar approach (1) increases the
workload of an already overtaxed judicial system, (2) is insufficiently objective and produces results
that are far from homogenous, (3) creates a sense of mathematical precision that is unwarranted in

1 terms of the realities of the practice of law, (4) is subject to manipulation by judges who prefer to
2 calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the
3 Claimants or of an overall dollar amount, (5) encourages lawyers to expend excessive hours, and
4 engage in duplicative and unjustified work, (6) creates a disincentive for the early settlement of
5 cases, (7) deprives trial courts of flexibility to reward or deter lawyers so that desirable objectives,
6 such as early settlement, will be fostered, (8) works to the particular disadvantage of the public
7 interest bar, and (9) results in confusion and lack of predictability.”].)

8 The percentage of attorneys’ fees set forth in the Settlement (i.e., a sum not to exceed 33%
9 of the Maximum Settlement Amount), is reasonable. Historically, courts have awarded fees in the
10 range of 20% to 50%. (*Newberg on Class Actions*, 4th Ed. 2002, § 14: 6.) Newberg notes that
11 achievement of a substantial recovery with modest hours expended should not be penalized but
12 should be rewarded for considerations of time saved by superior services performed. (*Id.*)
13 Furthermore, California and federal courts have long recognized that a percentage of recovery for
14 attorneys’ fees is properly awarded on the basis of the total value. (*Boeing v. Van Gemert* (1980)
15 444 U.S. 472, 480-481; *see also In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558
16 n.13 [Empirical studies show that . . . fee awards in class actions average around one-third of the
17 recovery.”].)

18 The Court should also consider that Plaintiffs’ counsel’s efforts have resulted in substantial
19 benefits in the form of a significant settlement fund established to compensate Affected Employees
20 and the State of California for the alleged PAGA violations. Without the efforts of Plaintiffs’
21 counsel, the claims alleged in the Complaint would likely have gone without remedy. In addition,
22 the requested fee percentage is less than that charged by Plaintiffs’ counsel for other employment
23 cases.

24 2. Attorneys’ Fees under Lodestar Method

25 Under the lodestar method, the court considers a compilation of the time spent and a
26 reasonable hourly compensation of each attorney to evaluate the reasonableness of the fee requested.
27 (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 622.) The hours spent and
28 the reasonable hourly compensation are computed to arrive at a “lodestar” figure which may then
be augmented or diminished by the court taking into account various “multiplier” factors. (*See id.*

1 at 622 (citing *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49).) Here, Plaintiffs' counsel's lodestar in
2 the action is \$16,500, which is based upon 46 hours of attorney time at a customary hourly rate.

3 In determining whether the number of hours expended on the litigation was reasonable, the
4 court must determine that "the time spent was reasonably necessary and that [] counsel made 'a
5 good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise
6 unnecessary.'" (*Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263 n.8.) The court
7 "should defer to the winning lawyer's professional judgment as to how much time he was required
8 to spend on the case." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112 [noting
9 that "[l]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of
10 inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."].)
11 "Testimony of an attorney as to the number of hours worked on a particular case is sufficient
12 evidence to support an award of attorney fees, even in the absence of detailed time records."
13 (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559 (citations omitted); see also *Wershba v. Apple*
14 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 ["California permits fee awards in the absence of
15 detailed time sheets"]; *Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1006–
16 1007 [the court may award fees based on time estimates].)

17 Here, Plaintiffs' counsel has spent 49 hours litigating this action to bring it to resolution, not
18 including the hours counsel will expend through the settlement and dismissal of this action. (See,
19 Declaration of Narak Mirzaie, served concurrently herewith) Per the breakdown above, the efforts
20 expended by Plaintiffs' counsel to achieve this excellent result include, but are not limited to, the
21 following: meeting with Plaintiffs and reviewing documents provided by Plaintiffs and Defendant;
22 preparing and submitting the PAGA notices to the LWDA and Defendant; preparing and filing the
23 PAGA complaint; analyzing numerous pages of documentation regarding Plaintiffs' personnel files
24 and payroll records, and the employee identification numbers, job position, and dates of employment
25 for aggrieved employees; appearing at court hearings; engaging in five (5) months of settlement
26 discussions; and negotiating and drafting the Settlement. Thus, Plaintiffs' counsel's hours were
27 necessary and reasonable to achieve the excellent result here.

28 The reasonable hourly rate is that prevailing in the community for similar work. (*PLCM*

1 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) “[I]n assessing a reasonable hourly rate, the
2 trial court is allowed to consider the attorney’s skill as reflected in the quality of work, as well as
3 the attorney’s reputation and status.” (*MBNA Am. Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th 1,
4 3.) The trial court may also “find hourly rates reasonable based on evidence of other courts
5 approving similar rates.” (*Parkinson v. Hyundai Motor America* (C.D. Cal. 2010) 796 F.Supp.2d
6 1160, 1172.) The reasonable hourly rate is that prevailing in the community for similar work. (*See*,
7 *e.g.*, *PLCM*, 22 Cal.4th at 1095; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th
8 976, 997 [“In setting the hourly fee the court was entitled to consider ‘fees customarily charged by
9 that attorney and others in the community for similar work.’”], *disapproved on another ground in*
10 *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.)

11 Here, the hourly rate \$475.00 requested by Plaintiffs’ counsel is consistent with the current
12 prevailing billing rates in the Los Angeles area Plaintiff’s Counsel is requesting 33% of the fees
13 which is \$22,275.00. Plaintiffs’ counsel’s rate is also comparable to those approved by courts for
14 other plaintiff’s firms in the Southern California area. (*See, e.g.*, *Kearney v. Hyundai Motor Am.*,
15 No. SACV 09–1298–JST (MLGx), 2013 WL 3287996 (C.D. Cal. June 28, 2013) (approving hourly
16 rates of \$650–\$800 for senior attorneys in consumer class action); *Parkinson v. Hyundai Motor*
17 *America* (C.D. Cal. 2010) 796 F.Supp.2d 1160, 1172 (approving hourly rates between \$445 and
18 \$675); *Richard v. Ameri-Force Mgmt. Servs., Inc.*, Case No. 37-2008-00096019 (San Diego Sup.
19 Ct., Aug. 27, 2010) (\$695 to \$750 an hour for partners; \$495 an hour for associates); *Barrera v.*
20 *Gamestop Corp.*, Case No. CV 09-1399 (C.D. Cal. Nov. 29, 2010) (\$700 an hour for partners; \$475
21 an hour for associates). Plaintiffs’ counsel is an experienced litigator who specializes in employment
22 law, with a substantial wage and hour class action and PAGA practice. Given the skill and
23 experience of Plaintiffs’ counsel, and the excellent result achieved for the State and Affected
24 Employees, the requested rates are reasonable.

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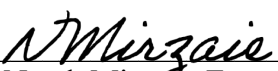
IV.

**DEFENDANTS DO NOT OPPOSE THIS MOTION FOR COURT APPROVAL OF THE
PAGA SETTLEMENT**

Defendants do not oppose Plaintiff's motion for Court approval of the PAGA Settlement and jointly request the Court approve the Settlement Agreement. Once the Court approves the Settlement Agreement and Release of PAGA Claim, and once Defendants' settlement payment clears, Plaintiff will move to dismiss the PAGA cause of action against all parties with prejudice.

Dated: October 28, 2021

M LAW ATTORNEYS, APC

By: 
Narak Mirzaie, Esq.
Attorneys for Plaintiff
Dominique Whitehair