

1 Eric K. Yaeckel [CSB No. 274608]

2 yaeckel@sullivanlawgroupapc.com

3 Ryan T. Kuhn [CSB No. 324538]

4 ryan@sullivanlawgroupapc.com

5 **SULLIVAN & YAECKEL LAW GROUP, APC**

6 2330 Third Avenue

7 San Diego, California 92101

8 (619) 702-6760 * (619) 702-6761 FAX

9 Attorneys for Plaintiff LAVONTRA BREAUX in a Representative capacity only, and on behalf of
10 other members of the public similarly situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF ORANGE**

13 LAVONTRA BREAUX, in a Representative
14 capacity only, and on behalf of other
15 members of the public similarly situated

16 Plaintiff,

17 v.

18 THE LOVESAC COMPANY, a Delaware
19 Corporation, and DOES 1-10, inclusive

20 Defendant

CASE NO. 30-2021-01212714-CU-OE-CXC

21 **MEMORANDUM OF POINTS AND**
22 **AUTHORITIES IN SUPPORT OF**
23 **PLAINTIFF'S UNOPPOSED MOTION RE:**
24 **PAGA SETTLEMENT APPROVAL**

25 Date: September 29, 2022

26 Time: 2:00 p.m.

27 Dept.: CX102

28 Judge: Hon. Peter J. Wilson

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. Summary of Application..... 2

II. Controlling Law.....4

III. Discussion5

 A. Settlement Terms.....6

 B. Basis for Request.....9

 C. The Nature and Scope of the Alleged Violations.....9

 D. Analysis of Potential Liability, on a Representative Basis.....9

 E. The Allocation of Penalties, and *Limited Release* of Claims.....10

 F. The LWDA Was Notified Multiple Times, and Does *Not* Object12

IV. Conclusion.....12

TABLE OF AUTHORITIES

CASES

<i>Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.</i> (S.D. Cal. 2009) No. 05cv1199-IEG-CAB, 2009 WL 2448430	4
<i>Amaral vs. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157, 1213-1214.....	4
<i>Carrington v. Starbucks Corp.</i> (2018) 30 Cal.App.5th 504.....	10
<i>Chu v. Wells Fargo Investments, LLC</i> (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1	11
<i>Donohue v. AMN Servs., LLC</i> (2021) 11 Cal.5th 58.	10
<i>Fleming v. Covidien Inc.</i> (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *4	4
<i>Iskanian v. CLS Trans. Los Angeles</i> (2014) 59 Cal. 4th 348, 360.....	4
<i>Moniz v. Adecco USA, Inc.</i> (2021) 72 Cal. App. 4th 56, 77	5
<i>Nordstrom Com’n Cases</i> (2010) 186 Cal.App.4th 576, 589.....	11
<i>O'Connor v. Uber Techs., Inc.</i> (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1135.....	5
<i>Sakkab v. Luxottica</i> (9th Cir. 2015) 803 F.3d 425.....	4
<i>Schiller v. David's Bridal, Inc.</i> (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL 2117001, at *14	11
<i>Syed v. M-I LLC</i> (E.D. Cal. Feb. 22, 2017) 2017 WL 714367, at *13	5
<i>Trang v. Turbine Engine Components Technologies Corp</i> (C.D. Cal. Dec. 19, 2012) No. CV 12-07658 DDP (RZx), 2012 WL 6618854	4

STATUTES, RULES AND REGULATIONS

California Labor Code § 2699(e)(2)	4,10
California Labor Code § 2699(f)(2)	4
California Labor Code § 2699(l)	5,10

1	California Labor Code § 2698 <i>et seq.</i>	2,9
2	Code of Civil Procedure § 664.6.....	7

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Plaintiff LAVONTRA BREAU ("Plaintiff"), in a Representative Capacity only, respectfully
2 submits her Application for Approval of a PAGA representative Settlement. This request is
3 **unopposed**. The LWDA was timely notified of this proposal, and does **not** object.

4 **I. SUMMARY OF APPLICATION**

5 On July 23, 2021, Plaintiff filed a complaint in the above-titled court alleging a single cause
6 of action under the Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code §2698, *et seq.*,
7 against THE LOVESAC COMPANY, a Delaware Corporation ("Defendant") for alleged violations
8 of the California Labor Code.

9 As this is a PAGA action only, the PAGA Period begins on May 18, 2020. There are
10 approximately **3,405** pay periods and **186** PAGA Members at issue¹. (Decl. of Ryan T. Kuhn, ¶3).

11 Following the exchange of informal discovery and analysis of numerous sets of time and wage
12 data, Plaintiff and Defendant (together the "Parties") attended full-day mediation with Mike Young,
13 an experienced "wage and hour" mediator At the end of the full-day mediation, the Parties reached a
14 proposed settlement that includes a payment of penalties to the LWDA. (Kuhn Decl., ¶4).

15 The Parties' proposed long-form settlement agreement entitled "Joint Stipulation Re: PAGA
16 Settlement" (the "PAGA Settlement" or "PAGA Settlement Agreement") is attached to the Declaration
17 of Ryan T. Kuhn, submitted concurrently herewith as **Exhibit 1**.

18 Based on the below figures, each PAGA Employee is estimated to receive an average payment
19 of approximately **\$110.28**. This figure represents an average only, as the actual amounts paid will vary
20 depending on the amount of workweeks worked during the PAGA Period.

21 On **June 13, 2022**, Plaintiff's counsel gave notice of the proposed PAGA Settlement to the
22 LWDA. (Kuhn Decl., ¶5). To date, Plaintiff's counsel has not received notice that the LWDA would
23 intervene. (*Id.*)

24 On **June 15, 2022**, Plaintiff's counsel gave notice of the proposed PAGA Settlement to the
25 LWDA. (Kuhn Decl., ¶6). To date, Plaintiff's counsel has not received notice that the LWDA would
26 intervene. (*Id.*)

27 On **July 12, 2022**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal the
28

¹ As of the date of the Parties' Mediation on March 31, 2022.

1 PAGA Settlement Agreement and provided notice of the hearing date. (Kuhn Decl., ¶7). To date,
2 Plaintiff's counsel has not received notice that the LWDA would intervene. (*Id.*)

3 On **July 12, 2022**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal copies
4 of this entire Motion, including the Notice, this supporting Memorandum, Declaration, Proposed
5 Order & Judgment, and Settlement Agreement. (Kuhn Decl., ¶8). To date, Plaintiff's counsel has not
6 received any opposition from the LWDA. (*Id.*)

7 Upon the Effective Date² (defined below), Defendant agrees to pay the non-reversionary
8 settlement amount of **\$150,000.00** in connection with the PAGA Settlement ("Gross Settlement
9 Amount"). Apart from the employer's share of payroll taxes, Defendant shall not be required to pay
10 more than the Gross Settlement Amount in connection with the PAGA Settlement. The Gross
11 Settlement Amount is broken down as follows:

12	*	\$2,950.00	Settlement Administrator Fees;
13	*	\$50,000.00	Attorneys' Fees (1/3 of Gross Settlement Amount);
14	*	\$10,000.00	Costs of Litigation.
15	*	\$5,000.00	Plaintiff's Enhancement Award (Kuhn Decl. ¶9).

16 After deducting the proposed amounts for Plaintiff's counsel's Attorneys' Fees and Costs, the
17 Settlement Administration Costs, and Plaintiff's Enhancement Award from the Gross Settlement
18 Amount, the amount remaining is defined as the "Net Settlement Amount." One hundred percent
19 (100%) of the Net Settlement Amount shall be allocated to the payment of civil penalties under the
20 PAGA (the "PAGA Allocation"). Pursuant to the PAGA, seventy-five percent (75%) of the PAGA
21 Allocation, or Sixty-One Thousand Five hundred and thirty seven Dollars and Fifty Cents
22 (\$61,537.50) shall be allocated to the State of California Labor and Workforce Development Agency
23 (the "LWDA Settlement Proceeds"), with the remaining twenty-five percent (25%) or Twenty
24 Thousand Five Hundred Twelve Dollars and Fifty Cents (\$20,512.50), allocated to the PAGA
25 Employees ("PAGA Employees Civil Penalties Fund").(Kuhn Decl. ¶10).

26
27
28

²

The term "Effective Date" shall mean the later date of: (1) sixty-five days after the Court enters an Order approving the PAGA settlement and Judgment is entered thereon; or (2) if any appeal is brought, ten (10) business days after the resolution of appeal. (Kuhn Decl. ¶5; Exhibit 1, I.1.M).

1 Given the above, the average payment to each individual employee will be approximately
2 **\$110.28** (Kuhn Decl. ¶11).

3 Further, there are no restrictions for any of the **186** PAGA Employees to file individual actions,
4 as the settlement agreement only covers PAGA claims. (Kuhn Decl., ¶11; **Exhibit 1**: “Released
5 Claims” § D.33, p. 5).

6 **II. CONTROLLING LAW**

7 PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state
8 against his or her employer for Labor Code violations committed against the employee and fellow
9 employees.” *Iskanian v. CLS Trans. Los Angeles* (2014) 59 Cal. 4th 348, 360. “To compensate for the
10 lack of [a]dequate financing of essential labor law enforcement functions,’ the California legislature
11 enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil
12 penalties for violations of the Labor Code.” *Sakkab v. Luxottica* (9th Cir. 2015) 803 F.3d 425.

13 Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time of
14 the alleged violation, the person employs one or more employees, the civil penalty is one hundred
15 dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred
16 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. However,
17 some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced "subsequent
18 violation penalty" or "heightened penalty" only after an employer has been notified that its conduct
19 violates the Labor Code. *See Trang v. Turbine Engine Components Technologies Corp.*, No. CV
20 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers
21 are not subject to heightened penalties for subsequent violations unless and until a court or
22 commissioner notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit*
23 *Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199-IEG-CAB, 2009 WL
24 2448430 (S.D. Cal. 2009) (finding that California law imposes the "subsequent violation penalty" only
25 after an employer has been notified its conduct violates the Labor Code). Further, a court may award
26 a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of
27 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
28 or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157,
1213-1214. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011)

1 (reducing PAGA penalties by 82%).

2 “The superior court shall review and approve any settlement of any civil action filed pursuant
3 to [PAGA].” Cal. Lab. Code. § 2699(I). In so doing, the court must consider whether the proposed
4 “PAGA settlement is fair and adequate in view of the purposes and policies of the statute.” *O'Connor*
5 *v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016). Those purposes and policies
6 include “benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging
7 compliance with Labor Code provisions, and deterring noncompliance.” *Id.* at 1132-33; Accord *Syed*
8 *v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb. 22, 2017) (concluding “the settlement amount
9 related to plaintiffs’ PAGA claims is fair, reasonable, and adequate in light of the public policy goals
10 of PAGA.”).

11 Recently the Court of Appeal has given guidance to trial courts in reviewing a PAGA
12 settlement:

13 We therefore hold that **a trial court should evaluate a PAGA settlement to**
14 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
15 **purposes to remediate present labor law violations, deter future ones, and to**
16 **maximize enforcement of state labor laws.** (*See Williams*, *supra*, 3 Cal.5th at p.
17 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA “sought to remediate present
violations and deter future ones”]; *Arias*, *supra*, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d
588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement
efforts to achieve maximum compliance with labor laws].)
Moniz v. Adecco USA, Inc., (2021) 72 Cal. App. 4th 56, 77

18 Prior to *Moniz*, Other Courts have followed the rationale in *O'Connor v. Uber Techs., Inc.*, 201
19 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states a court is permitted to approve a PAGA
20 settlement if the settlement is “fair and adequate in view of the purposes and policies of the statute.”
21 *Id.*

22 In deciding whether the settlement was “fair and adequate,” the *Flores* court looked sought how
23 the parties divvied up the civil penalties under Section 2699(i) of the California Labor Code. *Flores*
24 at 1076-77. As the court felt the parties’ division of penalties was fair and adequate pursuant to the
25 statute, the court approved the settlement. *Id.*

26 **III. DISCUSSION**

27 The Parties reached the terms of their proposed settlement agreement following the exchange
28 of extensive information and employment records. The Parties submit the proposed settlement of

1 PAGA penalties is fair, adequate, and reasonable. The Parties are unaware of any other cases that may
2 be impacted by the PAGA Settlement. (Kuhn Decl. ¶38).

3 **A. SETTLEMENT TERMS**

4 Based on the below figures, each PAGA Employee would receive an average payment of
5 approximately **\$110.28**. This figure represents an average only, as the actual amounts paid will vary
6 depending on the number of pay periods worked by each PAGA Employee during the PAGA Period.
7 (Kuhn Decl., ¶12).

8 On **multiple** occasions, Plaintiff's Counsel notified the LWDA of the PAGA Settlement.
9 (Kuhn Decl., ¶¶5-8). The PAGA Settlement Agreement was uploaded and the LWDA was given notice
10 of the hearing. As with all uploads to this filing portal, Plaintiffs' counsel immediately received an
11 auto-generated email that its submission was received by the LWDA. (*Id.*)

12 Accordingly, proper notice has been provided, and this application is **unopposed**.

13 Upon the Effective Date (defined below), Defendant agrees to pay the non-reversionary
14 settlement amount of **\$150,000.00** in connection with the PAGA Settlement ("Gross Settlement
15 Amount"). Apart from the employer's share of payroll taxes, Defendant shall not be required to pay
16 more than the Gross Settlement Amount in connection with the PAGA Settlement. The Gross
17 Settlement Amount is broken down as follows:

18	* \$2,950.00	Settlement Administrator Fees;
19	* \$50,000.00	Attorneys' Fees (1/3 of Gross Settlement Amount);
20	* \$10,000.00	Costs of Litigation.
21	* \$5,000.00	Plaintiff's Enhancement Award (Kuhn Decl., ¶9).

22 After deducting the proposed amounts for Plaintiff's counsel's Attorneys' Fees and Costs, the
23 Settlement Administration Costs, and Plaintiff's Enhancement Award from the Gross Settlement
24 Amount, the amount remaining is defined as the "Net Settlement Amount." One hundred percent
25 (100%) of the Net Settlement Amount shall be allocated to the payment of civil penalties under the
26 PAGA (the "PAGA Allocation"). Pursuant to the PAGA, seventy-five percent (75%) of the PAGA
27 Allocation, or Sixty-One Thousand Five hundred and thirty seven Dollars and Fifty Cents
28 (\$61,537.50) shall be allocated to the State of California Labor and Workforce Development Agency
 (the "LWDA Settlement Proceeds"), with the remaining twenty-five percent (25%) or Twenty
 Thousand Five Hundred Twelve Dollars and Fifty

1 Cents (\$20,512.50), allocated to the PAGA Employees (“PAGA Employees Civil Penalties Fund”).

2
3 (Kuhn Decl., ¶10).

4 Given the above, the average payment to each individual PAGA Employee will be
5 approximately **\$110.28** (Kuhn Decl., ¶12).

6 Further, the Settlement only covers PAGA claims. (Kuhn Decl., ¶ 11); **Exhibit A**: “Released
7 Claims” § IV.13). It does not cover PAGA Employee's individual wage and hour claims. (*Id*).

8 The group of allegedly aggrieved employees is defined as all individuals employed by
9 Defendant The Lovesac Company in California and classified as “non-exempt” from May 18, 2020
10 through the date of the Court’s Order granting approval of the Settlement (the “PAGA Employees”).
11 (Kuhn Decl.¶13; **Exhibit A**: I.1.g).

12 Pursuant to the PAGA Settlement Agreement, any unclaimed funds will be tendered to the
13 State of California Unclaimed Property fund. (Kuhn Decl.¶14; **Exhibit A**: III.12).

14 The Court will retain jurisdiction of this matter to enforce the settlement pursuant to C.C.P.
15 section 664.6. (Kuhn Decl.¶15; **Exhibit A**: VIII.24).

16 The proposed notice of the PAGA Settlement to be sent to the allegedly aggrieved employees
17 (the “Notice”) along with his or her Individual Penalties Share is attached to the Declaration of Ryan
18 T. Kuhn as **Exhibit 6**, paragraph 16. Due to the nature of Defendant’s workforce, the Parties agree that
19 it is sufficient to provide the Notice in English only. (*Id*).

20 The Settlement Administrator shall be responsible for: (a) processing the data provided by
21 Defendant to be used in calculating PAGA Employees’ Individual Penalties Shares; (b) preparing,
22 printing and mailing the Notice to PAGA Employees, as well as following up with reasonable skip
23 tracing; (c) calculating and mailing Individual Penalties Shares to PAGA Employees; (d) calculating
24 and paying the employer’s share of the applicable federal and state withholding tax; (e) filing any
25 required federal and state tax forms and related agency reporting; (f) filing any required reports with
26 the Court; and (g) any and all such tasks to which the Parties mutually agree, or which the Court orders
27 the Settlement Administrator to perform. (Kuhn Decl., ¶17).

28 Each PAGA Employee’s *pro rata* share shall be determined based on the number of Eligible

1 Pay Periods that he or she worked for Defendant during the PAGA Period, and shall be calculated as
2 follows: (1) for PAGA Employees, the PAGA Employees Civil Penalties Fund will be divided by the
3 total number of eligible pay periods worked by all PAGA Employees during the PAGA Period, and
4 the resulting figure will be referred to as the “Multiplier,” and (2) each PAGA Employee’s *pro rata*
5 share of the PAGA Employees Civil Penalties fund will be determined by multiplying the Eligible Pay
6 Periods that the PAGA Employee worked during the PAGA Period by the multiplier. (Kuhn Decl.¶18;
7 **Exhibit C**: Section III. 11.e.i-ii). That amount shall be referred to as the PAGA Employee’s
8 “Individual Penalties Share.” (*Id.*).

9 Each PAGA Employee’s Individual Penalties share will be treated as non-wage income and
10 reported by the Settlement Administrator on IRS Form 1099 to the respective PAGA Employee and
11 applicable governmental authority. (Kuhn Decl.¶19; **Exhibit A**:III.11.g).

12 **Please Note:** Pursuant to local rules, Plaintiff is disclosing there is a separate, individual
13 settlement payment being made to the named Plaintiff in this matter. She will receive an additional
14 \$45,000 which will be paid separate and apart from the \$150,000.00 PAGA Settlement.

15 Plaintiff’s separate individual payment was separately negotiated with the assistance of the
16 mediator. Had mediation failed Plaintiff intended to proceed with a separate individual arbitration of
17 claims that are beyond the scope of the instant PAGA settlement. (Kuhn Decl.¶20).

18 To wit, Plaintiff alleges that she complained several times to her supervisor that she was being
19 told not to report all hours worked, and was told to discipline employees who were unable to take meal
20 and rest breaks. In addition, she alleges that after she complained, this supervisor would then use false
21 pretenses to retaliate against Plaintiff with false write-ups. Plaintiff alleges she was also repeatedly
22 yelled and screamed at by this supervisor. Plaintiff further alleges that this relationship was so harmful
23 that Plaintiff had to go out on medical leave for over 3 months (due to the emotional distress), and
24 eventually was forced to resign due to the hostile work environment.(Kuhn Decl.¶21).

25 Based on these separate allegations, Defendant sought a broader release from Plaintiff than
26 from all other PAGA members. Rather than face a separate arbitration, Defendant was willing to pay
27 Plaintiff additional compensation in exchange for a complete section 1542 release of claims.(Kuhn
28 Decl.¶22).

1 Plaintiff's separate release has no impact on the PAGA Settlement presented to this Court. As
2 set forth above, no PAGA Employee is bound by such a release and all other employees retain the
3 ability to make claims in their individual capacity. (Kuhn Decl. ¶¶ 10, 23).

4 **B. BASIS FOR REQUEST**

5 The instant request is based on the fact that (1) the PAGA Period "cutoff date" is contingent
6 on Court approval, any delay diminishes the amounts received by the impacted employees; (2) Notice
7 to certain ex-employees may be adversely impacted by further delay (*i.e.* ex-employees may change
8 their mailing address without filing a proper "forwarding address"). (Kuhn Decl. ¶24).

9 An expedient approval of this settlement will provide a direct benefit to the impacted
10 employees at issue. The "fixes" provide a guarantee of future Labor Code compliance, and an
11 immediate monetary benefit. It also allows Defendants (who admirably "stepped up" to address these
12 issues) the opportunity to move on, and focus on future business. (Kuhn Decl. ¶25).

13 **C. THE NATURE AND SCOPE OF THE ALLEGED VIOLATIONS**

14 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
15 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff also alleged all employees were denied
16 compliant meal and rest periods, minimum wages, overtime, accurate wage statements,
17 reimbursements, and suffered waiting time violations. (*Id.*)

18 Specifically, Plaintiff alleges that she - and other employees - received "late" Meal Periods,
19 including those documented within Defendant's Time Records. (Kuhn Decl., ¶26). Plaintiff also
20 challenged whether Defendant maintained lawful meal and rest periods. Plaintiff alleged she- and other
21 employees -were not properly compensated due to Defendant's failure to maintain accurate time
22 records. (*Id.*) Finally, Plaintiff also challenged whether Defendant maintained lawful meal and rest
23 period policies. (*Id.*)

24 **D. ANALYSIS OF POTENTIAL LIABILITY, ON A REPRESENTATIVE BASIS**

25 The catalyst of this litigation concerned allegations that Plaintiff was denied legally compliant
26 meal and rest periods, and was not paid for all overtime hours worked. (Kuhn Decl., ¶27).
27 Investigations completed by Plaintiff's counsel revealed that Defendant's timekeeping policies and
28 employee records were not in compliance with California law. (Kuhn Decl., ¶28). However, these

1 investigations also revealed that the “rate of violation” by Defendant was significantly less than 100%.
2 (*Id.*). On many of those occasions, it appears that Defendant did, in fact, comply with the law. (*Id.*)

3 Based on the above, the maximum liability in a case of this type would be in the range of
4 **\$200,000.00 to \$300,000.00.** (Kuhn Decl., ¶29).

5 Moreover, Plaintiff’s counsel is aware of the Court’s discretion to mitigate penalties pursuant
6 to California Labor Code section 2699(e)(2). (Kuhn Decl., ¶30). To confirm, Plaintiff’s counsel
7 experienced the mitigation of “PAGA” penalties in *Carrington v. Starbucks Corp.* (2018) 30
8 Cal.App.5th 504. (*Id.*) In *Carrington*, Judge Bacal significantly mitigated PAGA penalties (\$5 per
9 violation), due to the efforts made by the employer to comply with the law. (*Id.*)

10 Plaintiff’s counsel agrees with Judge Bacal, and with the provision of the Labor Code, that
11 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
12 significant efforts to comply with the Labor Code. (Kuhn Decl., ¶31).

13 As the above factors exist in this case, it is the opinion of Plaintiff’s counsel that the settlement
14 is fair, adequate, and reasonable. Specifically, Plaintiff’s counsel’s understanding is that Defendant
15 has agreed to make changes to its policies, and amend them to the extent they do not comply with
16 California law. (Kuhn Decl., ¶32).

17 Plaintiff’s counsel, William B. Sullivan has approximately 28 years of experience in “class
18 action” litigation, both as plaintiff and defense counsel. (Kuhn Decl., ¶33). Plaintiff’s counsel, Eric
19 K. Yaeckel, has over 10 years of experience prosecuting class and representative action claims under
20 the California Labor Code. (*Id.*) Plaintiff’s counsel, Eric K. Yaeckel and William B. Sullivan, are the
21 attorneys of record in a matter that was recently heard (and favorably decided) before the California
22 Supreme Court titled *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58. (*Id.*) The *Donohue* matter
23 was a certified class and PAGA action. (*Id.*)

24 Plaintiff’s counsel were lead counsel on approximately 40 employment “wage and hour” claims
25 with class action, or representative action allegations. (*Id.*) Based on said experience, it is the opinion
26 of Plaintiff’s counsel that this settlement represents a fair and adequate payment. (Kuhn Decl., ¶34).

27 **C. THE ALLOCATION OF PENALTIES, AND LIMITED RELEASE OF CLAIMS**

28 While Labor Code section 2699(l) requires a court to “review and approve any penalties sought

as part of a proposed settlement agreement,” it does not provide any guidance as to what is considered an ‘adequate’ allocation of these penalties. However, the California Court of Appeal has held that an allocation of **zero dollars** to resolve PAGA claims may be appropriate:

The Nordstrom Commission Cases settlement agreement identifies liability for PAGA penalties as a claim against Nordstrom and includes the following language: “The Parties allocate \$0 to any Private Attorneys General Act penalty claim under Labor Code § 2699 et seq., for penalty claims based on the Released Claims. During the Class Period, Nordstrom paid Putative Class Members’ commissions pursuant to a commission plan that it contends was approved by the United States District Court in Rios, and consequently, Nordstrom contends no claim for penalties of any nature is valid.” Thus, the PAGA penalty claims were at issue, and were resolved as a part of the overall settlement of the case. We find no abuse of discretion in the trial court’s approval of the settlement agreement containing these terms.
Nordstrom Com’n Cases (2010) 186 Cal.App.4th 576, 589.

Moreover, District Courts in California have routinely approved settlement agreements which allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1 (approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement); see also *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL 2117001, at *14 (approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement).

Defendant, and its counsel, deserve credit for their willingness to consider - and address - the allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in “Wage and Hour” litigation) agreed to produce a substantial amount of documents and information necessary to evaluate the parameters of settlement. Following the full day mediation and arms-length negotiations, the Parties have reached a proposed settlement that includes a payment of penalties under PAGA. (Kuhn Decl., ¶35).

Here, the parties seek to allocate **\$82,050.00** of Gross Settlement Amount of the PAGA fund. Of this amount, the LWDA will receive **\$61,537.50**. (Kuhn Decl., ¶9, **Exhibit C**). The remaining **\$20,512.50** will be allocated and distributed among the PAGA Employees. (*Id.*) Each PAGA Employee is estimated to receive an average payment of approximately **\$110.28**. (*Id.*)

The Parties contend the PAGA Settlement amount is fair, adequate, and reasonable. (Kuhn Decl., ¶36). Moreover, the PAGA Settlement does not bar any employee from pursuing their own individual Labor Code claims. (Kuhn Decl., ¶11; **Exhibit 1: “Released Claims”** § D.33, p. 5). The

1 release only applies to the PAGA claims for penalties, based upon the allegations in Plaintiff's
2 operative Complaint. (*Id.*)

3 **D. THE LWDA WAS NOTIFIED MULTIPLE TIMES, AND DOES *NOT* OBJECT**

4 On **June 13, 2022**, Plaintiff's counsel gave notice of the instant PAGA Settlement to the
5 LWDA. (Kuhn Decl., ¶5). To date, Plaintiff's counsel has not received notice that the LWDA would
6 intervene. (*Id.*)

7 On **June 15, 2022**, Plaintiff's counsel gave notice of the instant PAGA Settlement to the
8 LWDA. (Kuhn Decl., ¶6). To date, Plaintiff's counsel has not received notice that the LWDA would
9 intervene. (*Id.*)

10 On **July 12, 2022**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal the
11 PAGA Settlement Agreement and provided notice of the hearing date. (Kuhn Decl., ¶7). To date,
12 Plaintiff's counsel has not received notice that the LWDA would intervene. (*Id.*)

13 On **July 12, 2022**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal copies
14 of this entire Motion, including the Notice, this supporting Memorandum, Declaration, Proposed
15 Order & Judgment, and Settlement Agreement. (Kuhn Decl., ¶8). To date, Plaintiff's counsel has not
16 received any opposition from the LWDA. (*Id.*)

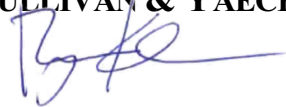
17 To date, Plaintiff has not received a response from the LWDA regarding the proposed PAGA
18 Settlement. If the LWDA contacts Plaintiff's counsel at any time prior to the September 29, 2022
19 hearing, Plaintiff's counsel will provide an updated declaration to the Court. (Kuhn Decl. ¶37).

20
21 **IV. CONCLUSION**

22 The Parties respectfully request that the Court approve the terms and conditions of the PAGA
23 Settlement.

24 Dated: July 12, 2022

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel

Ryan T. Kuhn

Attorneys for Plaintiff LAVONTRA BREAUX, in a
Representative capacity only, and on behalf of other
members of the general public similarly situated