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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

KATHERINE HOPPER, as an individual and on
behalf of other aggrieved employees and the
State of California,

Plaintiff,

v.

FM ORANGE COUNTY LLC, a California
limited liability company; BBB ORANGE
COUNTY LLC, a California limited liability
company; WILLIAM STORY, an individual;
TIM ROGERS, an individual; MARK
THOMAS, an individual; and CHRIS BERLIN,
an individual; and DOES 1 - 20, inclusive,

Defendants.

CASE NO: 30-2021-01199454-CU-OE-CJC

**DECLARATION OF THOMAS M.
DIACHENKO IN SUPPORT OF
SUPPLEMENT TO STIPULATION AND
[PROPOSED] ORDER APPROVING PAGA
SETTLEMENT**

Filed: May 5, 2021
Judge: Hon. Randall J. Sherman
Dept: X105
Trial: TBD

1 I, Thomas M. Diachenko, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and represent the
3 Plaintiff, Katherine Hopper in this matter.

4 2. I received my Bachelor of Science in Nursing from Boston University in 1981,
5 thereafter worked as a pediatric ICU nurse prior to and during law school. I received my Juris
6 Doctorate from the University of San Diego and passed the Bar in 1989.

7 3. I have been in practice (civil litigation and trials) for over 34 years, tried dozens of
8 cases for both the defense and plaintiff in three practice areas: medical malpractice, general liability
9 personal injury and wage/employment/PAGA claims. I have litigated and settled over 50 cases
10 which have included PAGA claims which have been approved by the Court. I have taken nine wage
11 cases to trial. One of those cases was a defense case which resulted in a Plaintiff's judgment. I tried
12 eight of those nine cases were tried on behalf of the Plaintiff for which favorable judgments were
13 obtained in all eight of those trials.

14 4. Of the nine wage and hour cases which I have taken to trial, four included PAGA
15 claims. Despite findings of liability, the amount of PAGA penalties recovered has either been
16 minimal or not recovered at all. (i) *PAGA Trial #1*: After a nine-day bench trial (spread over 4
17 months), the Court, in the case of *Marco Atempa and Keilyn Reyes v. Paolo Pedrazzani and PAMA*
18 *Inc.*, SDSC Case No. 37-2013-00058208-CU-OE-CTL ("Atempa Trial"), rendered a judgment in
19 plaintiffs' favor including an allocation for the PAGA claims. Plaintiffs sought \$456,133 for 72
20 employees over a two, and one half (2.5) years of \$456,133, the Court awarded \$31,074 in PAGA
21 penalties and \$22,911 was recovered seven years later. During those seven years, the corporate
22 defendant sought and discharged most of its financial obligations in bankruptcy, the individual
23 owner appealed and sued his defense attorneys for legal malpractice and a favorable opinion for the
24 plaintiff was issued in *Atempa v. Pedrazzani (2018) 27 Cal.App.5th 809 ("Atempa")*. (ii) *PAGA*
25 *Trial #2*: In 2019, the undersigned Plaintiff's counsel, tried a 4-week bench trial in *Horton v. SCI*
26 *Direct* SDSC Case No. 37-2016-00039356-CU-OE-CTL ("Horton Trial"), the Court found in favor
27 of the plaintiff on liability on her individual wage, indemnification, sexual harassment and PAGA
28 claims. However, the Court did not award any PAGA penalties because the Defendant reverse

1 auctioned the PAGA claims in a class action case which asserted PAGA claims the year *after Ms.*
2 Horton perfected and filed her PAGA claims. The calculated PAGA penalties sought pre-trial
3 totaled \$2,014,188, but nothing was awarded in PAGA penalties as a result of the “reverse auction”.
4 (iii) Also in 2019, counsel for Plaintiff tried his third case which included PAGA claims, in *Cubias,*
5 *et. al. v. Protein for Pets, et.al. SDSC Case No. 37-2026-00045232-CU-OE-CTL.* The case settled
6 on the first day of trial in the middle of the cross-examination of the individual owner defendant
7 who was called as plaintiff’s first witness pursuant to Evidence Code section 776. PAGA penalties
8 asserted ranged from \$1,406,409 - \$2,984,173 depending on how many categories of civil penalties
9 the court would allow. The Court approved a PAGA settlement of \$10,000. (iv.) The fourth trial
10 asserting PAGA claims is currently pending in the case of *Barragan v. LNG Logistics, et, al, SDSC*
11 *Case No. 37-2017-00033292-CU-OE-CTL.* In April of 2022, the jury found in favor of plaintiff for
12 failure to pay wages, liquidated damages, waiting time penalties, wage statement violations and
13 failure to produce penalties, but found for the defendant on meal and rest period violations. The
14 PAGA trial is currently set for December 18th and 19th of 2023. So, the two completed trials and a
15 combined 11 (eleven years) of litigation and advancing costs, Plaintiff’s counsel was only able to
16 recover ~6.8 % of what we sought in the Atempa Trial and nothing after the Horton Trial (even
17 though we were first to file and established liability after a 4-week trial). The average recovery rate
18 in those two completed PAGA trials was only 3.4% of the “maximum exposure”.

19 5. My current hourly rate is \$825 per hour. I have typically received 95-100% my
20 requested lodestar fee in the eight plaintiff judgments I have obtained over the years. I have written
21 over a dozen articles on wage and PAGA claims. I have been invited to speak about PAGA claims
22 on both a state and national level. I believe that the above hourly rate is fair and reasonable based
23 upon my comparative experience in this practice area and my understanding of the billing rates for
24 other attorneys of similar experience level. The next page contains an itemization of my time spent
25 on the PAGA claims for this Defendant, as follows:

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Date	Time	Tasks
7.19.23	0.8	Review PAGA S&R Agreement; Communicate with OC and team re PAGA settlement and agreement terms
7.21.23	0.6	Communicate with Jason W. and Grace H. re PAGA settlement, release agreement, etc.
7.26.23	0.5	Communicate with Grace H. re PAGA S&R
8.21.23	1.8	Finalize S&R and have executed, etc.; Communicate with Grace H. and legal team re paperwork, filing, etc.
8.22.23	0.4	Prepare PAGA settlement papers for filing with Court, service, etc.
9.12.23	0.4	Review and analyze Court's 9.8.23 minute order re PAGA Settlement Approval
9.19.23	0.3	Communicate need to supplement PAGA approval papers with OC
10.2.23	0.4	Prepare outline of supplemental PAGA Stip, order, etc.
10.4.23	2.1	Draft supplemental stipulation and prepare exhibits per Court's 9.8.23 Minute Order
10.6.23	0.3	Prepare supplemental stipulation and order per Court's 9.8.23 Minute Order
10.16.23	0.5	Prepare supplemental stipulation and order per Court's 9.8.23 Minute Order
10.18.23	1.3	Prepare supplemental stipulation, declaration, exhibits and order per Court's 9.8.23 Minute Order
10.19.23	1.2	Prepare declaration ISO PAGA Settlement Approval; Communicate with legal team re items needed for Court
TOTAL	18.1	

As set forth above, I have expended 18.1 hours on the PAGA related issues in this case. At \$825 per hour, this would total \$14,932.50 to date, which far exceeds the \$1,000 apportioned to attorney fees.

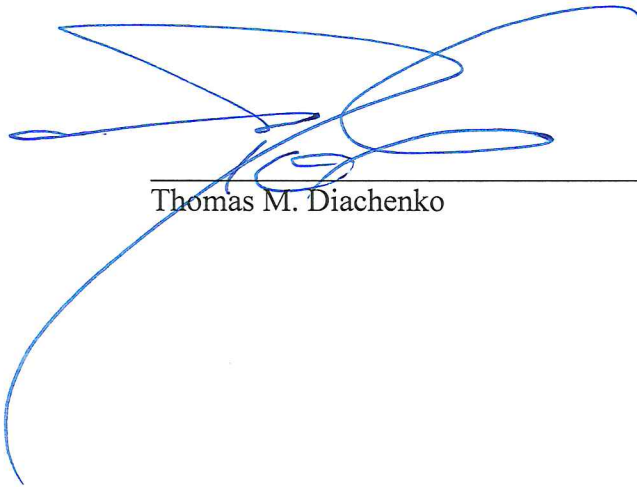
6. The expense of litigating and trying the PAGA claims will be significant based upon experience and judgment of all counsel. AS noted above, the hours spent on settling these PAGA claims including the additional briefing is far greater than the \$1,000 being apportioned to attorney fees. Should this case proceed to trial attorney fees will likely be hundreds of thousands of dollars for all counsel involved without any guarantee that liability will be established for other alleged "aggrieved employees".

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1 7. The above is true and accurate, based upon personal knowledge and belief and
2 asserted under penalty of perjury, as indicated by signature below, signed in San Diego, California
3 on October 19, 2023.

A handwritten signature in blue ink, appearing to read 'Thomas M. Diachenko', is written over a horizontal line. The signature is stylized with large loops and a long, sweeping underline that extends to the left.

Thomas M. Diachenko