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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

AUSTRALIA BROWN, individually and
on behalf of all others similarly situated,

Plaintiff,

vs.

ONTARIOIDENCE OPCO, LLC;
PROVIDENCE GROUP OF SOUTHERN
CALIFORNIA, LLC; PROVIDENCE
GROUP, INC.; and DOES 1 through 20,
inclusive,

Defendants.

Case No. CIVSB2116825

Assigned for All Purposes to:

Hon. David Cohn

Dept. S-26

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT
REPRESENTATIVE ACTION
SETTLEMENT**

Date: July 27, 2022

Time: 10:00 a.m.

Dept.: S-26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Australia Brown (“Plaintiff”) seeks approval of a settlement of claims under the
4 Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”) against
5 Defendant Ontarioidence OPCO, LLC (“Defendant”) in the amount of \$250,000. Plaintiff alleges
6 approximately 517 non-exempt employees who worked for Defendant were not paid at least
7 minimum wages for all hours worked, not paid overtime compensation, not provided with meal
8 periods or compensation in lieu thereof, not provided with rest breaks or compensation in lieu
9 thereof, not provided with accurate wage statements, not reimbursed for necessary business
10 expenses, and were not paid all wages owed upon separation of employment. The proposed
11 Settlement seeks to release claims for civil penalties for violations of Labor Code §§ 201, 202, 203,
12 204, 210, 223, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1,
13 1198, 2800, 2802.

14 Under Labor Code § 2699(1)(2), the Court must review and approve any proposed PAGA
15 settlement. Here, the proposed Settlement is sufficient to deter and punish future violations. The
16 Settlement is attached to the Declaration of Chelsea D. Hollins (“Hollins Decl.”) as Exhibit 1, and
17 the proposed letter to be sent to the aggrieved employees is attached thereto as Exhibit A. Plaintiff
18 now seeks this Court's approval of the Settlement terms.

19 **II. FACTUAL AND PROCEDURAL BACKGROUND**

20 On June 9, 2021, Plaintiff’s counsel sent a letter to the California Labor & Workforce
21 Development Agency (“LWDA”) via online submission and to Defendant via certified mail
22 regarding Defendant’s alleged violations. *See* Hollins Decl., ¶ 3, Exhibit 2. The LWDA did not
23 respond to this notice within 65 days, indicating it did not intend to investigate, thus allowing
24 Plaintiff to file the instant lawsuit pursuant to Labor Code Section 2699.3(a)(2)(A). *See* Hollins
25 Decl., ¶ 4.

26 Plaintiff initially filed his Complaint as a class action on June 10, 2021 against Defendants
27 Ontarioidence OPCO, LLC, Providence Group of Southern California, LLC and Providence Group,
28

1 Inc. Hollins Decl., ¶ 5. On August 16, 2021, Plaintiff filed her First Amended Complaint adding a
2 claim for Enforcement of the Private Attorneys General Act (“PAGA”). Hollins Decl., ¶ 6.

3 Defendant provided Plaintiff with an arbitration agreement containing a class claim waiver
4 purportedly signed by Plaintiff. Hollins Decl., ¶ 7. Defendants Providence Group of Southern
5 California, LLC and Providence Group, Inc. (Providence Defendants”) also produced evidence that
6 the Providence Defendants were not involved in Plaintiff’s employment. Hollins Decl., ¶ 8. The
7 Parties entered a tolling agreement that preserved Plaintiff’s rights against the Providence
8 Defendants and Plaintiff decided to file a request to dismiss the Providence Defendants and her
9 class and individual claims without prejudice. Hollins Decl., ¶ 9. On or about March 7, 2022
10 Plaintiff filed her request to dismiss the Providence Defendants and her class and individual claims
11 without prejudice, leaving Defendant Ontarioidence OPCO, LLC and the PAGA cause of action.
12 Hollins Decl., ¶ 10.

13 In preparation for mediation, Defendant produced data and documents for Plaintiff to
14 evaluate the PAGA claims and calculate the alleged exposure, including policy documents,
15 compensation plans, pay stubs and a list of aggrieved employees with dates of employment to
16 calculate the pay periods worked. Hollins Decl., ¶ 11. In preparation for mediation, Plaintiff also
17 produced work documents, and her paystubs to help prove her claims. Hollins Decl., ¶ 12. The
18 parties attended mediation on January 24, 2022, with Steven G. Pearl, a respected class action and
19 PAGA action mediator. Hollins Decl., ¶ 13. While the parties did not settle at mediation, they
20 continued to engage in extensive negotiations, and later reached an agreement to settle for \$250,000.
21 Hollins Decl., ¶ 14.

22 Around March 2022, the Parties finalized the terms of the Settlement Agreement, which is
23 now presented to this Court for approval. Hollins Decl., ¶ 15. Plaintiff provided notice of the
24 Settlement to the LWDA on May 2, 2022. Hollins Decl., ¶ 16, Exhibit 3. Plaintiff also served a
25 copy of the motion on the LWDA on May 2, 2022. Hollins Decl., ¶ 17, Exhibit 4.

26 **III. PAGA REQUIREMENTS**

27 Based on the California Supreme Court's opinions in *Arias v. Superior Court*, 46 Cal. 4th
28 969 (2009), and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014),

1 Plaintiffs can seek appropriate civil penalties as called for under PAGA on behalf of the State of
2 California and other similarly aggrieved employees without seeking class certification or meeting
3 the requirements of class certification (i.e. numerosity, typicality, commonality and adequacy). As
4 such, the class action two-step preliminary and final approval process is not required.

5 PAGA was enacted to allow enforcement of the Labor Code and recovery of penalties by
6 the State and by private individuals who have been aggrieved by their employers. The statute calls
7 for 75% of any penalties recovered to be paid to California's LWDA and the remaining 25% to the
8 aggrieved employees (Cal. Lab. Code § 2699(i) (2016)).

9 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved employee
10 must first provide written notice to the LWDA and the employer of the particular Labor Code
11 violations the aggrieved employee alleges the employer has violated. See Cal. Labor Code §
12 2699.3(a)(1)(A) (2016). Once the LWDA notifies the aggrieved employee that it does not intend to
13 investigate the alleged violations, or if the LWDA does not respond within a certain time period,
14 the aggrieved employee is then allowed to proceed in a civil action against the employer on behalf
15 of the LWDA and all other similarly aggrieved employees. See Cal. Labor Code § 2699.3(a)(2)(A)
16 (2016).

17 In 2009, the California Supreme Court considered the issue of whether an aggrieved
18 employee who brings a PAGA representative claim needs to meet class certification requirements.
19 *Arias*, 46 Cal. 4th at 976. After a substantial review of the legislative history of PAGA, the Court
20 held that an aggrieved employee's representative action brought on behalf of other aggrieved
21 employees against an employer for PAGA violations does not need to meet the requirements for
22 class certification. *Id.* at 975, 980-88. As the Court held, a plaintiff bringing suit under PAGA does
23 so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986. Because the
24 employee's PAGA action functions as a substitute for an action brought by the government itself, a
25 judgment in the PAGA action binds all those who would be bound by a judgment in an action
26 brought by the government. *Id.*

27 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court
28 need only "review and approve" the settlement. Cal. Lab. Code § 2699(1)(2) (2016). The Parties

1 to this current PAGA action have reached such an agreement and now seek this Court's approval of
2 the proposed settlement.

3 **IV. THE SETTLEMENT TERMS AND DISTRIBUTION OF PENALTIES**

4 The Parties have agreed that Defendant will pay a total settlement amount of \$250,000.00
5 (the "Gross Settlement Amount"). See Settlement Agreement, § II.2. From this amount, up to one-
6 third (1/3) of the Gross Settlement Amount, or \$83,333.33, is allocated to attorneys' fees and up to
7 \$20,000 to actual litigation costs. Settlement Agreement, § II.8. To date, Plaintiff's counsel has
8 spent \$13,225.87 in litigation costs. See Hollins Decl., ¶ 38, 43, Exhibit 5. The Settlement allocates
9 up to \$3,150.00 to payment for Settlement Administrator Simpluris' costs associated with
10 administration of the Settlement. Settlement Agreement, § II.2. For Plaintiff's efforts in assisting
11 with the Lawsuit and in exchange for a general release of her individual claims, \$7,500.00 is
12 allocated to Plaintiff. Settlement Agreement, § II.2.

13 After deducting the attorneys' fees and costs, Settlement Administrator's costs, and
14 Plaintiff's individual settlement awards, the remaining fund ("PAGA Penalties") of \$136,016.67
15 will be paid 75% to the LWDA ("LWDA Payment") and 25% to the PAGA Employees ("Employee
16 Amount"). Settlement Agreement, § II.5. "PAGA Employees" are "all current and former non-
17 exempt, hourly employees who worked for Defendant within the State of California between June
18 9, 2020 and Court approval of the Settlement." Settlement Agreement, § I.10.

19 The "PAGA Settlement Member Payment" for the PAGA Employees shall be determined
20 as follows: The PAGA Penalties will be divided by the total number of Qualifying Pay Periods for
21 all PAGA Employees ("Qualifying Pay Period Amount"). Each PAGA Employee will then be paid
22 an amount equal to the Qualifying Pay Period Amount multiplied by that PAGA Employee's total
23 number of Qualifying Pay Periods. Settlement Agreement, § II.6. All PAGA Employees' Payments
24 will be characterized as penalties for tax purposes and reported on IRS Form 1099. Settlement
25 Agreement, § II.7.

26 The Settlement Administrator will disburse Individual Settlement Shares to each PAGA
27 Employee to the last known physical address on file with Defendant in its regularly maintained
28 records. Prior to this disbursement, the Settlement Administrator shall check the addresses provided

1 using the National Change of Address database. Settlement Agreement, § V.4. For any returned
2 payments without a forwarding address, the Settlement Administrator shall run a skip trace.
3 Settlement Agreement, § V.4. PAGA Employees who receive their PAGA Settlement Member
4 Payments via U.S. Mail will receive a letter along with their PAGA Settlement Member Payment
5 explaining the reason for the payment, the content of which will be submitted to the Court for
6 approval. Settlement Agreement, § V.4. The proposed letter is attached to the Settlement Agreement
7 as Exhibit A. All funds not claimed within 180 days of mailing of payment shall be sent to the
8 California State Controller's Office Unclaimed Property Fund with an identification of the amount
9 of unclaimed funds attributable to each PAGA Employee. Settlement Agreement, § V.6.

10 In exchange for the settlement payment, the State of California and the PAGA Employees
11 will release the following claims:

12 Upon Defendant's full payment of all sums required by this Agreement, Plaintiff,
13 all PAGA Employees, and the State of California shall be deemed to have fully,
14 finally, and forever released, relinquished, and discharged Defendant and their
15 current, past, and present, subsidiaries, affiliates, directors, officers, managing
16 agents, and owners ("Released Parties") from any and all civil penalties under the
17 PAGA, California Labor Code § 2698, *et seq.*, which were alleged in the operative
18 complaint or could have been alleged based on the facts alleged in the operative
19 Complaint in the Action arising during the PAGA Period, including, civil penalties
20 for the failure to properly pay all minimum wages, overtime wages, provide lawful
21 meal periods or compensation in lieu thereof, authorize or permit lawful rest breaks
22 or provide compensation in lieu thereof, provide accurate itemized wage
statements, reimburse necessary business expenses, and timely pay all wages
during employment and upon separation of employment, and civil penalties for
violation of and/or based on California Labor Code §§ 201, 202, 203, 204, 210,
223, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197,
1197.1, 1198, 2800, 2802, and all claims for attorneys' fees and costs in connection
therewith ("Released Claims") that arose from June 9, 2020 through Court approval
of the Settlement ("Release Period").

23 Settlement Agreement, § I.11. Only Plaintiff signed a general release of claims. Settlement
24 Agreement, § II.3.

25 If the total number of aggrieved employees or the number of pay periods exceeds 517 or
26 9,671, respectively, by more than ten percent (10%), there will be a *pro rata* adjustment to the Gross
27
28

1 Settlement Amount of \$483.56 per additional PAGA Employee or \$25.85 per additional pay period,
2 whichever results in a greater increase. Settlement Agreement, § II.4.

3 **V. THE SETTLEMENT IS FAIR AND REASONABLE**

4 **A. Standard for Approval**

5 While there are no statutory or common law standards for approval of PAGA settlements,
6 the legislative history of the Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et. seq.*
7 (“PAGA”) sheds some light on the approval requirement as it was phrased in § 2699, subdivision
8 (l) prior to the July 1, 2016 amendments. *See* Cal. Lab. Code § 2699(l) (2015) (amended 2016)
9 (“The superior court shall review and approve any penalties sought as part of a proposed
10 settlement...”). PAGA was passed by the legislature as Senate Bill (“SB”) 796, and it was signed
11 by the Governor and filed with the Secretary of State on October 12, 2003. *See* Legislative
12 Counsel’s Digest re Senate Bill No. 796, attached as Exhibit A to the Request for Judicial Notice
13 (“RJN”) filed herewith, p. 1. It took effect on January 1, 2004.

14 The original version of the act did not contain the court approval requirement now codified
15 in § 2699(l). That subdivision was added as part of the amendments to the Act that were introduced
16 as SB 1809 in February of 2004 and signed by the Governor and filed with the Secretary of State
17 on August 11, 2004. *See* Legislative Counsel’s Digest re Senate Bill No. 1809, attached as Exhibit
18 B to the RJN, p. 1. Those amendments took effect immediately, and the court approval
19 requirement of § 2699(l) was one of the provisions that the legislature made retroactive to January
20 1, 2004. *Id.* at pp. 1-2.

21 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the
22 amendments (SB 1809). *See* RJN, Exs. A and B. On July 29, 2004, during the consideration of
23 the amendments in SB 1809, Senator Dunn sent a letter addressed to the President Pro Tem of the
24 Senate, which was published in the Senate Daily Journal, “to clarify the intent of subdivision (l)”
25 of what would become § 2699. *See* 7/29/04 Letter from Sen. Dunn to Sen. Burton, attached as
26 Exhibit C to the RJN. He was sending this letter “in response to an issue raised by the Judicial
27 Council of California.” *Id.* In the letter, Senator Dunn stated that:

1 The purpose of court review of the penalties in subdivision (l) is to ensure that
2 settlements involving penalties arising under Labor Code Section 2699 do not
3 undercut the dual statutory purposes of punishment and deterrence, or result in
4 unjust, arbitrary, and oppressive, or confiscatory settlements.

5 *Id.*

6 To Plaintiff's knowledge, this is the only statement in the legislative history directly
7 addressing the purpose of the court approval requirement. While the letter does not address any
8 specific factual issues to be considered, it does provide some very broad criteria. It suggests that
9 the courts should consider whether the penalties are so small as to "undercut the dual purposes of
10 punishment and deterrence" or so large that they may result in an "unjust, arbitrary and oppressive,
11 or confiscatory" settlement.

12 These broad criteria appear to give the Court wide latitude in determining whether to
13 approve the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on
14 the effect the penalties may have on the defendant/employer rather than the LWDA or the
15 aggrieved employees who will receive the penalties. This is different than the analysis of a class
16 action settlement, which typically focuses on the amount received by the class and compares that
17 to the reasonable range of potential outcomes in the case. *See, e.g., Kullar v. Foot Locker Retail,*
18 *Inc.*, 168 Cal.App.4th 116, 130 (2008); *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186
19 Cal.App.4th 399, 407 (2010).

20 **B. The Settlement Meets the Standard for Approval**

21 The \$250,000.00 Gross Settlement Amount is reasonable when considered in light of the
22 principles discussed in Senator Dunn's letter. For a group of approximately 517 employees, a
23 penalty of \$250,000 is large enough to punish Defendant for alleged past violations and deter future
24 violations. The settlement amount is equivalent to a penalty of about \$485 per employee, which is
25 a significant penalty for a wage and hour case. At the same time, the penalty amount is not so large
26 as to be unjust, oppressive or confiscatory, considering the company's potential exposure explained
27 below. Hollins Decl., ¶ 18.

28 The Gross Settlement Amount is also reasonable in light of the facts of the foregoing action,
the real risk that no PAGA penalties would be paid, and inherent risks and uncertainties associated
with PAGA claims. Hollins Decl., ¶ 19.

1 Plaintiff calculated the potential exposure at the initial violation rate of \$100 per pay period
2 as follows: 9,671 pay periods x \$100 per pay period = \$967,100. Hollins Decl., ¶ 20. If the Court
3 stacked different types of penalties in each pay period, Plaintiff calculated the exposure as follows:

- 4 - 9,671 pay periods x \$100 x 21.2% violation rate (late pay checks) = \$205,025 for wage
5 statement penalties;
- 6 - 9,671 pay periods x \$100 x 60% violation rate (for bonuses not included in overtime rate) =
7 \$580,260 for unpaid overtime penalties;
- 8 - 9,671 pay periods x \$100 x 100% violation rate (for off-the-clock work) = \$967,100 for
9 minimum wage violations;
- 10 - 9,671 pay periods x \$100 x 100% violation rate (for requiring employees to carry walkie-talkies
11 during meal periods) = \$967,100 for meal period violations;
- 12 - 9,671 pay periods x \$100 x 100% violation rate (for on-premises rest breaks) = \$967,100 for
13 rest break violations;
- 14 - 9,671 pay periods x \$100 x 100% violation rate (for failure to reimburse cellphone expense) =
15 \$967,100 for failure to reimburse business expenses violations. *Id.*

16 However, these calculations assumed the Court would find violations in every pay period based
17 on Plaintiff's theories of liability for minimum wage penalties, meal period and rest break
18 violations, and failure to reimburse business expenses.

19 Defendant could have defeated Plaintiff's claims by proving its rest break and meal period
20 policies were compliant and thus those PAGA claims were unmanageable, the bonuses were
21 discretionary and therefore should not be included in the overtime rate, the non-discretionary "hero
22 pay" bonus was included in the overtime rate, and the minimum wage claim was reliant on
23 individual employee testimony because a majority of the non-exempt employees did not carry
24 walkie-talkies and thus unmanageable. Hollins Decl., ¶ 21. The settlement negotiations took these
25 risks into account. Hollins Decl., *Id.* Plaintiff felt the strongest claim was the wage statement
26 violations for paying wages after the time periods required by Section 204, which should be given
27 full value, but the other claims likely had about a 10% chance of winning, making a large reduction
28 in potential exposure justified. Hollins Decl., ¶ 22.

1 Another crucial factor in evaluating the value of a PAGA-only case is that all PAGA
2 awards are discretionary and can be reduced by the Court. Hollins Decl., ¶ 23. Under Labor Code
3 § 2699(e)(2), the Court can reduce the PAGA penalties “if, based on the facts and circumstances of
4 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
5 or confiscatory.” *Id.* In other words, were this matter to go to trial, any award granted would be at
6 the discretion of the Court. *Id.* Thus, if Plaintiff was not able to “stack” PAGA penalties, the
7 maximum exposure of \$967,100 could be reduced even further. Plaintiff recognizes that, although
8 she believes there would be no persuasive grounds to reduce the penalties, the Court could
9 determine otherwise and significantly reduce the PAGA penalties, especially given that Defendant
10 is not a large employer with unlimited funds. Hollins Decl., ¶ 24. The wide range of potential
11 recovery and the additional delays and risks of trial justified settling at this point for a reasonable
12 amount of recovery. *Id.*

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement
15 pursuant to PAGA in this Action.

16 Dated: May 2, 2022

AEGIS LAW FIRM, PC

18 By 

19 Chelsea D. Hollins
20 Attorneys for Plaintiff Australia Brown