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Attorneys for Plaintiff LANCE HILD, in a Representative capacity only, and on behalf of other members of the public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LANCE HILD, in a Representative capacity
only, and on behalf of other members of the
public similarly situated

Plaintiff,

v.

WESTSIDE BUILDING MATERIAL
CORPORATION, a California Corporation,
and DOES 1-10, inclusive

Defendants

CASE NO. 37-2021-00041781-CU-OE-CTL

***SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S UNOPPOSED
MOTION *RE: PAGA SETTLEMENT*
APPROVAL***

Date: September 2, 2022

Time: 10:30 a.m.

Dept.: C-70

Judge: Hon. Carolyn Caietti

1 Plaintiff LANCE HILD, in a Representative Capacity only, respectfully submits this
2 *Supplemental* Memorandum in support of his Motion for Approval of a PAGA representative
3 Settlement. This Request is **unopposed**. The LWDA was timely notified of the original proposal and
4 hearing and did **not** object. (ROA # 37-38.) The LWDA was also provided with this supplemental
5 briefing and notice of the hearing. (See the concurrently submitted proof of service on the LWDA.)

6 **Please Note:** Plaintiff will address each separate request set forth in the Court’s August 5, 2022
7 Minute Order in separate sub-headers below.

8 **I. DISCUSSION**

9 Plaintiff maintains the parties reached the terms of their proposed settlement agreement
10 following the exchange of extensive information and employment records. An arms length negotiation
11 was presided over by experienced wage and hour mediator Michael Roberts, Esq. The parties submit
12 the proposed settlement of PAGA penalties is fair, adequate, and reasonable.

13 Plaintiff will not repeat arguments made in the prior briefing and will focus only on the issues
14 raised by the Court. However, Plaintiff does intend to expressly incorporate in all prior representations
15 about the Settlement by reference.

16 **A. ADEQUACY OF THE SETTLEMENT**

17 Plaintiff thoroughly investigated the claims at issue through both formal and informal
18 discovery. This allowed Plaintiff to access the strengths and weaknesses of the claims at issue.

19 Although it remained adversarial, the case was not extensively litigated as Defendant “stepped
20 up” early on in the litigation to attempt to address any perceived violations. Plaintiff maintains that this
21 warrants a “mitigation” of potential civil penalties, as it aligns with the public policy goals of PAGA
22 “encouraging [future] compliance with Labor Code provisions, and deterring noncompliance.”
23 *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1132-33 (N.D. Cal. 2016).

24 Further specifics are provided below.

25 **1. The Operative Claims and Investigation and Discovery Conducted**

26 On September 30, 2021, Plaintiff HILD filed the PAGA Complaint at issue in this matter.
27 (ROA # 1).
28

1 On November 8, 2021, Plaintiff HILD propounded his first set of written discovery requests
2 (five separate devices) on Defendant WESTSIDE BULIDING MATERIAL CORPORATION
3 (“WESTSIDE”). Plaintiff HILD sought (among other information and documents) the identities of
4 putative class member, WESTSIDE Compensation policies, employee handbooks, wage statements,
5 payroll records, time records and reimbursement policies. (Yaeckel decl. ¶ 3.)

6 On December 23, 2021, WESTSIDE served verified responses and some objections.
7 WESTSIDE produced *inter alia*, HILD’s time and wage records, a copy of the operative employment
8 handbook, copies of all other relevant employment policies, and information relevant to the size of the
9 representative group. (Yaeckel decl. ¶ 4.)

10 The parties met and conferred extensively regarding the requests for discovery as to other
11 employees. During this time the parties discussed the claims as a whole. Eventually, the parties agreed
12 to an early mediation and an informal production of additional discovery that Plaintiff needed to
13 evaluate before participating in mediation. (Yaeckel decl. ¶ 5.)

14 WESTSIDE agreed to turn over a large sampling of the time and wage records for other
15 putative aggrieved employees during the operative limitations period. In total there were over 1,110
16 pages of documents and data produced. This was analyzed internally for compliance by Plaintiff’s
17 counsel, to access *inter alia*, projected rates of violations for the representative group. (Yaeckel decl.
18 ¶ 6.)

19 As part of the investigation, Plaintiff’s counsel also spoke with several other employees during
20 the course of the litigation. (Yaeckel decl. ¶ 7.)

21 **2. Settlement Efforts**

22 On May 9, 2022, the parties attended a mediation before an experienced and well-respected
23 wage and hour class action mediator, Mike Roberts, Esq. (Yaeckel decl. ¶ 8.) Prior to the mediation,
24 counsel for both parties agreed to the informal exchange of additional information pertinent to a
25 class-wide settlement. In addition to the documents referenced above, such information included
26 verification of policies and procedures of WESTSIDE, as well as the size (employee numbers and
27 workweek information) of the potential PAGA representative group. (Yaeckel decl. ¶ 9.)

28 Both parties submitted detailed written submissions to the Mediator. Plaintiff’s brief (shared

1 with WESTSIDE) contained a detailed explanation of the claims at issue, and the results of Plaintiff's
2 counsel's analysis of the employee time and wage records. (Yaeckel decl. ¶ 10.)

3 The parties were able to reach an agreement on the key terms of settlement at the mediation.
4 Negotiations over the final terms continued for several weeks. (Yaeckel decl. ¶ 11)

5 As of May 27 of 2022, the parties finalized and executed the Settlement Agreement of PAGA
6 Claim (the "Agreement") previously presented to this Court. (Yaeckel decl. ¶ 12.)

7 Pursuant to the Court's instructions, the parties executed an amended "Agreement" as of
8 August 26, 2022 to clarify the scope of the release. (See **Ex. A at § 7**: "Please Note...") No other
9 changes were made to the Settlement Terms. (Yaeckel decl. ¶ 13.)

10 **3. Analysis of the Claims and Assessment of the Risk of Further Litigation**

11 Each of the primary claims at issue had risks to maintaining representative status through trial
12 (based on a manageability challenge) and then establishing liability.

13 There was an additional risk given the parties anticipation of the Supreme Court's recent
14 decision in *Viking River Cruises, Inc. v. Moriana*, __ U.S. __, 142 S. Ct. 1906 (2022). This casted
15 doubt on whether Plaintiff could have even proceeded with his PAGA claims on a representative basis.

16 Here, Plaintiff's primary claim was that Defendant failed to allow for meal and rest periods and
17 failed to pay meal and rest period penalties. (Yaeckel decl. ¶ 15.) The other claims were largely
18 derivative in nature (e.g. employees were not paid for work performed during meal periods). Plaintiff
19 also alleged that Defendant also failed pay for all time worked, and failed to accurately state on Class
20 Member's wage statements all hours worked. (Yaeckel decl. ¶ 16.) In addition, Plaintiff contends that
21 he incurred cell phone expenses without reimbursement and that Defendant failed to pay all wages due
22 upon termination. (Yaeckel decl. ¶ 17.)

23 As to the Meal and Rest period claims, Defendant maintained that it had compliant written
24 policies and otherwise complied with its duties to provide compliant breaks. Defendant also contended
25 individualized inquiries will abound as to why individual employees may have failed to take
26 appropriate meal or rest periods, making an trial on these issues unmanageable. (Yaeckel decl. ¶ 18.)

27 As to the unpaid wage claims, Defendants argued that it relieved employees of all duty during
28 breaks so employees were not "under employer control" during said breaks. (Yaeckel decl. ¶ 19.)

1 As to the reimbursement claims, Plaintiff contended that California law requires reimbursement
2 to these employees whenever a cell phone is used for work purposes. *See e.g., Cochrane v. Schwan's*
3 *Home Service, Inc.* (2014) 228 Cal.App.4th 1137. Defendant argued that *Cochran* is distinguishable
4 because the policy in this case does not require employees to use their cellular phones. Defendant also
5 argued that individualized inquiries regarding the use of cellular phones and necessity of other
6 expenses would make trial unmanageable. (Yaeckel decl. ¶ 20.)

7 Defendant argued all other claims were derivative and that the Trial Court could decline to
8 stack additional penalties, based on existing caselaw referenced in section 5, below. (Yaeckel decl. ¶
9 17.)

10 **4. Analysis of Potential PAGA Penalties**

11 As set forth in the moving papers, the total settlement amount is \$80,000. After all contingent
12 fees and costs are removed and the LWDA receives its 75% share, each employee would receive an
13 average share of approximately \$78.70. (See ROA # 34: Kuhn decl. ¶ 8.)

14 If Defendant's defenses were successful, the employees would not receive anything. Based on
15 Plaintiff's counsel's evaluation of the claims and examination of the records, Plaintiff estimates that
16 the most realistic "best case" scenario would be a judgment in the range of \$200,000.00 to
17 \$300,000.00. A worst case scenario would be a recovery of \$0, by way of a defense verdict. (See
18 Yaeckel decl. ¶¶ 22-23.) for a further breakdown of how this calculation was performed.)

19 These liability estimations factor in the risk of significant mitigation of penalties, as set forth
20 below.

21 **5. The Controlling Law Allows for Significant Mitigation of PAGA Penalties**

22 Plaintiff's "best case recovery" factors in that he would be unlikely to ever be awarded an
23 amount approaching the maximum damages. To wit, the majority of the damages would be
24 "derivative" penalties, stemming from the meal and rest period violations.

25 The Trial Court has great discretion to mitigate any penalties awarded. *Thurman v. Bayshore*
26 *Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

27 In a trial involving plaintiff's counsel, the Court (Hon. Katherine Bacal) found liability, but then
28 significantly reduced the PAGA penalties, down to \$5 a violation. See *Carrington v. Starbucks Corp.*

(2018) 30 Cal.App.5th 504; *See accord Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because employer was "not aware" of violations).

In the *Carrington* decision, the Court also noted that other trial courts have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code violation. *See Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137.

Plaintiff's counsel agrees with the rational that penalties can, and should, be mitigated in situations like this where an employer "steps up" early in litigation to address and perceived violations. Moreover, based on Plaintiff's counsel's analysis, it appears that the employer may not have even been aware of many of the alleged violations. This further supported mitigation. (Yaeckel decl. ¶ 24.)

Accordingly, counsel submits the recovery secured via this settlement, is a reasonable compromise and is in the best interests of the PAGA members and the State of California (who has not objected to the result). (Yaeckel decl. ¶ 25.)

B. CLAIMS RELEASED IN THE SETTLEMENT

As noted in the moving papers, both parties had already agreed that the release only applies to PAGA claims and does not apply to the nonparty employees' individual claims. (ROA # 33; Memo at p. 2, ll. 11-13.)

However, in line with the Court's instructions, the parties have now added express language to that effect in the Release Portion of the Settlement Agreement. (Yaeckel decl. ¶ 13; **Ex. A** at § 7, p. 4.)

C. THE REQUESTED ATTORNEYS' FEES

Plaintiff's counsel's attached declaration (paragraphs 26-27) provides a further breakdown of the evidence of the work performed and reasonableness of the work performed. Plaintiff has also detailed the exact costs incurred. (Yaeckel decl. ¶ 35.)

The controlling California Supreme Court decision on attorneys' fees in a common fund settlement is *Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480. *Laffitte* upheld the trial court's approval of attorneys fees in the amount of **one-third** of the gross settlement amount. *Id.*

The Court noted "[w]e join the overwhelming majority of federal and state courts in holding"

1 that the Court may determine an appropriate fee by awarding a percentage of the fund created. *Id.* at
2 503 (emphasis added.)

3 **First**, Plaintiff submits the attorney fee request for 1/3 of this common fund settlement is
4 proper, without further inquiry. However, a “lode-star” cross check also confirms the propriety of the
5 fee request as Plaintiff has actually billed slightly more than the requested amount. (See ROA # 35.)

6 **Please Note**: the fee award should include fees incurred to establish and defend the attorneys'
7 fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639. However, Plaintiffs’ counsel has nonetheless
8 agreed to “write off” all of the additional hours expended in providing this supplemental briefing.

9 **Second**, Plaintiff’s counsel’s hourly rates have been repeatedly approved as reasonable by the
10 San Diego Superior Court. (**Exhibits C-D.**)

11 Additionally, many trial courts look to the “Laffey Matrix” in determining what is a reasonable
12 hourly rate in a contingency fee class action setting. *See Ricks v. Barnes*, No. 05-1756 HHK/DAR,
13 2007 U.S. Dist. LEXIS 22410, at *16 (D.D.C. Mar. 28, 2007) (finding Updated Matrix rates
14 reasonable); *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006) (concluding that
15 use of the Updated Matrix is reasonable and noting that the Updated Matrix is more accurate than the
16 Laffey Matrix because the Updated Matrix is “based on increases/decreases in legal services rather
17 than increase[s]/decreases in the entire CPI which includes price changes for many different goods and
18 services”); *Kempf v. Barrett Bus. Servs.*, No. C-06-3161 SC, 2007 U.S. Dist. LEXIS 89447 (N.D. Cal.
19 Nov. 20, 2007) (finding attorneys’ requested fees reasonable when compared to rates in the Updated
20 Matrix).

21 Other Courts have even adjusted the Matrix upwards based upon the higher costs of living in
22 Los Angeles and other California cities. *In Re HPL Technologies, Inc. Securities Litigation*, 366
23 F.Supp.2d 912, 921 (N. Dist. Cal. 2005).

24 Here, counsel’s rates are in line with and actually lower than the Updated Laffey Matrix rates.
25 (Yaeckel decl. ¶¶ 31-32.)

26 **Third**, Plaintiff took this case on a contingency basis. (Yaeckel decl. ¶ 34.) There is an
27 **established practice** in the private legal market to reward attorneys for taking the risk of non-payment
28 by paying them a **premium over their normal hourly rates** for winning contingency cases. *In re*

1 *Washington Public Power Supply System Securities Litigation* (9th Cir. 1994) 19 F.3d 1291, 1299. If
2 attorneys' efforts create a benefit for others in addition to their own client, the court is empowered to
3 award fees from that fund. *Boeing v. Van Gemert* (1980) 444 U.S. 472, 478.

4 The rationale for fee enhancement in contingency cases has been explained as follows:

5 'A contingent fee must be higher than a fee for the same legal services paid as they
6 are performed. **The contingent fee compensates the lawyer not only for the legal
7 services he renders but for the loan of those services. The implicit interest rate
8 on such a loan is higher because the risk of default (the loss of the case, which
9 cancels the debt of the client to the lawyer) is much higher than that of
10 conventional loans.'** (Prosner, *Economic Analysis of Law* (4th ed.1992) pp. 534,
11 567.) 'A lawyer who both bears the risk of not being paid and provides legal
12 services is not receiving the fair market value of his work if he is paid only for
13 the second of these functions. If he is paid no more, competent counsel will be
14 reluctant to accept fee award cases.' (Leubsdorf, *The Contingency Factor in
15 Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct,
16 rule 4-200(B)(9) [recognizing the contingent nature of attorney representation is an
17 appropriate component in considering whether a fee is reasonable]; ABA Model
18 Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
19 Conduct, rule 1.5(a)(8). **Such fee enhancements are intended to compensate for
20 the risk of loss generally in contingency cases as a class.**

21 *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419 (disapproved on other grounds.)

22 The percentage of the fund approach also sets expectations and incentivizes counsel in taking
23 on the risk of a contingency case:

24 The bases of the equitable rule which permits surcharging a common fund with the
25 expenses of its protection or recovery, including counsel fees, appear to be these:
26 fairness to the successful litigant, who might otherwise receive no benefit because his
27 recovery might be consumed by the expenses; correlative prevention of an unfair
28 advantage to the others who are entitled to share in the fund and who should bear their
29 share of the burden of its recovery; **encouragement of the attorney for the
30 successful litigant, who will be more willing to undertake and diligently
31 prosecute proper litigation for the protection or recovery of the fund if he is
32 assured that he will be promptly and directly compensated should his efforts be
33 successful.**

34 *Jordan v. California Dep't of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446 (with emphasis added)
35 citing *Estate of Stauffer* (1959) 53 Cal.2d 124, 132.)

36 In line with the above, Plaintiff maintains the request for attorneys' fees in the amount of
37 \$26,666.67 and actual costs of expended in the amount of \$5,000 is reasonable and merits approval.

38 **D. CLAIMS ADMINISTRATION**

39 CAC Services Group, LLC. ("CAC") was agreed to by the parties to be the "Settlement
40 Administrator" for purposes of providing the Notice and issuing all payments pursuant to the

1 Agreement. CAC has extensive experience in administering class and representative action
2 settlements. (Yaeckel decl. ¶ 36.)

3 CAC agreed to administer this settlement for the specific amount of \$2,786.40. (Yaeckel decl.
4 ¶ 37; **Ex. E.**) In an abundance of caution, given counsel's experience that there are sometimes
5 unexpected costs, the parties requested (and CAC agreed to) a "not to exceed" maximum
6 administration cost of \$3,000. If administration is completed for less than \$3,000, the difference will
7 go back into the PAGA settlement fund for distribution between the LWDA and aggrieved employees.
8 (Yaeckel decl. ¶ 37.)

9 **E. PLAINTIFF'S INCENTIVE AWARD**

10 Plaintiff hereby requests an incentive award in the amount of \$5,000. Defendant **does not**
11 **oppose** this request.

12 Incentive awards are typical in class or mass actions. See *Rodriguez v. West Publ'g Corp.*, 563
13 F.3d 948, 958 (9th Cir. 2009). The Court may award incentive payments "to compensate [plaintiffs]
14 for work done on behalf of the class, to make up for financial or reputational risk undertaken in
15 bringing the action, and...to **recognize [their] willingness to act as a private attorney general.**" *Id.*
16 at 958-59.

17 Plaintiff also undertook the risk of being liable for costs if this case was lost, as well as the
18 reputational risk of being the named plaintiff in a wage and hour representative action against an
19 employer. See, e.g., *Deaver v. Compass Bank*, No. 13-cv-00222-JSC, 2015 WL 8526982 at **14-15
20 (N.D. Cal. Dec. 11, 2015) (approving \$7,500 incentive payment in \$500,000 wage and hour settlement,
21 finding the award "particularly appropriate in this wage and hour class action, where Plaintiff
22 undertook a significant 'reputational risk' in bringing this action against her former employer").

23 Plaintiff put his future employment prospects at risk by becoming a named representative as
24 the fact that they filed a lawsuit "is searchable on the internet and may become known to prospective
25 employers when evaluating" him for employment. *Guippone v. BH S&B Holdings, LLC*, 2011 U.S.,
26 Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011).

27 Plaintiff provided substantial factual information and documents to his counsel, identified
28 potential witnesses, and attended in-person and telephonic meetings with his counsel to discuss case

1 strategy and Defendant's wage and hour practices and policies. (Hild decl. ¶¶ 13-17.)

2 Mr. Hild served as the named representative knowing that filing a public lawsuit could harm
3 future employment prospects. (Hild decl. ¶¶ 4-6.) Mr. Hild was in fact asked to resign as a term of
4 settlement. (Hild decl. ¶¶ 10-11.) He also risked owing a significant award of costs if he lost the case.
5 (Hild decl. ¶¶ 13-17.) Despite these risks, he remained tilling to seek a settlement that would benefit
6 all employees. (Hild decl. ¶¶ 5,8, 11.)

7 Finally, Plaintiff's efforts resulted in a tangible monetary benefit for employees, who do not
8 give up their rights to bring individual claims.

9 **F. PROPOSED NOTICE TO PAGA EMPLOYEES**

10 The parties agreed upon notice is attached as Exhibit F to the Declaration of Eric K. Yaeckel.
11 As requested by the Court, the notice confirms that the release will not apply to the nonparty
12 employees' individual claims.

13 **IV. CONCLUSION**

14 The parties respectfully request that the Court approve the proposed PAGA settlement and sign
15 the Proposed Order and Judgment submitted with this motion.

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19 Dated: August 26, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

Eric Yaeckel

21 _____
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