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Attorneys for Plaintiff Anna Hernandez

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ANNA HERNANDEZ individually and as an
aggrieved employee pursuant to the Private
Attorneys General Act ("PAGA"), and on
behalf of the State of California and other
aggrieved employees,

Plaintiff.

vs.

OLD NAVY, LLC, a Delaware Limited
Liability Company.

Defendant.

CASE NO.: CGC-22-598893

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES, COSTS, AND
INCENTIVE AWARDS**

Date: January 30, 2024

Time: 9:30 a.m.

Dept.: 302 (Law and Motion)

Judge: Hon. Richard B. Ulmer

Complaint Filed: March 25, 2022

1 **I. INTRODUCTION**

2 Plaintiffs' counsel seek a fee award of 33.3% of the Gross Settlement Amount
3 (\$6,500,000.00) which would equate to \$2,164,500.00 of the Gross Settlement Amount. Because
4 the settlement also provides for forward-looking relief including changes that will make the
5 provision of seats at Old Navy's California stores feasible for the first time, Plaintiff's counsel
6 asserts that the overall value of the settlement is on the order of \$13,000,000 and the requested
7 fee is only 6%. The straight lodestar crosscheck (*infra*) is \$579,491.25. Additionally, Plaintiffs'
8 counsel requests \$30,368.18 (See Paragraph 7 of the Declaration of Kevin J. McInerney) and
9 Capstone Law APC requests \$364.62 (See Paragraph 15 of the Declaration of Raul Perez) for
10 reasonable litigation costs, and, on behalf of the Plaintiff, an incentive award (\$25,000) under the
11 Private Attorneys General Act ("PAGA").

12 **II. THE COMMON FUND FEE DOCTRINE**

13 As the California Supreme Court explained in *Laffitte v. Robert Half Int'l. Inc.* (2016) 1
14 Cal.5th 480, 486, 503, a trial court has equitable authority to award attorneys' fees under the
15 "common fund" doctrine if plaintiffs' counsels' efforts result in the creation of a fund of money
16 becoming available for beneficiaries who did not otherwise pay for the attorneys' successful
17 litigation efforts. *See also Serrano v. Priest* (1977) 20 Cal.3d 25, 32; *Boeing Co. v. Van Gemert*,
18 444 U.S. 472, 478 (1980). The common fund doctrine rests on the equitable principle of
19 preventing unjust enrichment. It is based "on the perception that persons who obtain the benefit
20 of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's
21 expense," and it "allows a court to prevent this inequity by assessing attorneys' fees against the
22 entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co.*
23 *v. Van Gemert*, 444 U.S. at 478.

24 The most common mechanism for calculating the reasonable common fund fee is the
25 "percentage method," which mirrors the private contingency fee market by awarding plaintiffs'
26 counsel a percentage of the total fund, just as private counsel litigating contingency fee cases
27 commonly sign retainers with their clients for a fixed percentage of the eventual recovery. This is
28 the method endorsed by the California Supreme Court in *Laffitte* (which affirmed a one-third

contingency fee plus costs) because of its many “recognized advantages” of that percentage approach over other fee-calculation methodologies, “including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation.” *Laffitte* at 503. While the Supreme Court in *Laffitte* allowed trial courts to conduct a lodestar-multiplier cross-check when additional efforts are required to assess the overall reasonableness of a common fund fee, the Court emphasized that trial courts “retain the discretion to forego a lodestar cross-check” and may award a reasonable percentage fee even if the court might award a lower fee under the lodestar-multiplier approach alone. *Id.* at 505-06.

III. THE COURT HAS COMPLETE DISCRETION IN THE AWARD OF FEES, COSTS, AND INCENTIVES; ANY AWARDS ARE COMPLETELY INDEPENDENT OF THE ISSUE OF SETTLEMENT APPROVAL OR NON-APPROVAL

Under the Settlement Agreement, the Court has the discretion to approve, modify, or reject all applications and/or requests for attorney fees, costs, and incentive awards. There is no “clear sailing” provision. The Court’s discretionary actions with respect to such awards are in no way tethered to the Court’s decision to approve or disapprove the proposed settlement. *See* Settlement Agreement, Section III., Paragraph 3(b).

If the requested fee of 33.3% is approved, there would only be a multiplier of 3.74 (total attorney lodestar of \$579,491.25: McInerney’s lodestar of \$351,975.00 and Capstone’s lodestar of \$227,516.25. In *Laffitte v. Robert Half International, Inc.*, (2016) 1 Cal.5th 480, 487, a standard misclassification case, the Supreme Court approved a one third fee that equated to a multiplier of 2.03 to 2.13 times the lodestar. A detailed accounting of the work performed in this case is set forth in Paragraph 5 of the Declaration of Kevin J. McInerney and in Paragraph 11 of the Declaration of Raul Perez.

IV. THE LWDA HAS THE RIGHT AND CAPACITY TO OBJECT

While the legislature found in 2003 that the Labor and Workforce Development Agency (“LWDA”) was underfunded and understaffed, there is no evidence that this condition exists

1 today. In fact, PAGA has been enormously successful because employees and their private
2 counsel have been doing a great percentage of the enforcement that the Labor Commissioner
3 would have been called upon to handle. There is perhaps no better example than these seating
4 cases. In the early 1900s, the IWC actually enforced the seating laws. Sometime near 1930, for
5 unknown reasons, all enforcement stopped. When the *Kilby* Court searched for activity, it found
6 only two letters written in the 1980s. *See Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1.¹

7 The LWDA has many attorneys and some of them, personally known to Plaintiff's
8 counsel, are very competent and knowledgeable. The LWDA, by virtue of the 2016 amendments
9 to PAGA, is now statutorily charged with the review of all potential settlements. This is why the
10 Parties must send the proposed settlement agreement to the LWDA and provide a copy of the
11 judgment within ten days of the court's entry. If the LWDA does not comment on this proposed
12 settlement, its silence should be regarded as acquiescence.

13 **V. THE AGGRIEVED EMPLOYEES' 25% PORTION CONSTITUTES AN**
14 **INCENTIVE AWARD AND THIS COURT SHOULD DECIDE WHICH**
EMPLOYEES RECEIVE MORE

15 In 2003, the earliest drafts of what would become PAGA provided that 100% of
16 recovered penalties would go to the State. Later, realizing that no rational employee would step
17 forward to file an action absent an incentive, provision was made for a 25% award.² As the Ninth
18 Circuit found in *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir. 2014), the entire
19 25% constitutes a bounty or incentive award. The PAGA statute does not dictate how the 25%
20 shall be apportioned among aggrieved employees.

21 In 2014, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles,*
22 *LLC* (2014) 59 Cal. 4th 348 also likened a PAGA action to a *qui tam* suit. This was followed the

24 ¹ Just looking at some of the large seating case settlements, the LWDA received 75% of the net
25 settlements in *Rhonique Green and Olivia Giddings v. Bank of America, N.A.* (Central District
26 Case No. 11-CV-04571-PA-AGR) (\$15 million), *Kristin Hall v. Rite Aid Corporation*, Case
27 No. 37-2009-00087938-CU-OE-CTL (\$13.5 million), *Kilby v. CVS Pharmacy, Inc.* 63 Cal.4th
28 1 (2016) (\$14,625,000), and *Smiles v. Walgreens*, Case No. RG17856962 (\$11,261,560.16).

² Often forgotten is that the legislative history reveals that the LWDA in 2003 opposed the
creation of PAGA.

1 following year in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). To the
2 extent that a PAGA action is viewed as a *qui tam*, California Govt. Code § 12652 is relevant.

3 Subsection (c)(1) Provides in part:

4 “A person may bring a civil action for a violation of this article for the person and
5 either for the State of California in the name of the state, if any state funds are
6 involved, or for a political subdivision in the name of the political subdivision, if
political subdivision funds are exclusively involved. The person bringing the
action shall be referred to as the *qui tam* plaintiff.”

7
8 Subsection (g)(3) provides:

9 “If the state or political subdivision does not proceed with an action under
10 subdivision (c), the *qui tam* plaintiff shall, subject to paragraphs (4) and (5),
11 receive an amount that the court decides is reasonable for collecting the civil
penalty and damages on behalf of the government. The amount shall be **not less
than 25 percent** and not more than 50 percent of the proceeds of the action or
settlement and shall be paid out of these proceeds. (emphasis added)”

12
13 An incentive award for Anna Hernandez is sought in the amount of \$25,000. In 2022, she
14 filed her seating claim in the San Francisco Superior Court.

15 In the following section, the incentive awards in other suitable seating cases are detailed.
16 In the instant case, Anna Hernandez has submitted a declaration detailing her contributions
17 which is filed concurrently. It is respectfully submitted that the requested incentive award in this
18 case is both reasonable and appropriate. The named Plaintiff took a real risk by suing her
19 employer in a large lawsuit, thus potentially prejudicing applications with future employers. **This**
20 **is a big deal: an employee takes a huge risk suing an employer. A future employer can and**
21 **often does a detailed computer background check. In this case, most of the other employees**
22 **did absolutely nothing. Some managerial types were overtly hostile. It is only decent that**
23 **the one employee who did the work and assumed the risks should be rewarded. She has**
24 **stayed loyal to this case for over the years.** She has devoted substantial time and has assisted in
25 the prosecution in very specific ways. Her requested incentive award would be consistent with
26 the entire idea of PAGA to incentivize employees to step forward and sue.

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1 **VI. COMPARABLE FEE AWARD AND INCENTIVE AWARDS IN OTHER**
2 **SEATING CASES**

3 Counsel for Plaintiffs provide the below information on other suitable seating cases for
4 the Court's reference. Obviously, a number of factors impact the amount of a settlement and, for
5 that reason, it is difficult to draw broad conclusions from other cases. The obvious factors that
6 determine a settlement include the parties' view of the judge, the quality of plaintiff counsel and
7 defense counsel, and the strength or weakness of the evidence indicating that seating would be
8 feasible. Between March of 2009, when the first seating cases were filed, and 2016, when the
9 California Supreme Court decided *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, there were
10 no settlements. There were over 30 decisions by trial courts and generally the state trial courts
11 got things right and the federal trial courts got things wrong. With the assistance of appellate
12 counsel (Michael Rubin of Altshuler Berzon), plaintiff's counsel prevailed on every single
13 appeal. Following *Kilby*, the following large settlements have been finalized:

14 1) *Nicole Garrett v. Bank of America, N.A.*, Case No. RG13699027. This action
15 involved tellers employed at Bank of America. The original case of *Rhonique Green and Olivia*
16 *Giddings v. Bank of America, N.A.* was filed in 2011 in the Los Angeles Superior Court and
17 removed to the Central District Court shortly thereafter. It was assigned to Judge Manuel Real.
18 However, after two reversals of his dismissals, the Ninth Circuit directed that a new judge be
19 assigned. Judge Real was replaced by Judge Percy Anderson who stayed the federal action in
20 favor of a parallel state action in Alameda County Superior Court. Not long after that, Bank of
21 America offered \$15 million. This Court approved the settlement and awarded \$5 million in
22 attorney fees and \$75,000 as incentive awards to the three plaintiffs. The fee award of one third
23 utilized a multiplier of 2.05. In *Garrett*, the LWDA received approximately \$7.3 million, and the
24 settlement equated to approximately \$15 per pay period.

25 2) *Danyell Murphy v. Target Corporation*, Case No. 3:09-CV-01436-WGH-DHB.
26 This action was filed in May of 2009 in the San Diego Superior Court and then removed to the
27 Southern District Court in July 2009. Judge William Hayes had denied class certification far
28 more frequently than approving it. The undersigned and his co-counsel were really unsure in

2011 as to how a representative case would be tried and filed their initial seating cases as class actions. Later there was a parallel state action filed as a straight PAGA case against Target; in addition to a copycat case that was also filed. The evidence against Target was mixed and the undersigned felt it important to get a big box retailer to settle. This was the first settlement involving a major retailer. In 2018, a settlement was reached for \$6 million, which translated to approximately \$4.74 per pay period. Judge Brad Seligman approved this settlement in the state filed case *Enombang v. Target Corporation*, Case No. RG17853948 and awarded 40% attorney fees using a multiplier of 1.4 and made incentive awards totaling \$80,000 to the four plaintiffs.

3) *Kristin Hall v. Rite Aid Corporation*, Case No. 37-2009-00087938-CU-OE-CTL. This action was filed in the San Diego Superior Court in 2009 and was certified by Judge Joan Lewis. She retained the case throughout its life. Rite Aid appealed class certification but lost. The case was set for trial in 2018 and plaintiff's counsel felt they had a very strong case. However, the share price of Rite Aid was falling rapidly after two attempted mergers with larger companies failed, from \$9 a share to below \$2 a share. The case settled on the morning of trial for \$18 million. This equated to approximately \$18 per pay period. Judge Lewis awarded the requested attorney fees of 40%. Incentive awards were \$200,000 to twelve individuals. The named plaintiff received \$50,000 and other awards varying between \$10,000-\$20,000 were given to class members who actively contributed to the prosecution of the case and who were going to be trial witnesses.

4) *Nisha Brown and Kathy Williams v. Wal-Mart Stores, Inc.*, Case No. 5:09-CV-03339-EJD. This action had very strong evidence from the beginning. It became much stronger when the trial judge, Edward J. Davila, twice issued evidentiary sanctions against Wal-Mart. The undersigned was one of the original plaintiffs' counsel, however his interest was transferred to his son-in-law when the workload of the several seating cases was redistributed among plaintiffs' counsel. Judge Davila certified the class, and his opinion was upheld by the Ninth Circuit following the California Supreme Court decision in *Kilby*. Plaintiff's counsel viewed Judge Davila from the outset as excellent and the case settled just a few months before trial for \$65 million. This equated to approximately \$26 per pay period. Judge Davila awarded \$21,664,500

1 in attorney fees which is 33% of the settlement utilizing a 2.2 multiplier and \$30,000 in incentive
2 awards to the two plaintiffs.

3 5) A somewhat crude and common method the Courts have utilized in comparing
4 proposed seating claim settlements is the dollars per pay period. The statutory default penalty
5 provided by the Labor Code is \$100 per pay period per employee. In a settlement this is normally
6 discounted because of risk factors. The risk factor with respect to suitable seating cases is
7 extremely high.³ Seven suitable seating cases have proceeded to trial in Superior Courts
8 throughout California. The employers have prevailed in each and every one of them. In the
9 instant case, the gross dollar per pay period is approximately \$30.76. This compares very
10 favorably with other suitable seating cases. For example, the settlement reached in *Alvarado v.*
11 *Old Navy* (San Francisco Superior Court Case No. CGC-17-562773) in August of 2020 equated
12 to \$25 per pay period for the 14(A) violations and \$11 per pay period for the 14(B) violations. If
13 one were to review the dozen plus settlements that have occurred over the past seven years, the
14 dollar per pay period amounts have ranged from \$4.74 (*Enombang v. Target*, Alameda County
15 Case No. RG17853948, May 2018) to \$32.42 (*Smith v. TJ Maxx of California, LLC* Alameda
16 County Case No. RG1900214, June 2022). In the seminal case of *Kilby v. CVS Pharmacy, Inc.*,
17 the case ultimately settled for \$18 per pay period in August of 2019. Upon review of the known
18 settlements, it is clear that the dollar per pay period in the instant case is at the very upper end of
19 the spectrum.

20 6) *Shane Sourgose v. Forever 21, Inc.*, Case No. BC679604. This action was filed in
21 the Los Angeles Superior Court on October 13, 2017, and was assigned to Judge Maureen
22 Duffy-Lewis. This case settled early on before a single deposition. Both sides viewed the trial
23 judge as an unknown and Plaintiff's counsel viewed the evidence as above average. The
24 settlement was approved by Judge Duffy-Lewis. The settlement is notable because it was the
25 first settlement in California history that awarded penalties for both the § 14(A) violation and the

26
27 ³ Even if the trial court finds in favor of the Plaintiff there is the additional risk that the Court
28 may depart downward from the default penalties under Labor Code Section 2699(e)(2).

§ 14(B) violation. The settlement provided for an overall \$22 per pay period with the § 14(B) employees getting \$11 (half of what the §14(A) employees received). The court awarded attorney fees of one-third (a multiplier of 2.9) and an incentive award to the plaintiff of \$20,000.

7) *Reannon Priddy v. Jo-Ann Stores, LLC*, Case No. RG17856862. This action was filed April 17, 2017, in the Alameda Superior Court and settled early on after the employer's motion for summary judgment was denied. This Court approved the settlement which provided for approximately \$24 per pay period and awarded attorney fees of 26.7 % using a multiplier of 1.4 and an incentive award to the named plaintiff of \$25,000.

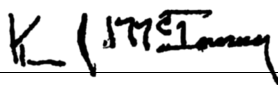
8) *Smiles v. Walgreens*, Case No. RG17856962. This action was filed June 1, 2017, in the Alameda Superior Court and settled in June 2019 as trial was about to commence. This Court approved the settlement which provided for approximately \$30.89 per pay period, awarded attorney fees of \$5,255,394.74 (using a multiplier of 1.82), and an incentive award to the named plaintiff of \$35,000.

VII. SEATING CASES THAT PROCEEDED TO TRIAL

It should be noted that the three suitable seating cases that have gone to trial resulted in the judgments in favor of the employer. The first case was *Lisa Garvey v. Kmart Corporation*, Case No. 3:11-CV-02575-WHA, which was tried in the Northern District Court before Judge William Alsup in 2013 and the second case was *Allen v. AMC, Inc.*, Case No. RG11585502, which was tried before Judge George Hernandez in the Alameda County Superior Court in May 2014. The undersigned served as plaintiffs' counsel on both of these cases, which were pre-Kilby decisions. Recently, a suitable seating case ended with a judgment for the employer. *Laface v. Ralphs Grocery Company et al*, No. BC632679, LA Sup. (2020). The finding in that case demonstrates that the risk of trying seating cases is very real.

Dated: January 4, 2024

Respectfully submitted,


Kevin J. McInerney
Attorney for Plaintiff Anna Hernandez