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individually and on behalf of all others similarly situated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

TERRANCE JAY WILCOXEN,
individually and on behalf of all others
similarly situated,

Plaintiff,

vs.

WYVERN RESTAURANTS, INC.; and
DOES 1-20, inclusive,

Defendants.

Case No. MSC22-00413

*Assigned for all purposes to
Hon. Charles S. Treat
Dept. 12*

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

Date: TBD

Time: TBD

Dept.: 12

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Terrance Jay Wilcoxon (“Plaintiff”) seeks approval of a settlement of claims under the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”) against Defendant Wyvern Restaurants, Inc. dba Round Table Pizza (“Defendant”) in the amount of \$89,000.00 on behalf of himself, the State of California, and all current and former non-exempt employees who worked for Defendant within the State of California (“PAGA Employees”) during the period commencing March 03, 2021 through December 21, 2021 (“PAGA Period”), and as a proxy/agent for the California Workforce Development Agency (“LWDA”) . Plaintiff alleges Defendant failed to properly pay minimum and overtime wages, failed to provide lawful meal periods, failed to permit rest breaks, failed to reimburse business expenses, failed to provide accurate itemized wage statements, and failed to pay all wages due during and upon separation of employment. The proposed Settlement seeks to release claims for civil penalties for violations of Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 551, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

On March 3, 2022, Plaintiff’s counsel sent a letter to the California Labor & Workforce Development Agency (“LWDA”) via online submission and to Defendant via certified mail regarding Defendant’s alleged violations. See Connolly Decl., ¶ 3, Exhibit 2. The LWDA did not respond to this notice within 65 days, indicating it did not intend to investigate, thus allowing Plaintiff to file the instant lawsuit pursuant to Labor Code Section 2699.3(a)(2)(A). *Id.* at ¶ 4.

Plaintiff initially filed his Complaint as a class action on March 4, 2022. *Id.* at ¶ 5. On May 24, 2022, Plaintiff filed his First Amended Complaint adding a claim for Enforcement of the Private

1 Attorneys General Act (“PAGA”). *Id.* at ¶ 6. Defendant provided Plaintiff and Plaintiff’s Counsel
2 with an arbitration agreement containing a class action waiver purportedly signed by Plaintiff. *Id.*
3 at ¶ 7. After reviewing the arbitration agreement and discussing the same, Plaintiff and Plaintiff’s
4 Counsel agreed to dismiss his individual and class claims without prejudice and proceed solely with
5 the PAGA cause of action. *Id.* On or about September 1, 2022, the Court entered an order granting
6 dismissal of Plaintiff’s individual class claims. *Id.*

7 In preparation for mediation, Plaintiff informally requested information and documents
8 regarding, *inter alia*, class contact information, class size, dates of employment, meal period
9 waivers, incentive pay, bonuses, commissions, training materials and employee handbooks, and
10 timekeeping and pay records. *Id.* at ¶ 8. In response, Defendant produced hundreds of pages of data
11 and documents for Plaintiff to evaluate the PAGA claims and calculate the alleged exposure,
12 including earnings statements, timekeeping records, and a list of aggrieved employees with dates
13 of employment to calculate the pay periods worked. *Id.* The parties attended mediation on
14 November 2, 2022, with Eve Wagner, a respected class action and PAGA action mediator. *Id.* At
15 mediation, the parties reached an agreement to settle for \$89,000.00. *Id.* at ¶ 9.

16 Around December of 2022, the Parties finalized the terms of the Settlement Agreement,
17 which is now presented to this Court for approval. *Id.* ¶ 10. Plaintiff provided notice of the
18 Settlement to the LWDA on February 13, 2023. *Id.* at ¶ 11, Exhibit 3. Plaintiff also served a copy
19 of the motion on the LWDA on February 13, 2023. *Id.* at ¶ 12, Exhibit 4.

20 **III. PAGA REQUIREMENTS**

21 Based on the California Supreme Court's opinions in *Arias v. Superior Court*, 46 Cal. 4th
22 969 (2009), and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014),
23 Plaintiffs can seek appropriate civil penalties as called for under PAGA on behalf of the State of
24 California and other similarly aggrieved employees without seeking class certification or meeting
25 the requirements of class certification (i.e. numerosity, typicality, commonality and adequacy). As
26 such, the class action two-step preliminary and final approval process is not required.

27 PAGA was enacted to allow enforcement of the Labor Code and recovery of penalties by
28 the State and by private individuals who have been aggrieved by their employers. The statute calls

1 for 75% of any penalties recovered to be paid to California's LWDA and the remaining 25% to the
2 aggrieved employees (Cal. Lab. Code § 2699(i) (2016)).

3 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved employee
4 must first provide written notice to the LWDA and the employer of the particular Labor Code
5 violations the aggrieved employee alleges the employer has violated. See Cal. Labor Code §
6 2699.3(a)(1)(A) (2016). Once the LWDA notifies the aggrieved employee that it does not intend to
7 investigate the alleged violations, or if the LWDA does not respond within a certain time period,
8 the aggrieved employee is then allowed to proceed in a civil action against the employer on behalf
9 of the LWDA and all other similarly aggrieved employees. See Cal. Labor Code § 2699.3(a)(2)(A)
10 (2016).

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

21 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court
22 need only "review and approve" the settlement. Cal. Lab. Code § 2699(1)(2) (2016). The Parties to
23 this current PAGA action have reached such an agreement and now seek this Court's approval of
24 the proposed settlement.

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1 IV. THE SETTLEMENT TERMS AND DISTRIBUTION OF PENALTIES

2 The Parties have agreed that Defendants will pay a total settlement amount of \$89,000.00
3 (the “Gross Settlement Amount”). See Settlement Agreement, § II ¶ 21. However, should the
4 number of pay checks exceed 4,300 by more than 5%, the Gross Settlement Amount will increase
5 pro rata at a rate of \$20.69 per additional pay period. *Id.* at § II ¶ 22. From the Gross Settlement
6 Amount, up to one-third (1/3) of the amount, currently \$29,666.67, is allocated to attorneys’ fees
7 and up to \$25,000.00 is allocated for reimbursement of litigation costs. *Id.* at, § II ¶ 21(b). To date,
8 Plaintiff’s counsel has spent \$16,682.30 in litigation costs. See Connolly Decl., ¶ 40. The Settlement
9 allocates up to \$4,250.00 to payment for Settlement Administrator Phoenix Settlement
10 Administrators’ costs associated with administration of the Settlement. Settlement Agreement, § II
11 ¶ 21(a). For Plaintiff’s efforts in assisting with the Lawsuit and in exchange for a general release of
12 his individual claims, \$5,000.00 is allocated to Plaintiff. *Id.* at § II ¶ 21(c).

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 \$25,083.33 will
15 be paid 75% to the LWDA (“LWDA Payment”) and 25% to the PAGA Employees (“Employee
16 Amount”). *Id.* at § II ¶ 23. “PAGA Employees” or singularly “PAGA Employee” means and refers
17 to all current and former non-exempt employees who worked for Defendant within the State of
18 California between March 3, 2021 and December 21, 2021. *Id.* at § I ¶¶ 10 – 11.

19 The Employee Amount for the PAGA Employees shall be determined as follows: The
20 Employee Amount will be divided by the total number of pay checks received by all PAGA
21 Employees during the PAGA Period to yield the “Per Pay Check Amount,” and then each PAGA
22 Employee’s individual number of Pay Checks will be multiplied by the Per Pay Check Amount to
23 yield his or her “Individual Settlement Payment.” *Id.* at II § ¶ 24. Individual Settlement Payments
24 shall be paid to PAGA Employees by way of a single check to each PAGA Employee (“Individual
25 Settlement Check.”) All PAGA Employees’ Payments will be characterized as penalties for tax
26 purposes and reported on IRS Form 1099. *Id.* at, § II ¶ 25.

27 Defendant shall compile a list containing information outlined in the Settlement Agreement
28 “PAGA Employee List.” *Id.* at § V ¶ 34. The Settlement Administrator shall use the PAGA

1 Employee List to disburse Individual Settlement Checks to each PAGA Employee to the last known
2 address in the PAGA Employee List or a more updated address from the National Change of
3 Address Database. *Id.* at § V ¶ 37. Prior to this disbursement, the Settlement Administrator shall
4 check the addresses provided using the National Change of Address database. *Id.* For any returned
5 payments without a forwarding address, the Settlement Administrator shall search for a more
6 current address for the PAGA Employee via skip trace or other reasonable method. *Id.* PAGA
7 Employees who receive their Individual Settlement Check via U.S. First Class Mail will receive a
8 letter along with their Individual Settlement Check explaining the reason for the payment
9 (“Employee Notice”), the content of which will be submitted to the Court for approval. *Id.* The
10 proposed letter is attached to the Settlement Agreement as Exhibit A. *Id.* Together, an Individual
11 Settlement Check that is mailed to a PAGA Employee with the Employee Notice is referred to as a
12 “Payment Packet.” *Id.* All funds not claimed within 180 calendar days of the initial mailing of the
13 original Payment Packet to the PAGA Employees shall be sent to the California State Controller’s
14 Office Unclaimed Property Fund with an identification of the amount of unclaimed funds
15 attributable to each PAGA Employee. *Id.* at § V ¶ 39.

16 In exchange for the settlement payment, the State of California and the PAGA Employees
17 will release the “Released Parties” meaning “Defendant and its current, former, and future
18 subsidiaries, affiliates, shareholders, officers, directors, employees, agents, representatives,
19 members, managers, principals, agents, predecessors, successors, assigns, attorneys, and/or any
20 individual or entity which could be jointly liable with Defendant” from “civil penalties under the
21 PAGA, California Labor Code § 2698, *et seq.*, that are based upon or arise from the factual
22 allegations alleged in the operative Complaint and/or Plaintiff’s PAGA notice, arising during the
23 PAGA Period, including for the failure to properly pay all minimum wages, overtime wages,
24 provide lawful meal periods or compensation in lieu thereof, authorize or permit lawful rest breaks
25 or provide compensation in lieu thereof, provide accurate itemized wage statements, reimburse all
26 business expenses, and timely pay all wages during employment and upon separation of
27 employment, and for violation of and/or based on California Labor Code §§ 201, 202, 203, 204,
28 210, 226, 226.3, 226.7, 510, 512, 551, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1,

1 2800, and 2802.” *Id.* at § I ¶¶ 16 – 17. Only Plaintiff signed a general release of claims. *Id.* at § III
2 ¶¶ 31.

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 regarding Senate Bill No. 1809, attached as
18 Exhibit 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 the
23 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:
28

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 \$89,000.00 Gross Settlement Amount is reasonable when considered in light of the
22 principles discussed in Senator Dunn's letter. Connolly Decl., ¶ 13. For a group of approximately
23 467 employees, a penalty of \$89,000.00 is large enough to punish Defendant for alleged past
24 violations and deter future violations. *Id.* The settlement amount is equivalent to a penalty of
25 approximately \$190.00 per employee, which is a significant penalty for a wage and hour case. *Id.*
26 At the same time, the penalty amount is not so large as to be unjust, oppressive or confiscatory,
27 considering the company's potential exposure explained below. *Id.*

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1 The Gross Settlement Amount is also reasonable in light of the facts of the foregoing action,
2 the real risk that no PAGA penalties would be paid, and inherent risks and uncertainties associated
3 with PAGA claims. Connolly Decl., ¶ 14.

4 Plaintiff calculated the potential exposure at the initial violation rate of \$100 per pay period
5 as follows: 10,210 pay periods x \$100 per pay period = \$1,021,000.00. Connolly Decl., ¶ 15. If the
6 Court stacked different types of penalties in each pay period, Plaintiff calculated the exposure as
7 follows: 10,210 pay periods x \$100.00 x 100% violation rate = \$1,021,000.00 for unpaid wages
8 based on the assumption that all employees worked at least a few minutes off the clock each pay
9 period; 10,210 pay periods x \$100.00 x 47% violation rate = \$479,870.00 for meal period violations
10 as shown in Defendant's records; 10,210 pay periods x \$100.00 x 100% violation rate =
11 \$1,021,000.00 for rest break violations based on the assumption that all employees were subject to
12 illegal rest break requirements; 10,210 pay periods x \$100.00 x 100% = \$1,021,000.00 for wage
13 statement penalties; and 10,210 pay periods x \$100.00 x 100% = \$1,021,000.00 for reimbursement
14 violations based on the Defendant's records. *Id.*

15 Defendants could have raised a number of arguments thereby defeating Plaintiff's claims
16 such as the argument that the off the clock claims were too individualized and thus unmanageable,
17 that Defendants paid wages for all time recorded, that rest breaks were authorized or permitted but
18 voluntarily relinquished, or that Defendants either paid meal premiums or employees signed valid
19 meal waivers. *Id.* at ¶ 16. The settlement negotiations took these risks into account. *Id.* Plaintiff felt
20 the claims likely had about a 10% chance of winning, making a large reduction in potential exposure
21 justified. *Id.* at ¶ 17.

22 Another crucial factor in evaluating the value of a PAGA-only case is that all PAGA
23 awards are discretionary and can be reduced by the Court. *Id.* at ¶ 18. Under Labor Code §
24 2699(e)(2), the Court can reduce the PAGA penalties "if, based on the facts and circumstances of
25 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
26 or confiscatory." *Id.* In other words, were this matter to go to trial, any award granted would be at
27 the discretion of the Court. *Id.* In settling this case, Plaintiff recognizes that, although she believes
28 there would be no persuasive grounds to reduce the penalties, the Court could determine otherwise

1 and significantly reduce the PAGA penalties. *Id.* at ¶ 19. Here, Defendant could argue it is a small
2 Round Table Pizza franchisee with low profit margins, its written policies were compliant, and it
3 at least paid reimbursement requests submitted by employees, making the imposition of any
4 substantial PAGA penalties unfair and crippling to its business and therefore its ability to continue
5 providing employment to aggrieved employees. *Id.* The wide range of potential recovery and the
6 additional delays and risks of trial justified settling at this point for a reasonable amount of recovery.
7 *Id.*

8 **VI. CONCLUSION**

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

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12 Dated: February 14, 2023

AEGIS LAW FIRM, PC

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14 By: 

15 Jamie M. Loos
16 Attorneys for Plaintiff Terrance Jay Wilcoxon
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