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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

JONATHAN KHODRA, on behalf of himself
and on behalf of all persons similarly situated,

Plaintiff,

v.

JHK HOSPITALITY, LLC, a Limited Liability
Company (dba La Quinta Inn & Suites by
Wyndham); and DOES 1-50, Inclusive,

Defendants.

Case No: 20STCV15655

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Hearing Date: October 1, 2021

Hearing Time: 8:30 AM

Reservation ID: 243018701512

Honorable Judge Richard J. Burdge
Department 37

Trial Date: None

Action Filed: April 22, 2020

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jonathan Khodra (“Plaintiff”) reached a settlement of the California Private Attorneys
4 General Act, Cal. Labor Code §2699, *et seq.* (“PAGA”) claim asserted in this action against Defendant
5 JHK Hospitality, LLC (dba La Quinta Inn & Suites by Wyndham) (“Defendant”) (collectively, the
6 “Parties”). In accordance with California Labor Code §2699(l), Plaintiff now asks this Court to review
7 and approve the settlement of Plaintiff’s PAGA claims.¹ This is only a settlement of the PAGA claims
8 for civil penalties, and is not a class settlement and does not release the individual wage claims, if any,
9 of the affected employees other than the Plaintiff herself. Cal. Labor Code § 2699(g)(1); *Iskanian v.*
10 *CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182
11 (2019) (unpaid wages are not recoverable under PAGA).

12 The PAGA settlement is set forth in the accompanying Settlement Agreement (“Settlement
13 Agreement”). A true and correct copy of the Settlement Agreement which sets forth the terms for the
14 settlement of the PAGA claim is attached as Exhibit #1 to the Declaration of Shani O. Zakay, filed
15 herewith. Capitalized terms shall have the same meaning as defined in the Settlement Agreement.
16 The LWDA received notice of this Settlement and this motion as set forth in the accompanying proof
17 of service.

18 A proposed order confirming review and approval of the PAGA settlement is submitted
19 herewith.

20 **II. RELEVANT FACTS**

21 On February 12, 2020, Plaintiff gave written notice to the LWDA of his intent to assert a claim
22 under PAGA and her alleged basis for the claim. At the time Plaintiff gave written notice to the
23 LWDA, Plaintiff also submitted the \$75 filing fee to the LWDA. More than 65 days passed after the
24 letter and amended letter were sent to the LWDA, and the LWDA has not indicated that it intends to
25 investigate the alleged violations referenced in the letters. On April 22, 2020, Plaintiff filed a
26 Complaint against Defendant in the Superior Court of the State of California, County of Los Angeles,
27

28 ¹ Section 2699(1)(2) provides as follows: “The superior court shall review and approve any settlement
of any civil action pursuant to this part.”

1 alleging claims that Defendant: (1) Violated California Business and Professions Code § 17200, *et*
2 *seq.*; (2) Failed to pay minimum wages in violation of California Labor Code §§ 1194, 1197, and
3 1197.1; (3) Failed to provide overtime wages in violation of California Labor Code § 510, *et seq.*; (4)
4 Failed to provide required meal periods in violation of California Labor Code §§ 226.7 & 512 and the
5 applicable IWC Wage Order; (5) Failed to provide required rest periods in violation of California
6 Labor Code §§ 226.7 & 512 and the applicable IWC Wage Order; (6) Failed to reimburse employees
7 for required business expenses in violation of California Labor Code § 2802; (7) Failed to provide
8 accurate itemized wage statements in violation of California Labor Code § 226; (8) Failed to provide
9 wages when due in violation of California Labor Code §§ 201, 202 and 203; (9) Failed to provide
10 seating in violation of California Labor Code § 1198 and California Code of Regulations, Title 8,
11 Section 1 1070(14); and (10) Violation of the Private Attorneys General Act in violation of Labor
12 Code §§ 2698, *et seq.* (Decl. Zakay at ¶ 4). On July 17, 2020, Plaintiff submitted a copy of the file-
13 stamped complaint to the LWDA. (*Id.*) After meeting and conferring regarding the existence of an
14 enforceable arbitration agreement between Plaintiff and Defendant, which included a class action
15 waiver, on October 20, 2020, Plaintiff filed a First Amended Complaint, alleging a single cause of
16 action for: (1) Violation of the Private Attorneys General Act California Labor Code §§2689 *et seq.*
17 (Decl. Zakay at ¶ 4.)

18 A. Mediation

19 After engaging in some discovery, Plaintiff and Defendant agreed to mediate with Hon.
20 William C. Pate (Ret.), an experienced and reputable Jurist and wage and hour and PAGA actions
21 mediator. (Decl. Zakay at ¶ 5.) Prior to the mediation, in order to evaluate the potential value of the
22 claims, the Parties engaged in further, significant informal discovery, including a production of all of
23 Defendant's relevant wage and hour policies, the exchange of detailed statistical data regarding shifts
24 worked by Plaintiff and the PAGA Settlement Members, including a sample of payroll records and
25 time records, and the exchange of detailed briefing and analysis in connection with the mediation.

26 On April 20, 2021, Plaintiff and Defendant engaged in a full-day mediation with the Hon.
27 William C. Pate (Ret.) At the conclusion of the full-day mediation, the Parties were able to reach a
28 settlement based on Judge Pate's recommendation, which led to the signing of a Memorandum of

1 Understanding memorializing the settlement. Thereafter, on June 19, 2021, Plaintiff, Defendant, and
2 their counsel fully executed the long-form settlement agreement.² The settlement was negotiated in
3 light of all known facts and circumstances and the uncertainty associated with litigation – including
4 the risk of Plaintiff not being able to maintain representative claims, the difficulty of proving Plaintiff’s
5 claims in a manageable trial, the merits of Defendant’s potential defenses, and the significant delay
6 and potential appellate issues inherent to litigation. (Decl. Zakay at ¶ 5.)

7 **III. TERMS OF THE PAGA SETTLEMENT**

8 The PAGA settlement is subject to Court approval consistent with Labor Code §2699(1)(2)
9 (Settlement Agreement at § 5.01). The Settlement Agreement negotiated by the Parties provides for a
10 “Gross Settlement Amount” payment in the amount of \$80,000.00 to resolve the PAGA Claims
11 (hereinafter referred to as the “PAGA Settlement”). From this PAGA Settlement of \$80,000.00, there
12 is a deduction of attorneys’ fees in the amount of \$26,666.67 (which is one-third of the PAGA
13 Settlement), reimbursement of incurred costs in an amount not to exceed \$15,000, and Settlement
14 Administration Costs, which will not exceed \$3,000. (Settlement Agreement at § 5.01 – 5.03).³ After
15 these deductions, the amount remaining is the “PAGA Payment”, which is estimated to be \$35,333.33.

16 Of the PAGA Payment amount, seventy-five percent (75%) will be paid to the LWDA and the
17 remaining twenty-five percent (25%) will be paid to the PAGA Settlement Members (Settlement
18 Agreement at 5.04).⁴ This 75/25 allocation is required by Labor Code §2699 as explained by *ZB, N.A.*
19 *v. Superior Court* (2019) 8 Cal.5th 175.

20 The Individual PAGA Payment for each PAGA Settlement Member shall be based on the

21
22 ² As part of the settlement and in addition to the Gross Settlement Amount, Defendant has agreed to
23 separately settle Plaintiff’s individual claims which is set forth in a separate Individual Settlement
24 Agreement. The Individual Settlement Agreement is attached to the PAGA Settlement Agreement as
25 Exhibit B.

26 ³ In the event the Court approves less than One-Third of the PAGA Settlement Amount in Attorneys’
27 Fees or less than \$15,000 in Attorneys’ Expenses to Plaintiff’s Counsel, the unawarded difference will
28 be added to the PAGA Payment and not to Plaintiff’s Counsel or the Defendant (Settlement Agreement
at 5.02). In the event the Court approves less than \$3,000 to administer the settlement or if the actual
cost to administer the settlement is less than \$3,000, the difference will be added to the PAGA
Payment. (*Id.* at 5.03.)

⁴ “PAGA Settlement Member” means all current and former hourly or non-exempt employees
employed by Defendant in California between February 12, 2019 and April 30, 2021. (Settlement
Agreement at § 1.01(iii).).

1 number of pay periods worked by each PAGA Settlement Member during the PAGA Period as a
2 percentage of the total pay periods worked by all PAGA Settlement Members during the PAGA
3 Period. (Settlement Agreement at 5.04.) The PAGA Period is the time period from February 12, 2019
4 and April 30, 2021. (Settlement Agreement at § 1.01(iii).)

5 Defendant has represented to Plaintiff's Counsel the number of pay periods and PAGA
6 Settlement Members. Defendant represents that there are approximately 35 PAGA Settlement
7 Members who worked approximately 900 pay periods during the PAGA Period. (Settlement
8 Agreement at § 6.02).

9 Upon entry of Judgment and funding in full of the Settlement by Defendant, the Released
10 Parties shall be entitled to a release of any and all claims for civil penalties under PAGA arising during
11 the PAGA Period, based on the facts alleged in the operative complaint at the time of approval by
12 Plaintiff in the Action and Plaintiff's notice letter to the LWDA, and any resulting claim for attorneys'
13 fees and costs under PAGA, which occurred during the PAGA Period. ("PAGA Released Claims")
14 (Settlement Agreement at §1.01(xxiii).) This PAGA Released Claims in the Settlement Agreement
15 excludes all PAGA claims outside the PAGA Period, all PAGA claims not alleged in the operative
16 complaint and Plaintiff's notice letter to the LWDA, and all non-PAGA claims. (*Id.*) The Settlement
17 Agreement does not release any individual claims of any individuals other than Plaintiff. (*Id.*)

18 The Gross Settlement Amount shall be due by Defendant to the Settlement Administrator
19 within 30 days after the Effective Date. (Settlement Agreement at 6.04(c).)

20 Notice will be provided to the PAGA Settlement Members in the following manner: Defendant
21 will provide the necessary information about the PAGA Settlement Members to the Settlement
22 Administrator (Simpluris) within ten (10) days of the approval of the PAGA settlement by the Court.
23 (Settlement Agreement at §6.03(a)(1)). Within twenty-one (21) days after receipt of the PAGA
24 Settlement Amount from Defendant, the Settlement Administrator will issue to each PAGA Settlement
25 Member a check for their Individual PAGA Payment at their last known home address along with an
26 explanatory letter which will be mutually approved by the parties. (Settlement Agreement at §
27 6.03(a)(2)). Checks will remain negotiable for one hundred twenty (120) days. (*Id.* at § 6.04(d).) Any
28 checks returned as non-deliverable on or before the check cashing deadline will be sent promptly via

1 regular First-Class U.S. Mail to the forwarding address affixed thereto. (*Id.*) If no forwarding address
2 is provided, the Settlement Administrator will promptly attempt to determine the correct address using
3 a skip-trace, or other search using the name, address, Social Security number, phone number, credit
4 reporting and social media of the PAGA Settlement Member involved and will then perform a re-
5 mailing. (*Id.*) If a PAGA Settlement Member's check is not cashed within 120 days from the date of
6 their mailing, the funds from such uncashed checks will be paid to the State Controller's Office,
7 Unclaimed Property Division in the name of the absent PAGA Settlement Member, subject to Court
8 approval, and the PAGA Settlement Members shall remain bound by the Settlement. (*Id.*) The
9 Individual PAGA Payments are 100% penalties and shall be reported using IRS tax form 1099. (*Id.* at
10 § 6.04(b).)

11 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
12 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
13 for settlement approval as set forth in the accompanying Declaration of Shani O. Zakay in compliance
14 with Labor Code section 2699(1). In addition, Plaintiff shall submit to the LWDA a copy of the
15 Court's judgment and order approving the Settlement Agreement within ten (10) days after entry of
16 judgment or order.

17 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

18 The claim before this court is the representative claim under PAGA on behalf of the State of
19 California for civil penalties pursuant to the PAGA. The parties have agreed to settle this PAGA
20 action in its entirety after significant informal discovery and an arm's length mediation. (Declaration
21 of Shani O. Zakay, at ¶ 5.) The settlement is intended to fully and finally resolve the PAGA Released
22 Claims asserted by Plaintiff on behalf of the State of California. This is only a settlement of the PAGA
23 claims for civil penalties, and is not a class settlement and does not release the individual claims, if
24 any, of the PAGA Settlement Members. This settlement does not release any claim that is not a PAGA
25 claim.⁵ Attorneys' fees equal to one-third of the PAGA Settlement amount (\$26,666.67) and litigation
26 expenses in an amount not to exceed \$15,000 will also be paid to Plaintiff's Counsel as part of the
27

28 ⁵ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th at 196: "Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

1 settlement in accordance with California Labor Code § 2699(g)(1) as set forth in the Settlement
2 Agreement.⁶ Lastly, payment to the Settlement Administrator in an amount not to exceed \$3,000 to
3 perform the administrative duties to distribute the settlement money shall also be paid. (Declaration
4 of Shani O. Zakay, at ¶ 6.)

5 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT**
6 **OF THE PAGA CLAIM**

7 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
8 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
9 agency at the same time that it is submitted to the court.” Consequently, the parties respectfully ask
10 the Court to review and approve the settlement of the PAGA claims and the PAGA Payment to be
11 paid as part of the proposed settlement.

12 **A. The PAGA Settlement Amount To Be Paid Is Fair And Reasonable**

13 Plaintiff and his counsel believe that the PAGA Settlement amount is fair and reasonable and
14 therefore "shall" be reviewed and approved. The Labor and Workforce Development Agency has
15 released data on PAGA settlement amounts. After removing the outliers at the low and high end, the
16 average, total settlement amount of PAGA claims is approximately \$10,000. Here, the PAGA
17 Settlement Amount of \$80,000 is significantly more and constitutes approximately \$88.88 per pay
18 period. (Declaration of Zakay, at ¶ 9.)

19 California Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the
20 maximum civil penalty if based on the facts and circumstances to do otherwise would result in an
21 award that is "unjust, arbitrary and oppressive or confiscatory." Before and during the mediation,
22 Defendant argued, among other things, that it was unlikely that any Judge would award more than the
23 actual amounts owed on the claims, let alone the full \$100 or \$200 per violation. In *Carrington v.*
24 *Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal affirmed a judgment after trial
25 which only provided for a PAGA penalty of \$5 per pay period. Therefore, at trial, any PAGA penalties
26 awarded in this case could be significantly less than Plaintiff's calculation, even had Plaintiff prevailed

27 ⁶ As set forth in the accompanying Declaration of Shani O. Zakay, Plaintiff's Counsel incurred costs
28 in the current amount of \$5,220.02 which is less than the cost allocation in the Settlement
Agreement. See Declaration of Zakay at ¶ 17.

1 on the PAGA claim. Here, multiplying the number of violations identified, assumed, and extrapolated
2 by Plaintiff's expert (a maximum of 4,821 violations)⁷ by \$5 results in a total potential liability of
3 **\$24,105**. Further, multiplying the maximum number of pay periods (901) by \$5 results in a total
4 potential liability of **\$4,505**. Therefore, even assuming Plaintiff would have prevailed on all of his
5 claims in trial, the result obtained by Plaintiff in the Settlement exceeds the amount Plaintiff would
6 have recovered had the Court relied on *Carrington* in awarding the PAGA penalties. (Declaration of
7 Zakay at ¶ 9.)

8 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
9 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
10 from \$2,800,000 to \$500,000, a reduction of 82.2%, as the court found maximum penalties "unjust"
11 because the employees had suffered no injuries. Some trial courts have actually awarded no civil
12 penalties, even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016 Cal. App.
13 Unpub. 1489, *5-7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los
14 Angeles County Superior Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016
15 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

16 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of
17 the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist.
18 LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot
19 recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor
20 Code by the defendant."). Here, Plaintiff would need to prove that each PAGA Settlement Member
21 suffered a violation for each period the employee worked in relation to meal or rest period violations,
22 failure to pay minimum or overtime wages, failure to provide accurate itemized wage statements,
23 failure to pay wages when due, failed to provide suitable seating, and/or failure to maintain required
24 records.

25 Defendant maintains that Plaintiff and the PAGA Settlement Members were properly
26 compensated, and that it did not violate the Labor Code.

27
28 ⁷ Assuming 901 pay periods.

1 Most importantly and relevant to this case, Defendant argued that the Supreme Court decision
2 in *Brinker v. Superior Court*, 53 Cal.4th 1004 (2012), weakened, if not eliminated, Plaintiff's claims,
3 on liability, value, and discretion with respect to the PAGA penalties, as to the meal and rest period
4 claims. A major component of the penalties alleged to have been owed by Defendant are attributed to
5 non-compliant meal and rest breaks. Before and during the mediation, Defendant argued that
6 Defendant's policies and culture afforded the PAGA Settlement Members an opportunity to take
7 timely meal and rest breaks, and that employees like the Plaintiff *chose* not to take compliant breaks.
8 Specifically, Defendant's written policies encouraged PAGA Settlement Members to take meal
9 periods and rest breaks according to schedules compliant with the California Labor Code. The policy
10 further *required* employees who felt they were not provided an opportunity to take a meal or a rest
11 break to notify their supervisor immediately. Defendant argued, therefore, that under the *Brinker*
12 decision it has no liability for the missed breaks whatsoever. Defendant argued that it adopted and
13 strictly enforced lawful policies and afforded Plaintiff and the PAGA Settlement Members compliant
14 meal and rest breaks. Because Plaintiff's claims were largely based on the missed meal and rest breaks,
15 and because Defendant's policies were, indeed, compliant, this presented a very real concern for
16 Plaintiff. If successful, this defense could eliminate or substantially reduce any recovery under PAGA.
17 While Plaintiff believes that this defense, and others, could be overcome, Defendant maintains these
18 defenses have merit and therefore present a serious risk to recovery of penalties. (Declaration of Zakay
19 at ¶ 12).

20 Accordingly, Defendant disputes and denies Plaintiff's allegations and claims asserted in the
21 operative complaint which are resolved by the Settlement Agreement. Defendant asserted additional
22 defenses to the PAGA claim, not only as to liability but also as to the amount of the penalties.
23 Defendant could argue that no penalties prior to the PAGA notification should be awarded because
24 the violations were not intentional, and at least one Court has so ruled. In addition, Defendant argued
25 that any Court would substantially reduce the PAGA penalty awards in light of decisions like
26 *Carrington*. These defenses present a risk to the PAGA claim and the potential that some or all of the
27 PAGA penalties sought may not be awarded. (Declaration of Zakay at ¶ 13.)
28

1 Given Defendant's potential defenses to the violations at issue, the risks and costs of continued
2 litigation, Plaintiff and their attorneys believe that the PAGA Settlement is fair and reasonable.
3 (Declaration of Zakay at ¶13.) Plaintiff's Counsel have significant experience litigating wage and
4 hour claims including claims for PAGA penalties, and the PAGA Settlement here is similar to or
5 greater than similar settlements that courts have approved. (Declaration of Zakay at ¶ 14.) The PAGA
6 Settlement, along with the other terms of the proposed settlement, were negotiated by experienced
7 counsel at arm's length with the assistance of an experienced and reputable mediator, Hon. William C.
8 Pate (Ret.). (Declaration of Zakay at ¶ 14.)

9 As set forth in the accompanying Declaration of Shani O. Zakay, the LWDA has been provided
10 notice of this motion and the PAGA settlement. The decision of the LWDA to accept the PAGA
11 Settlement and not oppose the motion should be given considerable weight. This is not a situation
12 where the Court needs to be concerned about the rights of absent employees as in a class settlement,
13 as this PAGA-only settlement does not release the individual claims of absent employees, and the
14 LWDA is a sophisticated government entity that is more than able to look out for its own rights.

15 **B. The Remaining Settlement Terms Are Fair And Reasonable**

16 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
17 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
18 there are no class allegations for which Plaintiff seek approval, the approval provisions applicable to
19 class settlements under Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs
20 to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
21 herein, the settlement terms for attorneys' fees and costs are reasonable.

22 **VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

23 Plaintiff's Counsel seek approval of attorneys' fees from the PAGA settlement in the amount
24 of \$26,666.67 representing one-third of the \$80,000 PAGA Settlement amount. PAGA does not have
25 any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys'
26 fees and costs in this settlement is a matter of contract for a contingent representation. Nevertheless,
27 should this Court review the requested attorneys' fees, it is clear that the requested fees and costs are
28 reasonable.

1 First, the requested fees are justified by the result achieved. Plaintiff's Counsel negotiated a
2 recovery of \$80,000, and this result justifies the requested fees equal to one third of this recovery.
3 This percentage is within the standard contingent recovery percentage of one-third, and this percentage
4 is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.* (2016) 1
5 Cal.5th 480, 504.

6 Second, the fee award is justified by the work performed. As detailed in the accompanying
7 Declaration of Zakay at ¶ 18, Plaintiff's Counsels' current combined lodestar of \$53,772.50 exceeds
8 the requested fee amount of \$26,666.67, with additional work to be performed.

9 Finally, as to litigation expenses, Plaintiff's Counsel will be recovering litigation expenses in
10 the total amount of \$5,220.04 which is less than the \$15,000 allocation for costs in the Settlement
11 Agreement, so the difference of \$9,779.96 will be added to the PAGA Payment amount. These
12 expenses are documented in the accompanying Declaration of Zakay at ¶ 17.

13 VII. CONCLUSION

14 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA settlement
15 as set forth in the Settlement Agreement and enter the proposed order and judgment submitted
16 herewith.

17 Dated: September 8, 2021

ZAKAY LAW GROUP, APC

18 By:

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20 Shani O. Zakay
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