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Attorneys for Defendants
WEST COAST CHILL, INC., a Nevada corporation
and THE JOSEPH COMPANY INTERNATIONAL, a
California corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

MICHELLE GARCIA-VIGIL, individually,
and as a representative of other aggrieved
employees,

Plaintiff,

v.

WEST COAST CHILL, INC., a Nevada
corporation; THE JOSEPH COMPANY
INTERNATIONAL, a California
corporation and DOES 1 through 250,
inclusive.

Defendant.

CASE NO. 30-2016-00857926-CU-OE-CJC

Assigned For All Purposes To:

Judge: Hon. William D. Claster
Dept.: CX-102

**DEFENDANTS, WEST COAST CHILL
AND THE JOSEPH COMPANY
INTERNATIONAL'S NOTICE OF
SETTLEMENT AND REQUEST FOR
COURT APPROVAL OF PAGA
SETTLEMENT**

Hearing:

Date: September 11, 2018
Time: 11:00 a.m.
Dept: CX-102

Date of Filing: June 14, 2016
Trial Readiness Conference: June 1, 2018
Trial Date: June 11, 2018

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Plaintiff and Defendants have reached a settlement and have exchanged a draft settlement agreement. The settlement is contingent on the Court approving the PAGA portion of the settlement pursuant to *Labor Code Section 2699*. That Section does not provide any directions on how Court approval is to be sought/obtained, and thus Defendants submit this brief and the Declaration of Scott Berger in support of its request

1 that the Court approve the PAGA portion of the settlement.

2 **I. INTRODUCTION**

3 Plaintiff brought this action seeking damages from the companies that had previously
4 hired her as an independent contractor alleging that she should have been classified as an
5 employee and not an independent contractor. As a result, she sought alleged damages in
6 connection with that alleged misclassification including wrongful termination, unpaid
7 overtime, meal and rest breaks that were not provided, lack of paycheck stubs, and waiting
8 time penalties for failing to pay said damages when she was terminated. In addition, Plaintiff
9 made a related PAGA claim.

10 On April 25, 2018, the parties attended a mediation with retired Judge Enrique
11 Romero, at the conclusion of that mediation, he made a mediator's proposal for a total
12 settlement of \$50,000.00 with \$1,000.00 of that allocated to the settlement of Plaintiff's PAGA
13 claims only and that Plaintiff's claims against the Defendants would be dismissed with
14 prejudice, and that the PAGA claims of any third parties would be dismissed without prejudice
15 and the settlement would have no res judicata or collateral estoppel application to those claims.
16 The draft settlement agreement is attached hereto as Exhibit "A".

17 Defendants now seek the Court's approval of the settlement of the PAGA claims per
18 *Labor Code Sectoin 2699*.

19 **II. FACTS**

20 **A. JCI and WCC's Business And Hiring Of Plaintiff As Independent**
21 **Contractor**

22 As detailed in the attached Declaration, JCI's main asset/product is its self-chilling
23 "soda can" and the technology around it. To market and promote the self-chilling can, JCI
24 formulated a caffeine free energy drink to sell in its cans. WCC was founded and established
25 in or about 2012 for the sole purpose of promoting and marketing the self-chilling can via this
26 new energy drink.

27 In 2011/2012, WCC/JCI were moving into their new building. At the time, Plaintiff
28 was working as an independent contractor for a phone company providing sales services for

1 that company. Plaintiff sold a new phone system to WCC/JCI for that phone company.
2 WCC/JCI were impressed with Plaintiff's sales skills and offered to hire her as an independent
3 contractor for WCC doing sales work for WCC's new energy drink. Plaintiff accepted that
4 offer.

5 In early 2012, Plaintiff started to work as an independent contractor for WCC
6 providing marketing and sales services. For some time, Plaintiff continued to also provide
7 services as an independent contractor for the phone company that she had previously worked
8 for. Plaintiff was never prevented from offering her services to other companies. Plaintiff
9 provided WCC/JCI with two invoices each month for \$2,000 each in connection with the
10 services she worked. For the most part, Plaintiff set her own schedule, but typically worked
11 five (5) days a week, and less than forty (40) hours per week. No limitations were placed on
12 Plaintiff's right to take a lunch break or other rest breaks. In fact, Plaintiff was observed
13 taking regular extended lunch breaks throughout her time with WCC/JCI and also took
14 numerous daily rest breaks, which she took to enjoy her smoking habit.

15 Unfortunately, WCC ran into significant financial problems as sales of its energy drink
16 declined significantly. Starting in 2015, WCC started to cut its staff, which had reached a high
17 of approximately 30 employees and independent contractors. As WCC appreciated the
18 services that Plaintiff had provided, it delayed ending Plaintiff's contract as an independent
19 contractor when the initial terminations/layoffs were made in October and December of 2015.
20 Unfortunately, the financial problems continued, and in January of 2016, WCC finally had to
21 end Plaintiff's contract as well.

22 Prior to letting Plaintiff go, she had never complained to anyone in management about
23 her employment as an independent contractor.

24 **B. Plaintiff's Claims Against WCC/JCI**

25 On June 14, 2016, Plaintiff filed her Complaint against Defendants WCC/JCI,
26 including a PAGA cause of action. As to the PAGA claim, Plaintiff alleged that Defendants
27 WCC/JCI improperly classified its employees as independent contractors, failed to pay
28 overtime, failed to provide meal and rest breaks, failed to provide proper pay stubs, and

1 waiting time violations. As Plaintiff was terminated in January of 2016, the one year statute of
2 limitations limited Plaintiff's PAGA claim to the period from June of 2015 through January of
3 2016, or 14 pay periods.

4 As for Plaintiff's misclassification claim, the primary claim she made in this case,
5 however *Section 2699.5*, does not include *Labor Code Section 226.8* among the *Sections*
6 available to pursue a PAGA claim and in *Noe v. Superior Court* (2015) 237 Cal.App.4th 316,
7 the Court held that a violation of *Section 226.8* was not included in *Section §2699.5*, and was
8 thus not a PAGA violation.

9 As for Plaintiff's other alleged PAGA violations, during the period at issue, June of
10 2015 through January of 2016, Plaintiff did not work any overtime, as the Defendants did not
11 have enough work for Plaintiff to do to justify working over 8 hours in a day, or over 40 hours
12 in a week, it barely had any work for Plaintiff to do at all during that period. As for the lack of
13 breaks, Defendants did not limit Plaintiff's right to take lunch or rest breaks. Plaintiff took
14 daily lunch breaks, typically in excess of an hour long. In addition, Plaintiff took numerous
15 rest breaks, typically to smoke, and if Plaintiff didn't take a break it was because she elected
16 not to take a break, and not because Defendants precluded her from taking one. (See *Brinker*
17 *Restaurant Corp. v. Sup.Ct.* (Hohnbaum) (2012) 53 Cal. 4th 1004).

18 So Plaintiff's potential PAGA claims were really limited to her claims that because she
19 was allegedly misclassified as an independent contractor she was not given code compliant
20 paycheck stubs, and since she wasn't paid the damages associated with the lack of paycheck
21 stubs, she was entitled to waiting time violations. The maximum damages associated with
22 those two PAGA claims is \$5,500, which had the matter proceeded to trial, the Court would
23 have had the authority to award a lesser amount based on the facts and circumstances of this
24 particular case and to ensure that an award is not unjust, arbitrary and oppressive, or
25 confiscatory per *Labor Code Section 2699*.

26 As Plaintiff would have recovered approximately \$10,000 from Defendants in
27 connection with these two minor violations if proven at trial, a Court could easily deny or
28 substantially reduce its award of PAGA damages to Plaintiff in connection with those same

1 claims especially given the minor nature of these violations and the fact that the lack of
2 paycheck stubs arose from the fact that Defendants honestly believed that Plaintiff was an
3 independent contractor.

4 **III. POTENTIAL THIRD PARTY PAGA CLAIMS**

5 Plaintiff brought her PAGA cause of action on behalf of herself, and other aggrieved
6 employees. Very little to no discovery has been performed in this matter related to those
7 potential employees. As set forth in the attached Declaration, during the period in question
8 June 2015 to June 2016, Defendants identified three other independent contractors working for
9 them. One of those contractors stopped working in October of 2015, and the other in
10 December of 2015. Thus only one remains with the Defendants.

11 None of these other independent contractors worked similar schedules or performed
12 similar services for Defendants as did the Plaintiff. For example, Mr. Cecil never came to the
13 office during that period. He was a true consultant whose primary function was to make
14 introductions to possible capital investors. As for the one independent contractor that is still
15 employed by Defendants, Mr. Kinses' primary role for WCC was promoting the brand during
16 the weekend bar and club events that he already was producing prior to providing any services
17 to Defendants. Each of these individuals was truly a consultant.

18 Even if they were employees, the settlement does not release any potential PAGA
19 claim they may have, but rather dismisses those claims without prejudice, and thus does not
20 have any res judicata or collateral estoppel effect.

21 **IV. CONCLUSION**

22 The parties have reached a settlement agreement for the sum of \$50,000.00, with
23 \$1,000.00 allocated to Plaintiff's PAGA claim. Defendants request that the Court approve that
24 settlement.

25
26 Dated: May 9, 2018

MURTAUGH TREGLIA STERN & DEILY LLP

27
28 Bv: _____

Michael J. Murtaugh
Matthew W. Johnson
Attorneys for Defendants
WEST COAST CHILL, INC., a Nevada
corporation and THE JOSEPH COMPANY
INTERNATIONAL, a California corporation

DECLARATION OF SCOTT BERGER

I, Scott Berger, hereby declare and state as follows:

1. I am the Executive Vice President of Joseph Company International (“JCI”) a Defendant in this action, and the parent company for West Coast Chill, Inc. (“WCC”) the other Defendant in this action.

2. As the Executive Vice President, I am familiar with all of WCC’S and JCI’S independent contractors and employees and the services performed by both for WCC and JCI.

3. JCI’s main asset/product is its self-chilling “soda can” and the technology around it. To market and promote the self-chilling can, JCI formulated a caffeine free energy drink to sell in its cans. WCC was founded and established in or about 2012 for the sole purpose of promoting and marketing the self-chilling can via this new energy drink.

4. In 2011/2012, WCC/JCI were moving into their new building. At the time, Plaintiff was working as an independent contractor for a phone company providing sales services for that company. Plaintiff sold a new phone system to WCC/JCI for that phone company. WCC/JCI were impressed with Plaintiff’s sales skills and offered to hire her as an independent contractor for WCC doing sales work for WCC’s new energy drink. Plaintiff accepted that offer.

5. In early 2012, Plaintiff started to work as an independent contractor for WCC providing marketing and sales services. For some time, Plaintiff continued to also provide services as an independent contractor for the phone company that she had previously worked for. Plaintiff was never prevented from offering her services to other companies.

6. Plaintiff provided WCC/JCI with two invoices each month for \$2,000 each in connection with the services she performed. For the most part, Plaintiff set her own schedule, but typically worked five (5) days a week, and less than forty (40) hours per week.

1 7. No limitations were placed on Plaintiff's right to take a lunch break or other
2 rest breaks. In fact, Plaintiff was observed taking regular extended lunch breaks throughout
3 her time with WCC/JCI and also took numerous daily rest breaks, which she took to enjoy her
4 smoking habit.

5 8. Unfortunately, WCC ran into significant financial problems as sales of its
6 energy drink declined significantly. Starting in 2015, WCC started to cut its staff, which had
7 reached a high of approximately 30 employees and independent contractors.

8 9. As WCC appreciated the services that Plaintiff had provided, it delayed ending
9 Plaintiff's contract as an independent contractor when the initial terminations/layoffs were
10 made in October and December of 2015. Unfortunately, the financial problems continued, and
11 in January of 2016, WCC finally had to end Plaintiff's contract as well. During that period of
12 time, despite the fact that Defendants maintained their contract with Plaintiff, Defendants had
13 very little work for Plaintiff to actually perform.

14 10. Prior to letting Plaintiff go, she had never complained to anyone in management
15 about her employment as an independent contractor.

16 11. Defendants have identified three other independent contractors that provided
17 services for the Defendants from June 2015 to June 2016. One of those contractors stopped
18 working in October of 2015, and the other in December of 2015. None of these other
19 independent contractors worked similar schedules or performed similar services for
20 Defendants as did the Plaintiff.

21 12. For example, Mr. Cecil never came to the office during that period. He was a
22 true consultant whose primary function was to make introductions to possible capital investors.

23 13. As for the one independent contractor that is still employed by Defendants, Mr.
24 Kinses' primary role for WCC is/was promoting the brand during the weekend bar and club
25 events that he already was producing prior to providing any services to Defendants.

26 14. While Defendants content and honestly believe that Plaintiff was an
27 independent contractor, each of these other individuals was truly a consultant.

28 I declare under penalty of perjury under the laws of the State of California that the

1 foregoing is true and correct.

2 Executed this _____ day of May, 2018 in Irvine, California.

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Scott Berger

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