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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF ORANGE

12 ROBERT ONOFRE, as an aggrieved employee
pursuant to the Private Attorneys General Act
13 (“PAGA”),

14 Plaintiffs,

15 vs.

16 ANAHEIM MAJESTIC GARDEN HOTEL, a
California corporation; PHR MANAGEMENT,
17 INC., a California corporation; KEN REAL
ESTATE LEASE LTD., a business entity of
18 unknown form; and DOES 1 through 10,
inclusive,

19 Defendants.

20
21 MIGUEL ZALDIVAR AVILA, individually
and on behalf of all others similarly situated,

22 Plaintiffs,

23 vs.

24 ANAHEIM MAJESTIC GARDEN HOTEL,
business form unknown; TSUBAKI HOTEL
25 COLLECTION, business form unknown, and
DOES 1-50, inclusive,

26 Defendants.
27
28

Case No.: 30-2016-00861544-CU-OE-CXC

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: May 23, 2019
Time: 2:00 p.m.
Place: Department CX102

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 8, 2019, Plaintiffs filed a motion for preliminary approval of their class action settlement with Defendants Anaheim Majestic Garden Hotel, PHR Management, Inc., and Ken Real Estate Lease Ltd. On April 10, 2019, the Court directed Plaintiffs to file supplemental briefing that: (1) explains why Defendant Tsubaki Hotel Collection is not included in the Settlement; (2) identifies how many people are in the Wage Statement Class; (3) explains why members of the Wage Statement Class should receive 20% of the Net Settlement Amount; (4) explains why the Settlement characterizes the consideration as 25% wages and 75% non-wages when the PAGA payment only constitutes \$50,000 of the \$1,850,000 settlement; (5) identifies the proposed Settlement Administrator; and (6) explains how the Parties intend to proceed procedurally given that this Settlement covers two actions. In addition to supplemental briefing, the Court directed the Parties to amend the Settlement and Class Notice.

Plaintiffs respectfully submit this supplemental memorandum of points and authorities to address the above items, and to summarize how the Parties amended the Settlement and Class Notice to address the Court's concerns.

II. ARGUMENT

A. Tsubaki Hotel Collection Is a Fictitious Business Name That is No Longer in Use by Defendants

Based on information provided by Defendants' counsel, Tsubaki Hotel Collection ("THC") was a fictitious business name that is no longer in use and never existed as a separate entity. (See Supplemental Declaration of Raul Perez ["Perez Decl."] ¶ 2, Ex. A.) THC is not named as a defendant in the *Onofre* Action. In the *Avila* action, Defendant Ken Real Estate Lease Ltd. responded to Plaintiffs' First Amended Complaint by stating that it does "business as Anaheim Majestic Garden Hotel and Tsubaki Hotel Collection."

B. There are Approximately 175 Members of the Wage Statement Class

Based on information provided by Defendants' counsel, and scaling to the June 30, 2015 to September 30, 2016 period when Defendants issued wage statements with an incorrect employer name, Plaintiffs estimate that there are approximately 175 Wage Statement Class members and approximately

6,568 such wage statements issued during this period.

C. Allocating Twenty Percent of the Net Settlement Fund to the Wage Statement Claim Is Fair and Reasonable In Light of Defendants' Exposure Balanced Against the Risks of Continued Litigation

The Court correctly notes that Plaintiffs' wage statement claim constitutes approximately 5.7% of Defendants' maximum potential exposure for all claims at issue. Nevertheless, Plaintiffs believe it is appropriate to allocate 20% of the Net Settlement Amount to the wage statement claim because: (1) Plaintiffs' claims are not equally likely to be certified or to succeed at trial; (2) Plaintiffs also seek PAGA penalties for wage statement violations; i.e., the overall value of the wage statement claim includes PAGA penalties; and (3) because only 25% (or \$625,000) of Defendants' maximum potential exposure for PAGA penalties (\$2,500,000) would have been paid to employees, the wage statement claim constitutes a larger percentage of the total damages/penalties specifically available for the class.

As stated above, in Plaintiffs' estimation the wage statement claim is the most likely of their claims to be certified, and to ultimately succeed at trial. Plaintiffs thus believe that the wage statement is one of their stronger claims, and comparatively speaking, constitutes more than 5.7% of Defendants' discounted exposure analysis; i.e., discounted by the risks of continued litigation.

Claim	Maximum Potential Exposure	Likelihood of Recovering Full Damages/Penalties	Discounted Amount
Minimum Wage Claim	\$6,825.00	60%	\$4,095.00
Business Expense Reimbursement Claim	\$1,251.25	60%	\$750.75
Meal & Rest Period Claims	\$2,486,900.00	55%	\$1,367,795.00
Waiting-Time Penalties	\$396,240.00	45%	\$178,308.00
Wage Statement Penalties	\$328,400.00	75%	\$246,300.00
PAGA Penalties	\$2,500,000.00	2%	\$50,000.00
Total	\$5,719,616.25		\$1,847,248.75

Separately, because 75% of Defendants' estimated exposure for PAGA penalties would have been paid to the LWDA rather than to the employees, the actual amount that would be recoverable for employees is approximately \$1,809,748.75, of which the wage statement claim constitutes roughly 14%, as shown in the chart below.

Claim	Discounted Amount	Percentage of Discounted Amount
Minimum Wage Claim	\$4,095.00	< 0.2%
Business Expense Reimbursement Claim	\$750.75	< 0.2%
Meal & Rest Period Claims	\$1,367,795.00	≈ 75.5%
Waiting-Time Penalties	\$178,308.00	≈ 9.8%
Wage Statement Penalties	\$246,300.00	≈ 13.6%
25% of PAGA Penalties	\$12,500.00	≈ 0.7%
Total	\$1,809,748.75	≈ 100%

Moreover, because the default PAGA penalty for initial violations (\$100 for each initial violation) is double the default penalty for initial wage statement violations (\$50 for each initial violation), Plaintiffs determined that the wage statement claim (inclusive of PAGA penalties) should constitute 20% of the remedies available to Class Members. Although Defendants dispute the above calculations, they nevertheless deferred to Plaintiffs on the allocation of the Net Settlement Amount to the wage statement claim.

D. The Court Should Preliminarily Approve the Parties' PAGA Settlement

The Parties have agreed to characterize 75% of the consideration provided by the Settlement as “non-wages,” which consists not just PAGA penalties, but also penalties for wage statement violations, waiting-time penalties, damages for business expense reimbursement, etc.

Plaintiffs believe that a \$50,000 settlement of their PAGA claim is fair and reasonable in light of the risks of continued litigation, as highlighted by the California Court of Appeal’s recent decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018) (awarding only 0.2% of maximum penalties as to do otherwise would be “unjust, arbitrary and oppressive, or confiscatory.”) In *Carrington*, during the penalty phase of trial, the plaintiff requested PAGA penalties in the amount of approximately \$70 million. The trial court instead awarded only \$150,000—**or 0.21% of the maximum**—and stated this reduction was warranted because imposing the maximum penalty would be “unjust, arbitrary, and oppressive” based on Starbucks’s “good faith attempts” to comply with meal period obligations and because the court found the violations were minimal. *Starbucks*, 30 Cal. App. 5th at 517. The Court of Appeal affirmed the lower court’s reduced award of a \$150,000 penalty under PAGA. *Id.* at 529.

Likewise, in *Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030 (N.D. Cal. 2016), the Court found that a \$1 million PAGA settlement was fair and reasonable in light of the unsettled nature of the law, resulting in a

1 \$2.52 per pay period award to the aggrieved employees (there were 397,110 pay periods in a \$1 million
2 PAGA settlement, resulting in a 97.5% reduction from the maximum). In *Fleming v. Covidien*, ED CV
3 10-01487 RGK (OPx), 2011 WL 7563047 (C.D. Cal. 2011), the Court reduced the potential penalties by
4 over 82%, awarding \$500,000 for 28,742 pay periods at issue, or approximately \$17.40 per pay period.
5 See also, e.g., *Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming
6 30% reduction under specified PAGA claim where the employer produced evidence that it took its
7 obligations seriously); *Elder v. Schwan Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct.
8 App. May 12, 2011) (reversing trial court decision denying any civil penalties where violations had been
9 proven, remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil
10 penalties); *Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17
11 (N.D. Cal. June 15, 2012) (denying PAGA penalties for violation of California Labor Code § 226 as
12 redundant with recovery on a class basis pursuant to California Labor Code § 226, directly); *Covidien*,
13 2011 WL 7563047 at *4 (reducing PAGA penalties from \$2.8 million to \$500,000.00); *Aguirre v.*
14 *Genesis Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30,
15 2013) (reducing penalty for past PAGA violations from \$1.8 million to \$500,000.00, after rejecting
16 numerous other PAGA claims).

17 Plaintiffs therefore determined an appropriate range of settlement for PAGA penalties as a
18 percentage of the settlement range that was consistent with other hybrid class/PAGA settlements
19 approved by California courts. See *Dearaujo v. Regis Corp.*, No. 2:14-cv-01408-KJM-AC (E.D. Cal.
20 June 29, 2016), 2016 WL 3549473 at *3 (preliminarily approving \$1.95 million settlement containing
21 \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-
22 0324 AWI SKO, 2012 WL 5364575 at *7 (E.D. Cal. Oct. 31, 2012) (approving \$3.9 million settlement
23 containing \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Chu v. Wells Fargo Invst., LLC*, No.
24 C 05-4526 MHP (N.D. Cal Feb. 16, 2011), 2011 WL 672645 at *1 (approving \$6.9 million settlement
25 containing \$10,000 PAGA penalties with \$7,500 paid to LWDA); *Guerrero v. R.R. Donnelley & Sons*
26 *Co.*, Case No. RIC 10005196 (Riverside County Super. Ct. July 16, 2013; Judge Matthew C. Perantoni)
27 (gross settlement fund of \$1,100,000, of which \$3,000 (or 0.3%) was allocated to the settlement of
28 PAGA penalties); *Parra v. Aero Port Services, Inc.*, No. BC483451 (L.A. County Super. Ct. April 20,

2015; Judge Jane Johnson) (gross settlement fund of approximately \$1,458,900, of which \$5,000 (or 0.3%) was allocated to the settlement of PAGA penalties); *Thompson v. Smart & Final, Inc.*, No. BC497198 (L.A. County Super. Ct. Nov. 18, 2014; Judge William F. Highberger) (gross settlement fund of \$3,095,000, of which approximately \$13,333 (or 0.4%) was allocated to the settlement of PAGA penalties); *Chavez v. Vallarta Food Enterprises, Inc.*, No. BC490630 (L.A. County Super. Ct. Nov. 10, 2014; Judge William F. Highberger) (gross settlement fund of \$1,545,900, of which \$10,000 (or 0.6%) was allocated to the settlement of PAGA penalties); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013; Judge Kenneth R. Freeman) (gross settlement fund of \$1,535,000, of which \$1,000 (or 0.1%) was allocated to the settlement of PAGA penalties).

Where PAGA penalties are negotiated in good faith and “there is no indication that [the] amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) (“[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.”).

E. The Parties Have Selected ILYM Group, Inc. to Administer the Settlement

The Parties have selected ILYM Group, Inc. (“ILYM”) to administer the Settlement. The Parties have revised the Class Notice and Proposed Order to identify ILYM as the Settlement Administrator.

F. Judgment in the Onofre Action Followed by a Dismissal with Prejudice of the Avila Action

If the Court grants preliminary and final approval of the Settlement, Plaintiff Onofre will ask the Court to enter a judgment in this action approving the terms of the Settlement and barring Class Members from re-litigating the Released Claims. Plaintiff Avila will then seek to dismiss his action with prejudice as to the Released Claims.

G. The Parties Have Revised the Settlement and Class Notice to Address the Court’s Concerns

The Parties have met and conferred and have prepared an amendment to the Settlement (“Amendment”) to address the Court’s concerns. The Amendment and attached Amended Notice of

1 Class Action Settlement (“Class Notice”) make the following changes:

- 2 • The Class Notice identifies ILYM as the Settlement Administrator. *See* Perez Decl., Ex.
3 B, Amendment, Ex. A.
- 4 • The Amendment eliminates the requirement for Class Member objectors to make
5 themselves available for deposition. *See* Amendment ¶ 2.
- 6 • The Amendment creates an Exclusion Form for Class Members to complete and submit
7 to the Settlement Administrator to opt out of the Settlement Class. *See* Amendment, Ex.
8 B.
- 9 • The Amendment gives Class Members 45 days to opt out or object to the Settlement
10 (“Response Deadline”). Class Members who receive a re-mailed Class Notice will have
11 between the later of an additional fifteen calendar days, or the Response Deadline, to
12 submit a Request for Exclusion or an objection to the Settlement. *See* Amendment ¶ 4.
- 13 • The Amendment proposes to tender unclaimed funds to the State Controller’s Office,
14 Unclaimed Property Division. *See* Amendment ¶ 8.
- 15 • The revised Class Notice now states under “Summary of the Proposed Settlement
16 Terms” that the payments from the Settlement are “up to” the requested amounts. *See*
17 Amendment, Ex. A.
- 18 • The revised Class Notice states that 25% of individual payments will be allocated as
19 wages, and 75% will be allocated as non-wages. *See* Amendment, Ex. A.
- 20 • The revised Class Notice explains how Class Members can access the files for this
21 action on the Court’s website, and includes the appropriate links to click so the Class
22 Member can enter into the case number. *See* Amendment, Ex. A.

23 **III. CONCLUSION**

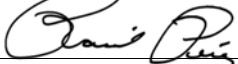
24 The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately
25 presented the materials and information necessary for preliminary approval, the Parties request that the
26 Court preliminarily approve the settlement.

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Dated: May 14, 2019

Respectfully submitted,

By:  _____

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