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individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERRA J. TUPPER, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

NATIONAL PSYCHIATRIC CARE AND REHABILITATION SERVICES, INC.; FAIR OAKS RESIDENTIAL TREATMENT FACILITY LLC; NATIONAL HOME HEALTH SERVICES, INC.; and DOES 1 through 20, inclusive,

Defendants.

Case No. 34-2022-00326696

Assigned for all purposes to
Hon. Lauri A. Damrell, Dept. 28

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

Date: December 1, 2023
Time: 9:00 a.m.
Dept: 28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Terra J. Tupper ("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 National Psychiatric Care and Rehabilitation, Inc. ("Defendant")[1] in the Gross Settlement Amount of $318,000.00. Plaintiff alleges approximately 275 aggrieved employees who worked for Defendant that were allegedly not paid at least minimum wages for all hours worked, not paid overtime compensation, not provided with meal periods or compensation in lieu thereof, not provided with rest breaks or compensation in lieu thereof, not provided with accurate wage statements, were not reimbursed for Defendant's necessary business expenses, and were not paid all wages owed upon separation of employment.

Under Labor Code § 2699(l)(2), the Court must review and approve any proposed PAGA settlement. Here, the proposed Settlement is sufficient and should be approved by the Court. The Settlement Agreement is attached to the Declaration of Fawn F. Bekam ("Bekam Decl.") as **Exhibit 2**, and the proposed letter to be sent to the aggrieved employees is attached thereto as **Exhibit 4**. Plaintiff now seeks this Court's approval of the Settlement terms.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 14, 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* Bekam Decl., ¶ 3, Exhibit 1. 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). *See* Bekam Decl. at ¶ 4.

On September 14, 2022 Plaintiff filed her Complaint as a class action lawsuit, alleging that, Defendant failed to: (1) pay minimum wages, (2) pay overtime wages, (3) provide lawful meal

[1] The settlement is made between Defendant National Psychiatric Care and Rehabilitation, Inc. and the other defendants, Fair Oaks Residential Treatment Facility LLC and National Home Health Services, Inc., were dismissed.

periods or compensation in lieu thereof, (4) authorize or permit lawful rest breaks or provide compensation in lieu thereof, (5) reimburse class members for Defendant's Necessary Business expenses, (6) provide accurate itemized wage statements, (7) timely pay all wages during employment, (8) pay all wages timely upon separation of employment and, (9) abide by the requirements of California Business and Professions Code Section 17200 *et seq. See* Complaint filed 09/14/2022. Plaintiff originally named as defendants Fair Oaks Residential Treatment Facility LLC and National Home Health Services, Inc., but these defendants contended that they were not Plaintiff's true employer, prompting Plaintiff to dismiss Fair Oaks Residential Treatment Facility LLC and National Home Health Services, Inc. *See* Order Granting Request for Dismissal of Defendants Fair Oaks Residential Treatment Facility LLC and National Home Health Services, Inc. Without Prejudice filed 02/07/2023. Defendants disputed all allegations in the Complaint.

Plaintiff filed a First Amended Complaint on November 30, 2022, adding a cause of action for Enforcement of Labor Code Section 2698 *et seq.*, ("PAGA"). *See* Amended Complaint First filed 11/30/2022. Defendants disputed all allegations in the First Amended Complaint.

Through informal document production, Plaintiff received Defendant's policy documents, employee time records and pay records, and Plaintiff's personnel file. Bekam Decl. at ¶ 5. Plaintiff's counsel then reviewed timekeeping and payroll records and compared them to pay records to identify potential violations. *Id.* The Parties attended mediation with Hon. Carl J. West (Ret.) on June 20, 2023, and were able to reach a settlement. *Id.* at ¶ 6.

On September 5, 2023, the parties fully executed a joint stipulation of settlement. *Id.* at ¶ 8, Exhibit 2. Plaintiff provided notice of the Settlement to the LWDA and served a copy of the motion on the LWDA. *Id.* at ¶ 9, Exhibit 3.

IV. PAGA REQUIREMENTS

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

PAGA was enacted to allow enforcement of the Labor Code and recovery of penalties by the State and by private individuals who have been aggrieved by their employers. The statute calls for 75% of any penalties recovered to be paid to California's LWDA and the remaining 25% to the aggrieved employees (Cal. Lab. Code § 2699(i) (2016)).

In order to enforce and seek penalties under PAGA in a civil action, an aggrieved employee must first provide written notice to the LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the employer has violated. *See* Cal. Labor Code§ 2699.3(a)(l)(A) (2016). Once the LWDA notifies the aggrieved employee that it does not intend to investigate the alleged violations, or if the LWDA does not respond within a certain time period, the3ggrieveed employee is then allowed to proceed in a civil action against the employer on behalf of the LWDA and all other similarly aggrieved employees. *See* Cal. Labor Code § 2699.3(a)(2)(A) (2016).

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

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

IV. THE SETTLEMENT TERMS AND DISTRIBUTION OF PENALTIES

The Parties have agreed that Defendant will pay a total settlement amount of $318,000.00 (the "Gross Settlement Amount"). *See* Settlement Agreement at § 3.1. From this amount, up to one-third (1/3) of the Gross Settlement Amount, or $106,000.00, is allocated to attorneys' fees and up to $15,000.00 to actual litigation costs (referred to as PAGA Counsel Litigation Expenses Payment). *See* Settlement Agreement at § 3.2.1. To date, Plaintiff's counsel has spent $12,230.55 in actual litigation costs and incurred $103,020.00 in attorneys' fees. *See* Bekam Decl. at ¶¶ 28-29, Exhibit 5. The Settlement allocates up to $3,950.00 to payment for Phoenix Settlement Administrators' costs associated with administration of the Settlement. *See* Settlement Agreement at § 3.2.3. The Settlement also allocates up to $10,000.00 to Plaintiff as an enhancement for her work on this matter and for a general release and waiver of Civil Code § 1542 protections. *See* Settlement Agreement at 3.2.2.

After deducting the attorneys' fees and costs (a total of $118,230.55), Settlement Administrator's costs ($3,950.00), and Plaintiff's Enhancement Award ($10,000.00), the remaining fund ("Net Settlement Amount") totals $185,819.45. Of this Net Settlement Amount, 75% will be paid to the LWDA ("LWDA PAGA Payment") and 25% to the PAGA Employees ("Employee Amount"). *See* Settlement Agreement at § 3.2.4. This means that $139,364.59 will go to the LWDA and $46,454.86 will go to the Aggrieved Employees. "Aggrieved Employees" means and refers to all current and former non-exempt employees who worked at least one pay period for NPCRS in California at any time during the PAGA period of September 14, 2021 to August 19, 2023. *See* Settlement Agreement at §§ 1.4 & 1.20.

Each Aggrieved Employee will receive a pro rata portion of the Employee Amount, determined based on the pay periods that he or she worked for Defendant in the State of California during the PAGA Period, to be calculated as follows: the Employee Amount will be divided by the total number of Pay Periods of all Aggrieved Employees to yield the "Per Pay Period Amount," and then each PAGA Employee's individual number of Pay Periods will be multiplied by the Per Pay Period Amount to yield his or her "Individual Settlement Payment." Individual Settlement Payments shall be paid to Aggrieved Employees by way of a single check to each Aggrieved

Employee ("Individual Settlement Check"). *See* Settlement Agreement at 3.2.4.1. All Aggrieved Employees' Payments will be characterized as penalties for tax purposes and reported on IRS Form 1099. *See* Settlement Agreement at 3.2.4.2.

The Settlement Administrator will disburse Individual PAGA Payments to each Aggrieved Employee to the last known physical address on file with Defendant in its regularly maintained records. *See* Settlement Agreement at §§ 1.5 & 4.2. Prior to this disbursement, the Settlement Administrator shall check the addresses provided using the National Change of Address database. *See* Settlement Agreement at § 4.4.1. For any returned payments without a forwarding address, the Settlement Administrator shall run a skip trace. *See* Settlement Agreement at 4.4.1. Aggrieved Employees will receive a letter along with their Individual Settlement Check explaining the reason for the payment, the content of which is being simultaneously submitted to the Court for approval. *See* Bekam Decl. at ¶ 10, Exhibit 4. All funds not claimed within 180 days of mailing of payment shall be sent to the California State Controller's Office Unclaimed Property Fund with an identification of the amount of unclaimed funds attributable to each PAGA Employee. *See* Settlement Agreement at § 4.4.3.

In exchange for the settlement payment, the Aggrieved Employees will release the "Released Parties" meaning "NPCRS and each of its future, former and present parent companies, divisions, real or alleged alter egos, real or alleged joint employers, agents (including, without limitation, any investment bankers, accountants, managing agents, investors, partners, administrators, insurers, reinsurers, attorneys, directors, officers, and employees), shareholders, owners, members, predecessors, successors, assigns, subsidiaries, and affiliates" from "all claims alleged or could have been alleged based on the facts alleged in the Operative Complaint and/or the PAGA Notice, which arose during the PAGA Period." *See* Settlement Agreement at §§ 1.27 & 5.2. Plaintiff separately will generally release the Released Parties and waive Civil Code § 1542 protections. *See* Settlement Agreement at §§ 5.1.

If the number of pay periods exceeds 5,300 by more than 10%, there will be a pro rata adjustment to the Gross Settlement Amount per additional pay period. *See* Settlement Agreement at § 8. Defendant has confirmed that the number of pay periods does not exceed 110% of 5,300.

V. THE SETTLEMENT IS FAIR AND REASONABLE

A. Standard for Approval

PAGA settlements must be "fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." *Moniz v. Adecco USA, Inc*., 72 Cal.App.5th 56, 77 (2021). The court must find that the plaintiff "has adequately represented the state's interests, and hence the public interest." *Id.* at 89. The LWDA must be notified of the settlement and be given an opportunity to object. The court may look to parallel class action guidelines to determine what is "fair, adequate and reasonable." *Kullar v. Foot Locker Retail,* 168 Cal.App.4th 116, 126 (2008). In that analysis, the court has "broad discretion in making this determination." *In re Microsoft I-V Cases,* 135 Cal.App.4th 706, 723 (2006). Relevant factors may include "the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation … the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant …." *Dunk v. Ford Motor Co*., 48 Cal.App.4th 1794, 1801 (1996).

B. The Settlement Meets the Standard for Approval

Here, the $318,000.00 Gross Settlement Amount is reasonable for a group of approximately 271 employees. A penalty of $318,000.00 is large enough to address alleged past violations and deter future violations. The settlement amount is equivalent to a penalty of about $1,156.36 per employee. At the same time, the penalty amount is not so large as to be unjust, oppressive or confiscatory, considering the company's potential exposure explained below. Bekam Decl. at ¶ 11. The Settlement Sum is also reasonable in light of the facts of the foregoing action, the real risk that no PAGA penalties would be paid, and inherent risks and uncertainties associated with PAGA claims. *Id.* at ¶ 12.

Plaintiff calculated the potential exposure at the initial violation rate of $100.00 per pay period as follows: 5,300 x $100.00 per pay period is $530,000.00 Bekam Decl. at ¶ 13. If the Court stacked different types of penalties in each pay period, Plaintiff calculated the exposure as follows:

a. 5,300 pay periods x $100 per pay period x 100% violation rate = $530,000.00 for rest break violations, assuming Defendant enforced a policy of requiring employees to remain on premises during rest periods and that policy was illegal;

b. 5,300 pay periods x $100 per pay period x 32.3% violation rate = $171,000.00 for meal period violations, assuming Defendant's on-duty meal period agreements were invalid;

c. 5,300 pay periods x $100 per pay period x 100% violation rate = $530,000.00 for failure to pay wages for time spent undergoing off-the-clock COVID screenings;

d. 5,300 pay periods x $100 per pay period x 100% violation rate =$530,000.00 for failure to provide accurate wage statements; and

e. 149 pay periods x $100 per pay period x 100% violate rate= $80,000.00 for failure to pay all wages due upon separation of employment.

Id. Defendant disputes that stacking would apply.

Further, Defendant raised a number of arguments during settlement negotiations and provided evidence that could have defeated Plaintiff's claims. Bekam Decl. at ¶ 14. For example, Defendant argued that employees were instructed to conduct COVID-19 screenings after clocking in, and any deviance from that instruction would be highly individualized. *Id.* Regarding meal and rest violations, Plaintiff argued that Defendant maintained an illegal policy and practice of requiring employees to remain on premises during meal and rest periods. *Id.* Defendant responded by citing policy documents that allegedly authorized compliant meal and rest periods and arguing that the nature of employees' work required them to remain on-duty during meal periods. *Id.*

Another crucial factor in evaluating the value of a PAGA-only case is that all PAGA awards are discretionary and can be reduced by the Court. *Id.* at ¶ 15. Under Labor Code § 2699(e)(2), the Court can reduce the PAGA penalties "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." In other words, were this matter to go to trial, any award granted would be at the discretion of the Court. Bekam Decl. at ¶ 15. In settling this case, Plaintiff recognizes that, although she believes there would be no persuasive grounds to reduce the penalties, the Court could determine otherwise and significantly reduce the PAGA penalties, especially with such a small employer. *Id*. The wide range of potential recovery and the additional delays and risks of trial justified settling for a reasonable amount of recovery. *Id*.

VI. CONCLUSION

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

Dated: November 1, 2023

AEGIS LAW FIRM, PC

By ______________________
Fawn F. Bekam
Attorneys for Plaintiff Terra J. Tupper