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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

LAVONTRA BREAUX, in a Representative capacity only, and on behalf of other members of the public similarly situated Plaintiff, v. L'OCCITANE, INC., a California Corporation; and DOES 1-10, inclusive Defendant	CASE NO. 30-2023-01311136-CU-OE-CXC **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION RE: *UNOPPOSED* PAGA APPROVAL** Date: April 3, 2025 Time: 2:00 p.m. Dept.: CX-104 Judge: Hon. Melissa R. McCormick

I. SUPPLEMENTAL BRIEFING

This is a"Wage and Hour" representative action brought pursuant to the Private Attorney General Act ("PAGA") by LAVONTRA BREAUX ("Plaintiff" or "BREAUX") against THE L'OCCITANE, INC. ("Defendant").

On **November 21, 2024**, the Court asked for supplemental briefing regarding Plaintiff's motion for PAGA settlement approval. (See ROA # 54). The Court requested additional information and changes to the proposed Settlement documents.

Herein, Plaintiff provides Revised Settlement documents in the parties' attempt to address all issues raised in the Court's minute order. An amendment to the Settlement Agreement is attached to the declaration of Eric K. Yaeckel as **Exhibit A**. A revised Notice to the PAGA Employees along with a "redlined" version is attached as **Exhibits B and C**. A declaration of Lavantra Breaux and a Proposed Order and Judgment is also being concurrently filed. The LWDA has been served with all documents and notified of the hearing. (See Proof of Service of LWDA).

II. ARGUMENT

The parties have now jointly attempted to address all the issues in the Court's prior ruling. For ease of reference, the headers are meant to track each issue pointed out in the minute order (ROA #54), in the same order.

A. THE PARTIES AMENDED SETTLEMENT AGREEMENT

This is intended to address points 1-4, in the Court's Minute Order.

The parties have entered into a amended agreement that limits the scope of release, and redefines some of the terms questioned by the Court. (See **Exhibit A**).

B. HIGH AND LOW AMOUNTS AND COMPENSATION TO PLAINTIFF

This is intended to address point 5, in the Court's Minute Order.

The settlement administrator has not yet calculated the exact amounts owed to each aggrieved employees, as that is not set to occur until after settlement approval. However, there are estimated to be 325 employees and 6,685 total pay periods in the PAGA period. Plaintiff's original motion estimated approximately $22,605.86 would be the employees 25% share of the PAGA allocation. Using these numbers a person who worked only one pay period would recover $3.38. An employee who worked throughout the PAGA period (i.e. 48 pay periods) would recover $162.24. (See Supplemental Yaeckel decl.¶ 3).

Pursuant to the parties Agreement, Plaintiff will receive her share of the PAGA recovery as an aggrieved employee. Based on the dates of her employment, it is estimated she worked approximately 21 pay periods during the PAGA period. That would result in an approximate recovery of $70.98. (See Supplemental Yaeckel decl.¶ 4).

Moreover, Plaintiff also entered into a separate confidential settlement agreement with Defendants which was intended to address claims she raised that were **not** related to the wage and hour claims in the instant action. Specifically, Plaintiff raised allegations that she was sexually harassed and assaulted by a third party vendor who was present at the worksite. She claimed the company did not adequately protect her nor did it adequately investigate her complaints on this issue. Had this matter not globally settled at mediation, Plaintiff would have separately pursued these individual claims in arbitration. (See Supplemental Yaeckel decl.¶ 5).

Please Note: while the terms are confidential, and the parties contend it is not relevant to this settlement, the parties separate individual settlement agreement can be lodged (but not filed) with the Court for its review, upon request.

C. SUMMARY OF CLAIMS AND ESTIMATES OF POTENTIAL PENALTIES

This is intended to address point 6, in the Court's Minute Order.

Prior to Settlement, Plaintiff identified the strengths and weaknesses of each claim and provided this information to the mediator and Defendant. The claims and potential damages on each are summarized as follows. After accounting for the relevant controlling law on PAGA claims, as set forth below, Plaintiff's counsel calculated a realistic maximum liability in a case of this type would be in the range of $200,000.00 to $300,000.00. (Supplemental Yaeckel decl. ¶¶ 6-23).

1. Unpaid Wages and Overtime Claims

Plaintiff's unpaid wages (and unpaid overtime) claims were centered around the allegation that employees were under employer control, but were instructed not to report all time worked. Plaintiff (as a manager) was also required to perform some administrative tasks outside of work hours. Finally, Plaintiff claimed Defendant failed to calculate the value of certain non-discretionary bonuses (Locci rewards and "holiday bonus") into the regular rate of pay for paying overtime. (Supplemental Yaeckel decl. ¶ 6).

However, Defendant presented evidence that it had specific policies which prohibited "off the clock work," and argued that as a result, individual inquiries and manageability issues would prevent a finding of liability on behalf of all employees. Defendant also argued the bonuses were discretionary in nature and thus did not need to be included in the regular rate of pay calculation. (Supplemental Yaeckel decl. ¶7).

Based on Plaintiff's counsels' analysis, this claim was worth as little as $0 as much as $434,525.00. (Yaeckel decl. ¶ 9).

2. Meal and Rest Period Claims

As to meal period claims, Defendant's records confirm "missing," "short," or "late" meal periods, which Plaintiff argued will establish liability pursuant to a recent Supreme Court decision. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61. Plaintiff also challenged whether the written meal and rest period policies were missing required language in they did not explicitly allow employees to "leave the premises." (Supplemental Yaeckel decl. ¶ 10).

Defendant contended it provided compliant breaks and individualized inquiries will abound as to why individual employees may have failed to take appropriate meal or rest periods. (Supplemental Yaeckel decl. ¶ 11).

Additionally, no records exist to show Plaintiff or other employees were provided rest periods, making this aspect of the claim much harder to prove. (*Id.*) Some Courts have been disinclined to accept survey evidence that may have been needed to help establish Labor Code violations. See e.g. *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630.

Based on Plaintiff's counsels' analysis, this claim was worth as little as $0 or as much as $534,800.00. (Supplemental Yaeckel decl. ¶ 8).

3. <u>Reimbursement Claims</u>

Plaintiff alleged that - although infrequent - she was required to use her personal cell phone to make any changes to her schedule, and to communicate with other employees and with her superiors. Plaintiff contends that California law requires reimbursement to these employees whenever a cell phone is used in such a manner. See e.g., *Cochrane v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137.

Defendant argued that *Cochran*e is distinguishable because there is no policy in this case that *require* employees to use their cellular phones. Defendant also argued that Plaintiff (as a supervisor) was not typical of other nonexempt employees regarding her alleged use of cellular phones. (Yaeckel decl. ¶ 13).

Based on Plaintiff's counsels' analysis, this claim was worth as little as $0 (a defense verdict or denial of class certification) or as much as $167,125.00. (Supplemental Yaeckel decl. ¶ 14).

4. <u>Derivative Claims (Labor Code § 226 and 203)</u>

Plaintiff contends Defendant also violated California Labor Code § 226 on multiple grounds, in that it failed to provide accurate information on the Wage Statements it provides to its California employees. Similarly, waiting time penalties could only be awarded if the Court found in favor of Plaintiff on unpaid compensation and meal and rest period claims pursuant to Labor Code § 203. (Supplemental Yaeckel decl. ¶¶ 15-16). However, Plaintiff acknowledges that these claims are largely derivative (in that both the gross and net wages would be inaccurate) due to the above-referenced claims.

Defendant argued that list failure to list gross and net wages are derivative of other claims that may ultimately fail and as a result there is no "knowing and intentional failure" to list information, which is what triggers liability under Labor Code §§ 203 and 226. See *Naranjo v. Spectrum Security Services, Inc.*(2024) 15 Cal.5th 1056, 1065 (Supplemental Yaeckel decl. ¶ 12).

Based on Plaintiff's counsels' analysis, these claims were worth as little as $0 or as much as $616,150.00. (Supplemental Yaeckel decl. ¶ 14).

Adding up each of the above claims yields a total of $1,752,600 in maximum potential penalties, before any consideration of mitigation.

5. <u>Case Law Supports a Further Reduction on Any PAGA Penalties</u>

Plaintiff concedes he would be unlikely to ever be awarded an amount approaching the maximum penalties set forth above. The Court would have great discretion to mitigate any penalties awarded. *Thurman v. Bayshore Transit Managemenet, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (disapproved on other grounds).

Following a (successful) trial involving plaintiff's counsel here, the Court found liability, but then significantly reduced the PAGA penalties, down to $5 a violation. See *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504; See accord *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx),2011 WL 7563047 at *4 (C.D. Cal. Aug. 12,2011)(reducing PAGA penalties by over 82%, in part because employer was "not aware" of violations). (Supplemental Yaeckel decl. ¶ 19).

In the *Carrington* decision, the Court also noted that other trial courts have declined to "stack" (impose multiple) penalties based on the same underlying Labor Code violation. *See Ruelas v. Costco Wholesale Corporation* (N.D. Cal. 2014) 67 F.Supp.3d 1137. (Supplemental Yaeckel decl. ¶ 20).

If the Court awarded penalties in line with *Carrington* and other authorities, it would reduce the maximum exposure to approximately $350,520 (estimating a 80% reduction). Moreover, the Court could (in its discretion) refuse to award all derivative penalties under Labor Code §§ 203, 226. (Supplemental Yaeckel decl. ¶ 21).

Based on the above, our office estimated the actual anticipated maximum liability in a case of this type would be in the range of $200,000.00 to $300,000.00. (Supplemental Yaeckel decl. ¶ 22).

Based on all the risks, Plaintiff's counsel believes the $167,125.00, settlement is a reasonable compromise on the disputed and contested claims. Counsel also believe it is in the best interests of the LWDA and Aggrieved Employees. (Supplemental Yaeckel decl. ¶ 23).

D. THE CLASS REPRESENTATIVE ENHANCEMENT

This is intended to address point 7 and 8, in the Court's Minute Order.

Please see the concurrently filed declaration of Lavontra Breaux, which details her services performed and time spent on the case.

The proposed $5,000 enhancement to Plaintiff is intended to serve as a reward for her services performed as a PAGA representative and for "sticking her neck out" in a publicly filed lawsuit that could harm her reputation with future job prospects.

While Plaintiff's moving papers did point out that she signed a broader release than other aggrieved employees, counsel wishes to clarify this is not why she is seeking the enhancement award. Legal and Factual Authority in support of the enhancement request was detailed in Plaintiff's original motion papers. (See ROA # 39: Memo at p.10-11; and ROA #45: Yaeckel decl. ¶¶ 31-34).

E. THE ATTORNEYS AND THEIR WORK PREFORMED

This is intended to address point 9, in the Court's Minute Order.

Plaintiff seeks attorneys fees in the total amount of 1/3 of the gross settlement amount, which amounts to $55,708.33.

1. <u>The Lodestar Calculation and Supporting Documentation</u>

Pursuant to the Court's request Plaintiff's counsel is submitting the invoice of all attorney time billed for this case. This invoice is based on the contemporaneous time records of the attorneys who worked on the matter. (Yaeckel decl. ¶ 23; **Exhibit D**). Counsel is not billing for any time incurred on this supplemental filing in support of settlement approval.

Given the actual fees incurred, in the amount of **$64,296.00,** no lodestar multiplier is necessary, and counsel is requesting less in fees than what was billed. **<u>Please Note</u>**: the original motion listed a lodestar of **$64,122.00**. However, an audit of the attorney timer records was performed subsequent to the Court's November 21, 2024 order that confirmed the actual lodestar was very slightly higher. (Yaeckel decl. ¶ 24; **Exhibit E**).

2. <u>The Reasonableness of the Proposed Fee Award</u>

For the reasons discussed in detail below, an award of attorneys' fees in the amount of one-third of the gross settlement fund is fair and reasonable, and in line with what other California courts, both state and federal, have awarded in settlements of similar litigation.

PAGA provides that a plaintiff is entitled to recover reasonable attorneys' fees, expenses, and costs. Section 2699(g)(1) of the California Labor Code provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." In a *qui tam* action, reasonable attorneys' fees and costs are typically awarded under the common fund doctrine where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

PAGA "is a type of qui tam action." *See Iskanian*, 59 Cal. 4th at 382. "A *qui tam* action 'is a type of private attorney general lawsuit' [citation], in which 'the *qui tam* plaintiff stands in the shoes of the state or political subdivision [citation].'" *People ex rei. Stratham v. Acacia Research Corp*., 210 Cal. App. 4th 487, 501 (2012).

A PAGA action is a *qui tam* action because the statute allows the employee plaintiff, acting as the proxy of the State's labor law enforcement agency, to sue his or her employer for Labor Code violations and recover civil penalties that otherwise would have been assessed and collected by the LWDA. *See Iskanian*, 59 Cal. 4th at 382. Indeed, majority of the civil penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to the aggrieved employees (e.g., 75% paid to the state; 25% paid to the aggrieved employees). *See* Cal. Lab. Code § 2699(i). Where, as here, a common fund is created in a *qui tam* action by the successful litigation of a plaintiff and her attorneys, the plaintiff's attorneys are entitled to recover their fees from the common fund:

> Those benefiting from the recovery of the fund, in this case some depositors and eventually the People of the State of California, must bear their share of the cost of litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each claimant's share reduced proportionately. To the extent the judgment relies upon section 1021.5 for recovery of attorney fees, it must be modified to confine the award of fees to the common fund theory.

Bank of America v. Cory, 164 Cal. App. 3d 66, 91 (1985) (authorizing common fund fees in a *qui tam* taxpayer suit against certain banks).

Likewise, through the successful efforts of Plaintiff and his attorneys, a common fund was created in the amount of $100,000 for the benefit of the employees and the State of California. Thus, these beneficiaries must bear their share of the costs and attorneys' fees, to be deducted from the gross settlement fund under the common fund theory. *Id*. Such fees are deducted as a percentage of the settlement amount. *See, e.g*., *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478-482 (1980); *Six* (6) *Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Williams v. MGM-Pathe Communications Co*., 129 F.3d 1026, 1027 (9th Cir. 1997); *Staton v. Boeing Co*., 327 F.3d 938, 967 (9th Cir. 2003).

The California Supreme Court recently upheld the use of the common fund theory of recovery for attorneys' fees in *Laffitte v. Robert Half Int'l Inc.,* 1 Cal. 5th 480, 506 (2016). In *Laffitte*, the settlement created a common fund of $19 million. The Court approved the award of attorneys' fees in the amount of one third of the gross $19 million settlement (e.g., an award of $6.33 million) under the common fund theory. *Id*. By awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the common fund method encourages attorneys to efficiently litigate to achieve the best results possible for the class. *See Laffitte*, 1 Cal. 5th at 492-494. Indeed, "the percentage method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. *Id*. at 493 (quoting *In re Rite Aid Corp. Securities Litig*., 396 F.3d 294, 300 (3d Cir. 2005) (internal quotations omitted).

As a California appellate court very recently confirmed, "fee awards in class actions average around one-third of the recovery' regardless of 'whether the percentage method or the lodestar method is used." *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (quoting *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, fn. 11 (2008)). Consistent with that observation, California state and federal courts routinely award attorneys' fees equaling one-third of the common fund. *See*, *e.g. Laffitte v. Robert Half Internat. Inc.*, 231 Cal. App. 4th 860, 871 (2016) ("33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits"); *Chavez*, 162 Cal. App. 4th at 66 n.11 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide conclude that fees representing one-third of the total recovery is consistent with market rates). Notably, the California Supreme Court in *Laffitte v. Robert Half Internat. Inc.* affirmed a fee award representing one-third of the fund. *Laffitte*, 231 Cal. App. 4th at 506.

A fee award in the amount of one-third of the common fund is also reasonable because it best reflects the market rate for contingency fees. *See Lealao v. Beneficial Cal. Inc.*, 82 Cal. App. 4th 19, 47 (2000) ("attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace. . . ."). Fees representing one-third of the recovery reflect the rate negotiated in "typical contingency fee agreements [which] provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried." *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL 8150856, at *16 (C.D. Cal. July 21, 2008) (citing an academic study collecting contingency fee agreements and finding that a fee award constituting 34% of the fund is reasonable on that basis). Because the negotiated fee structure mimics the marketplace, it is reasonable and should be approved.

A one-third common fund[1] attorneys' fee award is also consistent with what courts have awarded in other representative action cases. The following list shows PAGA actions where attorneys' fees were awarded on a common fund basis:

- *Jones v. J.C. Penney Corporation*, Los Angeles Superior Court. Case No. BC451823 (approving fee award from PAGA-only settlement of $1.375M against a common fund of $3.2M (42%));

- *Garcia v. Macy's*. San Bernardino County Superior Court, Case No. CIVDS1516007 (33.33% fee awarded on $12,500,000 settlement if a PAGA only case);

- *Garcia v. Pep Boys*, Orange County Superior Court, Case No. 30-2014-00720574-CU-OE-CJC (33.33% fee awarded on a $1,030,000 settlement of a PAGA only case);

- *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-00852123-CU-OC-CXC (33.33% fee awarded on a PAGA only case);

[1] Court have also approved fees in amounts greater than one-third of the common fund. *See Charles v. JPMorgan Chase Bank*, No. CGC-14-538933 (San Francisco County Superior Court June 18, 2019) (awarding plaintiffs $2.88 million in attorneys' fees on PAGA penalties totaling $2.7 million); *Boseman v. VXI Global Solutions, LLC*, No. BC602442 (Los Angeles County Superior Court Jan. 3, 2019) (awarding plaintiff $750,000 in attorneys' fees and costs on general PAGA penalties totaling $585,000); *Salas v. Hallmark Aviation Services LP*, No. BC586585 (Los Angeles County Superior Court February 17, 2017) (awarding plaintiff $600,000 in attorneys' fees on PAGA penalties totaling $605,000); *Monroe v. Continental Design Co., Inc.*, No. RG16817667 (Alameda County Superior Court June 21, 2017) (awarding plaintiff $110,000 in fees on PAGA penalties totaling $90,000); *Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 WL 3670794, at *6 (N.D. Cal. Aug. 25, 2017) (awarding attorneys' fees under the lodestar method with no regard to the proportion of the fees to civil penalties).

- *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (33.33% fee awarded on a $650,000 settlement of a PAGA only case).

An award of fees from the gross settlement amount under the common fund doctrine prevents unjust enrichment of those who benefit from the common fund created through the successful efforts of plaintiff's counsel and furthers the important goal of attracting competent counsel to handle representative actions enforcing minimum labor standards. *Laffitte,* 1 Cal. 5th at 503. In affirming the use of the common fund doctrine in California, the California Supreme Court summarized the benefits of the percentage method of recovery stating: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts." *Id.*

Based on the above, and the lodestar incurred in this case, Plaitniff submits the request for one-third of the gross settlement amount is proper. Moreover, several unique circumstances in this case presented hurdles to liability. In addition to the anticipated defenses addressed above, there were obstacles with the named Plaintiff who Defendant would have asserted that as a manger, she had at least some inovolvement in the scheduling of employee meal and rest breaks. This could have created a potential conflict as the class representative. Moreover, by getting an agreement from Defendant's to commit to an early mediation, Plaintiff's counsel did not have to incur large costs or fees and could maximize the recovery for the aggrieved employees and LWDA. (See Yaeckel ¶26).

F. COSTS OF LITIGATION

This is intended to address point 10, in the Court's Minute Order.

Plaintiff is amending his cost request to seek a total of **$10,103.44**.

Although incurred in the prosecution of this matter, Plaintiff will forgo seeking reimbursement for the postage, copy, transportation and research charges.

The requested invoice for the Judicate West mediation with Michael Young is attached to the declaration of counsel as Exhibit E.

G. REVISIONS TO THE PROPOSED NOTICE & PROPOSED ORDER AND JUDGMENT

This is intended to address points 11-15, in the Court's Minute Order.

Plaintiff has made all revisions to the proposed notice as requested by the Court. A revised Notice to the PAGA Employees along with a "redlined" version is attached to the declaration of Eric K. Yaeckel as Exhibits B and C.

Plaintiff has also met and conferred with opposing counsel, who confirmed that the employee population at issue does not need a Spanish translation of the notice. (Supplemental Yaeckel decl. ¶ 28).

Plaintiff has submitted a proposed order and judgment consistent with the above.

III. CONCLUSION

The Parties respectfully request that the Court approve the terms and conditions of the PAGA Settlement.

Dated: March 20, 2025

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