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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 general public similarly situated, Plaintiff v. L'OCCITANE, INC., a California Corporation; and DOES 1-10, inclusive Defendants	CASE NO. 30-2023-01311136-CU-OE-CXC **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION RE: *UNOPPOSED* PAGA APPROVAL** Date: November 21, 2024 Time: 2:00 p.m. Dept.: CX104 Judge: Hon. Melissa R. McCormick Reservation No. 74330897

I. SUMMARY OF MOTION

This is a "Wage and Hour" representative action, under California's Private Attorneys General Act of 2004. Plaintiff LAVONTRA BREAUX, in a Representative capacity only, and on behalf of other members of the general public similarly situated. "Plaintiff" respectfully submits the instant Points and Authorities in support of her motion for Approval of the PAGA Settlement.

This Request is **Unopposed**. The LWDA was timely notified of this proposal, concurrent with the filing. (See attached Electronic Proof of Service).

II. SETTLEMENT TERMS

This is a Labor Code §2698 *et seq.* "Wage and Hour" ("PAGA") action brought against L'OCCITANE, INC., ("L'OCCITANE"). The operative complaint alleges six causes of action (all under PAGA) for (1) meal and rest period violations; (2) minimum wage violations; (3) overtime violations; (4) wage statement violations; (5) failure to reimburse business expenses; and (6) failure to pay all wages owed to ex-employees at separation. (ROA # 1).

Following the exchange of discovery, analysis of numerous sets of time and wage data, and a mediation before respected "wage an hour" mediator Mike Young, Esq., the Parties reached a proposed settlement that includes a payment of penalties to the LWDA. (Yaeckel Decl., ¶4).

The Parties "PAGA Settlement Agreement" (the "Agreement") is attached to the declaration of Eric K. Yaeckel as Exhibit 1.

The Aggrieved Employees for purposes of this settlement are defined as "all persons who are employed or have been employed by Defendant in California as hourly, non-exempt employees from December 20, 2021, through March 11, 2024. (Ex. 1 at ¶ 1.4). This time period is the covered PAGA Period. (*Id.*)

It is estimated that there are 325 or less PAGA Members, who collectively worked 6,685 pay periods. (Yaeckel Decl., ¶6; Ex. 1 at § 8).

Here, the release is limited to PAGA claims only that are "stated in the Operative Complaint and in the PAGA Notice..." (Ex. 1 § 5.2). The settlement agreement only covers PAGA claims.

Based on the below figures, each PAGA Member would receive an average payment of approximately **$69.56**. (Yaeckel Decl., ¶6). This figure represents an average only, as the actual amounts paid will vary depending on the amount of pay periods worked during the PAGA period. (Exhibit 1 at 3.2.5).

The PAGA Member payments will be paid 100% as penalties pursuant to a IRS 1099 form. (Exhibit 1 at 3.2.6).

The Total Value of the proposed Settlement is **$167,125.00**, which is broken down as follows:

* **$55,708.33** Attorneys' Fees (1/3 of total settlement value);
* **$11,743.24** Costs of Litigation;
* **$5,000.00** Plaintiff's Representative Enhancement Award;
* **$4,250.00** Settlement Administration Fee[1];
* <u>Sub-Total of **$90,423.43** as the Total PAGA Penalties</u>;
* 75% (**$67,817.57**) shall be assigned/paid to the LWDA as penalties; and
* The remaining 25% (**$22,605.86**) will be disbursed among all employees based on pay periods worked during the PAGA period.

(See Ex. 1: Section 3 "Monetary Terms)

Given the above, the average payment to each individual employee will be approximately $69.56 (Yaeckel Decl., ¶6.) The actual payment will be determined based of the total pay periods worked by each employee during the PAGA period. (Ex. 1 § 3.2.5).

Subject to the Court's Approval, the parties have jointly drafted a proposed notice to go out with the settlement payments following approval. (Please see **Exhibit 2**).

After the check cashing deadline (which is not less than 180 days after the mailing) any unclaimed funds sent to the Aggrieved Employees will be sent to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee. (Ex. 1 at § 4.1.1, 4.1.3).

III. <u>CONTROLLING AUTHORITY</u>

PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state

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[1] The settlement administrator is Phoenix Class Action Administration Solutions, who has given the parties a bid not to exceed this specific amount. (See Yaeckel Decl. ¶ 8; Ex. 3.)

against his or her employer for Labor Code violations committed against the employee and fellow employees." *Iskanian v. CLS Trans. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 360. "To compensate for the lack of'[a]dequate financing of essential labor law enforcement functions,' the California legislature enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil penalties for violations of the Labor Code." *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 430.

Recently the Court of Appeal has given guidance to trial courts in reviewing a PAGA settlement:

> We therefore hold that **a trial court should evaluate a PAGA settlement to determine whether it is 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**. (*See Williams , supra* , 3 Cal.5th at p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present violations and deter future ones"]; *Arias , supra* , 46 Cal.4th at p. 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement efforts to achieve maximum compliance with labor laws].)

Moniz v. Adecco USA, Inc., (2021) 72 Cal. App. 4th 56, 77

The statute does not, however, require the two-step process utilized in class actions. See *Salazar v. Sysco Central Cal.*, No. 15-01758-DAD, 2017 WL 1135801, *2 (E.D. Cal. Feb. 2, 2017) (rejecting the application of class action settlement rules and procedures for PAGA settlement approval). Nothing in the PAGA statute changes the strong judicial preference in support approving settlements.

A court may award a lesser amount than the maximum civil penalty amount 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. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213-1214. *See e.g.*, *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 82%).

The Court in *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* ("Flores") the court was asked to approve a PAGA settlement (the "Settlement"). *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1075–76 (C.D. Cal. 2017). In deciding whether the court should approve the Settlement, the court looked at the California legislature, the California Courts of

Appeal, the California Supreme Court, and the California Labor & Workforce Development Agency for a definitive answer as to what precedent the court should follow in either approving or denying the settlement. *Id.* The court was not able to find a definitive answer. *Id*. As such, the court followed the rationale in *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states a court is permitted to approve a PAGA settlement if the settlement is “fair and adequate in view of the purposes and policies of the statute.” *Id*.

In deciding whether the settlement was “fair and adequate,” the *Court’s have* looked sought how the parties divvied up the civil penalties under Section 2699(i) of the California Labor Code. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1076–77 (C.D. Cal. 2017). As the court felt the parties’ division of penalties was fair and adequate pursuant to the statute, the court approved the settlement. *Id*.

IV. DISCUSSION

The parties reached the terms of their proposed settlement agreement following the exchange of extensive information and employment records. The parties submit the proposed settlement of PAGA penalties is fair, adequate, and reasonable.

A. THE NATURE AND SCOPE OF THE ALLEGED VIOLATIONS

The Complaint alleges Labor Code violations which triggered penalties under the PAGA statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff also alleged all employees were denied compliant Meal and Rest Periods, minimum wages, overtime, accurate wage statements, reimbursements, and suffered waiting time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA Notice” attached thereto).

Specifically, Plaintiff alleges that she - and other employees - received “short,” “late,” or “missing” Meal Periods, including those documented within Defendant’s Time Records. (Decl. Yaeckel, ¶11). Plaintiff also challenged whether Defendant maintained lawful meal and rest periods. Plaintiff alleged she- and other employees -were not properly compensated due to Defendant’s failure to maintain accurate time records. (*Id.*) Finally, Plaintiff also challenged whether Defendant maintained lawful meal and rest period policies. (*Id.*) Defendant denies Plaintiff's allegations entirely, and contends that its wage and hour policies and procedures are compliant with California law.

B. ANALYSIS OF POTENTIAL LIABILITY, ON A REPRESENTATIVE BASIS

The catalyst of this litigation concerned allegations that Ms. Breaux and others were denied legally compliant meal and rest periods, and was not paid for all Overtime hours worked. (Decl. Yaeckel, ¶ 11). Plaintiff further alleged that Defendant's timekeeping policies and employee records were not in compliance with California law. (Id.) Defendant denied Plaintiff's allegations entirely and contends that its policies and procedures at all times during the relevant time period complied with California law. Defendant maintained employees were provided with compliant meal and rest periods, and were properly paid for all hours worked.

Based on the above, the <u>maximum</u> liability in a case of this type would be in the range of **$200,000.00** to **$300,000.00**. (Decl. Yaeckel, ¶12). However, without revealing settlement protected communications, it was highly unlikely Plaintiff could ever recover anything approaching a maximum judgment. (*Id.*)

Moreover, Plaintiff's counsel is aware of the Court's discretion to mitigate penalties pursuant to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶13). To confirm, Plaintiff's counsel experienced the mitigation of "PAGA" penalties in *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504. (*Id.*) In *Carrington*, the Court significantly mitigated PAGA penalties ($5 per violation), due to the efforts made by the employer to comply with the law. (*Id.*)

Plaintiff's counsel agrees with the Court,, and with the provision of the Labor Code, that penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶14).

As the above factors exist in this case, it is the opinion of Plaintiff's counsel that the settlement is fair, adequate, and reasonable. (Decl. Yaeckel, ¶15).

Plaintiff's counsel, Eric K. Yaeckel, has over 13 years of experience prosecuting class and representative action claims under the California Labor Code. (Decl. Yaeckel, ¶ 16-20). Plaintiff's counsel, Eric K. Yaeckel and William B. Sullivan, are the attorneys of record in a matter that was recently heard (and favorably decided) before the California Supreme Court titled *Donohue v. AMN*

Servs., LLC (2021) 11 Cal.5th 58. (*Id.*) The *Donohue* matter was a certified class and PAGA action. (*Id.*)

Plaintiff's counsel were lead counsel on approximately 40 employment "wage and hour" claims with class action, or representative action allegations. (*Id.*) Based on said experience, it is the opinion of Plaintiff's counsel that this settlement represents a fair and adequate payment. (Yaeckel Decl., ¶ 21).

C. THE ALLOCATION OF PENALTIES, AND *LIMITED RELEASE* OF CLAIMS

While Labor Code section 2699(*l*) requires a court to "review and approve any penalties sought as part of a proposed settlement agreement," it does not provide any guidance as to what is considered an 'adequate' allocation of these penalties. However, Trial Courts have held that *where the* division of penalties was fair and adequate and in accordance with the PAGA statute, the court should approved the settlement. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1076–77 (C.D. Cal. 2017).

Defendants, and their counsel, deserve credit for their willingness to consider - and address - the allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in "Wage and Hour" litigation) agreed to produce a substantial amount of documents and information necessary to evaluate the parameters of settlement prior to Plaintiff's complaint being filed. Following a mediation and several follow up arms-length negotiations the parties have reached a proposed settlement that includes a payment of penalties under PAGA.

Here, the parties seek to allocate **$90,423.43** of the total settlement to the Total Value of the PAGA Fund. Of this amount, the value of additional measures taken to address and effectuate Labor Code compliance attributed towards LWDA penalties is **$67,817.57**, which is 75% of the PAGA fund. The remaining (25%) **$22,605.86** will be allocated and distributed among the current or ex-employees within the PAGA representation period.

The parties contend the settlement agreement amount is fair, adequate, and reasonable. (Yaeckel Decl., ¶¶ 15, 21). The release only applies to the PAGA claims for penalties, based upon the allegations in Plaintiff's operative Complaint. (Ex. 1 § 3.2.5).

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D. THE REQUEST FOR ATTORNEYS' FEES, COSTS & PLAINTIFF'S ENHANCEMENT

Plaintiff also requests the Court approve the requested attorneys' fees, costs and plaintiff's enhancement award for the reasons set forth below.

1. <u>Request for Reasonable Costs of Litigation</u>

Plaintiff's Counsel are entitled to reimbursement of their discretionary litigation costs. Cal. Lab. Code § 2699(g)(1). Out-of-pocket discretionary expenses are compensable if they would normally be billed to a fee-paying client. *See Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991), *overruled in part on other grounds in Olson v. Automobile Club of Southern Calif.*, 42 Cal. 4th 1142 (2008). Such discretionary costs may be claimed as part of an attorneys' fees motion when seeking statutory fees under the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1218 n.27 (2008) (awarding costs that are necessarily incurred).

As itemized in Plaintiff's Counsel's declarations, Plaintiff's Counsel advanced **$11,743.24** in out-of-pocket costs to the State for, among other things, filing fees and mediation fees. (Yaeckel Decl. ¶ 29;) Because these reasonable costs were necessarily incurred during the case's pendency, these costs are reasonable and should be awarded. *See also* Cal. Civ. Pro. Code § 1033.5(c)(4) ("[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.")

2. <u>Request for Reasonable Attorneys' Fees</u>

For the reasons discussed in detail below, an award of attorneys' fees in the amount of approximately 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.

The PAGA statute 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).

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 her attorneys, a common fund was created in the amount of $167,125.00 for the benefit of the employees and the State of California.

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. 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).

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.")

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.

For all of these reasons, a common fund fee award in the amount of 1/3 of the total settlement (**$55,708.33**) is fair and reasonable.

3. <u>A Lodestar Cross Check Further Confirms the Reasonableness of the Fee</u>

Should the Court deem if necessary, a lodestar cross-check of the requested attorneys fees. Given the actual fees incurred, in the amount of $64,122.00, no lodestar multiplier is necessary, and counsel is requesting less in fees than what was billed. (See Yaeckel decl. ¶ 22).

4. <u>Request for PAGA Representative Enhancement</u>

Plaintiff requests an enhancement payment of $5,000 for her service as the PAGA representative and for recognition that she was also required to release all of her underlying Labor Code claims. There is no such restriction on the other alleged aggrieved employees.

An enhancement is justified in light of the reputational risk that Plaintiff assumed by litigating claims against a former employer. *See Billinghausen v. Tractor Supply Co.,* 306 F.R.D. 245, 267-68

(N.D. Cal. 2015) (finding "personal detriment" upon testimony that future employers can easily learn that a prospective employee served as a plaintiff through the internet).

Second, the separate settlement payment is reasonable because Plaintiff "remained fully involved and expended considerable time and energy during the course of the litigation." *See In re Toys 'R' Us-Del FACTA Litig.*, 295 F.R.D. at 471 (citation omitted). Plaintiff devoted his time and effort toward assisting his attorneys with the prosecution of the claims, and assisted counsel with finalizing the settlement. (Yaeckel decl. ¶ 30).

The separate payment is also appropriate because Plaintiff otherwise "will not gain any benefit beyond that [he] would receive as an ordinary [Aggrieved Employee]." *In re Toys "R" Us FACTA Litig.*, 295 F.R.D. at 472; *Van Vranken*, 901 F. Supp. at 299 (holding that a substantial award is appropriate where a [representative's] claim made up "only a fraction of the common fund.").

Lastly, because PAGA is a "type of qui tam action," it is appropriate for the Plaintiff to receive a modest additional payment from the settlement as a "bounty" for his special effort in vindicating the State's interests by enforcing its labor laws. *See Iskanian*, 59 Cal. 4th at 382 ("A PAGA representative action is therefore a type of qui tam action."); *see also People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th 487, 500 (2012) ("The person who brings the qui tam action, called the 'relator,' stands in the shoes of the People of the State of California, who are deemed to be the real party in interest . . . The relator in a qui tam action under section 1871.7 does not personally recover damages but, if successful, receives [a portion] of the recovery as a bounty.") (internal citations omitted).

Here, by "sticking out her neck out" as a Class Representative in a publicly filed lawsuit, Plaintiff took a substantial risk that may adversely impact her ability to work in this field in the future. Any company who does a detailed background check, will be able to determine that Plaintiff asserted legal claims against their former employer. An entire industry exists that allows employers to run extensive background searches on potential employees. Companies who provide these services specifically highlight the fact that their services allows employers to weed out litigious employment candidates. (Yaeckel decl. ¶¶ 31-33).

Plaintiff also risked personally owing a large cost award, into the tens of thousands of dollars, had her claims been unsuccessful. (Yaeckel decl. ¶ 34).

The enhancement also recognizes that although this was alleged as a PAGA only claim, Plaintiff agreed to release all claims (e.g., a full 1542 release) as a part of the proposed settlement. (**Exhibit 1**: "Released Claims" § 5.1.1). In addition to the PAGA claims, Plaintiff possessed individual Labor Code violations that were required to be released as a result of this settlement. All other employees are subjected to a limited release of PAGA claims only.

The PAGA Representative Service Payment will be issued, using an IRS 1099 Form. (Ex. 1 at 3.2.2).

Dated: July 3, 2024

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