LOYR, APC
Young W. Ryu (SBN 266372)
young.ryu@loywr.com
Zachariah E. Moura (SBN 279508)
zach.moura@loywr.com
Kee Seok Mah (SBN 345736)
kee.mah@loywr.com
1055 West 7th Street, Suite 2290
Los Angeles, California 90017
Tel: (213) 318-5323
Fax: (800) 576-1170

HAINES LAW GROUP, APC
Paul K. Haines (SBN 248226)
phaines@haineslawgroup.com
Sean M. Blakely (SBN 264384)
sblakely@haineslawgroup.com
Joel M. Gordon (SBN 280721)
jgordon@haineslawgroup.com
2155 Campus Drive, Suite 180
El Segundo, California 90245
Tel: (424) 292-2350
Fax: (424) 292-2355

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

MICHAEL FLORES, as an individual and on behalf of all others similarly situated,

Plaintiff,

vs.

WE CARE PLUMBING, HEATING & AIR, LLC; RUSSELL COCHRAN, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No.: CVRI2303843

[*Assigned for all purposes to the Hon. Angel M. Bermudez in Dept. M301*]

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: December 19, 2024
Time: 8:30 a.m.
Dept: M301

Action Filed: July 27, 2023
Trial Date: None Set

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

Plaintiff Michael Flores ("Plaintiff") hereby submits the following supplemental brief in response to the Court's November 4, 2024 Order (the "Order") regarding Plaintiff's Motion for Preliminary Approval of Class Action Settlement. After reviewing the Court's Order, Plaintiff and Defendant We Care Plumbing, Heating & Air, LLC ("Defendant") (Plaintiff and Defendant are collectively referred to as the "Parties") amended the Stipulation of Settlement ("Settlement Agreement"), the Notice of Pendency of Class Action and Proposed Settlement ("Class Notice"), the Request for Exclusion Form, and the Notice of Estimated Settlement Award in accordance with the issues identified by the Court.

Plaintiff addresses each issue raised in the Court's Order. The Amended Settlement Agreement, Class Notice, Request for Exclusion Form, and Notice of Estimated Settlement Award are attached as Exhibits 1, 2, 3, and 4, respectively, to the Declaration of Sean M. Blakely, filed concurrently herewith. Red-line versions of the Settlement Agreement, Class Notice, Request for Exclusion Form, and Notice of Estimated Settlement Award are attached as Exhibits 5, 6, 7, and 8, respectively, to the Declaration of Sean M. Blakely ("Blakely Decl.").

1. <u>CMO G.3.b</u>

The Court's Order states: "*CMO ¶ G.3.b requires a declaration from defendant's counsel regarding other actions, and that he made an inquiry from defendant and other members of the firm. If any actions are known to exist, counsel to provide the name and case number, nature of the claims asserted, definition of the class and procedural status. The parties failed to comply.*"

CMO ¶ G.3.b provides the following: "The motion shall be supported by a declaration from the defendant's attorney that states (i) whether the attorney is aware of any class, representative or other collective action in any other court in this or any other jurisdiction that asserts claims similar to those asserted in this action on behalf of a class or group of individuals some or all of whom would also be members of the class defined in this action and (ii) the name and case number of any such case, the nature of the claims asserted, the definition of the class or other parties on whose behalf the action is brought, and the procedural status of that case."

On or about October 22, 2024, counsel for Defendant, Alexander T. Marx, submitted his

Declaration of Defendants' Counsel, Alexander T. Marx, for Motion for Preliminary Approval of Class Action and PAGA Settlement. In his declaration, Mr. Marx declares "neither I nor my clients are aware of any class, representative or other collective action in any other court in this or any other jurisdiction that asserts claims similar to those asserted in this action on behalf of a class or group of individuals some or all of whom would also be members of the class defined in this action. Prior to mediation, my office conducted research to compile all employment lawsuits filed against Defendant from July 1, 2019 to the present, the search did not produce results which would lead me to believe that there are claims similar to those asserted in this action on behalf of a class or group of individuals some or all of whom would also be member of the class defined in this action."

Therefore, the Parties believe they complied with CMO ¶ G.3.b. Nevertheless, Mr. Marx will submit a supplemental declaration attesting that he made a reasonable inquiry from Defendant and other members of his firm as to whether there are any such actions.

2. <u>CMO G.3.e</u>

The Court's Order states: "*CMO ¶ G.3.e requires the release to be limited to: (i) the defendants named in the complaint with their officers, directors, employees and agents (any other parties must be identified by name and an explanation that justify their inclusion); (ii) the claims stated in the complaint and facts alleged; (iii) liability that arose during the class period; and (iv) PAGA release only binds the named plaintiff and State of California, and limited to those claims described int eh LWDA notice and alleged in the complaint. The released complies (Settlement, ¶ 2, p. 1-2), except on p. 7-8, where it indicates PAGA aggrieved employees will release the claims. This needs to be amended.*"

The Parties revised the Settlement Agreement to address the Court's concerns. *See* Blakely Decl., ¶ 4, Exhibit 1, at section 9.C.i. Specifically, the Parties <u>removed</u> the following language from section 9.C.i of the Settlement Agreement: "Notwithstanding the foregoing, the PAGA settlement and release provisions will apply to all Aggrieved Employees, whether or not they exclude themselves from the class action settlement. Settlement Class members who were employed by Defendant at any time during the PAGA Period and submit a valid and timely

Request for Exclusion shall still be entitled to their portion of the PAGA Amount described above, and will release the PAGA Release Claims, whether they submit a valid and timely Request for Exclusion or not."

3. <u>CMO G.9</u>

The Court's Order states: *"CMO ¶ G.9.a requires a discussion of the PAGA settlement. ¶ G.9.b requires a declaration describing: (i) nature of alleged violations; (ii) number of individual violations, including length of the relevant employment period and number of employees allegedly employed during that period; (iii) the total amount of penalties for which the defendant is potentially liable if the allegations were proven true; (iv) the amount of penalties if the defendant is likely to be found liable at trial considering the weight of the evidence, the clarity of the applicable law and strength of any factual or legal defense; (v) the likelihood that any violations would be proven to have been knowing and intentional; (vi) any facts that tend to suggest the imposition of the total amount of statutory penalties for which the defendant would be likely to be liable at trial would be unjust, arbitrary, oppressive or confiscatory; (viii) how the agreed-upon penalties was calculated; and (viii) any other factors. Counsel only provides the numbers and not the other factors."*

<u>CMO ¶ G.9.b. i</u>

Plaintiff's PAGA claim derives from the alleged Labor Code violations alleged in the operative First Amended Class and Representative Action Complaint ("FAC"). Blakely Decl., ¶ 9. In other words, the nature of the alleged violations are derivative of Plaintiff's labor code claims and causes of action alleged in the FAC. *Id*. Plaintiff seeks PAGA civil penalties based on Defendant's: (i) alleged unlawful piece-rate/commission pay plans which allegedly failed to separately compensate employees for paid rest periods as well as "non-productive" time; (ii) alleged failure to provide timely, compliant, and uninterrupted thirty (30) minute meal periods to aggrieved employees; (iii) alleged failure to pay all overtime wages due to Defendant's alleged regular rate miscalculations; (iv) alleged failure to reimburse employees for all required business expenses, including the use of their personal cell phones for work-related purposes; (v) alleged failure to compensate employees for all wages as a result of its failure to compensate for all required travel time to various worksites; (vi) alleged failure to issue accurate, compliant and itemized wage statements; and (vii) alleged failure to pay all wages owed at the time of separation of employment with Defendant. *Id*.

CMO ¶ G.9.b. ii

As defined in section 2.B of the Parties' Settlement Agreement, the PAGA Period is April 20, 2022 through June 30, 2024. Blakely Decl., ¶ 10. During this time period, it is estimated that there are approximately 286 Aggrieved Employees who worked for Defendant in California as non-exempt employees. *Id*. Based on the data and information provided by Defendant, Plaintiff estimated there were approximately 4,347 alleged violations. *Id*.

CMO ¶ G.9.b. iii

Plaintiff estimates a total maximum PAGA exposure of approximately $434,700 if all allegations are proven true at trial. Blakely Decl., ¶ 11.

CMO ¶ G.9.b. iv

Given Defendant's various defenses to Plaintiff's claim for PAGA civil penalties (as discussed below and in Plaintiff's Renewed Motion for Preliminary Approval of Class Action Settlement), the likelihood that the Court would use its discretion to reduce PAGA civil penalties pursuant to Cal. Labor Code § 2699(e)(2), and considering the evidence available to Plaintiff, it was estimated that Defendant's estimated PAGA exposure would be approximately $65,205. Blakely Decl., ¶ 12.

CMO ¶ G.9.b. v

Plaintiff contends that it would be unlikely that the alleged violations would be found to be knowing and intentional, as Defendant asserted good-faith defenses to Plaintiff's claims and contends it complied with all wage and hour laws and regulations. Blakely Decl., ¶ 13. Plaintiff was not presented with any evidence that Defendant *intentionally* violated any section of the California Labor Code. *Id*. On the contrary, Defendant asserted numerous good-faith defenses to Plaintiff's labor code claims. *Id*. (*see also* Plaintiff's Renewed Motion for Preliminary Approval of Class Action Settlement filed on October 11, 2024, pp. 3-8). For example, with respect to Plaintiff's claims that Defendant instituted an unlawful piece-rate/commission pay plan, Defendant argues that its compensation plans are compliant with California law. Blakely Decl., ¶ 13. Defendant further contends that any liability for its failure to separately compensate employees for rest periods during shifts would be limited to back-pay for the rest periods themselves (i.e., pay for the 10 minutes per rest period) as opposed to the rest period penalties under Labor Code § 226.7, measured as an hour of pay per workday, sought by Plaintiff. *Id*. With respect to Plaintiff's meal period claims, Defendant argues that it has maintained compliant written meal period policies throughout the Class Period and has provided compliant meal periods in line with those policies. *Id*. Defendant further contends that under *Brinker*, it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken. *Id*. Defendant also maintains that any short, missed, or late first meal periods were the result of lawful employee waiver or choice, thereby precluding liability. *Id*. With respect to Plaintiff's claims for unreimbursed business expenses, Defendant maintains that Settlement Class members were not required to use their personal cell phones as a necessary part of their job. *Id*. With respect to Plaintiff's claim for wage statement penalties, Defendant argues that any alleged wage statement violations were not "knowing and intentional," and Plaintiff cannot show that he or other employees "suffer[ed] injury" due to the alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of penalties. *Id*. With respect to Plaintiff's claims for waiting time penalties, Defendant argues that it possesses strong, good-faith defenses to Plaintiff's underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id*.

As indicated in Plaintiff's Renewed Motion for Preliminary Approval of Class Action Settlement, Defendant vigorously denied Plaintiff's underlying claims, and further disputed Plaintiff's ability to proceed on a representative action basis. Blakely Decl., ¶ 13. Given Defendant's good-faith defenses, it is unlikely the Court would find any violations to be knowing and intentional. *Id*.

<u>CMO ¶ G.9.b. vi</u>

Defendant maintains that, given its good-faith defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff's claims, as awarding the full amount of PAGA civil penalties would be unjust, oppressive and confiscatory. Blakely Decl., ¶ 14; *see* also Lab. Code § 2699(e)(2). As indicated above and in Plaintiff's Renewed Motion for Preliminary Approval of Class Action Settlement, Defendant presented many good-faith defenses to Plaintiff's claims, and argued that it complied with California law at all times during the Class Period. Blakely Decl., ¶ 14.

Defendant argued that many Courts have reduced PAGA civil penalties, where, as here, the employer presented good-faith defenses to Plaintiff's claims. Blakely Decl., ¶ 14; *see Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien Inc.*, Case No. ED CV10-01487 RGK (OPx), 2011 WL 7563047, at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82% in part because employer "not aware" of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA civil penalty of just $5 per pay period where employer made "good faith attempts" to comply with the law).

<u>CMO ¶ G.9.b. vii & viii</u>

The amount of PAGA civil penalties, like other terms of the Settlement, was negotiated by the Parties with the assistance of the mediator, and is ultimately an agreed upon term of the Settlement. Blakely Decl., ¶ 15. As stated in Plaintiff's Renewed Motion for Preliminary Approval, Plaintiff estimated Defendant's realistic PAGA exposure at $65,205. Defendant argued that Plaintiff's PAGA exposure calculation was grossly inflated and that, even if the Court were to find for Plaintiff, the Court would significantly reduce PAGA penalties. Ultimately, then, the $50,000 allocation represents a compromise between the Parties. The Parties respectfully submit that the allocation to the Labor & Workforce Development Agency ("LWDA") for PAGA civil penalties is appropriate in light of other settlements allocating PAGA penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP, 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of $7,500 to LWDA out of $6.9 million settlement); *Lazarin v. Pro Unlimited, Inc.*, No. C-11-3609-HRL, 2013 WL 3541217 (N.D. Cal. Jul. 11, 2013) (approving PAGA payment of $7,500 to LWDA out of $1.25 million settlement); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575 at *7 (E.D. Cal. Oct.

31, 2012) (approving $10,000 PAGA allocation out of $3,700,000 total settlement, noting that "[t]his comports with settlement approval of PAGA awards in other cases….Therefore, the Court will approve the allocation of the Settlement to Plaintiffs' PAGA claim."); *Altamirano v. Shaw Industries, Inc.*, No. 13-cv-00939-HSG, 2015 WL 4512372, at *2 (N.D. Cal. July 24, 2015) (approving $500,000 settlement that allocated $1,500 to the LWDA); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC (JPRx), 2014 WL 6473804 at *8 (C.D. Cal. Nov. 18, 2014) (approving $18,750 PAGA payment to LWDA out of $5,800,000 total settlement); *Franco v. Ruiz Food Prods.*, No. 2012 WL 5941801 at *14 (E.D. Cal. Nov. 27, 2012) (approving $10,000 PAGA payment to LWDA out of $2,500,000 total settlement); *Aguirre v. DSW, Inc.*, No. EDCV11-01522 GW (SPx), 2012 WL 11875296 at *3 (C.D. Cal. Nov. 29, 2012) (approving $10,000 PAGA payment to LWDA out of $625,000 total settlement).

Notably, Plaintiff served the LWDA with the Settlement on October 11, 2024. Blakely Decl., ¶ 15. As of the date of the filing of this Supplemental Brief, the LWDA has not commented or objected to the Settlement. *Id*. As other courts have found, the LWDA's non-objection to a proposed PAGA settlement is indicative of the LWDA's assent to the terms of the settlement. For example, in *Jordan v. NCI Group, Inc.*, No. 16-701 JVS (SPx), 2018 WL 1409590 (C.D. Cal. Jan. 5, 2018), Judge Selna of the Central District approved a PAGA settlement and, in doing so, found persuasive that the LWDA was permitted to file a response to the proposed settlement and did not file any comment or objection. The Court inferred the LWDA's non-response was "tantamount to its consent to the proposed settlement terms, namely the proposed PAGA penalty amount." *Id.* at *3 (quoting *Echavez v. Abercrombie & Fitch Co., Inc.*, No. CV 11-09754-GAF, 2017 WL 3669607 at *3 (C.D. Cal. Mar. 23, 2017)); *see also Gooding v. Vita-Mix Corporation*, No. 2:16-cv-03898-ODW(JEMx), 2018 WL 571881 at *6 (C.D. Cal. Jan. 25, 2018) (overruling objection that PAGA payment was too low, and finding that "[the objector's] claim regarding the CLWDA is refuted by the fact that it receives a payment from the settlement fund in connection with Plaintiffs' PAGA claim, and that the CLWDA did not lodge any objection.")

4. <u>CMO G.3.f</u>

The Court's Order states: "CMO ¶ *G.3.f requires notice by first class mail, or a discussion* *of the alternative methods of notice. The settlement does not discuss how notice will be sent."*

The Parties revised the Settlement to make clear that the notice will be provided via U.S. first class mail. *See* Blakely Decl., ¶ 4, Exhibit 1, at section 9.B.

5. <u>CMO G.4.g</u>

The Court's Order states: "CMO ¶ *G.4.g precludes the order, notice or objection form from requiring an objecting party to appear at the final approval hearing, or filing a notice of intention to appear at the final approval hearing. The order complies BUT the notice improperly has this language. This needs to be removed. (Notice, p. 5).*

The Parties revised the Class Notice to address the Court's concerns. *See* Blakely Decl., ¶ 5, Exhibit 2, at p. 5. Specifically, the Parties removed the following language from the Class Notice: "Any attorney who intends to represent an individual objecting to the Settlement must file a notice of appearance with the Court and serve counsel for all parties on or before <<RESPONSE DEADLINE>>." *Id*.

6. <u>CMO G.5.f</u>

The Court's Order states: "*CMO ¶ G.5.f requires the notice to explain PAGA and advise aggrieved members that they may not object or opt out of PAGA. The notice must describe the PAGA settlement, including who is an aggrieved employee, an estimate of the share of penalties, and that the payments will be reported on Form 1099. The settlement is on p.1, 5, with a statement that it will be on a Form 1099 on p.4. But there is no statement of share of penalties. The notice only states the average payment estimate. (Notice p. 3.) The exclusion form only says "may still be entitled" rather than clarifies that they cannot be excluded from PAGA."*

The Parties revised the Notice of Estimated Settlement Award to include aggrieved employees' estimated payment from the PAGA Amount. *See* Blakely Decl., ¶ 7, Exhibit 4. The Notice of Estimated Settlement Award now states: "Your share from the PAGA Amount is estimated to be $___." *Id*. The Parties also revised the Request for Exclusion Form to address the Court's concerns and to specifically state that "exclusion from the class action settlement will not result in exclusion from the PAGA settlement. Employees may neither object to nor opt out of the PAGA settlement" *See* Blakely Decl., ¶ 6, Exhibit 3.

7. CMO G.8.c

The Court's Order states: "CMO ¶ *G.8.c requires the exclusion form to state that exclusion from the class settlement does not result in exclusion from PAGA settlement. The parties did not comply with the latter."*

The parties revised the Request for Exclusion Form to address the Court's concerns. *See* Blakely Decl., ¶ 6, Exhibit 7. Specifically, the Parties added the following language to the Request for Exclusion Form: "Exclusion from the class action settlement will not result in exclusion from the PAGA Settlement. Employees may neither object to nor opt of the PAGA settlement." *Id*.

8. Department Number

The Parties revised the Class Notice to indicate the correct department number, M301. *See* Blakely Decl., ¶ 5, Exhibit 2*,* at p. 5-6.

Dated: December 6, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________

Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiff