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EDUARDO SANDOVAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

EDUARDO SANDOVAL on behalf of himself and all aggrieved employees,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC.; and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: 22CV015414

[Assigned for All Purposes to the Hon. Karin Schwartz]

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT AND ENTRY OF JUDGMENT

Date: May 15, 2024
Time: 3:00 p.m.
Dept: 20

Reservation ID: 765149662728

Rene C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

TO THIS HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 15, 2024 at 3:00 p.m. or as soon thereafter as counsel may be heard in Department 20 of the Superior Court of the State of California for the County of Alameda, Plaintiff EDUARDO SANDOVAL (hereafter "Plaintiff") will move for an Order granting approval of PAGA settlement and entering a final judgment.

This motion is made on the grounds set forth in the accompanying materials. This Motion will be based upon this notice, the memorandum of points and authorities set forth below, the attached declarations, and the complete files and records in this action. A proposed judgment is lodged concurrently herewith.

NATHAN & ASSOCIATES, APC

Dated: April 18, 2024

By: /s/ Reuben D. Nathan
Reuben D. Nathan, Esq.
Attorney for Plaintiff
Eduardo Sandoval

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<u>Rules & Statutes</u>

I. INTRODUCTION

This PAGA action was filed on August 1, 2022. On August 30, 2023, the Parties participated in private mediation with Hon. Ronald S. Prager (Ret.). The case settled at mediation in its entirety for $300,000. Based on information provided to Plaintiff's counsel from Defendant's attorneys, the proposed agreement includes payments to approximately 421 former and current PAGA Settlement Aggrieved Employees for approximately 20,000 pay periods, subject to court approval.[1]

The Private Attorneys General Act of 2004 ("PAGA") provides:

> The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.
>
> (3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(Cal. Labor Code §2699(*l*).)

This case alleged PAGA claims based on Labor Code violations for failure to reimburse business expenses and was filed on behalf of non-exempt retail store associates, who, during the Covered Period (as defined below), were, according to Defendant's existing records, qualified as associate drivers to make deliveries of products to customer homes (or if any such person is incompetent, deceased, or unavailable due to military service, the person's legal representative or successor in interest evidenced by reasonable verification). (hereinafter referred to as "PAGA Settlement Aggrieved Employees") dating back to February 4, 2021 (i.e., one year before the PAGA Notice was served). Plaintiff Eduardo Sandoval ("Plaintiff") has represented himself individually and faithfully served as the representative for the State of California to collect civil penalties from Defendant HOME DEPOT U.S.A., INC. ("Defendant" or "Home Depot") for the alleged California

[1] This is only a settlement of the PAGA claims for civil penalties. It is not a class settlement and does not release the individual claims, if any, of the affected employees. (Cal. Labor Code §2699(g)(1); *Iskanian v. CLS Transportation*, (2014) 59 Cal. 4th 348, 381.)

Further, this settlement only releases PAGA claims up to April 7, 2024. See Settlement Agreement Sect. I.4-5

Labor Code violations. At the time of settlement, the central issue involved whether Defendant is required to reimburse employees for business expenses under California Labor Code section 2802 and the PAGA.

This motion seeks approval of a non-reversionary settlement that consists of $300,000.

Defendant has steadfastly denied that it violated the California Labor Code as to Plaintiff and the alleged Aggrieved Employees. The settlement reached by the parties is intended to resolve the entirety of this matter on behalf of Defendant and Plaintiff, including the State of California and all PAGA Settlement Aggrieved Employees employed from February 4, 2021 (i.e., one year before the PAGA Notice was served) up to April 7, 2024.

The PAGA settlement is set forth in the accompanying Settlement Agreement. See Ex. 1, attached to the Declaration of Reuben D. Nathan ("Nathan Decl"), filed herewith. The LWDA received notice of this settlement and this motion as set forth in the Nathan Decl., Para. 19.

A proposed order confirming review and approval of the PAGA settlement is being filed concurrently herewith.

II. THE GOALS OF PAGA AND ITS REQUIREMENTS

In 2003, the Legislature, recognizing the historic underfunding of the LWDA and the California Division of Labor Standards & Enforcement ("DLSE"), passed the PAGA in an effort to both spur more consistent compliance with California's labor laws and discourage employers from engaging in unlawful and anti-competitive business practices. (*See* Cal. Labor Code § 2698, note §1.) The parties' settlement agreement achieves the PAGA's goals.

While procedurally a PAGA claim may be filed as a class action, a PAGA claim is really an enforcement action pursued on behalf of the California Labor and Workforce Development Agency—the real party in interest. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) The PAGA Settlement Aggrieved Employees have *no* substantive claims under the PAGA. (*Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1003.)

The differences between a traditional class action and a PAGA representative action are well settled. Following the California Supreme Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, the Ninth Circuit in *Sakkab* explained:

> The class action is a procedural device for resolving the claims of absent parties on a representative basis. See Fed.R.Civ.P. 23; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832- 33 (1999); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613-17 (1997). By contrast, a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer. An employee bringing a PAGA action does so "as the proxy or agent of the state's labor law enforcement agencies," *Iskanian,* 59 Cal.4th at 380 (quoting *Arias v. Superior Court,* 46 Cal.4th 969, 986 (2009)), who are the real parties in interest, *see id.* at 382. As the state's proxy, an employee-plaintiff may obtain civil penalties for violations committed against absent employees, Cal. Lab.Code § 2699(g)(l), just as the state could if it brought an enforcement action directly. However, by obtaining such penalties, the employee-plaintiff does not vindicate absent employees' claims, for the PAGA does not give absent employees any substantive right to bring their "own" PAGA claims. *See Amalgamated Transit Union. Local 1756, AFL-CIO v. Superior Court,* 46 Cal .4th 993. 1003 (2009); *see also Iskanian,* 59 Cal.4th at 381 (explaining that "[t]he civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities").

Sakkab v. Luxottica Retail N. Am., Inc. (9th Cir. 2015) 803 F.3d 425, 435–436 *en banc review denied*.

The approval process in a PAGA case differs from a traditional class action as PAGA aggrieved employees do not hold substantive rights. (*See Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 972–974 (stating that aggrieved employees' ability to file PAGA claims on behalf of the state does not convert the state's interest into their own or render them real parties in interest and that PAGA settlements bind the government and do not injure the personal interests of aggrieved employees)). While the PAGA Settlement Aggrieved Employees are to receive 25% of the penalties the State collects (*see* Cal. Labor Code § 2699(i)), they lack a substantive right to these penalties. Rather, the State authorizes the penalties to incentivize bringing a suit on its behalf:

> The nature of PAGA penalties is also markedly different than damages sought in Rule 23 class actions. In class actions, damages are typically restitution for wrongs done to class members. But PAGA actions instead primarily seek to vindicate the public interest in enforcement of California's labor law. *See Sample v. Big Lots Stores, Inc.,* No. C 10-03276 SBA, 2010 WL 4939992 at *3 (N.D. Cal. Nov. 30, 2010): *Franco v. Athens Disposal Co.,* 171 Cal.App.4th 1277 (2009). The bulk of any recovery goes to the LWDA, not to PAGA Settlement Aggrieved Employees. And, the twenty-five percent portion of the penalty awarded to the aggrieved employee does not reduce any other claim that the employee may have against the employer – in this case, for example, for withheld overtime pay. *See Caliber Bodyworks, Inc. v. Super. Ct.,* 134 Cal.App.4th 365 (2005). The employee's recovery is thus an incentive to perform a service to the state, not restitution for wrongs done to members of the class.
>
> In the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief.

Baumann v. Chase Inv. Servs. Corp. (9th Cir. 2014) 747 F.3d 1117, 1123–1124. *Iskanian* makes clear the 25% share of penalties does not make the employees real parties in interest:

> A PAGA representative action is therefore a type of *qui tam* action. "Traditionally, the requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty." (*Sanders v. Pacific Gas & Elec. CO.* (1975) 53 Cal.App.3d 661, 671 (*Sanders*). The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation. The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit. (See *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399.)

Iskanian, 59 Cal.4th at 382; *Turrieta*, Cal.App.5th at 973–974.

PAGA provides that PAGA Settlement Aggrieved Employees may bring actions to recover civil penalties. (*See* Cal. Labor Code § 2699(a), (g).) Those civil penalties are a maximum of $100 per employee per pay period escalating to $200 per employee per pay period under certain circumstances and subject to reduction based on statutory factors; *see Bernstein v. Virgin Am., Inc.* (9th Cir. 2021) 3 F.4th 1127 at *1144:

> Until the employer has been notified that it is violating a Labor Code provision (whether or not the [Labor] Commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties.
>
> Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs' motion for summary judgment. On this basis, we reverse the district court's holding that Virgin is subject to heightened penalties for any labor code violation that occurred prior to that point.

(*Bernstein v. Virgin America, Inc.* (C.A. 9th 2021) 3 F.4th 1127, 1144; *see Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 355–356.) Courts retain discretion to reduce the PAGA penalty below the maximum based on a variety of factors. (Cal. Labor Code § 2699(e).) Of any civil penalties collected, 75% belongs to the LWDA and 25% belongs to the PAGA Settlement Aggrieved Employees. (Cal. Labor Code § 2699(i).)

The appropriate focus of the Court's review here should be on whether or not the real party in interest, i.e., the LWDA, objects to this proposed settlement and whether the proposed settlement enhances the State's enforcement of the State's labor regulations. *See Moniz v. Adecco USA, Inc.*

(2021) 72 Cal.App.5th 56, 64.

It is submitted that this settlement warrants approval by the Court. The settlement amount of $300,0000 for business-related expense reimbursement payments made by Defendant to the 421 employees is outstanding and warranted.

The settlement fund of $300,000 for approximately 20,000 pay periods equates to an approximate $15 per pay period. After payment of administration, requested fees and costs, and service awards, the proposed settlement provides a Net Settlement Amount of $155,0000 with approximately $116,250 allocated to the LWDA and $38,750 to the PAGA Settlement Aggrieved Employees. Based on this Settlement, the PAGA Settlement Aggrieved Employees will receive an average payment of $92.00 to be mailed to each of the 421, PAGA Settlement Aggrieved Employees. (Declaration of Reuben D. Nathan ("Nathan Decl.") ¶ 16.)

III. BECAUSE THE EMPLOYEES HAVE NO SUBSTANTIVE CLAIMS, TRADITIONAL NOTICE IS NOT REQUIRED

In a PAGA action, the real party in interest is the LWDA and the employees are nominal parties. (*See Urbino v. Orkin Servs. of Cal.* (9th Cir. 2013) 726 F.3d 1118, 1122–1123.) The LWDA, as the real party in interest has, of course, received formal notice of the terms of the settlement as required under California Labor Code section 2698(*l*). In contrast, the employees do not receive the traditional class notice because none is required:

> Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations. *Compare Concepcion*, 131 S.Ct. at 1751-52 (observing "it is…odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied"), *with Arias*, 46 Cal.4th at 984-87, 95 Cal.Rptr.3d 588, 209 P.3d 023. PAGA arbitrations therefore do not require the formal procedures of class arbitrations. *See Baumann,* 747 F.3d at 1123.
>
> Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed PAGA Settlement Aggrieved Employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees – critical requirements in federal class actions under Rules 23(a)(4) and (g)…Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality *Id*. at 1122-23 (citations omitted).

(*Sakkab*, 803 F.3d at 436.)

IV. RELEVANT ISSUES AND PROCEDURAL HISTORY

On approximately June 29, 2017, Defendant hired Plaintiff. Plaintiff worked for Defendant in non-exempt employee positions including Order Fulfillment Associate. Plaintiff's employment with Defendant ended on or about September 6, 2021.

Plaintiff alleges that from the outset, Defendant required Plaintiff to use his personal cell phone in order to discharge his duties for Defendant to meet the demands and responsibilities of his job, which included making deliveries from retail stores to designated destinations. While making such deliveries Plaintiff alleges he was required to use his personal cell phone for Defendant to make and/or receive calls, send and/or receive text messages, scan items, use GPS, and use the calculator on his personal cell phone while discharging his duties on Defendant's behalf. Plaintiff alleges that Defendant required the same of all Settlement Aggrieved Employees (referred to in the Settlement as "Settlement Group Members") in California.

On February 4, 2022, Plaintiff provided notice of Plaintiff's allegations to the Labor and Workforce Development Agency (LWDA), as presented in Plaintiff's Second Amended Complaint. Plaintiff provided notice to Defendant as well. The LWDA did not respond to these notices, thus allowing Plaintiff to initiate the PAGA lawsuit under California Labor Code section 2699.3(a)(2)(A). (Nathan Decl. ¶ 9).

On August 1, 2022, Plaintiff filed the Complaint in this Action. On September 21, 2022, Plaintiff filed the First Amended Complaint. On December 2, 2022, the Court issued its Order granting the Parties' Stipulation for Leave to file Second Amended Complaint. On December 13, 2022, Plaintiff filed the Second Amended Complaint. On January 12, 2023, Defendant filed its Answer to Plaintiff's Second Amended Complaint.

On August 30, 2023, the Parties participated in mediation before the Hon. Ronald s. Prager (Ret.). The Parties settled the case at mediation. (Nathan Decl. ¶ 11).

Prior to mediation, the parties engaged in hard-fought litigation and intended to take their claims and defenses to trial. The parties engaged in voluminous discovery, which included:

- written discovery
- the production of documents,

From Plaintiff's perspective, the evidence weighs in favor of Plaintiff due to Defendant's requirement for Plaintiff and Aggrieved Employees to use their personal cell phones in order to discharge their duties for Defendant without reimbursement in violation of California Labor Code Section 2802. Based on their investigation and discovery, Plaintiff was prepared to take the case to trial. Defendant denies Plaintiff's allegations in their entirety, but on the whole, believes this settlement is in the best interest of Defendant and the aggrieved employees.

These facts and the continuing risk and expense of further litigation led the parties to pursue mediation. In preparation for the mediation, Defendant provided Plaintiffs with information and data necessary for penalty calculations, including employment files, sampling data for the PAGA Settlement Aggrieved Employees, the total number of PAGA Settlement Aggrieved Employees, total number of pay periods between February 4, 2021 and April 7, 2024. Using this information, Plaintiff was able to calculate Defendant's total penalty exposure for the one-year statutory PAGA period. (Nathan Decl. ¶14.)

V. PLAINTIFF AND PLAINTIFF'S COUNSEL'S EFFORTS WERE THE DRIVING FORCE THAT LED TO PAYMENTS TO DEFENDANT EMPLOYEES

The extensive amount of work conducted over the course of this litigation to bring this case to resolution supports the requested fee and costs award of $120,000. This would equate to 40% of the total Settlement

Plaintiff's attorneys' lodestar also supports this request. (See, Declarations of Nathan, Righetti, and Glugoski.)

VI. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES

A. Summary of Settlement Terms

The Settlement Agreement (Nathan Decl., Exhibit 1) involves the formation of a non-reversionary fund consisting of $300,000 ("Gross Settlement Fund"). The Gross Settlement Fund will be used to make payments to the LWDA and PAGA Settlement Aggrieved Employees after payment of attorney fees, costs of administration, Plaintiff's incentive award, Plaintiff's 1542 releases and litigation costs. Plaintiff's incentive award is requested in the amount of $5,000 and settlement administration costs to ILYM Group Inc. shall not exceed $10,000. Plaintiff has executed a Cal. Civil

Code §1542 waiver for claims that can be individually asserted and are being released in exchange for $10,000.00. The Net Settlement Fund will be distributed as follows: Seventy-five percent (75%) of the Net Settlement Fund (i.e., $116,250) will be distributed to the California Labor & Workforce Development Agency ("LWDA") as required by the PAGA and the remaining twenty-five percent (25%), (i.e., approximately $38,750) will be distributed to all PAGA Settlement Aggrieved Employees on a pro-rata share basis based on the number of pay periods worked by each Settlement Aggrieved Employee. (Nathan Decl. ¶ 15.)

B. The Notice

Defendant will fund the Settlement Amount within 21 days of the Court's Order approving the Settlement. (Settlement Agreement § III(13).) The PAGA Settlement Aggrieved Employees will have 120 days to negotiate their checks. If for any reason a check is un-cashed, then a postcard reminder will be mailed. Should checks remain uncashed then the funds will be tendered to the California State Controller's Office, Unclaimed Property Division in the name of the employee(s). (Settlement Agreement § III(13)(d).) The Cover Letter (Settlement Agreement § III(13)(c)) informing the PAGA Settlement Aggrieved Employees of the nature of the payment will be provided with the settlement check. (Nathan Decl. ¶ 17, Ex. 1.)

The parties agree that payments will be made to the LWDA and the aggrieved employees no later than fourteen (14) calendar days after the Settlement Administrator receives the Settlement Group Information and is wired the Gross Settlement Amount, which is the date the final approval order and judgment approving the settlement becomes final. (Settlement Agreement § I(9) III(13). The PAGA Settlement Aggrieved Employees will have 120 days to negotiate their checks. If for any reason a check is un-cashed, then a postcard reminder will be mailed. Should checks remain uncashed then the funds will be tendered to the California State Controller's Office, Unclaimed Property Division in the name of the employee(s). The Cover Letter informing the PAGA Settlement Aggrieved Employees of the nature of the payment will be provided with the settlement check. (Nathan Decl. ¶ 18,Ex. 2).

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C. Settlement Allocation to the PAGA Settlement Aggrieved Employees

As noted, twenty-five percent (25%) of the PAGA penalties will be allocated to the PAGA Settlement Aggrieved Employees. Based on the numbers Defendant provided, approximately 421 current and former employees will share in this fund in proportion of the pay periods each member worked. The portion to each of the PAGA Settlement Aggrieved Employees will be treated as non-wages since these are civil penalties and reported by the Settlement Administrator by law PAGA Settlement Aggrieved Employees will receive, on average, $92.00, which exceeds the payout in most employment wage and hour PAGA settlements.

D. The Release

The California Supreme Court has explained that a judgment in "a representative action brought by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004…is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." (*Arias*, 46 Cal. 4th at 985–986.)

The release in the Settlement Agreement narrowly binds the PAGA Settlement Aggrieved Employees for civil penalty claims brought in the Action, as follows:

> "Released Claims" means any and all claims, causes of action, and factual or legal theories that were or reasonably could have been alleged based on Plaintiff's allegation that Settlement Group Members were not reimbursed for all business expenses, including all of the following: (i) all claims (including those for civil penalties and attorneys' fees recover) that could be brought or recovered pursuant to PAGA relating to unreimbursed business expenses; and (ii) any other recovery or penalty that Plaintiff, acting as a proxy for the LWDA and State of California, could have reasonably sought relating to or arising out of allegations of unpaid business expenses.

(Settlement Agreement § I(20))

> As of the Effective Date, Plaintiff, the LWDA, the State of California, and all Settlement Group Members (the "Releasing Entities") will release the Released Parties from the Released Claims, whether known or unknown. To be clear, the scope of this release is limited to the Released Claims. The Releasing Entities may later discover facts or legal arguments in addition to or different from those that they now know or currently believe to be true with respect to the claims, causes of action, and legal theories of the Action. Regardless, the discovery of new facts or legal arguments shall in no way limit the scope or definition of the Released Claims, and by virtue of this Agreement, Plaintiff and the Releasing Entities shall be deemed to

> have, and by operation of the final judgment approved by the Court, shall have, fully, finally, and forever settled and released all of the Released Claims. The Parties understand and specifically agree that the scope of this Release described in this Paragraph is a material part of the consideration for this Agreement, was critical in justifying the agreed upon economic value of the Settlement and without it, Defendant would not have agreed to the consideration provided, and is narrowly drafted and necessary to ensure that Defendant is obtaining peace of mind regarding the resolution of the claims that were or could have been alleged based on facts, causes of action, and legal theories contained in the Action. The period of the release described herein shall extend through the entirety of the Covered Period.

(Settlement Agreement § II(1))

VII. THE SETTLEMENT IS FAIR AND REASONABLE AND WARRANTS COURT APPROVAL

In 2016, the PAGA was amended to require the Court to "review and approve any settlement of any civil action filed pursuant to this part." (Cal. Labor Code § 2699(1)(2).) The amendment also required that the "proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." As such, the Settlement and this Motion have been concurrently submitted to the LWDA in accordance with this section. (Nathan Decl. ¶19, Ex. 3.)

A. Evaluation of the PAGA Settlement

Although PAGA and the legislative history do not require a Court to analyze a PAGA settlement in comparison to the "value" of the claims, the Court should pay particular attention to the views, if any are presented, of the LWDA. Plaintiffs do not expect the LWDA to object to this proposed settlement because the penalties obtained here are reasonable and should be viewed as a successful resolution in favor of the PAGA Settlement Aggrieved Employees and the State of California.

As well, a representative settlement is presumed fair where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) (and) counsel is experienced in similar litigation. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; *see Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 (stating factors used in determining the fairness of class action settlements are useful in evaluating a PAGA settlement).)

A court may also consider relevant factors such as the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [and] the presence of a governmental participant. (*Officers of Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1981) 688 F.2d 615, 625.) "This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties." (*Dunk*, 48 Cal.App.4th at 1801.) Moreover, the trial court has broad powers to determine whether a proposed [representative action] settlement is fair. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.)

In this case, Plaintiff's entire theory centers around Defendant's alleged practice of failing to reimburse expenses to Plaintiff and Aggrieved Employees for the use of personal cell phones while discharging their duties for Defendant. Defendant maintains data for all 421 PAGA Settlement Aggrieved Employees. Based on interviews with aggrieved employees, including Plaintiff, aggrieved employees were required to use their cell phones for a limited period of time every week, at the time of delivering items to customers. Defendants contend that aggrieved employees were not required to use their phone because Defendant either provided trucks with operating navigation systems, phones were made available for use, or Defendant used a third-party delivery company to make the deliveries. The data produced by Defendant confirms approximately 20,000 pay periods for the approximately 421 PAGA Settlement Aggrieved Employees between February 4, 2021, through April 7, 2024. (Nathan Decl. ¶20.)

Therefore, based on this analysis, Plaintiff believes the maximum total exposure value of the claims is $2,000,000.00 based on 20,000 pay periods (x $100 per violation). (Nathan Decl. ¶21.)

Under the PAGA, the realistic range for PAGA penalties range between $10-$15 per pay period. Courts have considerable discretion to reduce the penalty award below the maximum. In *Fleming v. Covidien* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, a federal court reduced PAGA penalties from $2,800,000.00 to $500,000.00, a reduction of 82.2%, because the court found maximum penalties "unjust." Some trial courts have awarded no civil penalties, even when Labor Code violations were established. Examples of such reductions include but are not limited to the following:

- *Makabi v. Gedalia* (2nd Dist. Ct. of App. Mar. 6, 2016) 2016 Cal.App.Unpub. 1489, *5–7 (no PAGA penalties were awarded by the Los Angeles County Superior Court) (unpublished decision).
- *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).
- *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801 (E.D. Cal. 2012), where the court approved a total PAGA penalty amount of $10,000, for as many as 2,055 current and former employees.
- *Schiller v. David's Bridal, Inc.*, 2012 WL 217001 (E.D. Cal. 2012), the court approved a PAGA penalty amount of $10,000 for 3,326 individuals.
- *Enombang v.Target*, Case No. RG17853948, on July 24, 2018 for a total amount of $9,000,000. The dispute involved 90,462 allegedly aggrieved employees and 1,939,006 pay periods in Alameda Superior Court. [$4.66 per pay period].
- *Pickett v. 99 Cents Only Stores*, Case No. BC473038, on August 1, 2017, for a total amount of $1,290,000. The dispute involved approximately 10,000 allegedly aggrieved employees and approximately 1,592,592.6 pay periods in Los Angeles Superior Court. Pickett v. 99 Cents Only Stores, Case No. BC473038 [$.81 per pay period.]
- *Carrington v. Starbucks Corp.*, (2018) 30 Cal.App.5th 504, the Court of Appeal affirmed a judgment after trial which provided for a PAGA penalty of $5 per pay period. In *Doe v. Google, et al.*, Case No. CGC-16-556034, the court approved $15 per aggrieved employee.

(Nathan Decl. ¶23).

This result is positive and favorable to the State, which will receive $116,250. The PAGA Settlement Aggrieved Employees will receive $38,750, which amounts on average to $92 per aggrieved employee, which is an outstanding result considering this is a cell phone reimbursement case, wherein the Defendant alleges that it provides its employees phones and a GPS system in its vehicles for employees to use while working. Additionally, this is a case in which Plaintiff and Aggrieved Employees used their personal cell phones for limited periods of time. (Nathan Decl. ¶

24).

VIII. THE ATTORNEY'S FEES AND COSTS SHOULD BE AWARDED

Notice to the LWDA has been provided as required by statute. We expect the LWDA will have no objection to the fee and cost request in light of the factual and legal record supporting the request.

PAGA carries with it a mandatory fee shifting statute under PAGA. Cal. Lab. Code Section 2699(g). As noted, Plaintiff has provided notice to the LWDA regarding all aspects of this settlement, including the amount of fees sought. Should the LWDA contact Plaintiffs' counsel regarding any aspects of this settlement prior to the hearing date, we will promptly notify the Court. Nevertheless, Plaintiff submits that the requested fees and costs sought are reasonable. As set forth above in Section IV, the parties conducted substantial discovery and trial preparation prior to agreeing to settle this case.

The tenacity of Defendant's defense strategy – coupled with the complexity, risk and demands of this case -- required the expenditure of 138.3 attorney hours from two law firms, Nathan & Associates, APC and Righetti Glugoski, P.C. Consistent with the scope of this action, the nature of the relief obtained on behalf of the LWDA and Aggrieved Employees and the amount of time expended in prosecution of the case, Plaintiff and Counsel hereby move for an award of attorney's fees and costs of $120,000. The requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent fee basis, especially in light of the benefits achieved. As outlined above and set forth in the accompanying Declarations Reuben Nathan, Matthew Righetti and John Glugoski, Counsel diligently litigated and investigated this case without duplication of efforts.

More importantly, not only are the attorney's fees being sought here in line with the market rates, but also approved by Courts in California.

- In *Enombang v. Target*, Alameda County Superior Court Case No. RG17853948, the court approved a settlement of $9,000,000 for 1,939,006 pay periods, which equates to $4.66 per pay period and Plaintiff's counsel were awarded 40% of the $9,000,000 settlement in attorney's fees;

- In *Varela et. al., v. Dolgen California, LLC*, Riverside County Superior Court Case No. RIC1306158, the court approved a fee award of $3,980,000.00 which equated to 40% of the Settlement Fund based on a lodestar of $2,783,570.00 times a multiplier of 1.43.

Nathan Decl. ¶49.

Here, Plaintiff's Counsel's lodestar exceeds the fees being requested and thus the practical effect would be an application of a negative multiplier to arrive at the requested fee.

A. Lodestar Calculation Approach

The trial court has broad authority to calculate the lodestar. (*PLCM Group, Inc.* v. *Drexler* (2000) 22 Cal.4th 1084, 1094-1095 [[T]he fee setting inquiry in California ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate)]. "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. (*Id.* at 1095).

B. Reasonable Hourly Rate

In calculating the lodestar, a billing rate of the attorneys are as follows;

- Attorney Matthew Righetti of Righetti Glugoski (36 years in practice): $1050.00;
- Attorney John Glugoski (26+ years in practice): $850 per hour;
- Attorney Reuben Nathan (23 years in practice): $950 per hour;
- Paralegals: rate of $225 per hour;

See, Nathan Decl. ¶¶25-42; Declaration of John Glugoski ("Glugoski Decl.") ¶¶7-22. These are equivalent to their current billing rates on a non-contingency fee basis. (Nathan Decl. ¶¶30-31; Glugoski Decl. ¶¶12-22). These amounts are supported by market rates of attorneys with similar experience and are consistent with their hourly rates that have been approved by other courts, as set forth in the accompanying declarations. (Nathan Decl. ¶¶30-31; Glugoski Decl. ¶¶20-22).

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C. Number of Hours Expended

In determining the number of hours expended by counsel, compensable hours include services provided including services prior to the filing of the complaint that were reasonably required. (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 655). Moreover, detailed time records are not required. "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559; *see also*, *Wershba., supra,* 91 Cal.App.4th at 255). Counsel has submitted time summaries setting forth in detail the categories of work performed and the amount of time spent on each of the various categories to support the number of hours expended. The categories are::

(1) Investigations, Factual Research

(2) Discovery

(3) Pleadings, Briefs and Pretrial Motions (includes legal research)

(4) Court Appearances

(5) Mediation Settlement and Administration

(6) Litigation Strategy, Analysis and Case Management

(7) Trial Preparation and Trial

The time summaries are attached to the corresponding attorney's Declaration. (Nathan Decl. ¶¶45-46; Glugoski Decl. ¶¶24-26).

As of the filing of this motion, attorney Reuben Nathan of Nathan & Associates, APC has expended 80.9 hours in the prosecution of this lawsuit. The lodestar of attorney Nathan as of the filing of this motion is $76,855. (Nathan Decl. ¶¶ 45-46, Ex. 4).

As of the filing of this motion, attorney Matthew Righetti of Righetti Glugoski, P.C. has spent 20.8 hours in the prosecution of this lawsuit. Attorney Righetti's lodestar as of the filing of this motion is $21,840. (Glugoski Decl. ¶25, Ex. 2).

As of the filing of this motion, attorney John Glugoski of Righetti Glugoski, P.C., has spent 36.6 hours in the prosecution of this lawsuit. Attorney Glugoski's lodestar at the time of the filing of this motion is $31,110. (Glugoski Decl. ¶25, Ex. 2).

The total hours expended by Righetti Glugoski, P.C. in the prosecution of this lawsuit is 57.4.

The total lodestar for Righetti Glugoski, P.C. is $52,950.

There was no duplication of effort and the combined efforts of Counsel were required for the successful outcome in the case. (Nathan Decl. ¶45-46, 48; Glugoski Decl. ¶¶23-26, 28). It is estimated that Counsel will expend (in total) an additional 10 hours of time beyond their current lodestars preparing for, the approval hearing and overseeing the completion of administration of this Settlement including monitoring the distribution of proceeds, following up on missing payments, communicating with clients, the Administrator and aggrieved employees, providing a final accounting for the Court, etc.

D. Adjustments to Lodestar/Multiplier

Not including anticipated future work through the completion of the case the combined lodestar is $129,805. Counsel's lodestar exceeds the fee award. No multiplier is being sought since the lodestar exceeds the fee request.

Generally, numerous courts have approved fee multipliers up to 4 times, but court's commonly have adjusted multiplier's upward to 2.0 multiplier based on certain factors such as (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132. For example, 2.0 multipliers were awarded in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 -2.25 multiplier and *Coalition for L.A. County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251-2.0 multiplier.

Although these factors, when applied to the facts of this case, weigh in favor of a positive multiplier commensurate with other cases, Counsel's lodestar exceeds the amount requested. Thus, a fee award of $129, 805 is tantamount to Counsel's lodestar with a negative multiplier.

E. Reimbursement of Court Costs and Expenses of Is Justified

The settlement provided for cost reimbursement not to exceed $20,000. The total costs expended equals $7,645.30. Nathan & Associates, APC has expended $1,124.45 in litigation costs and expenses (Nathan Decl. ¶51; Exhibit 5), and requests reimbursement in such amounts. Righetti Glugoski, PC has expended $6,520.85 in litigation costs (Glugoski Decl. ¶ 29; Exhibit 3), and therefore requests reimbursement in such amounts.

IX. THE REPRESENTATIVE AWARD SHOULD BE GRANTED

Plaintiff submits that it is appropriate that he receives an enhancement of $5,000 for the significant effort and risks he undertook in prosecuting this case. Because the purpose of the PAGA is to create incentives for private litigants to bring actions enforcing the California Labor Code, rewarding prevailing litigants with a substantial recovery promotes PAGA's purpose. Plaintiff has also executed a California Civil Code Section 1542 waiver for claims that can be individually asserted and are being released in exchange for $10,000.00. (Nathan Decl., Ex. 1, Settlement Agreement Sect. III(2), (7))

X. SUBMISSION TO THE LWDA

As set forth in the Nathan Decl. at ¶19, the settlement and this motion are concurrently being submitted to the LWDA in accordance with California Labor Code section 2699(1)(2). The proof of electronic submission is attached as Exhibit "3" to the Nathan Decl.

XI. THE SETTLEMENT ADMINISTRATOR

ILYM will serve as the Settlement Administrator and will be responsible for processing the settlement payments and providing notice to the PAGA Settlement Aggrieved Employees. The Settlement Agreement authorizes up to $10,000 in administration costs (Settlement Agreement Sect. I(23 and 34); III(9)) to ILYM.

XII. CONCLUSION

In light of the foregoing, Plaintiff respectfully request that the Court approve the Parties' Settlement Agreement attached as Exhibit 1 to the Nathan Decl., including Plaintiff's request for the representative award, attorney fees, costs, and administrative expenses, so that ILYM Group Inc. may begin administering the settlement in accordance with the terms of the Agreement.

Dated: April 18, 2024

Respectfully submitted,
NATHAN & ASSOCIATES, APC

By: _/s/ Reuben D. Nathan_
Reuben D. Nathan
Attorneys for Plaintiff

Court Reservation Receipt

Reservation

Reservation ID:
765149662728

Status:
RESERVED

Reservation Type:
Motion re: (for Approval of PAGA Settlement and Entry of Judgment)

Number of Motions:
1

Case Number:
22CV015414

Case Title:
SANDOVAL vs HOME DEPOT U.S.A., INC.

Filing Party:
Eduardo Sandoval (Plaintiff)

Location:
Rene C. Davidson Courthouse - Department 20

Date/Time:
May 15th 2024, 3:00PM

Confirmation Code:
CR-8P6BKFPEBNSSXKCAJ

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	.00	1	.00
Court Technology Fee	1.00	1	1.00
TOTAL			**$1.00**

Payment

Amount:
$1.00

Type:
Visa

Account Number:
XXXX8644

Authorization:
029582

Payment Date:
2024-02-28

Back to Main

Print Page