

1 Majed Dakak (SBN 271875)
2 *mdakak@kbslaw.com*
3 KESSELMAN BRANTLY STOCKINGER LLP
4 1230 Rosecrans Avenue, Suite 400
5 Manhattan Beach, CA 90266
6 (310) 307-4555
7 (310) 307-4570 (Fax)

8 Dennis S. Hyun (SBN 224240)
9 *dhyun@hyunlegal.com*
10 HYUN LEGAL, APC
11 515 S. Figueroa St., Suite 1250
12 Los Angeles, CA 90071
13 (213) 488-6555
14 (213) 488-6554 (Fax)

15 *Attorneys for Proposed Intervenor*
16 Mack Ricks, Marlena Barr, and Christina Moore

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

SIMONE N. ROGERS, in a Representative
capacity only, and on behalf of other members
of the general public similarly situated,

Plaintiff,

vs.

CONAM MANAGEMENT
CORPORATION, a California corporation;
and DOES 1 through 10, inclusive,

Defendants.

Case No. 37-2020-00013563-CU-OE-CTL

Related to 37-2020-00001430-CU-OE-CTL

[Assigned to the Hon. Richard S. Whitney,
Dept. 68]

PROPOSED INTERVENORS' *EX PARTE*
APPLICATION FOR LEAVE TO
INTERVENE AND OBJECTION TO
APPROVAL OF PAGA REPRESENTATIVE
ACTION SETTLEMENT; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT

Date: June 1, 2021

Time: 9:00 a.m.

Dept.: C-68

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 1, 2021, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard before the Hon. Richard S. Whitney, Judge presiding in Department C-68 of the
4 above-referenced Court located at 1100 Union Street, San Diego, CA 92101, Mack Ricks, Marlana
5 Barr, and Christina Moore (collectively, “Proposed Intervenors”) will and hereby do apply *ex parte* for
6 an Order for leave to intervene in the above-captioned lawsuit, *Simon Rogers v. Conam Management*
7 *Corporation*, S.D. Superior Court Case No. 37-2020-00013563-CU-OE-CTL (the “*Rogers Action*”), as
8 well as to object to the proposed settlement therein.

9 This Application is made pursuant to Code of Civil Procedure Section 387(a) on the basis that
10 Proposed Intervenors have a direct and immediate interest in the outcome of this pending action. First,
11 Plaintiffs Simone Rogers (“Rogers”) and Esther Lisa Shelley (“Shelley”) (collectively, “Plaintiffs,” or
12 “Settling Plaintiffs”) and their counsel, Eric Yaeckel, are not adequate representatives and cannot be
13 trusted to oversee any type of representative settlement on behalf of the State and aggrieved employees.
14 In email communications with Mr. Yaeckel, he continues to put his interests ahead of employees and
15 the State of California by threatening counsel for Proposed Intervenors to convert this Private
16 Attorneys General Act (the “PAGA”) settlement into a class action settlement to spite Proposed
17 Intervenors’ counsel. Proposed Intervenors’ counsel reached out to Mr. Yaeckel to obtain information
18 about the settlement to ensure that it is fair, adequate and reasonable. Moreover, Proposed Intervenors
19 filed the Notices of Related Cases and the *Ex Parte* Application to Deem Cases Related as required by
20 Local Rule 2.1.3.1. In response, Mr. Yaeckel said the following: “[m]y intention all along was that we
21 would allow you to retain the class claims so long as you would allow us to seek approval of the
22 PAGA settlement. I take your recent actions as obviously intending to interfere with our scheduled
23 PAGA settlement approval hearing. I must note that you were aware of this hearing and decided to take
24 action before even bothering to review our proposed settlement terms,. [sic] This is disappointing and
25 shows your true motivation was never to review our proposed settlement objectively. It was my hope
26 to stay out of each other’s way. However, if you take action which pits us as adversaries, I rescind any
27 promises as to whether or not we will expand our settlement to include class claims. I know defense
28 counsel is already reaching out to me to ‘talk.’” (Declaration of Majed Dakak (“Dakak Decl.”) at ¶ 7,

1 **Exh. D).** This email was in response to Proposed Intervenor simply filing the Notices of Related
2 Cases and the *Ex Parte* Application to Deem Cases Related as required by Local Rules. Clearly, Mr.
3 Yaeckel is putting his interests ahead of the State of California and aggrieved employees by threatening
4 Proposed Intervenor's counsel. Moreover, Mr. Yaeckel refused to share them and forward a copy of
5 his *Ex Parte* Application to Approve the PAGA Settlement. As such, Proposed Intervenor's counsel
6 had to obtain the settlement documents from the Labor Workforce and Development Agency (the
7 "LWDA"). It should also be noted that Mr. Yaeckel filed his Motion to approve his PAGA settlement
8 on an *ex parte* basis in order to ram his PAGA Settlement through this Court without allowing for
9 proper vetting by Proposed Intervenor (nor the Court). **Significantly, this is the second time that**
10 **Mr. Yaeckel has attempted to seek approval of his PAGA settlement via *ex parte* application.**

11 Nowhere in Settling Plaintiffs' 2nd *ex parte* application for approval of the Rogers PAGA
12 settlement (ROA #57) did Settling Plaintiffs' counsel disclose Judge John S. Meyer's comment during
13 the hearing on Settling Plaintiffs' 1st *ex parte* application (ROA #35), which asked for the same approval
14 of the Rogers PAGA settlement, where Judge Meyer stated "I am not going to – nor would Judge Strauss
15 approve this *ex parte*" after questioning the amount of the enhancement award. (See Dept. 75 May 6,
16 2021 Reporter's Transcript of Proceedings at p. 6:19 – 7:1 attached as **Exhibit C** to Dakak Decl.).

17 And as further detailed in the attached Memorandum, counsel for Rogers not been forthcoming
18 with the Court nor other parties interested in this litigation. For example, Settling Plaintiffs' counsel
19 failed to disclose in his 2nd *ex parte* application for approval of the Rogers PAGA settlement before this
20 Court (ROA #57), that the PAGA settlement was being vehemently opposed and instead labeled the *ex*
21 *parte* application as being "**UNOPPOSED**" (emphasis contained in the original caption of Rogers *ex*
22 *parte* application) including declaring the same in Rogers counsel's declaration.¹ Completely missing
23 in Settling Plaintiffs' 2nd *ex parte* application for approval of the Rogers PAGA settlement before this
24 Court (ROA #57), is the relevant history of the case. Rogers failed to disclose that Judge Meyer
25 ordered that Settling Plaintiffs' *Ex Parte* Application for Approval and Proposed Intervenor's *Ex Parte*

26
27 ¹ Settling Plaintiffs' counsel knew at the time of making its second *ex parte* application that it was
28 opposed as prior pleadings clearly communicated this. See Application for Leave to Intervene and
Object to the Approval of the PAGA Settlement filed on June 5, 2021 (ROA # 29) set for hearing by
Judge Meyer sitting in for Judge Strauss for 7/16/21 (ROA #s 47-49).

1 Application to Intervene and Object be heard via **noticed motion** at 9:00 a.m. on July 16, 2021. (*See*
2 Dept. 75 May 6, 2021 Minute Order and Reporter's Transcript of Proceedings at p. 6:26 – 7:7 attached
3 as **Exhibits B and C** to Declaration of Majed Dakak ("Dakak Decl.")).

4 Rather than comply with the spirit of Judge Meyer's ruling by allowing Proposed Intervenor's
5 Application to Intervene and Object to be set and heard **as a noticed motion** on the same day as any
6 motion for approval of the Rogers PAGA settlement and coordinating with counsel re the same,
7 Settling Plaintiffs refiled their *ex parte* application to approve the PAGA settlement again without any
8 exigency whatsoever (ROA #57) **and more importantly, without providing notice to Proposed**
9 **Intervenors, much less serving them with their 2nd Ex Parte Application**. Said conduct not only
10 violates the spirit of Judge Meyer's Order, in which he had already denied the requested relief via *ex*
11 *parte* application, but also violates the ethical rules for attorneys. Pursuant to Business & Professions
12 Code § 6068(d) and Rule 3.3(a)(1) and (d) of the California Rules of Professional Conduct, Settling
13 Plaintiffs' counsel had an ethical obligation to: (1) inform this Court of Judge Meyer's ruling requiring
14 Proposed Intervenor's *Ex Parte* Application to Intervene and Object was set to be heard via noticed
15 motion after a proper showing was made; and (2) given that Settling Plaintiffs' 2nd Application is also
16 via *ex parte*, they were required to inform this Court in their papers that Proposed Intervenor have
17 opposed and will be opposing Settling Plaintiffs' PAGA settlement. Tellingly, Settling Plaintiffs and
18 their attorney, Eric Yaeckel, did not do any of these things in their papers.

19 Additionally, it is abundantly clear that this settlement was made for the benefit of Mr. Yaeckel
20 and his clients, as opposed to protecting the interests of the State of California and all similarly aggrieved
21 employees. Here, the Parties originally agreed to settle this case for \$600,000, with the representatives
22 receiving the following enhancements: **\$37,500** to Rogers; and **\$17,500** to Shelley. (Memorandum of
23 Understanding ("MOU") at ¶¶ 1, 5. Attached as **Exhibit A** to Dakak Decl.). These terms are binding.
24 (MOU at ¶¶ 14, **Exh. A**). These enhancements clearly demonstrate that Mr. Yaeckel and his clients are
25 putting their interests first. These awards of \$37,500 and \$17,500 are 584 and 272.5 times larger than
26 the average employee award of \$64.20. To justify these exorbitant awards, Mr. Yaeckel contends that
27 his clients are waiving their individual claims as set forth in the MOU. (MOU at ¶ 5). However, as
28 made clear in the operative complaint, Plaintiffs are suing in their "Representative capacity only, and

1 on behalf of other members of the general public similarly situated.” (See Complaint caption).
2 Moreover, case authority makes clear that PAGA representatives do not have individual claims to
3 waive. Rather, the real party in interest is the State of California. *Iskanian v. CLS Transp. Los*
4 *Angeles, LLC*, 59 Cal. 4th 348, 384 (2014). As such, there is no justification for these excessive
5 incentive awards, especially when aggrieved employees will receive fractions less. Even Judge Meyer
6 sharply questioned the *reduced* size requested of the enhancement award requested in Roger 1st *ex*
7 *parte* PAGA Settlement Application. (See Dept. 75 May 6, 2021 Reporter’s Transcript of Proceedings
8 at 6:19 –26 attached as **Exhibit C** to Dakak Decl.).

9 The Parties then inexplicably reduced the Gross Settlement Amount from \$600,000 in the
10 MOU, to \$550,000 in the Settlement Agreement (an almost 10% reduction in the gross settlement
11 amount). The Parties also then removed Shelley from the Agreement and then reduced Rogers’
12 enhancement from \$37,500, to \$5,000. Significantly, the delta between the original Gross Settlement
13 Amount of \$600,000 and the new reduced Gross Settlement Amount of \$550,000 is exactly \$50,000,
14 which represents the difference if subtracting the additional monies that were to be paid Rogers and
15 Shelley for their enhancements, i.e., \$37,500 (original Rogers’ enhancement)-\$5,000 (Rogers’ current
16 enhancement) = \$32,500. \$32,500 + \$17,500 (Shelley’s enhancement) = \$50,000, the exact difference in
17 amounts between the original and current settlement. This strongly suggests that Settling Plaintiffs and
18 Defendant have entered into side deals to pay these monies to Rogers and Shelley as part of an
19 undisclosed side-deal. If such a side-deal was reached, it must be disclosed to the Court pursuant to
20 Labor Code § 2699(l)(2) (court must approve all PAGA settlements); *O’Connor*, 201 F. Supp. 3d at
21 1133 (settlement of claims must be consistent with purpose of PAGA).

22 Further, the inexplicably reduced gross settlement amount of \$550,000 is grossly inadequate. Per
23 paragraph 13 of the Parties’ Memorandum of Understanding (“MOU”), there are 37,200 pay periods at
24 issue. Based on the pay periods at issue, the total maximum exposure is \$24,254,400. The \$550,000
25 settlement accounts for only 2.26% of the total exposure, which is undisputedly woefully inadequate.
26 The truth of the matter is that Defendant ConAm Management Corporation (“Defendant”) has engaged in
27 a reverse auction. Specifically, Proposed Intervenor and Defendant attended **two mediations**, the first
28 on February 16, 2021. At the conclusion of the first mediation, Defendant’s counsel represented that he

1 needed more time to conduct an exposure analysis and obtain more settlement authority. What
2 Defendant did, however, was actually then engage in a reverse auction with Plaintiffs' counsel and settle
3 the PAGA action on March 5, 2021. Defendant's counsel then attempted to use the *Rogers* settlement to
4 force Proposed Intervenor's counsel to accept a cheap settlement and shortchange the class and the
5 aggrieved employees whom they were entrusted to represent by seeking to serve as class and PAGA
6 counsel. It was only after Proposed Intervenor's and their counsel refused to accept a settlement that was
7 pennies on the dollar did Defendant surreptitiously settle with Mr. Yaeckel and his clients.

8 Further, to avoid detection of Mr. Yaeckel's PAGA settlement, the Settling Parties failed to
9 comply with Rule 3.300 of the California Rules of Court and Local Rule 2.1.3.1 which requires parties
10 to an action to file a notice of related cases when the parties become aware of any related cases. The
11 *Rogers* Action was filed subsequent to Proposed Intervenor's related action. Thus, pursuant to Rule
12 3.300(h)(1), the *Rogers* Action was ordered related and assigned to this Court pursuant to Proposed
13 Intervenor's *Ex Parte* Application to Deem Cases Related and Reassignment. For these reasons, the
14 settlement cannot be approved and at a minimum, cannot be approved on an *ex parte* basis. There is no
15 exigency. To the contrary, the Court must scrutinize this settlement, as there is undisputed evidence of
16 collusion between the settling parties and a lack of candor with the Court.

17 The Parties were provided notice of this Application on May 26, 2021. (Declaration of Majed
18 Dakak ("Dakak Decl.") ¶ 3, **Exhibit F**).

19 This Application shall be based on this Notice, the attached Memorandum of Points and
20 Authorities and concurrently filed Declaration Majed Dakak, on the files and records herein; on the
21 files and pleadings in this action; on any matters the Court may take judicial notice of; and on such
22 other and further information as the Court may require.

23 DATED: May 27, 2021

KESSELMAN BRANTLY STOCKINGER LLP
HYUN LEGAL, APC

24
25 By: _____



Majed Dakak
Dennis S. Hyun

26
27 Attorneys for Proposed Intervenor's
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I. INTRODUCTION

Proposed Intervenor Mack Ricks (“Ricks”), Marlena Barr (“Barr”), and Christina Moore (“Moore”) (collectively, “Proposed Intervenor”) hereby apply to intervene in the current action and object to the settlement proposed by Plaintiffs Simone Rogers (“Rogers”) and Esther Lisa Shelley (“Shelley”) (collectively, “Plaintiffs”) and Defendant ConAm Management Corporation (“Defendant”) (collectively, the “Parties”).

First, the Settling Parties’ conduct clearly demonstrates collusive conduct and a lack of candor with the Court. Nowhere in Rogers 2nd *ex parte* application for approval of the Rogers Private Attorneys General Act (the “PAGA”) settlement (ROA #57) did Rogers disclose Judge Meyer’s comment during Rogers 1st *ex parte* application (ROA #35), which asked for the same approval of the Rogers PAGA settlement, where Judge Meyer stated “I am not going to – nor would Judge Strauss approve this *ex parte*” after questioning the amount of the enhancement award. (*See* Dept. 75 May 6, 2021 Reporter’s Transcript of Proceedings at p. 6:19 – 7:1 attached as **Exhibit C** to Declaration of Majed Dakak (“Dakak Decl.”)).

As further detailed below, counsel for Rogers not been forthcoming with the Court, nor other parties interested in this litigation. For example, counsel for Rogers, in filing his 2nd *ex parte* application for approval of the Rogers PAGA settlement before this Court (ROA #57), failed to disclose to the Court that the PAGA settlement was being vehemently opposed and instead labeled the *ex parte* application as being “**UNOPPOSED**” (emphasis contained in the original caption of Rogers *ex parte* application) including declaring the same in Rogers counsel’s declaration.² Completely missing in Rogers 2nd *ex parte* application for approval of the Rogers PAGA settlement before this Court (ROA #57), is the relevant history of the case. Rogers failed to disclose that the Honorable John S. Meyer ordered that Settling Plaintiffs’ *Ex Parte* Application for Approval and Proposed Intervenors Mack Ricks, Marlena Barr, and Christina Moore’s (collectively, “Proposed Intervenors”) *Ex Parte* Application to Intervene and Object be heard via noticed motion at 9:00 a.m. on July 16, 2021. (*See*

² Rogers counsel knew at the time of making its second *ex parte* application that it was opposed as prior pleadings clearly communicated this. *See* Application for Leave to Intervene and Object to the Approval of the PAGA Settlement filed on June 5, 2021 (ROA # 29) set for hearing by Judge Meyer sitting in for Judge Strauss for 7/16/21 (ROA #s 47-49).

1 Dept. 75 May 6, 2021 Minute Order and Reporter's Transcript of Proceedings at p. 6:26 – 7:7 attached
2 as **Exhibits B and C** to Dakak Decl.)

3 Rather than comply with the spirit of Judge Meyer's ruling by allowing both the Proposed
4 Intervenor's Application to Intervene and Object to be set and heard on the same day as any application
5 for approval of the Rogers PAGA settlement and coordinating with counsel re the same, Plaintiffs refiled
6 their 2nd *ex parte* application (without any exigency whatsoever, other than to sneak in a settlement
7 approval) (ROA #57), **without providing notice to Proposed Intervenor's, much less serving them**
8 **with their 2nd Ex Parte Application**. Said conduct not only violates the spirit of Judge Meyer's Order
9 which had already denied the prior *ex parte* application to approve the Rogers' PAGA settlement, but
10 also violates the ethical rules for attorneys. Pursuant to Business & Professions Code § 6068(d) and Rule
11 3.3(a)(1) and (d) of the California Rules of Professional Conduct, Settling Plaintiffs' counsel had an
12 ethical obligation to: (1) inform this Court of Judge Meyer's ruling requiring Proposed Intervenor's *Ex*
13 *Parte* Application to Intervene and Object was set to be heard via noticed motion after a proper showing
14 was made; and (2) given that Rogers 2nd Application is also *ex parte*, inform this Court in its papers that
15 Proposed Intervenor's have opposed and will be opposing Rogers' PAGA settlement. Tellingly, Settling
16 Plaintiffs and their attorney, Eric Yaeckel, did not do any of these things in their papers.

17 Second, Mr. Yaeckel and his clients are putting their interests ahead of the State of California
18 and other aggrieved employees. The LWDA has commented on the approval of settlements, noting
19 that in connection with approving a settlement, the trial court must ensure "the relief provided for
20 under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to
21 benefit the public...." *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016).
22 Further, as a PAGA representative, Settling Plaintiffs and Mr. Yaeckel take on a "special responsibility
23 to their fellow aggrieved workers who are effectively bound by any judgment." *O'Connor*, 201 F.
24 Supp. 3d at 1134. Here, per the terms of the enforceable MOU, Rogers was to receive an astounding
25 **\$37,500** and Shelley was to receive **\$17,500** as enhancement payments. Moreover, in email
26 communications with Mr. Yaeckel, he continues to put his interests ahead of employees and the State
27 of California by threatening counsel for Proposed Intervenor's to convert this PAGA settlement into a
28 class action settlement to spite Proposed Intervenor's counsel and dissuade Proposed Intervenor's

1 counsel from arguing and objecting to settlement terms which are unfair to bounded aggrieved
2 employees. Specifically, when Proposed Intervenor filed the Notices of Related Cases (which counsel
3 for both Rogers and Defendant failed to do despite their obligations to do so) and the *Ex Parte*
4 Application to Deem Cases Related as required by Local Rule 2.1.3.1, Mr. Yaeckel responded by
5 stating:

6 My intention all along was that we would allow you to retain the class
7 claims so long as you would allow us to seek approval of the PAGA
8 settlement. I take your recent actions as obviously intending to interfere
9 with our scheduled PAGA settlement approval hearing. I must note that
10 you were aware of this hearing and decided to take action before even
11 bothering to review our proposed settlement terms,. [sic] This is
12 disappointing and shows your true motivation was never to review our
proposed settlement objectively.

13 It was my hope to stay out of each other's way. However, if you take
14 action which pits us as adversaries, I rescind any promises as to whether or
15 not we will expand our settlement to include class claims. I know defense
16 counsel is already reaching out to me to "talk."

17 (Dakak Decl. at ¶ 5, **Exhibit D**). This email was in response to Proposed Intervenor simply filing the
18 Notices of Related Cases and the *Ex Parte* Application to Deem Cases Related as required by Local
19 Rules. Clearly, Mr. Yaeckel is putting his interests ahead of the State of California and aggrieved
20 employees by threatening Proposed Intervenor's counsel.

21 Third, this settlement must not be approved because it is the result of an undisputed reverse
22 auction. Only when Proposed Intervenor refused to settle this case for pennies on the dollar did
23 Defendant's counsel then settle the case with Plaintiffs. To be sure, Defendant's counsel admits that
24 because Proposed Intervenor refused to accept a paltry settlement after two mediations with Proposed
25 Intervenor, he then went to Mr. Yaeckel to enter into this settlement. It should be noted here that,
26 counsel for Proposed Intervenor and Defendant previously litigated a Fair Labor Standards Act (the
27 "FLSA") collective action for several years, resulting in a settlement which achieved 100% recovery
28 for the collective. Given the lengthy litigation history, counsel Proposed Intervenor and Defendant
agreed to mediate the first-filed case assigned to this Court, *Ricks et al. v. ConAm Mgmt. Corp.*, S.D.
Superior Court Case No. 00001430-CU-OE- CTL. Specifically, on February 16, 2021, Proposed
Intervenor and Defendant attended a mediation. At this time, Proposed Intervenor were not aware of
the Rogers' case. However, when Proposed Intervenor's counsel refused to settle for pennies on the

dollar, resulting in no settlement, Defendant's counsel then went to Settling Plaintiffs' counsel and achieved this paltry PAGA settlement. Given the prior related litigation between Proposed Intervenor and Defendant, Proposed Intervenor has already obtained admissible evidence over the course of years (depositions evidence etc.) to have a solid understanding of the claims, risks, and amount of damages relating to the overlapping PAGA claims in the *Rogers* and *Ricks* matters.

Lastly, Settling Plaintiffs again provide absolutely no exposure analysis. Per paragraph 13 of the Parties' MOU and Section II(7) of the Joint Stipulation of Settlement and Release ("Settlement Agreement"), there are 37,200 pay periods at issue. Based on the pay periods at issue, the total maximum exposure is \$24,254,400. The \$550,000 settlement accounts for only 2.26% of the total exposure, which is undisputedly woefully inadequate.

As discussed in detail herein, there are numerous problems with the proposed settlement and the misleading litigation conduct of the Settling Parties and their counsel, which mandate intervention and/or denial of approval of the Parties' proposed settlement. Accordingly, Proposed Intervenor respectfully request leave to intervene in this case, and/or the current settlement be denied approval.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Background of the *Ricks* Action

On January 9, 2020, Proposed Intervenor filed this Action in the San Diego County Superior Court. Proposed Intervenor's initial Complaint was filed on behalf of *Ricks* only and asserted the following causes of action: (1) failure to provide accurate wage statements; (2) failure to pay overtime wages; (3) failure to provide rest periods; (4) failure to timely pay wages; and (5) violation of the Unfair Competition Law (the "UCL").

On May 26, 2020, Proposed Intervenor filed the operative First Amended Complaint (the "FAC"), which added Moore and Barr as plaintiffs and the Sixth Cause of Action for violation of the PAGA premised on the above violations.

It should be noted that on June 6, 2018, Proposed Intervenor's counsel filed a Fair Labor Standards Act (the "FLSA") collective action in the United States District Court for the Southern District of California entitled *Cuevas v. ConAm Mgmt. Corp.*, U.S.D.C. S.D. Cal. Case No. 3:18-cv-01189-GPC-JMA (the "*Cuevas* Action"), which was also against this Defendant and involved the same

counsel, Adam Koh-Sweeney. The *Cuevas* Action involved similar regular rate/overtime claims and was heavily litigated, including numerous discovery disputes. The Honorable Gonzalo Curiel then granted the plaintiff's motion for collective certification in *Cuevas v. ConAm Mgt. Corp.*, 2019 WL 5320544, at *1 (S.D. Cal. Oct. 21, 2019):

Plaintiff alleges that ConAm maintains a single policy that fails to properly include non-discretionary bonuses in calculating overtime pay and it pays portions of overtime payment late or not at all. Leasing Professionals, Business Managers and Community Managers are all subject to the Winner's Circle program. (Dkt. No. 54-1, Gillane Decl., Ex. A.) Moreover, Community Managers and Business Managers are also subject to other non-discretionary bonus programs. (Dkt. No. 57, Dadek Decl., Ex. B (UNDER SEAL).) Because Plaintiff has plausibly demonstrated that ConAm handles its payroll uniformly as to non-discretionary bonuses, the lenient standard has been met.

Id. at *6.

The Parties in the *Cuevas* Action then settled the case achieving a 100% on the dollar for collective action members. As Judge Curiel's Order states, Proposed Intervenor's counsel in the *Cuevas* Action achieved this settlement, which also resulted in Defendant changing its payroll practices:

In this case, the Settlement Agreement provides 100% relief before employer-side taxes to the opt-ins and eliminates the inherent risk of continued litigation, or in other words, nearly 100% post employer side taxes in recovery for the collective action members.

In addition, as a result of the lawsuit, Defendant has changed some of its payroll practices in line with complaints made during the litigation that has affected each member of the collective action settlement. (Dkt. No. 83-1, Dakak Decl. ¶ 16.) Thus, because opt-ins will receive nearly 100% recovery and Defendant has adjusted its payroll process, the Court concludes that this factor supports approval of the settlement.

(Dkt. No. 87 at pp. 5:22-6:10, attached as **Exhibit E** to Dakak Decl. at ¶¶ 6-7).

Given the Parties' litigation history, here, the Parties' counsel agreed to mediate this matter with Michael Loeb, Esq., on February 16, 2021. (Dakak Decl. ¶ 8). In connection with the mediation, Defendant's counsel did not mention the *Rogers* Action, nor did Defendant file a Notice of Related Cases as required by Rule 3.300 of the California Rules of Court. (*Id.*) The Parties did not settle at the February 16, 2021 mediation. (*Id.*) Rather, the Parties and their counsel adjourned and agreed to complete a second mediation on March 30, 2021, so that Defendant's counsel could purportedly

1 conduct a further exposure analysis. (*Id.*) Defendant’s counsel, Mr. Koh-Sweeney, then represented
2 that he needed more time to analyze the data for mediation and asked to reschedule to April 13, 2021.
3 (*Id.*) Thus, the Parties mediated on April 13, 2021. (*Id.*) Defendant then for the first time at mediation
4 raised the *Rogers* Action the night before the mediation on April 13, 2021, claiming that Defendant had
5 already reached a settlement of the PAGA claims asserted in the *Rogers* Action and argued that the
6 settlement would preclude any PAGA claims in this Action. (*Id.*) Suffice it to say that this action did
7 not settle at mediation. (*Id.*) Proposed Intervenor’s counsel then conducted a case search and found
8 the *Rogers* Action and filed the Notices of Related Cases and this Application as required by Local
9 Rule 2.1.3.1. (*Id.*)

10 On May 6, 2021, this Court granted Proposed Intervenor’s *Ex Parte* Application, deemed the
11 cases related and reassigned the *Rogers* Action to this Court.

12 **B. The *Rogers* Action**

13 On March 12, 2020, Simone Rogers (“Rogers”) filed the *Rogers* Action, which asserts
14 representative claims only under the PAGA. Again, the *Rogers* Action asserts largely the same claims
15 against the same Defendant for: (1) meal and rest period violations; (2) minimum wage violations;
16 (3) overtime wage violations; (4) wage statement violations; (5) failure to reimburse expenses; and
17 (6) failure to pay wages at separation. As made clear in the operative complaint, Plaintiffs are suing in
18 their “Representative capacity only, and on behalf of other members of the general public similarly
19 situated.” (*See* Complaint caption).

20 As set forth in the Parties’ MOU, they released the following PAGA claims for \$600,000:

21 Plaintiffs will release, and the State of California and all PAGA Settlement
22 Employees will be deemed to release, all PAGA claims or causes of action
23 for civil penalties, attorneys fees, and/or costs under PAGA alleged in the
24 Action, or that could have been alleged in the Action, that are based on the
25 alleged meal and rest break, minimum wage, overtime compensation,
wage statement, unreimbursed business expenses, and final pay violations,
and any resulting claim for penalties under PAGA alleged to have been
violated in the Action through the PAGA Period.

26 (MOU at ¶ 7, attached as **Exhibit A** to Dakak Decl.)

27 Further, per the MOU, Rogers and Shelley are to receive \$37,500 and \$17,500, respectively, for
28 serving as representatives and for releasing their “individual claims,” even though they pled this

lawsuit in their “representative capacity” only.

As also set forth in the MOU, there are 37,200 pay periods at issue. (MOU at ¶ 13).

Lastly, the MOU is fully “enforceable and admissible in Court pursuant to Code of Civil Procedure section 664.6.” (MOU at ¶ 14).

C. The Parties’ Prior *Ex Parte* Applications

The *Rogers* action was never identified as a related action. (Dakak Decl. ¶ 4). Indeed, Proposed Intervenor’s counsel were never aware of the existence of this current case until the night before the second mediation on April 13, 2021. (*Id.*) Immediately upon being informed of this case and the pending settlement, Proposed Intervenor’s counsel met and conferred with Plaintiffs’ counsel, asking Mr. Yaeckel to serve a copy of his motion for approval of settlement. (*Id.*) While Mr. Yaeckel initially agreed to do so, he later backtracked and refused to serve Proposed Intervenor with this Application, forcing Proposed Intervenor to obtain the settlement from the LWDA. (*Id.*) Accordingly, Proposed Intervenor then applied for *ex parte* relief as soon as discovering that Mr. Yaeckel would be seeking *ex parte* approval of his PAGA settlement in Department 75 on May 6, 2021. (*Id.*)

On May 6, 2021, Judge Meyer (sitting in for Judge Strauss) heard both Settling Plaintiffs’ *Ex Parte* Application to Approve PAGA Settlement and Proposed Intervenor’s *Ex Parte* Application to Intervene and Object to Settlement. Judge Meyer ordered that both *Ex Parte* Applications be heard via **noticed motion on July 16, 2021:**

Today’s proceedings are heard before the Hon. Judge John S. Meyer, covering in the absence of Hon. Judge Richard E.L. Strauss.

The Court, having read the moving papers, and having heard comments from counsel, instructs counsel to proceed via noticed motion for each remedy sought; motions set to date and time noted below, respectively.

The Motion Hearing (Civil) is scheduled for 07/16/2021 at 09:00AM before Judge Richard E. L. Strauss. (Plaintiff’s Motion For Approval of PAGA Settlement)

The Motion Hearing (Civil) is scheduled for 07/16/2021 at 09:00AM before Judge Richard E. L. Strauss. (Proposed Intervenor’s Motion For Leave To Intervene and Object To Approval Of PAGA Settlement)

(May 6, 2021 Minute Order attached as **Exhibit B** to Dakak Decl.)

As indicated in the Court Reporter's Transcript of the hearing on May 6, 2021, Judge Meyer set the hearings for July 16, 2021, and understood that this Court would be ruling on the *Ex Parte* Application to Deem Cases Related and Reassignment. Judge Meyer further noted that the hearings on the **noticed motions** should be held on July 16, 2021, before this Court, and that the Parties could file supplemental papers on their respective *Ex Parte* Applications. Rather than comply with Judge Meyer's Order or the spirit of that Order after the cases were deemed related, and **without providing notice to Proposed Intervenorors of the 2nd Application for PAGA settlement**, Settling Plaintiffs refiled their identical *Ex Parte* Application for Approval, which was heard by Judge Meyer on May 12, 2021.

III. ARGUMENT

A. Intervention Must Be Granted Because Settling Plaintiffs and Their Counsel's Failure to Comply With the Spirit of Judge Meyer's Orders Demonstrates Inadequate Representation

On May 6, 2021, counsel for Proposed Intervenorors, Settling Plaintiffs, and Defendant appeared in Department 75 on Settling Plaintiffs' 1st *Ex Parte* Application to Approve PAGA Settlement and on Proposed Intervenorors' *Ex Parte* Application to Intervene and Object to the Settlement. This hearing was conducted before the Honorable John S. Meyer sitting in for Judge Richard Strauss, who was on vacation. Judge Meyer ordered that both *Ex Parte* Applications be heard via **noticed motion on July 16, 2021:**

Today's proceedings are heard before the Hon. Judge John S. Meyer, covering in the absence of Hon. Judge Richard E.L. Strauss.

The Court, having read the moving papers, and having heard comments from counsel, instructs counsel to proceed via noticed motion for each remedy sought; motions set to date and time noted below, respectively.

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1 As indicated in the Court Reporter's Transcript of the hearing on May 6, 2021, Judge Meyer set
2 the hearings for July 16, 2021, and understood that this Court would be ruling on the *Ex Parte*
3 Application to Deem Cases Related and Reassignment. Judge Meyer further noted that the hearings on
4 the **noticed motions** should be held on July 16, 2021, before this Court, and that the Parties could file
5 supplemental papers on their respective *Ex Parte* Applications. Rather than comply with Judge
6 Meyer's Order or at a minimum with the spirit of Judge Meyer's Order, and **without providing notice**
7 **to Proposed Intervenors of this Application**, Settling Plaintiffs refiled their identical 2nd *Ex Parte*
8 Application for Approval, which was previously heard by Judge Meyer on May 12, 2021. Settling
9 Plaintiffs' re-filed *Ex Parte* Application makes no mention of Judge Meyer's Order, which is quite
10 troubling. Judge Meyer ordered this Application and the *Ex Parte* Application to Intervene as noticed
11 motions, as opposed to a surreptitiously refiled *Ex Parte* Application. It is clear that Settling Plaintiffs,
12 Defendant and their counsel have no regard for the orders of the Court. Nor do Settling Plaintiffs want
13 their PAGA to be scrutinized by known objectors.

14 More importantly, Settling Plaintiffs' attorneys conduct violates the Rules of Professional
15 Conduct and the Business & Professions Code. Business & Professions Code § 6068(d) states that:
16 "[i]t is the duty of an attorney to ... [e]mploying, for the purpose of maintaining the causes confided to
17 the attorney, only those means that are consistent with the truth, and never misleading the judge or any
18 judicial officer by artifice or any false statement of fact or law."

19 As explained by the Court of Appeal, "[h]onesty in dealing with the courts is of paramount
20 importance, and misleading a judge is, regardless of motives, a serious offense." *Williams v. Superior*
21 *Court*, 46 Cal. App. 4th 320, 330 (1996); *see also* Cal. Rules of Prof'l Conduct 3.3(a)(1) (attorney must
22 not knowingly make any false statement of fact or law to tribunal or fail to correct any false statement
23 of material fact or law attorney has previously made to tribunal).

24 Further, in connection with *ex parte* proceedings, if the party seeking *ex parte* relief does not
25 provide notice to an opposing party (Proposed Intervenors), as the Settling Parties failed to do so here,
26 the Settling Parties were ethically obligated to disclose Proposed Intervenors' position to this Court and
27 should have also informed this Court that Judge Meyer ruled that Settling Plaintiffs' *Ex Parte*
28 Application to Approve and Proposed Intervenors' *Ex Parte* Application to Intervene and Object be

1 heard as noticed motions on **July 16, 2021**. Cal. Rules of Prof'l Conduct 3.3(d) ("In an ex parte
2 proceeding where notice to the opposing party in the proceeding is not required or given and the
3 opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the
4 lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse
5 to the position of the client.").

6 This litigation conduct here is simply not proper especially in the light of approval of a
7 settlement that binds others who do not have the benefit of speaking for themselves before the Court.
8 It also further demonstrates that Settling Parties, Defendant and their counsel have no interest in
9 protecting the State of California and aggrieved employees. Instead, they are looking out for
10 themselves to all others' detriment by not allowing for any light shine on their PAGA settlement.

11 **B. Intervention Must Be Permitted Because Settling Parties Have Sold Out the State**
12 **and Aggrieved Employees By Inexplicably Reducing the Settlement by \$50,000**

13 In *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016), the LWDA
14 provided its position on the settlement of PAGA claims. In *O'Connor*, the Court requested the
15 LWDA's input as to an approval of the PAGA portion of a settlement. The LWDA stressed that PAGA
16 settlements must be "genuine and meaningful":

17 **It is thus important that when a PAGA claim is settled, the relief**
18 **provided for under the PAGA be genuine and meaningful, consistent**
19 **with the underlying purpose of the statute to benefit the public** and, in
20 the context of a class action, the court evaluate whether the settlement
meets the standards of being 'fundamentally fair, reasonable, and
adequate' with reference to the public policies underlying the PAGA.

21 *Id.* at 1133 (emphasis added).

22 As further noted by the Court in *O'Connor*: "[i]t is important to note that where plaintiffs bring
23 a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers
24 who are effectively bound by any judgment." *Id.* at 1134. Because of this responsibility, the Court
25 further explained that there is a real risk of collusion:

26 This duty imposed upon the PAGA representative is especially significant
27 given that PAGA does not require class action procedures, such as notice
28 and opt-out rights. **The Court must be cognizant of the risk that despite**
this responsibility, there may be a temptation to include a PAGA

1 **claim in a lawsuit to be used merely as a bargaining chip**, wherein the
2 rights of individuals who may not even be members of the class and the
3 public may be waived for little additional consideration in order to induce
4 the employer to agree to a settlement with the class.

5 *O'Connor*, 201 F. Supp. 3d at 1134 (emphasis added).

6 Here, the Parties originally agreed to settle this case for \$600,000, with the representatives
7 receiving the following enhancements: **\$37,500** to Rogers; and **\$17,500** to Shelley. (MOU at ¶¶ 1, 5.
8 Attached as **Exhibit A** to Dakak Decl.). These terms are binding. (MOU at ¶¶ 14, **Exh. A**). These
9 enhancements clearly demonstrate that Mr. Yaeckel and his clients are putting their interests first.
10 These awards of \$37,500 and \$17,500 are 584 and 272.5 times larger than the average employee award
11 of \$64.20. To justify these exorbitant awards, Mr. Yaeckel contends that his clients are waiving their
12 individual claims as set forth in the MOU. (MOU at ¶ 5). However, as made clear in the operative
13 complaint, Plaintiffs are suing in their “Representative capacity only, and on behalf of other members
14 of the general public similarly situated.” (See Complaint caption). Moreover, case authority makes
15 clear that PAGA representatives do not have individual claims to waive. Rather, the real party in
16 interest is the State of California. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 384
17 (2014); *Williams v. Pinkerton*, 237 Cal. App. 4th 642, 646 (2015); see also *Achal v. Gate Gourmet,*
18 *Inc.*, 114 F. Supp. 3d 781, 807 (N.D. Cal. 2015) (“The state labor law agency on whose behalf the
19 representative plaintiff sues is therefore ‘always the real party in interest in the suit’”). As such, there
20 is no justification for these excessive incentive awards, especially when aggrieved employees will
21 receive fractions less. Even Judge Meyer sharply questioned the *reduced* size requested of the
22 enhancement award requested in Roger 1st *ex parte* PAGA Settlement Application. (See Dept. 75 May
23 6, 2021 Reporter’s Transcript of Proceedings at 6:19 –26 attached as **Exhibit C** to Dakak Decl.).

24 The Parties then inexplicably reduced the Gross Settlement Amount from \$600,000 in the
25 MOU, to \$550,000 in the Settlement Agreement (an almost 10% reduction in the gross settlement
26 amount). The Parties also then removed Shelley from the Agreement and then reduced Rogers’
27 enhancement from \$37,500, to \$5,000. Significantly, the delta between the original Gross Settlement
28 Amount of \$600,000 and the new reduced Gross Settlement Amount of \$550,000 is exactly \$50,000,
which represents the difference if subtracting the additional monies that were to be paid Rogers and

Shelley for their enhancements, i.e., \$37,500 (original Rogers enhancement)-\$5,000 (Rogers' current enhancement)=\$32,500. \$32,500+\$17,500 (Shelley's enhancement)=\$50,000, the exact difference in amounts between the original and current settlement. This strongly suggests that Settling Plaintiffs and Defendant have entered into side deals to pay these monies to Rogers and Shelley as part of an undisclosed side-deal. If such a side-deal was reached, it must be disclosed to the Court pursuant to Labor Code § 2699(l)(2) (court must approve all PAGA settlements); *O'Connor*, 201 F. Supp. 3d at 1133 (settlement of claims must be consistent with purpose of PAGA).

At any rate, the Settling Parties have inexplicably taken money away from the State of California and aggrieved employees for no reason whatsoever. This \$50,000 reduction is not explained in the Settling Parties' first or second *Ex Parte* Application and strongly smacks of collusion between the Parties.

To be sure, the Settling Parties already have a documented history of collusion. Again, in response to Proposed Intervenor's counsel informing Settling Plaintiffs of the *Ex Parte* Application to Deem Cases Related, Settling Plaintiffs' counsel, Mr. Yaeckel, stated the following:

My intention all along was that we would allow you to retain the class claims so long as you would allow us to seek approval of the PAGA settlement. I take your recent actions as obviously intending to interfere with our scheduled PAGA settlement approval hearing. I must note that you were aware of this hearing and decided to take action before even bothering to review our proposed settlement terms,. [sic] This is disappointing and shows your true motivation was never to review our proposed settlement objectively.

It was my hope to stay out of each other's way. However, if you take action which pits us as adversaries, I rescind any promises as to whether or not we will expand our settlement to include class claims. **I know defense counsel is already reaching out to me to "talk."**

(Dakak Decl. at ¶ 5, **Exhibit D**, emphasis added). This email is direct evidence of collusion and further undisputedly shows that Mr. Yaeckel is putting his own interests ahead of the State of California and aggrieved employees by threatening to engage in litigation conduct to spite Proposed Intervenor's counsel, as opposed to protecting the State and employees. And, this email further demonstrates that Defendant and Settling Plaintiffs are undisputedly engaging in a reverse auction.

Defendant initially attempted to settle with Proposed Intervenor's counsel, but when Proposed Intervenor's counsel would not settle for pennies on the dollar, Defendant then settled with Settling

1 Plaintiffs, resulting in this paltry settlement. **This is the very definition of a reverse auction.**

2 Again, Proposed Intervenors and Defendant agreed to mediate on February 16, 2021. (Dakak
3 Decl. ¶ 8). In connection with the mediation, Defendant's counsel did not mention the *Rogers* Action,
4 nor did Defendant file a Notice of Related Cases as required by Rule 3.300 of the California Rules of
5 Court. (*Id.*) The Parties did not settle at the February 16, 2021 mediation. (*Id.*) Rather, the Parties
6 and their counsel adjourned and agreed to complete a second mediation on March 30, 2021, so that
7 Defendant's counsel could purportedly conduct a further exposure analysis. (*Id.*) It should be noted
8 that at the mediation, Proposed Intervenors' counsel were seeking much higher recovery than the
9 instant settlement. (*Id.*) Defendant's counsel, Mr. Koh-Sweeney, then represented that he needed
10 more time to analyze the data for mediation and asked to reschedule to April 13, 2021. (*Id.*) Thus, the
11 Parties mediated on April 13, 2021. (*Id.*) Defendant then for the first time at mediation raised the
12 *Rogers* Action the night before the mediation on April 13, 2021, claiming that Defendant had already
13 reached a settlement of the PAGA claims asserted in the *Rogers* Action and argued that the settlement
14 would preclude any PAGA claims in this Action. (*Id.*)

15 Given this procedural morass, it is clear that when Proposed Intervenors would not settle for
16 pennies, Defendant approached Settling Plaintiffs and their counsel to reach this sweetheart deal. Again,
17 even Mr. Yaeckel openly admits that he will enter into any type of agreement that benefits himself and
18 that Defendant's counsel had already reached out to him to "talk." (Dakak Decl., **Exhibit D**).

19 Accordingly, this settlement is an undisputed reverse auction. *Amaraut v. Sprint/United Mgmt.*
20 *Co.*, 2020 WL 1820120, at *3 (S.D. Cal. Apr. 10, 2020) ("A reverse auction is said to occur when 'the
21 defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement
22 with in the hope that the district court will approve a weak settlement that will preclude other claims
23 against the defendant.' It has an air of mendacity about it.") (Citing *Negrete v. Allianz Life Ins. Co.*,
24 523 F.3d 1091, 1099–1100 (9th Cir. 2008)); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 399 (C.D.
25 Cal. 2007) (denying approval of settlement where it appeared that the parties engaged in a reverse
26 auction).

27 Defendant knew, given the long history of litigation in the *Cuevas* case, that Proposed
28 Intervenors would not settle for pennies on the dollar and that instead they would litigate the case to
Rogers v. Conam

1 achieve a settlement worth approving like in the *Cuevas* case which achieved 100% on the dollar.
2 Given that Defendant knew that Proposed Intervenor could and would achieve a better result,
3 Defendant proceeded with a reverse auction which harms the PAGA aggrieved employees.

4 **C. Proposed Intervenor Have No Recourse Other Than Intervening Because They**
5 **Cannot Opt-Out of the Settlement**

6 Settling Plaintiffs make only one vague and misleading mention of Proposed Intervenor in
7 falsely arguing that they do not have standing to object and that “the settlement will not affect” the
8 *Ricks* case. (*Ex Parte* at 2:25-28). That is factually and legally incorrect. It is well-settled that
9 Proposed Intervenor (who also represent the State by filing of their own overlapping PAGA action)
10 may intervene in a PAGA action. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 582 (2010)
11 (noting that a non-party may object to a PAGA settlement and file a motion to intervene). As set forth
12 in Proposed Intervenor’s *Ex Parte* Application, they do not have a right to opt-out of a PAGA-only
13 settlement. *Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 851 (9th Cir. 2020) (“... nonparty
14 employees as well as the government are bound by the judgment in an action brought under’ PAGA,
15 without an opportunity to opt out”) (citing *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014);
16 *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1120 (N.D. Cal. 2016) (“Because PAGA is an
17 action on behalf of the State, the PAGA settlement included in the Settlement Agreement would
18 prohibit any other driver from bringing a PAGA claim (or obtaining relief through a PAGA
19 representative suit) for the time period up to preliminary approval, *even if that driver opts out of the*
20 *Settlement Agreement.*”) (Emphasis added).

21 The case relied on by Settling Plaintiffs is not applicable and unavailing. *Robinson v. S. Cts.*
22 *Oil Co.*, 53 Cal. App. 5th 476, 482 (2020), deals with **post** judgment request to opt out of a PAGA
23 entered judgement. Here, the status of the case is pre judgment and the Proposed Intervenor in the
24 *Ricks* case have overlapping PAGA claims and thus are also acting on behalf of a government agency
25 (and thus are not non-parties but act in the same representative capacity as Rogers does with respect to
26 the overlapping PAGA claims. *See Kim v. Reins Int’l California, Inc.*, 9 Cal. 5th 73, 81 (2020) (“An
27 employee suing under PAGA ‘does so as the proxy or agent of the state’s labor law enforcement
28 agencies.’ Every PAGA claim is ‘a dispute between an employer and the state.’”). The only other case

1 cited, *Arias v. Superior Ct.*, 46 Cal. 4th 969, 986 (2009), also is a post judgment request to opt out of a
2 PAGA entered judgement.

3 **D. Intervention Must Be Permitted to Object to this Paltry Settlement, Especially**
4 **Given that Plaintiffs Provide No Exposure Analysis**

5 Notwithstanding that Settling Plaintiffs have filed two *ex parte* applications to approve the
6 settlement and the fact that Proposed Intervenors already raised this deficiency, Settling Plaintiffs again
7 provide absolutely no exposure analysis required to support the fairness of the settlement. Here, the
8 Parties are attempting to resolve the following claims for a paltry \$550,000: (1) meal period violations;
9 (2) rest period violations; (3) minimum wage violations; (4) overtime wage violations; (5) wage
10 statement violations; (6) failure to reimburse expenses; and (7) failure to pay wages at separation.
11 Courts have repeatedly held that a plaintiff can “stack,” or seek separate PAGA penalties for each
12 underlying violation of the Labor Code. *Vaquero v. Ashley Furniture Indus., Inc.*, 2012 WL 12965744,
13 at *5 n.2 (C.D. Cal. Dec. 3, 2012) (“PAGA penalties can be “stacked”—that is, multiple labor code
14 violations in a single pay period may each incur separate PAGA penalties.”); *Hernandez v. Towne*
15 *Park, Ltd.*, 2012 WL 2373372, at *17 n. 77 (C.D. Cal. June 22, 2012) (noting that courts have held that
16 plaintiffs asserting various underlying causes of action for violation of the Labor Code can recover a
17 separate PAGA penalty per violation, or “stack” said penalties); *Schiller v. David's Bridal, Inc.*, 2010
18 WL 2793650, at *6 (E.D. Cal. July 14, 2010) (same).

19 Based on 37,200 pay periods at issue per the MOU and the Settlement Agreement, the
20 following is the potential exposure:

21	Meal Periods	3720000
22	Rest Periods	3720000
23	Overtime	3720000
24	Wage Statement	9300000
25	Business Expenses	3720000
	Wages at Separation	37200
	Total exposure	\$24,254,400

26 The above is based on \$100 per pay period for the meal, rest, overtime, and business expense
27 violations. Labor Code § 2699(f)(2). Proposed Intervenors attributed the wages at separation claim at
28 only \$37,200, given that there would be only one violation at the time of separation. The wage statement

penalties are \$250 per wage statement. *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667 (2018). Thus, the \$550,000 settlement accounts for only 2.26% of the total potential liability.

Indeed, courts routinely reject proposed PAGA settlements when the settlement is comprises only single digit percentages of the total settlement value or estimated value of PAGA claims. (See, e.g., *Haralson v U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 972 (N.D. Cal. 2019) (noting concern in Northern District regarding settlements of less than 1 percent of total value of PAGA claim); *Guerrero-Hernandez v Ozburn-Hessey Logistics, LLC*, 2018 U.S. Dist. Lexis 225487 (C.D. Cal. July 13, 2018) (1 percent of gross settlement allocated to PAGA claims insufficient); *Cotter v Lyft, Inc.*, 176 F. Supp. 3d 930, 940 (N.D. Cal. 2016) (finding problematic seemingly arbitrary reduction of PAGA penalty to "miniscule" portion less than 1 percent of total settlement amount).

In *O'Connor*, 201 F. Supp 3d 1110, for instance, the District Court denied approval of a class action settlement that included \$1,000,000 for PAGA claims because the court was unable to discern the basis for the allocation. The court agreed with the LWDA that courts in hybrid class/PAGA actions must evaluate whether the PAGA component settlements are fundamentally fair, reasonable, and adequate with reference to the public policies underlying PAGA. *Id.* at 1133. Borrowing from cases analyzing class action settlements, courts have applied the following criteria in evaluating PAGA settlements: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed; and (5) the expertise and views of counsel. *Id.* at 1134 (quoting *Hanlon v Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir 1998)).

As a more concrete example, in *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058 (N.D. Cal. 2019), Proposed Intervenor's counsel obtained PAGA penalties for a wage statement violation for \$50 million alone. It is clear that the PAGA settlement is unfair. At any rate, Settling Plaintiffs again have provided no exposure analysis. Thus, Settling Plaintiffs' *Ex Parte* Application should be denied.

E. Legal Authority

California Code of Civil Procedure section 387 sets forth two separate and independent grounds for intervention. Proposed Intervenor's meet both grounds for intervention. First, if the disposition of an action could impede a proposed intervenor's ability to protect an interest relating to the property or transaction at issue in the litigation, an applicant is entitled to intervene as a matter of right. The fact

1 that such intervention may expand the issues in the case, create delay, or adversely affect the original
2 parties is irrelevant. Cal. Code Civ. Proc. § 387(d)(1); *Cal. Physicians' Serv. v. Super. Ct.*, 102 Cal. App.
3 3d 91, 96 (1980). Where the criteria in California Code of Civil Procedure section 387, subdivision
4 (d)(1) are satisfied, the trial court does not have discretion to deny the motion to intervene. *Highland*
5 *Dev. Co. v. City of Placer*, 170 Cal. App. 3d 169, 180 (1985) (intervention is "legally compelled"
6 where the criteria in Code Civ. Proc., § 387, subd. (b) are present.)³

7 Second, even where an applicant fails to meet the test for intervention as a matter of right, the trial
8 court has "broad discretion" to permit intervention when he or she asserts an interest in the litigation.
9 *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal. App. 3d 299, 302 (1976). Permissive intervention is
10 appropriate where a third party has a direct and immediate interest in the action, intervention will not
11 enlarge the issues in the case, and the reasons for wanting to intervene outweigh any opposition by the
12 parties. Cal. Code Civ. Proc. § 387(d)(2); *City of Malibu v. Cal. Coastal Com'n*, (2005) 128 Cal. App. 4th
13 897, 902. Courts are to liberally construe the statute in favor of intervention. *Simpson Redwood Co. v.*
14 *State of Calif.*, 196 Cal. App. 3d 1192, 1200 (1987) "[T]he intervener need neither claim a pecuniary
15 interest nor a specific legal or equitable interest in the subject matter of the litigation ... section 387
16 should be liberally construed in favor of intervention." Proposed intervenor seeks leave to intervene in
17 the current action based both upon intervention as a matter of right under Code of Civil Procedure section
18 387, subdivision (d)(1) and discretionary intervention under subdivision (d)(2).

19 Because Proposed Intervenors' class and PAGA action would be materially affected by the
20 Parties' current settlement and for the problematic issues described above as to the current settlement,
21 intervention must be granted.

22 1. Proposed Intervenor Meets the Requirements for Mandatory Intervention.

23 There are two threshold elements of the unconditional right to intervene in an action under
24 Code of Civil Procedure section 387, subdivision (d)(1)(B). They are: (1) an interest relating to the
25 property or transaction that is the subject of the action; (2) the fact that the disposition of the action
26 may, as a practical matter, impair or impede the proposed intervenor's ability to protect that interest.

27 ³ Cal. Code Civ. Proc. § 387 has been amended effective January 1, 2018. Case law may reference pre-
28 amendment subsections.

1 Once these two factors are satisfied, the court must permit intervention unless it is established that the
2 proposed intervenor's interests will be adequately represented by the existing parties. Code Civ. Proc. §
3 387(d)(1)(B); *Siena Ct. Homeowners Ass'n v. Green Valley Corp.*, 164 Cal. App. 4th 1416, 1424 (2008)
4 (citing *Hodge v. Kirkpatrick Dev., Inc.*, 130 Cal. App. 4th 540, 554-55 (2005).

5 As authorized legal representatives of absent aggrieved employees in the settlement between
6 Plaintiffs and Defendant whose claims would be extinguished if the settlement is approved, Proposed
7 Intervenors have an interest in the current action that was initially pled as a PAGA only action arising
8 from drug testing, but reverse engineered into global release covering every possible wage and hour
9 claim to bar Proposed Intervenors' claims. Moreover, approval of the Proposed Settlement would
10 operate as *res judicata* on Proposed Intervenors' and other aggrieved employees' PAGA claims. This is
11 the paradigmatic situation for permitting intervention. *See Villacres v. ABM Indus., Inc.*, 189 Cal. App.
12 4th 562, 583 (2010) (When a settlement contains various viewpoints, the courts may ensure that these
13 viewpoints are represented by allowing them to join as intervenors.)

14 **a. The Proposed Settlement, If Approved, Will Impede Proposed**
15 **Intervenors' Ability to Protect The Interests Of The Certified Classes.**

16 Proposed Intervenors and certified class members will suffer prejudice because the judgment
17 the proposed settlement would result in *res judicata* as to the claims of class members, aggrieved
18 employees, and the State of California. *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009) ("Because
19 an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions
20 as a substitute for an action brought by the government itself, a judgment in that action binds all those,
21 including nonparty aggrieved employees, who would be bound by a judgment in an action brought by
22 the government."). Therefore, if the Proposed Settlement is approved and judgment is entered,
23 Proposed Intervenors, the certified classes, aggrieved employees and the State of California will be
24 barred from pursuing any of the claims that Proposed Intervenors are litigating.

25 **b. Proposed Intervenors' Interests are Not Adequately Represented by**
26 **Plaintiff.**

27 The proposed settlement should be approved by the Court only if it is fair, reasonable, and
28 adequate and if it presents a reasonable compromise taking into many factors. The relevant factors are set

1 forth in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008). The most important factor to be
2 considered is the strength of plaintiff's case. "The court must independently and objectively analyze the
3 evidence and circumstances before it in order to determine whether the settlement is in the best interest of
4 those whose claims it will extinguish." *Id.* at 130 (emphasis added) (citing 4 *Newberg on Class Actions* §
5 11.41). The record before the trial court in this case does not contain the information required for an
6 understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.
7 *Clark v. Am. Residential Serv. LLC*, 175 Cal. App. 4th 785, 801 (2009) (citing *Kullar, supra* at 120.)
8 Plaintiffs have failed to set forth any facts or information demonstrating that the settlement is in the best
9 interest of the Proposed Intervenors, other non-exempt employees and the State of California.

10 First, as discussed above, the gross settlement of \$550,000 does not adequately compensate the
11 aggrieved employees and the State of California.

12 Second, it is clear that Settling Plaintiffs' counsel have failed to analyze the exposure on
13 Plaintiffs' claims, given the paltry settlement and their repeated failure to address the exposure analysis
14 in their 2nd *ex parte* application. Plaintiffs' counsel does not provide – much less thoroughly analyze –
15 the exposure as required by *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130, 133 (2008).

16 This Court has an obligation to ensure that the settlement agreement is not the product of fraud,
17 overreaching by or collusion between the negotiating parties, and the settlement, taken as a whole, is
18 fair, reasonable and adequate to all concerned. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th
19 Cir. 1988). In considering whether a settlement is reasonable, the trial court should consider relevant
20 facts, which may include, but are not limited to, "the strength of the plaintiffs' case, the risk, expense,
21 and complexity and likely duration of further litigation, the risk of maintaining class action status
22 through trial, the amount offered in settlement, the extent of discovery completed and the stage of the
23 proceedings, the experience and views of counsel, the presence of a governmental participant, and the
24 reaction of the class members to the proposed settlement." *Kullar*, 168 Cal.App.4th at 128; *Dunk v.*
25 *Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). "The court cannot accept a settlement ... the
26 proponents have not shown to be fair, reasonable and adequate." *Dunk*, 48 Cal. App. 4th at 1801.

27 Plaintiffs' *Ex Parte* Application is nothing but a collection of vague and ambiguous conclusory
28 statements without any analysis of the relevant factors set forth in *Kullar*. The settlement, taken as a

whole, is not fair, reasonable, or adequate to all concerned.

Because Plaintiffs have failed to establish the burden that the settlement is fair and reasonable and is in the best interest of the Proposed Intervenor, class members, aggrieved employees and the State of California, Proposed Intervenor must exercise their right to intervene in order to protect the interest of the class members, aggrieved employees and the State of California which they seek to adequately protect and represent.

2. Proposed Intervenor Meets the Requirements for Permissive Intervention.

Even if the Court deems that intervention is not mandatory, the Court should allow Proposed Intervenor to intervene pursuant to Code of Civil Procedure section 387(d)(2) which provides, in part, "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." Again, Proposed Intervenor easily satisfies these requirements. "The purposes of permissive intervention are to protect the interests of those who may be affected by the judgment." *Timberidge Enter., Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 881 (1978) (quoting *San Bernardino Cnty. v. Harsh Cal. Corp.*, 52 Cal. App. 2d 341, 346 (1959)).

First, Proposed Intervenor's application is timely because it is made at the earliest possible time after learning of the existence of this case and the proposed settlement, which Mr. Yaeckel first disclosed he was seeking approval of on May 4, 2021. (Dakak Decl. ¶ 9). Then, Settling Plaintiffs and Defendant did not provide notice of the May 12, 2021 *ex parte* hearing, nor serve Proposed Intervenor with their 2nd *ex parte* application, even though they knew that Proposed Intervenor would be opposing and objecting. As soon as Proposed Intervenor learned of Settling Plaintiffs' clandestine attempt, Proposed Intervenor then refiled their *Ex Parte* Application to Intervene and Object to preserve their rights.

Second, as detailed above, Proposed Intervenor has an interest in the matter of the litigation because the proposed settlement seeks to release claims that are already being litigated in Proposed Intervenor's lawsuit.

Third, Proposed Intervenor's intervention will not enlarge the current litigation because Proposed Intervenor's Complaint in Intervention, attached hereto as Exhibit 1, alleges similar claims

1 that Plaintiffs and Defendant are proposing to settle.

2 Finally, the reasons for intervention undeniably outweigh the reasons for opposition by Plaintiff
3 and Defendants. Presumably, the Parties will argue that intervention will delay approval of the
4 settlement. However, for the reasons set forth above, the settlement as it stands cannot be approved.
5 Therefore, allowing Proposed Intervenor to intervene to protect the interests of the Proposed
6 Intervenor, certified class members, aggrieved employees, and the State of California will actually add
7 value to any potential settlement reached by the Parties down the road. Intervention will not delay
8 possible settlement of the allegations sought to be released by the proposed settlement but rather ensure
9 that any potential settlement releasing the class and representative action claims will be fair, adequate,
10 and reasonable. Proposed Intervenor's goal in intervention is to protect not only his own interest, but
11 also the interests of class members/aggrieved employees and the State of California he seeks to
12 represent. Intervention is therefore necessary and should be permitted.

13 **F. EXIGENT CIRCUMSTANCES EXIST TO SUPPORT *EX PARTE* RELIEF**

14 Given that the Court has set the hearing on Plaintiff's *ex parte* application for approval for June
15 1, 2021, *ex parte* relief is warranted. If Proposed Intervenor sought the relief through a noticed
16 motion, then they would not be able to object to the settlement prior to the hearing on the application
17 for approval.

18 **IV. CONCLUSION**

19 For the reasons stated above, Proposed Intervenor's Application to Intervene, (attached,
20 Proposed Order, Exhibit 2) should be granted.

21
22 DATED: May 27, 2021

KESSELMAN BRANTLY STOCKINGER LLP
HYUN LEGAL, APC

23
24 By: _____



Majed Dakak
Dennis S. Hyun

25
26 Attorneys for Proposed Intervenor

EXHIBIT 1

1 Majed Dakak (SBN 271875)
2 *mdakak@kbslaw.com*
3 KESSELMAN BRANTLY STOCKINGER LLP
4 1230 Rosecrans Avenue, Suite 400
5 Manhattan Beach, CA 90266
6 (310) 307-4555
7 (310) 307-4570 (Fax)

8 Dennis S. Hyun (SBN 224240)
9 *dhyun@hyunlegal.com*
10 HYUN LEGAL, APC
11 515 S. Figueroa St., Suite 1250
12 Los Angeles, CA 90071
13 (213) 488-6555
14 (213) 488-6554 (Fax)

15 Attorneys for Proposed Intervenor
16 Mack Ricks, Marlena Barr, and Christina Moore

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN DIEGO**

13 SIMONE N. ROGERS, in a Representative
14 capacity only, and on behalf of other members
15 of the general public similarly situated,

16 Plaintiff,

17 vs.

18 CONAM MANAGEMENT
19 CORPORATION, a California corporation;
20 and DOES 1 through 10, inclusive,

21 Defendants.

Case No. 37-2020-00013563-CU-OE-CTL

[Assigned to the Hon. Richard E.L. Strauss, Dept.
75]

PROPOSED INTERVENORS'
COMPLAINT IN INTERVENTION

1 Proposed Intervenors Mack Ricks (“Ricks”), Marlena Barr (“Barr”), and Christina Moore
2 (“Moore”) (collectively, “Proposed Intervenors”) hereby submit this Complaint in Intervention in the
3 above-entitled action.

4 1. On January 9, 2020, Proposed Intervenors filed this Action in the San Diego County
5 Superior Court. Proposed Intervenors’ initial Complaint was filed on behalf of Ricks only and asserted
6 the following causes of action: (1) failure to provide accurate wage statements; (2) failure to pay
7 overtime wages; (3) failure to provide rest periods; (4) failure to timely pay wages; and (5) violation of
8 the Unfair Competition Law (the “UCL”).

9 2. On May 26, 2020, Proposed Intervenors filed the operative First Amended Complaint
10 (the “FAC”), which added Moore and Barr as plaintiffs and the Sixth Cause of Action for violation of
11 the PAGA premised on the above violations.

12 3. Intervenors have a right to intervene in this action under Code of Civil Procedure §
13 387(a) in that Intervenors have a direct and immediate interest in the outcome of this pending action,
14 entitled, *Rogers v. Conam Management Corporation*, S.D. Superior Court Case No. 37-2020-
15 00013563-CU-OE-CTL (the “*Rogers* Action”), particularly given that Plaintiffs Simone Rogers
16 (“Rogers”) and Esther Lisa Shelley (“Shelley”) (collectively, “Plaintiffs”) Defendant ConAm
17 Management Corporation (“Defendant”) have entered into a settlement that includes the claims
18 asserted on behalf of the class members, the State of California and aggrieved employees in the lawsuit
19 entitled, *Ricks et al. v. ConAm Management Corp. et al.*, S.D. Superior Court Case No. 37-2020-
20 00001430-CU-OE- CTL (the “*Ricks* Action”).

21 4. Intervenors have a direct and immediate interest in this matter in that the proposed
22 settlement will directly and adversely affect the rights of the class members, aggrieved employees and
23 the State of California for whom the *Ricks* Action is maintained.

24 WHEREFORE, Intervenors pray for judgment as follows:

25 1. For injunctive relief enjoining any approval of any settlement of the *Rogers* Case until
26 Intervenors are permitted to intervene to oppose the *Rogers* Action Settlement;

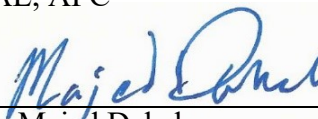
27 2. For attorney’s fees and costs; and

28 3. For such other and further relief as the Court may allow.

DATED: May 26, 2021

KESSELMAN BRANTLY STOCKINGER LLP
HYUN LEGAL, APC

By: _____


Majed Dakak

Attorneys for Proposed Intervenors

EXHIBIT 2

1 Majed Dakak (SBN 271875)
2 *mdakak@kbslaw.com*
3 KESSELMAN BRANTLY STOCKINGER LLP
4 1230 Rosecrans Avenue, Suite 400
5 Manhattan Beach, CA 90266
6 (310) 307-4555
7 (310) 307-4570 (Fax)

8 Dennis S. Hyun (SBN 224240)
9 *dhyun@hyunlegal.com*
10 HYUN LEGAL, APC
11 515 S. Figueroa St., Suite 1250
12 Los Angeles, CA 90071
13 (213) 488-6555
14 (213) 488-6554 (Fax)

15 Attorneys for Proposed Intervenors
16 Mack Ricks, Marlena Barr, and Christina Moore

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN DIEGO**

13 SIMONE N. ROGERS, in a Representative
14 capacity only, and on behalf of other members
15 of the general public similarly situated,

16 Plaintiff,

17 vs.

18 CONAM MANAGEMENT
19 CORPORATION, a California corporation;
20 and DOES 1 through 10, inclusive,

21 Defendants.

Case No. 37-2020-00013563-CU-OE-CTL

Related to 37-2020-00001430-CU-OE-CTL

[Assigned to the Hon. Richard S. Whitney,
Dept. 68]

**[PROPOSED] ORDER GRANTING
PROPOSED INTERVENORS' EX
PARTE APPLICATION FOR LEAVE
TO INTERVENE AND OBJECTION
TO APPROVAL OF PAGA
REPRESENTATIVE ACTION
SETTLEMENT**

Date: June 1, 2021

Time: 9:00 a.m.

Dept.: C-68

On June 1, 2021, Proposed Intervenor Mack Ricks (“Ricks”), Marlena Barr (“Barr”), and Christina Moore’s (“Moore”) (collectively, “Proposed Intervenor”) *Ex Parte* Application for Leave to Intervene and Objection to Approval of Class and PAGA Representative Action Settlement came on for hearing in Department 68 of the San Diego County Superior Court, before the Honorable Richard S. Whitney, Judge presiding. After consideration of the papers and oral argument, Intervenor’s *Ex Parte* Application for Leave to Intervene and Objection to Approval of Class and PAGA Representative Action Settlement is HEREBY GRANTED.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Intervenor is granted leave to intervene in the lawsuit entitled *Rogers v. Conam Management Corporation*, S.D. Superior Court Case No. 37-2020-00013563-CU-OE-CTL (the “*Rogers* Action”);
2. Intervenor shall be parties to the *Rogers* Action and, therefore, have the right to appear at all proceedings, and be included on the service list such that his counsel shall be served with all correspondence, notices, pleadings, and discovery from the date of this Order;
3. Plaintiffs Simone Rogers (“Rogers”) and Esther Lisa Shelley (“Shelley”) (collectively, “Plaintiffs”) *ex parte* application for approval of the PAGA settlement is denied; and
4. Intervenor’s proposed Complaint in Intervention, Exhibit 1 to *Ex Parte* Application, is hereby ordered deemed filed as of the date of this Order.

IT IS SO ORDERED.

Dated: _____

Hon. Richard S. Whitney
Judge of the Superior Court