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10 other members of the general public similarly situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF SAN DIEGO**

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

17 Plaintiff

18 v.

19 CONAM MANAGEMENT CORP., a
20 California Limited Liability Company; and
21 DOES 1-10, inclusive

22 Defendant

CASE NO. 37-2020-00013563-CU-OE-CTL

(Representative Action only)

**PLAINTIFF'S SUPPLEMENTAL
BRIEFING IN SUPPORT OF MOTION
FOR APPROVAL OF PAGA
SETTLEMENT**

Date: September 27, 2021

Time: 9:30 a.m.

Judge: Hon. Richard S. Whitney

Dept.: C-68

1 **I. SUMMARY OF REQUEST**

2 This matter is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
3 CONAM MANAGEMENT CORP. (“CONAM”). To confirm, this is a “PAGA” action **only**. After
4 initially reviewing the settlement, the Court “was tentatively leaning towards” approving it, but wanted
5 to hear it as a noticed motion, and invited “supplemental briefing.”

6 **1. The Court Should Approve the Agreement**

7 Following the exchange of discovery, analysis of numerous sets of time and wage data, and a
8 Mediation presided over by Jill R. Sperber, Esq., the parties reached a proposed settlement that
9 includes a settlement payment to the LWDA to resolve the PAGA claims.

10 The PAGA allocations were based on detailed investigations. Moreover, Defendant’s policy
11 “fixes” and/or internal audits are consistent with the public policy behind PAGA of deterring future
12 Labor Code compliance. *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016).

13 Since the initial Hearing, **nothing has changed** with regards to the settlement terms. Following
14 supplemental briefing, the parties request the Court now approve the settlement.

15 **2. Controlling Law Confirms that Ricks (a Non-Party) has No Standing to Challenge**

16 In a PAGA case, a Judgment binds all nonparty aggrieved employees. *Arias v. Superior Ct.*
17 (2009) 46 Cal.4th 969, 986. There is no right to opt-out, object to, or otherwise challenge the
18 Judgment. *Robinson v. S. Crys. Oil Co.* (2020) 53 Cal.App.5th 476, 482.

19 **Please Note:** Within the last few months, two Appellate Court opinions - both addressing San
20 Diego Superior Court actions - confirm this law. Both cases confirm that “objecting employees” may
21 not “Opt-Out” of a PAGA settlement, and are bound by the settlement terms. *Johnson v. Maxim*
22 *Healthcare Services, Inc.* (July 21, 2021) 66 Cal.App.5th 924; *Ali v. Auto Nation, Inc.* (July 14, 2021,
23 unpub.) 2021 WL 2947540 4th Appellate Dist., 1st Div., No. D077323.

24 Similarly, there is no mechanism for the Ricks parties to attempt to intervene in a purely PAGA
25 settlement. Ricks has no personal “interest” in a purely PAGA claim where the Plaintiff “stands in the
26 shoes” of the LWDA. There is no individual component to a PAGA case. *Iskanian v CLS Transp. Los*
27 *Angeles, LLC* (2014) 59 Cal.4th 348 382.

II. UPDATED FACTUAL BACKGROUND

The settlement terms are unchanged from what was first presented to the Court. The Settlement Agreement was attached to the prior declaration of counsel as Exhibit 1. (See ROA # 56.)

The Gross Settlement Value of the proposed PAGA Settlement is **\$550,000.00** which is broken down as follows:

- * **\$7,808.20** Settlement Administrator Fees;
- * **\$183,315.00** Attorneys' Fees (1/3 of Gross Settlement Value);
- * **\$5,664.74** Costs of Litigation;
- * **\$5,000.00** Individual Enhancement Award.
- * Sub-Total of **\$348,212.06**.
- 75% (**\$261,159.04**) shall be assigned/paid to the LWDA as penalties.
- 25% (**\$87,053.02**) shall be disbursed to the aggrieved employees

There are approximately 1,356 employees. Based on the above numbers these employees would receive an average share of \$64.20 each. The actual amount will be determined by the number of pay periods employed with Defendant. (See Doc. # 57 p. 2).

The LWDA has now received multiple rounds of notice (including notice of this hearing) and **does not object** to the proposed allocations. (ROA # 65 at ¶¶ 5-9; Yaeckel Decl., ¶ 3).

The release is limited to PAGA claims only. (See Doc. # 56: Exhibit 1 at ¶ 41; Yaeckel Decl., ¶ 4).. Accordingly, the settlement will not effect any employees right to assert claims in their individual capacity.

Plaintiff originally brought a request for settlement approval on an *Ex Parte* basis on May 12, 2021. The Court issued a minute order which stated it was "tentatively leaning towards" granting the settlement approval. (ROA # 62). However, in a subsequent minute order the Court decided to hear this matter by way of this noticed motion. (Doc. # 82).

The settlement terms remain unchanged. Since the initial hearing, the plaintiffs in the *Ricks* matter (collectively referred to herein as "Ricks") have stated multiple objections that have delayed this matter. Most telling, *Ricks* stated an (1) intention to bring a formal motion to intervene and (2)

1 informed this Court that they needed to conduct discovery on the settlement. However, the Ricks
2 parties *failed* to calendar and file a formal intervention motion and *failed* to ever serve any discovery.
3 (Yaeckel Decl., ¶ 5). Accordingly, their delay tactics should not be rewarded and the Court should
4 allow the settlement to move forward.

5 Finally, Ricks unsupported attacks on the Plaintiff in this case are without merit. The parties
6 never “reduced” the amount of the PAGA settlement and Plaintiff does not seek any individual
7 “enhancement” (beyond the requested \$5,000 enhancement) for her role in this case. Instead a
8 settlement was reached of PAGA claims and of **separate individual claims**, so that Defendant could
9 avoid two follow up lawsuits that had nothing to do with PAGA. This was all achieved through an
10 adversarial arms length negotiation presided over by an experienced wage and hour mediator. (Yaeckel
11 Decl., ¶ 6).

12 The Ricks parties know this and are deliberately mis-characterizing the events. It is clearly
13 written in the MOU (cited by Ricks for foundation) that Plaintiff Rogers will receive a separate
14 individual settlement, “in exchange for each Plaintiff executing a general release of all and any claims
15 (known or unknown) against Defendant, including a Civil Code § 1542 waiver.” Thus, the individuals
16 are giving up all rights to sue Defendants (even on claims **unrelated** to this action), and the remaining
17 employees are not doing so. Thus, the repeated attempts to mis-characterize these settlements as secret
18 “enhancements,” or somehow suggest something nefarious, is baseless. (Yaeckel Decl., ¶ 7).

19 Finally, to confirm the LWDA repeatedly received notice of this (and all other settlement
20 terms) and does **not** object. (ROA # 65 at ¶¶ 5-9; Yaeckel Decl., ¶ 3).

21 **III. DISCUSSION**

22 The PAGA Settlement should be approved in full for all of the following reasons.

23 **A. THE PROPOSED AGREEMENT WARRANTS PAGA SETTLEMENT APPROVAL**

24 The PAGA statute provides that this Court “shall review and approve” any PAGA settlement.
25 Labor Code § 2699.

26 However, there is no published California authority that has identified the exact standard a trial
27 court should employ in evaluating PAGA settlements. See *Flores v. Starwood Hotels & Resorts*
28

1 *Worldwide* (C.D.Cal. 2017) 253 F.Supp.3d 1074, 1075.

2 Courts that have weighed in have held the court must consider whether the proposed "PAGA
3 settlement is fair and adequate in view of the purposes and policies of the statute." *O'Connor v. Uber*
4 *Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016).

5 Those purposes and policies include "benefit[ing] the public by augmenting the state's
6 enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring
7 noncompliance." *Id.* at 1132-33; *Accord Syed v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb.
8 22, 2017) (concluding "the settlement amount related to plaintiffs' PAGA claims is fair, reasonable,
9 and adequate in light of the public policy goals of PAGA.").

10 Here, the objective of Labor Code compliance has been achieved. Defendant CONAM will be
11 required to pay a large sum to address the alleged past Labor Code violations. Moreover, (as can be
12 more fully detailed by CONAM) this settlement lead to "fixes" and/or internal audits as to existing
13 wage and hour policies, to ensure future compliance with the Labor Code. Accordingly, the risk of
14 future Labor Code compliance has been minimized and the PAGA policy goals are achieved.

15 The LWDA (who is the real party in interest, see below) has been notified and does not object
16 to the proposed settlement terms. (ROA # 65 at ¶¶ 5-9; Yaeckel Decl., ¶ 3).

17 **B. RICKS HAS NO PERSONAL INTEREST IN A PURELY PAGA CLAIM AND LACKS**
18 **STANDING TO CHALLENGE THE SETTLEMENT**

19 By law, a Plaintiff in a PAGA case stands in the shoes of the LWDA and there is no individual
20 component to a PAGA case. Accordingly, the Court need not even consider any arguments made by
21 the Ricks parties as they lack standing to challenge the proposed judgment.

22 When reviewing a PAGA only settlement, courts are not to factor in the value of individual
23 claims for damages, as would normally be done in a class action. As was recently confirmed by the
24 California Supreme Court, the state is the only party with an interest in a PAGA claim:

25 In a class action, the "representative plaintiff still possesses only a single claim for
26 relief—the plaintiff's own." (*Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th
27 1576, 1589 [92 Cal.Rptr.3d 409] (*Watkins*).) If a representative plaintiff voluntarily
28 settles her claim, she no longer has an interest in the class action and may lose the
ability to represent the class.[5] (*Watkins*, at p. 1592; see *Wallace v. GEICO General*
Ins. Co., *supra*, 183 Cal.App.4th at pp. 1400-1401.) "But **a representative action**
under PAGA is not a class action." (*Huff v. Securitas Security Services USA, Inc.*

(2018) 23 Cal.App.5th 745, 757 [233 Cal.Rptr.3d 502] (Huff).) There is no individual component to a PAGA action because "**every PAGA action ... is a representative action on behalf of the state.**" (*Iskanian, supra*, 59 Cal.4th at p. 387.) Plaintiffs may bring a PAGA claim only as the state's designated proxy, suing on behalf of all affected employees. (See *Arias, supra*, 46 Cal.4th at p. 986; *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124 [135 Cal.Rptr.3d 832].)

Kim v. Reins International California, Inc., (2020) 9 Cal. 5th 73, 86-87; See Accord *Amalgamated Transit Union, Local 1756, CIO v. Superior Court* (2001) 46 Cal.4th 1003 [PAGA actions are not for the benefit of private parties]; *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. Of San Diego Cnty.*, (2015) 234 Cal.App.4th 1109, 1119 ["the government is always the real party in interest" in a PAGA action].

Because a plaintiff-employee, in essence, stands in the government's shoes, a PAGA representative action is a form of a qui tam action, and the LWDA "is always the real party in interest in the suit." *Iskanian v CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348 382.

"The state's interest in such an action is to enforce its laws, not to recover damages on behalf of a particular individual." *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745. 760. Instead of focusing on fair recovery for individual claims, the goal of PAGA enforcement is to achieve "maximum compliance with state labor laws." *Huff*, 23 Cal.App at 756.

Accordingly, it is the State of California (not Ricks) who is the only party with an actual "interest" in the PAGA claims. It is undisputed that the State (via the LWDA) was timely notified of the proposed settlement and does not object. Accordingly, Ricks (as a third party) has no rights with respect to the instant settlement and the Court need not even consider the merits of Ricks' arguments.

C. NEW LAW - FROM THIS APPELLATE DIVISION - *REJECTS* RICKS' POSITIONS

On **July 21, 2021**, the Appellate Court published its opinion in *Johnson v. Maxim Healthcare Services, LLC*. In *Johnson*, the trial court had sustained a demurrer to a PAGA Complaint, on the grounds that Plaintiff's individual claims against the employer were time-barred. In *reversing*, the Appellate Court held, in pertinent part, as follows:

...there was no mechanism to opt out of the judgment entered on the PAGA claim. To this end, the court emphasized that a PAGA action substitutes as an action brought by the government; thus, a judgment or settlement in that action "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.

Johnson v. Maxim Healthcare Services, Inc. (July 21, 2021) 281 Cal.Rptr.3d 478, 482-483.

On **July 14, 2021**, the Appellate Court delivered its (currently unpublished) opinion in *Ali v. Auto Nation*. In *Ali*, two “third party plaintiffs” in another case objected (and attempted to intervene) in a proposed PAGA settlement. The trial court **denied** the objectors request to intervene, and the Appellate Court **affirmed**. Specifically, “In its order, the court noted that **several nonparty aggrieved employees filed objections** to the settlement; **it noted they were not entitled to be heard**, but it nonetheless considered their objections and found them to lack merit.” *Ali v. Auto Nation, Inc.* (**July 14, 2021**, unpub.) 2021 WL 2947540 at * 24 th Appellate Dist., 1st Div., No. D077323.. Although it is unpublished, the *Ali* Court also cited to binding precedent confirming that

Overlapping PAGA actions may be brought by different employees who allege the same violations and use the same theories. (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 866-867.) However, **once the claims have been resolved by any of the PAGA plaintiffs and judgment has been entered, the government and all nonparty aggrieved employees are bound by the judgment.** (*Ibid*; see *Iskanian, supra*, 59 Cal.4th at p. 386 [aggrieved employees bound by judgment in PAGA action]; *Arias, supra*, 46 Cal.4th at p. 986.)

Ali, supra, 2021 WL 2947540 at 4.

More recently, on **September 10, 2021**, this Superior Court (Hon. Joel R. Wohlfeil) rejected a similar challenge from a third party to a PAGA settlement, finding that the third party had no “personal rights” with regards to seeking PAGA penalties:

The settlement in this case cannot personally prejudice Sarabia through the inability to collect civil penalties because he has no personal right to them. The penalties distributed to a PAGA plaintiff are offered to incentivize the employee bringing a suit, not to create any right to recovery. Also, Mr. Sarabia is not prejudiced as a proxy because the state's interests were adequately represented by the plaintiffs in this action.

(**Ex. A** to Yaeckel decl.; *Quainton v. Ricoh* Case No: 37-2019-00060784-CU-OE-CTL)

While non-binding, the *Ali* and *Quainton* matters are very similar factually to the instant issues, and therefore of persuasive value. They also rely on the binding authorities cited above.

D. PLAINTIFF HAS ADEQUATELY REPRESENTED THE PAGA EMPLOYEES

Ricks never went forward with a formal request for intervention. However, it would have to be denied. Further, because Ricks is attempting to seek the same relief afforded in this settlement, the adequacy of Plaintiff Rogers representation is confirmed.

Intervention should be denied where the party's claimed interest is "adequately represented"

1 by existing parties. *Ziani Homeowners Assn. v. Brookfield Ziani LLC* (2015) 243 Cal. App. 4th 274.
2 Because Plaintiff's counsel diligently represented the PAGA employees, intervention must also be
3 denied on that basis.

4 The rationale is that "Intervention is not necessary or desirable when the intervenor's interests
5 are adequately represented, as it would serve only to complicate and delay the litigation for no good
6 reason." *Ziani*, 243 Cal. App. 4th at 282.

7 Where an applicant for intervention and an existing party "have the same ultimate objective,
8 a presumption of adequacy of representation arises." "[Citation.]" *League of United Latin Am. Citizens*
9 *v. Wilson* (9th Cir. 1997) 131 F.3d 1297, 1305. When a proposed intervenor disagrees with litigation
10 strategy or legal tactics, and not with any substance, courts are reluctant to give the intervenor equal
11 status. *League of United Latin Am. Citizens*, 131 F.3d at 1306.

12 The Appellate Court has noted that where the parties had already put work into mediating and
13 negotiating the settlement in an adversarial manner, a conclusion as to adequacy of representation was
14 well founded. *City and County of San Francisco v. State of California*, (2005), 128 Cal.App.4th 1030,
15 1036.

16 Thus, the question is not whether Ricks would have done a better job than Plaintiff in
17 representing the interests of the state; the statute requires only adequate representation. (CCP § 387,
18 subd. (d)(1)(B).)

19 As was already detailed to this Court the settlement in this action was preceded by discovery,
20 investigation, mediation and arm's length negotiations. (See ROA # 56 ¶¶ 16-20). .

21 Plaintiff's counsel did adequately represent the PAGA group. Prior to mediation, Plaintiff
22 secured all policies at issue, reviewed time and payroll data and confirmed policies and payroll
23 practices were applicable cross the various job positions. (Yaeckel decl. ¶ 8).

24 Defendant presented numerous defenses to both liability and manageability, especially given
25 that the CONAM non-exempt employee had diverse roles and worked in various locations across the
26 state. Plaintiff was able to provide evidence of some potential meal period violations, but Defendant
27 countered that it had compliant policies which provided for all breaks due. (Yaeckel decl. ¶ 9). .
28

1 Investigations completed by Plaintiff's counsel revealed some instances of uncompensated
2 work and overtime rate of pay issues. However, these investigations also revealed that the "rate of
3 violation" by Defendant was significantly less than 100%. On many occasions, it appears that
4 Defendant did, in fact, comply with the law. (Yaeckel decl. ¶ 10)..

5 Further, Defendant contends that it maintained compliant policies, compensated employees for
6 all time worked, paid meal break premiums, and did not require or permit off the clock work for any
7 reason. Further, Defendant contends that to the extent off the clock work occurred, there is no evidence
8 that it knew or should have known about the alleged off the clock work. (Yaeckel decl. ¶ 11). .

9 Despite these challenges, Plaintiff was able to secure a significant \$550,000 settlement. On
10 average, each employee would approximately receive \$64.20. The State of California, via the LWDA,
11 will receive \$261,159.04 and did not object to the settlement terms.

12 This is purely a "sour grapes" attorneys fees' driven challenge from Ricks. Ricks (as a third
13 party employee) is still free to pursue all non-PAGA claims. Because this settlement was preceded by
14 investigation, discovery, and an arms length mediation, Plaintiff has adequately represented the PAGA
15 employees and the State of California.

16 **E. RICKS FAILS TO ACCOUNT FOR MITIGATION**

17 Ricks, in arguing the settlement is undervalued, fails to account for the significant risks of
18 mitigation. As set forth more fully above, a detailed investigation and analysis of the claims was
19 performed, followed by an arms length negotiation presided over by a well respected mediator.
20 Notwithstanding, Ricks (without offering any admissible evidence of labor code violations) claims the
21 settlement is "too low." However, Ricks valuation fails to account for the fact that it would be
22 extraordinary for a Court to award a maximum PAGA penalty given the right to mitigation. Plaintiffs'
23 counsel had to take this into consideration.

24 Plaintiff's counsel has direct experience with the Court's discretion to significantly reduce the
25 award of PAGA penalties pursuant to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶ 12).
26 To confirm, Plaintiffs' counsel experienced the "Post-Trial" mitigation of "PAGA" penalties in
27 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504. (*Id.*) In *Carrington*, the Honorable
28

1 Katherine A. Bacal significantly mitigated PAGA penalties (\$5 per violation), due to the efforts made
2 by the employer to attempt to comply with the law. (*Id.*)

3 Plaintiff's counsel agrees with Her Honor, and with the provision of the Labor Code, that
4 penalties should be mitigated where violations are minimal (or rare), or where the employer makes
5 significant efforts to comply with the Labor Code. There was certainly evidence in this case that even
6 if some violations were perceived, that there had nonetheless been an effort from the employer to
7 attempt to comply with the law. (Decl. Yaeckel, ¶ 13).

8 As set forth above, Defendant presented several potentially viable defenses to liability.
9 Investigations completed by Plaintiff's counsel revealed some instances of uncompensated work.
10 However, these investigations also revealed that the "rate of violation" by Defendant was significantly
11 less than 100%. On many occasions, it appears that Defendant did, in fact, comply with the law.
12 Further, Defendant contends that it maintained compliant policies, compensated employees for all time
13 worked, paid meal break premiums, and did not require or permit off the clock work for any reason.
14 Further, Defendant contends that to the extent off the clock work occurred, there is no evidence that
15 it knew or should have known about the alleged off the clock work. (Yaeckel decl. ¶ 11.)

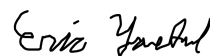
16 All of these factors would support mitigation of any "maximum" penalty available by statute.

17 **IV. CONCLUSION**

18 For all of the foregoing reasons, Plaintiff Rogers requests that the Court approve the PAGA
19 settlement as requested. A proposed order and judgment was previously submitted to the Court. (See
20 ROA # 61.)

21
22 Dated: September 20, 2021

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