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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

GERARDO VALADEZ, MIGUEL DIAZ,
LUPE RODRIGUEZ, and ARTHUR
BEBEKYAN, in a Representative capacity
only, and on behalf of other members of the
general public similarly situated,

Plaintiff,

v.

CALIBER HOLDINGS CORP; CALIBER
COLLISION TRANSPORT SERVICES
LLC; and DOES 1-10, inclusive.

Defendants

CASE NO. 37-2020-00015935-CU-OE-CTL

(Representative Action only)

**PLAINTIFF'S UNOPPOSED EX PARTE
APPLICATION SEEKING (1) TO
AMEND COMPLAINT (FOR PURPOSES
OF SETTLEMENT) (2) APPROVAL OF
PAGA SETTLEMENT; OR, IN THE
ALTERNATIVE, (3) AN OST TO HEAR
A NOTICED MOTION RE PAGA
SETTLEMENT APPROVAL**

Date: April 26, 2022

Time: 8:30 a.m.

Dept.: C-73

Judge: Hon. Joel R. Wohlfeil

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I. SUMMARY OF REQUEST

Plaintiffs GERARDO VALADEZ, MIGUEL DIAZ, LUPE RODRIGUEZ and ARTHUR BEBEKYAN (“Plaintiffs”), in a Representative capacity only, seek approval of a PAGA Settlement.

This proposed resolution requests a “global settlement” of **two (2) separate** PAGA actions. The instant action is in the San Diego Superior Court, and the other in Los Angeles County Superior Court. As this is the “first filed” matter, the parties stipulated to seek Court approval in this department. An amended consolidated complaint has been submitted, that encompasses all claims. (Yaeckel Decl., ¶ 9; Exhibit 2).

To confirm, the total amount of the proposed settlement is **\$3.075 million dollars**. There are **8,175** employees and **over 475,000** pay-periods at issue within the limitations period. The “average” employee will receive **\$54.00**, after the LWDA receives its 75% share of the penalty. (Yaeckel Decl., ¶ 3; Exhibit 1).

This Court has previously granted PAGA approval on an *Ex Parte* basis. This application attempts to track exactly the prior applications approved by this Court. (Yaeckel Decl., ¶ 6).

Please Note: The only “unique” factor is the attorney fee request, which is 40 % (forty percent) of the total settlement, and thus higher than Plaintiff counsel’s “normal” request, of one-third of the settlement. However, this slightly higher fee award was agreed upon by all parties, and factored into the settlement, as it will likely be necessary to provide attorneys fees to four separate counsel (in three separate PAGA matters) to achieve a global resolution.

This Request is Unopposed. The LWDA was timely and repeatedly notified of this proposal, and does not object.

II. CONTROLLING AUTHORITY

PAGA “authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees.” *Iskanian v. CLS Trans. Los Angeles* (2014) 59 Cal. 4th 348, 360. “To compensate for the lack of [a]dequate financing of essential labor law enforcement functions,’ the California legislature enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil

1 penalties for violations of the Labor Code.” *Sakkab v. Luxottica* (9th Cir. 2015) 803 F.3d 425.

2 Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time of
3 the alleged violation, the person employs one or more employees, the civil penalty is one hundred
4 dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred
5 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. However,
6 some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced "subsequent
7 violation penalty" or "heightened penalty" only after an employer has been notified that its conduct
8 violates the Labor Code. *See Trang v. Turbine Engine Components Technologies Corp.*, No. CV
9 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers
10 are not subject to heightened penalties for subsequent violations unless and until a court or
11 commissioner notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit*
12 *Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199-IEG-CAB, 2009 WL
13 2448430 (S.D. Cal. 2009) (finding that California law imposes the "subsequent violation penalty" only
14 after an employer has been notified its conduct violates the Labor Code). Further, a court may award
15 a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of
16 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
17 or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157,
18 1213-1214. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011)
19 (reducing PAGA penalties by 82%).

20 “The superior court shall review and approve any settlement of any civil action filed pursuant
21 to [PAGA].” Cal. Lab. Code. § 2699(l). In so doing, the court must consider whether the proposed
22 “PAGA settlement is fair and adequate in view of the purposes and policies of the statute.” *O'Connor*
23 *v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016). Those purposes and policies
24 include “benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging
25 compliance with Labor Code provisions, and deterring noncompliance.” *Id.* at 1132-33; *Accord Syed*
26 *v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb. 22, 2017) (concluding “the settlement amount
27 related to plaintiffs’ PAGA claims is fair, reasonable, and adequate in light of the public policy goals
28

1 of PAGA.”).

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

4 We therefore hold that **a trial court should evaluate a PAGA settlement to**
5 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
6 **purposes to remediate present labor law violations, deter future ones, and to**
7 **maximize enforcement of state labor laws.** (*See Williams*, *supra*, 3 Cal.5th at p.
8 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present
violations and deter future ones"]; *Arias*, *supra*, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d
588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement
efforts to achieve maximum compliance with labor laws].)

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

10 Prior to *Moniz*, Other Courts have followed the rationale in *O'Connor v. Uber Techs., Inc.*, 201
11 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states a court is permitted to approve a PAGA
12 settlement if the settlement is “fair and adequate in view of the purposes and policies of the statute.”
13 *Id.*

14 III. ARGUMENT

15 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
16 CALIBER HOLDINGS CORP (“Caliber”). As this is a “PAGA” action only, the Limitations Period
17 begins on March 24, 2019. It is estimated that there are approximately **8,175** PAGA Settlement
18 Employees at issue during the relevant period. c

19 Following the exchange of formal and informal discovery, analysis of numerous sets of time
20 and wage data, and a full day Mediation presided over by Lisa Kelrman, Esq., the parties reached a
21 proposed settlement that includes a settlement payment to the LWDA to resolve the PAGA claims.
22 (Yaeckel Decl., ¶ 4).

23 A. SETTLEMENT TERMS

24 Based on the below figures, each Settlement Employee would receive an average payment of
25 approximately **\$54.00**. This figure represents an average only, as the actual amounts paid will vary
26 depending on the number of pay periods worked by each PAGA Settlement Employee during the
27 PAGA period. (Yaeckel Decl., ¶ 9).

28 On **April 25, 2022** Plaintiffs’ counsel first notified the LWDA of the settlement proposal.

1 (Yaeckel Decl., ¶ 7). The Settlement Agreement was uploaded and the LWDA was given notice of the
2 hearing. As with all uploads to this filing portal, Plaintiffs' counsel immediately received an auto-
3 generated email that its submission was received by the LWDA. (*Id.*)

4 Accordingly, proper notice has been provided and this application is **unopposed**.

5 The Total Value of the proposed Settlement is **\$3,075,000.00** which is broken down as follows:

- 6 * **\$22,500** Settlement Administrator Fees (not to exceed);
- 7 • **\$40,000** Lead Plaintiff Enhancements (\$10,000 each)
- 8 * **\$1,230,000** Attorneys' Fees (40% of total settlement value);
- 9 * **\$16,750** Costs of Litigation
- 10 * Remaining PAGA Payment of **\$1,765,750**.
- 11 • 75% of the PAGA Payment (**\$1,324,312.50**) shall be assigned/paid to
- 12 the LWDA.
- 13 • 25% of the PAGA Payment (**\$441,437.50**) shall be assigned and
- 14 disbursed among all PAGA Settlement Employees based on pay periods
- 15 worked during the PAGA period..

16 (Yaeckel Decl., ¶ 8; See Ex. 1).

17 Further, the Settlement only covers PAGA claims. (Yaeckel Decl., ¶ 10); **Exhibit 1**: "Released
18 Claims" § 7(A)). It does not cover PAGA Settlement Employee's individual wage and hour claims.
19 (Yaeckel Decl., ¶ 10).

20 **B. THE BASIS FOR THE *EX PARTE* REQUEST**

21 The instant *Ex Parte* request is based on the fact that **(1)** the PAGA period "Effective (cutoff)
22 Date" is contingent on Court approval, any delay diminishes the amounts received by the impacted
23 employees; and **(2)** Notice to certain former employees may be adversely impacted by further delay
24 (*i.e.* many of the PAGA Settlement Employees are former employees who may change their mailing
25 address without providing any notice to the employer of a new address and may fail to file a proper
26 "forwarding address"). (Yaeckel Decl., ¶ 11); (See **Exhibit 1**: § I(2), (6) Settlement Period Goes
27 through the "Approval Date".)

1 **Please Note:** Recent studies have shown that there have been higher rates of changes of address
2 than previously observed following the COVID pandemic.¹

3 Additionally, as the settlement resolves two separate “wage and hour” lawsuits against
4 Defendants, this will provide for some finality to the pending litigation, to allow Defendants to move
5 on and focus on future business.

6 Additionally, an expedient approval of this settlement will provide a direct benefit to the
7 impacted employees at issue. There is now a minimized risk of any future Labor Code non-compliance
8 and employees and the state receive will receive an immediate monetary benefit. (Yaeckel Decl., ¶ 12).

9 **C. THE NATURE AND SCOPE OF THE ALLEGED VIOLATIONS**

10 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
11 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiffs generally alleged that all non-exempt
12 employees were denied compliant meal and rest breaks, minimum wages, overtime compensation,
13 accurate wage statements, reimbursements of business expenses, suffered waiting time violations, did
14 not receive all sick pay owed, were not provided with accurate records and other related wage and hour
15 claims and penalties brought under the PAGA statute.

16 As a part of the settlement the parties have submitted, a proposed First Amended Consolidated
17 Complaint. This consolidated Complaint contains the claims made in this matter on behalf of
18 GERARDO VALADEZ and MIGUEL DIAZ. It also incorporates in the separate PAGA claims against
19 Defendants filed by LUPE RODRIGUEZ and ARTHUR BEBEKYAN, that were originally pending
20 in the Los Angeles Superior Court, Case No. 21STCV10037. That lawsuit will be dismissed should
21 this matter receive final approval. (**Exhibit 1:** § II(31)).

22 **D. ANALYSIS OF POTENTIAL LIABILITY, ON A REPRESENTATIVE BASIS**

23 The catalyst of this litigation concerned allegations that Plaintiffs were not correctly paid for
24 all time worked, were forced to work through their breaks and that Defendants failed to keep compliant
25 time and wage records. (Decl. Yaeckel, ¶ 14).

26 Investigations completed by Plaintiffs’ counsel revealed some instances of uncompensated
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28 ¹ See <https://www.jchs.harvard.edu/blog/have-more-people-moved-during-pandemic>

1 work time. However, these investigations also revealed that the “rate of violation” by Defendants was
2 significantly less than 100%. On many of those occasions, it appears that Defendants did, in fact,
3 comply with the law. Further, Defendant contends that it maintained compliant policies, compensated
4 employees for all time worked, paid meal break premiums, and did not require or permit off the clock
5 work for any reason. Further, Defendants contends that to the extent off the clock work occurred, there
6 is no evidence that it knew or should have known about the alleged off the clock work. (Decl. Yaeckel,
7 ¶ 15).

8 Moreover, Plaintiffs’ counsel is aware of the Court’s discretion to significantly reduce the
9 award of PAGA penalties pursuant to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶ 16).
10 To confirm, Plaintiffs’ counsel experienced the mitigation of “PAGA” penalties in *Carrington v.*
11 *Starbucks Corp.* (2018) 30 Cal.App.5th 504. (*Id.*) In *Carrington*, Judge Bacal significantly mitigated
12 PAGA penalties (\$5 per violation), due to the efforts made by the employer to comply with the law.
13 (*Id.*)

14 Plaintiffs’ counsel agrees with Judge Bacal, and with the provision of the Labor Code, that
15 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
16 significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶ 17).

17 As the above factors exist in this case, it is the opinion of Plaintiffs’ counsel that the settlement
18 is fair, adequate, and reasonable. Moreover, upon notice of the potential violations, Defendant stepped
19 up to address the claims and participate in a mediation. (Decl. Yaeckel, ¶ 18).

20 Plaintiffs’ counsel, William B. Sullivan has approximately 27 years of experience in “class
21 action” and representative action litigation, both as plaintiff and defense counsel. Mr. Yaeckel has over
22 10 years of experience prosecuting class and representative action claims under the California Labor
23 Code. Counsel are the attorneys of record in a matter that was recently (and favorably) decided by the
24 California Supreme Court. See *Donohue v. AMN Services* (2021) 11 Cal.5th 58. The *Donohue* matter
25 is a certified class and PAGA action. Plaintiffs’ counsel are currently lead counsel on approximately
26 40 employment “wage and hour” claims with class action and/or representative actions allegations.
27 Based on said experience, it is the opinion of Plaintiffs’ counsel that this settlement represents a fair
28

1 and adequate payment to resolve these claims. (Decl. Yaeckel, ¶ 19).

2 **E. THE ALLOCATION OF PENALTIES, AND *LIMITED RELEASE OF CLAIMS***

3 While Labor Code section 2699(*l*) requires a court to “review and approve any penalties sought
4 as part of a proposed settlement agreement,” it does not provide any exact guidance from the state of
5 California as to what specifically is to be reviewed. Given the significant amount of penalties agreed
6 to and the assurance of no future Labor Code violations, Plaintiffs submit the settlement meets all
7 known grounds for approval.

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

10 We therefore hold that **a trial court should evaluate a PAGA settlement to**
11 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
12 **purposes to remediate present labor law violations, deter future ones, and to**
13 **maximize enforcement of state labor laws.** (*See Williams, supra*, 3 Cal.5th at p.
14 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present
15 violations and deter future ones"]; *Arias, supra*, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d
16 588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement
17 efforts to achieve maximum compliance with labor laws].)

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

19 Other courts that have weighed in on the review of a PAGA settlement have similarly held the
20 court must consider whether the proposed “PAGA settlement is fair and adequate in view of the
21 purposes and policies of the statute.” *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D.
22 Cal. 2016).

23 Those purposes and policies include “benefit[ing] the public by augmenting the state’s
24 enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring
25 noncompliance.” *Id.* at 1132-33; Accord *Syed v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb.
26 22, 2017) (concluding “the settlement amount related to plaintiffs’ PAGA claims is fair, reasonable,
27 and adequate in light of the public policy goals of PAGA.”).

28 Here the purposes of encouraging compliance and deterring non-compliance have been met.

Defendants, and its counsel, deserve credit for their willingness to consider - and address - the
allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in “Wage
and Hour” litigation) agreed to produce a substantial amount of documents and information necessary

1 to evaluate the parameters of settlement. Following a full day Mediation and numerous follow up
2 arms-length negotiations, the parties have reached a proposed settlement that includes a settlement
3 payment to resolve claims for penalties under PAGA. (Decl. Yaeckel, ¶ 20).

4 Here, the parties seek to allocate **\$1,765,750** as the total PAGA Payment. Of this amount, the
5 LWDA will receive a 75% share of **\$1,324,312.50**. (Decl. Yaeckel, ¶ 8, **Exhibit 1**). The remaining
6 25% share of **\$441,437.50** will be allocated and distributed among the current or former within the
7 PAGA representation period. (*Id.*) Each PAGA Settlement Employee would receive an average
8 payment of approximately **\$54.00**. (*Id.*).

9 The parties contend the settlement agreement amount is fair, adequate, and reasonable..
10 Plaintiffs, based on considerable experience, contends this payment amount is sufficient to fairly
11 compensate the LWDA and PAGA Settlement Employees for any alleged violation of the Labor Code
12 in the past. (Decl. Yaeckel, ¶ 19). Moreover, Defendant has committed to internal audits and/or
13 wholesale policy changes to “deter” future violations.

14 Finally, the PAGA settlement does not bar any employee from pursuing their own individual
15 Labor Code claims. (Decl. Yaeckel ¶ 10; **Exhibit 1: “Released Claims”** § I(1)). The release only
16 applies to the PAGA claims for penalties, based upon the allegations in Plaintiffs’ operative Complaint
17 and LWDA letter. (*Id.*)

18 **F. THE LWDA WAS NOTIFIED, AND DOES NOT OBJECT**

19 On **April 25, 2022**, Plaintiffs’ counsel uploaded via the LWDA’s electronic filing portal the
20 parties Settlement Agreement that is being presented to this Court. The LWDA was also notified of
21 the instant *ex parte* hearing and served with the ex parte papers. As with all uploads to this filing
22 portal, Plaintiffs’ counsel immediately received an auto-generated email that its submission was
23 received. (Decl. Yaeckel ¶ 6).

24 To date, no response from the LWDA has been received. If the LWDA contacts Plaintiffs’
25 counsel at any time prior to the November 17, 2020 hearing, Plaintiff’s counsel will provide an
26 updated declaration to the Court. (Decl. Yaeckel ¶22).

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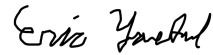
1 **IV. CONCLUSION**

2 The parties respectfully request that the Court (1) provided leave to file the proposed
3 consolidated complaint and (2) approve their proposed PAGA Settlement.

4 *In the alternative*, should the Court wish to have a noticed motion, Plaintiffs ask for an order
5 shortening time to have the motion heard based on these unopposed moving papers.

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8 Dated: April 25, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

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