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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

GERARDO VALADEZ, MIGUEL DIAZ,
LUPE RODRIGUEZ, ARTHUR
BEBEKYAN and SCOTT WODIN, 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 FILE A
CONSOLIDATED COMPLAINT (FOR
PURPOSES OF SETTLEMENT), and (2)
APPROVAL OF PAGA SETTLEMENT;**

Date: May 17, 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, ARTHUR BEBEKYAN and SCOTT WODIN (“Plaintiffs”), in a Representative capacity only, seek approval of a PAGA Settlement. As previously discussed with the Court, this proposed resolution will dispose of **three (3) separate** PAGA actions. As this is the “first filed” matter, the parties stipulated to seek Court approval in this department. (Yaeckel Decl., ¶ 5).

To confirm, the total amount of the proposed settlement is **\$3.075 million dollars**. There are at least **8,175** employees, and **over 475,000** pay-periods, at issue within the limitations period. The “average” employee will receive approximately **\$53.66**. (Yaeckel Decl., ¶ 9).

Please Note: On April 26, 2022, this Court originally granted PAGA approval of these settlement terms on an *Ex Parte* basis. The instant *Ex Parte* simply provides Attorney signatures, as to all parties. (Yaeckel Decl., ¶ 6).

The only “unique” factor here is the attorney fee request, which is 40 % (forty percent) of the total settlement, and thus higher than Plaintiffs’ counsel’s “normal” request, of one-third of the settlement. (Yaeckel Decl., ¶ 21). However, this slightly higher fee award was agreed upon by all parties, and specifically factored into the settlement, as it was necessary to provide attorneys fees to four *separate* law firms, representing clients in the three separate PAGA matters.

This Request is **Unopposed**. The LWDA was timely and repeatedly notified of this proposal, and does **not object**. (Yaeckel Decl., ¶ 7).

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

1 enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil
2 penalties for violations of the Labor Code.” *Sakkab v. Luxottica* (9th Cir. 2015) 803 F.3d 425.

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

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

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

7 We therefore hold that **a trial court should evaluate a PAGA settlement to**
8 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
9 **purposes to remediate present labor law violations, deter future ones, and to**
10 **maximize enforcement of state labor laws.** (*See Williams*, *supra*, 3 Cal.5th at p.
11 546, 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].)

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

13 III. ARGUMENT

14 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
15 CALIBER HOLDINGS CORP (“Caliber”). As this is a “PAGA” action only, the Limitations Period
16 begins on March 24, 2019. It is estimated that there are approximately **8,175** PAGA Settlement
17 Employees at issue during the relevant period. (Decl. of Eric K. Yaeckel, ¶ 3).

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

22 A. SETTLEMENT TERMS

23 Based on the below figures, each Settlement Employee would receive an average payment of
24 approximately **\$53.66**. This figure represents an average only, as the actual amounts paid will vary
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1 depending on the number of pay periods worked by each PAGA Settlement Employee during the
2 PAGA period. (Yaeckel Decl., ¶ 8).

3 On **April 25, 2022**, Plaintiffs' counsel first notified the LWDA of the settlement proposal.
4 (Yaeckel Decl., ¶ 5). As with all uploads to this filing portal, Plaintiffs' counsel immediately received
5 an auto-generated email that its submission was received by the LWDA. (*Id.*)

6 On **May 16, 2022**, Plaintiffs' counsel again noticed the LWDA's via the electronic filing portal
7 of the instant hearing, and provided copies of this entire ex parte application. (Yaeckel Decl., ¶ 6). As
8 with all uploads to this filing portal, Plaintiffs' counsel immediately received an auto-generated email
9 that its submission was received. (*Id.*)

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

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

- 12 * **\$22,500** Settlement Administrator Fees (not to exceed);
- 13 • **\$50,000** Plaintiff Enhancements for § 1542 Release (\$10,000 each)
- 14 * **\$1,230,000** Attorneys' Fees (40% of total settlement value);
- 15 * **\$17,765.16** Costs of Litigation
- 16 * Remaining PAGA Payment of **\$1,754,734.84**.
- 17 • 75% of the PAGA Payment (**\$1,316,051.13**) shall be assigned/paid to
- 18 the LWDA.
- 19 • 25% of the PAGA Payment (**\$438,683.71**) shall be assigned and
- 20 disbursed among all PAGA Settlement Employees based on pay periods
- 21 worked during the PAGA period..

22 (Yaeckel Decl., ¶ 8; See Ex. 1).

23 Given the above, the average payment to each individual PAGA Settlement Employee will be
24 approximately **\$53.66**. (Yaeckel Decl., ¶ 9). This is an average only, the actual payment will vary
25 based on how many pay periods the PAGA Settlement Employee worked during the PAGA Period.
26 (*Id.*)

Further, the Settlement only covers PAGA claims. (Yaeckel Decl., ¶ 9); **Exhibit 1**: “Released Claims” § 7(A). It does not cover PAGA Settlement Employee's individual wage and hour claims. (Yaeckel Decl., ¶ 9). **Please Note**: The named plaintiffs have executed a broader release of claims which were negotiated in exchange for each Plaintiff to make release of both PAGA claims *and* their separate individual claims.

B. THE BASIS FOR THE *EX PARTE* REQUEST

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

Please Note: Recent studies have shown that, following the COVID pandemic, there have been higher rates of “changes of address” than previously observed by analysts.¹

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

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

C. THE NATURE AND SCOPE OF THE ALLEGED VIOLATIONS

The Complaint alleges Labor Code violations which triggered penalties under the PAGA statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiffs generally alleged that all non-exempt employees were denied compliant meal and rest breaks, minimum wages, overtime compensation,

¹ See <https://www.jchs.harvard.edu/blog/have-more-people-moved-during-pandemic>

1 accurate wage statements, reimbursements of business expenses, suffered waiting time violations, did
2 not receive all sick pay owed, not provided with accurate records and other related wage and hour
3 claims and penalties. (Yaeckel Decl., ¶ 13).

4 As a part of the settlement the parties have submitted, via stipulation, a First Amended
5 Consolidated Complaint. This consolidated Complaint contains the claims made in this matter on
6 behalf of GERARDO VALADEZ and MIGUEL DIAZ. It also incorporates in the separate PAGA
7 claims against Defendants filed by LUPE RODRIGUEZ, ARTHUR BEBEKYAN and SCOTT
8 WODIN, that were originally pending in the Los Angeles Superior Court, Case No. 21STCV10037,
9 and in the San Diego Superior Court with Case No. 37-2021-00045394-CU-OE-CTL respectively.
10 Those lawsuits will be dismissed should this matter receive approval. (**Exhibit 1**: § II(31)).

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

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

15 Investigations completed by Plaintiffs' counsel revealed some instances of uncompensated
16 work time. However, these investigations also revealed that the "rate of violation" by Defendants was
17 significantly less than 100%. On many of those occasions, it appears that Defendants did, in fact,
18 comply with the law. Further, Defendant contends that it maintained compliant policies, compensated
19 employees for all time worked, paid meal break premiums, and did not require or permit off the clock
20 work for any reason. Further, Defendant contends that to the extent off the clock work occurred, there
21 is no evidence that it knew or should have known about the alleged off the clock work. (Decl. Yaeckel,
22 ¶ 15).

23 Moreover, Plaintiffs' counsel is aware of the Court's discretion to significantly reduce the
24 award of PAGA penalties pursuant to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶ 17).
25 To confirm, Plaintiffs' counsel experienced the mitigation of "PAGA" penalties in *Carrington v.*
26 *Starbucks Corp.* (2018) 30 Cal.App.5th 504. (*Id.*) In *Carrington*, Judge Bacal significantly mitigated
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1 PAGA penalties (\$5 per violation), due to the efforts made by the employer to comply with the law.
2 (*Id.*)

3 Plaintiffs' counsel agrees with Judge Bacal, 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. (Decl. Yaeckel, ¶ 18).

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

9 Plaintiffs' lead counsel, William B. Sullivan has approximately 27 years of experience in "class
10 action" and representative action litigation, both as plaintiff and defense counsel. Mr. Yaeckel has over
11 11 years of experience prosecuting class and representative action claims under the California Labor
12 Code. Counsel are the attorneys of record in a matter currently pending before the California Supreme
13 Court titled *Donohue v. AMN Services* (S253677). The *Donohue* matter is a certified class and PAGA
14 action. Plaintiffs' counsel are currently lead counsel on approximately 40 employment "wage and
15 hour" claims with class action and/or representative actions allegations. Based on said experience, it
16 is the opinion of Plaintiffs' counsel that this settlement represents a fair and adequate payment to
17 resolve these claims. (Decl. Yaeckel, ¶ 20).

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

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

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

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27 We therefore hold that **a trial court should evaluate a PAGA settlement to**
28 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
purposes to remediate present labor law violations, deter future ones, and to

1 **maximize enforcement of state labor laws.** (*See Williams*, *supra*, 3 Cal.5th at p.
2 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present
3 violations and deter future ones"]; *Arias*, *supra*, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d
4 588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement
5 efforts to achieve maximum compliance with labor laws].)

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

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

11 Those purposes and policies include "benefit[ing] the public by augmenting the state's
12 enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring
13 noncompliance." *Id.* at 1132-33; Accord *Syed v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb.
14 22, 2017) (concluding "the settlement amount related to plaintiffs' PAGA claims is fair, reasonable,
15 and adequate in light of the public policy goals of PAGA.").

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

17 Defendants, and its counsel, deserve credit for their willingness to consider - and address - the
18 allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in "Wage
19 and Hour" litigation) agreed to produce a substantial amount of documents and information necessary
20 to evaluate the parameters of settlement. Following a full day Mediation and numerous follow up
21 arms-length negotiations, the parties have reached a proposed settlement that includes a settlement
22 payment to resolve claims for penalties under PAGA. (Decl. Yaeckel, ¶ 20).

23 Here, the parties seek to allocate **\$1,754,734.84** as the PAGA Payment. Of this amount, the
24 LWDA will receive a 75% share of **\$1,316,051.13**. (Decl. Yaeckel, ¶ 8, **Exhibit 1**). The remaining
25 25% share of **\$438,683.71**. will be allocated and distributed among the current or former within the
26 PAGA representation period. (*Id.*) Each PAGA Settlement Employee would receive an average
27 payment of approximately **\$53.66**. (*Id.*)

28 The parties contend the settlement agreement amount is fair, adequate, and reasonable. ((Decl.
Yaeckel, ¶ 19.) Plaintiffs, based on considerable experience, contends this payment amount is

1 sufficient to fairly compensate the LWDA and PAGA Settlement Employees for any alleged violation
2 of the Labor Code in the past. (Decl. Yaeckel, ¶ 20).

3 Finally, the PAGA settlement does not bar any employee from pursuing their own individual
4 Labor Code claims. (Decl. Yaeckel ¶22; **Exhibit 1**: “Released Claims” § I(1)). The release only applies
5 to the PAGA claims for penalties, based upon the allegations in Plaintiffs’ operative Complaint and
6 LWDA letter. (*Id.*)

7 **F. THE LWDA WAS NOTIFIED MULTIPLE TIMES, AND DOES NOT OBJECT**

8 On **April 25, 2022** Plaintiffs’ counsel first notified the LWDA of the settlement proposal. The
9 Settlement terms were uploaded to the LWDA was given notice of the hearing. As with all uploads
10 to this filing portal, Plaintiffs’ counsel immediately received an auto-generated email that its
11 submission was received by the LWDA. (Decl. Yaeckel, ¶ 7).

12 On **May, 16, 2022**, Plaintiffs’ counsel again noticed the LWDA’s via the electronic filing
13 portal of the instant hearing, and provided copies of this entire ex parte application. To date, no
14 response from the LWDA has been received. If the LWDA contacts Plaintiffs’ counsel at any time
15 prior to the hearing, Plaintiffs’ counsel will provide an updated declaration to the Court. (Decl.
16 Yaeckel, ¶ 7).

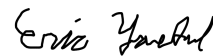
17 To date, no response from the LWDA has been received. If the LWDA contacts Plaintiffs’
18 counsel at any time prior to the hearing, Plaintiff’s counsel will provide an update to the Court.

19 **V. CONCLUSION**

20 The parties respectfully request that the Court approve their proposed PAGA Settlement.

21
22 Dated: May 16, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

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24 

25 Eric K. Yaeckel
26 Plaintiffs GERARDO VALADEZ, MIGUEL DIAZ,
27 LUPE RODRIGUEZ, ARTHUR BEBEKYAN, and
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