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9 Attorneys for Plaintiff
10 YURALIS PENA

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

13 YURALIS PENA, an individual, for the real
party in interest, the State of California

14 Plaintiff,

15 v.

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17 SOUTH COUNTY ORAL
18 MAXILLOFACIAL SURGERY;
EASTLAKE SURGERY CENTER; and
19 DOES 1 through 50,

20 Defendants.
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Case No. 37-2020-00029759-CU-OE-CTL

Judge: Hon. Gregory W. Pollack
Dept.: C-71

**PLAINTIFF'S UNOPPOSED EX PARTE
NOTICE AND EX PARTE APPLICATION
FOR APPROVAL OF PAGA SETTLEMENT**

Judge: Hon. Gregory W Pollack
Dept.: C-71
Date: July 22, 2021
Time: 9:00 a.m.

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

2 PLEASE TAKE NOTICE that on **July 22, 2021 at 9:00 a.m.**, or as soon thereafter as the
3 matter may be heard in Department C-71 of the Superior Court of California, County of San Diego,
4 330 W. Broadway, San Diego, California 92101, Plaintiff Yuralis Pena will, and hereby does, move
5 for an ex parte order approving the proposed settlement pursuant to the Private Attorneys General
6 Act of 2004. This ex parte application is unopposed by Defendants South County Oral Maxillofacial
7 Surgery and Eastlake Surgery Center.

8 This ex parte application is based upon this notice, the declaration of Alex Asil Mashiri, the
9 declaration of Tamim Jami, exhibits, all other papers filed in this action, and upon such other
10 evidence and argument as may be presented at the hearing.

11 Date: June 25, 2021

MASHIRI LAW FIRM APC

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13 By: 
14 Alex Asil Mashiri
15 Attorney for Plaintiff
16 Yuralis Pena
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour case seeking civil penalties under the Private Attorneys General Act pursuant to Labor Code section 2698 *et seq.* (“PAGA”).¹ Plaintiff Yuralis Pena (“Plaintiff”), brought this enforcement action against Defendants South County Oral Maxillofacial Surgery and Eastlake Surgery Center (“Defendants”) on behalf of the real party in interest, the State of California for Labor Code² violations Defendants allegedly committed against their current and former employees who were employed between June 21, 2019 and October 31, 2020 (“PAGA Represented Employees”).

After several months of negotiations, detail discussions about the claims in this case, and informal exchange of information, the Parties were able to reach a reasonable settlement.

Accordingly, Plaintiff seeks court approval of the PAGA settlement pursuant to section 2699(*I*). Defendants do not oppose this Ex Parte request.

II. FACTUAL AND PROCEDURAL HISTORY

On June 21, 2020, after conferring with Plaintiff regarding her Labor Code claims and grievances, counsel for Plaintiff sent the statutorily required notice to the California Labor and Workforce Development Agency (“LWDA”) and Defendants, declaring Plaintiff’s intent to proceed with the enumerated Labor Code claims on behalf of herself and all other aggrieved employees against Defendants. (Declaration of Alex Asil Mashiri [Mashiri Decl.] ¶ 13; Declaration of Tamim Jami [“Jami Decl.”] ¶ 17.) Plaintiff’s Counsel also requested Plaintiff’s employment/personnel file and subsequently, researched and investigated all of Plaintiff’s concerns. (Mashiri Decl. ¶ 14; Jami Decl. ¶ 17.)

On August 25, 2020, Plaintiff filed her complaint under the PAGA in this matter. (Mashiri Decl. ¶ 15; Jami Decl. ¶ 18.) The complaint asserts a claim for civil penalties for violation of sections 201, 202, 203, 204, 226, 226(c), 226(a)(1)-(a)(9), 226.3, 227.3, 510, 558, 1194, 1197, 2802 and 2699 *et seq.* (*Ibid.*)

¹ This is a PAGA-only action.

² All further statutory references will be to the California Labor Code unless otherwise noted.

1 Between September 2020 and December 2020, the Parties, through counsel, engaged in
2 several discussions regarding the claims in this case. (Mashiri Decl. ¶ 16; Jami Decl. ¶ 19.) The
3 Parties, subsequently, decided to engage in good faith settlement discussions amongst themselves
4 for the sole purpose of short-circuiting protracted litigation, and avoiding any additional fees and
5 costs. (*Ibid.*)

6 Given the nature of the case, and the fact that there were only about 11 employees (current
7 and former) who were affected by the alleged violations, Defendants, through counsel, engaged an
8 expert witness CPA firm to review the payroll data. The information was then provided to Plaintiff's
9 counsel. (Mashiri Decl. ¶ 17; Jami Decl. ¶ 20.)

10 Plaintiff, through counsel, was able to evaluate the case, prepare risk assessment and
11 litigation cost estimates, provide a detailed settlement demand, and engage in detailed settlement
12 discussions surrounding potential liability and civil penalty exposure. (Mashiri Decl. ¶ 18; Jami
13 Decl. ¶ 21.)

14 The Parties engaged in numerous rounds of settlement discussions spanning the course of
15 three months. (Mashiri Decl. ¶ 19; Jami Decl. ¶ 22.) Ultimately the Parties agreed to settle this
16 matter for \$47,000.00. (*Ibid.*)

17 Subsequently, the Parties entered into a long-form settlement agreement ("Settlement
18 Agreement") outlining the terms of the Parties' agreement. (Mashiri Decl. ¶ 20, Exh. 3; Jami Decl. ¶
19 23.) A copy of the Settlement Agreement was provided to the LWDA on May 25, 2021. (Mashiri
20 Decl. ¶ 20.)

21 The gross settlement amount is \$47,000.00. (Mashiri Decl. ¶ 21; Jami Decl. ¶ 24.). The
22 Parties' proposed settlement included PAGA civil penalties, litigation costs, and attorney's fees.
23 (*Ibid.*) The proposed PAGA civil penalties are \$27,781.25, of which 75% (or \$20,835.94) will be
24 paid to the LWDA and the remaining 25% (or \$6,945.31) will be allocated to the approximately 11
25 PAGA Represented Employees. (*Ibid.*) Of the remaining balance, \$1,218.75 will be allocated
26 towards litigation costs incurred in this case, and the remaining amount of \$18,000.00 will be
27 allocated towards Plaintiff's attorneys' fees incurred as a result of the PAGA lawsuit. (*Ibid.*) In
28

1 addition to the proposed monetary settlement, Defendants have already taken affirmative steps to
2 both cure and avoid any of the alleged violations. (*Ibid.*)

3 **III. GOOD CAUSE EXISTS TO GRANT THIS RELIEF ON AN EX PARTE BASIS**

4 Good cause exists to grant *ex parte* relief on this issue because: (a) approval of the
5 settlement of the PAGA claims will fully and entirely resolve this case; (b) waiting for the
6 process of a noticed motion will simply delay the resolution of the case; and (c) the Parties are
7 operating under the expectation that the matter has been resolved and, thus, are not taking action
8 that otherwise would need to be taken (*e.g.*, discovery, depositions, etc.) if the case is not
9 resolved. Moreover, because this is an unopposed *ex parte* application and the LWDA has been
10 notified via online filing of the settlement agreement between the parties, no party would be
11 prejudiced by having this matter heard on an *ex parte* basis.

12 Additionally, the San Diego Superior Court, including this department, has routinely heard
13 and approved PAGA settlements on an *ex parte* basis. (See, *e.g.*, *Hashemi v. Trademark*
14 *Constructions Co.*, 37-2017-00041889-CU-OE-CTL (Hon. G. Pollack); *Lopez v. Temco Logistics et*
15 *al.*, 37-2019-00027884-CU-OE-CTL (Hon. R. Frazier); *Garcia et al. v. Courtyard by Marriott et al.*,
16 37-2019-00008681-CU-OE-CTL (Hon. R. Strauss); *Baker v. Vivint*, 37-2018-00058265-CU-OE-
17 CTL (Hon. T. Taylor.); *Wilkins v. Hotel Investment Group, Inc.* (37-2017-00017266-CU-CTL)
18 (Hon. K. Bacal); *Derocco v. Irvine Company Apartment Communities, Inc.*, 37-2017-00034528-CU-
19 OE-CTL (Hon. R. Trapp); *Ramirez v. The Helm Management Co. et al.*, 37-2019-00008434-CU-
20 OE-NC (Hon. T. M. Casserly).)

21 **IV. THE PRIVATE ATTORNEYS GENERAL ACT (PAGA)**

22 “In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act
23 of 2004.” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980 (*Arias*).) PAGA is the acronym for
24 the Private Attorneys General Act of 2004, which is codified under California Labor Code sections
25 2698 - 2699.6. (Labor Code § 2698.)

26 “[T]he Legislature ‘declared that adequate financing of labor law enforcement was necessary
27 to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement
28 agencies had declined and were unlikely to keep pace with the future growth of the labor market,

1 and that it was therefore in the public interest to allow aggrieved employees, acting as private
2 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
3 labor law enforcement agencies were to retain primacy over private enforcement efforts.”
4 (*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1125–26, citation
5 omitted disapproved on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175.)

6 Thus, the PAGA is a type of *qui tam* action, “authorizing a private party to bring an action
7 to recover a penalty on behalf of the government and receive part of the recovery as compensation.”
8 (*Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 753 (*Huff*) review denied (Aug.
9 8, 2018) citing *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379.)
10 When an employee brings a representative action under the PAGA, he or she does so as the proxy or
11 agent of state labor law enforcement agencies, representing the same legal right and interest as those
12 agencies, in a proceeding that is designed to protect the public, not to benefit private parties.”
13 (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal. 4th 993, 1003.)
14 Thus, “[e]very PAGA claim ‘is a dispute *between an employer and the state.*’” (*Kim v. Reins Int’l*
15 *California, Inc.* (2020) 9 Cal.5th 73, 81 (*Kim*), citation omitted.)

16 While a case under the PAGA is representative in nature, it is **not** a class action, and
17 therefore, may be brought *without* the procedural requirements involved in a class action, *i.e.*, class
18 certification. (*Kim, supra*, 9 Cal.5th at pp. 86-87.)

19 Lastly, non-party aggrieved employees in a PAGA action are not entitled to notice and have
20 no right to opt out. (*Arias, supra*, 46 Cal.4th at p. 986.)

21 V. ARGUMENT

22 A. Controlling Law Regarding PAGA Approval

23 Labor Code section 2699(i) mandates that PAGA penalties shall be allocated as follows:

24 75 percent to the Labor and Workforce Development Agency for
25 enforcement of labor laws and education of employers and employees about
26 their rights and responsibilities under this code, to be continuously
27 appropriated to supplement and not supplant the funding to the agency for
28 those purposes; and 25 percent to the aggrieved employees.

Under Labor Code section 2699(l)(2), the court is required to review and approve any PAGA

1 settlement. (Lab. Code § 2699(1)(2).) “PAGA settlements are subject to trial court review and
2 approval, ensuring that any negotiated resolution is fair to those affected.” (*Williams v. Superior*
3 *Court* (2017) 3 Cal.5th 531, 549.)

4 Civil penalties recovered under the PAGA “are intended to ‘*remediate present violations*
5 *and deter future ones,*’ **not to redress employees’ injuries.**” (*Kim, supra*, 9 Cal.5th at p. 86) Indeed,
6 the share of civil penalties (25%) distributed to the aggrieved employees are designed as a “financial
7 incentive” to enforce the labor laws under the PAGA, not to compensate them for any damages or
8 injuries suffered. (*Kim, supra*, 9 Cal.5th at p. 86; *Brown v. Ralphs Grocery Co.* (2011) 197
9 Cal.App.4th 489, 501[stating that “the purpose of the PAGA is not to recover damages or
10 restitution...”]; *Huff, supra*, 23 Cal.App.5th at p. 753 [same]; *Provost v. YourMechanic, Inc.* (2020)
11 55 Cal.App.5th 982, 992 [stating that the Legislature provided the 25% share of civil penalties to
12 aggrieved employees as an “financial incentive” to pursue PAGA cases].)

13 **B. This PAGA Settlement Is Fair Under Labor Code Section 2699(1)(2)**

14 While Labor Code section 2699(1)(2) requires a court to “review and approve any settlement
15 of any civil action filed pursuant to [the PAGA],” it does not provide any guidance as to what is
16 considered “fair.” However, at the lower end of the spectrum, the California Court of Appeal has
17 held that an allocation of **zero dollars** to resolve PAGA claims may be appropriate in certain
18 circumstances:

19
20 The Nordstrom Commission Cases settlement agreement identifies liability for PAGA
21 penalties as a claim against Nordstrom and includes the following language: “The Parties
22 allocate \$0 to any Private Attorneys General Act penalty claim under Labor Code § 2699 *et*
23 *seq.*, for penalty claims based on the Released Claims. During the Class Period, Nordstrom
24 paid Putative Class Members’ commissions pursuant to a commission plan that it contends
was approved by the United States District Court in *Rios*, and consequently, Nordstrom
contends no claim for penalties of any nature is valid.” Thus, the PAGA penalty claims were
at issue, and were resolved as a part of the overall settlement of the case. We find no abuse
of discretion in the trial court’s approval of the settlement agreement containing these terms.

25 (*Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589.)

26 Moreover, courts in California have routinely approved settlements which allocate less than
27 2% of the overall settlement amount to PAGA penalties. (*See e.g., Haji v. be.group*, San Diego
28 Superior Court Case No: 37-2017-00025918-CU-OE-CTL (Taylor T.) [approving allocation of

1 \$20,000.00 to civil penalties under PAGA out of \$1,693,000.00 settlement]; *Chu v. Wells Fargo*
2 *Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 672645, at *1 [approving allocation of
3 \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement]; *see also Schiller v. David's Bridal,*
4 *Inc.* (E.D. Cal., June 11, 2012) 2012 WL 2117001, at * 14 [approving allocation of \$7,500.00 to
5 PAGA penalties out of \$518,245.00 settlement].)

6 The Parties seek to allocate \$27,781.25 in civil penalties under Labor Code section 2699(i).
7 From that amount, 75% (or \$20,835.94) will be paid to the LWDA and the remaining 25% (or
8 \$6,945.31) will be allocated to the 11 PAGA Represented Employees.

9 Prior to negotiating a settlement in this case, Plaintiff's counsel conducted a thorough
10 investigation into the facts of this case, conducted legal research as to the claims and applicable
11 laws, reviewed payroll records, engaged in several discussions with defense counsel regarding the
12 scope of the claims alleged in this case, engaged in informal discovery, and engaged in several
13 detailed settlement discussions with defense counsel. (Mashiri Decl. ¶¶ 11, 13-19; Jami Decl. ¶ 14-
14 22.)

15 Critically important here is that Defendants have already taken affirmative steps to both cure
16 and avoid any of the alleged violations. (Mashiri Decl. ¶ 21; Jami Decl. ¶ 24.)

17 As a result, and based on counsel's professional experience, the circumstances of this case,
18 and the work performed, the Parties contend that the proposed PAGA settlement is adequate, fair,
19 and appropriate. (Mashiri Decl. ¶ 22; Jami Decl. ¶ 25.)

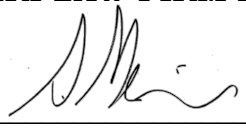
20 VI. CONCLUSION

21 For the reasons stated above, Plaintiff respectfully requests that the Court approve the
22 proposed PAGA settlement.

23 Respectfully submitted,

24 Date: June 25, 2021

MASHIRI LAW FIRM APC

25
26 By: 
27 Alex Asil Mashiri
28 Attorney for Plaintiff
Yuralis Pena