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other members of the general public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

STANISLAV SAVINOK, in a
Representative capacity only, and on behalf
of other members of the general public
similarly situated

Plaintiff

v.

AIRMAXX, INC., a California
Corporation; ALEX GLOZMAN, an
individual, and DOES 1-10, inclusive

Defendants

CASE NO. 37-2020-00031033-CU-OE-CTL

(Representative Action only)

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS UNOPPOSED EX
PARTE APPLICATION *RE: PAGA*
SETTLEMENT APPROVAL**

Date: January 7, 2021

Time: 8:30 a.m.

Judge: Hon. Kenneth J. Medel

Dept.: C-66

1 Plaintiff STANISLAV SAVINOK, in a Representative capacity only, respectfully submits his
2 *Ex Parte* Application for Approval of a PAGA Settlement. This Request is Unopposed. The LWDA
3 was timely notified of this proposal, and does not object.

4 I. SUMMARY OF APPLICATION

5 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
6 Airmaxx, Inc., and Alex Glozman (hereinafter collectively “Airmaxx” or “Defendants”). As this is a
7 “PAGA” action only, the Limitations Period begins on June 30, 2019. There are approximately 23
8 PAGA Members at issue. (Anderson Decl., ¶ 3).

9 Following the exchange of informal discovery, analysis of numerous sets of time and wage
10 data, and Plaintiff providing Defendants with a formal Settlement Demand, the parties reached a
11 proposed settlement that includes a payment of penalties to the LWDA. (Anderson Decl., ¶4; **Exh. 1**).

12 Based on the below figures, each PAGA Member would receive an average payment of
13 approximately **\$100.00**. This figure represents an average only, as the actual amounts paid will vary
14 depending on the amount of work weeks each individual employee was employed during the PAGA
15 period. (Anderson Decl., ¶ 7).

16 The Total Value of the proposed Settlement is **\$9,200.00** which is broken down as follows:

- 17 • 75% (**\$6,900.00**) shall be assigned/paid to the LWDA as penalties.
- 18 • The remaining 25% (**\$2,300.00**) in cash will be disbursed among all employees based
19 on work weeks employed during the PAGA period. (Anderson Decl., ¶ 7).

20 Given the above, the average payment to each individual employee will be approximately
21 **\$100.00**. (*Id.*)

22 **Please Note:** The PAGA claim at issue is a very small part of a larger dispute between Mr.
23 Savinok and his former employer. The remaining issues are not relevant to this litigation and are not
24 currently before this Court. Plaintiff is not seeking any attorney’s fees or costs in this litigation as they
25 will be addressed in “settlement discussions” following the resolution of this matter. (Anderson Decl.,
26 ¶ 8).

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

“The superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA].” Cal. Lab. Code. § 2699(l). In so doing, the court must consider whether the proposed “PAGA settlement is fair and adequate in view of the purposes and policies of the statute.” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016).

However, “neither the California legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer” as to what the appropriate standard is for approval of a PAGA settlement. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 2017 WL 2224265, at *1 (C.D. Cal. May 19, 2017).

A court may award a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213-1214. See e.g., *Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 82%).

Courts have routinely approved PAGA settlements where the PAGA allocation reflects a much smaller percentage of the gross settlement amount. There are numerous comparable cases in which the total settlement exceeded \$2,000,000 and the PAGA penalty was \$10,000 or less. See e.g. *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, 2014 WL 4703915, at *1 (C.D. Cal. Sept. 2, 2014); *Franco v. Ruiz Food Prods., Inc.*, 2012 WL5941801, at *14 (E.D. Cal. Nov. 27, 2012); *Garcia v. Gordon Trucking*, 2012 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011).

III. DISCUSSION

The parties submit the proposed settlement of PAGA penalties is fair, adequate, and reasonable.

A. THE BASIS FOR THE *EX PARTE* REQUEST

The instant *Ex Parte* request is based on the fact that (1) the PAGA period “cutoff date” is contingent on Court approval, and any delay diminishes the amounts received by the impacted employees; (2) Notice to certain ex-employees may be adversely impacted by further delay (*i.e.* ex-employees may change their mailing address without filing a proper “forwarding address”). (Anderson Decl., ¶ 9; Please see **Exhibit 1**: “Effective Date” at page 1).

Additionally, an expedient approval of this settlement will provide a direct benefit to the impacted employees at issue. The “fixes” provide a guarantee of future Labor Code compliance, and an immediate monetary benefit. It also allows Defendants (who admirably “stepped up” to address these issues) the opportunity to move on, and focus on future business. (Anderson Decl., ¶ 10).

B. 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). Plaintiff also alleged all employees were denied compliant Meal and Rest Periods, minimum wages, overtime, accurate wage statements, reimbursements, and suffered waiting time violations. (See ROA # 1, Exhibit 1: “Plaintiff’s LWDA Notice” attached thereto).

Specifically, Plaintiff alleged he- and other employees -were not properly compensated due to Defendants’ failure to provide accurate overtime compensation and maintain accurate time records. Plaintiff alleged that he - and other employees - received “interrupted,” “short,” “late,” or “missing” Meal and Rest Periods, including those documented within Defendants’ Time Records. (Anderson Decl., ¶ 11).

C. ANALYSIS OF POTENTIAL LIABILITY ON A REPRESENTATIVE BASIS

The catalyst of this litigation concerned allegations that Mr. Savinok was denied legally compliant Meal and Rest periods, and was not paid for all Overtime hours worked. (Anderson Decl., ¶ 12).

1 Investigations completed by Plaintiff's counsel revealed that Defendants' timekeeping policies
2 and employee records were not in compliance with California law. (Anderson Decl., ¶ 13).

3 Based on the above, the maximum liability in a case of this type would be in the range of
4 \$20,000.00 to \$30,000.00. (Anderson Decl., ¶ 14).

5 However, Plaintiff's investigations also revealed that the "rate of violation" by Defendants was
6 significantly less than 100%. On many of those occasions, it appears that Defendants did, in fact,
7 comply with the law. (Anderson Decl., ¶ 15)

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

13 Plaintiff's counsel agrees with the Court in *Carrington*, and with the provision of the Labor
14 Code, that penalties *should* be mitigated where violations are minimal (or rare), or where the employer
15 makes significant efforts to comply with the Labor Code. (Anderson Decl., ¶ 17).

16 Plaintiff's counsel, William B. Sullivan, has approximately 27 years of experience in "class
17 action" litigation, both as plaintiff and defense counsel. (Anderson Decl., ¶ 19). Plaintiff's counsel
18 Eric K. Yaeckel and William B. Sullivan are the attorneys of record in a matter currently pending
19 before the California Supreme Court titled *Donohue v. AMN Services* (S253677). (*Id.*) The *Donohue*
20 matter is a certified class and PAGA action. Plaintiff's counsel, William B. Sullivan and Eric K.
21 Yaeckel, are currently lead counsel on approximately 40 employment "wage and hour" claims with
22 class action, or representative action allegations. Plaintiff's counsel, William B. Sullivan, has been
23 involved for over 25 years in cases that are primarily prosecuted under the California Labor Code. (*Id.*)
24 Based on said experience, it is the opinion of Plaintiff's counsel that this settlement represents a fair
25 and adequate payment. (*Id.*)

26 **D. THE ALLOCATION OF PENALTIES, AND LIMITED RELEASE OF CLAIMS**

27 While Labor Code section 2699(l) requires a court to "review and approve any penalties sought
28 as part of a proposed settlement agreement," it does not provide any guidance as to what is considered

1 an 'adequate' allocation of these penalties. However, the California Court of Appeal has held that an
2 allocation of **zero dollars** to resolve PAGA claims may be appropriate:

3 The Nordstrom Commission Cases settlement agreement identifies liability for PAGA
4 penalties as a claim against Nordstrom and includes the following language: "The
5 Parties allocate \$0 to any Private Attorneys General Act penalty claim under Labor
6 Code § 2699 et seq., for penalty claims based on the Released Claims. During the Class
7 Period, Nordstrom paid Putative Class Members' commissions pursuant to a
8 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.
Nordstrom Com'n Cases (2010) 186 Cal.App.4th 576, 589.

9 Moreover, District Courts in California have routinely approved settlement agreements which
10 allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v. Wells*
11 *Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1
12 (approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement); see also
13 *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL
14 2117001, at *14 (approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement).

15 Defendants, and its counsel, deserve credit for their willingness to consider - and address - the
16 allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in "Wage
17 and Hour" litigation) agreed to produce a substantial amount of documents and information necessary
18 to evaluate the parameters of settlement. Following a detailed settlement demand and case analysis
19 prepared by Plaintiff and submitted to Defendants, and arms-length negotiations thereafter, the parties
20 have reached a proposed settlement that includes a payment of penalties under PAGA. (Anderson
21 Decl., ¶ 20).

22 Here, the parties seek to allocate the total settlement (**\$9,200.00**) to the PAGA Fund. As such,
23 the LWDA will receive **\$6,900.00**. (Anderson Decl., ¶ 7; **Exhibit 1**). The remaining **\$2,300.00** will
24 be allocated and distributed among the current or ex-employees within the PAGA representation
25 period. (*Id.*) Each PAGA Member will receive an average payment of approximately **\$100.00**. (*Id.*)

26 The parties contend the settlement agreement amount is fair, adequate, and reasonable.
27 (Anderson Decl., ¶ 20).

28 Moreover, the PAGA settlement does not bar any employee from pursuing their own individual

1 Labor Code claims. (Anderson Decl., ¶ 8; **Exhibit 1**: “Released Claims” § III. (4), pages 3, 4). The
2 release only applies to the PAGA claims for penalties, based upon the allegations in Plaintiff’s
3 operative Complaint. (*Id.*)

4 **E. THE LWDA WAS NOTIFIED MULTIPLE TIMES, AND DOES NOT OBJECT**

5 On **December 31, 2020**, Plaintiff’s counsel **first notified** the LWDA of the settlement proposal
6 and provided notice of the instant *Ex Parte* hearing via the LWDA’s electronic filing portal. (Anderson
7 Decl., ¶ 5). Plaintiff’s counsel immediately received an auto-generated email that its submission was
8 received by the LWDA. (*Id.*)

9 On **January 6, 2021**, at approximately 9:10 a.m., Plaintiff’s counsel uploaded via the LWDA’s
10 electronic filing portal the “Proposed Settlement,” that is being presented to this Court including this
11 supporting memorandum, notice, declaration, and proposed order. (Anderson Decl., ¶ 6). Plaintiff’s
12 counsel immediately received an auto-generated email that its submission was received. (*Id.*)

13 If the LWDA contacts Plaintiff’s counsel at any time prior to the hearing, Plaintiff’s counsel
14 will provide an updated declaration to the Court. (*Id.*) To date, no response from the LWDA has been
15 received. (*Id.*)

16 **IV. CONCLUSION**

17 The parties respectfully request that the Court approve its proposed allocation of PAGA
18 penalties to the LWDA and the represented employees.

19 *In the alternative*, should the Court wish to have a noticed motion, Plaintiff asks for an order
20 shortening time to have the motion heard based on these unopposed moving papers.

21 Dated: January 6, 2021

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23 

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