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11 Attorneys for Plaintiffs KATHERINE BOOKOUT-VARNER, SARA LASHKARI, and JENNIFER
12 CORDEAU, in a Representative capacity only, and on behalf of other members of the general public
13 similarly situated

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN DIEGO**

16 KATHERINE BOOKOUT-VARNER,
17 SARA LASHKARI, and JENNIFER
18 CORDEAU, in a Representative capacity
19 only, and on behalf of other members of the
20 general public similarly situated,

21 Plaintiff

22 v.

23 STITCH FIX, INC., a Delaware Corporation;
24 and DOES 1-10, inclusive

25 Defendants

CASE NO. 37-2020-00027926-CU-OE-CTL

(Representative Action only)

**PLAINTIFF'S UNOPPOSED EX PARTE
APPLICATION RE: PAGA SETTLEMENT
APPROVAL**

Date: November 17, 2020

Time: 9:00 a.m.

Judge: Hon. Katharine Bacal

Dept.: C-69

1 Plaintiffs KATHERINE BOOKOUT-VARNER, SARA LASHKARI, and JENNIFER
2 CORDEAU (“Plaintiffs”), in a Representative capacity only, and on behalf of other members of the
3 general public similarly situated respectfully submit their *Ex Parte* Application for Approval of a
4 PAGA representative Settlement. This Request is **Unopposed**. The LWDA was timely and repeatedly
5 notified of this proposal , and does **not object**.

6 I. SUMMARY OF APPLICATION

7 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
8 STITCH FIX, INC. (“Stitch Fix”). As this is a “PAGA” action only, the Limitations Period begins on
9 June 3, 2019. It is estimated that there are approximately **1,820** PAGA Settlement Employees at issue.
10 (Decl. of Eric K. Yaeckel, ¶ 3).

11 Following the exchange of informal discovery, analysis of numerous sets of time and wage
12 data, and a full day Mediation presided over by Tripper Ortman, Esq., the parties reached a proposed
13 settlement that includes a settlement payment to the LWDA to resolve the PAGA claims. (Yaeckel
14 Decl., ¶ 4).

15 Based on the below figures, each Settlement Employee would receive an average payment of
16 approximately **\$52.12**. This figure represents an average only, as the actual amounts paid will vary
17 depending on the number of pay periods worked by each PAGA Settlement Employee during the
18 PAGA period. (Yaeckel Decl., ¶ 8).

19 On **October 30, 2020**, Plaintiffs’ counsel first notified the LWDA of the settlement proposal.
20 (Yaeckel Decl., ¶ 5). As with all uploads to this filing portal, Plaintiffs’ counsel immediately received
21 an auto-generated email that its submission was received by the LWDA. (*Id.*)

22 On **November 9, 2020**, at approximately 3:10 p.m., Plaintiffs’ counsel uploaded via the
23 LWDA’s electronic filing portal the parties’ Settlement Agreement. Plaintiffs also provided notice of
24 this hearing at that time. (Yaeckel Decl., ¶ 6). As with all uploads to this filing portal, Plaintiffs’
25 counsel immediately received an auto-generated email that its submission was received. (*Id.*)

26 On **November 13, 2020**, at approximately 2:45 p.m., Plaintiffs’ counsel counsel uploaded via
27 the LWDA’s electronic filing portal a copy of this entire *ex parte* application. (Yaeckel Decl., ¶ 7). As
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1 with all uploads to this filing portal, Plaintiffs' counsel immediately received an auto-generated email
2 that its submission was received. (*Id.*)

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

4 The Total Value of the proposed Settlement is **\$600,000.00** which is broken down as follows:

- 5 * **\$8,000** Settlement Administrator Fees;
- 6 * **\$200,000** Attorneys' Fees (1/3 of total settlement value);
- 7 * **\$12,500** Costs of Litigation.
- 8 * **PAGA Payment of \$379,500.**
- 9 • 75% of the PAGA Payment (**\$284,625**) shall be assigned/paid to the
- 10 LWDA.
- 11 • 25% of the PAGA Payment (**\$94,855**) shall be assigned and disbursed
- 12 among all PAGA Settlement Employees based on pay periods worked
- 13 during the PAGA period..

14 (Yaeckel Decl., ¶ 8; See Ex. 1).

15 Given the above, the average payment to each individual PAGA Settlement Employee will be

16 approximately **\$52.12**. This is an average only, the actual payment will vary based on how many pay

17 periods the PAGA Settlement Employee worked during the PAGA Period. (*Id.*)

18 Further, the Settlement only covers PAGA claims. (Yaeckel Decl., ¶ 9); **Exhibit 1**: "Released

19 Claims" § III.(4)(b)). It does not cover PAGA Settlement Employee's individual wage and hour claims.

20 **Please Note**: the bulk of the PAGA group did not have any individual claims to begin with, as the

21 majority of Stitch Fix's employees signed severance packages. (Yaeckel Decl., ¶ 9).

22 **Please Note**: Plaintiffs' counsel is cognizant of Her Honor's concerns regarding adequate

23 notice to the LWDA of the hearing from past cases. Plaintiffs' counsel contacted the Court Clerk for

24 Department C-69, who graciously informed Plaintiffs' counsel that the first or second available *Ex*

25 *Parte* date **must** be taken. The furthest date Plaintiffs could schedule was this November 17, 2020 date

26 for purposes of provided notice to the LWDA, which gave the LWDA 8 days notice of the hearing.

27 (Yaeckel Decl., ¶10).

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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.

Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. However, some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced "subsequent violation penalty" or "heightened penalty" only after an employer has been notified that its conduct violates the Labor Code. *See Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199-IEG-CAB, 2009 WL 2448430 (S.D. Cal. 2009) (finding that California law imposes the "subsequent violation penalty" only after an employer has been notified its conduct violates the Labor Code). Further, 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%).

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

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

14 Further, the Court in *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (“Flores”) the court
15 was asked to approve a PAGA settlement (the “Settlement”). *Flores v. Starwood Hotels & Resorts*
16 *Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1075–76 (C.D. Cal. 2017). In deciding whether the court
17 should approve the Settlement, the court looked at the California legislature, the California Courts of
18 Appeal, the California Supreme Court, and the California Labor & Workforce Development Agency
19 for a definitive answer as to what precedent the court should follow in either approving or denying the
20 settlement. *Id.* The court was not able to find a definitive answer. *Id.* As such, the court followed the
21 rationale in *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states
22 a court is permitted to approve a PAGA settlement if the settlement is “fair and adequate in view of
23 the purposes and policies of the statute.” *Id.*

24 In deciding whether the settlement was “fair and adequate,” the *Flores* court looked at how the
25 parties divvied up the civil penalties under Section 2699(i) of the California Labor Code. *Flores* at
26 1076-77. As the court felt the parties’ division of penalties was fair and adequate pursuant to the
27 statute, the court approved the settlement. *Id.*

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A. THE BASIS FOR THE *EX PARTE* REQUEST

Additionally, an expedient approval of this settlement will provide a direct benefit to the impacted employees at issue. There is no risk of future Labor Code non-compliance and employees and the state receive an immediate monetary benefit. It also allows Defendant the opportunity to move on, and focus on future business. (Yaeckel Decl., ¶ 12).

The Complaint alleges Labor Code violations which triggered penalties under the PAGA statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiffs alleged that all non-exempt Stylists (and similar roles) were denied compliant meal and rest breaks, minimum wages, overtime compensation, accurate wage statements, reimbursements of business expenses and suffered waiting time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA Notice” attached thereto).

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1 **C. ANALYSIS OF POTENTIAL LIABILITY, ON A REPRESENTATIVE BASIS**

2 The catalyst of this litigation concerned allegations that Plaintiffs were forced to work off the
3 clock and were forced to work through their breaks. (Decl. Yaeckel, ¶ 14).

4 Investigations completed by Plaintiffs’ counsel revealed some instances of uncompensated
5 work time. However, these investigations also revealed that the “rate of violation” by Defendant was
6 significantly less than 100%. On many of those occasions, it appears that Defendant did, in fact,
7 comply with the law. Further, Defendant contends that it maintained compliant policies, compensated
8 employees for all time worked, paid meal break premiums, and did not require or permit off the clock
9 work for any reason. Further, Defendant contends that to the extent off the clock work occurred, there
10 is no evidence that it knew or should have known about the alleged off the clock work. (Decl. Yaeckel,
11 ¶ 15).

12 Based on the above, the maximum liability in a case of this type would be in the range of
13 **\$600,000.00 to \$900,000.00**. (Decl. Yaeckel, ¶ 16).

14 Moreover, Plaintiffs’ counsel is aware of the Court’s discretion to significantly reduce the
15 award of PAGA penalties pursuant to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶ 17).
16 To confirm, Plaintiffs’ counsel experienced the mitigation of “PAGA” penalties in *Carrington v.*
17 *Starbucks Corp.* (2018) 30 Cal.App.5th 504. (*Id.*) In *Carrington*, Her Honor significantly mitigated
18 PAGA penalties (\$5 per violation), due to the efforts made by the employer to comply with the law.
19 (*Id.*)

20 Plaintiffs’ counsel agrees with Her Honor, and with the provision of the Labor Code, that
21 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
22 significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶ 18).

23 As the above factors exist in this case, it is the opinion of Plaintiffs’ counsel that the settlement
24 is fair, adequate, and reasonable. Moreover, upon notice of the potential violations, Defendant
25 immediately stepped up to address the claims and participate in an early mediation. (Decl. Yaeckel,
26 ¶ 19). Plaintiffs’ counsel, William B. Sullivan has approximately 27 years of experience in “class
27 action” and representative action litigation, both as plaintiff and defense counsel. Mr. Yaeckel has over
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1 9 years of experience prosecuting class and representative action claims under the California Labor
2 Code. Counsel are the attorneys of record in a matter currently pending before the California Supreme
3 Court titled *Donohue v. AMN Services* (S253677). The *Donohue* matter is a certified class and PAGA
4 action. Plaintiffs' counsel are currently lead counsel on approximately 40 employment "wage and
5 hour" claims with class action and/or representative actions allegations. Based on said experience, it
6 is the opinion of Plaintiffs' counsel that this settlement represents a fair and adequate payment to
7 resolve these claims. (Decl. Yaeckel, ¶ 20).

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

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

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

17 Those purposes and policies include "benefit[ing] the public by augmenting the state's
18 enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring
19 noncompliance." *Id.* at 1132-33; Accord *Syed v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb.
20 22, 2017) (concluding "the settlement amount related to plaintiffs' PAGA claims is fair, reasonable,
21 and adequate in light of the public policy goals of PAGA.").

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

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

3 Here, the parties seek to allocate **\$379,500** of the PAGA Payment. Of this amount, the LWDA
4 will receive a 75% share of **\$284,625**. (Decl. Yaeckel, ¶ 8, **Exhibit 1**). The remaining 25% share of
5 **\$94,855** will be allocated and distributed among the current or former within the PAGA representation
6 period. (*Id.*) Each PAGA Settlement Employee would receive an average payment of approximately
7 **\$52.12**. (*Id.*)

8 The parties contend the settlement agreement amount is fair, adequate, and reasonable. (See
9 Ex. 1 § V(12). Plaintiffs, based on considerable experience, contends this payment amount is sufficient
10 to fairly compensate the LWDA and PAGA Settlement Employees for any alleged violation of the
11 Labor Code in the past. (Decl. Yaeckel, ¶ 20). Moreover, there is no need to “deter” future violations
12 here, as Defendant no longer employs the PAGA Settlement Employees.

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

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

18 On **October 30, 2020**, Plaintiffs’ counsel uploaded via the LWDA’s electronic filing portal the
19 “Memorandum of Understanding,” which memorialized the Parties’ agreement after Mediation. As
20 with all uploads to this filing portal, Plaintiffs’ counsel immediately received an auto-generated email
21 that its submission was received. (Decl. Yaeckel ¶5), **Exhibit 2**).

22 On **November 9, 2020**, at approximately 3:10 p.m., Plaintiffs’ counsel uploaded via the
23 LWDA’s electronic filing portal the parties Settlement Agreement that is being presented to this Court.
24 The LWDA was also notified of the instant ex parte hearing. As with all uploads to this filing portal,
25 Plaintiffs’ counsel immediately received an auto-generated email that its submission was received.
26 (Decl. Yaeckel ¶6, **Exhibit 3**).

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1 On **November 13, 2020**, at approximately 2:45 p.m., Plaintiffs' counsel uploaded via the
2 LWDA's electronic filing portal this entire *ex parte* application, including the notice, this supporting
3 memorandum, declaration, and proposed order. (Decl. Yaeckel ¶ 7). As with all uploads to this filing
4 portal, Plaintiffs' counsel immediately received an auto-generated email that its submission was
5 received. (*Id.*), **Exhibit 4**).

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

9 **IV. CONCLUSION**

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

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

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15 Dated: November 13, 2020

SULLIVAN & YAECKEL LAW GROUP, APC

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18 _____
19 Eric K. Yaeckel
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