

Eric K. Yaeckel [CSB No. 274608]
yaeckel@sullivanlawgroupapc.com
Katherine A. Dishongh [CSB No. 339223]
kdishongh@sullivanlawgroupapc.com
SULLIVAN & YAECKEL LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff NANCY CALIGARIS, in a Representative capacity only, and on behalf of other members of the public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

NANCY CALIGARIS, in a Representative capacity only, and on behalf of other members of the public similarly situated

Plaintiff,

v.

SAN DIEGO FUNDING, a California Corporation, and DOES 1-10, inclusive

Defendants

CASE NO. 37-2020-00045598-CU-OE-CTL

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

Date: April 12, 2022

Time: 8:30 a.m.

Dept.: 64

Judge: Hon. John S. Meyer

1 Plaintiff NANCY CALIGARIS, in a Representative Capacity only, respectfully submits her
2 *Ex Parte* Application for Approval of a PAGA representative Settlement. This Request is unopposed.
3 The LWDA 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 SD
6 FUNDING, a California Corporation (“Defendant”). As this is a “PAGA” action only, the Limitations
7 Period begins on October 8, 2019. There are approximately **574** pay periods and **23** PAGA Members
8 at issue. (Decl. of Eric Yaeckel, ¶3).

9 Following the exchange of discovery, analysis of numerous sets of time and wage data,
10 mediation before Mike Roberts, and assistance of Mr. Roberts subsequent to the March 22, 2022
11 Mediation, the Parties reached a proposed settlement that includes a payment of penalties to the
12 LWDA. (Yaeckel Decl., ¶4).

13 Based on the below figures, each PAGA Member would receive an average payment of
14 approximately **\$376.81**. This figure represents an average only, as the actual amounts paid will vary
15 depending on the amount of workweeks employed during the PAGA period.

16 On **April 5, 2022**, Plaintiff’s counsel gave notice of the instant Settlement to the LWDA.
17 (Yaeckel Decl., ¶5). To date, Plaintiff’s counsel has not received notice that the LWDA would
18 intervene. (*Id.*)

19 On **April 8, 2022**, Plaintiff’s counsel uploaded via the LWDA’s electronic filing portal copies
20 of this entire *ex parte* application, including the Notice, this supporting Memorandum, Declaration,
21 Proposed Order & Judgment, and Settlement Agreement. (Yaeckel Decl., ¶6). To date, Plaintiff’s
22 counsel has not received any opposition from the LWDA. (*Id.*).

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1 The Total Value of the proposed Settlement is **\$70,000.00** which is broken down as follows:

- 2 * **\$2,000.00** Settlement Administrator Fees;
- 3 * **\$23,333.33** Attorneys' Fees (1/3 of total settlement value);
- 4 * **\$5,000.00** Costs of Litigation.
- 5 * Sub-Total of **\$34,666.67**. 75% (**\$26,000.00**) shall be assigned/paid to the
- 6 LWDA as penalties.
- 7 * The remaining 25% (**\$8,666.67**) in cash will be disbursed among all employees
- 8 based on work weeks employed during the PAGA period.(Yaeckel Decl., ¶7)

9 Given the above, the average payment to each individual employee will be approximately
10 **\$376.81**. (*Id.*)

11 Further, there are no restrictions for any of the **23** employees to file individual actions, as the
12 settlement agreement only covers PAGA claims. (Yaeckel Decl., ¶8); **Exhibit A**: "Released Claims"
13 § D.33, p. 5).

14 **II. CONTROLLING LAW**

15 PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state
16 against his or her employer for Labor Code violations committed against the employee and fellow
17 employees." *Iskanian v. CLS Trans. Los Angeles* (2014) 59 Cal. 4th 348, 360. "To compensate for the
18 lack of [a]dequate financing of essential labor law enforcement functions,' the California legislature
19 enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil
20 penalties for violations of the Labor Code." *Sakkab v. Luxottica* (9th Cir. 2015) 803 F.3d 425.

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
26 compliance with Labor Code provisions, and deterring noncompliance." *Id.* at 1132-33; Accord *Syed*
27 *v. M-I LLC*, 2017 WL 714367, at *13 (E.D. Cal. Feb. 22, 2017) (concluding "the settlement amount
28 related to plaintiffs' PAGA claims is fair, reasonable, and adequate in light of the public policy goals

1 of PAGA.”).

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

6 A court may award a lesser amount than the maximum civil penalty amount if, based on the
7 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
8 arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2*
9 (2008) 163 Cal.App.4th 1157, 1213-1214. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at
10 *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 82%).

11 Courts have routinely approved PAGA settlements where the PAGA allocation reflects a much
12 smaller percentage of the gross settlement amount. There are numerous comparable cases in which the
13 total settlement exceeded \$2,000,000 and the PAGA penalty was \$10,000 or less. *See e.g. Hicks v.*
14 *Toys ‘R’ Us–Delaware, Inc.*, 2014 WL 4703915, at *1 (C.D. Cal. Sept. 2, 2014); *Franco v. Ruiz Food*
15 *Prods., Inc.*, 2012 WL5941801, at *14 (E.D. Cal. Nov. 27, 2012); *Garcia v. Gordon Trucking*, 2012
16 WL 5364575, at *3 (E.D. Cal. Oct. 31, 2012); *Chu v. Wells Fargo Investments, LLC*, 2011 WL
17 672645, at *1 (N.D. Cal. Feb. 16, 2011).

18 In *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 972 (N.D. Cal. 2019), the
19 Court discussed two policies for the approval of a PAGA claim:

20 Where PAGA claims are settled in the same agreement with the underlying Labor Code
21 claims, courts have also looked to the interplay of the two recoveries to determine
22 whether PAGA's purposes have been served. The *O'Connor* (Uber) court, for instance,
23 adopted a “sliding scale,” noting that “[b]y providing fair compensation to the class
24 members as employees and substantial monetary relief, a settlement not only vindicates
25 the rights of the class members as employees, but may have a deterrent effect upon the
26 defendant employer and other employers, an objective of PAGA.” 201 F. Supp. 3d at
27 1134. Similarly, “if the settlement resolves the important question of the status of
28 workers as employees entitled to the protection of the Labor Code or contained
substantial injunctive relief, this would support PAGA's interest in augmenting the
state's enforcement capabilities, encouraging compliance with Labor Code provisions,
and deterring noncompliance.” *Id.* at 1134-35.

Further, the Court in *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (“*Flores*”) the court
was asked to approve a PAGA settlement (the “Settlement”). *Flores v. Starwood Hotels & Resorts*

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

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

13 **III. DISCUSSION**

14 The parties reached the terms of their proposed settlement agreement following the exchange
15 of extensive information and employment records. The parties submit the proposed settlement of
16 PAGA penalties is fair, adequate, and reasonable.

17 **A. THE BASIS FOR THE *EX PARTE* REQUEST**

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

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

27 **B. THE NATURE AND SCOPE OF THE ALLEGED VIOLATIONS**

28 The Complaint alleges Labor Code violations which triggered penalties under the PAGA

1 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff also alleged all employees were denied
2 compliant Meal and Rest Periods, minimum wages, overtime, accurate wage statements,
3 reimbursements, and suffered waiting time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA
4 Notice” attached thereto).

5 Specifically, Plaintiff alleges that she - and other employees - received “late” Meal Periods,
6 including those documented within Defendant’s Time Records. (Decl. Yaeckel, ¶11). Plaintiff also
7 challenged whether Defendant maintained lawful meal and rest periods. Plaintiff alleged she- and other
8 employees -were not properly compensated due to Defendant’s failure to maintain accurate time
9 records. (*Id.*) Finally, Plaintiff also challenged whether Defendant maintained lawful meal and rest
10 period policies. (*Id.*)

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

12 The catalyst of this litigation concerned allegations that Ms. Carneiro was denied legally
13 compliant meal and rest periods, and was not paid for all Overtime hours worked. (Decl. Yaeckel,
14 ¶12). Investigations completed by Plaintiff’s counsel revealed that Defendant’s timekeeping policies
15 and employee records were not in compliance with California law. (Decl. Yaeckel, ¶13). However,
16 these investigations also revealed that the “rate of violation” by Defendant was significantly less than
17 100%. (*Id.*) On many of those occasions, it appears that Defendant did, in fact, comply with the law.
18 (*Id.*)

19 Based on the above, the maximum liability in a case of this type would be in the range of
20 **\$200,000.00 to \$300,000.00**. (Decl. Yaeckel, ¶14).

21 Moreover, Plaintiff’s counsel is aware of the Court’s discretion to mitigate penalties pursuant
22 to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶15). To confirm, Plaintiff’s counsel
23 experienced the mitigation of “PAGA” penalties in *Carrington v. Starbucks Corp.* (2018) 30
24 Cal.App.5th 504. (*Id.*) In *Carrington*, Judge Bacal significantly mitigated PAGA penalties (\$5 per
25 violation), due to the efforts made by the employer to comply with the law. (*Id.*)

26 Plaintiff’s counsel agrees with Her Honor, and with the provision of the Labor Code, that
27 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
28 significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶16).

1 As the above factors exist in this case, it is the opinion of Plaintiff's counsel that the settlement
2 is fair, adequate, and reasonable. Specifically, Plaintiff's counsel's understanding is that Defendant
3 has agreed to make changes to its policies, and amend them to the extent they do not comply with
4 California law. (Decl. Yaeckel, ¶17).

5 Plaintiff's counsel, William B. Sullivan has approximately 28 years of experience in "class
6 action" litigation, both as plaintiff and defense counsel. (Decl. Yaeckel, ¶18). Plaintiff's counsel, Eric
7 K. Yaeckel, has over 10 years of experience prosecuting class and representative action claims under
8 the California Labor Code. (*Id.*) Plaintiff's counsel, Eric K. Yaeckel and William B. Sullivan, are the
9 attorneys of record in a matter that was recently heard (and favorably decided) before the California
10 Supreme Court titled *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58. (*Id.*) The *Donohue* matter
11 was a certified class and PAGA action. (*Id.*)

12 Plaintiff's counsel were lead counsel on approximately 40 employment "wage and hour" claims
13 with class action, or representative action allegations. (*Id.*) Based on said experience, it is the opinion
14 of Plaintiff's counsel that this settlement represents a fair and adequate payment. (Yaeckel Decl., ¶19).

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

16 While Labor Code section 2699(*l*) requires a court to "review and approve any penalties sought
17 as part of a proposed settlement agreement," it does not provide any guidance as to what is considered
18 an 'adequate' allocation of these penalties. However, the California Court of Appeal has held that an
19 allocation of **zero dollars** to resolve PAGA claims may be appropriate:

20 The Nordstrom Commission Cases settlement agreement identifies liability for PAGA
21 penalties as a claim against Nordstrom and includes the following language: "The
22 Parties allocate \$0 to any Private Attorneys General Act penalty claim under Labor
23 Code § 2699 et seq., for penalty claims based on the Released Claims. During the Class
24 Period, Nordstrom paid Putative Class Members' commissions pursuant to a
25 commission plan that it contends was approved by the United States District Court in
26 Rios, and consequently, Nordstrom contends no claim for penalties of any nature is
27 valid." Thus, the PAGA penalty claims were at issue, and were resolved as a part of the
28 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.

26 Moreover, District Courts in California have routinely approved settlement agreements which
27 allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v. Wells*
28 *Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1

1 (approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement); see also
2 *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL
3 2117001, at *14 (approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement).

4 Defendant, and its counsel, deserve credit for their willingness to consider - and address - the
5 allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in “Wage
6 and Hour” litigation) agreed to produce a substantial amount of documents and information necessary
7 to evaluate the parameters of settlement. Following the a full day Mediation and arms-length
8 negotiations, the parties have reached a proposed settlement that includes a payment of penalties under
9 PAGA. (Decl. Yaeckel, ¶20).

10 Here, the parties seek to allocate **\$34,666.67** of the total settlement to the Total Value of the
11 PAGA Fund. Of this amount, the LWDA will receive **\$26,000.00**. (Decl. Yaeckel, ¶7, **Exhibit A**). The
12 remaining **\$8,666.67** will be allocated and distributed among the current or ex-employees within the
13 PAGA representation period. (*Id.*) Each PAGA Member would receive an average payment of
14 approximately **\$376.81**. (*Id.*)

15 The parties contend the settlement agreement amount is fair, adequate, and reasonable. (Decl.
16 Yaeckel, ¶ 21). Moreover, the PAGA settlement does not bar any employee from pursuing their own
17 individual Labor Code claims. (Decl. Yaeckel ¶ 8; **Exhibit A**: “Released Claims” § D.33, p. 5). The
18 release only applies to the PAGA claims for penalties, based upon the allegations in Plaintiff’s
19 operative Complaint. (*Id.*)

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

21 On **April 5, 2022**, Plaintiff’s counsel gave notice of the instant Settlement to the LWDA.
22 (Yaeckel Decl., ¶5). To date, Plaintiff’s counsel has not received notice that the LWDA would
23 intervene. (*Id.*)

24 On **April 8, 2022**, Plaintiff’s counsel uploaded via the LWDA’s electronic filing portal copies
25 of this entire *ex parte* application, including the Notice, this supporting Memorandum, Declaration,
26 and Proposed Order & Judgment, and Settlement Agreement. (Yaeckel Decl., ¶6). To date, Plaintiff’s
27 counsel has not received any opposition from the LWDA. (*Id.*)

28 To date, Plaintiff has not received a response from the LWDA regarding the proposed

1 settlement. If the LWDA contacts Plaintiff's counsel at any time prior to the April 12, 2022 hearing,
2 Plaintiff's counsel will provide an updated declaration to the Court. (Decl. Yaeckel ¶22).

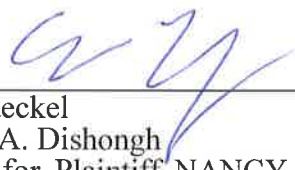
3 **IV. CONCLUSION**

4 The parties respectfully request that the Court approve their proposed allocation of PAGA
5 penalties to the LWDA and the represented employees.

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

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10 Dated: April 8, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

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