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10 other members of the general public similarly situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF SAN DIEGO**

13 ARNOLDO CORONADO, in a
14 Representative capacity only, and on behalf
15 of other members of the general public
16 similarly situated

17 Plaintiff

18 v.

19 BUICK GMC SDNC, LLC, a Delaware
20 Limited Liability Company, and DOES 1-10,
21 inclusive

22 Defendants

CASE NO. 37-2020-00032403-CU-OE-CTL

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

Date: October 13, 2021

Time: 8:30 a.m.

Dept: C-72

Judge: Hon. Timothy Taylor

Plaintiff ARNOLDO CORONADO, in a Representative capacity only, and on behalf of other members of the general public similarly situated respectfully submits his *Ex Parte* Application for Approval of the PAGA Settlement. This Request is **Unopposed**. The LWDA was timely notified of this proposal, and does **not object**.

I. SUMMARY OF APPLICATION

This is a Labor Code § 2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against an automotive dealership[BUICK GMC SDNC, LLC. (“Defendant” or “BUICK”). This is a “PAGA” action only, with a one year limitations period beginning on July 9, 2019 and going through the date of Settlement Approval. It is estimated that there are approximately 96 employees within the proposed settlement group, which is made up of BUICK’S non-exempt employees. (Decl. of Eric K. Yaeckel, ¶ 3).

Following several exchanges of information, analysis of numerous sets of time and wage data, and Mediation presided over by Hon. William McCurine (ret.), the parties reached a proposed settlement that includes a payment of penalties to the LWDA. (Yaeckel Decl., ¶ 4; **Exhibit 1**).

On **October 5, 2021**, Plaintiff’s counsel first notified the LWDA of the terms of the parties agreement. (Yaeckel Decl., ¶ 5). To date, Plaintiff’s counsel has not received notice that the LWDA would intervene or object. (*Id.*)

On **October 11, 2021**, Plaintiff’s counsel uploaded via the LWDA’s electronic filing portal the entire ex parte application seeking settlement approval. (Yaeckel Decl., ¶ 6). To date, Plaintiff’s counsel has not received notice that the LWDA would respond. (*Id.*)

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

The Maximum Settlement Amount of the proposed Settlement is **\$105,000.00** which is broken down as follows:

- * **\$3,000.00** Settlement Administrator Fees;
- * **\$35,000.00** Attorneys’ Fees (1/3 of Maximum Settlement Amount);
- * **\$12,00.00** Costs of Litigation.
- * Sub-Total of **\$55,000.00**
 - 75% (**\$41,250.00**) shall be assigned/paid to the LWDA as penalties.
 - 25% (**\$13,750.00**) shall be disbursed as Individual Settlement Amounts

1 to the Representative Action Members.

2 (Yaeckel Decl., ¶ 7; See **Exhibit 1**).

3 Given the above, the average payment to each individual employee will be approximately
4 **\$143.23**. (*Id.*) Further, there are no restrictions for any of the PAGA employees to file individual
5 actions as the release is limited to claims brought under PAGA only. (Yaeckel Decl., ¶ 8; **Exhibit 1**:
6 ¶ 13, pg. 2).

7 Given the impact of the COVID-19 pandemic, Defendant requested a payment plan as follows.
8 Within thirty (30) calendar days after the Effective Date, Defendant shall deposit the first monthly
9 installment of \$15,000 with the Settlement Administrator. Defendant shall then deposit a monthly
10 installment of \$18,000 every thirty (30) days.

11 The parties have agreed that settlement costs only (administration and counsel's costs) will be
12 paid first. The LWDA and the aggrieved employees will be paid second. Attorneys fees will be paid
13 last. **Exhibit 1**: ¶ 22, pg. 4).

14 **II. CONTROLLING AUTHORITY**

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).

28 A court may award a lesser amount than the maximum civil penalty amount if, based on the

1 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
2 arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2*
3 (2008) 163 Cal.App.4th 1157, 1213-1214. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at
4 *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 82%).

5 It has been noted that the California Supreme Court, California legislature, California Courts
6 of Appeal, and LWDA have failed to provide any definitive standard for PAGA settlement approval.
7 *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1075 (C.D. Cal. 2017).
8 However, in deciding whether the settlement was “fair and adequate,” the *Flores* court looked at how
9 the parties divvied up the civil penalties under Section 2699(i) of the California Labor Code. *Flores*
10 at 1076-77. As the court felt the parties’ division of penalties was fair and adequate pursuant to the
11 statute, the court approved the settlement. *Id.*

12 **III. DISCUSSION**

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

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

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

21 Additionally, the ongoing COVID-19 crisis has detrimentally impacted the majority of the
22 employees at issue due to layoffs and general reductions in work. Accordingly, an expedient approval
23 of this settlement will provide a direct benefit to the impacted employees at issue. It will also benefit
24 the Defendant, who has also been impacted by the economic downturn. Any “fixes” and/or internal
25 audits done in regard to the challenged policies provide for future Labor Code compliance. It also
26 allows (2) Defendant (who admirably “stepped up” to address these issues without heavily litigating
27 the case) the opportunity to move on, and focus on future business. (Yaeckel Decl., ¶ 10).

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

2 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
3 statute (Labor Code §2698 et seq.). Plaintiff alleged he and others were denied compliant Meal and
4 Rest Periods, minimum wages, overtime, accurate wage statements, reimbursements, and suffered
5 waiting time violations. (See ROA #1, and Exhibit 1: “Plaintiff’s LWDA Notice” attached thereto).

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

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

12 The catalyst of this litigation concerned allegations that Plaintiff was denied legally compliant
13 meal and rest periods, and was not paid for all hours worked. (Yaeckel Decl., ¶ 12).

14 Investigations completed by Plaintiff’s counsel revealed that some of Defendants’ employee
15 records were not in compliance with California law. (Yaeckel Decl., ¶ 13). However, these
16 investigations also revealed that the “rate of violation” by Defendant was significantly less than 100%.
17 (*Id.*) On many of those occasions, it appears that Defendant did, in fact, comply with the law. (*Id.*)

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

23 Plaintiff’s counsel, William B. Sullivan, has approximately 28 years of experience in “class
24 action” and representative action litigation, both as plaintiff and defense counsel. (Yaeckel Decl., ¶
25 15). Plaintiff’s counsel, Eric K. Yaeckel, has over 10 years of experience prosecuting class and
26 representative action claims under the California Labor Code. (*Id.*) Plaintiff’s counsel, Eric K. Yaeckel
27 and William B. Sullivan, are the attorneys of record in a matter that was recently heard (and favorably
28 decided) before the California Supreme Court titled *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th

58. (*Id.*) The *Donohue* matter was a certified class and PAGA action. (*Id.*) Plaintiff's counsel were lead counsel on approximately 40 employment "wage and hour" claims with class action, or representative action allegations. (*Id.*) Based on said experience, it is the opinion of Plaintiff's counsel that this settlement represents a fair and adequate payment. (Yaeckel Decl., ¶ 16).

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

As set forth above, while Labor Code section 2699(*I*) requires a court to "review and approve any penalties sought as part of a proposed settlement agreement," it does not provide any guidance as to what is considered an 'adequate' allocation of these penalties.

Courts that have weighed in on the review of a PAGA settlement have held 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).

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

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

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

After deductions for fees and costs the parties seek to allocate **\$55,000.00** of the total Gross Settlement Amount to the PAGA Fund. 75% (**\$41,250.00**) shall be assigned and transmitted to the LWDA as penalties. The remaining 25% (**\$12,500.00**) shall be allocated to the PAGA Settlement Employees on a pro-rata basis based on the number of weeks they worked during the PAGA Period. (Yaeckel Decl., ¶ 7; Ex. 1 at ¶ 33, p. 6).

1 Given the above, the average payment to each individual employee will be approximately
2 **\$143.23**. The actual amount will vary based on the employee's weeks worked during the PAGA
3 period.

4 The parties contend the settlement agreement amount is fair, adequate, and reasonable.
5 (Yaeckel Decl., ¶ 16). Moreover, the PAGA settlement does not bar any employee from pursuing their
6 own individual Labor Code claims as the Release claims are limited to those brought under PAGA
7 only. (**Exhibit 1**: ¶ 13, pg. 2). The release only applies to the PAGA claims for penalties, based upon
8 the allegations in Plaintiff's operative Complaint. (*Id.*)

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

10 On **October 5, 2021**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal the
11 parties' Settlement Agreement submitted with this application. (Yaeckel Decl., ¶ 5). To date,
12 Plaintiff's counsel has not received notice that the LWDA would intervene. (*Id.*)

13 On **October 11, 2021**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal
14 copies of this entire *ex parte* application, including the Notice, this supporting Memorandum,
15 Declaration, and Proposed Order & Judgment. (Yaeckel Decl., ¶ 6). To date, Plaintiff's counsel has
16 not received any opposition from the LWDA. (*Id.*).

17 **IV. CONCLUSION**

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

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

22
23 Dated: October 11, 2021

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28 Representative capacity only, and on behalf of other
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