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11 THIEU DINH

12 and Aggrieved Employees

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF SAN DIEGO

15 THIEU DINH (a.k.a. "TONY" DINH), an
16 Individual, on behalf of himself and all other
17 aggrieved employees of Defendants in the
18 State of California,

19 Plaintiff,

20 vs.

21 CAO-CAO NAIL 2000 OF UTC, LLC;
22 DUNG KIM CAO, an Individual; and DOES
23 1-10, Inclusive,

24 Defendants.

ELECTRONICALLY FILED

Superior Court of California,
County of San Diego

05/11/2021 at 02:47:00 PM

Clerk of the Superior Court
By Kristin Sorianosos, Deputy Clerk

Case No. 37-2020-00017596-CU-OE-CTL

UNLIMITED CIVIL CASE

UNOPPOSED MOTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
SETTLEMENT OF CIVIL ACTION
AND NEGOTIATED PENALTIES
PURSUANT TO THE PRIVATE
ATTORNEYS' GENERAL ACT OF
2004**

DATE: OCTOBER 1, 2021

TIME: 10:30 A.M.

DEPT: C-70

HON. CAROLYN CAIETTI

RESERVATION NUMBER: 2376352

1 I. INTRODUCTION

2 Plaintiff presents this unopposed motion for approval of penalties pursuant to the Private
3 Attorneys' General Act, Labor Code §2698, *et seq.* ("PAGA"), in connection with a settlement of
4 individual and representative Labor Code claims. **This settlement is non-reversionary.**

5 Mr. Dinh ("Plaintiff") was employed with defendants Cao Cao Nail 2000 of UTC, LLC and
6 Dung Kim Cao, the owner ("Defendants"), in 2019, primarily as a custodian, at a nail salon. After
7 a the end of his employment (a workers' compensation action was a separate proceeding), Mr. Dinh
8 filed this action for damages, alleging multiple wage and hour violations such as nonpayment of
9 minimum wages, overtime wages, meal and rest period premiums, inaccurate wage statements, and
10 waiting time penalties. In addition, Mr. Dinh pleaded personal claims for wrongful termination and
11 disability discrimination. Finally, as a representative for the State of California, Mr. Dinh alleges
12 in the First Amended Complaint a claim for violation of the Private Attorneys' General Act, Labor
13 Code §2896, *et seq.* ("PAGA"), including the initial claims, as well as claims regarding his
14 coworkers' reported experiences regarding alleged tip theft and other wage violations including
15 subsidizing work costs through charging other employees for Mr. Dinh's hourly wage. These claims
16 are permissible under *Huff v. Securitas Security Services USA, Inc.*, 23 Cal.App.5th 745 (2018).
17 Defendants deny all allegations.

18 This case represents the pinnacle of the goals of litigation: contentious arms'-length
19 negotiations, which revealed the strengths and weaknesses of each side's case, coupled with
20 vigorous verified written and informal discovery by both sides, leading to early resolution of the
21 dispute. In this fashion, the parties avoid incurring additional attorneys' fees to reach a reasonable
22 settlement at the earliest opportunity.

23 The details of the settlement are a gross settlement sum of \$225,000, with \$25,000 settling
24 Mr. Dinh's individual claims, \$100,000 allotted to PAGA penalties, and \$100,000 allotted to
25 attorneys' fees and costs, including costs of administering the PAGA payments to aggrieved
26 employees. This is rare, in that typically the costs of administration come from the gross fund, and
27 not the allocation to attorneys' fees. This results in a net gain of \$100,000 for the State of California

1 and the aggrieved employees, a remarkable recovery.

2 This allocation also ensures that the attorneys' fees do not exceed the amount being
3 distributed to the interested parties: Mr. Dinh, the aggrieved employees, and the State of California.
4 Accordingly, Plaintiff requests that the Court approve of the Notice to aggrieved employees (Exhibit
5 2 to Menhennet Declaration), and of the proposed settlement agreement (Exhibit 1 to Menhennet
6 Declaration), which provide substantial benefits to both the State of California and to the aggrieved
7 employees.

8 **II. PROCEDURAL HISTORY**

9 Plaintiff filed his complaint on May 26, 2020, immediately after the courts reopened due to
10 the pandemic closure. Plaintiff thereafter notified the Labor and Workforce Development Agency
11 regarding the allegations in the complaint, which notice began a dialogue with Defendants regarding
12 substantiating the claims.

13 Plaintiff amended his complaint to include the PAGA claim, while continuing a dialogue
14 with Defendants regarding discovery and potential settlement. Plaintiff propounded written
15 discovery and continued productive potential early resolution discussions, including the possibility
16 of mediation. Defendants also propounded written discovery, to which Plaintiff responded.

17 Through careful analysis of verified discovery responses and continued discussions re
18 possible mediation, and revision of damages estimates based upon discovery responses, the parties
19 were able to agree on a settlement sum without engaging a paid mediator. At the forefront of the
20 negotiations was the existence of the potentially substantial PAGA penalties, which spurred
21 settlement.

22 **III. PAGA CLAIMS AND PENALTIES**

23 **A. Nature of the Alleged Violations**

24 Mr. Dinh's experience as an employee involved alleged Labor Code violations with respect
25 to meal and rest breaks and non-payment of premiums, overtime premiums, and failure to pay all
26 wages earned at separation. With respect to Defendants' other workers, there are allegations of
27 misclassification as independent contractors, in violation of Labor Code section 226.8, as well as

1 alleged theft of tips, and charging the nail technicians to cover Mr. Dinh's hourly pay. Mr. Dinh
2 also alleged that the nail technicians were not paid for stand-by time, or time spent while not
3 servicing customers, such as clean-up and prep time in between customers. Accordingly, there are
4 allegations regarding failure to pay minimum wage and agreed wage. Mr. Dinh also alleged that
5 the contractor/employees were paid part in cash and part through wages, which led to inaccurate
6 wage statements. A true and correct copy of the PAGA notice is attached to the Menhennet
7 Declaration at Exhibit 3. Again, Defendants deny all allegations.

8 **B. Number of Individual Violations, Relevant Employment Period, and Aggrieved**
9 **Employees**

10 The statute of limitations for PAGA claims is one year. *See* Cal. Civ. Code § 340(a). PAGA
11 provides that the statute of limitations is tolled while a plaintiff exhausts his or her administrative
12 remedies with the LWDA prior to suit, required by the statute. *See* Cal. Labor Code § 2699.3(d).
13 The settlement defines the PAGA limitations period as from June 8, 2019 (one year prior to the
14 LWDA notice), to the date of Court approval.

15 Formal and informal discovery conducted while the parties were litigating and settling the
16 case helped ascertain the appropriate aggrieved employees and claims. Discovery determined the
17 number of pay periods and therefore the number of PAGA penalties triggered by alleged Labor
18 Code violations, as well as the number of aggrieved employees. The approximate number of
19 aggrieved employees is 40. This includes the nail technicians and alleged Labor Code violations
20 which Mr. Dinh himself did not suffer, but is entitled to seek penalties for under *Huff*.

21 PAGA violations generally arise on a per-pay-period basis. *See, e.g.,* Cal Labor Code §
22 2699(f) ("civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period
23 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period
24 for each subsequent violation."). Through responses to written discovery, it was confirmed that the
25 Defendants paid Plaintiff and other aggrieved employees on a weekly basis. Menhennet Decl. ¶1.
26 Therefore, in terms of the PAGA liability period from June 8, 2019 through the date of filing this
27

1 motion, there were a total of 100 pay periods. As an illustration of the reasonableness of the
2 settlement, Plaintiff was only present for 6 pay periods, but he has been able, as representative for
3 the State of California, to recover penalties for 100 weeks, and for 40 employees.

4 Plaintiff's claims for unpaid minimum wages for off-the-clock work implicate Labor Code
5 sections 204, 1194, 1197, and 1198—each of which proscribes an employer's failure to pay an
6 employee minimum wage. Theoretically, Plaintiff could argue that each section implicates PAGA
7 penalties and thus Defendants may be tagged for four times the penalties for their violation of the
8 state minimum wage laws. However, Defendants would argue that such a construction would result
9 in ***quadruple-counting*** for a single violation, and thus in an award that is unjust, arbitrary and
10 oppressive, or confiscatory, in direct contravention of the PAGA. Cal. Lab. Code, § 2699, subd.
11 (e)(2); *Amaral v. Cintax Corp. No. 2*, 163 Cal.App.4th 1157, 1213-14 (2008).

12 Assigning just one penalty, per employee (40), per week, at \$100 per week (from June 8,
13 2019 through June 8, 2020, is \$4,000 per pay period, and \$208,000 over one year. From June 8,
14 2020, to the date of filing this motion (48 weeks), is \$8,000 per pay period, and amounts to \$384,000,
15 for just one violation per employee. As mentioned, the penalties are discretionary, and cannot be
16 oppressive or confiscatory. The recovery of \$100,000 in penalties in this settlement represents
17 nearly 1/6 of the total available penalties for one violation per pay period (\$592,000), an exceptional
18 result.

19 The financial hardship suffered by Defendant through the pandemic has affected
20 Defendant's bottom line and ability to pay substantial PAGA penalties, a factor which must be
21 considered by the Court during approval, so that the award is not confiscatory. Labor Code
22 §2699.2(e)(2). The business temporarily closed due to the Governor's COVID-19 orders,
23 March 19, 2020 – June 18, 2020, July 15, 2020 – August 2, 2020 and December 3, 2020 –
24 January 26, 2021.

25 **C. Definition of Aggrieved Employees**

26 The aggrieved employees are defined as:
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1 “PAGA Settlement Group Members” means Plaintiff and all current and former
2 employees employed by Defendants in any position, including but not limited to
3 Janitor, Nail Technician or Technician (and whether designated by Defendants as
4 contractors or employees), in the state of California at any time from June 8, 2019
5 through the Court Approval Date, who are included in the Putative Aggrieved
6 Employee List. There are approximately forty (40) individuals that compose the
7 PAGA Settlement Group Members.

8 Settlement Agreement, ¶II.G.

9 **D. Scope of Release**

10 The release contained in the Settlement Agreement is as follows:

11 “Upon the Effective Date, the LWDA and the PAGA Settlement Group Members
12 including Plaintiff Dinh and each of the PAGA Plaintiffs, shall fully release and
13 forever discharge any and all PAGA Claims, including but not limited to any such
14 claims seeking civil penalties under California Labor Code Sections 558 and 2698 *et*
15 *seq.* predicated on the alleged California Labor Code violations asserted in the First
16 Amended Complaint, filed September 28, 2020, as well as the underlying LWDA
17 Notice, (which include California Labor Code Sections 201-203, 204, 208, 210, 221,
18 224, 226, 226(a), 226.3, 226.7, 351, 510, 512, 558, 1174, 1174.5, 1194, 1194a,
19 1194.2, 1197, 1197.1, 1198, 2802 and 2698) during the period June 1, 2019 through
20 the Effective Date, (hereinafter the “Released PAGA Claims”) against Cao-Cao Nail
21 2000 of UTC, LLC, Dung Kim Cao a.k.a. Stephanie Cao and/or Cao-Cao’s past and
22 present parents, subsidiaries, affiliated companies or corporations, members,
23 managers, officers, directors, shareholders, partners, agents, family members,
24 insurers, and/or any other individual or entity which could be liable for the acts of
25 omissions of Cao-Cao or Ms. Cao (hereinafter “Released Parties”). To the extent an
26 alleged PAGA violation arises directly from the operative facts pled in the Complaint
27 and implicates the same primary rights and defenses being settled here, those claims
28 are settled and released to the fullest extent permitted under applicable law.”

Settlement Agreement, §III.B.

The proposed Notice to Class Members containing the proposed release is attached hereto
as Exhibit 2 to Menhennet Declaration.

E. Discovery and Investigation

As mentioned, the parties engaged in both formal and informal written discovery, as well as
document productions. Menhennet Decl. ¶7.

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1 The informal and formal discovery conducted by the Parties in this case were more than
2 adequate to assess the case's merits and create a damages model for Plaintiff and those potentially
3 aggrieved under PAGA. Menhennet Decl. ¶6.

4 **F. Imposing Civil Penalties on Defendants**

5 Plaintiff believed it would be difficult to obtain recovery for all Labor Code penalties
6 alleged, and also recover PAGA penalties for the same alleged wage violations, as PAGA penalties
7 are within the court's discretion. *See Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, at
8 *17 (N.D. Cal. June 15, 2012) (denying PAGA penalties for violation of California Labor Code §
9 226 as redundant and duplicative of recovery of statutory wage statement penalties). However,
10 even if PAGA penalties are awarded a court can reduce them in its discretion if the award would
11 be "unjust, arbitrary and oppressive, or confiscatory." Labor Code § 2699(i); *see, e.g., Parr v.*
12 *Golden State Overnight Delivery Service, Inc.*, 2014 WL 11199453, *2 (Alameda Super. Ct. Jul.
13 10, 2014) (PAGA penalties reduced by 95%); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 514
14 (2014) (PAGA penalties reduced by 90%); *Cotter v. Lyft*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal.
15 2016) (holding penalty award would be reduced "by a substantial amount" where the defendant did
16 not deliberately evade a clear legal obligation); *Fleming v. Covidien, Inc.*, 2011 WL 7563047, at
17 *4 (C.D. Cal. Aug. 12, 2011) (reducing penalty award by 82% where defendant was "not aware"
18 that its actions violated the law); *Aguirre v. Genesis Logistics*, 2013 WL 10936035, at *2-3 (C.D.
19 Cal. Dec. 30, 2013) (reducing penalty award by 72% because a higher penalty would be
20 oppressively punitive). Indeed, a court can choose to award no penalties. *See Driscoll v. Granite*
21 *Rock*, 2011 WL 10366147 (Santa Clara Super. Ct. Sep. 20, 2011) (holding that "it would be unjust,
22 arbitrary and improper to impose any, let alone millions of dollars, in PAGA penalties" where
23 plaintiffs offered no evidence of which pay periods the alleged injuries occurred).

24 In this case, Plaintiff's Labor Code violations, if proved, amounted to only \$10,966; the
25 remaining \$14,034 individual settlement represents general damages to total \$25,000. The fact that
26 the parties agreed to apportion \$100,000, four times Plaintiff's entire recovery, represents an
27 excellent result worth Court approval at this time. It is rare when a PAGA settlement exceeds

individual recovery.

G. Allocation of Agreed-Upon PAGA Penalties

PAGA settlements must be “fundamentally fair, reasonable, and adequate”. See California Labor and Workforce Development Agency's Comments on Proposed PAGA Settlement (“LWDA Comments”), *O'Connor v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. Jul. 29, 2016), ECF No. 736 at 2-3.3. Additionally, PAGA allocations need not represent any percentage of the overall settlement value to secure court approval, and courts routinely approve PAGA settlements representing only a tiny fraction of the overall settlement value.

The parties are cognizant that PAGA settlements do not require the same strictures as class actions, and do not require a showing of Code of Civil Procedure section 382 factors such as commonality, numerosity, superiority, and related factors enumerated in Federal Rule of Civil Procedure 23, and on that basis submit that approval at this time is appropriate. The distribution plan of \$25,000 to forty employees is to evenly distribute it, \$625 each, determined to be the most equitable method of distribution given the nature of the violations alleged. The parties have agreed to hire Phoenix class action administrators to prepare the notice to aggrieved employees and distribute the checks.

Based upon recent reported decisions regarding PAGA allocations in the class and PAGA-only context, the foregoing allocation and alternative notice procedure is exceedingly fair to the aggrieved employees who may have civil penalty claims against defendants for the discrete claims being released.

Accordingly, the parties seek Court approval for: (1) the settlement of the individual and PAGA action; (2) the PAGA penalties to be distributed as noted herein; and (3) the dismissal of all of Plaintiffs’ claims against Defendants with prejudice pursuant to the Settlement.

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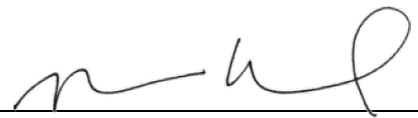
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1 **IV. CONCLUSION**

2 The parties respectfully request that the Court grant final approval of settlement of this
3 action, the amount of penalties pursuant to Labor Code section 2699(l), and the proposed notice to
4 aggrieved employees negotiated by the parties.

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6 Dated: May 11, 2021

KASED LAW GROUP APC

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9 By: 

10 Nathan N. Kased
11 Janine R. Menhennet
12 Attorneys for Plaintiff THIEU DINH, and all
13 other aggrieved employees of Defendants in the
14 State of California
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