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12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF AMADOR

14 CARRELL BILL BILYEU, an individual,

15 Plaintiff,

16 v.

17 U.S. MINE CORP, a Nevada Corporation; and
18 DOES 1 to 50, inclusive,

19 Defendants.

) NO. 20-CV-11946

)
) **PLAINTIFF'S APPLICATION FOR**
) **COURT APPROVAL OF PAGA**
) **SETTLEMENT**

) Assigned to Hon. J.S. Hermanson

) Action Filed: December 23, 2020

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Private Attorneys General Act (“PAGA”) representative action relates to the Aggrieved
4 Employees’ work for Defendant U.S. Mine Corp (“Defendant”). Plaintiff Carrell Bilyeu
5 (“Plaintiff”) was formerly employed by Defendant as a heavy haul truck operator at Defendant’s pit
6 mining operation from October 1, 2019, through October 2021.

7 This action was originally filed in the Amador County Superior Court on December 23,
8 2020 (Starr Decl. ¶9). Plaintiff alleges that the Defendant committed the following Labor Code
9 violations against the Aggrieved Employees: (1) minimum wage violations; (2) rest break
10 violations; (3) work expense violations; (4) wage statement violations; and (5) waiting time
11 penalties. Plaintiff sent a PAGA letter to Defendant alleging these Labor Code violations on August
12 16, 2020. (Starr Decl. ¶10).

13 The parties attended mediation on November 10, 2021, with experienced employment law
14 mediator, and retired judge, Honorable David I. Brown (Ret.). Through a combination of discovery,
15 depositions, extensive negotiations, and mediation, the parties were able to reach an agreement.¹
16 (Starr Decl. ¶11). The PAGA case settled for a total of \$30,180.00 (Starr Decl. ¶13).

17 In addition to the PAGA cause of action (cause of action twelve), the Complaint also alleges
18 numerous individual claims against Defendant for violation of the Fair Employment and Housing
19 Act (“FEHA”) and wage and hour violations as to Plaintiff personally (causes of action one through
20 eleven). (Starr Decl. ¶14). At the November 10, 2021 mediation, an individual, confidential,
21 settlement was reached in consideration for Plaintiff’s individual wage and hour and FEHA claims.
22 (Starr Decl. ¶15). Plaintiff is willing to submit Plaintiff’s individual settlement agreement to the
23 Court for *in camera* review, if requested.

24 **II. DESCRIPTION OF THE SETTLEMENT TERMS**

25 The Aggrieved Employees who are covered by this settlement are all non-exempt employees
26 of Defendant who were employed in California during the PAGA Period. (Starr Decl. ¶16). The
27

28 ¹ The Settlement Agreement and General Release is attached to the Starr Declaration and filed as part of this motion.

PAGA Period covers August 16, 2019, through the date of the Court's approval of this settlement, or February 11, 2022, whichever is earlier. (Starr Decl. ¶17). This settlement covers approximately 205 Aggrieved Employees who collectively worked an estimated 4,024 pay periods.² (Starr Decl. ¶18).

The gross amount of the PAGA settlement is \$30,180.00 (Starr Decl. ¶13). The settlement is broken down as follows:

- \$11,991.36 in PAGA Penalties, of which 75% (\$8,993.52) will go to the LWDA and 25% (\$2,997.84) will be distributed to the Aggrieved Employees on a pro rata basis;
- \$1,000 to Plaintiff as an enhancement payment;
- \$10,060.00 to Frontier Law Center for attorney fees;
- \$3,878.64³ to Frontier Law Center as reimbursement for costs; and
- \$3,250.00 to Phoenix Administrators to administer the settlement.

The claims being released pursuant to the settlement are the following:

For the claims arising out of the violations alleged both in Plaintiff's Complaint and PAGA Notice or reasonably could have been alleged based on the facts and legal theories contained in the Complaint or the PAGA Notice, which are: alleged violations of California Labor Code §§ 201, 202, 203, 204, 226(a), 226.2, 226.3, 226.7, 510, 512(a), 551, 552, 1174(d), 1194, 1197, 1197.1, 1198, 2698, et seq., 2800, and 2802, and the applicable Industrial Wage Order(s).

This settlement releases claims for PAGA penalties *only*. A notice will be mailed to all Aggrieved Employees along with their share of the settlement which clearly sets forth the claims being released. (Starr Decl. ¶19).

III. DATA REVIEWED AND DISCOVERY OBTAINED PRIOR TO MEDIATION, WHICH SUPPORTED THE PARTIES' SETTLEMENT

Through formal and informal discovery, the parties exchanged extensive information relating to the causes of action at issue in this case. Plaintiff and Defendant both propounded and responded to written discovery. (Starr Decl. ¶22). Defendant took Plaintiff's deposition on October 12, 2021. (Starr Decl. ¶23). Informal discovery was also exchanged prior to mediation,

² This number is based on calculations performed on September 24, 2021.

³ This is less than the amount allowable under the settlement agreement.

1 including time and payroll data and witness statements. (Starr Decl. ¶24).

2 **IV.ARGUMENT AND PAGA PENALTY ANALYSIS**

3 PAGA permits an aggrieved employee to sue an employer for civil penalties associated with
4 the employer's alleged violation of various California Labor Code provisions. Labor Code section
5 2699(a). In a settlement of a PAGA action brought by an aggrieved employee, the Superior Court
6 must "review and approve any penalties sought as part of a proposed settlement agreement" relating
7 to PAGA penalties. Labor Code section 2699(l). Plaintiff now seeks this Court's approval of the
8 settlement put before it. An analysis of the PAGA penalties at issue in the case follows.

9 **a) Failure to Pay all Wages Due**

10 Plaintiff alleges that the Aggrieved Employees were required to attend daily safety meetings
11 prior to clocking in. Specifically, Plaintiff alleges that the daily safety meetings began at 6:45 a.m.,
12 but Plaintiff and the Aggrieved Employees were prohibited from clocking-in until 7:00 a.m.,
13 depriving Plaintiff and the Aggrieved Employees of fifteen (15) minutes of compensation. Plaintiff
14 further alleges that Defendant's employed a rounding policy which operated to further deprive
15 Plaintiff and the Aggrieved Employees for compensation for all hours worked. Finally, Plaintiff
16 alleges that at least some of this uncompensated time was would have been overtime. Thus,
17 according to Plaintiff's allegations, Defendant violated Labor Code sections 510, 1197.1, and 1194.

18 **Maximum Available Penalties**

19 The applicable PAGA penalties for Defendant's failure to pay Plaintiff and the Aggrieved
20 Employees all minimum and overtime wages are found in Labor Code section 1197.1, which are
21 one hundred dollars (\$100) for each underpaid employee for each pay period for which the
22 employee is underpaid and two hundred fifty dollars (\$250) for each subsequent violation for the
23 same specific offense. The maximum available penalties are approximately [(205 initial violations *
24 \$100 per initial violation) + (3,819 * \$200 per subsequent violation)] \$784,300.00.

25 **Estimated Penalty Exposure at Trial**

26 As an initial matter, if this case went to trial, it is likely that the Court would only apply the
27 initial violation amount (\$100 per pay period) given the ruling in *Amaral v. Cintas Corp. No. 2*, 163
28 Cal. App. 4th 1157 (Cal. Ct. App. 2008), which is applicable to the facts in this case. Specifically,

1 since Defendant has never had penalties imposed on it by the Labor and Workforce Development
2 Agency in the past, and was thus never placed on notice by the LWDA of labor code violations,
3 subsequent violation rates do not apply under the *Amaral* holding. Thus, if Plaintiff were to succeed
4 on this claim, the realistic maximum penalty amount would be (4,024 initial violations * \$100)
5 \$402,400.

6 Furthermore, Plaintiff's claim has some weaknesses given that Defendant produced policies
7 which contradict his allegations. Specifically, while Plaintiff adamantly maintains that he and the
8 Aggrieved Employees were required to show up fifteen (15) minutes early, every day, to attend an
9 off-the-clock daily safety meeting, Defendant has produced written policies which state that
10 employees were required to clock-in prior to doing *any* work and were prohibited from working off
11 the clock. Lastly, it is likely that, even if Plaintiff prevails on this claim, the Court may find that
12 100% of employees did not work off the clock 100% of the pay periods.

13 Because of the reasons set forth above, Plaintiff estimates that the realistic PAGA penalty
14 exposure at trial relating to off-the-clock work, if at all, is approximately 33% of the maximum
15 penalties available, or (\$402,400 * 33%) **\$132,792**.

16 **b) Failure to Provide Compliant Rest Breaks**

17 Plaintiff alleges that Defendant required Plaintiff and the Aggrieved Employees to remain
18 on the work premises and on-duty during their rest breaks. Plaintiff alleges that Defendant's rest
19 break policy explicitly states that employees are required to remain on-site during their rest breaks.
20 Moreover, Plaintiff alleges that Defendant's employee handbook suggests that employees are on-
21 duty whenever they are on company property. Plaintiff alleges that Defendant's failed to provide
22 Plaintiff and the Aggrieved Employees with "premium pay" for non-compliant rest breaks in
23 violation of Labor Code section 226.7.

24 **Maximum Available Penalties**

25 The applicable PAGA penalties for Defendant's failure to pay Plaintiff and the Aggrieved
26 Employees "premium pay" for non-compliant rest periods are found in Labor Code section
27 2699(f)(2), which is one hundred dollars (\$100) for each aggrieved employee per pay period for the
28 initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for

1 each subsequent violation. The maximum available penalties are approximately [(205 initial
2 violations * \$100 per initial violation) + (3,819 * \$200 per subsequent violation)] \$784,300.00.

3 **Estimated Penalty Exposure at Trial**

4 As stated above, if the Court applies the ruling in *Amaral* to this case, then only the initial
5 violation rate will apply, reducing the maximum available penalties to (4,024 initial violations *
6 \$100) \$402,400.

7 Additionally, the success or failure of Plaintiff's claim for failure to provide compliant rest
8 breaks rests on whether Plaintiff and the Aggrieved Employees were *prohibited* from leaving the
9 jobsite during their rest periods, rather than a scenario where there was no practical ability to leave
10 the job-site during their rest periods. Specifically, there Defendant maintains, and Plaintiff does not
11 deny the fact that the job-site was located far from any commercial establishments. Therefore,
12 while Defendant's written policies appeared facially non-compliant, the written policies were
13 factually irrelevant.

14 Defendant further argues that a trial on the matter would necessarily require 205 mini trials
15 which *could* render the case unmanageable as envisioned in *Wesson*. (*Wesson v. Staples the Office*
16 *Superstore, LLC* (2021) 283 Cal. Rptr. 3d 846, 859-860). Specifically, Defendant will argue that
17 Plaintiff will have the burden of determining whether *each individual employee* believed they were
18 forbidden from leaving the premises, or whether they didn't leave the premises simply because
19 there was nowhere to go within the permitted rest break time.

20 Because of the reasons set forth above, Plaintiff estimates that the realistic PAGA penalty
21 exposure at trial relating to the rest break claim, if at all, is approximately 10% of the maximum
22 penalties available, or (\$402,400 * 10%) **\$40,240**.

23 **c) Failure to Reimburse Work-Related Expenses**

24 Labor Code section 2802 requires an employer to reimburse their employees for
25 expenditures incurred in direct consequence of the discharge of their duties. Plaintiff alleges that
26 Defendant failed to reimburse Plaintiff and the Aggrieved Employees for the costs of purchasing
27 special safety boots, rain boots, and gloves. Defendant's failure to reimburse the Aggrieved
28 Employees for these work-related expenses constitutes a violation of Labor Code 2802.

1 **Maximum Available Penalties**

2 The applicable PAGA penalties for Defendant's failure to pay Plaintiff and the Aggrieved
3 Employees "premium pay" for non-compliant rest periods are found in Labor Code section
4 2699(f)(2), which is one hundred dollars (\$100) for each aggrieved employee per pay period for the
5 initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for
6 each subsequent violation. The maximum available penalties are approximately [(205 initial
7 violations * \$100 per initial violation) \$20,500.00.

8 **Estimated Penalty Exposure at Trial**

9 Plaintiff maintains that Defendant required Plaintiff and the Aggrieved Employees to
10 purchase special boots, rain boots, and gloves, and failed to reimburse them for these expenses.
11 Defendant counters that these items were available at the worksite, that Plaintiff and the Aggrieved
12 Employees were not required to purchase them, and that regardless, these items could be used in
13 other employment.

14 Because of the reasons set forth above, Plaintiff estimates that the realistic PAGA penalty
15 exposure at trial relating to the expense reimbursement claim, if at all, is approximately 10% of the
16 maximum penalties available, or (\$20,500.00 * 10%) **\$2,050.00**.

17 **d) Failure to Provide Complete and Accurate Wage Statements**

18 As noted previously, Plaintiff alleges that Defendant failed to compensate Plaintiff and the
19 Aggrieved Employees for all hours worked. Therefore, the total number of hours worked and gross
20 and net wages earned was not accurately listed on their wage statements in violation of Labor Code
21 section 226.

22 **Maximum Available Penalties**

23 The applicable PAGA penalties for Defendant's failure to provide Plaintiff and the
24 Aggrieved Employees with proper wage statements are found in Labor Code section 226.3, which
25 are two hundred fifty dollars (\$250) per employee per initial violation and one thousand dollars
26 (\$1,000) per employee for each subsequent violation. The maximum available penalties are
27 approximately [(205 initial violations * \$250 per initial violation) + (3,819 * \$1,000 per subsequent
28 violation)] \$3,870,250.00.

1 **Estimated Penalty Exposure at Trial**

2 First, as noted above, if the Court applies the ruling in *Amaral* to this case, then only the
3 initial violation rate will apply, reducing the maximum available penalties to (4,024 initial
4 violations * \$250) \$1,006,000. Additionally, there is significant legal debate as to whether the
5 penalties in Labor Code section 226.3 apply to the present case, or whether this penalty only apply
6 in cases where the defendants failed to provide *any* wage statements whatsoever. (See *Lopez v.*
7 *Friant & Assoc.* (2011) 192 Cal.App.4th 75.) If the Court decides to apply the penalties set forth in
8 Labor Code section 2699 instead of Labor Code section 226.3, the initial violation rate is reduced
9 to \$100, further reducing the maximum available penalties to (4,024 initial violations * \$100)
10 \$402,400. Moreover, Plaintiff's wage statement penalty claim is entirely derivative of, and thus
11 entirely dependent on Plaintiff succeeding on his claim for failure to pay all wages owed, which
12 Plaintiff attributed a 33% chance of success. Finally, Courts are hesitant to award full PAGA
13 penalties where those penalties are derivative of other claims that were subject to PAGA penalties
14 in the first instance; the basis for this is the Court's concerns about double-recovery. (See *Naranjo*
15 *v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444.) Therefore, it is possible that
16 Plaintiff will not be able to collect PAGA penalties for derivative wage statement violations at all.

17 Because of the reasons set forth above, Plaintiff estimates that the realistic PAGA penalty
18 exposure at trial relating to the wage statement claim, if at all, is approximately 16.5% of the
19 maximum penalties available. Thus, the penalties would likely range from (\$402,400 * 16.5%)
20 **\$66,396** using the penalties found in Labor Code section 2699 to (\$1,006,000 * 16.5%) **\$165,990**
21 using the penalties found in Labor Code section 226.3.

22 **e) Failure to Timely Pay All Final Wages**

23 Labor Code sections 201 and 202 require an employer to provide an employee with all
24 wages due and owing at the time of separation, or within seventy-two (72) hours of resignation.
25 Since Plaintiff alleges Defendant failed to pay all wages due to the Aggrieved Employees during
26 their employment, it follows that Defendant failed to comply with Labor Code sections 201 and
27 202.

28 ///

1 **Maximum Available Penalties**

2 The PAGA penalties for Defendant's failure to provide Plaintiff and the Aggrieved
3 Employees with all wages due and owing at the time of separation are found in Labor Code section
4 2699(f)(2), which are one hundred dollars (\$100) for each initial violation and two hundred dollars
5 (\$200) for each subsequent violation. The maximum available penalties are approximately [(205
6 initial violations * \$100 per initial violation) \$20,500.00.

7 **Estimated Penalty Exposure at Trial**

8 As with Plaintiff's wage statement claim, Plaintiff's waiting time penalty claim is entirely
9 derivative of, and thus entirely dependent on Plaintiff succeeding on his claim for failure to pay all
10 wages owed, which Plaintiff attributed a 33% chance of success. Additionally, the Court may find
11 that the Defendant did not intentionally fail to pay all wages due at the conclusion of the Aggrieved
12 Employees' employment, since a dispute exists as to whether the wages were due in the first
13 instance.

14 Because of the reasons set forth above, Plaintiff estimates that the realistic PAGA penalty
15 exposure at trial relating to the waiting time penalty claim, if at all, is approximately 16.5% of the
16 maximum penalties available, or (\$20,500 * 16.5%) **\$3,382.50**.

17 **V. OTHER RISKS AND FACTORS THAT THE PARTIES CONSIDERED IN**
18 **DETERMINING THAT THE SETTLEMENT WAS FAIR**

19 As set forth above, Plaintiff estimates the realistic PAGA penalty exposure at trial to be
20 between \$244,860.50 and \$344,454.50. Thus, the settlement of \$30,180 represents between 8.77%
21 and 12.3% of the PAGA penalties which could realistically be imposed on Defendant at trial. This
22 is a reasonable recovery in light of the various risks associated with continuing to litigate this case,
23 as well as the likelihood that this amount could be further reduced at the Court's discretion.

24 First, as discussed above, the Court of Appeal, Second District, recently held that Courts
25 have inherent authority to ensure manageability of PAGA claims at trial, and to strike
26 unmanageable claims. (*Wesson v. Staples the Office Superstore, LLC* (2021) 283 Cal. Rptr. 3d 846,
27 859-860). Thus, it is plausible that a trial court would deny Plaintiff's PAGA claim, in its entirety,
28 were the matter to proceed to trial, resulting in no recovery at all.

1 Second, assuming Plaintiff ultimately prevails on his PAGA claims, the Court still has
2 discretion to reduce any potential PAGA penalties. Pursuant to Labor Code section 2699(f)(2) the
3 Court can decline to award PAGA penalties where "...if, based on the facts and circumstances of
4 the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive,
5 or confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks*
6 *Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim at trial, the
7 trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith
8 attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such
9 reduction to be proper. *Id.* at 539.

10 For the reasons above, Plaintiff's settlement, which represents 8.77% - 12.3% of the PAGA
11 penalties likely to be imposed on Defendant at trial, falls within the range of reasonableness.

12 VI. THE COURT SHOULD APPROVE THE PROPOSED PAGA SETTLEMENT

13 a. Approval of a PAGA Settlement Through Application is Sufficient

14 Plaintiff submits this Application for Approval of PAGA Settlement in compliance with the
15 requirements set forth in Labor Code section 2699(l). Specifically, Labor Code section 2699(l)
16 requires the superior court to review and approve any settlement of any civil action filed under
17 PAGA but does not require a noticed motion. Thus, Plaintiff respectfully requests that this Court
18 approve this settlement through this unopposed application.

19 b. Plaintiff's Submission of this Settlement to the LWDA

20 As required by Labor Code section 2699(l)(2), Plaintiff will submit a copy of the proposed
21 settlement to the LWDA via online filing at the same time that it is submitted to the Court. (Starr
22 Decl. ¶25). Further, Plaintiff will serve the LWDA with a copy of this application. (Starr Decl.
23 ¶26).

24 c. The PAGA Penalties Being Recovered are Reasonable Under the Circumstances

25 For the reasons set forth in detail above, the terms of the parties' settlement are reasonable
26 under the circumstances and serve the purpose of PAGA. (*O'Connor v. Uber Technologies, Inc.*
27 (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135.).

28 ///

1 **d. Plaintiff's Requested Fees and Costs Should be Approved**

2 Here, Plaintiff's counsel requested fees are reasonable, as it represents 33 1/3 percent of the
3 fund. Furthermore, Plaintiff's counsel has spent a significant amount of time litigating this case,
4 including time spent communicating with the client, evaluating and analyzing the relevant legal
5 theories, drafting and filing various PAGA letters, drafting and filing the complaint, engaging in
6 discovery, preparing for and attending mediation, and drafting the instant application. (Starr Decl.
7 ¶27). In sum, Plaintiff's counsel has spent approximately 139.90 hours litigating this case to date,
8 resulting in billable fees of approximately \$55,705.00. (Starr Decl. ¶28). Therefore, Plaintiff's
9 counsel requested fees of \$10,060.00 is reasonable.

10 Plaintiff has incurred \$3,878.64 in costs litigation this case. (Starr Decl. ¶30). These costs
11 include filing fees, service costs, the cost of a Plaintiff's deposition transcript, mediation costs, and
12 various other litigation costs. (Starr Decl. ¶31).

13 **e. Plaintiff's Requested Enhancement Payment and Settlement Payment Should**
14 **be Approved**

15 Plaintiff is requesting \$1,000 as a service award for bringing this PAGA claims; this is
16 Plaintiff's Enhancement Award. In any representative action, Enhancement Awards are designed to
17 encourage individuals to bring claims on behalf of a group of people who have been similarly
18 wronged. In the PAGA context, Enhancement Awards are designed to encourage individuals to
19 bring suit for penalties on behalf of the State itself; if nobody brought PAGA actions, the State
20 would lose out on a significant amount of civil penalties attributable to employer misconduct.
21 Additionally, Plaintiff participated in the discovery process, provided numerous documents to his
22 counsel for review, spent several hours collectively on the phone answering questions about the
23 case, and had his deposition taken. (Declaration of Carrell Bilyeu ¶5). It is because of his
24 willingness to participate in the litigation process which ultimately resulted in this settlement.
25 Therefore, the amount attributed to Plaintiff as an enhancement payment is reasonable.

26 **VII.CONCLUSION**

27 Based on the above facts and arguments, Plaintiff respectfully requests the court to approve
28 the PAGA settlement and enter an order dismissing this action with prejudice.

1 Date: January 4, 2022

FRONTIER LAW CENTER

2
3 /s/ Manny Starr

4 Manny Starr

5 Daniel V. Ginzburg

6 Attorneys for Plaintiff

7 Carrell Bilyeu

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