

1 Alex Asil Mashiri, Esq. (SBN 283798)
alex@mashirilawfirm.com
2 **MASHIRI LAW FIRM APC**
11251 Rancho Carmel Drive #500694
3 San Diego, CA 92150
Tel: (858) 348-4938
4 Fax: (858) 348-4939

5 Tamim Jami, Esq. (SBN 311351)
tamim@jamilaw.com
6 **THE JAMI LAW FIRM P.C.**
3525 Del Mar Heights Rd #941
7 San Diego, CA 92130
Tel: (858) 284-0248
8 Fax: (858) 284-0977

9 Attorneys for Plaintiff
10 DANIEL FRANCO

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO**

13 DANIEL FRANCO, an individual, for the real
party in interest, the State of California

14 Plaintiff,

15 v.

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17 KINGS & CONVICTS BP LLC.; and
18 DOES 1 through 50,

19 Defendants.
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Case No. 37-2021-00004476-CU-OE-CTL

Judge: Hon. Gregory W. Pollack
Dept.: C-71

**PLAINTIFF'S UNOPPOSED EX PARTE
NOTICE AND EX PARTE APPLICATION
FOR APPROVAL OF PAGA SETTLEMENT**

Judge: Hon. Gregory W Pollack
Dept.: C-71
Date: January 31, 2022
Time: 8:30 a.m.

1 **TO ALL PARTIES HEREIN AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on **January 31, 2022 at 8:30 a.m.**, or as soon thereafter as
3 the matter may be heard in **Department C-71** of the Superior Court of California, County of San
4 Diego, 330 W. Broadway, San Diego, California 92101, Plaintiff DANIEL FRANCO will, and
5 hereby does, move for an ex parte order approving the proposed settlement pursuant to the Private
6 Attorneys General Act of 2004. This ex parte application is unopposed by Defendant KINGS &
7 CONVICTS BP LLC.

8 This ex parte application is based upon this notice, the declaration of Alex Asil Mashiri, the
9 declaration of Tamim Jami, exhibits, all other papers filed in this action, and upon such other
10 evidence and argument as may be presented at the hearing.

11 Date: January 5, 2022

MASHIRI LAW FIRM APC

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13 By: 
14 Alex Asil Mashiri
15 Attorney for Plaintiff
16 DANIEL FRANCO
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour case seeking civil penalties under the Private Attorneys General Act pursuant to Labor Code section 2698 *et seq.* (“PAGA”).¹ Plaintiff DANIEL FRANCO (“Plaintiff”), brought this enforcement action against Defendant KINGS & CONVICTS BP LLC (“Defendant”) on behalf of the real party in interest, the State of California, for Labor Code² violations allegedly committed against current and former employees who were employed between March 2, 2020, and the approval date (“PAGA Represented Employees”).

After engaging in informal discovery, including extensive review of sample payroll records, legal research, and detailed discussions about the case, the Parties were able to reach a fair, adequate, and reasonable settlement in this case with the assistance of Mr. Jeffrey Krivis, Esq., a well-regarded mediator of complex class and representative wage and hour actions.

Accordingly, Plaintiff seeks court approval of the PAGA settlement pursuant to section 2699(*l*). Defendant does not oppose this Ex Parte request.

II. FACTUAL AND PROCEDURAL HISTORY

A. THE PARTIES

Defendant is an brewery based in San Diego, California with a half-dozen retail breweries throughout California. Declaration of Tamim Jami [“Jami Decl.”] ¶ 16.) Plaintiff is an ex-employee who worked for Defendant from July 2016 to October 2020. (*Id.*)

B. PLAINTIFF’S INVESTIGATION, DISCOVERY, AND CLAIMS

On November 25, 2020, after conferring with Plaintiff regarding his Labor Code claims and grievances, counsel for Plaintiff sent the statutorily required notice to the California Labor and Workforce Development Agency (“LWDA”) and Defendant, declaring Plaintiff’s intent to proceed with the enumerated Labor Code claims on behalf of himself and all other aggrieved employees against Defendants. (Jami Decl. ¶ 15.) Plaintiff’s Counsel also requested Plaintiff’s

¹ This is a PAGA-only action.

² All further statutory references will be to the California Labor Code unless otherwise noted.

1 employment/personnel file and subsequently, researched and investigated all of Plaintiff's concerns.
2 (Declaration of Alex Asil Mashiri [Mashiri Decl.] ¶ 13; Jami Decl. ¶ 17.)

3 On January 29, 2021, Plaintiff filed his complaint under the PAGA in this matter. (Mashiri
4 Decl. ¶ 14; Jami Decl. ¶ 18.) The complaint alleged representative claims for civil penalties under
5 the PAGA for (1) violation of Labor Code sections 510 and 1194; (2) violation of Labor Code
6 section 246; (3) violation of Labor Code sections 233 and 234; (4) violation of Labor Code section
7 227.3; (5) violation of Labor Code section 226(a)(1); (6) violation of Labor Code section 226(a)(5);
8 (7) violation of Labor Code section 226(a)(9); (8) violation of Labor Code section 226(a); (9)
9 violation of Labor Code sections 512, 226.7 and the IWC Wage Order; (10) violation of Labor Code
10 section 226.7 and the IWC Wage Order; (11) violation of Labor Code section 204; (12) violation of
11 Labor Code sections 201, 202, and 203; and (13) violation of Labor Code section 1197 and the
12 applicable IWC Wage Order. (*Id.*)

13 After service of the complaint, the Parties, through counsel, engaged in several discussions
14 regarding the claims in this case. (Mashiri Decl. ¶ 15; Jami Decl. ¶ 19.) While the Parties
15 tentatively agreed to attend a mediation, they disagreed as to the scope of this action. (*Id.*)
16 Defendant contended that the scope of this action is limited to those employees who worked at the
17 location where Plaintiff was employed and in the same position. (*Id.*) Plaintiff contended that the
18 scope of this action is broader and encompasses all non-employees who suffered from at least of one
19 of the alleged Labor Code violation within the applicable period. (*Id.*)

20 To resolve the dispute before mediation, the Parties presented the issue via briefing at an
21 informal discovery conference before the Court on May 6, 2021. (Mashiri Decl. ¶ 15; Jami Decl. ¶
22 19.) The Court opined that the scope of this action is not limited to the same location of, or similar
23 position as, Plaintiff, but rather to the entirety of Defendant's non-exempt employees and locations
24 throughout California. (*Id.*) After considering the Court's informal opinion, the Parties agreed to
25 exchange comprehensive employee records and attend a mediation. (*Id.*)
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1 **C. SETTLEMENT NEGOTIATIONS**

2 On September 8, 2021, the Parties attended a full day mediation with Mr. Jeffrey Krivis,
3 Esq., a well-regarded mediator of complex class and representative wage and hour actions. (Mashiri
4 Decl. ¶ 16; Jami Decl. ¶ 20.)

5 While the case did not settle on the day of the September 8, 2021 mediation, the Parties were
6 able to continue settlement discussions with the assistance of Mr. Krivis and ultimately reached a
7 proposed settlement in the gross amount of \$225,000.00 in the days that followed. (Mashiri Decl. ¶
8 17; Jami Decl. ¶ 21.) From that amount, \$210,000 was for the PAGA settlement and \$15,000 was
9 for Plaintiff's individual settlement.

10 Prior to negotiating a settlement at the mediation, Plaintiff's counsel conducted a thorough
11 investigation into the facts and claims in this case and conducted extensive legal research as to the
12 claims and applicable laws, including attending an informal discovery conference regarding the
13 scope of this case. (Mashiri Decl. ¶ 18; Jami Decl. ¶ 22.)

14 Additionally, prior to mediation, Defendant provided a Sample Set of approximately 56
15 randomly selected employees who have worked for Defendant throughout California. (Mashiri
16 Decl. ¶ 19; Jami Decl. ¶ 23.) These payroll records were produced by way of PDF documents,
17 consisting of thousands of documents, which Plaintiff's counsel had to manually go through in
18 detail. (*Id.*) Using the information in the PDF documents, Plaintiff's counsel created an Excel
19 spreadsheet outlining the systemic violations, resulting claims, and civil penalty exposure in
20 preparation of the Parties' September 8, 2021 mediation. (*Id.*) Plaintiff's counsel also provided a
21 detailed mediation brief to Mr. Krivis' office. (*Id.*)

22 As a result of the successful mediation, the parties entered into a long-form settlement
23 agreement ("Settlement Agreement") outlining the terms of the Parties' agreement. (Mashiri Decl. ¶
24 20; Jami Decl. ¶ 24.) A copy of the Settlement Agreement is attached to the Declaration of Alex
25 Asil Mashiri as Exhibit 3. A copy of the Settlement Agreement was provided to the LWDA on
26 November 22, 2021. (Jami Decl. ¶ 24.)

27 The proposed PAGA settlement amount is \$210,000.00. (Mashiri Decl. ¶ 21; Jami Decl. ¶
28 25.) The Parties' proposed settlement includes PAGA civil penalties, administration costs, litigation

1 costs, and attorney's fees. (*Id.*) The proposed PAGA civil penalties are \$111,581.65 of which 75%
2 (or \$83,686.24) will be paid to the LWDA and the remaining 25% (or \$27,895.41) will be allocated
3 to the approximately 556 PAGA Represented Employees. (*Id.*) Of the remaining balance, \$9,768.35
4 will be allocated towards litigation costs incurred in this case, \$4,650 will be allocated towards the
5 Settlement Administrator's costs, and the remaining amount of \$84,000 will be allocated towards
6 Plaintiff's attorneys' fees incurred as a result of the PAGA lawsuit.³ (*Id.*)

7 **III. GOOD CAUSE EXISTS TO GRANT THIS RELIEF ON AN EX PARTE BASIS**

8 Good cause exists to grant *ex parte* relief on this issue because: (a) approval of the
9 settlement of the PAGA claims will fully and entirely resolve this case; (b) waiting for the
10 process of a noticed motion will simply delay the resolution of the case; and (c) the Parties are
11 operating under the expectation that the matter has been resolved and, thus, are not taking action
12 that otherwise would need to be taken (*e.g.*, discovery, depositions, etc.) if the case is not
13 resolved. Moreover, because this is an unopposed *ex parte* application and the LWDA has been
14 notified via online filing of the settlement agreement between the parties, no party would be
15 prejudiced by having this matter heard on an *ex parte* basis.⁴

16 Additionally, the San Diego Superior Court, including this department, has routinely heard
17 and approved PAGA settlements on an *ex parte* basis. (See, *e.g.*, *Yuralis Pena v. South County Oral*
18 *Maxillofacial Surgery Center et al.*, 37-2020-00029759-CU-OE-CTL (Hon G. Pollack); *Hashemi v.*
19 *Trademark Constructions Co.*, 37-2017-00041889-CU-OE-CTL (Hon. G. Pollack); *Lopez v. Temco*
20 *Logistics et al.*, 37-2019-00027884-CU-OE-CTL (Hon. R. Frazier); *Garcia et al. v. Courtyard by*
21 *Marriott et al.*, 37-2019-00008681-CU-OE-CTL (Hon. R. Strauss); *Baker v. Vivint*, 37-2018-
22 00058265-CU-OE-CTL (Hon. T. Taylor.); *Wilkins v. Hotel Investment Group, Inc.* (37-2017-
23 00017266-CU-CTL) (Hon. K. Bacal); *Derocco v. Irvine Company Apartment Communities, Inc.*,

25 ³ These figures are slightly different from the figures contained in the settlement agreement because Plaintiff's costs
26 were estimated in the settlement agreement as \$11,000, versus \$9,768.35 in actual costs, and the difference has been
added to the civil penalties.

27 ⁴ There is a pending case alleging PAGA claims against Defendant where the state is the real party of interest; *Joel*
28 *Valderrama v. Kings & Convicts BP LLC* Los Angeles Superior Court, Case No. 21STCV36470. Defendant filed a
notice of related case on October 29, 2021.

37-2017-00034528-CU-OE-CTL (Hon. R. Trapp); *Ramirez v. The Helm Management Co. et al.*, 37-2019-00008434-CU-OE-NC (Hon. T. M. Casserly)⁵.)

IV. **THE PRIVATE ATTORNEYS GENERAL ACT (PAGA)**

“In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004.” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980 (*Arias*)). PAGA is the acronym for the Private Attorneys General Act of 2004, which is codified under California Labor Code sections 2698 - 2699.6. (Labor Code § 2698.)

“[T]he Legislature ‘declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.’” (*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1125–26, citation omitted disapproved on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175.)

Thus, the PAGA is a type of *qui tam* action, “authorizing a private party to bring an action to recover a penalty on behalf of the government and receive part of the recovery as compensation.” (*Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 753 (*Huff*) review denied (Aug. 8, 2018) citing *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379.) When an employee brings a representative action under the PAGA, he or she does so as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties.” (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal. 4th 993, 1003.) Thus, “[e]very PAGA claim ‘is a dispute *between an employer and the state.*’” (*Kim v. Reins Int’l California, Inc.* (2020) 9 Cal.5th 73, 81 (*Kim*), citation omitted.)

While a case under the PAGA is representative in nature, it is ***not*** a class action, and

⁵ Hon. Judge Strauss, Hon. Judge Trapp and Hon. Judge Casserly have since retired from the bench.

1 therefore, may be brought *without* the procedural requirements involved in a class action, *i.e.*, class
2 certification. (*Kim, supra*, 9 Cal.5th at pp. 86-87.)

3 Lastly, non-party aggrieved employees in a PAGA action are not entitled to notice and have
4 no right to opt out. (*Arias, supra*, 46 Cal.4th at p. 986.)

5 V. ARGUMENT

6 A. Controlling Law Regarding PAGA Approval

7 Labor Code section 2699(i) mandates that PAGA penalties shall be allocated as follows:

8 75 percent to the Labor and Workforce Development Agency for
9 enforcement of labor laws and education of employers and employees about
10 their rights and responsibilities under this code, to be continuously
11 appropriated to supplement and not supplant the funding to the agency for
12 those purposes; and 25 percent to the aggrieved employees.

13 Under Labor Code section 2699(l)(2), the court is required to review and approve any PAGA
14 settlement. (Lab. Code § 2699(l)(2).) “PAGA settlements are subject to trial court review and
15 approval, ensuring that any negotiated resolution is fair to those affected.” (*Williams v. Superior*
16 *Court* (2017) 3 Cal.5th 531, 549.)

17 Civil penalties recovered under the PAGA “are intended to ‘*remediate present violations*
18 *and deter future ones,*’ ***not to redress employees’ injuries.***” (*Kim, supra*, 9 Cal.5th at p. 86) Indeed,
19 the share of civil penalties (25%) distributed to the aggrieved employees are designed as a “financial
20 incentive” to enforce the labor laws under the PAGA, not to compensate them for any damages or
21 injuries suffered. (*Kim, supra*, 9 Cal.5th at p. 86; *Brown v. Ralphs Grocery Co.* (2011) 197
22 Cal.App.4th 489, 501[stating that “the purpose of the PAGA is not to recover damages or
23 restitution...”]; *Huff, supra*, 23 Cal.App.5th at p. 753 [same]; *Provost v. YourMechanic, Inc.* (2020)
24 55 Cal.App.5th 982, 992 [stating that the Legislature provided the 25% share of civil penalties to
25 aggrieved employees as an “financial incentive” to pursue PAGA cases].)

26 B. This PAGA Settlement Is Fair Under Labor Code Section 2699(l)(2)

27 While Labor Code section 2699(l)(2) requires a court to “review and approve any settlement
28 of any civil action filed pursuant to [the PAGA],” it does not provide any guidance as to what is
considered “fair.” However, at the lower end of the spectrum, the California Court of Appeal has

1 held that an allocation of **zero dollars** to resolve PAGA claims may be appropriate in certain
2 circumstances:

3 The Nordstrom Commission Cases settlement agreement identifies liability
4 for PAGA penalties as a claim against Nordstrom and includes the following
5 language: “The Parties allocate \$0 to any Private Attorneys General Act
6 penalty claim under Labor Code § 2699 *et seq.*, for penalty claims based on
7 the Released Claims. During the Class Period, Nordstrom paid Putative Class
8 Members' commissions pursuant to a commission plan that it contends was
9 approved by the United States District Court in *Rios*, and consequently,
10 Nordstrom contends no claim for penalties of any nature is valid.” Thus, the
11 PAGA penalty claims were at issue, and were resolved as a part of the overall
12 settlement of the case. We find no abuse of discretion in the trial court's
13 approval of the settlement agreement containing these terms.

14 (*Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589.)

15 Moreover, courts in California have routinely approved settlements that allocate less than
16 2% of the overall settlement amount to PAGA penalties. (*See e.g., Haji v. be.group*, San Diego
17 Superior Court Case No: 37-2017-00025918-CU-OE-CTL (Taylor T.) [approving allocation of
18 \$20,000.00 to civil penalties under PAGA out of \$1,693,000.00 settlement]; *Chu v. Wells Fargo*
19 *Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 672645, at *1 [approving allocation of
20 \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement]; *see also Schiller v. David’s Bridal,*
21 *Inc.* (E.D. Cal., June 11, 2012) 2012 WL 2117001, at * 14 [approving allocation of \$7,500.00 to
22 PAGA penalties out of \$518,245.00 settlement].)

23 The Parties seek to allocate \$111,581.65 in civil penalties under Labor Code section 2699(i).
24 From that amount, 75% (or \$83,686.24) will be paid to the LWDA and the remaining 25% (or
25 \$27,895.41) will be allocated to the approximately 556 PAGA Represented Employees.

26 The Parties reached the terms of their proposed settlement after informal discovery,
27 including the production of payroll records on 10% of the PAGA Represented Employees, research
28 on esoteric legal issues, and a full day of mediation with Mr. Krivis.

Notably, the Parties’ proposed settlement is limited in scope to a release of civil penalties
under the PAGA. In other words, the proposed settlement does not seek to release any individual
claims that the PAGA Represented Employees may have in their individual capacity.

Based on counsel’s professional experience, the circumstances of this case, and the work
performed, the Parties contend that the PAGA penalty of \$111,581.65 under Labor Code section

1 2699(i) is fair, adequate, and reasonable.

2 **VI. CONCLUSION**

3 For the reasons stated above, Plaintiff respectfully requests that the Court approve the
4 proposed PAGA settlement.

5 Respectfully submitted,

6 Date: January 5, 2022

MASHIRI LAW FIRM APC

7 By: 
8 Alex Asil Mashiri
9 Attorney for Plaintiff
10 DANIEL FRANCO
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