

SULLIVAN EMPLOYMENT LAW P.C.

Martin Sullivan (SBN 274279)

martin@sullivanlawgrp.com

1801 Century Park East, Suite 850

Los Angeles, California 90067

Telephone: (323) 645-5470

Attorneys for Plaintiff , the Putative Class, and Aggrieved Employees

JOEL GLASER APC

Joel Glaser, Esq. (SBN 194442)

11500 W. Olympic Boulevard, Suite 400

Los Angeles, CA 90064

Tel: ((310) 943-8005

Attorneys for Defendants Blue Pacific Engineering Construction, Inc., Palm Engineering Construction Company, Inc., and Shahram Elihu dba Blue Pacific Engineering & Construction

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

LISA ALLEN, an individual, on behalf of the
State of California, as a private attorney general,
and on behalf of all others similarly situated,

Plaintiff,

v.

BLUE PACIFIC ENGINEERING
CONSTRUCTION, INC., a California
corporation, SHAHRAM ELIHU dba BLUE
PACIFIC ENGINEERING &
CONSTRUCTION, a business of unknown
formation, PALM ENGINEERING
CONSTRUCTION COMPANY, INC., a
California corporation, and DOES 1-20,
inclusive,

Defendants.

Case No.: 37-2020-00040867-CU-OE-CTL

**STIPULATED REQUEST FOR
APPROVAL OF PAGA
SETTLEMENT AND DISMISSAL;
DECLARATION OF MARTIN
SULLIVAN**

Date Filed: November 9, 2020

Trial Date: None Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

STIPULATED REQUEST FOR APPROVAL OF PAGA SETTLEMENT AND DISMISSAL..	3
I. The Instant Action.....	3
II. THE MERITS OF THE CASE IN LIGHT OF FACTUAL AND LEGAL DEFENSES...	4
A. Merits and Legal Defenses of Case	4
B. Defendants’ Alleged Practices Not Easily Certifiable.....	5
C. Typicality of Plaintiff.....	5
D. Adequacy of Plaintiff.....	5
E. Individual Issues Likely Predominate and PAGA Is Likely Unmanageable.....	6
III. THE PARTIES DIMISSAL WITHOUT PREJUDICE OF CLASS CLAIMS AND	
DISMISSAL WITH PREJUDUCE OF HER INDIVIDUAL AND PAGA CLAIMS.....	6
A. Dismissal With Prejudice of The PAGA Claims is Fair and Should Be Approved	8
B. Dismissal Without Prejudice of The Class Claims	10
IV. PAGA Settlement Administration	10

**STIPULATED REQUEST FOR APPROVAL OF PAGA SETTLEMENT
AND DISMISSAL**

Plaintiff LISA ALLEN (“Plaintiff”) and Defendants BLUE PACIFIC ENGINEERING CONSTRUCTION, INC., SHAHRAM ELIHU dba BLUE PACIFIC ENGINEERING & CONSTRUCTION, PALM ENGINEERING CONSTRUCTION COMPANY, INC., (“Defendants”) (together referred to herein as the “Parties”), by and through their attorneys of record, hereby stipulate to dismiss the class claims without prejudice, and the PAGA and individual claims with prejudice, as follows:

I. THE INSTANT ACTION.

On November 9, 2020, Plaintiff filed this action asserting individual and class claims for: (1) Failure to pay minimum wages and prevailing wages (Labor Code §§ 1194, 1194.2, 1197, 1771, 1774, and Applicable IWC Wage Order) (2) Failure to Pay Overtime Wages (Labor Code §§ 510, 1197, 1198, and Applicable IWC Wage Order (3) Failure to Provide Complaint Rest Periods to and/or Pay Missed Rest Period Premiums (Labor Code § 226.7, and Applicable IWC Wage Order); (4) Failure to Provide Compliant Meal Periods to and/or Pay Missed Meal Period Premiums (Labor Code §§ 226.7, 512, and Applicable IWC Wage Order); (5) Failure to Reimburse Business Expenses (Labor Code § 2802); (6) Failure to Provide Complete and Accurate Wage Statements (Labor Code § 226); (7) Waiting Time Penalties (Labor Code §§ 201-203); (8) Failure to Pay Wages Timely(Labor Code §§ 204, 210); and (9) UCL Violation (Bus. & Prof Code §§ 17200-17204). On January 20, 2021, Plaintiff filed a First Amended Complaint (“FAC”), adding a claim for (10) Penalties Pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”) for Violations of California Labor Code Sections set forth in the other causes of action.

Plaintiff brings this class action on behalf of herself and the following class: All individuals who are or were employed by Defendants in California as a non-exempt employee from November 9, 2016, through the date of trial (the “Class Members”) (Code Civ. Proc., § 382).” FAC, ¶ 2.

1 In addition, Plaintiff brings this action against Defendants for economic, non- economic,
2 and compensatory damages, penalties, pre-judgment interest and post-judgment interest, and
3 costs and reasonable attorneys' fees pursuant to, inter alia, Code of Civil Procedure section
4 1021.5. This lawsuit is also a PAGA action, brought on behalf of Plaintiff, the State of California
5 as private attorney general, and on behalf of the following aggrieved employees: All individuals
6 who are or were employed by Defendants in California as a non-exempt hourly employee from
7 November 12, 2019 through the date of trial (the "Aggrieved Employees"). FAC, 4.

8 **II. THE MERITS OF THE CASE IN LIGHT OF FACTUAL AND** 9 **LEGAL DEFENSES**

10 **A. MERITS AND LEGAL DEFENSES OF CASE**

11 Plaintiff alleged as follows: that the Defendants failed to fully conform their pay practices
12 to the requirements of the law during the relevant statutory periods; that the other Class Members
13 were not compensated for all hours worked including, but not limited to, all hours they were
14 subject to the control of Defendants and/or suffered or permitted to work under the Labor Code
15 and the Applicable Wage Order (Allen Decl., ¶ 2.); that this off the clock work would, at times,
16 result in unpaid prevailing wages and unpaid overtime (Allen Decl., ¶ 2.)

17 Defendants assert that all work was on the clock and there was no rounding. (Sullivan
18 Decl., 4.) Plaintiff contends that although Plaintiff was advised of the right to take meal and rest
19 breaks, the work schedule was too busy to do so. (Allen Decl., ¶ 3; Sullivan Decl., ¶ 5.)
20 Defendants assert that there was sufficient time and coverage for meal and rest breaks, and it is
21 not required to police them so long as they are provided. (Sullivan Decl., 5.) Additionally,
22 Defendant produced time records showing that Plaintiff signed off on her work hours and
23 acknowledged that she received all legally required meal and rest breaks. (Sullivan Decl., 5.)

24 Plaintiff alleges she was required to use her personal money, personal cellular phone, and
25 vehicle to purchase and pick up supplies, for which she was not reimbursed. (Allen Decl., ¶4;
26 Sullivan Decl., 6.) Defendants assert that they maintained a reimbursement policy and that
27 Plaintiff's allegations are individualized and not common to other employees. (Sullivan Decl., 6.)
28

1 The waiting time, wage statement, pay period, UCL and PAGA claims are all derivative
2 of the aforementioned claims. (Sullivan Decl., 7.) Importantly, no facial violations appear on
3 Plaintiff's wage statements and the timing of pay periods during employment appear to comply
4 with Labor Code § 204 based on Plaintiff's wage statements. *Id.* Therefore, the same defenses
5 apply. *Id.*

6 **B. DEFENDANTS' ALLEGED PRACTICES NOT EASILY**
7 **CERTIFIABLE**

8 Defendants' time records show that for each time record, employees acknowledged by
9 their signature that work hours listed on each time sheet was accurate and that the employee
10 received all meal and rest breaks. (Sullivan Decl., ¶ 8.) These written acknowledgements of time
11 worked undercut Plaintiff's allegations that she and others worked off the clock, which is the
12 primary basis for claims for unpaid minimum wage, unpaid wages, unpaid prevailing wages, and
13 unpaid overtime. *Id.* Plaintiff's wage statements appear facially compliant and, for these records,
14 the timing of the pay during employment complied with Labor Code § 204 requirements. *Id.*
15 While Plaintiff contends she was required to pick up supplies using her personal vehicle and was
16 not paid for such use, even she does not allege that this practice was widespread. (Sullivan Decl.,
17 ¶ 8; Allen Decl., ¶ 4.) Indeed, she seemed to be singled out to perform these errands and to make
18 these purchases. *Id.* All of these factors present a significant barrier to certification and success
19 on the merits. (Sullivan Decl., ¶ 8.)

20 **C. TYPICALITY OF PLAINTIFF**

21 Plaintiff worked as a Laborer-Apprentice for Defendants. (Allen Decl., ¶ 5; Sullivan ¶ 9)
22 However, Defendants contend that other hourly in positions dissimilar to Plaintiff's and not all
23 tied to Laborer Apprentice work and practices. *Id.* Typicality is therefore at issue. *Id.*

24
25
26 **D. ADEQUACY OF PLAINTIFF**
27
28

1 Plaintiff contends that she experienced sexual harassment from Defendants’ supervisors
2 and planned to bring a case under the California Fair Employment and Housing Act. (Allen
3 Decl., ¶ 6; Sullivan Decl., ¶ 10.) Defendants deny these contentions. While these contentions,
4 and the litigation cost of defense they would require, justify an individual settlement for Plaintiff,
5 Defendants argue that it calls into question her adequacy to serve as the class representative.
6 (Sullivan Decl., ¶ 10.) Adequacy is therefore at issue. *Id.*

7 **E. INDIVIDUAL ISSUES LIKELY PREDOMINATE AND PAGA**
8 **IS LIKELY UNMANAGEABLE**

9 Due to the individualized experiences of hourly employees with taking breaks and/or
10 timekeeping and differing communications with managers about such business practices,
11 individualized issues likely predominate. (Sullivan Decl., ¶ 11.) Relatedly, manageability may be
12 difficult to prove because discussion of the merits may require mini trials for affected employees.
13 (Sullivan Decl., ¶ 11.)

14 Based on the above allegations incorporated by reference, Defendants violated Labor
15 Code sections 1194, 1194.2, 1197, 1771, 1774, 510, 1197, 1198, 201, 202, 203, 204, 210, 226,
16 226.7, 2802; and the applicable Wage Order (Cal. Code of Regs., tit. 8, § 11050). The resolution
17 of this matter, which includes dismissal without prejudice of the class claims, does not prejudice
18 the putative class members, whose claims and rights to pursue damages remain fully intact. The
19 Parties therefore seek approval of the settlement of Plaintiff’s PAGA claims and dismissal
20 without prejudice of her class claims.

21 **III. THE PARTIES DIMISSAL WITHOUT PREJUDICE OF CLASS**
22 **CLAIMS AND DISMISSAL WITH PREJUDUCE OF HER INDIVIDUAL**
23 **AND PAGA CLAIMS.**

24 Plaintiff resolved her PAGA claims for penalties, fees, and costs against Defendant for
25 \$35,000. (Sullivan Decl., ¶ 12.) A true and correct copy of the Memorandum of Understanding
26 for PAGA Settlement (“MOU”) is attached to the Sullivan Declaration as **Exhibit A**. *Id.* A copy
27
28

1 of this stipulation, the settlement agreement, and proposed order has been submitted to the
2 LWDA. (Sullivan Decl., ¶ 12.)

3 Plaintiff's counsel has expended \$1,325.15 in litigation expenses. (Sullivan Decl., ¶ 13.)
4 Plaintiff's counsel also expended approximately 59 hours litigating this case, resulting in
5 \$36,875 in fees. (Sullivan Decl., ¶ 14.) Thus, Plaintiff's counsel expended more than \$38,200 in
6 fees and costs and takes a financial loss in resolving this case on a non-class basis. (Sullivan
7 Decl., ¶ 14.)

8 Plaintiff only worked for Defendants from mid-February 2020 to mid-June 2020. (Allen
9 Decl., ¶ 5; Sullivan Decl., ¶ 17.) Based on time records, Plaintiff typically worked fewer than 40
10 hours per week and earned between \$24 and \$31 per hour, averaging in the \$26 per hour range,
11 depending on the project and location. *Id.* Assuming Plaintiff worked through two meal breaks
12 per work week with knowledge of Defendants, which Defendants contest, and because Plaintiff
13 earned an average of around \$26 per hour, she would be owed \$832.00 in meal period premiums
14 (16 workweeks x 2 violations x \$26/hour = \$832). *Id.* Assuming the same rest period violation
15 rate, Plaintiff would be entitled to \$832 in rest period premiums. *Id.* Plaintiff estimates that she
16 worked off the clock approximately 30 minutes of overtime each week given her short tenure
17 with Defendants, she would be owed \$312 in unpaid overtime (16 workweeks x .5 hours x
18 \$26/hr. x 1.5 = \$312), \$104 in minimum wage violations (16 workweeks x .5 hours x \$13/hr. =
19 \$104), \$6,240 in waiting time penalties (\$26/hr. x 8 hours x 30 days), and an estimated \$500 in
20 unreimbursed business expenses. *Id.* With approximately 16 pay periods at issue, Plaintiff's
21 wage statement claim is estimated to be worth \$1,550 (($\50×1) + ($\$100 \times 15$) = \$1,550). *Id.*
22 Plaintiff does not recover any PAGA enhancement award under the settlement agreement. *Id.*
23 Plaintiff did, however, sign a confidential individual release of all claims known and unknown,
24 including Fair Employment and Housing claims, which was integral to the settlement agreement
25 as required by Defendant. *Id.* Thereunder, she receives separate consideration to settle her
26 individual claims, known and unknown. *Id.*

1 Plaintiff planned to bring a lawsuit under FEHA for sexual harassment and
2 discrimination based on alleged wrongful conduct and comments, as well as retaliation by
3 Defendants' supervisors. (Allen Decl., ¶ 6; Sullivan Decl., ¶ 18.) Liability for Plaintiff's FEHA
4 claims, which were released by the settlement agreement, could easily exceed \$100,000
5 exclusive of fees and costs. (Sullivan Decl., ¶ 18.)

6 The total exposure for Plaintiff's individual claims for damages, exclusive of fees and
7 costs, released by the settlement agreement and general release, therefore exceeds \$109,000.
8 (Sullivan Decl., ¶ 19.)

9 **A. DISMISSAL WITH PREJUDICE OF THE PAGA CLAIMS IS**
10 **FAIR AND SHOULD BE APPROVED**

11 When PAGA claims are settled, the trial court must "review and approve" the settlement.
12 Labor Code § 2699(l). In so doing, the court must consider whether the proposed "PAGA settlement
13 is fair and adequate in view of the purposes and policies of the statute." *O'Connor v. Uber Techs.,*
14 *Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016). The parties have agreed to an allocation of
15 \$35,000.00 as PAGA penalties. Of this amount, and after the deduction of fees and costs, 75% shall
16 be sent to the Labor and Workforce Development Agency (LWDA), and the remaining 25% shall
17 be distributed to the Aggrieved Employees. (*Id.*) This allocation is fair and reasonable given the
18 nature of the PAGA claims, which has a limited 1-year statute of limitations. Courts "repeatedly
19 approve[] PAGA allocations of both smaller amounts and that comprised a smaller portion of the
20 total settlement consideration in the agreements at issue." (*See Davis v. Cox Commc'ns California,*
21 *LLC*, No. 16cv989 BAS (BLM), 2017 WL 1496407, at *1 (S.D. Cal. Apr. 26, 2017) (preliminarily
22 approving \$4,000 PAGA allocation in \$2710,000 settlement); *Moore v. Fitness Int'l, LLC*, No.
23 12cv1551 LAB (NLS), 2014 WL 12571448, at *5 (S.D. Cal. Jan. 22, 2014) (approving \$2,500
24 PAGA allocation when attorneys' fees award alone amounted to \$200,000); *Jack v. Hartford Fire*
25 *Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving
26 \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, No. 08cv821
27 IEG (BLM), 2010 WL 2196104, at *2 (S.D. Cal. June 1, 2010) (approving \$3,000 PAGA allocation
28

1 in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133,
2 at *9 (N.D. Cal. Apr. 3, 2009) (approving \$11,250 PAGA allocation in \$1,026,000 settlement); *In*
3 *re Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 579 (2010) (“[T]he trial court did not
4 abuse its discretion in approving a settlement which does not allocate any damages to the PAGA
5 claims.”).) Thus, the \$35,000 PAGA allocation is well within a fair and reasonable range for the
6 PAGA penalties and should now be approved.

7 Based upon Defendant’s responses to formal discovery and documents produced,
8 Plaintiff estimates that the total number of PAGA pay periods at issue is approximately 11,000
9 with 153 aggrieved employees. (Sullivan Decl., ¶ 15; see also **Exhibit A, section 2.**) The PAGA
10 claim is based on the same alleged violations of law and therefore is susceptible to an adverse
11 judgment on the merits for the same reasons discussed above. (Sullivan Decl., ¶ 15.) In addition,
12 the PAGA claim has manageability issues that could create the possibility of mini-trials not
13 suitable for resolution on a representative basis. *Id.* Nonetheless, Defendant has promised to pay
14 \$35,000 for the release of these claims, which shall be distributed as follows:

Gross PAGA Settlement Amount	\$35,000.00
Attorneys’ Fees (1/3 of the GSA)	(\$11,666.67)
Litigation Costs and Expenses	(\$1,325.15 ¹)
Incentive Award	(\$0.00)
Settlement Administration Costs	(\$3,275.00 ²)
PAGA Payment to the LWDA	(\$14,049.88)
Net PAGA Settlement Amount	\$4,683.29

23 *Id.* Thus, the average payment to each Aggrieved Employee, after fees, costs, and payment to
24 the LWDA are accounted for, is \$30.61 ($\$4,683.29 / 153 = \30.61). *Id.* While total PAGA
25 exposure could be as much as \$1.1 million based upon a \$100 per paid period violation (11,000

26 ¹ The litigation costs sought herein are less than the amount allotted in the MOU.

27 ² The settlement administration costs sought herein are less than the amount allotted in the MOU.

1 pay periods x \$100 - \$1.1 million), such high awards are uncommon, subject to discretionary
2 reduction, and still requires a win on the merits and a manageable trial plan. *Id.*

3 **B. DISMISSAL WITHOUT PREJUDICE OF THE CLASS**
4 **CLAIMS**

5 No prejudice will result to any putative class members as a result of Plaintiff's dismissal
6 without prejudice of the Class claims, as set forth in the concurrently filed Declaration of Martin
7 Sullivan and incorporated herein. *See* Sullivan Decl. (*See* Cal. R. Ct., Rule 3.770 (“[T]he action
8 may be dismissed without notice to the class members if the court finds that the dismissal will
9 not prejudice them.”)).

10 In particular, the requested dismissal without prejudice of the class claims will not affect
11 the ability or entitlement of any other putative class member to seek any relief or remedies for
12 underlying violations. Rather, the Parties seek to dismiss Plaintiff's individual and PAGA
13 claims with prejudice, including her first through tenth causes of action. (Sullivan Decl., ¶¶ 20-
14 22.) Plaintiff has notified the LWDA of the settlement terms and provided copies of these
15 dismissal papers. (Sullivan Decl., ¶ 23.)

16 Further, the Parties' PAGA and individual settlement agreement is not to the detriment of
17 the putative class members. (Sullivan Decl., ¶¶ 20-22.) For example, this proposed class in this
18 action has not been certified and no notice of the pendency of this action has been made, either
19 orally or in writing. Moreover, no notice has been required to be provided to the putative class
20 members; there is no pending request for preliminary or final approval of the instant claims; and
21 the terms of the individual settlement agreement are reasonable. *Id.*

22 **IV. PAGA SETTLEMENT ADMINISTRATION**

23 The PAGA Settlement Administration process is described in the MOU. (See **Exhibit A.**)
24 Within 15 days of approval of the settlement, Defendants shall provide the Claims Administrator
25 with the name, current mailing address, and telephone number of each PAGA Member. (*Id.* at §
26 5.) Defendants shall deposit the full \$35,000 PAGA Settlement Payment with the Claims
27 Administrator within 30 days of approval of the settlement. (*Id.* at § 6.) The Claims
28

1 Administrator shall then disburse the net settlement amount within 5 days of their receipt based
2 on the relative number of pay periods worked by each PAGA member during the PAGA period
3 (*Id.* at § 7.). Checks that remain uncashed after 180 days shall be void and the funds thereunder
4 sent to the agreed upon cy pres, Justice Gap Fund. (*Id.* at § 10.)

5 THEREFORE, the Parties hereby stipulate, and subject to the approval of this Court, that:

6 1. Plaintiff's class allegations shall be dismissed without prejudice. The dismissal of
7 these class allegations is without prejudice as to the rights of any of the putative class members
8 whom Plaintiff has been attempting to represent to date. In accordance with California Rule of
9 Court, Rule 3.770, the dismissal of the uncertified class claims may be approved without notice
10 being given to members of the proposed class because the dismissal would not prejudice any
11 putative class members.

12 2. The PAGA claim as to all aggrieved employees is dismissed with prejudice.

13 3. Plaintiff's individual claims shall be dismissed with prejudice.

14 4. By this stipulation and settlement, Defendants do not admit wrongdoing or liability,
15 which is expressly denied, Defendants do not waive any factual or legal defenses, which are
16 expressly reserved, nor do Defendants make or agree to any representations as to the merits of
17 plaintiff's claims.

18 5. The Parties shall bear their own costs, attorneys' fees, expenses, and disbursements
19 incurred in this action.

1 Dated: 6-20-22

SULLIVAN EMPLOYMENT LAW PC

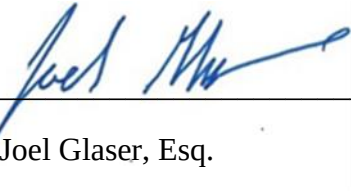
2
3 By: 

4 Martin Sullivan, Esq.

5 *Attorneys for Plaintiff, the Class, and Aggrieved*
6 *Employees*

7
8
9 Dated: June 17, 2022

JOEL GLASER APC

10
11 By: 

12 Joel Glaser, Esq.

13 *Attorneys for Defendants*
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28