

Eric K. Yaeckel [CSB No. 274608]
yaeckel@sullivanlawgroupapc.com

Ryan T. Kuhn [CSB No. 324538]
ryan@sullivanlawgroupapc.com

SULLIVAN & YAECKEL LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff LANCE HILD, in a Representative capacity only, and on behalf of other members of the public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LANCE HILD, in a Representative capacity
only, and on behalf of other members of the
public similarly situated

Plaintiff,

v.

WESTSIDE BUILDING MATERIAL
CORPORATION, a California Corporation,
and DOES 1-10, inclusive

Defendants

CASE NO. 37-2021-00041781-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION RE:
PAGA SETTLEMENT APPROVAL**

Date: August 5, 2022

Time: 10:30 a.m.

Dept.: C-70

Judge: Hon. Carolyn Caietti

1 Plaintiff LANCE HILD, in a Representative Capacity only, respectfully submits his Motion
2 for Approval of a PAGA representative Settlement. This Request is **unopposed**. The LWDA was
3 timely notified of this proposal and hearing, and does **not** object.

4 **I. SUMMARY OF MOTION**

5 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
6 WESTSIDE BUILDING MATERIAL CORPORATION, a California Corporation (“Defendant”). As
7 this is a “PAGA” action only, the Limitations Period begins on July 8, 2020. There are approximately
8 **4,160** pay periods and **144** PAGA Members at issue. (Decl. of Ryan T. Kuhn, ¶3).

9 Following the exchange of informal discovery, analysis of numerous sets of time and wage
10 data, mediation before Mike Roberts, and assistance of Mr. Roberts subsequent to the May 9, 2022
11 Mediation, the Parties reached a proposed settlement that includes a payment of penalties to the
12 LWDA. (Kuhn Decl., ¶4).

13 Based on the below figures, each PAGA Member would receive an average payment of
14 approximately **\$78.70**. This figure represents an average only, as the actual amounts paid will vary
15 depending on the amount of workweeks employed during the PAGA period.

16 On **May 31, 2022**, Plaintiff’s counsel gave notice of the instant Settlement to the LWDA.
17 (Kuhn Decl., ¶5). To date, Plaintiff’s counsel has not received notice that the LWDA would intervene.
18 (*Id.*)

19 On **June 13, 2022** counsel uploaded copies of the *ex parte* application, including the Notice,
20 this supporting Memorandum, Declaration, Proposed Order & Judgment, and the **signed** Settlement
21 Agreement to the LWDA’s electronic filing portal. (Kuhn Decl., ¶6). To date, Plaintiff’s counsel has
22 not received any opposition from the LWDA. (*Id.*).

23 On **June 14, 2022**, the Court continued Plaintiff’s *Ex Parte* application re Settlement Approval,
24 and scheduled the instant hearing. (ROA#31).

25 On **July 13, 2022**, Plaintiff’s Counsel uploaded the instant Motion, and provided notice of the
26 hearing date, to the LWDA’s electronic filing portal. (Kuhn Decl. ¶7). To date, Plaintiff’s counsel has
27 not received any opposition from the LWDA. (*Id.*).

28 The Total Value of the proposed Settlement is **\$80,000.00** which is broken down as follows:

- * **\$3,000.00** Settlement Administrator Fees;
- * **\$26,666.67** Attorneys' Fees (1/3 of total settlement value);
- * **\$5,000.00** Costs of Litigation.
- * Sub-Total of **\$45,333.33**. 75% (**\$34,000.00**) shall be assigned/paid to the LWDA as penalties.
- * The remaining 25% (**\$11,333.33**) in cash will be disbursed among all employees based on work weeks employed during the PAGA period.(Kuhn Decl., ¶8)

Given the above, the average payment to each individual employee will be approximately **\$78.70**. (*Id.*)

Further, there are no restrictions for any of the **144** employees to file individual actions, as the settlement agreement only covers PAGA claims. (Kuhn Decl., ¶9); **Exhibit A**: "Released Claims" § 7, p. 3).

II. CONTROLLING LAW

PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees." *Iskanian v. CLS Trans. Los Angeles* (2014) 59 Cal. 4th 348, 360. "To compensate for the lack of [a]dequate financing of essential labor law enforcement functions,' the California legislature enacted PAGA to permit aggrieved employees to act as private attorneys general to collect civil penalties for violations of the Labor Code." *Sakkab v. Luxottica* (9th Cir. 2015) 803 F.3d 425.

Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. However, some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced "subsequent violation penalty" or "heightened penalty" only after an employer has been notified that its conduct violates the Labor Code. *See Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers

are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199-IEG-CAB, 2009 WL 2448430 (S.D. Cal. 2009) (finding that California law imposes the "subsequent violation penalty" only after an employer has been notified its conduct violates the Labor Code). Further, a court may award a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213-1214. *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by 82%).

"The superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA]." Cal. Lab. Code. § 2699(l). In so doing, 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.").

Recently the Court of Appeal has given guidance to trial courts in reviewing a PAGA settlement:

We therefore hold that **a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.** (*See Williams*, *supra*, 3 Cal.5th at p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present violations and deter future ones"]; *Arias*, *supra*, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement efforts to achieve maximum compliance with labor laws].) *Moniz v. Adecco USA, Inc.*, (2021) 72 Cal. App. 4th 56, 77

Prior to *Moniz*, Other Courts have followed the rationale in *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states a court is permitted to approve a PAGA

1 settlement if the settlement is “fair and adequate in view of the purposes and policies of the statute.”

2 *Id.*

3 **III. DISCUSSION**

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

7 **A. THE BASIS FOR THE REQUEST**

8 The instant request is based on the fact that (1) the PAGA period “cutoff date” is contingent
9 on Court approval, any delay diminishes the amounts received by the impacted employees; (2) Notice
10 to certain ex-employees may be adversely impacted by further delay (*i.e.* ex-employees may change
11 their mailing address without filing a proper “forwarding address”). (Kuhn Decl., ¶10); See **Exhibit**
12 **A: “Effective Date”** § 7, p. 2-3).

13 Additionally, an expedient approval of this settlement will provide a direct benefit to the
14 impacted employees at issue. The “fixes” provide a guarantee of future Labor Code compliance, and
15 an immediate monetary benefit. It also allows Defendants (who admirably “stepped up” to address
16 these issues) the opportunity to move on, and focus on future business. (Kuhn Decl., ¶11).

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

18 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
19 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff also alleged all employees were denied
20 compliant Meal and Rest Periods, minimum wages, overtime, accurate wage statements,
21 reimbursements, and suffered waiting time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA
22 Notice” attached thereto).

23 Specifically, Plaintiff alleges that he - and other employees - received “late” Meal Periods,
24 including those documented within Defendant’s Time Records. (Kuhn Decl., ¶12). Plaintiff also
25 challenged whether Defendant maintained lawful meal and rest periods. Plaintiff alleged he- and other
26 employees -were not properly compensated due to Defendant’s failure to maintain accurate time
27 records. (*Id.*) Finally, Plaintiff also challenged whether Defendant maintained lawful meal and rest
28 period policies. (*Id.*)

1 **C. ANALYSIS OF POTENTIAL LIABILITY, ON A REPRESENTATIVE BASIS**

2 The catalyst of this litigation concerned allegations that Mr. Hild was denied legally compliant
3 meal and rest periods, and was not paid for all Overtime hours worked. (Kuhn Decl.,¶13).

4 Investigations completed by Plaintiff’s counsel revealed that Defendant’s timekeeping policies and
5 employee records were not in compliance with California law. (Kuhn Decl.,¶14). However, these
6 investigations also revealed that the “rate of violation” by Defendant was significantly less than 100%.
7 (*Id.*). On many of those occasions, it appears that Defendant did, in fact, comply with the law. (*Id.*)

8 Based on the above, the maximum liability in a case of this type would be in the range of
9 **\$200,000.00 to \$300,000.00.** (Kuhn Decl.,¶15).

10 Moreover, Plaintiff’s counsel is aware of the Court’s discretion to mitigate penalties pursuant
11 to California Labor Code section 2699(e)(2). (Kuhn Decl.,¶16). To confirm, Plaintiff’s counsel
12 experienced the mitigation of “PAGA” penalties in *Carrington v. Starbucks Corp.* (2018) 30
13 Cal.App.5th 504. (*Id.*) In *Carrington*, Judge Bacal significantly mitigated PAGA penalties (\$5 per
14 violation), due to the efforts made by the employer to comply with the law. (*Id.*)

15 Plaintiff’s counsel agrees with Her Honor, and with the provision of the Labor Code, that
16 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
17 significant efforts to comply with the Labor Code.(Kuhn Decl.,¶17).

18 As the above factors exist in this case, it is the opinion of Plaintiff’s counsel that the settlement
19 is fair, adequate, and reasonable. Specifically, Plaintiff’s counsel’s understanding is that Defendant
20 has agreed to make changes to its policies, and amend them to the extent they do not comply with
21 California law. (Kuhn Decl.,¶18).

22 Plaintiff’s counsel, William B. Sullivan has approximately 28 years of experience in “class
23 action” litigation, both as plaintiff and defense counsel. (Kuhn Decl.,¶19). Plaintiff’s counsel, Eric
24 K. Yaeckel, has over 10 years of experience prosecuting class and representative action claims under
25 the California Labor Code. (*Id.*) Plaintiff’s counsel, Eric K. Yaeckel and William B. Sullivan, are the
26 attorneys of record in a matter that was recently heard (and favorably decided) before the California
27 Supreme Court titled *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58. (*Id.*) The *Donohue* matter
28 was a certified class and PAGA action. (*Id.*)

1 Plaintiff's counsel were lead counsel on approximately 60 employment "wage and hour" claims
2 with class action, or representative action allegations. (*Id.*) Based on said experience, it is the opinion
3 of Plaintiff's counsel that this settlement represents a fair and adequate payment. (Kuhn Decl., ¶20).

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

5 While Labor Code section 2699(*l*) requires a court to "review and approve any penalties sought
6 as part of a proposed settlement agreement," it does not provide any guidance as to what is considered
7 an 'adequate' allocation of these penalties. However, the California Court of Appeal has held that an
8 allocation of **zero dollars** to resolve PAGA claims may be appropriate:

9 The Nordstrom Commission Cases settlement agreement identifies liability for PAGA
10 penalties as a claim against Nordstrom and includes the following language: "The
11 Parties allocate \$0 to any Private Attorneys General Act penalty claim under Labor
12 Code § 2699 et seq., for penalty claims based on the Released Claims. During the Class
13 Period, Nordstrom paid Putative Class Members' commissions pursuant to a
14 commission plan that it contends was approved by the United States District Court in
15 Rios, and consequently, Nordstrom contends no claim for penalties of any nature is
16 valid." Thus, the PAGA penalty claims were at issue, and were resolved as a part of the
17 overall settlement of the case. We find no abuse of discretion in the trial court's
18 approval of the settlement agreement containing these terms.
19 *Nordstrom Com'n Cases* (2010) 186 Cal.App.4th 576, 589.

20 Moreover, District Courts in California have routinely approved settlement agreements which
21 allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v. Wells*
22 *Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011, No. C 05 4526 MHP) 2011 WL 672645, at *1
23 (approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement); see also
24 *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL
25 2117001, at *14 (approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement).

26 Defendant, and its counsel, deserve credit for their willingness to consider - and address - the
27 allegations. Specifically, Defense Counsel (who have extensive experience and knowledge in "Wage
28 and Hour" litigation) agreed to produce a substantial amount of documents and information necessary
to evaluate the parameters of settlement. Following the a full day Mediation and arms-length
negotiations, the parties have reached a proposed settlement that includes a payment of penalties under
PAGA. (Kuhn Decl., ¶21).

Here, the parties seek to allocate **\$45,333.33** of the total settlement to the Total Value of the
PAGA Fund. Of this amount, the LWDA will receive **\$34,000.00**. (Decl. Kuhn, ¶8, **Exhibit A**). The

1 remaining **\$11,333.33** will be allocated and distributed among the current or ex-employees within the
2 PAGA representation period. (*Id.*) Each PAGA Member would receive an average payment of
3 approximately **\$78.70**. (*Id.*)

4 The parties contend the settlement agreement amount is fair, adequate, and reasonable. (Kuhn
5 Decl., ¶22). Moreover, the PAGA settlement does not bar any employee from pursuing their own
6 individual Labor Code claims. (Kuhn Decl., ¶9); **Exhibit A**: “Released Claims” § 7, p. 3). The release
7 only applies to the PAGA claims for penalties, based upon the allegations in Plaintiff’s operative
8 Complaint. (*Id.*)

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

10 On **May 31, 2022**, Plaintiff’s counsel gave notice of the instant Settlement to the LWDA.
11 (Kuhn Decl., ¶5). To date, Plaintiff’s counsel has not received notice that the LWDA would intervene.
12 (*Id.*)

13 On **June 13, 2022** counsel uploaded copies of the *ex parte* application, including the Notice,
14 this supporting Memorandum, Declaration, Proposed Order & Judgment, and the **signed** Settlement
15 Agreement to the LWDA’s electronic filing portal. (Kuhn Decl., ¶6). To date, Plaintiff’s counsel has
16 not received any opposition from the LWDA. (*Id.*).

17 On **June 14, 2022**, the Court continued Plaintiff’s *Ex Parte* application re Settlement Approval,
18 and scheduled the instant hearing. (ROA#31).

19 On **July 14, 2022**, Plaintiff’s Counsel uploaded the instant Motion, and provided notice of the
20 hearing date, to the LWDA’s electronic filing portal. (Kuhn Decl. ¶7). To date, Plaintiff’s counsel has
21 not received any opposition from the LWDA. (*Id.*).

22 To date, Plaintiff has not received a response from the LWDA regarding the proposed
23 settlement. If the LWDA contacts Plaintiff’s counsel at any time prior to the August 5, 2022
24 hearing, Plaintiff’s counsel will provide an updated declaration to the Court. (Kuhn Decl. ¶23).

25
26
27
28 ///

1 **IV. CONCLUSION**

2 The parties respectfully request that the Court approve their proposed allocation of PAGA
3 penalties to the LWDA and the represented employees.
4

5
6
7 Dated: July 14, 2022

SULLIVAN & YAECKEL LAW GROUP, APC

8 

9 _____
Eric K. Yaeckel

Ryan T. Kuhn

10 Attorneys for Plaintiff LANCE HILD, in a
11 Representative capacity only, and on behalf of other
12 members of the general public similarly situated
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28