

1 Jeffrey M. Curtiss (239199)
Jeffrey M. Curtiss, Attorney at Law
2 jeff@jcurtisslaw.com
3 390 Bridge Parkway, Suite 220
Redwood City, CA 94065
Telephone: (650) 739-0200

4 Attorney for Plaintiff
5 BENJAMIN LEVINE

6 Daniel F. Pyne, III (131955)
Hopkins & Carley, A Law Corporation
7 dpyne@hopkinscarley.com
70 South First Street
8 San Jose, CA 95113

9 Attorneys for Defendants
EVOLUTION SURGICAL, INC.,
10 ROB LAW, KELLY COAN

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF ALAMEDA**
13

14 BENJAMIN LEVINE,

15 Plaintiff,

16 vs.

17 EVOLUTION SURGICAL, INC., a corporation,
KELLY COAN, an individual, ROB LAW, an
18 individual and DOES 1 to 10, inclusive,

19 Defendants.
20
21
22

Case No. 21-CV-000812

Judge: Hon. Frank Roesch

**NOTICE OF JOINT MOTION AND JOINT
MOTION FOR PAGA SETTLEMENT
APPROVAL; MEMORANDUM OF POINTS
AND AUTHORITIES**

Date: April 20, 2023
Time: 3:30 p.m.
Dept: 17

*[Filed Concurrently with Declaration of Jeffrey
M. Curtiss In Support of Joint Motion for PAGA
Settlement Approval; and [Proposed] Order]*

Reservation No.: 356750104468

Action Filed: October 14, 2021
Trial Date: January 17, 2023

23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
24

25 PLEASE TAKE NOTICE that, on April 20, 2023, at 3:30 p.m., or as soon thereafter as this
26 matter may be heard in Department 17 of the above-entitled court, located at 1221 Oak Street,
27 Oakland, California, the plaintiff Benjamin Levine ("Plaintiff" or "Levine") and the defendants
28

1 Evolution Surgical, Inc. ("EVO"), Kelly Coan and Rob Law (collectively, "Defendants") will and
2 hereby do move for an order approving the settlement of Levine's Private Attorneys General Act
3 ("PAGA"), California Labor Code §§ 2698-2699.5, claim.

4 This joint motion will be, and hereby is, made pursuant to pursuant to section 2699(1)(2)
5 of the California Labor Code on the grounds that PAGA settlements must be reviewed and
6 approved by the Court. The parties' settlement of this case is contingent upon on this Court's
7 approval of the proposed PAGA settlement.

8 This joint motion is based on this notice of motion, the accompanying memorandum of
9 points and authorities and declaration of Jeffrey M. Curtiss (and exhibits thereto), on the records on
10 file in this action, as well as such other evidence as may properly come before the Court at or before
11 the time of the hearing of the instant motion.

12
13 DATED: March 13, 2023

JEFFREY M. CURTISS, ATTORNEY AT LAW

14
15 By: 

16 Jeffrey M. Curtiss
17 Attorney for Plaintiff
BENJAMIN LEVINE

18 DATED: March 14, 2023

HOPKINS AND CARLEY, A LAW
CORPORATION

19
20
21 By: 

22 Daniel F. Pyne, III
23 Attorneys for Defendants
EVOLUTION SURGICAL, INC.,
24 ROB LAW, KELLY COAN
25
26
27
28

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

	Page
I. INTRODUCTION AND PROCEDURAL HISTORY	1
A. Plaintiff’s Individual and Representative Claims.....	1
B. The Parties’ Settlement Agreement.....	6
II. LEGAL ANALYSIS	7
A. Plaintiff Submitted A Copy Of The Settlement To The LWDA.....	8
B. Court Approval of a PAGA Settlement is Unlike Class Action Settlement Approval	8
C. The LWDA Did Not Investigate Plaintiff’s PAGA Allegations	8
D. The PAGA Settlement in this Case is Fair, Adequate, and Reasonable	9
III. CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>Baumann v. Chase Inv. Servs. Corp.</i> , 747 F.3d 1117 (9th Cir. 2014)	8
<i>Chu v. Wells Fargo Investments, LLC</i> 2011 WL 672645 (N.D. Cal. Feb. 16, 2011)	10
<i>Cunningham v. Leslie's Poolmart, Inc.</i> , 2013 U.S. Dist. LEXIS 90256, 2013 WL 3233211 (C.D. Cal. June 25, 2013)	8
<i>Franco v. Ruiz Food Prods., Inc.</i> 2012 WL 5941801 (E.D. Cal. Nov. 27, 2012)	10
<i>Garcia v. Gordon Trucking</i> 2012 WL 5364575 (E.D. Cal. Oct. 31, 2012)	10
<i>Hibbs-Rines v. Seagate Techs., LLC.</i> , No. C 08-05430 SI, 2009 WL 513496 (N.D. Cal. Mar. 2, 2009)	11
<i>Navarro v. Ordaz Cultured Marble & Onyx, Inc.</i> No. C 13-00847 LB, Doc No. 71, slip op. (N.D. Cal. Feb. 23, 2015)	10
<i>Raphael v. Tesoro Ref. & Mktg. Co. LLC</i> , No. 15-cv-2862-ODW, 2015 WL 5680310 (C.D. Cal. Sept. 25, 2015)	12
<i>Salazar v. McDonald's Corp.</i> , No. 14-cv-2096, 2017 WL 88999 (N.D. Cal. Jan. 5, 2017)	12

California Cases

<i>Alonzo v. First Transit, Inc.</i> , No. B277109, 2018 WL 5118644 (Cal. Ct. App. Oct. 22, 2018)	8, 11
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal. App. 4th 1157 (2008)	12
<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009)	7, 8, 11
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018)	10
<i>Davis v. Farmers Ins. Exchange</i> , 245 Cal. App. 4th 1302 (2016)	3, 4

1	<i>Franco v. Athens Disposal Co., Inc.</i> ,	
2	171 Cal. App. 4th 1277 (2009).....	8
3	<i>Thurman v. Bayshore Transit Management, Inc.</i> ,	
4	203 Cal. App. 4th 1112 (2012).....	10
5	California Statutes	
6	Business & Professions Code	
7	§ 17200	1
8	California Code Regs., Title 8	
9	§ 11070(2)(I)	2
10	California Labor Code	
11	§ 203	2, 4, 5
12	§ 204	2, 3, 4
13	§ 221	2, 3
14	§ 226(a).....	2, 4
15	§ 1171	2
16	§§ 2698-2699.5	1
17	§ 2699(i)	6
18	§ 2699(1)(2).....	6, 7, 8, 9
19	§ 2699(e)(2)	12
20	§ 2699.3(a)(2)(B).....	9
21	§ 2802	2, 5
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND PROCEDURAL HISTORY**

3 **A. Plaintiff's Individual and Representative Claims**

4 The plaintiff Benjamin Levine ("Plaintiff" or "Levine") worked for the defendant Evolution
5 Surgical, Inc. ("EVO" or "Defendant") as a Territory Manager between approximately January 5,
6 2017 and June 4, 2021. Levine alleges that EVO failed to compensate him according to the California
7 Labor Code during his four-and-one-half years of employment. Declaration of Jeffrey M. Curtiss
8 ("Curtiss Decl."), ¶ 2.)

9 On or about November 8, 2022, the parties entered into a confidential settlement agreement,
10 resolving Levine's individual claims. The settlement agreement is contingent on the Court granting
11 the instant joint motion for settlement approval of Levine's Private Attorneys General Act ("PAGA")
12 claim for \$5,000, all of which is to be distributed to the Labor and Workforce Development Agency
13 and the aggrieved employees (and none of which would go towards Levine's attorney's fees and
14 costs).¹ (Curtiss Decl., ¶ 3.)

15 Levine brought individual claims against EVO for unpaid overtime, unlawful wage
16 deductions, improper wage statements, waiting time penalties, unpaid business expenses, violation
17 of Business & Professions Code § 17200, bad faith, breach of contract and the untimely provision of
18 his personnel file.²

19
20 ¹ The PAGA statute is set forth at California Labor Code §§ 2698-2699.5.

21 ² Levine's individual claims are premised, in general, on the following contentions:

- 22
- 23 • Levine was misclassified as an outside sales representative and, as a result, is entitled to
unpaid overtime.
 - 24 • EVO made improper deductions from Levine's commissions.
 - 25 • Levine should have been paid twice per month, with corresponding wage statements.
 - 26 • Levine did not receive adequate reimbursement for business expenses.
 - 27 • Levine is entitled to waiting time penalties arising out of the failure to pay all wages due
and owing at the time of termination.
 - 28 • Levine is entitled to penalties for EVO's failure to provide Levine's personnel file in a
timely manner.

(Curtiss Decl., Ex. A.)

1 Levine's individual claims differ in scope from those of the PAGA claim. There is no PAGA
2 claim for misclassification, and, hence, unpaid overtime.³ Likewise, there is no PAGA claim for
3 failure to provide a personnel file in a timely manner. (Curtiss Decl., ¶ 5.) The thrust of the PAGA
4 claim is that EVO: (1) did not pay wages two times per month, as required by Labor Code § 204; (2)
5 made unlawful deductions from wages, in violation of Labor Code § 221; (3) issued inaccurate or
6 incomplete wage statements, in violation of Labor Code § 226(a); (4) owes waiting time penalties
7 per Labor Code § 203 for the failure to pay out all wages due and owing at the time of termination
8 of employment; and (5) failed to reimburse employee business expenses, as required by Labor Code
9 § 2802.⁴ EVO generally denied Plaintiff's PAGA allegations in its answer. The substance of this
10 general denial has been further elucidated through the course of discovery in this action. (*Id.*)

11 The parties have engaged in extensive discovery, including propounding and responding to
12 special interrogatories and requests for production. Levine took the depositions of the principals of
13 EVO, Kelly Coan and Rob Law, as well as a Person Most Knowledgeable deposition of EVO, which
14 included employees Eric Wiederhold, Vice President of Sales, Dalia Summerour, Director of
15 Finance, Mary-Anne Boutiette, Director of Human Resources, and Kelly Coan, Principal. (Curtiss
16 Decl., ¶ 6.)

17 Through the course of the extensive discovery conducted in this action, EVO has defended
18
19

20 ³ Levine contends that, unlike most of the aggrieved employees, he does not qualify as an
21 exempt outside salesperson, because he was not a salesperson. He was a manager. Labor Code §
22 1171 excludes from the overtime laws employees who are outside salespersons, defined as someone
who regularly works more than half their working time engaged in sales activities outside the
workplace. Cal. Code Regs., tit. 8, § 11070(2)(I).

23 ⁴ The number of "aggrieved employees" covered by the complaint during the relevant statutory
24 period – i.e., from July 16, 2020 to the date of Court approval, if any -- is thirty-nine. (Curtiss Decl.,
¶ 9.)

25 Prior to filing this action, Levine exhausted his administrative remedies under PAGA by
26 sending a letter to the PAGA Administrator of the California Labor and Workforce Development
27 Agency ("LWDA Letter") on July 16, 2021, providing written notice of alleged violations of the
California Labor Code by Defendants and seeking penalties stemming from such violations. (Curtiss
Decl., ¶ 4.)
28

1 against the PAGA claim by asserting:

- 2 • With respect to the allegation that EVO did not pay commission wages two times per
3 month, as required by Labor Code § 204:
 - 4 ○ EVO asserts that commission wages are only due and owing once the
5 commissions are both earned and capable of calculation. (See, e.g., Dept. Labor
6 Standards Enforcement Opinion Letter (Dec. 9, 2002).) EVO asserts that its
7 outside sales representatives were paid one time per month during the relevant
8 statutory period, because the calculation of commissions depended on information
9 provided by Arthrex, Inc. (“Arthrex”), the manufacturer of the medical devices
10 EVO sold. This information was provided by Arthrex only once per month.
 - 11 ○ EVO paid commissions promptly upon being provided the information from
12 Arthrex which formed the basis for commission calculations. Thus, EVO did not
13 fail to pay commissions during pay periods when those commissions were both
14 earned and capable of calculation, because EVO contends that once it had the
15 requisite information to pay commissions to its outside sales representatives, the
16 commissions were paid (and paid in a timely manner). (Curtiss Decl., ¶ 7.)
- 17 • With respect to the allegation that EVO made unlawful deductions from wages, in
18 violation of Labor Code § 221:
 - 19 ○ EVO asserts that it did not deduct from the commissions otherwise payable to its
20 salespersons except as required by law or as authorized and agreed by the
21 salesperson(s) in question. In essence, EVO cites to the proposition that an
22 employer can make deductions for the direct costs associated with a sale, i.e. for
23 things like shipping, the cost of the product being sold, or the cost of free products
24 offered by the salesperson to induce the sale. *Davis v. Farmers Ins. Exchange*,
25 245 Cal. App. 4th 1302, 1332-1333 (2016).
 - 26 ○ The Company calculated commissions payable to its salespersons by first
27 calculating the revenue allocable to salespersons within a territory as a result of
28 sales generated within the territory, then deducting costs associated with the sales

1 from the territory revenue to determine the net revenue payable to salespersons
2 within the territory, and then multiplying each salesperson's commission
3 percentage by the net revenue for the territory to determine the commissions
4 payable to the individual salesperson.

- 5 ○ Evolution Surgical provided its salespersons with written commission statements
6 reflecting its calculation of commissions paid to them, and it provided them with
7 written confirmation of periodic changes in their commission rate, which they
8 acknowledged receiving. (*Id.*)

- 9 • With respect to the allegation that EVO issued inaccurate or incomplete wage statements,
10 as required by Labor Code § 226(a):

- 11 ○ The claim is premised on EVO's failure to make commission payments two times
12 per month, which would result in two wage statements per month, as opposed to
13 the single wage statement per month which EVO actually issued.

- 14 ○ EVO asserts that, for the same reasons that commission payments were only
15 earned and capable of calculation one time per month (see *infra*), only one wage
16 statement per month needed to be issued. In other words, because EVO sales
17 representatives were properly paid one time per month, only one wage statement
18 per month was required under Labor Code § 204. (*Id.*)

- 19 • With respect to the allegation that EVO owes waiting time penalties per Labor Code §
20 203 for failure to pay out all wages due and owing at the time of termination of
21 employment:

- 22 ○ EVO asserts that Labor Code § 203 waiting time penalties are only available to
23 employees who have ended their employment during the relevant statutory period,
24 because waiting time penalties only accrue after the end of the employment
25 relationship. Further, Labor Code § 203 waiting time penalties are only available
26 for employers that intentionally withhold wages.

- 27 ○ Of the thirty-nine aggrieved employees, thirteen ended their employment
28 relationship with EVO during the relevant statutory period. Of these thirteen

1 employees, EVO asserts that it both had a good faith belief that all wages due and
2 owing were paid by the time of termination, and also that, in fact, all such wages
3 due and owing were in fact paid. Thus, there is no liability by the company for
4 waiting time penalties.

- 5 ○ The claim for waiting time penalties is, in essence, a derivative claim. An essential
6 predicate for such a claim is the non-payment of wages. Here, the claim for non-
7 payment of wages rests on the existence of unlawful deductions from
8 commissions. Thus, to the extent the deductions from commissions were lawful,
9 as EVO asserts, there is no derivative liability for waiting time penalties. (*Id.*)

10 With respect to the allegation that EVO failed to reimburse employee business expenses,
11 as required by Labor Code § 2802:

- 12 ○ Pursuant to expense reimbursement policies produced during the course of
13 discovery in this action, EVO paid a monthly stipend of \$500.00 or \$750.00 per
14 month (depending on the position) to its salespeople to reimburse them for
15 mileage, internet connectivity and cellular connectivity charges that they incurred
16 in the course and scope of performing their job duties.
- 17 ○ To the extent that a salesperson believed that his or her actual expenses for
18 mileage, internet connectivity and cellular connectivity exceeded \$500.00 in any
19 month, the Company permitted the salesperson to submit documentation
20 supporting reimbursement in excess of that amount. The Company reimbursed
21 salespeople for expenses that they claimed they incurred that were not covered by
22 the monthly stipend. (*Id.*)

23 After extensive, arms-length negotiations by and among the parties and their respective
24 counsel, including a full-day private mediation on September 28, 2021 before the Honorable Kevin
25 J. Murphy, the parties reached this settlement, completely resolving this matter, including Plaintiff's
26 individual claims and the representative PAGA claim. (Curtiss Decl., ¶ 9.) The PAGA settlement of
27 \$5,000 is a compromise by both parties and reflects a reasonable assessment of the risks for each, as
28 well as the recognition that continued litigation will cause further extensive and costly discovery for

1 all parties, followed by a jury trial, and that further litigation would cause inconvenience, distraction,
2 disruption, delay and expense disproportionate to the potential benefits of litigation. (Curtiss Decl.,
3 ¶ 10.)

4 During the relevant statutory period of July 16, 2020 to the time of settlement, there are thirty-
5 nine employees who worked a total of 777 pay periods. A settlement of \$6.44 per employee, per pay
6 period, is reasonable under the circumstances. (Curtiss Decl., ¶ 10.) With respect to the proposed
7 settlement, pursuant to Labor Code section 2699(i), 75% of the total amount would be awarded to
8 the California Labor and Workforce Development Agency and 25% would be awarded to the thirty-
9 nine aggrieved employees.

10 **B. The Parties' Settlement Agreement**

11 On September 28, 2021, the parties engaged in a full day mediation before the Honorable
12 Kevin J. Murphy, an experienced mediator of California employment law actions. Although the
13 mediation was unsuccessful on that day, after engaging in extensive discovery, including written
14 discovery and depositions of EVO employees, as well as the plaintiff Benjamin Levine, and the
15 named defendants Kelly Coan and Rob Law, the parties engaged in further settlement negotiations
16 and were eventually able to privately negotiate a complete settlement of Plaintiff's claims. The
17 parties previously negotiated the confidential settlement of Plaintiff's individual claims and all
18 claims for Plaintiff's attorney's fees, litigation expenses and costs associated with the litigation of
19 this action. The parties separately negotiated a complete settlement of Plaintiff's PAGA claim
20 ("PAGA Settlement Agreement" herein), for which the parties now jointly seek this Court's approval
21 under Labor Code section 2699(1)(2).

22 As part of the PAGA Settlement Agreement executed by the parties on or about November
23 8, 2022, EVO agreed to pay \$5,000.00 ("PAGA Settlement Amount" herein) in consideration for
24 full and complete release of Plaintiff's representative claims under PAGA. Under section 2699(i) of
25 the California Labor Code, Plaintiff and the aggrieved employees are entitled to recover 25% of the
26 PAGA Payment, or \$1,250.00, with the remaining 75%, or \$3,750.00, to be paid directly to the Labor
27 and Workforce Development Agency ("LWDA").

28 The parties have agreed that, upon entry of an order approving this settlement, the LWDA

1 and any of EVO's employees who worked between July 16, 2020 and the date on which the Court
2 approves this Settlement Agreement, will be barred from pursuing any action for civil penalties under
3 PAGA against EVO stemming from any violations of the California Labor Code.

4 The PAGA Settlement Amount serves as a full and complete satisfaction of the PAGA claims
5 asserted on behalf of the aggrieved employees, which is defined as sales representatives who worked
6 for Defendant during the period of July 16, 2020 through the date of the Court's Order approving the
7 Settlement Agreement. Nothing in this Joint Motion, the individual settlement agreement, the PAGA
8 Settlement Agreement, nor the proposed order will prevent any current or former employee -- except
9 for Benjamin Levine -- from claiming or pursuing individual claims against EVO for violations of
10 the California Labor Code.

11 The parties and their respective counsel agree that the settlement of the PAGA claims for the
12 consideration and on the terms set forth herein is fair, reasonable, and adequate, given all known
13 facts and circumstances and the risks inherent in litigation, including potential appellate issues. In
14 addition, Plaintiff, as a designated private attorney general, believes the settlement amount entered
15 into is in the best interest of the LWDA and that the PAGA Settlement is fair, reasonable, and
16 adequate, given the inherent risk of litigation.

17 The Parties now request the Court's approval of the Parties' binding PAGA Settlement
18 Agreement of this representative action entitled *Benjamin Levine v. Evolution Surgical, Inc. et al*
19 (San Mateo County Superior Court) (the "Action"). Plaintiff's counsel represents that he will provide
20 the LWDA a copy of this motion pursuant to Labor Code § 2699(1)(2). (Curtiss Decl., ¶ 4.)

21 **II. LEGAL ANALYSIS**

22 Under Labor Code § 2699 (1)(2), the parties must obtain approval of their PAGA settlement
23 from the Court and hereby seek the Court's approval. As explained by the California Supreme Court
24 in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), the Parties do not have to follow class action
25 procedural rules in this PAGA Action and therefore need not follow the class action procedures for
26 obtaining an approval of the settlement. Other than the requirement in section 2699 (1)(2) that the
27 court "review and approve" a settlement of a civil action filed under PAGA, neither the California
28 legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA]

1 has provided any definitive answer to [the] vexing question” of the appropriate standard for
2 approving the settlement of PAGA claims, whether brought as a class or representative action.
3 *Alonzo v. First Transit, Inc.*, No. B277109, 2018 WL 5118644, at *8 (Cal. Ct. App. Oct. 22, 2018).

4 **A. Plaintiff Submitted a Copy of the Settlement to the LWDA**

5 Labor Code § 2699(1)(2) requires that any proposed settlement of a PAGA action be
6 submitted to the LWDA. Plaintiff will complete this requirement by submitting the instant motion
7 and supporting papers to the LWDA through its online submission portal. (Curtiss Decl. ¶ 4.)

8 **B. Court Approval of a PAGA Settlement is Unlike Class Action Settlement Approval**

9 Labor Code § 2699(1)(2) provides that the superior court shall review and approve any
10 settlement of any civil action filed pursuant to the PAGA. “Since a representative action under PAGA
11 allows an individual employee to seek monetary relief arising out of unlawful conduct directed at a
12 group of employees, PAGA actions bear a superficial resemblance to a type of class action. There
13 are, however, several factors distinguishing representative PAGA actions and class actions. First, a
14 unique feature of a representative action under PAGA is that it is fundamentally a law enforcement
15 action designed to protect the public and penalize the employer for past illegal conduct. The purpose
16 is not to collect damages on behalf of other employees or provide restitution to victims of Labor
17 Code violations.” *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. LEXIS 90256, *16-17,
18 2013 WL 3233211 (C.D. Cal. June 25, 2013); *see Franco v. Athens Disposal Co., Inc.*, 171 Cal. App.
19 4th 1277, 1300 (2009) (“Restitution is not the primary object of a PAGA action, as it is in most class
20 actions.”).

21 Moreover, there is no requirement that the Court apply the same level of scrutiny in approving
22 a PAGA settlement as it does with class actions. Indeed, the California Supreme Court has held that
23 an employee who sues an employer under the PAGA need not satisfy class action requirements.
24 *Arias*, 46 Cal. 4th at 974. For example, “PAGA has no notice requirements for unnamed aggrieved
25 employees, nor may such employees opt out of a PAGA action.” *Baumann v. Chase Inv. Servs.*
26 *Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014).

27 **C. The LWDA Did Not Investigate Plaintiff's PAGA Allegations**

28 The Labor Code requires that a proposed PAGA settlement be sent to the LWDA at the same

1 time that it is submitted to the Superior Court for review and approval. Cal. Lab. Code § 2699(1)(2).
2 However, the Labor Code does not authorize the LWDA to interfere with, obstruct, object, or
3 otherwise impede a request for approval of a PAGA settlement. Indeed, the time for the LWDA to
4 comment on a settlement is during the short window in which it must inform the aggrieved employee
5 that it declines to investigate. Cal. Lab. Code § 2699.3(a)(2)(B). Once that window shuts, the
6 aggrieved employee is deputized to act on behalf of the LWDA in a civil action. The Labor Code is
7 clear that all that is required to obtain court approval of a PAGA settlement is for the proposed
8 settlement to be sent to the LWDA. Lab. Code § 2699(1)(2).

9 Here, the LWDA had opportunity to investigate and obtain civil penalties by citation after
10 Plaintiff submitted his PAGA notice to the LWDA. (Curtiss Decl., ¶ 4). “If the [LWDA] intends to
11 investigate the alleged violation, it shall notify the employer and the aggrieved employee or
12 representative by certified mail of its decision within 65 calendar days of the postmark date of the
13 notice.” Lab. Code § 2699.3(a)(2)(B). “Within 120 calendar days of that decision, the [LWDA] may
14 investigate the alleged violation and issue any appropriate citation.” *Id.* That ship has sailed. All that
15 is required now regarding LWDA involvement is for the requisite documentation to be submitted to
16 the LWDA pursuant to Labor Code § 2699(1)(2). That has been done. (Curtiss Decl., ¶ 4).

17 **D. The PAGA Settlement in this Case is Fair, Adequate, and Reasonable**

18 Plaintiff conducted a thorough investigation into the facts of the action, including by
19 propounding formal written discovery and taking depositions. This review and analysis included: (1)
20 information bearing on the number of “aggrieved employees” and the number of pay periods during
21 the relevant statutory period; (2) wage statements for Levine and the aggrieved employees; (3)
22 commission statements, including any deductions from commissions; (4) expense reimbursements;
23 (5) Company policies regarding expense reimbursements; (6) all email messages during Levine’s
24 employment; and (7) transcripts for the depositions discussed above. I closely reviewed the
25 documents and data provided by EVO to determine the amount of potential PAGA penalties owed
26 to Levine and other remedies potentially available to Levine and the aggrieved individuals based on
27 the claims in the action. (Curtiss Decl., ¶ 8.)

28 As a result of this investigation, Levine learned that there are a maximum of thirty-nine total

1 aggrieved employees, including Levine, throughout the State of California for the period between
2 July 16, 2020 and the settlement date (the “PAGA period”). These thirty-nine aggrieved individuals
3 worked approximately 777 total pay periods during this time, or roughly 20 pay periods per aggrieved
4 employee (calculated by taking 777 pay periods divided by thirty-nine aggrieved employees). The
5 amount of the settlement therefore equals an approximate penalty of \$128 per aggrieved employee.
6 This amount is fair and reasonable considering the probability of recovery in this matter and the role
7 of judicial discretion in right-sizing any penalty amount.

8 The settlement amount is fair and reasonable in light of applicable case law:

- 9 • *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1136 (2012)
10 (“In summary, the trial court stated that the evidence showed “that after January 1,
11 2003 for meal periods and after June 7, 2004 for rest periods, defendants took their
12 obligations under Wage Order No. 9 seriously and attempted to comply with the law.”
13 In light of that undisputed finding, and the facts and circumstances that the trial court
14 specified in its statement of decision in support of the finding, the trial court
reasonably determined that imposition of the maximum statutory penalty amount
against defendants would be unjust — if not also arbitrary, oppressive, or
confiscatory.”).
- 15 • *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (“Although the trial
16 court may have disagreed with Starbucks regarding the issue of liability, it clearly
17 took the circumstances proffered by Starbucks into consideration when it imposed the
18 penalty, as evident from the significant reduction of the \$50 maximum penalty (per
19 initial violation) to the penalty imposed—only \$5 per initial violation. The trial court
20 stated this reduction was warranted because imposing the maximum penalty would
be unjust, arbitrary, and oppressive based on Starbucks’s “good faith attempts” to
comply with meal break obligations and because the court found the violations were
minimal.”).
- 21 • Furthermore, PAGA settlements of amounts similar to \$5,000 have been approved as
22 part of several larger global settlements. *See, e.g., Navarro v. Ordaz Cultured Marble*
23 *& Onyx, Inc.* (N.D. Cal. Feb. 23, 2015) No. C 13-00847 LB, Doc No. 71, slip op. at
24 *2 (approving \$20,000 PAGA settlement for 13 aggrieved employees); *Franco v.*
25 *Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14
26 (approving PAGA penalties of \$10,000 for 2,055 class members and aggrieved
27 employees); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575,
28 at *3 (approving PAGA settlement payment of \$10,000 for approximately 1,869 class
members and aggrieved employees); *Chu v. Wells Fargo Investments, LLC* (N.D. Cal.
Feb. 16, 2011) 2011 WL 672645, at *1 (approving \$10,000 PAGA settlement
payment for approximately 2,752 class members and aggrieved employees)). Here,
in contrast, this is a settlement of a small PAGA claim, involving only thirty-nine total
employees.

Further, the procedure by which the settlement was reached is sound:

- The California appellate court in *Alonzo v. First Transit, Inc.*, No. B277109, 2018 WL 5118644, (Cal. Ct. App. Oct. 22, 2018), approved a PAGA settlement amount of \$13,333.33 and found that the PAGA settlement “was entered into in good faith” and was “fair, reasonable, and adequate” where the parties “thoroughly litigated” the case before reaching settlement, where the parties attended mediation with an experienced employment law mediator, where the parties reached the settlement through arm’s-length bargaining in a mediation, and where investigation and discovery were sufficient to fully apprise the court and counsel of the claims, which gave the settlement a presumption of fairness. Additionally, the Court approved the PAGA penalty award after taking into consideration “that Plaintiffs admitted that Defendants had significant defenses which could result in greatly reduced PAGA penalties” to conclude that the allocation of settlement funds to the PAGA penalty to be “fair, reasonable, and adequate.” *Id.*, at *8.

Approval of the Parties’ PAGA Settlement Agreement is warranted because counsel for all parties agree that the amount allocated for civil penalties under PAGA is fair and reasonable for the reasons set forth in the Declaration of Jeffrey M. Curtiss. Specifically, this PAGA settlement is reasonable for the following reasons:

1. The number of alleged “aggrieved employees” is small, totaling only thirty-nine employees during the PAGA period.
2. The PAGA settlement was negotiated as part of an informed, non-collusive, arms-length negotiation following a full day mediation with a private mediator, extensive discovery and subsequent attorney-to-attorney negotiations.
3. The total PAGA settlement amount of \$5,000 is not subject to deduction for attorneys’ fees, as Levine’s counsel is not asserting a claim for fees for this PAGA settlement.
4. Levine and his counsel bear significant risk in terms of obtaining full recovery of all their claimed PAGA penalties. EVO has good faith arguments that it properly paid and reimbursed Levine and the other sales representatives.
5. To recover under PAGA, Levine would -- arguably -- have to prevail on behalf of each of the aggrieved employees. *Hibbs-Rines v. Seagate Techs., LLC.*, No. C 08-05430 SI, 2009 WL 513496, at *4 (N.D. Cal. Mar. 2, 2009) (“Plaintiff will have to prove Labor

Code violations with respect to each and every individual on whose behalf plaintiff seeks to recover civil penalties under PAGA.”). This could be a tall order.

6. The differences among the “aggrieved employees” as to work locations, schedules, miles driven and commission deductions could have presented manageability issues for the Court, which may undermine this claim. *Salazar v. McDonald's Corp.*, No. 14-cv-2096, 2017 WL 88999, at *7-9 (N.D. Cal. Jan. 5, 2017) (striking representative PAGA claims as unmanageable where underlying claims would require individualized determinations); see also *Raphael v. Tesoro Ref. & Mktg. Co. LLC*, No. 15-cv-2862-ODW, 2015 WL 5680310 at *2-3 (C.D. Cal. Sept. 25, 2015) (granting motion for judgment on the pleadings where resolving a PAGA claim would require the court to “engage in a multitude of individualized inquiries making the PAGA action unmanageable and inappropriate”).
7. This PAGA settlement only covers PAGA claims for the period covered by the PAGA period. It does not affect any other employee’s ability to bring their own claims for non-PAGA claims.
8. Last but certainly not least, even in the event liability is established under Levine’s PAGA claim, the Court may exercise its discretion to reduce any award. Labor Code § 2699(e)(2) provides that in an action by an aggrieved employee to recover penalties under PAGA, a court may award a lesser amount than the maximum civil penalty amount specified by this part 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. See *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1212 (2008).

Thus, the Court should approve the Parties’ PAGA Settlement Agreement.

///

///

///

///

///

1 **III. CONCLUSION**

2 Based on the foregoing, the Parties respectfully requests that the Court grant this motion and
3 approve the Parties' PAGA settlement, and dismissing the action accordingly.

4
5 DATED: March 13, 2023

JEFFREY M. CURTISS, ATTORNEY AT LAW

6
7 By: 
8 Jeffrey M. Curtiss
9 Attorney for Plaintiff
BENJAMIN LEVINE

10 DATED: March 14, 2023

HOPKINS AND CARLEY, A LAW
CORPORATION

11
12
13 By: 
14 Daniel F. Pyne, III
15 Attorneys for Defendants
EVOLUTION SURGICAL, INC.,
16 ROB LAW, KELLY COAN
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1150 West 79th Street, Los Angeles, California, 90044. On March 14, 2023, I served a copy of the within document(s):

**NOTICE OF MOTION AND JOINT MOTION FOR PAGA SETTLEMENT APPROVAL;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Daniel F. Pyne, III
Karishma Borkar
Hopkins & Carley, A Law Corporation
70 South First Street
San Jose, CA 95113
dpayne@hopkinscarley.com – Email
kborkar@hopkinscarley.com – Email

Attorneys for Defendants
EVOLUTION SURGICAL, INC.,
ROB LAW, KELLY COAN

California Labor & Workforce Development Agency
800 Capitol Mall, Suite 5000 (MIC-55)
Sacramento, CA 95814

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on March 14, 2023, at Los Angeles, California.


DeEtra Crudup



Superior Court of Alameda County Public Portal

Make a Reservation

LEVINE vs EVOLUTION SURGICAL, INC., A CORPORATION, et al.

Case Number: 21CV000812 Case Type: Unlimited Civil Category: Other Employment Complaint Case
Date Filed: 2021-10-14 Location: Rene C. Davidson Courthouse - Department 17

Reservation

Case Name:

LEVINE vs EVOLUTION SURGICAL, INC., A
CORPORATION, et al.

Case Number:

21CV000812

Type:

Motion re: (Joint Motion for PAGA Settlement Approval)

Status:

RESERVED

Filing Party:

Benjamin Levine (Plaintiff)

Location:

Rene C. Davidson Courthouse - Department 17

Date/Time:

04/20/2023 3:30 PM

Number of Motions:

1

Reservation ID:

356750104468

Confirmation Code:

CR-PRX3PQFWOFGDSHMQY

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
Court Technology Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount:

\$1.00

Type:

Visa

Account Number:

XXXX0311

Authorization:

057951

Payment Date:

1969-12-31

 [Print Receipt](#)

 [Reserve Another Hearing](#)

 [View My Reservations](#)

[Terms of Service](#)

[Contact Us](#)

[About this Site](#)

Copyright © Journal Technologies, USA. All rights reserved.