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Attorney for Plaintiffs GLORIA COLUNGA and NOE RAMIREZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

GLORIA COLUNGA, an individual; and)	Case No. 37-2022-00014365-CU-WT-CTL
NOE RAMIREZ, an individual;)	
)	PLAINTIFFS' EX PARTE
Plaintiffs,)	APPLICATION FOR ORDER
)	APPROVING THE PARTIES' PROPOSED
vs.)	SETTLEMENT OF CIVIL PENALTIES
)	UNDER THE PAGA
MFM ENTERPRISES, INC., a California)	
Corporation; MARK MOOTHART, an)	
individual; and DOES 1 through 30,)	
inclusive,)	
Defendants.)	Trial: June 16, 2023
)	
)	
)	Date: November 21, 2022
)	Time: 8:30 a.m.
)	Judge: Hon. Timothy Taylor
)	Dept. C-72

Plaintiffs Gloria Colunga and Noe Ramirez hereby respectfully seek Court-approval of their proposed settlement agreement with their former employer Defendant MFM Enterprises, Inc. and its owner Mark Moothart, with respect to the settlement's allocation of funds for civil penalties for unpaid wages and expenses, and unpaid meal and rest break premiums, under the Private Attorney General Act of 2004 ("the PAGA"). The parties participated in an all-day

1 mediation on November 3, 2022, and have reached a settlement calling for the payment of
2 \$90,000 in total for all claims – inclusive of both torts not falling under the PAGA, and
3 Plaintiffs’ wage and hour claims -- subject to this Court’s approval of the allocation of \$2,000 of
4 the total settlement towards the claimed PAGA civil penalties. (Exhibit 1)

5 The PAGA allows for the recovery of civil penalties of a maximum of \$100 for the first
6 pay period in which a violation occurs, and \$200 for each subsequent pay period in which a
7 violation occurs, subject to a one-year statute of limitations. The Court has the discretion to
8 approve the amount of civil penalties proposed in a settlement agreement, by consideration of the
9 nature and extent of the claims as a whole, the risks involved, the expected duration of ongoing
10 litigation, and the circumstances and equities present in the particular case.

11 In this matter, the heart of Plaintiff Colunga’s case centered around her claims of
12 unlawful sexual harassment, wrongful constructive termination of employment, and intentional
13 infliction of emotional distress, which do not fall under the gambit of the PAGA. The larger
14 share of the proposed settlement funds are being allocated to her tort claims, while a significantly
15 smaller portion is being attributed to both Plaintiffs’ wage and hour violation claims. The monies
16 proposed for the wage and hour violations are to go towards the alleged unpaid wages
17 themselves, warranting a distribution of an even smaller amount towards the \$100/\$200 civil
18 penalties, subject to this Court’s approval under the PAGA. A copy of the proposed settlement
19 has been submitted to the LWDA in conjunction with the filing of the instant application, in
20 accordance with the requirements of the PAGA.
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1 I.

2 **STATEMENT OF FACTS**

3 **A. UNDERLYING FACTS**

4 This action arises out of Plaintiffs' employments with Defendant MFM Enterprises, Inc.
5 ("MFM"), a t-shirt silk-screening business in San Diego. Both Plaintiffs are Spanish speakers
6 and were hourly, non-exempt employees engaged in daily tasks surrounding the processing of t-
7 shirt orders. Plaintiff Colunga became a supervisor but remained an hourly non-exempt worker.
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9 Ms. Colunga worked for Defendants for 15 years before the wrongful constructive
10 termination of her employment in February, 2021. Starting earnestly in 2019, Mr. Moothart
11 began to subject Ms. Colunga to sexual harassment, which escalated over time and became so
12 intolerable that she had no option ultimately but to resign. As alleged in the case, Mr. Moothart
13 mimicked with his hands grabbing both of her breasts, and he touched her rear-end with his hand
14 on multiple occasions, more frequently doing so during the Covid-19 pandemic when most of
15 MFM's hourly employees were not on-site to witness it. As she testified at deposition, he
16 subjected her to nonconsensual neck massages, breathed down her neck, and he frequently
17 demanded that she tell him what she did during her evenings at home. Ms. Colunga, who, when
18 she first began working for Defendants, knew no English, was too intimidated by Mr. Moothart's
19 frequent anger tantrums and yelling to protest, and she needed the job.
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21 Plaintiff Noe Ramirez Ramirez worked for Defendants for 9 years until he quit in May,
22 2021. Both Plaintiffs have alleged that they were prevented from taking 10-minute rest breaks in
23 the morning due to Mr. Moothart's instructions. Mr. Moothart precluded Ms. Colunga from
24 taking her lunch breaks away from the office and his control, and more often than not, he
25 interrupted both her and Mr. Ramirez's lunches with questions, commands and instructions.
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Both Ms. Colunga and Mr. Ramirez have alleged that they were required after their 8 hour shifts ended to perform tasks and deliveries for Defendants off-the-clock, including taking multiple boxes to UPS for shipment, delivering items to customers, and purchasing things for the business. They claim they were not paid for their time or their mileage.

B. PROCEDURAL HISTORY AND SETTLEMENT

Through present counsel, on or about December 30, 2021, an administrative complaint of discrimination was duly filed on Ms. Gloria Colunga's behalf with the California Department of Fair Employment and Housing, or Civil Rights Department. The complaint set forth the basis for Ms. Colunga's intended sexual harassment and wrongful constructive termination of employment claims.

Also on December 30, 2021, again through counsel, both Plaintiffs Gloria Colunga and Noe Ramirez submitted a claim with the California Labor and Workforce Development Agent, setting forth the basis for their intended claims for unpaid wages, business expenses, missed meal and rest breaks, and inaccurate wage statements.

On April 18, 2022, the present case was filed in the San Diego County Superior Court. In the Complaint filed, Plaintiffs assert nine causes of action: (1) sexual harassment; (2) wrongful constructive termination of employment; (3) intentional infliction of emotional distress; (4) failure to pay all wages; (5) failure to allow meal breaks; (6) failure to allow rest breaks; (7) failure to furnish accurate wage statements; (8) failure to reimburse business expenses; and (9) unfair business practices. On the first three cases of action, the Complaint seeks economic and non-economic damages, punitive damages and attorney's fees and costs. The fourth through ninth causes of action contain claims for wage and hour violations, and seek statutory penalties as well as civil penalties under the Private Attorney General Act of 2004 ("the PAGA") for Plaintiffs. The

1 Complaint does not contain allegations for any aggrieved employees other than Plaintiffs Gloria
2 Colunga and Noe Ramirez, and no other aggrieved employees have been identified or come
3 forward. No representative class is alleged in the Complaint.

4 The parties have been engaged in written discovery, and defense counsel has taken the
5 deposition of Plaintiff Colunga. Plaintiffs have been poised to take the depositions of Defendant
6 Moothart and MFM's office manager, among others.

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8 On November 3, 2022, the parties attended a full-day mediation before Anthony Pantoni
9 Esq. of Signature Resolution. During mediation, each party was represented by counsel and
10 Plaintiffs had a Spanish-speaking individual present to interpret for them. After a long day of
11 mediating, the parties ultimately reached a settlement agreement conditioned upon this Court's
12 approval of the term of the agreement with respect to the disposition of Plaintiffs' claimed
13 entitlement to civil penalties under the PAGA. (Please see the executed Memorandum of
14 Understanding attached as Exhibit 1) Of the confidential settlement amount of \$90,000, \$2,000 is
15 proposed to be allocated to the PAGA penalties and subject to Court approval, per Labor Code
16 Section 2699.3(b)(4). Of that dollar amount, 75 percent would be remitted to the State of
17 California, per the Labor Code, and 25 percent would be remitted jointly to Plaintiffs Gloria
18 Colunga and Noe Ramirez.
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21 The greater share of Plaintiffs' portion of the settlement is being allocated to Ms. Colunga's
22 sexual harassment and related tort claims, with \$6,901.12 then being allocated to her wage claims
23 and the remaining \$10,000 being allocated to Mr. Ramirez's wage claims. The civil penalties for
24 those unpaid wages have been agreed to be \$2,000. Counsel for the respective parties each agree
25 that the sum of \$2,000 is a fair and reasonable amount to be allocated to Plaintiffs' PAGA civil
26 penalties claims, in light of the multiple causes of action and defenses (several of which are not
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1 based on alleged violations of the Labor Code), the disputed facts, the remedies available to
2 Plaintiffs were they to succeed on their claims, and the amount of the settlement. Counsel are in
3 agreement and jointly seek the Court's approval of the settlement of the PAGA portion of the case.
4 The parties have negotiated a written settlement agreement which follows the terms of the MOU
5 signed at the mediation.
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7 II.

8 LEGAL ARGUMENT

9 A PAGA action is a type of "qui tam action" in which a private plaintiff or plaintiffs pursue
10 a dispute between an employer and the Labor and Workforce Development Agency on behalf of
11 the state. Because a settlement of PAGA claims comprises a claim that could otherwise be brought
12 by the state, the Act requires that a court review and approve any settlement of any civil action
13 filed pursuant to the Act. Lab.C. §2699(1)(2).
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15 Under the circumstances present in the instant case, the allocation of \$2,000 to the two
16 plaintiffs' PAGA claims is fair, reasonable and adequate. Only Plaintiff Colunga alleged any tort
17 causes of action -- for sexual harassment, wrongful constructive termination of employment and
18 intentional infliction of emotional distress -- and those formed the basis for most of the discussions
19 at mediation and the negotiated settlement. As such, the bulk of the settlement funds are
20 apportioned to her tort claims which do not implicate the PAGA. With \$6,901.12 being
21 apportioned to Ms. Colunga's wage and hour claims, and \$10,000 to Mr. Ramirez's wage and hour
22 claims, setting aside \$2,000 for PAGA remedies is appropriate and fair.
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25 **A. THE PARTIES SEEK APPROVAL OF THE PORTION OF THE** 26 **SETTLEMENT ALLOCATED TO THE PAGA CIVIL PENALTIES**

27 Unlike in a class action, the Court's role upon an application for approval of relief under
28 the PAGA is to review the PAGA portion of the settlement only, not the settlement as a whole.

1 The PAGA portion subject to approval is, by statute, limited to the civil penalties for the Labor
2 Code violations set forth in Labor Code Sections 2699.5. Lab.C. §§ 2699.3, 2699.5. While there
3 are no established standards for approval of a PAGA settlement, the courts tend to look to the
4 general standard applied to settlements in other qui tam actions, to assess whether the settlement
5 is “fair, adequate and reasonable under all the circumstances.” Govt. C. § 12652(e)(2)(B). The
6 court can consider such things as the strengths of the plaintiff’s case, the risks, the stage of the
7 proceedings, the likely duration of further litigation, and the settlement amount. Moniz v.
8 Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 76-77. The purpose of the civil penalties is to
9 “‘remediate present violations and deter future ones,’ not to redress employees’ injuries.” Kim v.
10 Reins International California, Inc. (2020) 9 Cal.5th 73, 86.
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13 Thus, this Court is being asked respectfully to approve the \$2,000 being allocated
14 towards the civil PAGA penalties Plaintiffs claim for those pay periods within the one year
15 limitations period that they were not paid all wages or reimbursed all expenses, and were not
16 paid meal and rest break premium pay.¹ The maximum amount of penalties Plaintiffs could
17 recover in this case are limited by statute to \$100 for the first violation, and \$200 for each
18 subsequent pay period in which the violations occurred. Notice to the LWDA was given on
19 December 30, 2021, so penalties under the one-year statute of limitations could arguably be
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25 ¹ The actual unpaid wages themselves being claimed are not, by definition, part of the PAGA
26 claim for relief – the only relief the PAGA affords are pay period civil penalties. A claim for
27 unpaid wages has a separate three-year statutory limitations period, or four years under Business
28 and Professions Code Sections 17200 et seq.

1 calculated from December 30, 2020 through Plaintiffs' separations from their employments on
2 February 24, 2021 and May 5, 2021, respectively.²

3 The trial court has the discretion to reduce the amount awardable under the PAGA under
4 the facts, circumstance and equities in the case. Labor Code Section 2699(e)(2) states that the
5 court may "award a lesser amount than the maximum civil penalty amount specified in this part
6 if, based on the facts and circumstances of the particular case, to do otherwise would result in an
7 award that is unjust, arbitrary and oppressive, or confiscatory." See Cotter v. Lyft, Inc. (N.D.
8 Cal. 2016) 193 F.Supp.3d 1030, 1037. In this regard, Defendants dispute that Plaintiffs or any
9 other employees were denied full wages, reimbursement of business expenses, or meal and rest
10 breaks. Defendants produced in discovery copies of Plaintiff's time cards (showing the recording
11 of hours and minutes worked, payments of overtime wages, and meal breaks taken), itemized
12 wage statements, and photos of Industrial Wage Commission posters MFM contends were
13 displayed in the worksite informing employees of their rights to breaks and the like, amongst
14 other things. See, e.g., Thurman v. Bayshore Transit Management (2012) 203 Cal.App.4th 1112,
15 1136, disapp'r'd on other grounds in ZB, N.A. v. Superior Court (2019) 8 Cal.5th 175 [when
16 considering penalties reduction, court noted that defendants attempted to comply with the law].
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26 ² For Plaintiff Colunga, there were roughly 14 pay periods in the time frame of December 30,
27 2020 until her separation on February 24, 2021. Adding up penalties in this window yields a total
28 of \$2,700 [\$100 + (13 x \$200)]. Due to industrial injuries, her last day actually physically
worked was in January, 2021. For Plaintiff Ramirez, there were roughly 17 pay periods between
December 30, 2021 and May 5, 2021, for \$3,300 in civil penalties [\$100 + (16 x \$200)].

1 **B. NO OTHER NON-EXEMPT EMPLOYEES ARE KNOWN TO BE**
2 **ELIGIBLE TO SHARE IN THE CLAIMED PAGA PENALTIES**

3 Before the Covid-19 pandemic began, Defendants employed about 8 hourly workers at
4 any given time. MFM has traditionally experienced a regular turn-over of hourly workers, with
5 Plaintiffs being an exception. During the pandemic, between April and near the end of 2020,
6 MFM was largely shut-down with reduced operations and t-shirt orders, and only Plaintiffs and
7 two other employees were brought on site in-person for meetings or to work shorter than normal
8 shifts. One of those two other employees is MFM's office manager, Alex Wilson, who
9 personally attended the mediation and who has defended MFM's position in discovery that no
10 wage and hour violations occurred. It is also unknown whether Defendants would claim that she
11 was exempt from the wage and hour laws during the period of time in question, under an
12 administrative or executive exemption. The other employee brought into work during the
13 pandemic, Mr. Reynante Espinoza, denies having any unpaid wages and denies being prevented
14 from taking any meal or rest breaks. Defendants' sworn discovery responses identify Mr.
15 Espinoza as a witness with personal knowledge who would testify that no wage and hour
16 violations occurred. (Please see Exhibits 2 and 3, Defendant's Responses to Form
17 Interrogatories). Plaintiffs communicated with Mr. Espinoza prior to mediation who confirmed at
18 that time that he does not claim any unpaid wages or missed meal or rest breaks.

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21 A considerable portion of the time frame that Plaintiffs allege that they did not receive
22 full pay, expense reimbursement, meal or rest breaks or accurate wage statements, arguably
23 occurred before and during the Covid-19 pandemic, purportedly outside the one-year period for
24 the calculation of penalties and when the other hourly workers were not brought on site. As such,
25 there are no other workers presently known who could claim a share of the PAGA penalties.
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1 Defendants have denied having committed any wage and hour violations against Plaintiffs or any
2 other employees, and have contended that no other current or former hourly employees would
3 testify in this case that they saw any violations being committed against Plaintiffs Colunga or
4 Ramirez, whether before, during, or after the Covid-19 pandemic and shut-down of MFM.
5 Defendants have also asserted that all such witnesses would testify that they themselves were not
6 denied any wages, or meal or rest breaks, or that they received inaccurate wage statements.
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8 While Plaintiffs believe in the merits of their claims and would contest Defendants'
9 assertions and evidence at trial, including regarding the nature and sincerity of their efforts to
10 comply with their obligations under the Labor Code, the facts and circumstances of the case are
11 such that they would be the ongoing subject of dispute through considerable additional and
12 involved litigation until trial in mid-June, 2023, and the sought-after civil penalties could be
13 subject to potential reduction. Plaintiffs would seek to stack the penalties available under the
14 Labor Code sections violated and the PAGA which would be contested by Defendants.
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16 In this vein, California courts have approved the settlement of PAGA claims where the
17 facts are in dispute and the proposed payment of civil penalties are thus a small proportion of the
18 proposed settlement. See, e.g., Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal.) 2017 WL
19 3670787, at *10 (granting approval of a \$5,000 PAGA penalty in a \$370,000 settlement,
20 representing 1.4 percent). "Generally, unless the settlement is clearly inadequate, its acceptance
21 and approval are preferable to lengthy and expensive litigation with uncertain results." Id.
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23 In this matter, the proposed civil penalties represent approximately 2.2 percent of the
24 overall settlement, which is largely intended to satisfy Plaintiff Colunga's DFEH claims. The
25 penalties are not so out of proportion with the amounts which could be awarded within the one-
26 year statute of limitations periods applicable to Plaintiffs' respective claims. The intensity and
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1 degree with which the violations are being contested, and the commensurate expense to be
2 incurred by both sides in ongoing lengthy litigation involving multiple depositions, are all factors
3 that bear upon the reasonableness of the proposed \$2,000 amount. Should other MFM employees
4 ultimately actually exist who decide that they suffered wage and hour violations, they would not
5 be foreclosed by the instant proposed settlement from pursuing either their unpaid wages or any
6 “statutory penalties” provided directly by Labor Code Sections, like § 226 applicable to
7 inaccurate wage statements, which are different from the default PAGA “civil penalties” claimed
8 herein pursuant to Sections 2698 et seq. between December 30, 2020 and December 30, 2021.
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10 *Kim, supra*, at 81.

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12 **III.**

13 **CONCLUSION**

14 For each of the foregoing reasons and for any others which the court may consider at the
15 time of the hearing, Plaintiffs and Defendants respectfully request that the Court approve the
16 PAGA portion of their settlement calling for the allocation of \$2,000 to the statute’s civil
17 penalties.
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19 Dated: 11/18/22

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Jennifer B. Cottis

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Jennifer B. Cottis, Attorney for Plaintiffs
GLORIA COLUNGA and NOE RAMIREZ
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