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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA – UNLIMITED JURISDICTION

DAVID CLARK,

Plaintiff,

vs.

CUATRO AMIGOS, INC., dba AJ
BONO PLUMBING; and DOES 1-100,
inclusive,

Defendants.

CASE NO: C22-00727

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO APPROVE PAGA SETTLEMENT

Date:
Time:
Dept.:

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2 **I. INTRODUCTION**

3 Plaintiff David Clark (“Plaintiff”) respectfully moves this Court for an Order granting
4 approval of the proposed PAGA Settlement against Defendant Cuatro Amigos, Inc. dba AJ Bono
5 Plumbing (“Defendant”). Following highly contested litigation and substantial discovery, including
6 both written discovery and depositions, and as the parties began preparing for trial, Plaintiff and
7 Defendant reached a resolution of all of Plaintiff’s claims in this Action, both his individual claims
8 and the PAGA claim asserted as Plaintiff’s Ninth Cause of Action. The PAGA portion of the
9 settlement resolves claims for PAGA penalties involving a total of 6 employees (“Aggrieved
10 Employees”) from February 18, 2021, through May 3, 2024 (“PAGA Period”), covering
11 approximately 222 overall pay periods, and with an estimated maximum potential value of
12 \$109,000, for a total of \$20,000 (18.3% of the maximum potential value).

13 The PAGA portion of this case addresses alleged violations of Labor Code Sections 201,
14 202, 226(a)(1)-(9), 226.7, 226.8, 246(b)(1), 512, 2802, and the applicable IWC Wage Order(s).
15 Relevant to this claim, Plaintiff alleges that Defendant misclassified him and other technicians as
16 independent contractors (though it turned out that other technicians were classified as employees),
17 failed to furnish accurate itemized wage statements, failed to furnish meal and rest breaks, required
18 technicians to pay for business expenses, failed to furnish sick pay, and failed to pay all wages at
19 termination or within 72 hours of resignation.

20 As set forth herein, the proposed Settlement embodies all of the features of an appropriate
21 settlement as it is the product of (1) arms-length negotiations, (2) negotiated by attorneys
22 experienced in wage and hour issues, and (3) it reflects a reasoned compromise based directly on
23 the relative strength and value of the PAGA claim, as well as the risks, expense, complexity and
24 likely duration of further litigation.

1 The value achieved by the Settlement Agreement may be gleaned from the fact that the
2 LWDA and the Aggrieved Employees encompassed by the Settlement Agreement will receive a
3 penalty that is well within the range regularly approved by courts for PAGA settlements.

4 It is also important to underscore that all penalty amounts paid to Aggrieved Employees
5 will be an unexpected windfall, as civil penalties are normally collected solely by the Labor
6 Commissioner and are not distributed to employees, serve as a penalty against the employer and
7 are not designed to compensate employees, and do not impact any Aggrieved Employees' potential
8 individual claims.

9 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
10 Court enter the Order submitted herewith.

11 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

12 **A. Pertinent Facts and Procedural History.**

13 Plaintiff Clark worked as a non-exempt technician for Defendant from 2018 until he
14 resigned his employment in 2022. Clark alleges that he and other technicians were misclassified
15 as independent contractors. Clark alleges that because of this misclassification, he and the other
16 aggrieved employees did not receive accurate itemized wage statements, did not receive the right
17 to take compliant meal and rest breaks, and was not provided with the right to accrue and use sick
18 pay. Plaintiff also alleged that he and other technicians had amounts deducted from their pay,
19 including for truck maintenance, vehicle registration, and other amounts, that constituted business
20 expenses required to have been borne by Defendant. Finally, Plaintiff alleges that as a result of
21 the above violations, he was not paid all wages owed him within 72 hours of his resignation.

22 Plaintiff Clark filed a notice with the LWDA alleging violations of Labor Code sections
23 201, 202, 226(a)(1)-(9), 226.7, 226.8, 246(b)(1), 512, and 2802. VJK Decl., ¶ 7. Plaintiff also
24 alleged individual causes of action against Defendants for related Labor Code violations.

25 Plaintiff and Defendant conducted substantial formal and informal discovery, which
26 included a failed mediation with experienced mediator Russ Wunderli, Esq., exchange of
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1 information and documents as well as the deposition of Plaintiff and of Defendant's two owners.
2 As the parties began to prepare for trial in this action, Plaintiff and Defendant re-engaged in arms-
3 length settlement negotiations which ultimately resulted in resolution of Plaintiff's claims in this
4 action. VJK Decl., ¶ 4-5, Exhibit 1.

5 Plaintiff submitted a copy of the settlement agreement and these moving papers to the
6 LWDA concurrently with the filing of this motion. VJK Decl., ¶ 6, Exhibit 2.

7 **B. The Proposed Settlement**

8 The Parties jointly prepared and executed the Settlement Agreement. VJK Decl., Exhibit
9 1. The Settlement Agreement sets forth the terms of the Settlement reached by the Parties,
10 including the following key points:

11 1. Defendant agrees to settle the PAGA claim for the payment of twenty thousand
12 dollars (\$20,000.00) (hereinafter the "Gross Settlement Amount"). Settlement Agreement at § 3.1.

13 2. Plaintiff's counsel seeks payment of one-third of this amount (\$6,666.67) as
14 attorneys' fees and up to \$3,000.00 in declared costs related to prosecution of the PAGA claims in
15 this action. Settlement Agreement at § 3.2.1. This amount will be funded no later than six months
16 following Court approval. Settlement Agreement at § 4.2.

17 3. The remaining portion, \$10,333.33 is to be allocated as PAGA Penalties. Settlement
18 Agreement at § 3.2.1. Seventy-five percent (75%) of this amount, or \$7,750.00, shall be distributed
19 to the LWDA and the remaining twenty-five percent (25%) of this amount, or \$2,583.33, shall be
20 distributed to the Aggrieved Employees. Settlement Agreement, at § 3.2.2.

21 4. All Aggrieved Employees, estimated to be six (6), will receive a pro rata share of
22 the \$2,583.33 allocated to them, based on the number of pay periods that he or she was employed
23 by Defendant during the PAGA Period. Settlement Agreement, at § 3.2.2.1.

24 5. In exchange for the above settlement consideration, Defendant shall be entitled to
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1 the following release from each Aggrieved Employee, including Plaintiff¹:

2 [A]ll claims for PAGA penalties that were alleged, or reasonably
3 could have been alleged, based on the facts stated in the First
4 Amended Complaint, and the PAGA Notice.

5 Settlement Agreement, § 5.2.

6 **III. LEGAL ARGUMENT**

7 **A. Standards for Approval of a PAGA Settlement**

8 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
9 statute, which states that the “[t]he superior court shall review and approve any settlement of any
10 civil action filed pursuant to this part.” *See Labor Code* § 2699(1)(2). This involves a review of
11 whether the settlement is “fair, adequate, and reasonable under all the circumstances.” *Moniz v.*
12 *Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77. This is not the same standard in the PAGA
13 context as it is with class actions, because the trial court need not “act as a fiduciary for aggrieved
14 employees.” *Ibid.* However, the Court is to use a standard of review for settlements that “prevents
15 fraud, collusion or unfairness [citation], and protects the interests of the public and the LWDA in
16 the enforcement of state labor laws.” *Ibid.* (internal quotations and citations omitted).

17 In general, courts have determined that a settlement which serves the deterrent and punitive
18 functions of the PAGA statute is appropriately approved. E.g. *Moniz, supra*, 72 Cal.App.5th at 77;
19 *Hernandez v. Best Buy Stores, LP*, 2017 WL 2445438 *2 (S.D. Cal. 2017); *Gutilla v. Aerotek, Inc.*,
20 2017 WL 2729864 * 3 (E.D. Cal. 2017). Here, the purposes of the PAGA are being well-served
21 by the resolution.

22 As with any settlement, the Court must be mindful in conducting its inquiry that
23 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
24 litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,

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26 ¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009) 46 Cal. 4th 969,
27 986 (concluding that “with respect to the recovery of civil penalties, nonparty employees as well as the government
28 are bound by the judgment in an action brought under the act . . .”).

1 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
2 absolutes and an abandoning of highest hopes” [*Officers for Justice v. Civil Service Com.*, 688
3 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
4 of wasteful and expensive litigation that induce consensual settlements.” *Id.*, at 625. As such, “the
5 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or
6 “judged against a hypothetical or speculative measure of what might have been achieved by the
7 negotiators.” *Id.*

8 When evaluating the fairness, adequacy, and reasonableness of a PAGA penalty, courts
9 compare the potential penalty amount (its verdict value, as some courts refer to it) with the actual
10 recovery under the settlement. [Citations]. There is no express or even baseline percentage of
11 recovery required. Under the express terms of the PAGA, a verdict value is not guaranteed even if
12 the plaintiff prevails, as courts have discretion to lower the amount of penalties based on the
13 circumstances of a particular case. Citation.] *Manzo v. McDonald’s Restaurants of California, Inc.*
14 (E.D. Cal., Sep. 29, 2022) 2022 WL 4586236, *6 (approving settlement of less than 1% of “verdict
15 value” of PAGA claims). Further, while “[a PAGA] action is ... designed to protect the public
16 and penalize the employer for past illegal conduct” [*Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
17 LEXIS 66454 (E.D. Cal. June 30, 2010), at 11], a reviewing Court must take into account the fact
18 that settlement of a PAGA claim – like any settlement – involves a “compromise” that stops short
19 of rendering findings of liability and damages. Moreover, the Court must not lose sight of the fact
20 that “[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose
21 of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise
22 may not have been assessed and collected by overburdened state enforcement agencies.” *See*
23 *Ochoa-Hernandez v. CAJDER Foods, Inc.* (N.D. Cal. Apr. 2, 2010) 2010 U.S. Dist. LEXIS 32774,
24 at 12.

1 **B. The Settlement Meets the Criteria for Approval**

2 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

3 In conducting a review of a settlement, it is generally recognized that an “agreement ...
4 reached through arms-length negotiation between experienced parties . . . is entitled to a
5 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
6 44 (C.D. Cal. Apr. 12, 2010). A presumption of fairness exists here, as the proposed Settlement
7 (1) is the product of arms-length negotiations [VJK Decl., ¶ 4], (2) that was negotiated by Counsel
8 with significant experience in similar wage and hour litigation [*Id.*, ¶¶ 12-14], (3) which occurred
9 after Counsel had conducted sufficient investigation to evaluate the strength and potential value of
10 the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *Id.*, at ¶¶ 8-
11 9. Based thereon, the court should give considerable weight to the competency and integrity of
12 counsel in assuring itself that the Settlement Agreement represents an arm’s-length transaction
13 entered without self-dealing or other potential misconduct.

14 **2. The Proposed Settlement Furthers the Purposes of the PAGA, Taking into**
15 **Consideration Defendant’s Defenses and Mitigating Factors, and Should Be**
16 **Approved.**

17 i. Misclassification Claim.

18 Plaintiff’s misclassification claim is based on the allegation that he and other technicians
19 who worked for Defendant during the PAGA period were misclassified as independent contractors
20 in violation of Labor Code section 226.8. Through substantial discovery, Plaintiff determined that
21 he was the only technician who Defendant chose to classify as an independent contractor, rather
22 than as an employee. VJK Decl., ¶ 8.c.iv. Accordingly, the maximum civil penalty that Defendant
23 could have faced as a result of its alleged misclassification of Plaintiff was \$15,000. Lab. Code §
24 226.8 (penalty is \$5,000 to \$15,000 for single violation).

25 ii. Waiting Time Penalty Claim.

26 Under Labor Code sections 201 and 202, Defendant was required to pay employees for all
27 wages earned and unpaid at termination or within 72 hours of resignation. As set forth above, this
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1 claim is predicated on the allegation that former employees did not receive all wages they were
2 entitled to receive because they were not paid for all time worked, did not receive meal and rest
3 premium pay for noncompliant meal/rest periods, and did not receive sick pay while employed by
4 Defendant, and therefore left employment with earned but unpaid wages. The civil penalty for
5 violation of Labor Code sections 201 and/or 202 is found at Labor Code section 2699(f), and is
6 \$100 per employee per pay period, as there is no civil penalty defined for violations of these code
7 sections². Based on the data provided to Plaintiff in discovery, Plaintiff determined that Plaintiff
8 was the only former employee during the PAGA period. VJK Decl., ¶ 8.c.v. Accordingly,
9 Defendant faced a maximum potential penalty liability of \$100 (1 * \$100).

10
11 iii. Meal Period/Rest Period Claims.

12 Plaintiff's meal and rest period allegations are based on the allegations that Plaintiff was
13 not afforded the right to compliant meal and rest periods because he was misclassified as an
14 independent contractor. Further, with respect to Defendant's other technicians, Defendant did not
15 record their work time (or their meal periods), and a presumption exists that compliant meal periods
16 were not provided in violation of Labor Code sections 226.7 and 512. *See Donohue v. AMN*
17 *Services, LLC* (2021) 11 Cal.5th 58, 78. Further, Defendant's employee technicians were paid
18 solely by commission, and accordingly were not provided with paid rest breaks as required by law.
19 *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 117. The civil penalty for non-
20 complaint meal or rest periods is found at Labor Code section 558 and is \$50 per employee per pay
21 period. Assuming the Aggrieved Employees suffered at least one meal period and at least one rest
22 period violation in each pay period during the PAGA period (222 pay periods), the maximum value
23 of these claims is \$11,100 on the meal period claims and another \$11,100 on the rest period claims.
24 However, such a violation rate is unlikely to have actually occurred with respect to the other
25 technicians, who worked almost exclusively away from the home office and had substantial control

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27 ² *See Culley v. Lincare, Inc.* (E.D. Cal 2017), 236 F.Supp.3d 1184, 1191 (Holding that Labor Code section 256 does
28 not apply to claims of violations of Labor Code sections 201/202 for employees other than seasonal workers);
Raziano v. Albertsons LLC (C.D. Cal. Dec. 13, 2019) 2019 WL 9464279, *8 (same).

1 over their own schedules, given the existence of relatively wide arrival windows for appointments.
2 VJK Decl., ¶ 8.c.iii, 8.c.vi.

3 iv. Sick Pay Claim.

4 Labor Code sections 245 *et seq.* (the “Healthy Workplaces, Healthy Families Act of 2014),
5 requires employers to furnish paid sick leave to employees who have been employed for more than
6 30 days. Plaintiff alleges that Defendant violated this act with respect to him and all other
7 Aggrieved Employees because Defendant failed to provide paid sick days at all. The civil penalty
8 for violating this act is found at Labor Code section 248.5(e) and provides for a penalty not to
9 exceed an aggregate of \$4,000 per employee. Accordingly, the maximum penalty that could be
10 assessed against Defendant on this claim would be \$24,000 (\$4,000 x 6).

11 v. Wage Statement Claim.

12 The wage statement allegations in this claim are derivative of the above facts. Plaintiff,
13 having been misclassified, was not furnished with any wage statements at all. Plaintiff’s
14 employment with Defendant ended in January 2022, and his employment overlapped with
15 approximately 22 pay periods. Defendant’s other technicians, though they had been furnished with
16 wage statements, the wage statements failed to state, among other things, the number of hours
17 worked during the applicable pay period in violation of Labor Code section 226(a)(2).

18 With respect to the maximum penalty exposure on this claim, it should first be noted that
19 California courts have not clearly determined whether the applicable penalty for noncompliant
20 wage statements is found under Labor Code section 226.3 or Labor Code section 2699(f). *See*
21 *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 673-674 (indicating
22 the \$250 penalty under Labor Code section 226.3 applies in all instances); *but see, Noori v.*
23 *Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, 971 fn. 13 (indicating civil
24 penalties for noncompliant wage statements are available pursuant to 2699(f)). Given the lack of
25 clarity among the courts, and the explicit language of Labor Code section 226.3 stating that its
26 penalty applies where “the employer fails to provide the employee a wage deduction statement or
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1 fails to keep the records required in subdivision (a) of Section 226,” the appropriate measure of
2 maximum exposure for inaccurate wage statements should be the \$100 “default” penalty set forth
3 in Labor Code section 2699(f). With respect to Plaintiff not receiving any wage statements at all,
4 the penalty would be the \$250 set forth in Labor Code sections 226.3. Using that amount, the
5 maximum exposure faced by Defendant was \$25,500 ((200 pay periods x \$100) + (22 pay periods
6 x \$250)).

7
8 vi. Business Reimbursement Claim

9 Plaintiff alleged that Defendant deducted amounts from their wages for numerous expenses
10 that Defendant was required to bear itself as business expenses, including, vehicle registration and
11 insurance fees, costs for tools, costs for uniforms, fuel expenses, and a deduction that was set aside
12 for purchasing a boat for Defendant, all in violation of Labor Code section 2802. The penalty for
13 violations of Labor Code section 2802 is found at Labor Code section 2699(f) and is \$100 per
14 employee per pay period. While Defendant denies these allegations, assuming that such deductions
15 did occur, were not permitted, and took place during each pay period covered by the PAGA Period,
16 the maximum penalties that could be assessed for this claim is \$22,200 (222 x \$100).

17 vii. Total PAGA Exposure and Settlement Value

18 Based on the facts set forth above, the maximum exposure for the PAGA violations
19 asserted would be \$109,000. VJK Decl., ¶ 9. The PAGA settlement amount of \$20,000 represents
20 approximately 18.3% of the maximum PAGA exposure in this case.

21 Even without examining Defendant’s defenses, the settlement amount is well within the
22 range of PAGA settlements approved by courts. Courts have regularly approved PAGA
23 settlements representing less than 5% of the maximum exposure. *See Bowen v. Jea Senior Living*
24 *Health and Welfare Benefit Plan, LLC* (E.D. Cal, Dec. 8, 2023) 2023 WL 8527732 at *9-10
25 (approving PAGA settlement of approximately 3% of maximum liability); *Manzo v. McDonald’s*
26 *Restaurants of California, Inc.* (E.D. Cal. Sep. 29, 2022) at *7 (approving PAGA settlement of
27 less than 1% of maximum liability); *Rodriguez v. Danell Custom Harvesting, LLC* (E.D. Cal.
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2018) 293 F.Supp.3d 1117, 1133 (approving PAGA settlement representing 0.6% of maximum liability); Indeed, as low as 0.2 percent of total value has been approved. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504, 517 (\$150,000 approved where maximum value was \$75,000,000).

viii. Defendant's Defenses

Defendant's defenses include that its technicians were largely free to operate on their own and therefore had reasonable opportunity to take compliant meal and rest periods. Further, Defendants contend that Plaintiff was not an independent contractor and that Defendants were at all relevant times compliant with the Labor Code and as such, Plaintiff was not an aggrieved employee within the meaning of the PAGA. If Defendant's defenses were successful, any recovery would be reduced or potentially eliminated.

Second, PAGA claims never carry full value, as the Legislature has empowered courts to reduce PAGA awards while there is no required formula for the discount of PAGA awards that are "unjust, arbitrary, and oppressive, or confiscatory." Labor Code §2699(e)(2).

For these reasons, Plaintiff concluded the \$20,000.00 PAGA settlement is fair, reasonable, and just. VJK Decl., ¶ 9.

3. The Scope of the Release is Appropriately Tailored

The California Supreme Court has concluded that in the context of PAGA "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Arias v. Superior Court* (2009), 46 Cal. 4th 969, 987. Thus, the scope of the release provided in exchange for the foregoing consideration is limited to the claims for civil penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the First Amended Complaint and Plaintiff's PAGA Notice under Labor Code §§ 2698 *et seq.* Settlement Agreement, at § 5.2. This settlement has no impact on any individual claims other nonparty aggrieved employees may have against Defendant.

1 **4. Plaintiff's Requested Fees and Costs Are Reasonable**

2 PAGA provides for recovery of fees and costs for a prevailing plaintiff. Labor Code §
3 2699(g)(1). Plaintiff requests one-third of the overall settlement as fees, for a total of \$6,666.67.
4 Plaintiff also requests \$3,000.00 in declared costs incurred in the prosecution of this action. As set
5 forth in detail in the accompanying declaration of Vladimir J. Kozina, this fee and cost request is
6 reasonable and should be approved. VJK Decl., ¶¶ 10-11.

7 **IV. CONCLUSION**

8 For all the reasons set forth above, Plaintiff respectfully requests that this Court grant the
9 instant motion and approve the PAGA Settlement as fair, reasonable, and adequate.

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11 Dated: May 10, 2024

Respectfully submitted,

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13 MAYALL HURLEY, P.C.

14 By: 
15 VLADIMIR J. KOZINA
16 Attorneys for Plaintiff
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