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Attorneys for Plaintiffs ANGEL KYRIAKIDES and FRANCISCO GASTELUM, in a Representative capacity only, and on behalf of other members of the general public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ANGEL KYRIAKIDES; and FRANCISCO
GASTELUM, in a Representative capacity
only, and on behalf of other members of the
general public similarly situated

Plaintiff

v.

CUMMING CHEVROLET, a California
Corporation, and DOES 1-10, inclusive

Defendants

CASE NO. 37-2022-00045463-CU-OE-CTL

**PLAINTIFF'S *EX PARTE* APPLICATION
RE: *UNOPPOSED* PAGA SETTLEMENT
APPROVAL**

Date: October 23, 2023

Time: 8:30 a.m.

Judge: Hon. Gregory W. Pollack

Dept: C-71

I. SUMMARY OF APPLICATION

This is a “Wage and Hour” representative action, under California’s Private Attorneys General Act of 2004. Plaintiffs ANGEL KYRIAKIDES; and FRANCISCO GASTELUM in a Representative capacity only, and on behalf of other members of the general public similarly situated (“Plaintiffs”) respectfully submit the instant Points and Authorities in support of their *Ex Parte* Application for Approval of the PAGA Settlement. This Request is **Unopposed**. The LWDA was timely notified of this proposal, and does **not** object to the allocations.

As set forth below, there is good cause for the request, as summarized immediately below:

1. In the experience of Plaintiffs’ counsel, and due primarily to the resultant effects of the Covid-19 pandemic, “employee notification” has become much more difficult, as many individuals have moved (at least once) since the cessation of their employ; and
2. As a PAGA Approval is - and will be - **unopposed** by any party (as the only two parties who know of the proposed settlement are the moving parties), there is no prejudice to any party, or individual;

To confirm, given the unopposed nature of the motion, and the risk that “notification” to the proposed PAGA Members will be impacted by any delay, it is the experience of Plaintiffs’ counsel that either (1) approval of the settlement via the instant *Ex Parte*, or, in the alternative (2) an Order **Shortening Time** (“OST”) to hear the Motion for PAGA Approval, is proper. (Yaeckel Decl. ¶ 10).

The LWDA was notified of the settlement terms, and this hearing, multiple times, and does not object. (Yaeckel Decl. ¶¶5-6.)

II. RELEVANT HISTORY AND TERMS OF SETTLEMENT

This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against CUMMING CHEVROLET (“CUMMING”). As this is a “PAGA” action only, the Limitations Period begins on August 31, 2021 and ends on the date of settlement approval. There are approximately 115 PAGA Members at issue. (Yaeckel Decl., ¶3).

Following the exchange of discovery, analysis of numerous sets of time and wage data, and a full day of mediation, and continuing negotiations over the final terms between the parties, the parties

1 reached a proposed settlement that includes a payment of penalties to the LWDA. (Yaeckel Decl., ¶4).

2 On October 3, 2023, Plaintiffs' counsel first gave notice of the instant Settlement to the
3 LWDA. (Yaeckel Decl., ¶5).

4 On October 12, , Plaintiffs' counsel again gave notice of the settlement terms and also notified
5 the LWDA of the October 23, hearing. (Yaeckel Decl., ¶5)

6 On October 19, 2023 Plaintiffs uploaded (via the LWDA's electronic filing portal) copies of
7 this entire *ex parte* application, including the Notice, this supporting Memorandum, and Proposed
8 Order. (Yaeckel Decl., ¶6). To date, Plaintiff's counsel has not received any response from the LWDA.
9 *Id.*

10 The Gross Settlement Amount that will be funded is **\$50,000.00**, and is broken down as
11 follows:

12	*	\$15,000.00	Attorneys' Fees (30% of total settlement value);
13	*	\$9,526.14	Costs of Litigation.
14	*	\$3,200.00	Costs of Settlement Administration
15	*	\$5,0000.00	Plaintiffs' Service Award (each)
16	*	Sub-Total of \$12,273.86 . 75% (\$9,537.51) shall be assigned/paid to the LWDA	
17		as penalties. The remaining 25% (\$3,084.46) in cash will be disbursed among	
18		all employees based on work weeks employed during the PAGA period.	

19 **Please Note:** as part of the settlement, Defendant has also agreed to under take "additional
20 measures" to ensure compliance with each of the challenged wage and hour practices at issue in the
21 litigation. Defendant conservatively estimated it will cost no less than \$75,000 to implement these
22 measures. (Ex. A at sec, IV(B). This further supports approval given PAGA's stated purpose of
23 "deterring future violations." *Moniz v. Adecco USA, Inc.*, (2021) 72 Cal. App. 4th 56, 77.

24 Given the above, the average payment to each individual employee will be approximately
25 **\$26.82**. (Yaeckel Decl., ¶ 7).

26 Further, there are no restrictions for any of the employees to file individual actions, as the
27 settlement agreement only covers PAGA claims. (Yaeckel Decl., ¶8); Ex. A at § IV(A).)

III. CONTROLLING AUTHORITY

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, LLC* (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 Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 430.

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

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 Court in *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (“Flores”) the court was asked to approve a PAGA settlement (the “Settlement”). *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1075–76 (C.D. Cal. 2017). In deciding whether the court

1 should approve the Settlement, the court looked at the California legislature, the California Courts of
2 Appeal, the California Supreme Court, and the California Labor & Workforce Development Agency
3 for a definitive answer as to what precedent the court should follow in either approving or denying the
4 settlement. *Id.* The court was not able to find a definitive answer. *Id.* As such, the court followed the
5 rationale in *O'Connor v. Uber Techs., Inc.*, 201 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states
6 a court is permitted to approve a PAGA settlement if the settlement is “fair and adequate in view of
7 the purposes and policies of the statute.” *Id.*

8 In deciding whether the settlement was “fair and adequate,” the *Court’s* have looked sought
9 how the parties divvied up the civil penalties under Section 2699(i) of the California Labor Code.
10 *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1076–77 (C.D. Cal.
11 2017). As the court felt the parties’ division of penalties was consistent with the the statute, the court
12 approved the settlement. *Id.*

13 **III. DISCUSSION**

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

17 **A. THE BASIS FOR THE *EX PARTE* REQUEST**

18 At a case management conference on June 23, 2023, the parties advised the Court of the
19 tentative settlement which is now final. The Court indicated the parties could proceed with an *ex parte*
20 application to seek approval. (Yaeckel Decl., ¶9).

21 The basis for the instant *Ex Parte* is to either **(1)** obtain approval of the settlement via the
22 instant *Ex Parte*, or **(2)** request an Order **Shortening Time** (“OST”) to hear a Motion for PAGA
23 Approval, preferably in the early October time period. There is good cause for the request, as
24 summarized immediately below:

- 25 **1.** In the experience of Plaintiffs’ counsel, and due primarily to the resultant effects of the
26 Covid-19 pandemic, “employee notification” has become much more difficult, as many
27 individuals have moved (at least once) since the cessation of their employ; and
28

1 2. As Approval is - and will be - **unopposed** by any party (as the only two parties who
2 know of the proposed settlement are the moving parties), there is no prejudice to any
3 party, or individual.

4 To confirm, given the unopposed nature of the motion, and the risk that “notification” to the
5 proposed PAGA Members will be impacted by any delay, it is the experience of Plaintiffs’ counsel that
6 either (1) approval of the settlement via the instant *Ex Parte*, or (2) an Order **Shortening Time**
7 (“OST”) to hear the Motion for PAGA Approval, is proper. (Yaeckel Decl. ¶ 10).

8 Finally, an expedient approval of this settlement will provide a direct benefit to the impacted
9 employees at issue. The non-monetary “fixes” provide a guarantee of future Labor Code compliance,
10 and an immediate monetary benefit. It also allows Defendants the opportunity to move on, and focus
11 on future business. (Yaeckel Decl., ¶11).

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

13 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
14 statute (Labor Code §2698 *et seq.*) (See ROA #1.) Plaintiffs also alleged all employees were denied
15 compliant Meal and Rest Periods, Minimum Wages, Overtime, accurate Wage Statements,
16 Reimbursements, and suffered Waiting Time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA
17 Notice” attached thereto).

18 Specifically, Plaintiffs allege that they - and other employees - received “short,” “late,” or
19 “missing” Meal Periods, including those documented within Defendant’s Time Records. (Decl.
20 Yaeckel, ¶12). Plaintiff also challenged whether Defendant maintained lawful Meal and Rest Period
21 policies. Finally, Plaintiffs alleged they - and other employees - were not properly compensated due
22 to Defendant’s failure to maintain accurate Time Records. (*Id.*)

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

24 Investigations completed by Plaintiffs’ counsel revealed that Defendant’s timekeeping policies
25 and employee records were not in full compliance with California law. (Decl. Yaeckel, ¶13). However,
26 these investigations also revealed that the “rate of violation” by Defendant was significantly less than
27 100%. (*Id.*). On many of those occasions, it appears that Defendant did, in fact, comply with the law.
28

1 (Id.)

2 Based on the above, the likely maximum liability in a case of this type would be in the range
3 of **\$75,000.00 to \$100,000.00**. (Decl. Yaeckel, ¶14). However, without revealing settlement protected
4 communications, it was highly unlikely Plaintiffs could ever recover anything approaching a
5 maximum judgment. (Id.)

6 Moreover, Plaintiffs' counsel is aware of the Court's discretion to mitigate penalties pursuant
7 to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶15). To confirm, Plaintiffs' counsel
8 experienced the mitigation of "PAGA" penalties in *Carrington v. Starbucks Corp.* (2018) 30
9 Cal.App.5th 504. (Id.) In *Carrington*, Judge Bacal significantly mitigated PAGA penalties (\$5 per
10 violation), due to the efforts made by the employer to comply with the law. (Id.)

11 Plaintiffs' counsel agrees with Her Honor, and with the provision of the Labor Code, that
12 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
13 significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶16).

14 As the above factors exist in this case, it is the opinion of Plaintiffs' counsel that the settlement
15 is fair, adequate, and reasonable. Specifically, Plaintiffs' counsel's understanding is that Defendant
16 has agreed to make changes to its policies, and amend them to the extent they do not comply with
17 California law. (Decl. Yaeckel, ¶17).

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

25 Plaintiffs counsel are lead counsel on approximately 40 employment "wage and hour" claims
26 with class action, or representative action allegations. (Id.) Based on said experience, it is the opinion
27 of Plaintiff's counsel that this settlement represents a fair and adequate payment. (Yaeckel Decl., ¶19).
28

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

2 While Labor Code section 2699(*l*) requires a court to “review and approve any penalties sought
3 as part of a proposed settlement agreement,” it does not provide any guidance as to what is considered
4 an ‘adequate’ allocation of these penalties. However, Trial Courts have held that *where the* division
5 of penalties was fair and adequate and in accordance with the PAGA statute, the court should approved
6 the settlement. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, 253 F. Supp. 3d 1074, 1076–77
7 (C.D. Cal. 2017).

8 After subtracting the contingent costs set forth above, the parties seek to allocate **\$12,273.86**
9 of the total settlement to the Total Value of the PAGA Fund. Of this amount, **\$9,205.40**, which is 75%
10 of the PAGA fund. (Decl. Yaeckel Decl. ¶20). The remaining (25%) **\$3,084.46** will be allocated and
11 distributed among the current or ex-employees within the PAGA representation period. (*Id.*)

12 The parties contend the settlement agreement amount is fair, adequate, and reasonable. (Ex.
13 A at sec. II(E)). Moreover, the PAGA settlement does not bar any employee from pursuing their own
14 individual Labor Code claims. (Ex. A at sec. IV(A).) The release only applies to the PAGA claims for
15 penalties, based upon the allegations in Plaintiff’s operative Complaint. (*Id.*)

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

17 On October 3, 2023, Plaintiffs’ counsel first gave notice of the instant Settlement to the
18 LWDA. (Yaeckel Decl., ¶5).

19 On October 12, , Plaintiffs’ counsel again gave notice of the settlement terms and also notified
20 the LWDA of the October 23, hearing. (Yaeckel Decl., ¶6).

21 On October 19, 2023 Plaintiffs uploaded (via the LWDA’s electronic filing portal) copies of
22 this entire *ex parte* application, including the Notice, this supporting Memorandum, and Proposed
23 Order. (Yaeckel Decl., ¶6).

24 To date, Plaintiffs have not received a response from the LWDA regarding the proposed
25 settlement. If the LWDA contacts Plaintiffs’ counsel at any time prior to the hearing, Plaintiffs’
26 counsel will provide an updated declaration to the Court. (Yaeckel Decl., ¶6).

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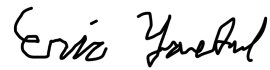
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IV. CONCLUSION

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

Dated: October 19, 2023

SULLIVAN & YAECKEL LAW GROUP, APC



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