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Attorneys for Plaintiff DESIREE ASHLEY HERNANDEZ, 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 IMPERIAL

DESIREE ASHLEY HERNANDEZ, in a
Representative capacity only, and on behalf
of other members of the general public
similarly situated

Plaintiff

v.

WESTWIND MANAGEMENT, INC., a
Florida Corporation; WESTWIND
ENTERPRISES, a California Corporation;
and WESTWIND ENTERPRISES, LTD dba
RIO BEND RV & GOLF RESORT, a
California Limited Partnership ; and DOES
1-10, inclusive,

Defendants

CASE NO. ECU003008

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

Date: June 12, 2024

Time: 8:30 a.m.

Dept.: 5

Judge: Hon. Jeffrey B. Jones

1 **I. SUMMARY OF APPLICATION**

2 This is a “Wage and Hour” representative action, claiming under California’s Private Attorneys
3 General Act of 2004 (California Labor Code §2698 *et seq.*).

4 Plaintiff DESIREE ASHLEY HERNANDEZ (“Plaintiff”) respectfully submits the instant
5 Points and Authorities in support of her *Ex Parte* Application for Approval of the PAGA Settlement.

6 This Request is **Unopposed**. The LWDA was timely notified (as of May 15, 2024), of this
7 proposal, and does **not** object to the allocations. (Yaeckel Decl., ¶5).

8 **II. SUMMARY OF SETTLEMENT**

9 This is a Labor Code §2698 *et seq.* “Wage and Hour” (“PAGA”) action brought against
10 Westwind Management, Inc.; Westwind Enterprises; and Westwind Enterprises, Ltd. Db a Rio Bend
11 RV & Golf Resort, (“Defendants” or “WMI”). As this is a “PAGA” action only, the Limitations Period
12 initiates on May 2, 2022. There are approximately **45** PAGA Members at issue. (Yaeckel Decl., ¶3).

13 Following the exchange of discovery, analysis of numerous sets of time and wage data, and
14 direct settlement negotiations between the Parties, the Parties reached a proposed settlement that
15 includes a payment of penalties to the LWDA. (Yaeckel Decl., ¶4).

16 Based on the below figures, each PAGA Member would receive an average payment of
17 approximately **\$35.19**. This figure represents an average only, as the actual amounts paid will vary
18 depending on the amount of workweeks employed during the PAGA period.

19 **Please Note:** Although this was alleged as a PAGA only claim, Defendant required Plaintiff
20 to release all claims (e.g., a full 1542 release) as a part of the proposed settlement. (**Exhibit 1:**
21 **“Released Claims”** § III.10, p. 5). In addition to the PAGA claims, Plaintiff possessed individual Labor
22 Code violations and other employment related claims. All other employees are subjected to a limited
23 release of PAGA claims only and retain all claims in their individual capacities.

24 Further, approval is warranted as there was a risk that a maximum judgment could impact the
25 business’s ability to remain viable. Because the employer was willing to “step up” and address the
26 alleged violations, Plaintiff (and counsel) did not want to seek an amount that could jeopardize the
27 business’ ability to continue to offer employment to the impacted employees. (Yaeckel Decl., ¶15).

28 The LWDA has notice of all settlement terms and does **not** object.

Specifically, on **May 15, 2024**, Plaintiff's counsel gave notice of the instant Settlement to the LWDA. (Yaeckel Decl., ¶5).

On **June 11, 2024**, Plaintiff's counsel uploaded via the LWDA's electronic filing portal copies of this entire *ex parte* application, including the Notice, this supporting Memorandum, Declaration, and Proposed Order & Judgment. (Yaeckel Decl., ¶7). To date, Plaintiff's counsel has not received any response. *Id.*

The Total Value of the proposed Settlement is **\$35,000.00** which is broken down as follows:

- * **\$11,666.67** Attorneys' Fees (1/3 of total settlement value);
- * **\$2,000.00** Costs of Litigation;
- * **\$15,000.00** (\$5,000 for Plaintiff's Representative Enhancement Bonus & \$10,000 for additional Individual section 1542 Release);
- * Sub-Total of **\$6,333.33**;
- * 75% (**\$4,750.00**) shall be assigned/paid to the LWDA as penalties;
- * The remaining 25% (**\$1,583.33**) in cash will be disbursed among all employees based on work weeks employed during the PAGA period; and
- * Defendant will separately pay all settlement administration costs.

(Yaeckel Decl., ¶8).

Given the above, the average payment to each individual employee will be approximately **\$35.19**. (*Id.*)

Further, there are no restrictions for any of the **45** employees to file individual actions, as the settlement agreement only covers PAGA claims. (Yaeckel Decl., ¶9; **Exhibit 1**: "Released Claims" § III.6, p. 4).

Defendants will separately pay all the Settlement administration costs. (Yaeckel Decl., ¶5). This amount has been quoted as not to exceed **\$2,750**. This cost is not included in the Gross Settlement Amount of Net Settlement Amount. (**Exhibit 1**: "Released Claims" § II.4, p. 4)

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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 should approve the Settlement, the court looked at the California legislature, the California Courts of

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

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

12 **IV. DISCUSSION**

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

16 **A. THE *EX PARTE* IS NECESSARY TO ENSURE PROPER NOTICE TO EMPLOYEES**

17 The instant *Ex Parte* request is based on the fact that notice to certain ex-employees may be
18 adversely impacted by further delay (*i.e.* ex-employees may change their mailing address without
19 filing a proper “forwarding address”). (Yaeckel Decl., ¶10).

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

24 Finally, this is an un-opposed request. If the Court is not inclined to hear it on an “ex parte”
25 basis, Plaintiff requests the Court put it on the first available motion calendar and allow these papers
26 to serve as the moving papers.

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

28 The Complaint alleges Labor Code violations which triggered penalties under the PAGA

1 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff also alleged all employees were denied
2 compliant Meal and Rest Periods, minimum wages, overtime, accurate wage statements,
3 reimbursements, and suffered waiting time violations. (See ROA #1, Exhibit 1: “Plaintiff’s LWDA
4 Notice” attached thereto).

5 Specifically, Plaintiff alleges that she - and other employees - received “short,” “late,” or
6 “missing” Meal Periods, including those documented within Defendant’s Time Records. (Decl.
7 Yaeckel, ¶12). Plaintiff also challenged whether Defendant maintained lawful meal and rest periods.
8 Plaintiff alleged she- and other employees -were not properly compensated due to Defendant’s failure
9 to correctly calculate overtime. (*Id.*)

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

11 The catalyst of this litigation concerned allegations that Ms. Hernandez was denied legally
12 compliant meal and rest periods, and was not paid for all Overtime hours worked. (Decl. Yaeckel,
13 ¶13). Investigations completed by Plaintiff’s counsel revealed that Defendant’s timekeeping policies
14 and employee records were not always in compliance with California law. (Decl. Yaeckel, ¶14).

15 However, these investigations also revealed that the “rate of violation” by Defendant was
16 significantly less than 100%. (*Id.*). On many of those occasions, it appears that Defendant did, in fact,
17 comply with the law. (*Id.*) Moreover, Defendant possessed evidence that some of the current
18 employees would disclaim a violation, even given a “factual showing” of a non-compliant break. (*Id.*).

19 Further, there was a risk that a maximum judgment could impact the business’s ability to
20 remain viable. Because the employer was willing to “step up” and address perceived violations,
21 Plaintiff (and counsel) were willing to consider the impact on the business if litigation had continued.

22 Based on the above, the maximum liability in a case of this type would be in the range of
23 **\$40,000.00 to \$50,000.00**. (Decl. Yaeckel, ¶15). However, without revealing settlement protected
24 communications, it was highly unlikely Plaintiff could ever recover anything approaching a maximum
25 judgment. (*Id.*)

26 Moreover, Plaintiff’s counsel is aware of the Court’s discretion to mitigate penalties pursuant
27 to California Labor Code section 2699(e)(2). (Decl. Yaeckel, ¶16). To confirm, Plaintiff’s counsel
28 experienced the mitigation of “PAGA” penalties in *Carrington v. Starbucks Corp.* (2018) 30

1 Cal.App.5th 504. (*Id.*) In *Carrington*, the Trial Court significantly mitigated PAGA penalties (\$5 per
2 violation), due to the efforts made by the employer to comply with the law. (*Id.*)

3 Plaintiff's counsel agrees with *Carrington*, and with the provision of the Labor Code, that
4 penalties *should* be mitigated where violations are minimal (or rare), or where the employer makes
5 significant efforts to comply with the Labor Code. (Decl. Yaeckel, ¶17).

6 As the above factors exist in this case, it is the opinion of Plaintiff's counsel that the settlement
7 is fair, adequate, and reasonable. Specifically, Plaintiff's counsel's understanding is that Defendant
8 has agreed to make changes to its policies, and review and/or amend them to ensure compliance with
9 California law. (Decl. Yaeckel, ¶18).

10 Plaintiff's counsel, William B. Sullivan has approximately 30 years of experience in "class
11 action" litigation, both as plaintiff and defense counsel. (Decl. Yaeckel, ¶19). Plaintiff's counsel, Eric
12 K. Yaeckel, has over 13 years of experience prosecuting class and representative action claims under
13 the California Labor Code. (*Id.*) Plaintiff's counsel, Eric K. Yaeckel and William B. Sullivan, are the
14 attorneys of record in a matter that was recently heard (and favorably decided) before the California
15 Supreme Court titled *Donohue v. AMN Servs., LLC* (2021) 11 Cal.5th 58. (*Id.*) The *Donohue* matter
16 was a certified class and PAGA action. (*Id.*)

17 Plaintiff's counsel were lead counsel on approximately 40 employment "wage and hour" claims
18 with class action, or representative action allegations. (Yaeckel Decl., ¶20). Based on said experience,
19 it is the opinion of Plaintiff's counsel that this settlement represents a fair and adequate payment. (*Id.*)

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

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

27 After subtracting the contingent costs set forth above, the parties seek to allocate **\$6,333.33**
28 of the total settlement to the Total Value of the PAGA Fund. 75% (**\$4,750.00**) shall be assigned/paid

1 to the LWDA as penalties. The remaining 25% (\$1,583.33) will be allocated and distributed among
2 the current or ex-employees within the PAGA representation period. (Yaeckel Decl., ¶21).

3 The parties contend the settlement agreement amount is fair, adequate, and reasonable.
4 (Yaeckel Decl., ¶¶ 18, 20, 22). Moreover, the PAGA settlement does not bar any employee from
5 pursuing their own individual Labor Code claims. (Yaeckel Decl. ¶9). The release only applies to the
6 PAGA claims for penalties, based upon the allegations in Plaintiff's operative Complaint. **Exhibit 1:**
7 "Released Claims" § III.6, p. 4).

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

9 On May 15, 2024, Plaintiff's counsel gave notice of the instant Settlement to the LWDA.
10 (Yaeckel Decl., ¶5). To date, Plaintiff's counsel has not received notice that the LWDA would
11 intervene. (*Id.*)

12 On June 11, 2024, Plaintiff's counsel uploaded via the LWDA's electronic filing portal copies
13 of this entire *ex parte* application, including the Notice, this supporting Memorandum, Declaration,
14 and Proposed Order & Judgment. (Yaeckel Decl., ¶7). To date, Plaintiff's counsel has not received any
15 response. *Id.*

16 To date, Plaintiff has not received a response from the LWDA regarding the proposed
17 settlement. If the LWDA contacts Plaintiff's counsel at any time prior to the hearing, Plaintiff's
18 counsel will provide an updated declaration to the Court. (Decl. Yaeckel ¶23).

19 **V. CONCLUSION**

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

22
23 Dated: June 11, 2024

SULLIVAN & YAECKEL LAW GROUP, APC

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25 

26 Eric K. Yaeckel
27 Ryan T. Kuhn
28 Attorneys for Plaintiff DESIREE ASHLEY
HERNANDEZ, in a Representative capacity only