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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

Case No. **CIVDS2011822**

ABNER QUINCHO, on behalf of the State of
California, as private attorney general,

Plaintiff,

vs.

CAFE RIO, INC., a Corporation; and DOES 1
through 50, inclusive,

Defendants.

**NOTICE OF MOTION AND MOTION
TO APPROVE PAGA SETTLEMENT;
and,**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION**

Hearing Date: December 14, 2021

Hearing Time: 9:00 a.m.

Judge: Hon. Janet Frangie

Dept.: S29

Complaint Filed: May 29, 2020

Trial Date: Not Set

1 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

2 YOU ARE HEREBY NOTIFIED THAT at 9:00 a.m. on December 14, 2021, or as
3 soon thereafter as the matter can be heard, in Department S29 of the above entitled Court
4 before the Honorable Janet Frangie, Plaintiff Abner Quincho ("Plaintiff") will and hereby
5 does move for an order approving the settlement of the PAGA claim alleged against
6 Defendant Café Rio, Inc. ("Defendant") in accordance with Labor Code §2699(1). The
7 proposed settlement is set forth in the accompanying PAGA Settlement Agreement
8 ("Settlement Agreement").

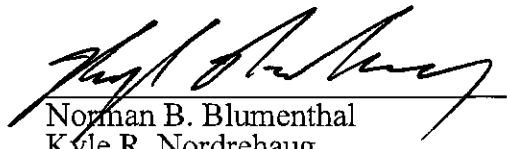
9 This Motion will be based on this notice, the accompanying points and authorities, the
10 Declaration of Kyle Nordrehaug, the Declaration of David Winston, and the complete files
11 and records in this action. The Labor Workforce Development Agency has been served with
12 this motion and the Settlement Agreement as set forth in the accompanying proof of service.

13 Respectfully submitted,

14 Dated: November 16, 2021

**BLUMENTHAL NORDREHAUG
BHOWMIK DE BLOUW LLP**

15
16
17 By:


Norman B. Blumenthal
Kyle R. Nordrehaug
Aparajit Bhowmik

Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Abner Quincho (“Plaintiff”) reached a settlement of the California Private
4 Attorneys General Act, Cal. Labor Code §2699, *et seq.* (“PAGA”) claim asserted in this
5 action against Defendant Cafe Rio, Inc. (“Defendant”) (collectively, the “Parties”) which
6 provides for a “Gross PAGA Settlement Amount” payment in the amount of \$835,000. In
7 accordance with California Labor Code §2699(l), Plaintiff now asks this Court to review and
8 approve the settlement of Plaintiff’s PAGA claims.¹ This is only a settlement of the PAGA
9 claims for civil penalties, and is not a class settlement and does not release the individual
10 wage claims, if any, of the affected employees other than of the Plaintiff himself. Cal. Labor
11 Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v.*
12 *Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

13 The PAGA settlement is set forth in the accompanying PAGA Settlement Agreement
14 (“Settlement Agreement”). A true and correct copy of the Settlement Agreement which sets
15 forth the terms for the settlement of the PAGA claims is attached as Exhibit #1 to the
16 Declaration of Kyle Nordrehaug, filed herewith. Capitalized terms shall have the same
17 meaning as defined in the Settlement Agreement. The LWDA received notice of this
18 Settlement and this motion as set forth in the accompanying proof of service.

19 A proposed order confirming review and approval of the PAGA settlement is
20 submitted herewith.

21 **II. RELEVANT FACTS**

22 On May 29, 2020, Plaintiff filed a PAGA-Only Representative Action Complaint in
23 San Bernardino County Superior Court alleging a single cause of action for Civil Penalties
24 Pursuant to Labor Code §§ 2699, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204,
25 210, 226(a), 226.7, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802 and the
26 applicable IWC Wage Order(s). On June 24, 2021, Plaintiff sent an amended notice letter to
27

28 ¹ Section 2699(1)(2) provides as follows: “The superior court shall review and approve any settlement of any civil action pursuant to this part.”

1 the Labor and Workforce Development Agency adding allegations based on Labor Code
2 sections 203, 204, 226 and under the Healthy Workplace Healthy Family Act of 2014 (Labor
3 Code sections 246 *et seq.*). On September 27, 2021, Plaintiff filed a First Amended
4 Complaint alleging a single cause of action for Civil Penalties pursuant to Labor Code §§
5 2699, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226.7, 246, 248,
6 248.1, 248.2, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, and the applicable IWC
7 Wage Order(s).

8 Plaintiff and Defendant agreed to mediate with Mark S. Rudy. Prior to the mediation,
9 in order to evaluate the potential value of the claims, the Parties engaged in significant
10 efforts to obtain the facts regarding the claims asserted, including the exchange of detailed
11 statistical data regarding shifts worked by Plaintiff and the Aggrieved Employees, the
12 production of hundreds of pages of relevant documents, and the exchange of detailed
13 briefing and analysis in connection with the mediation. (Declaration of Kyle Nordrehaug, at
14 ¶3).

15 Plaintiff's theory of PAGA liability as argued at mediation alleged that Defendant
16 failed to pay for work done off the clock because, for example, Defendant texted employees
17 during off hours regarding work-related issues. Plaintiff further alleges that Defendant failed
18 to provide reimbursement for cell phone use in connection with these work-related
19 communications. Plaintiff also alleges that Defendant violated meal and rest break laws,
20 including that Defendant explicitly allowed employees to leave the work premises for meal
21 periods but failed to include this freedom in the written rest period policy. Moreover,
22 Defendant's written rest period policy failed to expressly provide rest periods for every
23 "major fraction" of a four hour work period. Instead, Defendant provided "a paid 10-minute
24 rest break per 4 hour period of time worked." Plaintiff also alleges that Defendant prohibited
25 employees from possessing a cell phone during all working hours including during meal and
26 rest periods. Plaintiff alleges that employees should have been free from Defendant's control
27 during meal and rest periods and should have been allowed to make personal phone calls
28 during their breaks if they chose to do so. Plaintiff also alleges that Defendant failed to

1 provide all meal periods and, for those meal period violations that were paid with a penalty,
2 the penalty payments were not paid at the regular rate. Plaintiff also alleges that Defendant
3 provided inaccurate wage statements because, for example, Defendant inaccurately stated the
4 Total Hours Worked by commingling non-working hours like holiday and meal penalty
5 hours in the number. Plaintiff further alleges that Defendant also failed to list the hours and
6 hourly rates for overtime wages paid to increase the regular rate based on bonus wages that
7 were paid. (Declaration of Kyle Nordrehaug, at ¶3). Defendant denies all such allegations.

8 On March 2, 2021, the Parties engaged in an all-day mediation session before
9 Mediator Rudy, a respected and experienced mediator knowledgeable of both the wage and
10 hour laws and representative claims at issue in this action. Through arm's-length
11 negotiations with the assistance of the mediator at and after the mediation, the Parties
12 reached an agreement to settle the PAGA claims in the Action which led to the signing of a
13 Memorandum of Understanding memorializing the settlement.² The settlement was
14 negotiated in light of all known facts and circumstances and the uncertainty associated with
15 litigation – including the risk of Plaintiff not being able to maintain representative claims, the
16 difficulty of proving Plaintiff's claims in a manageable trial, the merits of Defendant's
17 potential defenses, and the significant delay and potential appellate issues inherent to
18 litigation – and was reached after extensive arm's length negotiations, with the assistance of
19 Mediator Rudy. (Declaration of Kyle Nordrehaug, at ¶3).

20 **III. TERMS OF THE PAGA SETTLEMENT**

21 The PAGA settlement is subject to Court approval consistent with Labor Code
22 §2699(1)(2)(Settlement Agreement at §III(4)(a)). The Settlement Agreement negotiated by

23 ² As part of this Settlement, in addition to the Gross PAGA Settlement Amount, Defendant has
24 agreed to pay Plaintiff a total of \$15,000 pursuant to a separate agreement in exchange for a general
25 release of all individual claims arising out of employment with Defendant, including a waiver of any
26 unknown claims pursuant to California Civil Code section 1542 ("Individual Settlement"). No
27 Attorney's Fees will be paid to PAGA Counsel from the Individual Settlement. The Individual
28 Settlement will cover all of Plaintiff's individual claims. (Settlement Agreement at §III(5)(b)). The
individual claims were not at issue in this action and exist independent and apart from the PAGA
claims at issue before the Court. *See Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 80 (2020) (the
"[s]ettlement of individual claims does not strip an aggrieved employee of standing, as the state's
authorized representative, to pursue PAGA remedies" nor resolve the PAGA claims.).

1 the Parties provides for a “Gross PAGA Settlement Amount” payment in the amount of
2 \$835,000 to resolve the PAGA Released Claims (hereinafter referred to as the “PAGA
3 Settlement”). From this PAGA Settlement of \$835,000, there is a deduction of attorneys’
4 fees in the amount of \$278,333 (which is one-third of the PAGA Settlement), reimbursement
5 of incurred costs in an amount not to exceed \$30,000, and Settlement Administration Costs
6 not to exceed \$15,000. (Settlement Agreement at §III(4)(b)-(c)).³ After these deductions, the
7 amount remaining is the “PAGA Payment”, which is estimated to be \$511,667.

8 Of the PAGA Payment amount, seventy-five percent (75%) will be paid to the LWDA
9 and the remaining twenty-five percent (25%) will be paid to the Aggrieved Employees
10 (Settlement Agreement at III(4)(a)(1)).⁴ This 75/25 allocation is required by Labor Code
11 §2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

12 The Individual PAGA Payment for each Aggrieved Employee shall be based on a pro
13 rata share of the number of pay periods worked during the PAGA Period by each Aggrieved
14 Employee divided by the total number of pay periods worked during the PAGA Period. (*Id.*)
15 The PAGA Period is the time period from January 29, 2019 through and including April 18,
16 2021. (Settlement Agreement at § I(13)).

17 Defendant has represented to PAGA Counsel the number of pay periods and
18 Aggrieved Employees. Defendant represents that there are approximately 2,327 Aggrieved
19 Employees who worked approximately 34,614 pay periods during the PAGA Period.
20 (Settlement Agreement at § 3(3)).

21
22 ³ In the event that Court approval is required and a payment of less than One-Third of the Gross
23 PAGA Settlement Amount in Attorneys’ Fees or \$30,000 in Attorneys’ Expenses to PAGA Counsel
24 is approved, the unawarded difference will be added to the PAGA Payment and not to PAGA
25 Counsel or the Defendant. (Settlement Agreement at III(4)(b)). In the event the Court approves less
26 than \$15,000 to administer the settlement or if the actual cost to administer the settlement is less than
27 \$15,000, the difference will be added to the PAGA Payment. (*Id.* at III(4)(c)). The payment of
28 Attorneys’ Fees shall be made 80% to Blumenthal Nordrehaug Bhowmik De Blouw LLP and 20%
to Winston Law Group P.C. (Settlement Agreement at § III(4)(b)).

⁴ “Aggrieved Employees” means all individuals Defendant employed in California and classified as
non-exempt during the period from January 29, 2019 through and including April 2, 2021. The
PAGA Period is the time period from January 29, 2019 through and including April 18, 2021.
(Settlement Agreement at § I (2),(13)).

1 Upon entry of final judgment, the Released Parties shall be entitled to a release from
2 the State of California and the Aggrieved Employees only as to all PAGA claims that
3 occurred during the PAGA Period that have been or could have been alleged under the
4 PAGA based upon the allegations set forth in the operative complaint and the PAGA notice
5 letters sent on Plaintiff's behalf, whether known or unknown, and whether anticipated or
6 unanticipated, that accrued during the PAGA Period, including any alleged violations arising
7 out of or relating to California Labor Code sections 201, 202, 203, 204, 210, 226, 226.7, 246,
8 248, 248.1, 248.2, 510, 512, 558(a), 1194, 1197, 1197.1, 1198, 2698, *et seq.*, and 2802, and
9 any provision of Industrial Welfare Commission Wage Order 5, as well as any other alleged
10 violations of the Labor Code or any other applicable Industrial Welfare Commission Wage
11 Order provisions (the "PAGA Released Claims")(Settlement Agreement at §III(5)(a)). The
12 PAGA Released Claims expressly excludes claims for vested benefits, wrongful termination,
13 unemployment insurance, disability, social security, workers' compensation, class claims,
14 and PAGA claims outside of the PAGA Period. (*Id.*) The Settlement Agreement expressly
15 confirms that "In no event shall the release of the PAGA Released Claims in this Settlement
16 Agreement release any non-PAGA, individual claims of any Aggrieved Employees other
17 than Plaintiff." (*Id.*)

18 Defendant will provide the necessary information about the Aggrieved Employees to
19 the Settlement Administrator (ILYM Group) within thirty (30) days of the approval of the
20 PAGA settlement by the Court. (Settlement Agreement at §IV(2)). Within twenty (20) days
21 after receipt of the Gross PAGA Settlement Amount from Defendant, the Settlement
22 Administrator will issue to each Aggrieved Employee a check for their Individual PAGA
23 Payment at their last known home address along with an explanatory letter notifying the
24 Aggrieved Employees of the Parties' settlement. (Settlement Agreement at §IV(4)). Checks
25 will remain negotiable for one hundred eighty (180) days. (*Id.*) Any checks returned as non-
26 deliverable on or before the check cashing deadline will be sent promptly via regular First-
27 Class U.S. Mail to the forwarding address affixed thereto. (*Id.*) If no forwarding address is
28 provided, the Settlement Administrator will promptly attempt to determine the correct

1 address using a skip-trace, or other search using the name, address, Social Security number,
2 phone number, credit reporting and social media of the Aggrieved Employee involved and
3 will then perform a re-mailing. (*Id.*) If an Aggrieved Employees' check is not cashed within
4 one hundred twenty (120) days after its first mailing to the Aggrieved Employees the
5 Settlement Administrator shall send the affected Aggrieved Employees notice informing
6 them that, unless their check is cashed in the next 60 days, it will expire and become non-
7 negotiable, and offer to replace the check if it was lost or misplaced but not cashed. (*Id.*)
8 Subject to Court approval, all checks not cashed within one hundred eighty (180) days of
9 payment shall be paid to the Unclaimed Property Fund of the California Controller in the
10 name(s) of the absent Aggrieved Employees, and the Aggrieved Employees shall remain
11 bound by the Settlement Agreement and will be deemed to have released the Released
12 Parties from the PAGA Released Claims (*Id.*) The Individual PAGA Payments shall be
13 treated entirely as civil penalties (non-wages) and shall be reported using IRS tax form 1099.
14 (Settlement Agreement at §I(6)).

15 Within twenty (20) days after receipt of the Gross PAGA Settlement Amount from
16 Defendant, the Settlement Administrator will pay the Attorneys' Fees, the Attorneys'
17 Expenses, the Administration Costs, and the portion of the PAGA Payment allocated to the
18 LWDA from the Gross PAGA Settlement Amount. (Settlement Agreement at §IV(5)). The
19 Settlement Administrator will provide an accounting under oath to the parties of the amounts
20 paid out. (Settlement Agreement at §IV(6)).

21 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of
22 the Settlement Agreement and this motion to the LWDA concurrently with the filing of the
23 instant motion for settlement approval as set forth in the accompanying proof of service in
24 compliance with Labor Code section 2699(1). In addition, Plaintiff shall submit to the
25 LWDA a copy of the Court's judgment and order approving the Settlement Agreement
26 within ten (10) days after entry of judgment or order.

27 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

28 The claim before this court is the representative claim under PAGA on behalf of the

1 State of California for civil penalties pursuant to the PAGA. The parties have agreed to
2 settle this PAGA claim in its entirety after investigation and arm's length mediation.
3 (Declaration of Kyle Nordrehaug, at ¶4.) The settlement is intended to fully and finally
4 resolve the PAGA Released Claims asserted by Plaintiff on behalf of the State of California.
5 This is only a settlement of the PAGA claims for civil penalties, and is not a class settlement
6 and does not release the individual claims, if any, of the Aggrieved Employees. This
7 settlement does not release any claim that is not a PAGA claim.⁵ Attorneys' fees equal to
8 one-third of the Gross PAGA Settlement amount (\$278,333) and litigation expenses in an
9 amount not to exceed \$30,000 will also be paid to PAGA Counsel as part of the settlement in
10 accordance with California Labor Code § 2699(g)(1) as set forth in the Settlement
11 Agreement.⁶ Lastly, payment to the Settlement Administrator in an amount not to exceed
12 \$15,000 to perform the administrative duties to distribute the settlement money shall also be
13 paid. (Declaration of Kyle Nordrehaug, at ¶¶ 4-5.)

14 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE**
15 **SETTLEMENT OF THE PAGA CLAIM**

16 Labor Code § 2699(l) requires that the Court "shall review and approve any
17 settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement
18 shall be submitted to the agency at the same time that it is submitted to the court."
19 Consequently, the parties respectfully ask the Court to review and approve the settlement of
20 the PAGA claims and the PAGA Payment to be paid as part of the proposed settlement.

21 **A. The PAGA Settlement Amount To Be Paid Is Fair And Reasonable**

22 The Parties believe that the PAGA Settlement amount is fair and reasonable and
23 therefore "shall" be reviewed and approved. The Labor and Workforce Development
24 Agency has released data on PAGA settlement amounts. After removing the outliers at the
25 low and high end, the average total amount for a PAGA settlement was approximately

26 ⁵ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th at 196: "Nonparty employees are bound
27 by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

28 ⁶ As set forth in the accompanying Declaration of Kyle Nordrehaug, PAGA Counsel incurred costs
in the current amount of \$14,045.46, which is less than the cost allocation in the Settlement
Agreement. See Declaration of Nordrehaug at ¶ 9.

1 \$10,000 per settlement. Here, the Gross PAGA Settlement Amount of \$835,000 is
2 significantly more and constitutes approximately \$24 per pay period. (Declaration of
3 Nordrehaug, at ¶6.)

4 This PAGA Settlement amount compares favorably to the estimated amount of PAGA
5 penalties. With the assistance of an expert, Plaintiffs calculated that the maximum amount of
6 statutory PAGA civil penalties was potentially \$3,461,400 based on 34,614 pay periods.⁷
7 (Declaration of Nordrehaug, at ¶6.) Importantly, however, these calculations were
8 performed at the maximum statutory rate for the penalties, when in fact, it is likely that any
9 penalties awarded would be at a lower rate. California Labor Code Section 2699(e)(1)
10 permits a Court to award a lesser amount than the maximum civil penalty if based on the
11 facts and circumstances to do otherwise would result in an award that is "unjust, arbitrary
12 and oppressive or confiscatory."

13 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
14 affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay
15 period. Therefore, at trial, any PAGA penalties awarded could be significantly less than
16 Plaintiff's calculation even where Plaintiff prevailed on the PAGA claim. If the amount of \$5
17 per pay period from *Carrington v. Starbucks* is used, the potential recovery of civil penalties
18 would be only \$173,070, which is less than this settlement provides.

19 Under PAGA, Courts have considerable discretion to reduce the penalty award. In
20 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court
21 reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the
22 court found maximum penalties "unjust" because the employees had suffered no injuries.
23 Some trial courts have actually awarded no civil penalties, even when Labor Code violations
24 are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of
25

26 ⁷ Stacking is where more than one civil penalty is imposed in a pay period for the same conduct.
27 The valuation of \$3,461,400 is the civil penalty amount without stacking. If stacking is permitted,
28 then the valuation increases with each additional penalty added to each pay period. Plaintiff,
however, is not aware of any PAGA award which permitted stacking and in the cases cited herein,
only one penalty per pay period was assessed.

1 App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County Superior
2 Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist.
3 LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

4 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove
5 each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*,
6 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of
7 PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven
8 suffered a violation of the Labor Code by the defendant."). Here, Plaintiff would need to
9 prove that each Aggrieved Employee suffered a violation for each period the employee
10 worked in relation to meal or rest period violations, failure to pay minimum or overtime
11 wages, failure to provide accurate itemized wage statements, failure to pay wages when due,
12 and failure to reimburse for required expenses.

13 Defendant maintains that Plaintiff and the Aggrieved Employees were properly
14 compensated, and that Defendant did not violate the Labor Code. Accordingly, Defendant
15 disputes and denies Plaintiff's allegations and claims asserted in the complaint which are
16 resolved by the Settlement Agreement. Defendant asserted additional defenses to the PAGA
17 claim, not only as to liability but also as to the amount of the penalties. Defendant could
18 argue that no penalties prior to the PAGA notification should be awarded because the
19 violations were not intentional, and at least one court has so ruled. These defenses present a
20 risk to the PAGA claim and the potential that some or all of the PAGA penalties sought may
21 not be awarded. (Declaration of Nordrehaug, at ¶7.)

22 Given Defendant's potential defenses to the violations at issue, the risks and costs of
23 continued litigation, Plaintiff and his attorneys believe that the PAGA Settlement is fair and
24 reasonable. (Declaration of Nordrehaug, at ¶7.) Defendant has similarly concluded that it is
25 desirable that the action is settled in the manner and upon the terms and conditions set forth
26 in the Settlement Agreement in order to avoid further expense, inconvenience and distraction
27 of further legal proceedings, as well as the uncertainty of litigation. Defendant has
28

1 determined that it is desirable and beneficial to put to rest the claims in the action and
2 Defendant agrees that the PAGA Settlement is fair, reasonable, and adequate.

3 PAGA Counsel have significant experience litigating wage and hour claims including
4 claims for PAGA penalties, and the PAGA Settlement here is similar to or greater than
5 similar settlements that courts have approved. (Declaration of Nordrehaug, at ¶9.) The
6 PAGA Settlement, along with the other terms of the proposed settlement, were negotiated by
7 experienced counsel at arm's length with the assistance of a private mediator, Mark S. Rudy.
8 (Declaration of Nordrehaug, at ¶7.)

9 As set forth in the accompanying proof of service, the LWDA has been provided
10 notice of this motion and the PAGA settlement. The decision of the LWDA to accept the
11 PAGA Settlement and not oppose the motion should be given considerable weight. This is
12 not a situation where the Court needs to be concerned about the rights of absent employees
13 as in a class settlement, as this PAGA-only settlement does not release the individual claims
14 of absent employees, and the LWDA is a sophisticated government entity that is more than
15 able to look out for its own rights.

16 **B. The Remaining Settlement Terms Are Fair And Reasonable**

17 Although PAGA requires that a court approve the proposed PAGA settlement, Labor
18 Code § 2699(1) does not require that a court approve any other elements of the proposed
19 settlement. Because there are no class allegations for which Plaintiff seeks approval, the
20 approval provisions applicable to class settlements under Cal. Code Civil Proc. §382 do not
21 apply. Accordingly, the Court only needs to approve the settlement of the civil penalties
22 sought in the PAGA claim. Nevertheless, as explained herein, the settlement terms for
23 attorneys' fees and costs are reasonable.

24 **VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

25 PAGA Counsel seek approval of attorneys' fees from the PAGA settlement in the
26 amount of \$278,333 representing one-third of the \$835,000 Gross PAGA Settlement
27 Amount. PAGA does not have any requirements for reviewing attorneys' fees, and
28 Plaintiff's position is that the payment of attorneys' fees and costs in this settlement is a

1 matter of contract for a contingent representation. Nevertheless, should this Court review the
2 requested attorneys' fees, it is clear that the requested fees and costs are reasonable.

3 First, the requested fees are justified by the result achieved. PAGA Counsel
4 negotiated a recovery of \$835,000, and this result justifies the requested fees equal to one
5 third of this recovery. This percentage is within the standard contingent recovery percentage
6 of one-third, and this percentage is what was expressly approved by the Supreme Court in
7 *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016); *Amaro v. Anaheim Arena Mgmt.*,
8 *LLC*, 69 Cal. App. 5th 521, 545 (2021) (recognizing that ““fee awards in class actions average
9 around one-third of the recovery”” regardless of ““whether the percentage method or the lodestar
10 method is used.”” (quoting *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008))).

11 Second, the fee award is justified by the work performed and contributions to the
12 case. As detailed in the accompanying Declaration of Kyle Nordrehaug at ¶8 and
13 Declaration of David Winston at ¶28, the fee award represents PAGA Counsel’s current
14 lodestar of \$118,463 with a reasonable multiplier of 2.3, with significant additional work to
15 be performed such that the multiplier will ultimately be less. Generally, the Ninth Circuit and
16 California Courts award positive multipliers between 2 to 4 times the lodestar to reward
17 counsel for accepting the contingent risks of the litigation or obtaining good results. See,
18 e.g., *Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award with multiplier between 2.03
19 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting
20 reasonable multipliers of 2.0 to 4.0 are often applied and affirming 1.75 multiplier); *Wershba*
21 *v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001) (noting that multipliers can range
22 from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D.
23 Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v.*
24 *Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third of fund,
25 which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
26 LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that
27 represented a multiplier of 2.76 as falling within the "majority" range for risk multipliers).
28

1 Third, the consideration of the enhancement factors also justify the enhancement of
2 the lodestar. Courts multiply the lodestar by a factor to account for the risk of non-payment,
3 delay in payment, the quality of work, and the novelty and difficulty of the issues involved.
4 See *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001). Failure to apply a risk multiplier in
5 cases that meet these criteria is an abuse of discretion. *Stetson v. Grissom*, 821 F.3d 1157,
6 1166 (9th Cir. 2016).

7 Finally, as to litigation expenses, PAGA Counsel will be recovering litigation
8 expenses in the total amount of \$14,045.46 which is less than the \$30,000 allocation for costs
9 in the Settlement Agreement, so the difference of \$15,954.54 will be added to the PAGA
10 Payment amount. These expenses are documented in the accompanying Declaration of
11 Nordrehaug at ¶9.

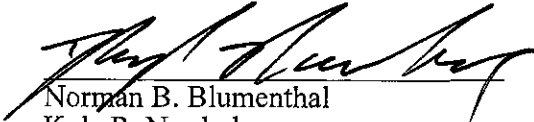
12
13 **VII. CONCLUSION**

14 Based on the foregoing, Plaintiff respectfully request this Court approve the PAGA
15 settlement as set forth in the Settlement Agreement and enter the proposed order and
16 judgment submitted herewith.

17
18 Dated: November 16, 2021

**BLUMENTHAL NORDREHAUG
BHOWMIK DE BLOUW LLP**

19
20
21 By:


Norman B. Blumenthal
Kyle R. Nordrehaug
Attorneys for Plaintiff