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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **IN AND FOR THE COUNTY OF ORANGE**

18 LILLIA HUPP, ERIC BROWN, PHILIP URIBE,
19 PATRICIA NWAJEL, ANEESAH WADOOD,
20 BRIAN MATSUMOTO, LORI JELENICKI,
21 MICHELLE MIDDLETON, PAULA GARCIA,
22 KRISTA GODINEZ, COURTLAND GEOFFREY
23 MILLER, KELLY RIORDAN, GABRIEL
24 BATCHELDER, ANGELA HANKINS, ANNA
25 ACOSTA, and TAWANA ROSE MERAZ-PILANA-
26 MANAGE, on behalf of the State of California, as
27 private attorney generals,

28 Plaintiffs,

v.

ARTHUR J. GALLAGHER SERVICE COMPANY,
a Delaware corporation; GALLAGHER BASSETT
SERVICES, INC., a Delaware corporation;
ARTHUR J. GALLAGHER & CO. (ILLINOIS), an
Illinois corporation; ARTHUR J GALLAGHER &
CO. INSURANCE BROKERS OF CALIFORNIA,
INC., a California corporation; ARTHUR J.
GALLAGHER RISK MANAGEMENT SERVICES,
INC., an Illinois corporation; and DOES 1 through
25, inclusive,

Defendants.

Case No. 30-2020-01145295-CU-OE-CXC

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

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

Hearing Date: July 15, 2021
Hearing Time: 2:00 p.m.

Judge: Hon. Peter Wilson
Dept.: CX 102

Complaint Filed: June 29, 2020

Trial Date: Not Set

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

2 YOU ARE HEREBY NOTIFIED THAT at 2:00 p.m. on July 15, 2021, or as soon
3 thereafter as the matter can be heard, in Department CX102 of the above entitled Court
4 before the Honorable Peter Wilson, Plaintiffs Lillia Hupp, Eric Brown, Philip Uribe, Patricia
5 Nwajei, Aneesah Wadood, Brian Matsumoto, Lori Jelenicki, Michelle Middleton, Paula
6 Garcia, Krista Godinez, Courtland Geoffrey Miller, Kelly Riordan, Gabriel Batchelder,
7 Angela Hawkins, Anna Acosta, and Tawana Rose Meraz-Pilana-Manage (“Plaintiffs”) will
8 and hereby do move for an order approving the settlement of the PAGA claim alleged
9 against Defendants Arthur J. Gallagher Service Company, Gallagher Bassett Services, Inc.,
10 Arthur J. Gallagher & Co. (Illinois), Arthur J. Gallagher & Co. Insurance Brokers of
11 California, Inc., and Arthur J. Gallagher Risk Management Services, Inc. (“Defendants”) in
12 accordance with Labor Code §2699(l). The proposed settlement is set forth in the
13 accompanying Settlement Agreement (“Settlement Agreement”).

14 This Motion will be based on this notice, the accompanying points and authorities, the
15 Declarations of Kyle Nordrehaug and Jacob Whitehead, and the complete files and records in
16 this action. The Labor Workforce Development Agency has been served with this motion
17 and the Settlement Agreement as set forth in the accompanying proof of service.

18 Respectfully submitted,

19 Dated: June 7, 2021

WHITEHEAD EMPLOYMENT LAW

20 By: /s/ Jacob Whitehead
21 Jacob N. Whitehead

22 **BLUMENTHAL NORDREHAUG**
23 **BHOWMIK DE BLOUW LLP**

24 By: /s/ Kyle Nordrehaug
25 Norman B. Blumenthal
26 Kyle R. Nordrehaug

27 *Attorneys for Plaintiffs*
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Lillia Hupp, Eric Brown, Philip Uribe, Patricia Nwajei, Aneesah Wadood,
4 Brian Matsumoto, Lori Jelenicki, Michelle Middleton, Paula Garcia, Krista Godinez,
5 Courtland Geoffrey Miller, Kelly Riordan, Gabriel Batchelder, Angela Hawkins, Anna
6 Acosta, and Tawana Rose Meraz-Pilana-Manage (“Plaintiffs”) reached a settlement of the
7 California Private Attorneys General Act, Cal. Labor Code §2699, *et seq.* (“PAGA”) claim
8 asserted in this action against Defendants Arthur J. Gallagher Service Company, Gallagher
9 Bassett Services, Inc., Arthur J. Gallagher & Co. (Illinois), Arthur J. Gallagher & Co.
10 Insurance Brokers of California, Inc., and Arthur J. Gallagher Risk Management Services,
11 Inc. (“Defendants”) (collectively, the “Parties”). In accordance with California Labor Code
12 §2699(l), Plaintiffs now ask this Court to review and approve the settlement of Plaintiffs’
13 PAGA claims.¹ This is only a settlement of the PAGA claims for civil penalties, and is not a
14 class settlement and does not release the individual wage claims, if any, of the affected
15 employees other than the Plaintiffs themselves. Cal. Labor Code § 2699(g)(1); *Iskanian v.*
16 *CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175,
17 182 (2019) (unpaid wages are not recoverable under PAGA).

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

24 A proposed order confirming review and approval of the PAGA settlement is
25 submitted herewith.

26
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.”

II. RELEVANT FACTS

On February 7, 2020, Plaintiff Paula Garcia filed a putative Class Action Complaint in San Bernardino County Superior Court (*Paula Garcia v. Gallagher Bassett Services, Inc.*, Case No. CIVDS2004140, “*Garcia Action*”) alleging seven causes of action against Defendant Gallagher Bassett Services, Inc. for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) Failure to Pay Overtime Compensation in Violation of Cal. Lab. Code §§ 510, 1994 and 1198, *et seq.*; (3) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (4) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (6) Failure to Provide Wages When Due in Violation of Cal. Labor Code §§ 201, 202 and 203; and, (7) Violation of the Private Attorneys General Act [Labor Code §§ 2698, *et seq.*].

On May 29, 2020, Plaintiff Paula Garcia filed a First Amended Representative Action Complaint (“FAC”) in the *Garcia Action* for Defendant’s alleged violation of the PAGA. Plaintiff Garcia’s FAC alleged a single cause of action for civil penalties pursuant to California Labor Code § 2699, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204, 210, 226, 226.7, 510, 512, 558(a)(1)(2), 1194, and 1198.

On June 29, 2020, Plaintiffs Lillia Hupp, Eric Brown and Philip Uribe filed a putative Class Action Complaint in this Court (“*Hupp Action*”) alleging eight causes of action against Defendants for: (1) Failure to Provide Meal Periods In Violation of Labor Code §§ 226.7, 512, and 1198, and IWC Wage Order No. 4-2001; (2) Failure To Provide Rest Periods In Violation of Labor Code §§ 226.7 and 1198, and IWC Wage Order No. 4-2001; (3) Failure to Maintain Accurate Payroll Records In Violation of Labor Code § 1174; (4) Failure to Provide Accurate Itemized Wage Statements In Violation of Labor Code § 226; (5) Failure To Reimburse Business Expenses In Violation of Labor Code § 2802; (6) Failure to Timely Pay Wages Twice Monthly In Violation of Labor Code § 204; (7) Failure To Timely Pay

1 Final Wages Upon Discharge Or Quit In Violation of Labor Code §§ 201-202; and
2 (8) Unfair Business Practices In Violation of Business & Professions Code § 17200 *et seq.*

3 On July 29, 2020, Plaintiffs Lillia Hupp, Eric Brown and Philip Uribe filed a First
4 Amended Class Action Complaint in this Court adding a cause of action for Violation of the
5 Private Attorneys General Act of 2004 (Labor Code §§ 2698 *et seq.*) and adding Plaintiffs
6 Patricia Nwajei, Aneesah Wadood, Brian Matsumoto, Lori Jelenicki, and Michelle
7 Middleton.

8 Plaintiffs and Defendants in the *Garcia* and *Hupp* Actions thereafter agreed to
9 mediate with Hon. Carl J. West (Ret.). Prior to the mediation, Defendants provided
10 Plaintiffs in the *Garcia* and *Hupp* Actions with the number of allegedly aggrieved employees
11 during the relevant time period, and the corresponding number of pay periods where the
12 employees worked at least one shift during a pay period, so that Plaintiffs could evaluate the
13 potential value of the claims. The Parties also exchanged anticipated arguments, defenses,
14 and analysis in connection with the mediation. (Declaration of Kyle Nordrehaug, at ¶3).

15 On November 11, 2020, the Parties engaged in an all-day mediation session before
16 Mediator West, a respected and experienced mediator knowledgeable of both the wage and
17 hour laws and representative claims at issue in this action. On November 18, 2020, the
18 Parties engaged in a second mediation session before Joel Grossman, another respected and
19 experienced mediator with knowledge of wage and hour and representative actions. Through
20 arms-length negotiations with the assistance of Mediator West, the Parties reached an
21 agreement to settle the PAGA claims in the *Garcia* and *Hupp* Actions which led to the
22 signing of a Memorandum of Understanding memorializing the settlement.² The settlement
23 was negotiated in light of all known facts and circumstances and the uncertainty associated
24 with litigation – including the risk of Plaintiffs not being able to maintain representative

25 ² As part of the settlement and in addition to the Gross PAGA Settlement Amount, Defendants have
26 agreed to separately settle Plaintiffs' individual claims which are set forth in separate, stand-alone
27 confidential settlement agreements in exchange for each individual Plaintiff's general release of all
28 known and unknown claims of any type whatsoever they may have against Defendants, including a
waiver of any unknown claims pursuant to California Civil Code section 1542. Settlement
Agreement at §III, ¶29.

1 claims, the difficulty of proving Plaintiffs' claims in a manageable trial, the merits of
2 Defendants' potential defenses, and the significant delay and potential appellate issues
3 inherent to litigation – and was reached after extensive arm's length negotiations, with the
4 assistance of Mediator West. (Declaration of Kyle Nordrehaug, at ¶3).

5 On May 14, 2021, the Parties filed a Joint Stipulation for Leave to File a Second
6 Amended Representative Action Complaint in the *Hupp* Action, adding Paula Garcia, Krista
7 Godinez, Courtland Geoffrey Miller, Kelly Riordan, Gabriel Batchelder, Angela Hankins,
8 Anna Acosta and Tawana Rose Meraz-Pilana-Manage as additional named plaintiffs and
9 asserting a claim for PAGA penalties based on any and/or all facts and California Labor
10 Code provisions asserted in the *Hupp* Action and/or the *Garcia* Action. On June 7, 2021, the
11 Second Amended Representative Action Complaint was filed in the *Hupp* action.

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

13 The PAGA settlement is subject to Court approval consistent with Labor Code
14 §2699(1)(2). (Settlement Agreement at §III ¶27(a)). The Settlement Agreement negotiated
15 by the Parties provides for a “Gross PAGA Settlement Amount” payment in the amount of
16 \$700,000 to resolve the PAGA Claims (hereinafter referred to as the “PAGA Settlement”).
17 From this PAGA Settlement of \$700,000, there is a deduction of attorneys' fees in the
18 amount of \$233,334 (which is one-third of the PAGA Settlement), reimbursement of
19 Attorney's Expenses in an amount not to exceed \$25,000, and Settlement Administration
20 Costs not to exceed \$7,500. (Settlement Agreement at §III, ¶27 (b),(c)).³ After these
21 deductions, the amount remaining is the “PAGA Payment”, which is estimated to be
22 \$434,166. (Declaration of Kyle Nordrehaug, at ¶4.)

23 Of the PAGA Payment amount, seventy-five percent (75%) will be paid to the LWDA
24 and the remaining twenty-five percent (25%) will be paid to the alleged Aggrieved
25

26 ³ If payment of less than One-Third of the Gross PAGA Settlement Amount in Attorneys' Fees or
27 \$25,000 in Attorneys' Expenses to PAGA Counsel is approved, the unawarded difference will be
28 added to the PAGA Payment and shall not revert to PAGA Counsel or the Defendants. The payment
of Attorneys' Fees shall be made 60% to Blumenthal Nordrehaug Bhowmik De Blouw LLP and
40% to Whitehead Employment Law. (Settlement Agreement at § I(14)).

1 Employees (“Individual PAGA Payment”). (Settlement Agreement at §III, ¶27(a)(1)).⁴ This
2 75/25 allocation is required by Labor Code §2699 as explained by *ZB, N.A. v. Superior*
3 *Court*, 8 Cal.5th 175 (2019).

4 The Individual PAGA Payment for each Aggrieved Employee shall be based on the
5 number of pay periods each Aggrieved Employee worked during the PAGA Period as a
6 Claims Adjuster while classified as exempt in California as a percentage of the total pay
7 periods worked by all alleged Aggrieved Employees during the PAGA Period as Claims
8 Adjusters who are classified as exempt in California. (Settlement Agreement at § I(8)) The
9 PAGA Period is the time period from February 7, 2019 through December 31, 2020.
10 (Settlement Agreement at § I(14)).

11 Defendants represented to Plaintiffs’ Counsel the number of pay periods and
12 Aggrieved Employees. Defendants have represented that the Aggrieved Employees consist
13 of approximately 371 employees who collectively worked approximately 11,968 pay periods
14 during the PAGA Period as Claims Adjusters who were classified as exempt in California as
15 of December 15, 2020.

16 Upon entry of judgment, the Released Parties shall be entitled to a release of PAGA
17 Released Claims. The PAGA Released Claims include any and all claims, known or
18 unknown, for civil penalties under California Labor Code section 2698 *et seq.* (PAGA) that:
19 were asserted in any complaint filed, or to be filed, in the *Garcia* Action and/or *Hupp* Action
20 and/or Plaintiffs’ letters to the LWDA (including any subsequently amended complaints or
21 letters); and/or that could have been asserted in any complaint filed, or to be filed, in the
22 *Garcia* Action and/or *Hupp* Action based on the facts and/or allegations in any complaint
23 filed in the *Garcia* Action and/or *Hupp* Action and/or Plaintiffs’ letters to the LWDA
24

25 ⁴ “Aggrieved Employees” means all current and former allegedly aggrieved individuals who were
26 employed by Defendants Gallagher Bassett Services, Inc., Arthur J. Gallagher Service Company,
27 Arthur J. Gallagher & Co. (Illinois), Arthur J. Gallagher & Co. Insurance Brokers of California, Inc.,
28 and/or Arthur J. Gallagher Risk Management Services, Inc. as Claims Adjusters and/or Senior
Claims Adjusters (collectively “Claims Adjusters”) in California and were classified as exempt
while in the Claims Adjuster position at any time from February 7, 2019 to December 31, 2020.
(Settlement Agreement at § III(27)(b)).

1 (including any subsequently amended complaints or letters). This release only applies to
2 PAGA claims that arose during the PAGA Period and includes claims for PAGA civil
3 penalties premised on: California Labor Code Sections 200-204, 210, 218, 218.5, 226, 226.7,
4 510, 512, 558, 1174, 1194, 1198, and 2802; failure to pay wages and overtime; failure to pay
5 for all hours worked/compensation due for services; off-the-clock work; failure to provide
6 meal periods; failure to authorize and permit rest periods; failure to pay meal or rest period
7 premiums; failure to maintain accurate payroll records; failure to provide accurate itemized
8 wage statements; failure to reimburse business expenses; and failure to timely pay wages at
9 termination (“PAGA Released Claims”). (Settlement Agreement at § III(28)).

10 This release as to the State of California and Aggrieved Employees only covers
11 claims that arise under the PAGA and does not cover an aggrieved employee’s individual
12 Labor Code claims. The PAGA Released Claims expressly exclude claims for vested
13 benefits, wrongful termination, unemployment insurance, disability, social security, workers’
14 compensation, class claims, and PAGA claims outside of the PAGA Period. Any class
15 claims will be dismissed without prejudice. (*Id.*).

16 Notice shall be provided to the Aggrieved Employees in the following manner:
17 Defendants will provide the Aggrieved Employee List to the Settlement Administrator
18 (Simpluris) in a secure manner on a confidential basis within fifteen (15) calendar days after
19 the Effective Date. (Settlement Agreement at § IV(33))

20 Within fifteen (15) calendar days after receipt of the Gross PAGA Settlement Amount
21 from Defendants, the Settlement Administrator will issue to each Aggrieved Employee a
22 check for their Individual PAGA Payment at their last known home address along with an
23 explanatory letter.⁵ Checks will remain negotiable for one hundred eighty (180) days. Any
24 checks returned as non-deliverable on or before the check cashing deadline will be sent
25 promptly via regular First-Class U.S. Mail to the forwarding address affixed thereto. If no
26 forwarding address is provided, the Settlement Administrator will promptly attempt to
27 determine the correct address using a skip-trace, or other search using the name, address,

28 ⁵ The form of the notice to accompany the checks is attached as Exhibit 2 to the Settlement Agreement.

1 Social Security number, phone number, credit reporting and social media of the Aggrieved
2 Employee involved and will then perform a re-mailing. If an Aggrieved Employees' check is
3 not cashed within 120 days after its first mailing to the Aggrieved Employees the Settlement
4 Administrator shall send the affected Aggrieved Employees notice informing them that
5 unless their check is cashed in the next 60 days, it will expire and become non-negotiable,
6 and offer to replace the check if it was lost or misplaced but not cashed. All checks not
7 cashed within 180 days of payment shall be paid to the California Controller's Unclaimed
8 Property Fund for the benefit of those Aggrieved Employees who failed to negotiate their
9 check where they may claim the funds. The Individual PAGA Payments are 100% penalties
10 and shall be reported using IRS tax form 1099. (*Id.* at § IV(34).)

11 Within fifteen (15) calendar days after receipt of the Gross PAGA Settlement Amount
12 from Defendants, the Settlement Administrator will pay the Attorneys' Fees, the Attorneys'
13 Expenses, the Administration Costs, and the portion of the PAGA Payment allocated to the
14 LWDA from the Gross PAGA Settlement Amount. (*Id.* at § IV(35)) The Settlement
15 Administrator will provide an accounting under oath to the parties of the amounts paid out.
(*Id.* at § IV(36).)

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

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

23 The claim before this court is the representative claim under PAGA on behalf of the
24 State of California for civil penalties pursuant to the PAGA. The Parties have agreed to
25 settle this PAGA claim in its entirety after the informal exchange of pre-mediation
26 information and arm's length mediation. (Declaration of Kyle Nordrehaug, at ¶4.) The
27 settlement is intended to fully and finally resolve the PAGA Released Claims asserted by
28 Plaintiffs on behalf of the State of California. This is only a settlement of the PAGA claims

1 for civil penalties, and is not a class settlement and does not release the individual claims, if
2 any, of the Aggrieved Employees. This settlement does not release any claim that is not a
3 PAGA claim.⁶ Attorneys' fees equal to one-third of the PAGA Settlement amount
4 (\$233,334) and litigation expenses in an amount not to exceed \$25,000 will also be paid to
5 Plaintiffs' Counsel as part of the settlement in accordance with California Labor Code §
6 2699(g)(1) as set forth in the Settlement Agreement.⁷ A payment to the Settlement
7 Administrator in an amount not to exceed \$7,500 to perform the administrative duties to
8 distribute the settlement money shall also be paid. (Declaration of Kyle Nordrehaug, at ¶¶ 4-
9 5.)

10 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE**
11 **SETTLEMENT OF THE PAGA CLAIM**

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

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

18 The Parties believe that the PAGA Settlement amount is fair and reasonable and
19 therefore "shall" be reviewed and approved. The Labor and Workforce Development
20 Agency has released data on PAGA settlement amounts. After removing the outliers at the
21 low and high end, the average, total settlement amount of PAGA claims is approximately
22 \$10,000. Here, the PAGA Settlement amount of \$700,000 is significantly more and
23 constitutes approximately \$59 per pay period. (Declaration of Nordrehaug, at ¶6.)
24

25 ⁶ As explained by the Supreme Court in ZB, N.A., 8 Cal. 5th at 196: "Nonparty employees are
26 bound by the judgment in an action under the PAGA, but only with respect to recovery of civil
penalties."

27 ⁷ As set forth in the accompanying Declaration of Kyle Nordrehaug, Plaintiffs' Counsel incurred
28 costs in the current amount of \$17,891.17, which is less than the cost allocation in the Settlement
Agreement. See Declaration of Nordrehaug at ¶ 9.

1 This PAGA Settlement amount compares favorably to the estimated amount of PAGA
2 penalties. With the assistance of an expert, Plaintiffs calculated that the maximum amount of
3 statutory PAGA civil penalties was potentially \$1,108,800 for 357 employees based on
4 11,088 pay periods (these are the estimated numbers of allegedly aggrieved employees and
5 pay periods relied on at mediation).⁸ (Declaration of Nordrehaug, at ¶6.) Importantly,
6 however, these calculations were performed at the maximum statutory rate for the penalties,
7 when in fact, it is likely that any penalties awarded would be at a lower rate. California
8 Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the maximum
9 civil penalty if based on the facts and circumstances to do otherwise would result in an award
10 that is "unjust, arbitrary and oppressive or confiscatory."

11 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
12 affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay
13 period. Therefore, at trial, any PAGA penalties awarded could be significantly less than
14 Plaintiffs' calculation even where Plaintiffs prevailed on the PAGA claim. If the amount of
15 \$5 per pay period from *Carrington v. Starbucks* is used, the potential recovery of civil
16 penalties would be only \$59,840.00, which is less than this settlement provides.

17 Under PAGA, Courts have considerable discretion to reduce the penalty award. In
18 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court
19 reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the
20 court found maximum penalties "unjust" because the employees had suffered no injuries.
21 Some trial courts have actually awarded no civil penalties, even when Labor Code violations
22 are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of
23 App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County Superior
24

25
26 ⁸ Stacking is where more than one civil penalty is imposed in a pay period for the same conduct.
27 The valuation of \$1,108,800 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. Plaintiffs,
however, are not aware of any PAGA award which permitted stacking and in the cases cited herein,
only one penalty per pay period was assessed.

1 Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist.
2 LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

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

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

23 Given Defendants' potential defenses to the violations at issue, the risks and costs of
24 continued litigation, Plaintiffs and their attorneys believe that the PAGA Settlement is fair
25 and reasonable. (Declaration of Nordrehaug, at ¶7.) Plaintiffs' Counsel have significant
26 experience litigating wage and hour claims including claims for PAGA penalties, and the
27 PAGA Settlement here is similar to or greater than similar settlements that courts have
28 approved. (Declaration of Nordrehaug, at ¶10.) The PAGA Settlement, along with the other

1 terms of the proposed settlement, were negotiated by experienced counsel at arm's length
2 with the assistance of an experienced private mediator, Hon. Carl J. West (Ret.).
3 (Declaration of Nordrehaug, at ¶7.)

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

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

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

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

20 Plaintiffs' Counsel seeks approval of attorneys' fees from the PAGA settlement in the
21 amount of \$233,334 representing one-third of the \$700,000 PAGA Settlement Amount.
22 PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiffs' position
23 is that the payment of attorneys' fees and costs in this settlement is a matter of contract for a
24 contingent representation. Nevertheless, should this Court review the requested attorneys'
25 fees, it is clear that the requested fees and costs are reasonable.

26 First, the requested fees are justified by the result achieved. Plaintiffs' Counsel
27 negotiated a recovery of \$700,000, and this result justifies the requested fees equal to one-
28 third of this recovery. This percentage is within the standard contingent recovery percentage

1 of one-third, and this percentage is what was expressly approved by the Supreme Court in
2 *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016).

3 Second, the fee award is justified by the work performed. As detailed in the
4 accompanying Declaration of Kyle Nordrehaug at ¶8 and Declaration of Jacob Whitehead at
5 ¶ 21, the requested fee award is equivalent to Plaintiffs' Counsels' current lodestar of
6 \$221,384.50, with significant additional work to be performed such that the multiplier will
7 ultimately be less than 1 (i.e. a negative multiplier). Generally, the Ninth Circuit and
8 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for
9 accepting the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1
10 Cal. 5th at 506 (approving one-third fee award with multiplier between 2.03 and 2.13);
11 *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable
12 multipliers of 2.0 to 4.0 are often applied and affirming 1.75 multiplier); *Wershba v. Apple*
13 *Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001) (noting that multipliers can range from 2 to
14 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014)
15 (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v. Bank of*
16 *America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third of fund, which
17 was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK,
18 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a
19 multiplier of 2.76 as falling within the "majority" range for risk multipliers).

20 Third, consideration of the enhancement factors justify the enhancement of the
21 lodestar. Courts multiply the lodestar by a factor to account for the risk of non-payment,
22 delay in payment, the quality of work, and the novelty and difficulty of the issues involved.
23 See *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001). Failure to apply a risk multiplier in
24 cases that meet these criteria is an abuse of discretion. *Stetson v. Grissom*, 821 F.3d 1157,
25 1166 (9th Cir. 2016).

26 Finally, as to litigation expenses, Plaintiffs' Counsel will be recovering litigation
27 expenses in the total amount of \$17,891.17 which is less than the \$25,000 allocation for costs
28 in the Settlement Agreement, so the difference of \$7,108.83 will be added to the PAGA

1 Payment amount. These expenses are documented in the accompanying Declaration of
2 Nordrehaug at ¶9.

3 **VII. CONCLUSION**

4 Based on the foregoing, Plaintiffs respectfully request this Court approve the PAGA
5 settlement as set forth in the Settlement Agreement and enter the proposed order and
6 judgment submitted herewith.

7 Dated: June 7, 2021

WHITEHEAD EMPLOYMENT LAW

8
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