

1 **WILLIAM M. CROSBY (SBN: 49357)**
2 **13522 Newport Avenue, Suite 201**
3 **Tustin, CA 92780**
4 **Telephone: (714) 544-2493**
5 **Facsimile: (714) 544-2497**
6 **Email: wcrosby@wcrosbylaw.com**

7 **MAURICE MANDEL II (SBN: 98593)**
8 **P.O. Box 411**
9 **Newport Beach, CA 92662**
10 **Telephone: (949) 874-2002**
11 **Email: MMANDEL2@AOL.COM**

12 **Attorneys for Plaintiff REBECCA DALTON**

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF ORANGE**

15 **COMPLEX JUSTICE CENTER**

16 **REBECCA DALTON, INDIVIDUALLY)**
17 **AND ON BEHALF OF OTHERS)**
18 **SIMILARLY SITUATED, AND ON)**
19 **BEHALF OF THE PEOPLE OF THE)**
20 **STATE OF CALIFORNIA, ROES 1-20,)**

21 **v.)**

22 **STUBRIK'S STEAKHOUSE, WFO, ENT.)**
23 **GROUP, INC.; DENNIS RAINEY; CRAIG)**
24 **VOORTING; DOES I through X, inclusive,)**
25 **Defendants.**

26 **CASE NO. 30-2021-01177894-CU-OE-CX**
27 **DATE FILED: January 8, 2021**
28 **COURTROOM: CX 102**
JUDGE: PETER WILSON

REVISED NOTICE OF MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT, AND FOR RE-DESIGNATION
OF THE PAGA PERIOD;

DECLARATIONS IN SUPPORT THEREOF,
EXHIBITS, PROPOSED JUDGMENT AND
ORDER SEPARATELY SUBMITTED

Date: November 18, 2021
Time: 2:00 PM
Dept: CX 102

29 **TO THE HONORABLE COURT AND THE INTERESTED PARTIES:**

30 **NOTICE IS HEREBY GIVEN THAT on November 18, 2021 at 2:00 PM in Department CX 102,**

1 located at 751 W. Santa Ana Blvd., Santa Ana, CA, 92701, Plaintiff Rebecca Dalton shall and hereby does
2 move this Court for appropriate findings and Orders approving and adjudging the settlement of the PAGA
3 claims brought by Plaintiff Dalton as a part of her case based on alleged violations of the FEHA by the
4 Defendants. The Motion shall be based on this notice of motion, the authorities contained herein, the
5 Declarations and exhibits attached hereto, and such other and further evidence and argument as the Court may
6 properly consider at the hearing on the Motion.
7

8 In addition, the Plaintiff is requesting the Court re-designate the PAGA period to be from December
9 30, 2019 to March 29, 2021 (the date the First Amended Complaint was filed), granting Plaintiff relief from
10 the provision in the MOU to extend the PAGA period to the date the Court approves the settlement, on the
11 basis that the Defendants have unreasonably delayed in reaching a full settlement agreement with the Plaintiff
12 and this has resulted in benefits to the Defendants in substantially increasing the size of the Aggrieved
13 Employee group, and the period of time covered by this PAGA action. Plaintiff is also requesting the Court
14 designate the Labor Code sections which PAGA claims will be released to be those contained in the FAC,
15 only.
16

17 Dated: October 26, 2021

18 MMII-my electronic signature
19 Maurice Mandel II, Attorney for
20 Plaintiff REBECCA DALTON
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

BRIEF SUMMARY OF THE CASE	5
SUMMARY OF THE SETTLEMENT	6
BRIEF SUMMARY OF PROCEDURE	6
<i>LWDA statutory compliance</i>	6
<i>FEHA statutory compliance</i>	7
THE COURT SHOULD APPROVE THE PAGA SETTLEMENT	7
<i>Court approval is only required for the PAGA settlement, not the settlement of individual claims</i>	7
<i>The proposed settlement meets the requirements by this Court and Department</i>	8
<i>Plaintiff complied with the Statutory requirements of PAGA</i>	12
<i>The settlement is fair, reasonable, and adequate in view of PAGA's public policy goals</i>	13
<i>The employer provided evidence disproving the majority of the PAGA claims and immediately remediated</i>	13
<i>The risk, expense, complexity, and likely duration of further litigation</i>	15
<i>The amount offered in settlement</i>	15
<i>The extent of discovery completed and the stage of the proceedings</i>	16
<i>The presence of government participation</i>	16
<i>The expertise and views of counsel</i>	16
THE COURT SHOULD SET THE PAGA PERIOD TO END WITH THE FILING OF THE FAC	17
Legal basis for this relief	17
Factual basis for this relief	18
Irreconcilable differences have arisen regarding the long form settlement agreement	18
CONCLUSION	18

TABLE OF EXHIBITS (attached to Mandel Declaration)

1. PAGA letter dated 12-30-2020 and receipt from LWDA
2. Original complaint filed January 8, 2021
3. First Amended Complaint (FAC) dated March 29, 2021
4. LWDA receipt for Court Complaint dated August 19, 2021
5. DFEH complaint filed January 5, 2021
6. DFEH complaint amended March 29, 2021
7. Answer to FAC, May 10, 2021
8. Stipulation and settlement between Plaintiff Dalton and Defendants
9. *Patel v. Nike Retail Servs., Inc.*, No. 14-CV-04781-RS, 2019 WL 2029061, at *2 (N.D. Cal. May 8, 2019)
10. Email from Defendants attorney Summer Young-Agresti dated September 10, 2021
11. Documents from Dalton employment file re: meal and rest period policies
12. Proposed Notice to Aggrieved Employees

1 **BRIEF SUMMARY OF THE CASE**

2 After working at Stubrik's Steakhouse for over 14 years, Rebecca Dalton quit and brought this suit
3 to redress the severe and pervasive sexual harassment that she suffered at the hands of her married manager,
4 Dennis Rainey. The harassment was Verbal- constant comments about the sexuality of Ms. Dalton's derriere
5 (he did not use that word) and the type of sex acts that Mr. Rainey wanted to perform with Ms. Dalton along
6 with repeated rejected invitations for a sexual liaison; Visual- at least one display of his penis while
7 masturbating and displays of pornography on the work computer; and Physical- stalking; kicking Ms. Dalton's
8 posterior while she was working, and other touchings, in a misguided attempt to arouse ardor in Ms. Dalton
9 toward Mr. Rainey. Ms. Dalton obtained what counseling she could afford, to deal with this situation.
10

11 Like so many women in her position, Ms. Dalton thought if she ignored these antics, Mr. Rainey would
12 come to his senses and realize: 1. He wasn't getting anywhere with the antics, and 2. This was not only
13 morally wrong, it was illegal and he would stop. These hopes by Ms. Dalton never came to fruition.
14

15 Ms. Dalton also brought wage claims under the Labor Code and UCL for being required to work off
16 the clock.
17

18 These individual violations of the Labor Code, UCL and Fair Employment and Housing Act (FEHA)
19 were and are the GRAVAMEN of Ms. Dalton's case, not PAGA allegations. However, and in hindsight,
20 probably unfortunately, Ms. Dalton did allege a PAGA cause of action, which now requires Court approval.
21 Defendants denied all allegations (See: Answer to FAC, **Exhibit 7**,).

22 On August 30, 2021, the parties engaged in a mediation with a well respected employment law
23 mediator, Mr. Mark Lemke. In preparation for this mediation, the parties conducted both formal and informal
24 discovery and an exchange of information, which is described in detail in the declaration. At the mediation,
25 the matter settled, leaving Ms. Dalton to seek this Court's approval of a small settlement of what turned out
26 to be difficult PAGA claims. In order to facilitate the approval of the PAGA settlement, Ms. Dalton and her
27 counsel have waived all requests for payments for representative enhancement and attorney's fees on the
28

1 PAGA portion of the settlement; and an absence of such payments has enabled them to engage a known
2 Settlement Administrator for a very reasonable sum because no tax documentation will be necessary- once
3 the Court approves the PAGA settlement. The Stipulation and Settlement are attached hereto as **Exhibit 8**

4 **SUMMARY OF THE SETTLEMENT**

5
6 Defendants have agreed to a settlement of all of Ms. Dalton's individual non-PAGA claims and the
7 PAGA claim as a lump sum totalling \$85,000.00. This apportioned as follows:

8 1. Payment of \$1000.00 in settlement of the PAGA claim with \$750.00 going to the LWDA and
9 \$250.00 being distributed to approximately 22 employees, on a per capita basis. Each employee will receive
10 \$11.36. This payment will be handled by a settlement administrator for a minimal fee of \$150.00, attributed
11 to the costs/expenses of suit.

12
13 2. Payment of \$1500.00 to Ms. Dalton as wages with a W-2, and deduction of regular
14 employment taxes.

15 3. The remainder of the gross settlement amount shall be paid to Ms. Dalton in settlement of her
16 disputed claims for violation of the FEHA, UCL and Labor Code, for general damages, interest, attorney's
17 fees and costs.

18 4. Ms. Dalton has waived any request for an enhancement as a PAGA representative.

19 5. The attorneys for Ms. Dalton have waived any request for attorney's fees or costs arising from
20 the PAGA settlement.
21

22 **BRIEF SUMMARY OF PROCEDURE**

23 *LWDA statutory compliance*

24 On December 30, 2020, Plaintiff submitted her PAGA Notice of Claims, to the LWDA through the
25 electronic submission process on the Department of Industrial Relations (DIR) website and posted the same,
26 the next day, certified mail, RRR to Stubrik's Steakhouse, Dennis Rainey and Craig Voorting, as required by
27 statute. A true and correct copy of the letter and the LWDA confirmation is attached hereto as **Exhibit 1**.
28

1 Plaintiff filed this action on January 8, 2021, *without pleading a PAGA claim*. A true and correct copy
2 of the original complaint is attached hereto as **Exhibit 2**.

3 On March 30, 2021, Plaintiff filed her First Amended Complaint (FAC), in which she alleged a PAGA
4 cause of action for the first time. A true and correct copy of the FAC is attached hereto as **Exhibit 3**.

5 On August 19, 2021, counsel discovered that due to an oversight the FAC had not been submitted to
6 the LWDA, and remedied that error. A true and correct copy of the LWDA confirmation of the Court
7 Complaint submission is attached hereto as **Exhibit 4**.

8 As shown on the proof of service, a copy of this Notice of Motion and Motion was served on the
9 LWDA, at the time of filing and service on the other parties.

10 *FEHA statutory compliance*

11 Plaintiff filed an administrative Complaint with the DFEH on January 5, 2021, and received an
12 immediate Right to sue notice. A true and correct copy of the DFEH complaint and the Right to sue notice
13 is attached hereto as **Exhibit 5**.

14 During initial discovery, Plaintiff discovered the true name of Stubrik's was WFO Ent. Group, Inc.,
15 and filed an amended administrative Complaint with the DFEH on March 29, 2021, and received confirmation
16 from the DFEH that the original right to sue notice applied to the amended complaint. A true and correct copy
17 of the Amended DFEH complaint and the Right to sue notice is attached hereto as **Exhibit 6**.

18 **THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

19 *Court approval is only required for the PAGA settlement, not the settlement of individual claims*

20 Pursuant to Labor Code § 2699(1)(2), "the superior court shall review and approve any settlement of
21 any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency while it
22 is submitted to the Court." As shown on the proof of service of this Motion, this has been served upon the
23 LWDA concurrent with the filing in this court. With that notice, if the LWDA has objection to the PAGA
24 apportionment or this settlement, they have the right to file such with the court for consideration in whether
25

1 to grant this motion or not.

2 *The proposed settlement meets the requirements by this Court and Department*

3 Judge Wilson has published his requirements for consideration of approval of a PAGA settlement, and
4 this shall be individually addressed.

5
6 **1. A comprehensive definition of the group of allegedly aggrieved employees represented by plaintiff**
7 **in the action.**

8 The FAC is the operative pleading for the PAGA claim. It is attached hereto as Exhibit 4, and it states
9 at ¶48 (p 15) the represented group is “all current and former employees of defendant WFO, similarly situated,
10 within the time period of December 20, 2019 to the present date.” Plaintiff contends the “present date” means
11 the date that the FAC was filed, March 29, 2021.

12
13 **2. A definition of the PAGA claims encompassed by the settlement, premised on the allegations of the**
14 **operative complaint.**

15 The allegations are found in the 6th cause of action, pages 15-19

- 16 a. Alleged violations of Labor Code (LC) § 202- failure to pay all wages owed at the time or
17 within 72 hours of termination or quitting. ¶54
18
19 b. Alleged violations of LC § 206.5- requiring employees to create false time records by punching
20 the time clock while continuing to work. ¶ 55.
21
22 c. Alleged violations of LC § 226 (a)- failing to provide accurate statements of earnings with
23 each paycheck, penalty proscribed in LC § 226.3. ¶ 56-57
24
25 d. Alleged violations of LC § 510- failing to pay overtime premium pay. ¶ 59
26
27 e. Alleged violations of LC § 558 and 558.1- failing to pay overtime premium pay. ¶ 60
28
29 f. Alleged violations of LC § 1174- failing to keep accurate records, with a penalty proscribed
30 by LC § 1174.5- ¶61
31
32 g. Alleged violations of LC § 1198- working overtime hours without being paid overtime

premium pay- ¶62

h. Alleged violations of LC § 1199- working more than 8 hours a day or 40 hours a week without being paid overtime premium pay- ¶ 63

i. Alleged violations of LC § 221 and 223- by requiring wait staff to “cover” refused or disputed credit card charges by a customer from the earnings of the wait staff, and/or requiring wait staff to pay for refused meals if there was an error by the wait staff- ¶65

These claims were likewise made in the Plaintiff’s claim to the LWDA, which is attached hereto as

Exhibit 1.

Defendants denied all allegations (Answer to FAC, **Exhibit 7**, and asserted the employees voluntarily waived meal and rest period breaks (23d Aff. Def. Pg 6)

3. The total consideration being provided by defendant(s) for the settlement (“gross settlement amount”), and a description of each allocation of the consideration, such that all of the total consideration is accounted for. This description must include:

a. A description of all consideration being received by plaintiff, including for plaintiff's individual claims and PAGA claims;

Plaintiff Rebecca Dalton will receive the following:

1. \$1,500.00 as regular wages, subject to withholding and employment taxes, reported on a W-2.
2. \$51,023.89 as general damages for the alleged violations of the FEHA, and for interest, and penalties for violations of the Labor Code and UCL. (Unfair Competition Law; Bus.&Prof. Code §§ 179200 et. seq., reported on a 1099.

3. Ms. Dalton does not actually receive the attorney’s fees and costs and these are discussed below, however, these could be construed as payment of a debt for Ms. Dalton.

b. A description of all consideration being received by aggrieved employees including, as applicable, civil penalties and/or unpaid wages.

1 1. The aggrieved employees, numbering 22, shall receive a proportionate share of the \$250.00 for
2 PAGA penalties that is not paid to the LWDA; on a per capita basis. The payment will be about \$11.36 per
3 person. This shall be distributed by the administrator, on information provided by the employer.

4
5 ***c. A statement of the amount of consideration that will be subject to the 75%/25% allocation required by***
6 ***section 2699(i)***

7 1. A total of \$1000.00 is subject to the 75%/25% allocation required by section 2699 (i).

8 ***d. The amounts sought for attorney's fees, attorney costs, and costs of administration.***

9 Plaintiff is not seeking attorney's fees, costs or costs of administration from the PAGA settlement,
10 however, from the individual settlement, the following are being paid:

- 11 1. \$3326.11 for attorney costs/expenses.¹
12
13 2. \$150.00 to the settlement administrator for costs of administration, on the proviso that no claim
14 for attorney's fees or representative enhancement is being made on the PAGA claim. (Included in #1)
15 3. \$28,000.00 for attorney's fees representing 1/3 of the total recovery for Ms. Dalton, excluding
16 the \$1000.00 on the PAGA claim. Total recovery is \$85,000.00, minus PAGA payment= \$84,000.00.

17 ***e. Any amount sought as a plaintiff's enhancement.***

18 Plaintiff is not seeking enhancement for acting as a PAGA representative.

19
20 ***f. A description of any other amount(s) being deducted from the gross settlement amount.***

21 No other amounts are being deducted from the GSA.

22 **4. An explanation as to how the amount payable to each purported aggrieved employee is to be**
23 **calculated.**

24 The calculation is based on a per capita distribution to all servers who were employed by the employer
25 during the relevant time period which is December 19, 2019 to March 29, 2020, as alleged in the FAC. The
26

27 ¹ Filing fee-\$435.00; Process service-\$239.68; efilng fees - \$77.34; LWDA filing fee- \$75.00; photocopies- \$255.09, CourtCall - \$94; mediation fee
28 - \$1,750; Administrator for PAGA-\$150.00; anticipated other costs (motion fee, court call, efilng fees) \$250.00. Total costs: \$3326.11.

1 commencement date is based on one year prior to the date of the PAGA letter (**Exhibit 1**). The end date is
2 based on the date the FAC (with the first PAGA allegations) was filed. The payment will be reported on a
3 1099, if required by IRS rules (re: amount of payment). This determination will be made by the administrator.

4
5 **5. An explanation as to why the attorneys' fees and costs sought are reasonable within the meaning**
6 **of Labor Code section 2699 (g) (1).**

7 First, no attorney's fees are being sought for the settlement of the PAGA claim, they are only being
8 calculated on the individual recovery of Ms. Dalton for damages related to her FEHA and individual wage
9 claims, even though substantial attorney hours have been expended on the PAGA claim and this motion.
10 Second, the amount of the attorney's fees for recovery of FEHA damages and on a wage claim is based on a
11 percentage of 1/3, contractually set between the Client and her counsel. The costs are recoverable pursuant
12 to CCP 1031.
13

14 **6. A description of the tax treatment for any of the payments to plaintiff and/or aggrieved employees.**

15 The description of the tax treatment is included with the discussions of the distributions above.

16 **7. A provision setting forth the disposition of unclaimed funds, i.e., checks uncashed within a stated**
17 **period of time after being sent to aggrieved employees.**

18 Any settlement checks issued to the Settlement Class which are not cashed within 180 days shall be
19 voided and the funds delivered to the State Controller's Office Unclaimed Property Fund in the names of the
20 applicable payees.
21

22 **8. A provision that the proposed settlement be submitted to the Labor and Workforce Development**
23 **Agency at the same time that it is submitted to the court. (Labor Code section 2699(l)(2))**

24 In accordance with the requirements of PAGA and this Court, copies of this Notice of Motion and
25 Motion for Approval of PAGA settlement and the proposed judgment were served upon the LWDA by
26 electronically filing same through the LWDA website.
27

28 **9. A provision that the Court will retain jurisdiction to enforce the settlement pursuant to CCP section**

1 **664.6.**

2 The parties have agreed in writing, signed by the parties, to the retention of jurisdiction by the Court
3 for enforcement pursuant to CCP section 664.6.

4 **10. A notice to aggrieved employees that will accompany the payment to them. A copy of such notice**
5 **is to be provided to the court for approval along with the motion seeking approval of the settlement.**
6 **The notice must inform the recipient as to the scope of the released claims, and as to the recipient's**
7 **responsibility for any taxes payable on the amount received.**

8
9 Plaintiff has attached the proposed notice to the aggrieved employees as Exhibit 12.

10 **11. Releases that do not include Civil Code section 1542 releases for aggrieved employees other than**
11 **plaintiff.**

12
13 Only Plaintiff is subject to a waiver of Civil Code section 1542, the aggrieved employees are not.

14 **12. Releases that release, for aggrieved employees other than plaintiff, no more than the civil penalties**
15 **available under PAGA by reason of the facts alleged in the operative complaint.**

16 This is the scope of the released claims by aggrieved employees other than Plaintiff, as explained in
17 the notice.

18 **13. Counsel's declaration(s) in support of the motion must state whether the parties (Plaintiff(s) and**
19 **Defendant(s)) know of any other cases that may be impacted by the settlement.**

20
21 The parties do not know of any other cases that may be impacted by this settlement.

22 **14. The moving papers must include a copy of all written notices to the LWDA pursuant to Labor Code**
23 **section 2699.3(a)(1)(A).**

24 To date the only correspondence with the LWDA is the initial letter (**Exhibit 1**), the filing of the FAC
25 with the LWDA via electronic portal (**Exhibit 4**), and the papers in support of this motion.

26
27 *Plaintiff complied with the Statutory requirements of PAGA*

28 In *Patel v. Nike Retail Servs., Inc.*, No. 14-CV-04781-RS, 2019 WL 2029061, at *2

1 (N.D. Cal. May 8, 2019), (**Exhibit 5**) the Court discussed at length the requirements for a motion seeking
2 approval of a PAGA settlement. First, it must be shown that the statutory requirements of PAGA were
3 satisfied, and second, that the settlement agreement is fair, reasonable, and adequate in view of PAGA's public
4 policy goals. This section addresses the statutory requirements of PAGA.

5
6 Since PAGA is essentially a law enforcement action the Plaintiff must first allow state authorities to
7 investigate before filing a PAGA claim. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal.App.5th 745, 752
8 (2018). Plaintiff has done that by electronically submitting the Notice of Claims to the LWDA (**Exhibit 1**)
9 on December 30, 2020. Although Plaintiff's initial complaint (**Exhibit 2**) was filed within the 60 day waiting
10 period, it did not contain a PAGA claim, it was not until March 29, 2021, that the PAGA cause of action was
11 filed, as part of the FAC. (**Exhibits 3 & 4**) This motion and supporting papers were likewise electronically
12 submitted to the LWDA per the proof of service.

13
14 *The settlement is fair, reasonable, and adequate in view of PAGA's public policy goals*

15 The following factors are "relevant to evaluating the PAGA settlement: (1) the strength of the
16 plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount
17 offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence
18 of government participation; and (6) the expertise and views of counsel." Patel, 2019 WL 2029061, at *6
19 (N.D. Cal. May 8, 2019). *These factors favor approval here.*

20
21 *The employer provided evidence disproving the majority of the PAGA claims and immediately remediated*

22 As listed above there were 9 categories of PAGA violations alleged, 4 of them involved non-payment
23 of overtime pay, 3 more involved recordkeeping violations over the overtime pay, one alleged that employees
24 were required to work off the clock (leading to overtime violations) and one involved "chargebacks" to wait
25 staff for refused/denied credit card charges taken in violation of company policy.

26
27 Plaintiff was advised and confirmed independently that almost immediately after service of the
28 complaint, January 10, 2021, the Defendants began a program to remediate any alleged violations of the Labor

1 Code for which Plaintiff alleged individual statutory claims. Plaintiff was informed that the chargebacks were
2 returned to the employees; a new system of time keeping was instituted; and overtime premium pay was paid
3 when earned. Defendants adamantly denied the majority of alleged PAGA violations ever occurred.

4
5 Prior to the Mediation, the employer provided documentary evidence comprised of time records for
6 the wait staff for the relevant time period up to April 26, 2021, the relevant time period is January 8, 2020 to
7 March 29, 2021. This evidence included the records of the “chargebacks” to employees of the bad credit card
8 charges for 2020 and 2021 through April. The total amount of the chargebacks was \$412.24 for 2020 and
9 \$185.58 for 2021, a total of \$597.52. Defendants asserted that they remediated the practice by eliminating
10 it after receiving the litigation in January and repaid the employees on the 12 charges. This was confirmed
11 independently. The chargebacks were the only undisputed documented violation, and the employer paid the
12 principal amount to the employees after service of the lawsuit.

13
14 Defendants also provided the time records for all of the wait staff, which showed that the great
15 majority of shifts worked by wait staff fell below the 6 hour mark, the point at which meal periods were
16 required. The analysis of these records showed that proving overtime violations was going to require
17 individual testimony by each of the wait staff, if possible.

18
19 Defendants also provide over 3 years of time and wage records for Ms. Dalton, going back to 2017.
20 Plaintiff understood and interpreted the time records differently, yielding a conclusion opposite to that of the
21 Defendants who contended that the records showed strict compliance with LC §§ 510, 558, 1198 and 1199
22 (overtime); § 202 (pay on quit); § 206.5 (working off clock); § 226 (a) (wage statements inaccuracy) ; and §
23 1174 (record keeping inaccuracy).

24
25 In other words, there was a reasonable dispute regarding the facts in this case, and there was significant
26 risk in this regard for both parties going forward.

27
28 Here, Plaintiff would be required to prove at trial each of the underlying Labor Code violations as to
each of the 22 allegedly aggrieved employees to seek penalties under PAGA. See *Cardenas v. McLane*

1 *Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011 WL 379413, at *3 (C.D. Cal. Jan. 31, 2011)
2 ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the
3 plaintiff has not proven suffered a violation of the Labor Code by the defendant."). Moreover, even if Plaintiff
4 prevailed, Plaintiff may not recover all the civil penalties sought. A court may reduce the penalty when "to
5 do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." LC§
6 2699(e)(2).
7

8 Therefore, this factor favors approving the settlement.

9 *The risk, expense, complexity, and likely duration of further litigation*

10 For similar reasons, the need to demonstrate all 22 aggrieved employees' entitlement to a PAGA award
11 threatens a risky, expensive, and complex trial that would extend the duration of the lawsuit. Additionally,
12 Plaintiff risks an adverse judgment which could result in either a diminished recovery or no recovery at all.
13 Although Plaintiff's counsel was confident that Plaintiff would prevail at trial, Plaintiff's counsel concluded
14 that continued litigation was not in the best interest of Ms. Dalton or the aggrieved employees.
15

16 Finally, Defendant risks the potential for a judgment levying a significantly higher fine and attorneys'
17 fee award than that proposed in the settlement agreement. Thus, this factor also favors approving the
18 settlement.
19

20 *The amount offered in settlement*

21 The only penalties that could be asserted with sufficient certainty to be calculated without the above
22 discussed individual proof, would be based on the 12 charge backs to wait staff on the credit cards. These took
23 place over 10 separate pay periods and assuming a different employee on each one, this is, also assuming max
24 penalties under 4 different statutes, \$2,400.00 in penalties.
25

26 The amount offered in settlement weighs towards approval of the settlement. The civil penalty payment
27 of \$1000 represents approximately 42% of the maximum penalties recoverable. The agreed-upon civil penalty
28 is within the realistic range of recovery of civil penalties in this action. *See Carrington v. Starbucks Corp.*,

1 30 Cal.App.5th 504, 529 (2018) (awarding 10% of maximum penalty). In accordance with statute, 25% of
2 the amount allocated as civil penalties is to be paid to the aggrieved employees, with the remaining 75% to
3 be paid to the LWDA.

4 Moreover, only the aggrieved employees' PAGA claims are being released. No individual claims of
5 the aggrieved employees (besides Ms. Dalton) are being released, nor could they in this action.

7 *The extent of discovery completed and the stage of the proceedings*

8 The original complaint was filed on January 8, 2021, the FAC was filed on March 29, 2021, the case
9 was mediated on August 30, 2021, obviously the parties decided to put the money toward resolution rather
10 than expensive depositions, Plaintiff's deposition was not even taken, no depositions were taken. The parties
11 agreed to an informal exchange of information and documents in order to be able to mediate for a full day with
12 Mr. Lemke, and the Defendants provided information sufficient for Plaintiff to evaluate the strength of the
13 PAGA claims, and Defendants' position, as well as Ms. Dalton's individual FEHA, UCL and Labor Code
14 claims.

16 Because the parties have engaged in such a cooperative exchange and worked diligently on bringing
17 this case to a rapid conclusion, this factor weighs in favor of finding the settlement fair, reasonable, and
18 adequate.

20 *The presence of government participation*

21 The LWDA has not directly intervened in this case or spoken on the proposed PAGA settlement.
22 Therefore, this factor is neutral.

23 *The expertise and views of counsel*

24 Plaintiff's counsel has extensive experience in employment litigation, including both wage-and-hour
25 class actions and representative PAGA actions. Mr. Crosby has over 50 years experience and Mr. Mandel has
26 over 40 years of experience in employment litigation, including wage and hour class action and several PAGA
27 litigations. Plaintiff's counsel is of the opinion that the PAGA settlement is fair, reasonable, and adequate.
28

1 Based on the conduct observed during the litigation of this case, and attitudes at the mediation, Defendant
2 would continue to defend the claims aggressively through trial and through appeal, if necessary. This factor,
3 as well as all the above factors, favor approving the PAGA settlement.

4 **THE COURT SHOULD SET THE PAGA PERIOD TO END WITH THE FILING OF THE FAC**

5
6 The FAC states that the PAGA period is “within the time period of December 20, 2019 to the present
7 date.” The “present date” can only refer to the date the FAC was filed, March 29, 2021. Defendants have
8 delayed and refused to enter into the long form settlement agreement that they agreed to far beyond any
9 reasonable expectation, and during that time have asserted that the PAGA group of “Aggrieved Employees”
10 has expanded from the 22 encompassed within the original time period to 65 employees based on the extended
11 period.

12
13 **Legal basis for this relief**

14 Plaintiff seeks relief from Paragraph 5, of the MOU which states: “PAGA Period. The “PAGA Period”
15 shall be from December 20, 2019 through the date the Court enters the order granting approval of the PAGA
16 settlement.” on the basis of mistake of fact, and unjust enrichment.

17 A contract provision can be eliminated or modified based on a mistake of fact. Civil Code §§ 3399-
18 3402. In this case, Plaintiff and her attorneys believed that the Defendants were going to cooperate with the
19 immediate provision of a long form settlement agreement, not to drag out that process for an additional two
20 months while the Defendants added additional employees to their staff to be covered by any PAGA releases
21 negotiated on August 30, 2021.

22
23 Further, the Court may be constrained to fashion relief outside the scope of the pleading unless
24 otherwise agreed to by the parties. Given the small amount of money being paid for the PAGA claim, it makes
25 no sense to expand the scope of the claim in either code sections or time, particularly when the delay is being
26 caused by the party that benefits from it. This is a tactic to benefit the Defendants, not the PAGA group. Cf.
27 *Amaro v Anaheim Arena Management, LLC* (Sep. 28, 2021, 4th App Dist, Div 3) Class Action Release deemed
28

1 overbroad by exceeding scope of pleading. But *Amaro* also ruled:

2 “Our opinion only finds that allowing a named plaintiff to release PAGA
3 claims beyond the one-year limitations period of his or her own claim is not unlawful per
4 se. A trial court may still refuse to approve such a release if it is unfair given the
5 circumstances of the case.” (See § 2699, subd. (l)(2); *Williams v. Superior Court*, *supra*, 3
6 Cal.5th at p. 549. [(2017) 3 Cal.5th 531] No such circumstances exist here.”

7 **Factual basis for this relief**

8 As mentioned above, at the time of the Mediation, when the PAGA payment was negotiated to be
9 \$1000.00, Plaintiff and Counsel were using the information provided by the Defendants which showed the
10 group of “Aggrieved Employees” was 22 persons. This application was expected to be filed in early
11 September, however, Defendants and their counsel did not provide any long form settlement agreement
12 until September 23, almost a month after the settlement. Since that time every response by the Defendants
13 regarding the long form settlement agreement has taken 10 days from the Defendants and 3-4 days from
14 the Plaintiff, despite that Defendant’s counsel has at least two attorneys working on this matter and
15 Plaintiff has one.

16
17 The additional factual basis for this relief is that the FAC designates “the present date” as the end
18 date for the PAGA period, and that would be the date the FAC was filed with the Court, March 29, 2021.

19 **Irreconcilable differences have arisen regarding the long form settlement agreement**

20 Plaintiff has made this motion based on the MOU because irreconcilable differences have arisen in
21 the preparation of the long form settlement agreement. Please see declaration of Maurice Mandel in
22 support of this motion.
23

24 **CONCLUSION**

25 Of the factors enumerated above the one that most promotes PAGA’s public policy goals is the
26 fact that the workplace at Stubrik’s Steakhouse changed to improve compliance with the Labor Code,
27 almost concurrent with the service of the lawsuit. The Court should recall that the Defendants had the
28

1 PAGA Notice of Claims beginning at the first of 2021, at least 10 days longer than the Complaint, and the
2 claims of the PAGA group were enumerated therein. Prompt remediation ended up being to the benefit of
3 all concerned.

4 For the foregoing reasons, Plaintiff respectfully requests that the Court grant the present motion
5 and entered the proposed order submitted concurrently herewith.
6

7 Dated: October 26, 2021

8 MMII-my electronic signature

9 Maurice Mandel II, Attorney for

Plaintiff REBECCA DALTON

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

On October 26, 2021, I served the foregoing document described as:

on interested parties in this action by ELECTRONIC SERVICE, addressed as follows:

MMII-my electronic signature
Maurice Mandel II