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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

KIMBERLY KIPP and TIYANNA GRAVES, as
individuals and on behalf of all others similarly
situated,

Plaintiff,

v.

KINDERCARE EDUCATION LLC, a Limited
Liability Company; and DOES 1 through 50,
Inclusive,

Defendants.

Case No. 56-2021-00556612-CU-OE-VTA

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

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

Hearing Date: July 12, 2022

Hearing Time: 8:30 a.m.

Reservation No. 2648459

Judge: Benjamin F. Coats

Dept.: 43

Trial Date: Not Set

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

2 YOU ARE HEREBY NOTIFIED THAT at 8:30 a.m. on July 12, 2022, or as soon
3 thereafter as the matter can be heard, in Department 43 of the above entitled Court before the
4 Honorable Benjamin F. Coats, Plaintiffs Kimberly Kipp and Tiyanne Graves ("Plaintiffs")
5 will and hereby do move for an order approving the settlement of the PAGA claim alleged
6 against Defendant KinderCare Education LLC ("Defendant") in accordance with Labor Code
7 §2699(l). The proposed settlement is set forth in the accompanying Private Attorneys
8 General Act Settlement Agreement and Release ("Settlement Agreement").

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

13 Respectfully submitted,

14 Dated: June 14, 2022

15 **BLUMENTHAL NORDREHAUG**
16 **BHOWMIK DE BLOUW LLP**

17 By:

18 
19 Norman B. Blumenthal
20 Kyle R. Nordrehaug
21 Aparajit Bhowmik

22 *Attorneys for Plaintiffs*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Kimberly Kipp and Tiyanne Graves (“Plaintiffs”) reached a settlement of
4 the California Private Attorneys General Act, Cal. Labor Code §2699, *et seq.* (“PAGA”)
5 claim asserted in this action against Defendant KinderCare Education, LLC (“Defendant”)
6 (collectively, the “Parties”) which provides for a Gross Settlement Amount (hereinafter
7 referred to as “Gross Settlement Amount”) payment in the amount of \$345,000. In
8 accordance with California Labor Code §2699(l), Plaintiffs now ask this Court to review and
9 approve the settlement of Plaintiffs’ PAGA claims.¹ This is only a settlement of the PAGA
10 claims for civil penalties, and is not a class settlement and does not release the individual
11 wage claims, if any, of the affected employees other than the Plaintiffs themselves. Cal.
12 Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB*,
13 *N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under
14 PAGA).

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

21 A proposed order confirming review and approval of the PAGA settlement is
22 submitted herewith.

23 **II. RELEVANT FACTS**

24 On May 12, 2021, Kimberly Kipp (“Kipp”) served a notice to the LWDA of factual
25 allegations regarding Defendant’s alleged wage and hour violations including failure to pay
26 overtime, failure to pay minimum wages, failure to provide compliant meal periods and
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 failure to pay meal period premiums, failure to provide compliant rest periods and failure to
2 pay rest period premiums, failure to reimburse for all necessary work expenses, failure to pay
3 all earned wages at least twice during each calendar month, failure to provide accurate and
4 compliant itemized wage statements, failure to maintain accurate records and failure to
5 timely pay all earned wages to separating employees at the time of separation.

6 On May 20, 2021, Tiyanne Graves (“Graves”) served a notice to the LWDA of factual
7 allegations regarding Defendant’s alleged wage and hour violations including failure to
8 provide accurate itemized wage statements, failure to properly record and provide legally
9 required meal and rest periods, failure to pay minimum wages, failure to pay overtime and
10 sick pay wages, failure to reimburse employees for required expenses and failure to provide
11 wages when due.

12 On July 28, 2021, Kipp filed the instant Representative Action Complaint alleging a
13 single cause of action against Defendant for recovery of civil penalties under PAGA based
14 on the alleged California Labor Code violations identified in the notice to the LWDA dated
15 May 12, 2021 (“*Kipp Action*”).

16 On August 4, 2021, Graves filed a Representative Action Complaint in Riverside
17 Superior Court (Case No. CVRI2103557) alleging a single cause of action against Defendant
18 for recovery of civil penalties under PAGA based on the alleged California Labor Code
19 violations identified in the notice to the LWDA dated May 20, 2021 (“*Graves Action*”).

20 Plaintiffs and Defendant agreed to mediate with Tripper Ortman, Esq. Prior to the
21 mediation, the Parties conducted significant investigation and discovery of the facts and law.
22 Defendant produced hundreds of pages of documents relating to its policies, practices, and
23 procedures regarding paying non-exempt employees for all hours worked, overtime, meal
24 and rest period policies, payroll and operations policies, and more. Plaintiffs were provided
25 with sufficient records and data to determine the number of Aggrieved Employees and the
26 number of workweeks in the PAGA Period. The Parties agree that the above-described
27 investigation and evaluation, as well as the information exchanged during the settlement
28

1 negotiations, are more than sufficient to assess the merits of the Parties' positions and to
2 compromise the issues on a fair and equitable basis. (Declaration of Kyle Nordrehaug, at ¶3).

3 Plaintiffs' theory of PAGA liability as argued at mediation alleged that Defendant
4 required Plaintiffs and the alleged aggrieved employees to use their personal cell phones and
5 vehicles for work-related purposes without reimbursing these necessary business expenses.
6 Specifically, Defendant required employees to use their personal phones to clock in and out,
7 as well as communicate with supervisors and coworkers, without reimbursing them for a
8 reasonable portion of their monthly cell phone expenses. Plaintiffs also allege that Defendant
9 required Plaintiff and other alleged aggrieved employees to use their personal vehicles from
10 time to time for pickups or drop offs at UPS for Defendant's business purposes, but failed to
11 reimburse these employees for accrued mileage. Plaintiffs also allege that Defendant failed
12 to maintain accurate records of the hours actually worked by Plaintiffs and other alleged
13 aggrieved employees, resulting in unpaid minimum and overtime wages. Specifically,
14 Defendant requires its employees to clock in only for their pre-determined work schedules,
15 regardless of when employees actually begin or end their work shift. Plaintiffs and other
16 alleged aggrieved employees regularly performed work both before clocking in and after
17 clocking out for their shifts, but were not accurately compensated for all of this time.
18 Moreover, Defendant paid Plaintiffs and other alleged aggrieved employees various forms of
19 non-discretionary incentive pay, such as "Premium Pay" and "Crisis Pay" for working
20 during the pandemic, but failed to incorporate the value of the incentive pay into the regular
21 rate of pay for purposes of paying overtime wages and meal period premiums. Instead,
22 Defendant paid overtime wages at 1.5 times the base rate of pay and meal premiums at the
23 base rate in all pay periods, including those in which non-discretionary incentive pay was
24 earned. Further, Plaintiffs allege Defendant failed to authorize and permit Plaintiffs and
25 other alleged aggrieved employees to take all lawful rest periods to which they were entitled.
26 Specifically, notwithstanding the written rest policy, in practice Defendant actively
27 discouraged employees from taking rest periods and disseminated misinformation regarding
28 employees' rest period rights. (Declaration of Kyle Nordrehaug, at ¶3).

1 On February 28, 2022, the Parties engaged in an all-day mediation session before
2 Mediator Tripper Ortman, Esq., a respected and experienced mediator knowledgeable of
3 both the wage and hour laws and representative claims at issue in this action. Through arms-
4 length negotiations with the assistance of the mediator, the Parties reached an agreement to
5 settle the PAGA claims in the *Kipp* Action and *Graves* Action which led to the signing of a
6 Memorandum of Understanding memorializing the settlement.² As part of the settlement,
7 Plaintiff Kipp has filed a First Amended Complaint in the *Kipp* Action adding Tiyanne
8 Graves as a Plaintiff and including the facts and allegations in the *Graves* Action.
9 (Declaration of Kyle Nordrehaug, at ¶3).

10 The settlement was negotiated in light of all known facts and circumstances and the
11 uncertainty associated with litigation – including the risk of Plaintiffs not being able to
12 maintain representative claims, the difficulty of proving Plaintiffs’ claims in a manageable
13 trial, the merits of Defendant’s potential defenses, and the significant delay and potential
14 appellate issues inherent to litigation – and was reached after extensive arm’s length
15 negotiations, with the assistance of Mediator Ortman. (Declaration of Kyle Nordrehaug, at
16 ¶3).

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

18 The PAGA settlement is subject to Court approval consistent with Labor Code
19 §2699(1)(2). (Settlement Agreement at ¶11). The Settlement Agreement negotiated by the
20 Parties provides for a Gross Settlement Amount payment in the amount of \$345,000 to
21 resolve the Plaintiffs’ “Representative PAGA Claims (hereinafter referred to as the “PAGA
22 Settlement”). From this Gross Settlement Amount of \$345,000, there is a deduction of
23 _____

24 ² Pursuant to separate Confidential Settlement Agreements, in addition to the Gross Settlement
25 Amount, Defendant has agreed to separately pay Plaintiffs a sum certain in exchange for a general
26 release of any and all individual claims arising out of employment with Defendant, including a
27 waiver of any unknown claims pursuant to California Civil Code section 1542. The individual
28 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 attorneys' fees in the amount of \$115,000.00 (which is one-third of Gross Settlement
2 Amount), reimbursement of incurred costs in the amount of \$22,856.40, Settlement
3 Administration Costs not to exceed \$22,500, and PAGA service award payments in the
4 amount of \$10,000.00 each to Plaintiffs Kipp and Graves. (Settlement Agreement at ¶¶ 4(a)-
5 (c)).³ After these deductions, the amount remaining is the "PAGA Fund", which is estimated
6 to be \$164,643.60.

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

12 Each Aggrieved Employee will receive a portion of Aggrieved Employees' PAGA
13 Portion on a pro-rata basis (Settlement Agreement at ¶ 5). To determine each Aggrieved
14 Employee's Individual PAGA Payment, Kindercare will use the following formula:
15 Settlement Payment = Aggrieved Employees' PAGA Portion (≈\$40,000x [Pay Periods
16 Worked by Individual Aggrieved Employee during the PAGA Period ÷ Total Pay Periods
17 Worked by All Aggrieved Employees during the PAGA Period]. (Settlement Agreement at
18 ¶5). The PAGA Period is the time period from January 1, 2020 to April 30, 2022.
19 (Settlement Agreement at p. 2).

20 Defendant has represented to PAGA Counsel the number of pay periods and
21 Aggrieved Employees. Defendant represents that there are approximately 6,987 Aggrieved
22

23
24 ³ In the event the Court approves less than 33 and 1/3% of the Gross Settlement Amount in
25 Attorneys' Fees or less than \$27,500 in Attorneys' Expenses to PAGA Counsel, the unawarded
26 difference will be added to the PAGA Fund and not to PAGA Counsel or the Defendant. In the event
the Court approves less than \$22,500 to administer the settlement or if the actual cost to administer
the settlement is less than \$22,500, the difference will be added to the PAGA Fund.

27 ⁴ "Aggrieved Employees" means "All individuals who are or were employed by KinderCare who
28 were classified as non-exempt employees within the State of California from January 1, 2020 and
April 30, 2022 or the date the Court enters an order and judgment approving this settlement,
whichever is earlier." (Settlement Agreement at pg. 2).

1 Employees who worked approximately 150,000 pay periods during the PAGA Period.
2 (Settlement Agreement at ¶6).

3 Upon entry of final judgment, the Released Parties shall be entitled to a release from
4 the State of California and the Aggrieved Employees only for “the PAGA claim for
5 violations of Labor Code §§ 201, 202, 203, 204, 221, 226, 226.3 226.7, 246, 246.5, 351, 510,
6 512, 516, 1182.12, 1194, 1194.2, 1197, 1198, 2698, and 2802, as well as the applicable
7 provisions of the Industrial Wage Orders, and for any other PAGA violations that could have
8 been asserted in the action based on the factual assertions and legal assertions in the
9 operative Complaints and/or PAGA Notices” attached to the Settlement Agreement as
10 Exhibit B (all of the foregoing are collectively referred to as “Plaintiffs’ Representative
11 PAGA Claims”). (Settlement Agreement at ¶2) The Settlement Agreement expressly states
12 that “the settlement shall not impact Aggrieved Employees’ ability to assert individual Labor
13 Code claims other than PAGA claims.” (*Id.*)⁵

14 Within 10 business days of the Effective Date, KinderCare shall deposit the Gross
15 Settlement Amount or \$345,000.00 with the Settlement Administrator. Within thirty (30)
16 calendar days after receipt of the Gross Settlement Amount from Defendant, the Settlement
17 Administrator will issue payment to the LWDA and to each Aggrieved Employee a check for
18 their Individual PAGA Payment at their last known home address along with an explanatory
19 letter which will be mutually approved by the parties. (Settlement Agreement at ¶9(a)).
20 Individual PAGA Payment Checks issued to Aggrieved Employees will expire one hundred
21 and eighty (180) days from the date they are mailed by the Settlement Administrator. (*Id.* at
22 ¶9(b)) All money represented by uncashed settlement checks shall be sent to the California
23
24

25 ⁵ The Settlement Agreement also expressly states that “nothing contained herein shall be construed to
26 release the Labor Code section 203 claim for waiting time penalties based on the theory of
27 KinderCare providing final pay card packets to terminated employees in the currently pending
28 matter of *Rochelle Westmoreland v. Kindercare Education, LLC*, San Francisco Superior Court Case
No. CGC-19-573125, and individuals who meet the definition of the Aggrieved Employees herein
shall likewise be entitled to participate in any settlement in *Westmoreland* regardless of whether they
are also included in this settlement.” (Settlement Agreement at ¶2)

1 State Controller's Unclaimed Property division in the name of the Individual(s) who did not
2 negotiate a settlement check during the negotiation period. (*Id.*)

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

9 10 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

11 The claim before this court is the representative claim under PAGA on behalf of the
12 State of California for civil penalties pursuant to the PAGA. The parties have agreed to
13 settle this PAGA claim in its entirety after investigation and an arm's length mediation
14 session. (Declaration of Kyle Nordrehaug, at ¶4.) The settlement is intended to fully and
15 finally resolve the Plaintiffs' "Representative PAGA Claims asserted by Plaintiffs on behalf
16 of the State of California. This is only a settlement of the PAGA claims for civil penalties,
17 and is not a class settlement and does not release the individual claims, if any, of the
18 Aggrieved Employees. This settlement does not release any claim that is not a PAGA claim.⁶
19 Attorneys' fees equal to one-third of the Gross Settlement Amount (\$115,000.00) and
20 litigation expenses in an amount of \$22,856.40 will also be paid to PAGA Counsel as part of
21 the settlement in accordance with California Labor Code § 2699(g)(1), as set forth in the
22 Settlement Agreement.⁷ Lastly, payment to the Settlement Administrator in an amount not
23 to exceed \$22,500 to perform the administrative duties to distribute the settlement money
24 shall also be paid. (Declaration of Kyle Nordrehaug, at ¶¶ 4-5.)

25
26 ⁶ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th at 196: "Nonparty employees are 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 Declarations of Fletcher W. Schmidt and Kyle Nordrehaug,
28 PAGA Counsel incurred costs in the current amount of \$22,856.40, which is less than the cost
allocation in the Settlement Agreement. See Declaration of Schmidt at ¶ 12 and Nordrehaug at ¶ 9.

1
2 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE**
3 **SETTLEMENT OF THE PAGA CLAIM**

4 Labor Code § 2699(l) requires that the Court “shall review and approve any
5 settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement
6 shall be submitted to the agency at the same time that it is submitted to the court.”
7 Consequently, the parties respectfully ask the Court to review and approve the settlement of
8 the PAGA claims and the PAGA Fund to be paid as part of the proposed settlement.

9 **A. The Gross Settlement Amount To Be Paid Is Fair And Reasonable**

10 The Parties believe that the Gross Settlement Amount is fair and reasonable and
11 therefore "shall" be reviewed and approved. Here, the Gross Settlement Amount of \$345,000
12 is significantly more than many PAGA settlement amounts. (Declaration of Nordrehaug, at
13 ¶6.)

14 This Gross Settlement Amount compares favorably to the estimated amount of PAGA
15 penalties. With the assistance of an expert, Plaintiffs calculated that the maximum amount of
16 statutory PAGA civil penalties was potentially \$7,500,000 to \$15,000,000 based on 150,000
17 pay periods applicable to the Aggrieved Employees during the PAGA Period, which assumes
18 that Plaintiffs could prove at least one Labor Code violation in each and every pay period
19 during the PAGA period.⁸ (Declaration of Nordrehaug, at ¶6.) Importantly, however, these
20 calculations were performed at the maximum statutory rate for the penalties, when in fact, it
21 is likely that any penalties awarded would be at a lower rate. California Labor Code Section
22 2699(e)(1) permits a Court to award a lesser amount than the maximum civil penalty if based
23 on the facts and circumstances to do otherwise would result in an award that is "unjust,
24 arbitrary and oppressive or confiscatory."

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 \$7,500,000 to \$15,000,000 is the civil penalty amount without stacking. If stacking
28 is permitted, 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 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
2 affirmed a judgment after trial which provided for a PAGA penalty of \$5 per pay period.
3 While the plaintiff in *Carrington* alleged a maximum of \$70 million in penalties, after trial
4 the plaintiff was only awarded \$150,000 for the 30,000 proven violations. If *Carrington* is
5 applied to this case, a realistic outcome at trial could be that only \$750,000 or less in PAGA
6 penalties might be awarded. Therefore, at trial in this case, any PAGA penalties awarded
7 could be significantly less than Plaintiffs' calculation even where Plaintiffs prevailed on the
8 PAGA claim. Notably, the amount of the PAGA Fund here (\$160,000) is higher than was
9 awarded after a PAGA trial in *Carrington v. Starbucks*. (Declaration of Kyle Nordrehaug, at
10 ¶6).

11 Under PAGA, Courts have considerable discretion to reduce the penalty award. In
12 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court
13 reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the
14 court found maximum penalties "unjust" because the employees had suffered no injuries.
15 Some trial courts have actually awarded no civil penalties, even when Labor Code violations
16 are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of
17 App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County Superior
18 Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist.
19 LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

20 In order to recover any PAGA penalties, Plaintiffs would be required at trial to prove
21 each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*,
22 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of
23 PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven
24 suffered a violation of the Labor Code by the defendant."). Here, Plaintiffs would need to
25 prove that each Aggrieved Employee suffered a violation for each period the employee
26 worked in relation to meal or rest period violations and/or the payment of meal or rest period
27 premiums, failure to pay minimum or overtime wages, failure to provide accurate itemized
28 wage statements, failure to pay all earned wages to separating employees at time of

1 separation, failure to reimburse for all necessary work expenses, failure to maintain accurate
2 records and failure to pay all earned wages at least twice during each calendar month.

3 Defendant maintains that Plaintiffs and the Aggrieved Employees were properly
4 compensated, and that they did not violate the Labor Code. Accordingly, Defendant disputes
5 and denies Plaintiffs' allegations and claims asserted in the operative complaint which are
6 resolved by the Settlement Agreement. Defendant asserted additional defenses to the PAGA
7 claim, not only as to liability but also as to the amount of the penalties. Defendant could
8 argue that no penalties prior to the PAGA notification should be awarded because the
9 violations were not intentional, and at least one Court has so ruled. These defenses present a
10 risk to the PAGA claims and the potential that some or all of the PAGA penalties sought
11 may not be awarded. (Declaration of Nordrehaug, at ¶7.)

12 Moreover, Plaintiffs signed Arbitration Agreements that include a representative
13 action waiver which, Defendant contends, precludes Plaintiffs from bringing representative
14 action claims on behalf of other employees. All parties acknowledge that, in the current term,
15 the United States Supreme Court will be issuing its decision in *Viking River Cruises, Inc. v.*
16 *Moriana*, Case No. 20-1573 (Certiorari granted Dec. 15, 2021) which will decide whether
17 the Federal Arbitration Act preempts the California Supreme Court decision of *Iskanian v.*
18 *CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (2014), which currently prevents Defendant
19 from seeking enforcement of the arbitration agreements to preclude Plaintiffs from bringing
20 PAGA claims in this Court in the first place. An adverse ruling in *Viking River Cruises, Inc.*
21 could result in the dismissal of the representative PAGA allegations in this case, and
22 therefore no recovery whatsoever for the LWDA and the Aggrieved Employees.

23 In addition to *Viking River Cruises* potentially resulting in the dismissal of the PAGA
24 claim, Defendant contended that it had viable defenses to Plaintiffs' claims. Specifically,
25 Defendant contended that it maintained lawful wage and hour policies and that Plaintiffs had
26 no evidence that KinderCare denied them or other aggrieved employees of their meal periods
27 or rest breaks. In reality, the time punch data shows the opposite. Specifically, only 5.94%
28 of all qualifying shifts show non-compliant meal periods just based on the employees' time

1 records. Furthermore, Defendant paid out more than 50,000 meal period and rest break
2 penalties during the relevant time period. Lastly, Defendants did not have a rounding policy
3 as alleged in the operative complaints and employees did not incur any unreimbursed
4 business expenses for cell phone use as each site provide a company cell phone for
5 employees to use.

6 Given Defendant's potential defenses to the violations at issue, the risks and costs of
7 continued litigation, and the upcoming United States Supreme Court decision in *Viking River*
8 *Cruises, Inc.*, Plaintiffs and their attorneys believe that the PAGA Settlement is fair and
9 reasonable. (Declaration of Nordrehaug, at ¶7.) Defendant has similarly concluded that it is
10 desirable that the action is settled in the manner and upon the terms and conditions set forth
11 in the Settlement Agreement in order to avoid further expense, inconvenience and distraction
12 of further legal proceedings, as well as the uncertainty of litigation. Defendant has
13 determined that it is desirable and beneficial to put to rest the claims in this action and
14 Defendant agrees that the PAGA Settlement is fair, reasonable, and adequate.

15 PAGA Counsel have significant experience litigating wage and hour claims including
16 claims for PAGA penalties, and the PAGA Settlement here is similar to or greater than
17 similar settlements that courts have approved. (Declaration of Nordrehaug, at ¶9;
18 Declaration of Schmidt at ¶¶ 4-7.) The PAGA Settlement, along with the other terms of the
19 proposed settlement, were negotiated by experienced counsel at arm's length with the
20 assistance of a private mediator, Tripper Ortman. (Declaration of Nordrehaug, at ¶7.)

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

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

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

9 **C. The Service Awards Are Fair and Reasonable**

10 Plaintiffs each seek a service award of \$10,000 for their service on behalf of the
11 Aggrieved Employees and the LWDA. Courts routinely award “service payments” to
12 plaintiffs in successful representative actions, in recognition of the crucial role they play in
13 enforcing public-interest statutes and vindicating the rights of absent class members. Service
14 payments “are intended to compensate class representatives for work done on behalf of the
15 class, to make up for financial or reputational risk undertaken in bringing the action, and,
16 sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v.*
17 *West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Although this is a PAGA case, not
18 a class action, the Court should likewise award service payments here for the same reasons:
19 to compensate Plaintiffs for the considerable time and resources they expended, and the
20 reputational and financial risks they incurred in service of the successful prosecution of the
21 claims against Defendant.

22 The Plaintiffs actively participated in this litigation. They spent substantial time
23 meeting with PAGA counsel, and provided valuable information about the day-to-day
24 operations of Defendant. They spent numerous hours gathering information. They all
25 assisted counsel in preparing for mediation, and made themselves available on the day of the
26 mediation. (Declaration of Nordrehaug, at ¶8.)

27 Service awards are also appropriate because Plaintiffs, like class representatives,
28 undertook significant risks. Courts widely recognize that plaintiffs undertake a “reputational

1 risk” by suing their employers. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir.
2 2009); *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). And, given the ease with
3 which prospective employers can run a background check, filing a lawsuit can also
4 negatively impact a plaintiff’s future employment opportunities. For these reasons, many
5 employees are unwilling to risk jeopardizing their employment by filing a class or
6 representative lawsuit against their employer on behalf of their fellow employees. Not only
7 did Plaintiffs undertake reputational risks, but they also assumed the risk of a judgment
8 against them and personal liability for an award of costs to Defendant in the event of an
9 adverse outcome. In class action losses, the class representative is deemed the losing party
10 and thus potentially liable for the prevailing party’s costs. *Earley v. Superior Court*, 79
11 Cal.App.4th 1420, 1433-1434 (2000).

12 In short, Plaintiffs conferred a substantial benefit on the LWDA and the Aggrieved
13 Employees. As detailed in the Declaration of Nordrehaug at ¶13, the amount of the requested
14 service awards are reasonable when compared to other settlements and will further PAGA’s
15 goal of incentivizing workers to step forward and take on the costs and risks of prosecuting
16 Labor Code violations.

17 18 **VI. THE ATTORNEYS’ FEES AND COSTS ARE FAIR AND REASONABLE**

19 PAGA Counsel seek approval of PAGA Counsel’s Fees from the PAGA settlement in
20 the amount of \$115,000 representing one-third of the \$345,000 Gross Settlement Amount.
21 PAGA does not have any requirements for reviewing attorneys’ fees, and Plaintiffs’ position
22 is that the payment of attorneys’ fees and costs in this settlement is a matter of contract for a
23 contingent representation. Nevertheless, should this Court review the requested attorneys’
24 fees, it is clear that the requested fees and costs are reasonable.

25 First, the requested fees are justified by the result achieved. PAGA Counsel
26 negotiated a recovery of \$345,000.00, and this result justifies the requested fees equal to one
27 third of this recovery. This percentage is within the standard contingent recovery percentage
28 of one-third, and this percentage is what was expressly approved by the Supreme Court in

1 *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016); *Amaro v. Anaheim Arena Mgmt.*,
2 *LLC*, 69 Cal. App. 5th 521, 545 (2021) (recognizing that “fee awards in class actions
3 average around one-third of the recovery” regardless of “whether the percentage method or
4 the lodestar method is used.” (quoting *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11
5 (2008))).

6 Second, the fee award is justified by the work performed. As detailed in the
7 accompanying Declaration of Fletcher W. Schmidt at ¶9 [lodestar of \$99,120] and
8 Declaration of Nordrehaug at ¶8 [lodestar of \$68,783.75], the fee award represents an
9 amount that is less than PAGA Counsel’s current lodestar of \$167,903.75, i.e. a negative
10 multiplier of 0.7, when a positive multiplier would ordinarily be warranted.

11 Generally, the Ninth Circuit and California Courts award positive multipliers between
12 2 to 4 times the lodestar to reward counsel for accepting the contingent risks of the litigation
13 or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award
14 with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182
15 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied and
16 affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
17 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa*
18 *Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which
19 was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D.
20 Cal. 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v.*
21 *Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6,
22 2013) (approving fee award that represented a multiplier of 2.76 as falling within the
23 "majority" range for risk multipliers).

24 Third, consideration of the enhancement factors justify the enhancement of the
25 lodestar. Courts multiply the lodestar by a factor to account for the risk of non-payment,
26 delay in payment, the quality of work, and the novelty and difficulty of the issues involved.
27 See *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001). Failure to apply a risk multiplier in
28

1 cases that meet these criteria is an abuse of discretion. *Stetson v. Grissom*, 821 F.3d 1157,
2 1166 (9th Cir. 2016).

3 Finally, as to PAGA Counsel's Costs, PAGA Counsel will be recovering litigation
4 expenses in the total amount of \$22,856.40 which is less than the \$27,500 allocation for costs
5 in the Settlement Agreement, so the difference of \$4,643.60 will be added to the PAGA Fund
6 amount. These expenses are documented in the accompanying Declaration of Fletcher
7 Schmidt at ¶12 [expenses of \$22,066.90] and Declaration of Nordrehaug at ¶9 [expenses of
8 \$789.50].

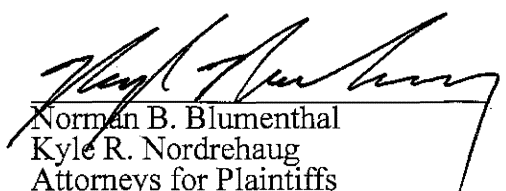
9
10 **VII. CONCLUSION**

11 Based on the foregoing, Plaintiffs respectfully request this Court approve the PAGA
12 settlement as set forth in the Agreement and enter the proposed order and judgment
13 submitted herewith.

14 Dated: June 14, 2022

15 **BLUMENTHAL NORDREHAUG**
16 **BHOWMIK DE BLOUW LLP**

17 By:

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