

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

Norman B. Blumenthal (SBN #068687)

Kyle R. Nordrehaug (SBN #205975)

Aparajit Bhowmik (SBN #248066)

Nicholas J. De Blouw (SBN #280922)

2255 Calle Clara

La Jolla, CA 92037

Telephone: (858) 551-1223

Facsimile: (858) 551-1232

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

MAURICIO VIDES, on behalf of the State of
California, as a private attorney general,

Plaintiff,

vs.

FLIGHTS RESTAURANT GROUP, INC., a
Corporation; FLIGHTS RESTAURANT
BURLINGAME, INC., a Corporation; FLIGHTS
RESTAURANT CAMPBELL, INC., a
Corporation; FLIGHTS RESTAURANT LOS
GATOS, INC., a Corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No. 22CV402958

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

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

Hearing Date: July 3, 2024

Hearing Time: 1:30 p.m.

Judge: Hon. Theodore C. Zayner

Dept.: 19

Action Filed: September 9, 2022

Trial Date: None Set

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

2 YOU ARE HEREBY NOTIFIED THAT at 1:30 p.m. on July 3, 2024, or as soon
3 thereafter as the matter can be heard, in Department 19 of the above entitled Court before the
4 Honorable Theodore C. Zayner, Plaintiff Mauricio Vides (“Plaintiff”) will and hereby does
5 move for an order approving the settlement of the PAGA claim alleged against Defendants
6 Flights Restaurant Group, Inc., Flights Burlingame, Inc., Flights Campbell, Inc., and Flights
7 Los Gatos, Inc. (“Defendants”) in accordance with Labor Code §2699(l). The proposed
8 settlement is set forth in the accompanying PAGA Settlement Agreement (“Agreement”).

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

13 Respectfully submitted,

14 Dated: May 29, 2024

**BLUMENTHAL NORDREHAUG
BHOWMIK DE BLOUW LLP**

16 By: /s/ Kyle Nordrehaug
17 Norman B. Blumenthal
18 Kyle R. Nordrehaug
19 Aparajit Bhowmik
20 *Attorneys for Plaintiff*

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. RELEVANT FACTS.....	7
III. TERMS OF THE PAGA SETTLEMENT	10
IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS.....	13
V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT OF THE PAGA CLAIM.....	13
VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE.....	17
VII. CONCLUSION.....	19

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>Amaro v. Anaheim Arena Mgmt., LLC,</i> 69 Cal. App. 5th 521 (2021)	17
<i>Boyd v. Bank of America,</i> 2014 WL 6473804, at *11 (C.D. Cal. 2014).....	18
<i>Cardenas v. McLane Foodservice, Inc.,</i> 2011 U.S. Dist. LEXIS 13126 (C.D. Cal. 2011).....	15
<i>Carrington v. Starbucks Corp.,</i> 30 Cal.App.5th 504 (2018).....	14, 15
<i>Chavez v. Netflix, Inc.,</i> 162 Cal.App.4th 43 (2008).....	17
<i>Fleming v. Covidien,</i> 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	15
<i>Hopkins v. Stryker Sales Corp.,</i> No. 11-CV-02786-LHK, 2013 WL 496358 (N.D. Cal. Feb. 6, 2013).....	18
<i>In re Taco Bell Wage & Hour Actions,</i> 2016 U.S. Dist. LEXIS 48557 (E.D. Cal. Apr. 6, 2016).....	15
<i>Iskanian v. CLS Transportation,</i> 59 Cal. 4th 348, 381 (2014).....	7
<i>Ketchum v. Moses,</i> 24 Cal.4th 1122, 1132 (2001).....	18
<i>Laffitte v. Robert Half Int’l,</i> 1 Cal. 5th 480, 503 (2016).....	17, 18
<i>Makabi v. Gedalia,</i> 2016 Cal. App. Unpub. 1489 (2nd Dist. Ct. of App. 2016).....	15
<i>Pellegrino v. Robert Half Intern., Inc.,</i> 182 Cal.App.4th 278 (2010).....	18

1	<i>Stetson v. Grissom</i> ,	
2	821 F.3d 1157, 1166 (9th Cir. 2016).....	18
3	<i>Vandervort v. Balboa Capital Corp.</i> ,	
4	8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014).....	18
5	<i>Wershba v. Apple Computer, Inc.</i> ,	
6	91 Cal.App.4th 224, 254 (2001).....	18
7	<i>ZB, N.A. v. Superior Court</i> ,	
8	8 Cal.5th 175 (2019).....	7, 11, 13
9	<u>Statutes:</u>	
10	California Labor Code §201.....	12
11	California Labor Code §202.....	12
12	California Labor Code §203.....	12
13	California Labor Code §204.....	12
14	California Labor Code §210.....	12
15	California Labor Code §218.6.....	12
16	California Labor Code §221.....	12
17	California Labor Code §223.....	12
18	California Labor Code §226.....	12
19	California Labor Code §226.3.....	12
20	California Labor Code §226.7.....	12
21	California Labor Code §246.....	12
22	California Labor Code §510.....	12
23	California Labor Code §512.....	12
24	California Labor Code §516.....	12

1	California Labor Code §558.....	12
2	California Labor Code §1174.....	12
3	California Labor Code §1174.5.....	12
4	California Labor Code §1182.12.....	12
5	California Labor Code §1194.....	12
6	California Labor Code §1194.2.....	12
7	California Labor Code §1197.....	12
8	California Labor Code §1197.1.....	12
9	California Labor Code §1198.....	12
10	California Labor Code §2698.....	7
11	California Labor Code §2699.....	<i>passim</i>
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Mauricio Vides (“Plaintiff”) reached a settlement of the California Private
4 Attorneys General Act, Cal. Labor Code §2699, *et seq.* (“PAGA”) claim asserted in this
5 action against Defendants Flights Restaurant Group, Inc., Flights Burlingame, Inc., Flights
6 Campbell, Inc., and Flights Los Gatos, Inc. (“Defendants”) (collectively, the “Parties”)
7 which provides for a “Gross PAGA Settlement Amount” payment in the amount of
8 \$265,000.00. In accordance with California Labor Code §2699(l), Plaintiff now asks this
9 Court to review and approve the settlement of Plaintiff’s PAGA claims.¹ This is only a
10 settlement of the PAGA claims for civil penalties and is not a class settlement and does not
11 release the individual wage claims, if any, of the affected employees other than the Plaintiff
12 himself. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348,
13 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not
14 recoverable under PAGA).

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

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

24 **II. RELEVANT FACTS**

25 PAGA Counsel mailed the necessary correspondence to the California Labor and
26 Workforce Development Agency (“LWDA”) on June 21, 2022 on behalf of Plaintiff
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 Mauricio Vides, requesting authorization from the LWDA to seek civil penalties as provided
2 by the Private Attorney General Act of 2004 (“PAGA”) for the wage and hour violations
3 alleged in the PAGA Notice. (Declaration of Kyle Nordrehaug, at ¶3). The 65-day notice
4 period for the LWDA to notify of its intent to investigate expired on August 27, 2022.

5 On September 9, 2022, Plaintiff Mauricio Vides filed a Representative Action
6 Complaint in this Court against Defendants Flights Restaurant Group, Inc., Flights
7 Burlingame, Inc., Flights Campbell, Inc., and Flights Los Gatos, Inc. alleging a single cause
8 of action for recovery of civil penalties for Violation of the PAGA [Labor Code §§ 2698, *et*
9 *seq.*].

10 Plaintiff and Defendants agreed to mediate with Hon. Brian C. Walsh (Ret.). Prior to
11 the mediation, the Parties conducted significant investigation and discovery of the facts and
12 law. Defendants produced hundreds of documents relating to their policies, practices, and
13 procedures regarding paying non-exempt employees for all hours worked, overtime, meal
14 and rest period policies, payroll and operations policies, and more. Plaintiff was provided
15 with sufficient records and data to determine the number of Aggrieved Employees and the
16 number of pay periods in the PAGA Period. The Parties agree that the above-described
17 investigation and evaluation, as well as the information exchanged during the settlement
18 negotiations, are more than sufficient to assess the merits of the Parties’ positions and to
19 compromise the issues on a fair and equitable basis. (Declaration of Kyle Nordrehaug, at ¶3).

20 Plaintiff’s theory of PAGA liability as argued at mediation alleged that Defendants
21 deprived Plaintiff another Aggrieved Employees of compliant meal and rest breaks on a
22 regular basis. Plaintiff alleged that not only were Defendants’ meal and rest period policies
23 unlawful on their face, but they resulted in consistent violations for which premium
24 payments were seldom paid. Plaintiff alleged, for example, that Defendants’ written rest
25 break policy encouraged employees to skip their rest breaks by describing these breaks as
26 something “they have the option to take at their convenience or waive.” Plaintiff argued that
27 this statement is far afield from the legal obligation of relieving an employee of duties for
28 their statutorily entitled rest break. Moreover, Plaintiff alleged that the records in this case

evidence widespread meal period violations, including the artificial recording of fictitious meal periods of exactly 30 minutes. Plaintiff's expert determined the time punch records reflect a meal break violation rate assuming waivers of 77.9% of shifts greater than 6 hours (or 33% of all shifts)(7,009 unique violations out of 8,992 shifts greater than 6 hours). The pay data reflects meal break premiums paid for 185 instances, therefore roughly 2.6% of facial violations had a premium paid. The 7,009 meal break violations include 1,284 late meal breaks (after 5th hour), 523 missed meal breaks (for shifts greater than 6 hours), 305 short meal breaks (under 30 minutes), 3,852 automatically-deducted meal breaks, 59 missed 2nd meal breaks (for shifts greater than 12 hours), and 1,513 recorded meal periods that are exactly 30 minutes in duration. In addition to these violations, Plaintiff alleged that Defendants required off the clock work in the form of a very strict donning and doffing policy that included detailed grooming requirements and dressing into the company provided uniform. Only after all of Defendants' strict requirements were met could Plaintiff and other Aggrieved Employees make their way to the point of sale machine to clock in. Plaintiff also alleged at mediation that Defendants contacted him while off the clock to coordinate scheduling changes and assignments while at the same time failing to pay for this off the clock time and also not reimbursing him for the expenses he incurred on his personal cell phone for work-related issues. (Declaration of Kyle Nordrehaug, at ¶3).

On September 19, 2023, the Parties engaged in an all-day mediation session before Mediator Walsh, a former judge and a well-respected and experienced mediator knowledgeable of both the wage and hour laws and representative claims at issue in this action. Through arms-length negotiations with the assistance of the mediator, the Parties reached an agreement to settle the PAGA claims in this action which led to the signing of a Memorandum of Understanding memorializing the settlement. (Declaration of Kyle Nordrehaug, at ¶3).

The settlement was negotiated in light of all known facts and circumstances and the uncertainty associated with litigation – including the risk of Plaintiff not being able to maintain representative claims, the difficulty of proving Plaintiff's claims in a manageable

1 trial, the merits of Defendants’ potential defenses, and the significant delay and potential
2 appellate issues inherent to litigation – and was reached after extensive arm’s length
3 negotiations, with the assistance of Mediator Walsh. (Declaration of Kyle Nordrehaug, at
4 ¶3).

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

6 The PAGA settlement is subject to Court approval consistent with Labor Code
7 §2699(1)(2). (Agreement at ¶ 6.1). The Agreement negotiated by the Parties provides for a
8 “Gross PAGA Settlement Amount” payment in the amount of \$265,000 to resolve the
9 Released PAGA Claims (hereinafter referred to as the “PAGA Settlement”). From this
10 PAGA Settlement of \$265,000, there is a deduction of attorneys’ fees (“PAGA Counsel Fees
11 Payment”) in the amount of \$88,333 (which is one-third of the PAGA Settlement),
12 reimbursement of incurred costs (“PAGA Counsel Litigation Expenses Payment”) in an
13 amount not to exceed \$25,000, a service award payment to Plaintiff Vides in the amount of
14 \$12,500 (“Service Award) and Settlement Administration Costs (“Administration Expenses
15 Payment”) not to exceed \$6,000. (Agreement at ¶¶ 3.2.1-3.2.2, 3.2.4).² After these
16 deductions, the amount remaining is the “PAGA Payment”, which is estimated to be no less
17 than \$133,167.

18 Of the PAGA Payment amount, seventy-five percent (75%) (no less than \$99,875.25)
19 will be paid to the LWDA and the remaining twenty-five percent (25%) (no less than
20 \$33,291.75) will be paid to the Aggrieved Employees (Agreement at ¶ 3.2.3)³ This 75/25
21

22 ² If the Court approves a PAGA Counsel Fees Payment and/or a PAGA Counsel Litigation Expenses
23 Payment less than the amounts requested, the Administrator will allocate the remainder of these
24 amounts to the PAGA Payment. (Settlement Agreement at ¶ 3.2.1). To the extent the Administration
25 Expenses are less or the Court approves payment less than \$6,000, the Administrator will allocate
26 the remainder of this amount to the PAGA Payment (*Id.* at ¶ 3.2.2). In the event the Court approves
a Service Award of less than \$12,500, the unawarded difference will be added to the PAGA Payment
and not Plaintiff, PAGA Counsel, or Defendants (*Id.* at ¶ 3.2.4).

27 ³ “Aggrieved Employees” means all individuals who are or previously were employed by
28 Defendants in California and classified as a non-exempt employee at any time during the PAGA
Period. The PAGA Period is the period from June 21, 2021 through September 20, 2023. (Settlement
Agreement at ¶¶ 1.4, 1.23).

1 allocation is required by Labor Code §2699 as explained by *ZB, N.A. v. Superior Court*, 8
2 Cal.5th 175 (2019).

3 The Individual PAGA Payment for each Aggrieved Employee shall be based on the
4 number of pay periods each Aggrieved Employee worked during the PAGA Period as an
5 Aggrieved Employee, as a percentage of the total pay periods worked by all Aggrieved
6 Employees during the PAGA Period.⁴ The PAGA Period is the time period from June 21,
7 2021 through September 20, 2023. (Agreement at ¶ 1.23).

8 Based on a review of its records, Defendants estimate that there are approximately
9 272 Aggrieved Employees who worked a total of 7,550 pay periods during the PAGA
10 Period. (Agreement at ¶ 4.1). (Declaration of Kyle Nordrehaug, at ¶4)

11 Upon entry of final judgment, the Released Parties shall be entitled to a release from
12 the State of California and all Aggrieved Employees for any “Released PAGA Claims”,
13 which means any and all claims, debts, restitution, liabilities, demands, actions, or causes of
14 action for civil penalties that were alleged or which could have been alleged based on the
15 factual allegations in the operative complaint, as amended, in this action (the “Operative
16 Complaint”) that occurred during the PAGA Period, including all claims for civil penalties
17 against Defendants Flights Restaurant Group, Inc., Flights Burlingame, Inc., Flights
18 Campbell, Inc., and Flights Los Gatos, Inc., based on the facts of the Operative Complaint
19 for failure to pay all wages due, including overtime wages and regular wages; failure to pay
20 overtime compensation at the proper rate of pay; failure to include additional renumeration,
21 including shift differentials, in the regular rate of pay for purposes of paying overtime;
22 failure to provide meal and/or rest periods, failure to pay proper meal or rest period penalties;
23 failure to maintain accurate time records; failure to provide and maintain accurate itemized
24 wage statements; failure to maintain accurate employee payroll records; failure to timely pay
25

26 ⁴ See Settlement Agreement at ¶ 3.2.3 (“The Administrator will calculate each Individual PAGA
27 Payment by (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Payment by
28 the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the
PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay
Periods.”)

1 wages due during or at separation of employment; waiting-time penalties; and claims based
2 on the facts of the Operative Complaint for violations of California Labor Code Sections
3 201-204, 210, 218.6, 221, 223, 226, 226.3, 226.7, 246, 510, 512, 516, 558, 1174, 1174.5,
4 1182.12, 1194, 1194.2, 1197, 1197.1, 1198 and 2699 and applicable California Industrial
5 Welfare Commission (“IWC”) Wage Orders, including IWC Wage Order No. 1 (Cal. Code
6 Regs., tit. 8, § 11010) and IWC Wage Order No. 4 (Cal. Code Regs., tit. 8, § 11040) during
7 the PAGA Period, against the Released Parties (the “Released PAGA Claims”)(Agreement at
8 ¶ 5.2). The Released PAGA Claims expressly excludes all other claims, including claims for
9 vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
10 unemployment insurance, disability, social security, workers’ compensation, and California
11 class claims, and PAGA claims outside of the PAGA Period. (*Id.*) The Agreement expressly
12 confirms that “In no event shall the release of the Released PAGA Claims in this Settlement
13 Agreement release any individual claims of any individuals.” (*Id.*)

14 Within fourteen (14) days after Defendants fund the Gross PAGA Settlement
15 Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA
16 PAGA Payment, the Administration Expenses Payment, the Service Award and the PAGA
17 Counsel Expenses Payment. (Agreement at ¶ 4.4).⁵ Checks will remain negotiable for one
18 hundred eighty (180) days. (*Id.* at ¶ 4.4.1) For any Aggrieved Employee whose Individual
19 PAGA Payment check is uncashed and cancelled after the void date, the Administrator
20 transmit the funds represented by such checks to the State of California Unclaimed Property
21 Fund in the name of the individual who failed to cash their check (*Id.* at ¶ 4.4.3).

22 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of
23 the Agreement and this motion to the LWDA concurrently with the filing of the instant
24 motion for settlement approval as set forth in the accompanying proof of service in
25 compliance with Labor Code section 2699(1). In addition, Plaintiff shall submit to the
26

27 _____
28 ⁵ Disbursement of the PAGA Counsel Litigation Expenses Payment shall not precede disbursement
of the Individual PAGA Payments. (*Id.*).

1 LWDA a copy of the Court’s judgment and order approving the Agreement within ten (10)
2 days after entry of judgment or order.

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

4 The claim before this Court is solely the representative claim under PAGA on behalf
5 of the State of California for civil penalties pursuant to the PAGA. The parties have agreed
6 to settle this PAGA claim in its entirety after investigation and an arm’s length mediation
7 session. (Declaration of Kyle Nordrehaug, at ¶4.) The settlement is intended to fully and
8 finally resolve the Released PAGA Claims asserted by Plaintiff on behalf of the State of
9 California. This is only a settlement of the PAGA claims for civil penalties and is not a class
10 settlement and does not release the individual claims, if any, of the Aggrieved Employees,
11 other than any claims under PAGA. This settlement does not release any claim that is not a
12 PAGA claim.⁶ PAGA Counsel Fees equal to one-third of the Gross PAGA Settlement
13 amount (\$83,333) and PAGA Counsel Litigation Expenses in an amount not to exceed
14 \$25,000 will also be paid to PAGA Counsel as part of the settlement in accordance with
15 California Labor Code § 2699(g)(1), as set forth in the Agreement.⁷ The Plaintiff will
16 receive a service award in exchange for a general release, which includes his wage and hour
17 claims, and for his participation and service as detailed in the accompanying Declaration of
18 Mauricio Vides. Lastly, payment to the Administrator in an amount not to exceed \$6,000 to
19 perform the administrative duties to distribute the settlement money shall also be paid.
20 (Declaration of Kyle Nordrehaug, at ¶¶ 4-5.)

21 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE**
22 **SETTLEMENT OF THE PAGA CLAIM**

23 Labor Code § 2699(l) requires that the Court “shall review and approve any
24 settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement
25

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

28 ⁷ As set forth in the accompanying Declaration of Kyle Nordrehaug, PAGA Counsel incurred costs
in the current amount of \$14,786.87 which is less than the cost allocation in the Settlement
Agreement. See Declaration of Nordrehaug at ¶ 9.

1 shall be submitted to the agency at the same time that it is submitted to the court.”
2 Consequently, the parties respectfully ask the Court to review and approve the settlement of
3 the PAGA claims and the PAGA Payment to be paid as part of the proposed settlement.

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

5 The Parties believe that the PAGA Settlement amount is fair and reasonable and
6 therefore "shall" be reviewed and approved. The Labor and Workforce Development Agency
7 has released data on PAGA settlement amounts. Here, the Gross PAGA Settlement Amount
8 of \$265,000 is significantly more than other PAGA settlements and constitutes
9 approximately \$35 per pay period. (Declaration of Nordrehaug, at ¶6.)

10 This PAGA Settlement amount compares favorably to the estimated amount of PAGA
11 penalties. With the assistance of an expert, Plaintiff calculated that the maximum amount of
12 statutory PAGA civil penalties was potentially \$755,000 based on 7,550 pay periods
13 applicable to the Aggrieved Employees during the PAGA Period.⁸ (Declaration of
14 Nordrehaug, at ¶6.) Importantly, however, these calculations were performed at the
15 maximum statutory rate for the penalties, when in fact, it is likely that any penalties awarded
16 would be at a lower rate. California Labor Code Section 2699(e)(1) permits a Court to
17 award a lesser amount than the maximum civil penalty if based on the facts and
18 circumstances to do otherwise would result in an award that is "unjust, arbitrary and
19 oppressive or confiscatory."

20 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
21 affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay
22 period. Therefore, at trial, any PAGA penalties awarded could be significantly less than
23 Plaintiff's calculation even where Plaintiff prevailed on the PAGA claim. If the amount of \$5
24 per pay period from *Carrington v. Starbucks* is used, the potential recovery of civil penalties
25 would be only \$37,750, which is far less than this settlement provides.

26 ⁸ Stacking is where more than one civil penalty is imposed in a pay period for the same conduct.
27 The valuation of \$755,000 is the civil penalty amount without stacking. If stacking is permitted, then
28 the valuation increases with each additional penalty added to each pay period. Plaintiff, however, is
not aware of any PAGA award which permitted stacking and in the cases cited herein, only one
penalty per pay period was assessed.

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

10 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove
11 each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*,
12 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of
13 PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven
14 suffered a violation of the Labor Code by the defendant."). Here, Plaintiff would need to
15 prove that each Aggrieved Employee suffered a violation for each period the employee
16 worked in relation to failure to pay all wages due, including overtime wages and regular
17 wages, failure to pay overtime compensation at the proper rate of pay, failure to include
18 additional remuneration, including shift differentials, in the regular rate of pay for purposes
19 of paying overtime, failure to provide meal and/or rest periods, failure to pay proper meal or
20 rest period penalties, failure to maintain accurate time records, failure to provide and
21 maintain accurate itemized wage statements, failure to maintain accurate employee payroll
22 records, failure to timely pay wages due during or at separation of employment and waiting-
23 time penalties.

24 Defendants maintain that Plaintiff and the Aggrieved Employees were properly
25 compensated, and that they did not violate the Labor Code. Accordingly, Defendants dispute
26 and deny Plaintiff's allegations and claims asserted in both the PAGA Notice and the
27 Operative Complaint, which are resolved by the Agreement. Defendants asserted additional
28 defenses to the PAGA claim, not only as to liability but also as to the amount of the

1 penalties. Defendants could argue that no penalties prior to the PAGA notification should be
2 awarded because the violations were not intentional, and at least one Court has so ruled.
3 These defenses present a risk to the PAGA claims and the potential that some or all of the
4 PAGA penalties sought may not be awarded. (Declaration of Nordrehaug, at ¶7.)

5 Given Defendants' potential defenses to the violations at issue, the risks and costs of
6 continued litigation, Plaintiff and his attorneys believe that the PAGA Settlement is fair and
7 reasonable. (Declaration of Nordrehaug, at ¶7.) Defendants have similarly concluded that it
8 is desirable that the action is settled in the manner and upon the terms and conditions set
9 forth in the Agreement in order to avoid further expense, inconvenience and distraction of
10 further legal proceedings, as well as the uncertainty of litigation. Defendants have
11 determined that it is desirable and beneficial to put to rest the claims in this action and
12 Defendants agree that the PAGA Settlement is fair, reasonable, and adequate.

13 PAGA Counsel have significant experience litigating wage and hour claims including
14 claims for PAGA penalties, and the PAGA Settlement here is similar to or greater than
15 similar settlements that courts have approved. (Declaration of Nordrehaug, at ¶¶ 7, 10.) The
16 PAGA Settlement, along with the other terms of the proposed settlement, were negotiated by
17 experienced counsel at arm's length with the assistance of a private mediator, Hon. Brian C.
18 Walsh (Ret.). (Declaration of Nordrehaug, at ¶7.)

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

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

27 Although PAGA requires that a court approve the proposed PAGA settlement, Labor
28

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

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

PAGA Counsel seek approval of attorneys' fees from the PAGA settlement in the amount of \$88,333 representing one-third of the \$265,000 Gross PAGA Settlement Amount. PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys' fees and costs in this settlement is a matter of contract for a contingent representation. Nevertheless, should this Court review the requested attorneys' fees, it is clear that the requested fees and costs are reasonable.

First, the requested fees are justified by the result achieved. PAGA Counsel negotiated a recovery of \$265,000.00, and this result justifies the requested fees equal to one third of this recovery. This percentage is within the standard contingent recovery percentage of one-third, and this percentage is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016); *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (recognizing that ““fee awards in class actions average around one-third of the recovery”” regardless of ““whether the percentage method or the lodestar method is used.”” (*quoting Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008))).

Second, the fee award is justified by the work performed and contributions to the case. As detailed in the accompanying Declaration of Kyle Nordrehaug at ¶ __, the fee award represents PAGA Counsel's current lodestar of \$71,225.00 with a reasonable multiplier of 1.2, with significant additional work to be performed such that the multiplier will ultimately be negligible.

1 Generally, the Ninth Circuit and California Courts award positive multipliers between
2 2 to 4 times the lodestar to reward counsel for accepting the contingent risks of the litigation
3 or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award
4 with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182
5 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied and
6 affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
7 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa*
8 *Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which
9 was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D.
10 Cal. 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v.*
11 *Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6,
12 2013) (approving fee award that represented a multiplier of 2.76 as falling within the
13 "majority" range for risk multipliers).

14 Third, consideration of the enhancement factors justify the enhancement of the
15 lodestar. Courts multiply the lodestar by a factor to account for the risk of non-payment,
16 delay in payment, the quality of work, and the novelty and difficulty of the issues involved.
17 See *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001). Failure to apply a risk multiplier in
18 cases that meet these criteria is an abuse of discretion. *Stetson v. Grissom*, 821 F.3d 1157,
19 1166 (9th Cir. 2016).

20 Finally, as to litigation expenses, PAGA Counsel will be recovering litigation
21 expenses in the total amount of \$14,786.87 which is less than the \$25,000 allocation for costs
22 in the Agreement, so the difference of \$10,213.13 will be added to the PAGA Payment
23 amount. These expenses are documented in the accompanying Declaration of Nordrehaug at
24 ¶9.

25 VII. CONCLUSION

26 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA
27 settlement as set forth in the Agreement and enter the proposed order and judgment
28 submitted herewith.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: May 29, 2024

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

By: /s/ Kyle Nordrehaug
Kyle Nordrehaug
Attorney for Plaintiff