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Attorney for Plaintiff
Gisselle Selvy-Medina

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

10	GISSELLE SELVY-MEDINA, on behalf of	)	NO. 37-2023-00041657-CU-OE-CTL
11	herself and all aggrieved employees,	)	
12	Plaintiff,	)	PLAINTIFF GISSELLE SELVY-
13	v.	)	MEDINA'S APPLICATION TO
14	NOTHING BUNDT CAKES,	)	APPROVE PAGA SETTLEMENT;
15	ROARK CAPITAL GROUP,	)	MEMORANDUM OF POINTS AND
16	NOTHING BUNDT CAKES FRANCHISING,	)	AUTHORITIES; DECLARATION OF
17	LLC, and DOES 1 to 100,	)	ADAM ROSE; PROPOSED ORDER
18	Defendants.	)	No Hearing Requested
19		)	
20		)	
21		)	
22		)	
23		)	
24		)	
25		)	
26		)	
27		)	
28		)	

TO THE COURT AND ALL PARTIES:

Please take notice that Plaintiff Gisselle Selvy-Medina applies for an order to approve the PAGA settlement, pursuant to Labor Code section 2699(1)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This is a PAGA suitable seating case relating to plaintiff Gisselle Selvy-Medina's work for Nothing Bundt Franchising, LLC dba Nothing Bundt Cakes ("NBC"). The crux of the allegations is that NBC should have provided suitable seating to herself and the aggrieved employees pursuant to paragraph 14 of Wage Order 5.

1 Following mediation with Hon. Amy Hogue (Ret.) of Signature Resolution, the
2 parties reached a tentative agreement. Pursuant to Labor Code section 2699(1)(2): “The
3 superior court shall review and approve any settlement of any civil action filed pursuant to
4 [PAGA].” Thus, Plaintiff proceeds with this motion to approve the settlement.

5
6 II. Description of Settlement Terms

7 The gross settlement amount is \$137,500. From this amount, the following applies:

- 8 1. \$104,000 is attributed to the PAGA claims;
- 9 2. From the \$104,000, Frontier Law Center will receive up \$36,400 in attorney fees
10 (35%);
- 11 3. Frontier Law Center will also recover its costs up to \$8,700;
- 12 4. Phoenix Class Action Administration Solutions will administer the settlement for no
13 more than \$8,500;
- 14 5. Plaintiff will receive a service enhancement of up to \$2,000 for the PAGA claims;
- 15 6. The PAGA net settlement amount is \$48,400;
- 16 7. From the PAGA net settlement amount, 25% or \$12,100 will be distributed to the
17 aggrieved employees on a pro rata basis, and 75% or \$36,300 will be disbursed to the Labor
18 and Workforce Development Agency; and
- 19 8. Subsequently, \$33,500 is attributed to a settlement and general release of all
20 individual claims have been or could be asserted by Plaintiff.

21
22 III. The Court is Authorized to Approve the Settlement

23 Although there is not set criteria for evaluating a PAGA settlement, the general
24 guidelines is to determine if the settlement not only vindicates the rights of the employees,
25 but may also have a deterrent effect upon the defendant employer and other employers.
26 (See *O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1100, 1134.) This
27 PAGA settlement accomplishes both.

28 ///

1 The Suitable Seating Requirement

2 Paragraph 14 of Wage Order 5 (applies to food services businesses) provides the
3 following: “(A) All working employees shall be provided with suitable seats when the
4 nature of the work reasonably permits the use of seats. (B) When employees are not
5 engaged in the active duties of their employment and the nature of the work requires
6 standing, an adequate number of suitable seats shall be placed in reasonable proximity to
7 the work area and employees shall be permitted to use such seats when it does not interfere
8 with the performance of their duties.”

9 This twofold suitable seating requirement was analyzed in *LaFace v. Ralphs*
10 *Grocery Company* (2022) 75 Cal.App.5th 388. The trial court found in favor of Ralphs, and
11 the judgment was affirmed on appeal. (*Id.*) The court explained that under *Kilby v. CVS*
12 *Pharmacy, Inc.* (2016) 63 Cal.4th 1, Paragraph 14(B) of the Wage Order does not require
13 seats to be provided if doing so would interfere with employees’ performance of their
14 duties. (*Id.* at p. 405.)

15 Further, paragraph 14(B) applies during lulls in operation when an employee, while
16 still on the job, is not then actively engaged in any duties. (*Id.* at p. 406; citation omitted.) If
17 an employee's actual tasks at a discrete location make seated work feasible, they are entitled
18 to a seat under section 14(A) while working there. (*Ibid.*) However, if other job duties take
19 them to a different location where they must perform standing tasks, they would be entitled
20 to a seat under 14(B) during lulls in operation. (*Ibid.*) Finally, *Kilby* stated that to determine
21 whether seating is required, “Courts should look to the actual tasks performed, or
22 reasonably expected to be performed.” (*Kilby, supra*, 63 Cal.4th at p. 18.)

23 For Paragraph 14(A), Plaintiff’s contention was that her duties as a cake froster did
24 not require constant standing. For Paragraph 14(B), the contention is there were no
25 adequate seats available during any lulls in activity.

26 In contrast, Defendant’s contention is that it provided stools for employees to use
27 when employees were not working.

28 ///

1 A. Maximum Liability

2 In advance of the mediation NBC provided the following information:

- 3 1. 747 aggrieved employees worked 11,065 pay periods from July 4, 2022 to January
4 19, 2024 (the initial PAGA notice was sent on July 10, 2023);
- 5 2. A spreadsheet detailing work locations and job titles;
- 6 3. Exemplar store floor plans;
- 7 4. General employee training material;
- 8 5. Photographs from break rooms; and
- 9 6. Operating locations are El Cajon, Santee, Point Loma, Mission Valley, Carlsbad,
10 Chula Vista, San Marcos, Pacific Highlands, and Carmel Mountain.

11 Under Labor Code section 2699(f)(2), the applicable PAGA penalties are \$100 per
12 pay period for each aggrieved employee, and \$200 for each aggrieved employee for each
13 subsequent violation. Usually, the higher subsequent violation rate applies only when the
14 employer is notified of the violation and does not correct it. (See, e.g., *Amaral v. Cintas*
15 *Corp. No. 2* (2008) 163 Cal.App.4th 1157.)

16 Nonetheless, the maximum liability using the \$100 and \$200 penalties is \$1,485,200.
17 If only initial penalties apply, the maximum liability is \$100 x 11,065 pay periods =
18 \$1,106,500. The PAGA portion of the settlement is 9.3% of this maximum number. As
19 explained below, the result from the PAGA portion of the settlement is an excellent result
20 given the inherent risks in proceeding further.

21

22 B. Risks Posed

23 There were three primary categories of jobs that were the focus of the claims alleged
24 on behalf of the aggrieved employees. The first is froster/baker: they frost and decorate
25 NBC's cakes. Seats were not provided for the frosters at their workstations, but NBC
26 maintained that stools were available when not working. The paragraph 14(A) standard of
27 providing seats would not apply since the nature of the work might not allow for and the
28 14(B) standard of providing stools might be satisfied if the stools were readily accessible.

1 There were also crafters who performed cake decoration. Although workers could
2 take the position that crafting could be done while seated, NBC's differing approach could
3 be substantiated by its position it provided stools to use while employees were not working.

4 There were register employees who were at the cash registers. After the decision in
5 *LaFace, supra*, it might be difficult to maintain the position that employees at cash registers
6 could work while seated. The inquiry with NBC would require an in-depth forensic analysis
7 of NBC's business operations to determine if NBC could operate at a profitable level if the
8 cashiers were seated instead of actively engaging customers.

9 Finally, the approximately 747 allegedly aggrieved included individuals with
10 positions like drivers whose duties clearly did not call for sitting in the stores.

11 Given these risks about suitable seating, a more realistic maximum liability is
12 approximately half the maximum of \$1,106,500, or \$553,250. This is because it could
13 potentially go either way in favor or against the aggrieved employees based on the nature of
14 their work, coupled with the ostensible provision of stools for use during lulls in activity.

15 With the more realistic maximum of \$553,250, the PAGA portion of the settlement
16 of \$104,000 represents 18.7% of the maximum liability, which is certainly within the range
17 of reasonableness for PAGA settlements. (*See, e.g., Carrington v. Starbucks Corp.*, 30 Cal.
18 App. 5th 504 (2018) (affirming imposition of .2% award of total PAGA penalties); *Viceral*
19 *v. Mistras Group, Inc.*, 2016 WL 5907869, * 9 (N.D. Cal. Oct. 11, 2016) (approving the
20 settlement of PAGA claims for 0.15% of maximum value where the settlement as a whole
21 vindicates employee rights and may have a deterrent effect on the employer); *Hamilton v.*
22 *Juul Labs, Inc.*, No. 20-CV-03710-EMC, 2021 WL 5331451, at *10 (N.D. Cal. Nov. 16,
23 2021) (approving settlement of PAGA claims at a rate of 1.3-2.2% of the maximum value).

24 25 C. The Objectives of PAGA Were Met

26 Through this case, NBC was made abundantly aware of need to provide suitable
27 seating, albeit when the aggrieved employees have lulls in work activities. Thus, the
28 deterrent effect of PAGA was met.

1 Further, the average recovery for the 747 aggrieved employees from 25% of the net
2 settlement amount of \$12,100 is \$16.20. This amount is reasonable given the risks
3 described above, and it provides vindication for the aggrieved employees with regard to
4 suitable seating. Consequently, the motion should be granted.

5
6 IV. Plaintiff's Individual Settlement

7 The individual settlement covers all of Plaintiff's potential individual claims.
8 Although this was a PAGA only case, Plaintiff has discussed potential FEHA allegations
9 based on workplace developments. Thus, there is a separate individual settlement which
10 does not necessarily require court approval, as it does not involve PAGA penalties.

11
12 V. Plaintiff is Entitled to an Incentive Award

13 The requested \$2,000 service award for Plaintiff for the PAGA settlement is based
14 on her extensive statements about her experiences with suitable seating at NBC. Plaintiff
15 spent up to five hours helping to prepare for mediation and was available throughout the
16 mediation. Pursuant to *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380,
17 1393-1394, Plaintiff should receive an incentive for taking the time and effort to assist the
18 aggrieved employees and LWDA for the proposed recovery.

19
20 VI. Frontier Law Center is Entitled to Attorney Fees and Costs

21 PAGA allows a plaintiff to recover attorneys' fees and costs. (Lab. Code, § 2699(g).)
22 Courts recognized that an appropriate method for determining attorneys' fees is based on a
23 percentage of the total value of benefits to class members by the settlement. (*Wershba v.*
24 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25,
25 34 (1977) ("*Serrano III*"). Although this is not a class action, the same logic applies.

26 When a litigant's efforts create a fund from which others derive benefits, he or she
27 may require the beneficiaries to compensate those who created the fund. Both California
28 state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at p. 35.)

1 Indeed, the California Supreme Court has held that the award of attorneys' fees in
2 common fund wage and hour class action settlements should start with the percentage
3 method. *See Laffitte v. Robert Half Int'l* (2016) 1 Cal. 5th 480, 503 (2016) ("We join the
4 overwhelming majority of federal and state courts in holding that when class action
5 litigation establishes a monetary fund for the benefit of the class members, and the trial
6 court in its equitable powers awards class counsel a fee out of that fund, the court may
7 determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
8 created.").

9 The requested fees of \$36,400 for the PAGA settlement is reasonable, as it
10 represents 35% of the common fund. Plaintiff's counsel has already incurred \$8,588.68 in
11 costs, and the number will increase with subsequent filings. The costs include filing fees,
12 service costs, mediation, and other costs which should be approved through this motion.

13
14 VII. The Settlement Administrator's Expenses Should be Approved

15 Attached to the declaration of Adam Rose is the administration bid from Phoenix Class
16 Action Administration Solutions for \$8,500. As the third-party administrator, Phoenix will
17 send out the checks and notices accompanying the checks to the aggrieved employees. The
18 bid of \$8,500 is reasonable given there are 747 aggrieved employees.

19
20 VIII. Conclusion

21 Based on the above and the concurrently filed declaration of Adam Rose, Plaintiff
22 respectfully requests the court to grant the motion to approve the PAGA settlement for this
23 suitable seating PAGA case.

24
25 Date: May 3, 2024

FRONTIER LAW CENTER

26
27 /s/ Adam Rose
28 Attorney for Plaintiff
 Gisselle Selvy-Medina