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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 GISSELLE SELVY-MEDINA, on behalf of
11 herself and all aggrieved employees,

12 Plaintiff,

13 v.

14 NOTHING BUNDT CAKES,
15 ROARK CAPITAL GROUP,
16 NOTHING BUNDT CAKES FRANCHISING,
LLC, and DOES 1 to 100,

Defendants.

) NO. 37-2023-00041657-CU-OE-CTL
)
) PLAINTIFF GISSELLE SELVY-
) MEDINA'S NOTICE OF MOTION AND
) AND MOTION TO APPROVE PAGA
) SETTLEMENT; MEMORANRDUM OF
) POINTS AND AUTHORITIES;
) DECLARATION OF ADAM ROSE;
) PROPOSED ORDER
)
) Date: August 30, 2024
) Time: 10:30 a.m.
) Dept: C-70

17
18
19 TO ALL PARTIES:

20 Please take notice that on August 30, 2024 at 10:30 a.m. or as soon thereafter as may
21 be heard in Department C-70 of the San Diego Superior Court located at 330 W. Broadway,
22 San Diego, CA 92010, Plaintiff Gisselle Selvy-Medina will move the court pursuant to
23 Labor Code section 2699(1)(2) to approve the proposed PAGA settlement. The motion is
24 based on this notice, the memorandum of points and authorities, the declaration of Adam
25 Rose, pleadings on file, and arguments at the hearing.

26 Date: August 7, 2024

FRONTIER LAW CENTER
/s/ Adam Rose
Attorney for Plaintiff
Gisselle Selvy- Medina

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

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

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

11 Also, during the case Plaintiff brought up her position that she was harassed by a co-
12 worker while working that the NBC location in Mission Valley. Therefore from the
13 \$137,000 gross settlement, \$33,500 is attributed to this harassment claim, and the remainder,
14 which is \$104,000, is attributed to the PAGA claim. If necessary, Plaintiff can amend the
15 complaint to include the harassment claim, yet the parties have agreed to this allocation.

16
17 II. Description of Settlement Terms

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

- 19 1. \$104,000 is attributed to the PAGA claims;
- 20 2. From the \$104,000, Frontier Law Center will receive up \$36,400 in attorney fees
21 (35%);
- 22 3. Frontier Law Center will also recover its costs up to \$8,700;
- 23 4. Phoenix Class Action Administration Solutions will administer the settlement for no
24 more than \$8,500;
- 25 5. Plaintiff will receive a service enhancement of up to \$2,000 for the PAGA claims;
- 26 6. The PAGA net settlement amount is \$48,400;
- 27 7. From the PAGA net settlement amount, 25% or \$12,100 will be distributed to the
28 aggrieved employees on a pro rata basis, and 75% or \$36,300 will be disbursed to the Labor

1 and Workforce Development Agency; and

2 8. Subsequently, \$33,500 is attributed to a settlement and general release of all
3 individual claims have been or could be asserted by Plaintiff.

4
5 III. The Court is Authorized to Approve the Settlement

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

11
12 A. The Suitable Seating Requirement

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

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

26 Further, paragraph 14(B) applies during lulls in operation when an employee, while
27 still on the job, is not then actively engaged in any duties. (*Id.* at p. 406; citation omitted.) If
28 an employee's actual tasks at a discrete location make seated work feasible, they are entitled

1 to a seat under section 14(A) while working there. (*Ibid.*) However, if other job duties take
2 them to a different location where they must perform standing tasks, they would be entitled
3 to a seat under 14(B) during lulls in operation. (*Ibid.*) Finally, *Kilby* stated that to determine
4 whether seating is required, “Courts should look to the actual tasks performed, or
5 reasonably expected to be performed.” (*Kilby, supra*, 63 Cal.4th at p. 18.)

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

9 In contrast, Defendant’s contention is that it provided stools for employees to use
10 when employees were not working. In fact, suitable seating claims are now relatively
11 harder to prove. Under *LaFace*, suitable seating cases are harder to prove “The *Kilby* court
12 observed that Section 14(B) applies during ‘lulls in operation’ when an employee, while
13 still on the job, is not then actively engaged in any duties. (Citation omitted.) ... Moreover,
14 Section 14(B) provides for seats when sitting ‘does not interfere with the performance of
15 [the employee’s] duties.’” The *LaFace* plaintiff lost at trial and lost the appeal based on the
16 supposition that the activity at Ralphs was robust enough to negate the use of seats. (*Id.* at
17 pp. 407- 409.)

18 Likewise, NBC took the position that the activity at its bakery stores was swift
19 enough to necessitate relatively consistent movement, and as a result seats could interfere
20 with the performance of employees’ duties. Given these risks, as explained below the
21 PAGA settlement of \$104,000 is fair, reasonable, and adequate.

22
23 A. Maximum Liability

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

- 25 1. 747 aggrieved employees worked 11,065 pay periods from July 4, 2022 to January
26 19, 2024 (the initial PAGA notice was sent on July 10, 2023);
- 27 2. A spreadsheet detailing work locations and job titles;
- 28 3. Exemplar store floor plans;

- 1 4. General employee training material;
- 2 5. Photographs from break rooms; and
- 3 6. Operating locations are El Cajon, Santee, Point Loma, Mission Valley, Carlsbad,
- 4 Chula Vista, San Marcos, Pacific Highlands, and Carmel Mountain.

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

10 Nonetheless, the maximum liability using the \$100 and \$200 penalties is \$1,485,200.
11 If only initial penalties apply, the maximum liability is \$100 x 11,065 pay periods =
12 \$1,106,500. The \$104,000 PAGA settlement is 9.3% of this maximum number. As
13 explained below, the result from the PAGA portion of the settlement is an excellent result
14 given the inherent risks in proceeding further.

15 16 B. Risks Posed

17 There were three primary categories of jobs that were the focus of the claims alleged
18 on behalf of the aggrieved employees. The first is froster/baker: they frost and decorate
19 NBC's cakes. Seats were not provided for the frosters at their workstations, but NBC
20 maintained that stools were available when not working. The paragraph 14(A) standard of
21 providing seats would not apply since the nature of the work might not allow for and the
22 14(B) standard of providing stools might be satisfied if the stools were readily accessible.

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

26 There were register employees who were at the cash registers. After the decision in
27 *LaFace, supra*, it might be difficult to maintain the position that employees at cash registers
28 could work while seated. The inquiry with NBC would require an in-depth forensic analysis

1 of NBC's business operations to determine if NBC could operate at a profitable level if the
2 cashiers were seated instead of actively engaging customers.

3 Finally, the approximately 747 allegedly aggrieved included individuals with
4 positions like drivers whose duties clearly did not call for sitting in the stores. Given these
5 risks about suitable seating, a more realistic maximum liability is approximately half the
6 maximum of \$1,106,500, or \$553,250. This is because it could potentially go either way in
7 favor or against the aggrieved employees based on the nature of their work, coupled with
8 the ostensible provision of stools for use during lulls in activity.

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

18
19 C. The Settlement is Fair, Adequate, and Reasonable Since the Objectives of PAGA
20 Were Met

21 Through this case, NBC was made abundantly aware of need to provide suitable
22 seating, albeit when the aggrieved employees have lulls in work activities. Thus, the
23 deterrent effect and objectives of PAGA were met.

24 Further, the settlement is fair, reasonable, and adequate as specified in *Moniz v.*
25 *Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. The average recovery for the 747 aggrieved
26 employees from 25% of the net settlement amount of \$12,100 is \$16.20. This amount is
27 quite reasonable given the risks for suitable seating cases described above, and it provides
28 vindication for the aggrieved employees with regard to suitable seating.

1 IV. Plaintiff's Individual Settlement

2 The individual settlement covers all of Plaintiff's potential individual claims.
3 Although this was a PAGA only case, Plaintiff as discussed above, Plaintiff brought up
4 potential FEHA allegations based on workplace developments. Thus, there is a separate
5 individual settlement for \$33,500 which does not necessarily require court approval, as it
6 does not involve PAGA penalties.

7
8 V. Plaintiff is Entitled to an Incentive Award

9 The requested \$2,000 service award for Plaintiff for the PAGA settlement is based
10 on her extensive statements about her experiences with suitable seating at NBC. Plaintiff
11 spent up to five hours helping to prepare for mediation and was available throughout the
12 mediation. The requested service award is relatively low compared to other PAGA cases
13 since Plaintiff is receiving an individual settlement for FEHA allegations as explained in
14 more detail above.

15 Pursuant to *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-
16 1394, Plaintiff should receive an incentive for taking the time and effort to assist the
17 aggrieved employees and LWDA for the proposed recovery.

18
19 VI. Frontier Law Center is Entitled to Attorney Fees and Costs

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

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

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

8 The requested fees of \$36,400 for the PAGA settlement is reasonable, as it
9 represents 35% of the common fund. If it is determined too high, 33.3% of \$104,000 is
10 \$34,632. Also, Plaintiff's counsel has already incurred \$8,588.68 in costs, and the number
11 will increase with subsequent filings. The costs include filing fees, service costs, mediation,
12 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 with its
22 exhibits, Plaintiff respectfully requests the court to grant the motion to approve the PAGA
23 settlement for this suitable seating PAGA case.

24
25 Date: August 7, 2024

FRONTIER LAW CENTER

26
27 /s/ Adam Rose

28 Attorney for Plaintiff
Gisselle Selvy-Medina