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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

GUSTAVO DIAZ, an individual, on behalf of
the State of California, as a private attorney
general,

PLAINTIFF,

v.

TFORCE FINAL MILE, LLC; BEAVEX,
INC.; TFORCE LOGISTICS, LLC; TFORCE
CRITICAL; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. 30-2021-01209725-CU-OE-CXC

[Case Assigned for All Purposes to Hon.
William Claster in Dept. CX104]

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: September 24, 2021

Time: 9:00 a.m.

Dept.: CX104

Reservation No.: 73590306

Complaint Filed: July 9, 2021

Trial Date: None Scheduled

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

2 **PLEASE TAKE NOTICE** that on September 24, 2021 at 9:00 a.m. in Department CX104
3 of the above-entitled court, Plaintiff GUSTAVO DIAZ will move the Court for an Order Granting
4 Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Liane Katzenstein Ly, the Settlement and Release Agreement
9 (Exhibit "1" to the concurrently filed Katzenstein Ly Declaration), all other papers and records on
10 file in this action, and on such oral and documentary evidence as may be presented at the hearing
11 on this Motion.

12
13 DATED: August 18, 2021

KINGSLEY & KINGSLEY, APC

14
15 By: 

16 Liane Katzenstein Ly
17 Attorneys for Plaintiff GUSTAVO DIAZ and All
18 aggrieved employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff GUSTAVO DIAZ (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of their Motion for Approval of Representative Action Settlement. The
5 Parties have reached a proposed settlement documented in the Settlement and Release Agreement
6 (“Settlement” or “Settlement Agreement”), attached to the concurrently filed declaration of Liane
7 Katzenstein Ly.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code section
9 2699, *et seq.* (“PAGA”). The Gross Settlement Amount is \$225,000.00. After deduction of
10 attorney’s fees and litigation expenses, a litigation enhancement to the Plaintiff, and settlement
11 administration costs as detailed in the Settlement Agreement, the remaining amount of
12 \$132,000.00 is allocated as “PAGA Penalties” and is to be split between the Labor and Workforce
13 Development Agency (“LWDA”) and the aggrieved employees as required by Labor Code section
14 2699(i), with \$99,000.00 (or 75%) going to the LWDA and \$33,000.00 (or 25%) distributed to
15 the aggrieved employees.¹

16 The Parties request that the Court “review and approve any settlement of any civil action
17 filed pursuant to this part” (*See* Lab. Code §2699(1)(2).) If the Court deems the Settlement fair
18 and acceptable, the Parties request that the Court (1) enter an order approving the Settlement and
19 ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final
20 Judgement thereon.²

21 ///

22 ///

25 ¹ Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the
26 Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ² As indicated on the Proof of Service, the instant Motion will be concurrently uploaded to the LWDA’s website
28 on the date this Motion is submitted for filing as required by Labor Code §2699(1)(2). (Declaration of Liane
Katzenstein Ly (“Ly Decl.”) ¶5.) Proof of submission of Plaintiff’s Motion, all related documents, and copy of
the email from the LWDA confirming receipt is attached to the Declaration of Liane Katzenstein Ly as Exhibit
“2.” (*Id.*)

1 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

2 A. Litigation Overview and Procedural History

3 On January 13, 2020, Plaintiff, individually and on behalf of all others similarly situated,
4 filed a Class Action Complaint in the Superior Court for the State of California, County of Los
5 Angeles, Case Number 20STCV01403 (the “State Action”) for (1) Failure to Pay Minimum Wages
6 and Overtime; (2) Failure to Provide Meal and Rest Periods; (3) Failure to Timely Pay Wages
7 Each Pay Period; (4) Failure to Reimburse Expenses; (5) Failure to Provide Accurate Itemized
8 Wage Statements; and (6) Violation of the Unfair Competition Law, pursuant to §§ 201, 202, 203,
9 204, 226(a)-(e), 226.2, 226.7, 226.8, 256, 510, 512, 558, 1174, 1194, 1194.2, 1197, 1197.1, 1198,
10 and 2802. (Ly Decl. ¶6; Settlement Agreement, Ex. 1, (“Ex. 1”) at § II, ¶17.) Plaintiff alleges that
11 this underlying conduct gives rise to a claim pursuant to Labor Code §2699, et seq. (*Id.*)

12 On February 14, 2020, Defendants filed a Notice of Removal, removing the State Action
13 in the Superior Court of the State of California for the County of Los Angeles to the United States
14 District Court for the Central District of California – Western Division, Case Number 2:20-cv-
15 01521 JAK (AGRx). (Ly Decl. ¶7; Ex. 1 at § II, ¶18.)

16 Subsequently, Defendant requested that Plaintiff’s individual claims proceed in arbitration
17 pursuant to an arbitration agreement signed by both Parties. (Ly Decl. ¶8; Ex. 1 at § II, ¶19.)

18 The Parties stayed the federal action, and Defendant initiated arbitration. (Ly Decl. ¶9; Ex.
19 1 at § II, ¶20.)

20 The Parties moved forward in arbitration, stayed the federal action, and entered into a
21 tolling agreement as to the PAGA claim that had not yet been filed in the federal action. (Ly Decl.
22 ¶10; Ex. 1 at § II, ¶21.)

23 Thereafter, the Parties attended mediation with Hon, Stephen J. Sundvold (Ret.) on
24 February 17, 2021, and a settlement was reached. (Ly Decl. ¶11; Ex. 1 at § II, ¶22.)

25 The Individual Action is in arbitration in front of Emily R. Boyle, Esq. (“Arbitration”), and
26 has been settled. (Ly Decl. ¶12; Ex. 1 at § II, ¶23.)

27 The Parties entered into a tolling agreement and as part of this Settlement, the Parties
28 agreed to file a representative action in Orange County Superior Court. (“the PAGA Action”). (Ly

Decl. ¶13; Ex. 1 at § II, ¶24.) As such, on July 7, 2021, Plaintiff submitted his Representative Action Complaint. (*Id.*)

Although Defendants deny that it violated any pertinent law, it recognized the risks of litigation, and the Parties were able to reach the proposed Settlement now presented to the Court for approval. (Ly Decl. ¶14.)

B. Factual Background

Defendants operate a delivery network throughout the United States through which Defendants provide delivery services for medical supplies, medicine, alcohol, electronics, and other items from local businesses to local consumers. (Ly Decl. ¶15.) Plaintiff worked as a driver from 2006 to the present throughout Southern California, delivering items such as medical supplies, medicine, alcohol, electronics, and other items to local California businesses, households, and other consumers. (Ly Decl. ¶16.) Defendants operate the platform that connects drivers like Plaintiff and the PAGA Participants with customers who need the services of a delivery driver. (Ly Decl. ¶17.) Defendants classified these individuals as independent contractors. (Ly Decl. ¶18.) Plaintiff argued that they were employees. (Ly Decl. ¶19.)

III. **PAGA ACTIONS AND THE REQUIREMENTS**

A. The PAGA Statutory Scheme

PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Orange, LLC*, 59 Cal. 4th 348, 380).

When an aggrieved employee brings a PAGA claim, “the government is always the real party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A] PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff

that brings a PAGA claim represents “the same legal right and interest as state labor law enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California’s labor laws on behalf of the state. (In cases where the LWDA itself pursues these penalties, the “aggrieved employees” receive none of the penalties.)

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

“The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.”

Lab. Code § 2699.3 (a)(1)

Plaintiff contends that he has complied with the notice requirements and has properly pled a PAGA cause of action.

B. The Court Has Discretion When Awarding the Amount of Penalties

PAGA provides for penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code.³ *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213; *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL

³ *See also Willner*, 35 F.Supp.3d 1116 (N.D. Cal. 2014); *McKenzie v. Federal Exp. Corp.*, 765 F. Supp. 2d 1222, 1232 (C.D. Cal. 2011)

1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendants deny that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability, and expressly denies that any employees suffered harm.” Therefore, Defendants have represented in this litigation that given the Court’s discretion the damages are uncertain and are significantly less than the amounts claimed by the Plaintiff.

IV. THE SETTLEMENT

Pursuant to the Settlement Agreement, Defendants will pay the total sum of \$225,000.00 in full and final settlement of the PAGA claim alleged. (Ly Decl. ¶20; Ex 1 at ¶34.) Per the Settlement Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$225,000.00
Attorneys’ Fees (1/3):	\$75,000.00
Requested Case Costs:	\$8,000.00
Settlement Administrator:	\$7,500.00
PAGA Penalties:	\$132,000.00
	<i>(\$99,000.00 to the LWDA; \$33,000.00 to the distributed to aggrieved employees)</i>
Named Plaintiff Enhancement:	\$2,500.00
Amount Distributed to aggrieved employees:	\$33,000.00

(Id.)

Each aggrieved employee shall receive a pro-rata portion of the \$33,000.00 based on the number of Eligible Pay Periods worked for Defendant, during the Covered Period. (Ex. 1 at ¶36.) For settlement purposes, the “PAGA Participants” are defined as: “Plaintiff and all persons who had previously contracted to transport goods within the State of California under one or more contracts with BeaEx Incorporated and/or JNJW Enterprises, Inc (dba Conejo Courier & Cartage) and who performed deliveries under those contracts between April 25, 2019 and January 2, 2020 (both dates inclusive) after they were assumed by one or more of the defendants, but who were *not* classified as employees during that period.” (Ly Decl. ¶21; Ex. 1 at ¶1.)

1 **V. ARGUMENT**

2 A. The Court Should Approve the Settlement Agreement

3 The Parties recognize that in accordance with Labor Code §2699(l), Court approval is
4 required in the event of a settlement of a PAGA action on a representative basis. However, as
5 explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow
6 the class action procedural rules in PAGA cases and therefore need not obtain approval of the
7 PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply
8 with the requirements of Labor Code §2699, the Parties submit the instant Motion and the
9 Settlement Agreement (Exhibit “1” to the Katzenstein Ly Declaration) for Court approval.

10 B. The Risks of Moving Forward with Plaintiff’s PAGA Claim

11 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
12 and discount taken follows. (Ly Decl. ¶22.) PAGA Counsel had to consider the arguments and
13 defenses asserted by Defense Counsel. (Ly Decl. ¶23.) PAGA Counsel also had to assess the
14 risks of moving forward to trial and what this Court would do in awarding penalties were Plaintiff
15 to prevail at trial. (*Id.*) Defendants’ strongest argument was that its classification of Plaintiff and
16 the PAGA Participants was correct. (Ly Decl. ¶24.) Defendants argued that they are not
17 employers under the “ABC” test from *Dynamex Operations West, Inc. v. Superior Court* (2018)
18 4 Cal.5th 903, 913 or *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48
19 Cal.3d 341, 350. Defendants argued that they were not in the same business as the drivers and
20 they did not have control over the working conditions. (Ly Decl. ¶25.) Plaintiff disagreed, but
21 the passage of Proposition 22 (app-based transportation carve-out) on November 3, 2020 made
22 succeeding on these claims less likely. (Ly Decl. ¶26.)

23 Additionally, PAGA Counsel considered the following facts and arguments in determining
24 that the Settlement was fair and reasonable: Plaintiff believed that Defendants may persuasively
25 argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether
26 waive any penalties under PAGA. (Ly Decl. ¶27; Ex. 1 at ¶25.) Pursuant to Labor Code §226.3,
27 the Labor Commissioner has the discretion to “decide not to penalize an employer for a first
28 violation when that violation was due to ... inadvertent mistake.” (*Ibid.*) And in accordance with

1 PAGA, the court in a PAGA action has the same discretion “to assess a civil penalty” that the
2 Labor Commissioner would have, as well as complete discretion to “award a lesser amount than
3 the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances
4 of the particular case, to do otherwise would result in an award that is unjust, arbitrary and
5 oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)). (*Ibid.*) In addition, Defendants
6 have presented evidence and argument which they believe would be sufficient to establish non-
7 employee status of plaintiff and the PAGA Participants, showing lack of control by Defendants
8 over the work environment of the PAGA Participants, establishing that the PAGA Participants
9 (including Plaintiff) operated as bona fide independent businesses, and further establishing that the
10 PAGA Participants did not operate in the same business as the Defendants. (*Ibid.*)

11 Class Counsel believed that the full value of the PAGA claims were \$1,035,000.00 based
12 on approximately forty-five (45) PAGA Participants and one thousand six hundred and twenty
13 (1,620) pay periods. (Ly Decl. ¶28.) This amounted to a \$100.00 a pay period violation for the
14 overtime, meal break, rest break, itemized wage statement, and reimbursement claims and a \$5,000
15 misclassification penalty for a violation of Labor Code section 226.8 claim for each of the forty-
16 five (45) PAGA Participants. (Ly Decl. ¶29.)

17 In light of these arguments and the potential risks on the merits and manageability of the
18 PAGA claims, PAGA Counsel determined that the Settlement was fair and reasonable. (Ly Decl.
19 ¶30; *Id* at Ex. 1 at ¶25.)

20 C. There Is a Strong Risk the Higher \$200 Civil Penalty Triggered for “Subsequent”
21 Violations Will Not Apply

22 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
23 triggered for “subsequent” violations. Labor Code section 2699(f)(2). If this case were to proceed
24 to trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated
25 section 226(a) more than once for a given employee. Plaintiff is not aware of any case law that
26 interprets “subsequent” in the context of section 2699. However, Defendant is likely to rely on
27 *Amaral v. Cintas Corp. No. 2 163 Cal.App.4th 1157 (2008)* because it rejected a purely temporal
28 understanding of the term “subsequent” and interpreted its use in Labor Code sections 210 and

225.5 to require that “the employer has been notified that it has violated a Labor Code provision” before higher penalties are triggered. *Id.* at 1209. Defendant presumably will take the position that it has not been notified that it actually violated Labor Code section 226 until the Labor Commissioner has issued a formal citation. Even if the Court would agree with Plaintiff that Defendant was put on notice on April 25, 2019, the date Defendant was served with Plaintiff’s PAGA letter, the \$200 civil penalty would only apply to violations for a period of 3 months, occurring between April 25, 2019 to January 2, 2020 (the end of the Covered Period).

D. A Court May Exercise Its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp.* No. 2 163 Cal.App.4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”

For example, in *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the plaintiff brought a PAGA claim for violations of Labor Code section 226(a) based on the following issues: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee’s employer. (*Id.* At *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to \$18 per wage statements, reflecting 18% of the potential exposure.

(*Id.* at *4). The Court reasoned:

Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a \$2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to \$500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’s “good faith attempts” to comply and because the violations were minimal).

Here, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendants would argue that this is a technical violation that is distinct from the situation where an employer changes the hourly rate or hours worked reflected on a wage statement to deprive the employee of all wages due. All of which, Counsel for Defendants would argue, should significantly mitigate the civil penalty.

VI. SUBMISSION TO THE LWDA

As required, Plaintiff will concurrently submit this Motion to the LWDA. (*Id.* at Ly Decl. ¶15.)

VII. CONCLUSION

Plaintiff and his respective Counsel submit that the proposed Settlement as documented in the Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. The Parties respectfully request that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Settlement Agreement, and that final judgment be entered.

DATED: August 18, 2021

KINGSLEY & KINGSLEY, APC

By: _____

Liane Katzenstein Ly
Attorneys for Plaintiff GUSTAVO DIAZ and All
aggrieved employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On August 18, 2021, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

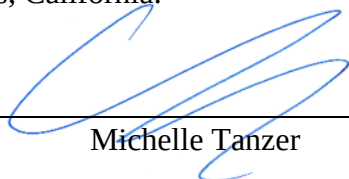
MARRON LAWYERS, APC Paul Marron, Esq. pmarron@marronlaw.com Steven C. Rice, Esq. srice@marronlaw.com Paul B. Arenas, Esq. parenas@marronlaw.com Alexander T. Marx, Esq. amarx@marronlaw.com 5000 E. Spring St., Suite 580 Long Beach, CA 90815 <i>Attorneys for Defendant</i>	JOSE GARAY, APLC Jose R. Garay, Esq. jose@garaylaw.com 249 E. Ocean Blvd. #814 Long Beach, CA 90802 <i>Attorneys for Plaintiff</i>
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[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

[XX] (BY ELECTRONIC SERVICE): I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (STATE): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 18, 2021, at Woodland Hills, California.



Michelle Tanzer