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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DANIEL COLMENARES, an individual,
CATHY HERNANDEZ, and individual, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

FREE ENERGY SAVINGS COMPANY,
LLC, a California Limited Liability
Corporation; ALLAN RAGO, an individual;
KRISTINE VANNEMAN, an individual;
LEFLORIDA LESLIE, an individual and
DOES I through 100, inclusive;

Defendants.

Case No. CIVSB2028719

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Jessica Morgan
Department S26

REPRESENTATIVE ACTION

**DECLARATION OF DANIEL SROURIAN IN
SUPPORT OF MOTION FOR APPROVAL
OF PRIVATE ATTORNEYS' GENERAL ACT
("PAGA") SETTLEMENT**

Date: December 13, 2023

Time: 8:30 a.m.

Dept: S26

Judge: Hon. Jessica Morgan

Complaint filed: December 9, 2020

Trial date: Not Set

1 I, Daniel Srourian, declare as follows:

2 1. I am the owner of Srourian Law Firm, P.C., counsel of record for Plaintiffs
3 DANIEL COLMENARES and CATHY HERNANDEZ (“Plaintiffs”). I am a member in good
4 standing of the State Bar of California. I submit this Declaration in support of the Motion for
5 Approval of Private Attorneys General Act (“PAGA”) Settlement brought by Plaintiffs. This
6 Declaration is based on my personal knowledge and if called to testify I could and would
7 competently testify to the matters contained in this Declaration.

8 2. On behalf of the State of California, Plaintiffs Daniel Colmenares and Cathy
9 Hernandez (“Plaintiffs”) brought a Private Attorneys’ General Act (“PAGA”) action for
10 aggrieved employees (“PAGA Members”) of Defendants Free Energy Savings Company, LLC,
11 Allan Rago, Kristine Vanneman, and Leflorida Leslie (“Free Energy” or “Defendants”) based
12 on their alleged failure to (1) pay overtime wages; (2) pay minimum wages; (3) pay meal period
13 compensation; (4) pay rest period compensation; (5) furnish accurate wage and hour statements;
14 (6) pay wages due upon discharge; and (7) indemnify for business expenses. Plaintiffs seek
15 Court approval of a \$200,000.00 non-reversionary settlement.

16 3. Free Energy Savings Company, LLC is a licensed heating and air conditioning,
17 insulation, and weatherization contractor providing free weatherization, insulation, and other
18 energy improvements to California residents statewide, funded by local gas and electric utilities.
19 Free Energy Savings Company, LLC operates out of the city of Montclair in San Bernardino
20 County, California. Allan Rago, Kristine Vanneman, and Leflorida Leslie are each an owner,
21 manager, or managing agent of Free Energy Savings Company, LLC.

22 4. Plaintiff Daniel Colmenares performed work as an Outreach Specialist for Free
23 Energy from approximately 2013 to 2020. Plaintiff Cathy Hernandez performed work as an
24 Outreach Specialist for Free Energy from approximately 2017 to 2020. The PAGA Members
25 are hourly-paid employees of Defendants in California or persons retained as independent
26 contractor Outreach Specialists for Defendants during the PAGA Period.

27 5. Prior to reaching the Settlement, Plaintiffs and their counsel conducted extensive
28 investigation and discovery into the claims alleged in the Action. Before the mediation,

1 Defendants produced timekeeping and payroll data for a 25% randomly selected sample of
2 aggrieved employees from November 2019 to April 2023. Plaintiffs' expert analyzed the time
3 and payroll data for a total of approximately 77 allegedly aggrieved employees and over
4 120,000 shifts, and assisted Plaintiffs' counsel in preparing a model of the potential civil
5 penalties prior to mediation. In addition, Defendants produced relevant wage-and-hour policies
6 and procedures, job descriptions, and the applicable independent contractor agreements. Based
7 on this discovery and investigation, Plaintiffs' counsel was able to act intelligently and
8 effectively in negotiating the proposed Settlement.

9 6. The Parties mediated a full-day mediation with Lou Marlin on June 19, 2023.
10 Settlement was not reached at the mediation, but Mr. Marlin tendered a mediator's proposal that
11 was subsequently accepted by the parties. A settlement in principle was reached on June 22,
12 2023. After many conversations and emails, a detailed Settlement Agreement and Release was
13 signed in August 2023. Attached as **Exhibit 1 to the Declaration of Michael D. Singer in**
14 **Support of Motion for Approval of PAGA Settlement** is true and correct copy of the Joint
15 Stipulation of PAGA Settlement and Release ("Settlement Agreement" or "SA").

16 7. Of the PAGA Members, 31 individuals, including Plaintiffs, were retained by
17 Defendants as Outreach Specialists ("OSs"), and were classified as independent contractors
18 until January 2021, when they were reclassified from independent contractors to W-2
19 employees.

20 8. Plaintiffs contend that based on the job duties of OSs, they were misclassified
21 and should have at all times been treated as non-exempt employees.

22 9. After the COVID-19 pandemic, Defendants reclassified OSs from independent
23 contractors to non-exempt employees. Plaintiffs contend that OS' job duties remained
24 unchanged. In fact, nothing about their employment with Defendants changed (OSs were still
25 not provided with legally compliant meal/rest breaks and were not reimbursed for all business
26 expenses incurred) other than they were officially switched to W2 employees. As such, the
27 alleged violations continued after the reclassification. Therefore, Plaintiffs bring claims on
28 behalf of all non-exempt employees in addition to the individuals who were misclassified for a

period of time during the relevant time period. There are approximately 392 non-exempt employees who are PAGA Members.

10. Under the Settlement, the claims of all PAGA Members shall be settled for the Gross Settlement Amount (“GSA”) of \$200,000.00, which is inclusive all attorneys’ fees and costs to Plaintiffs’ Counsel, Settlement Administration Costs, and payment to the LWDA and PAGA Members.

11. The GSA shall be allocated as follows:

<u>GROSS SETTLEMENT AMOUNT:</u>	\$ 200,000.00
Plaintiffs’ Counsel’s Fees:	-\$ 66,600.00
Plaintiffs’ Counsel’s Litigation Costs:	-\$ 19,372.00
Administration Costs:	-\$ 3,995.00
<u>NET SETTLEMENT FUND:</u>	\$ 110,033.00
Labor Workforce & Development Agency: 75%	-\$ 82,524.75
Aggrieved Employees: 25%	-\$ 27,508.25

12. Pursuant to the PAGA, 25% of PAGA penalties estimated at \$27,508.25 will be distributed proportionately to the 423 PAGA Members who worked during the PAGA Period based on the number pay periods each worked during the PAGA Period. With an aggregate 14,325 pay periods worked by all PAGA Members, each will receive an estimated \$1.92 per pay period (“PAGA Pay Period Value”).

13. Defendants will provide contact information to ILYM Group, Inc. (“ILYM”), who will mail each PAGA Member a cover letter explaining the settlement, the basis for the payment, and a settlement check for that amount.

14. The Gross Settlement Amount of \$200,000.00 is significant enough to deter Defendants from future violations, creating an effective disincentive for Defendants to engage in unlawful business practices. The Settlement provides a substantial benefit to the State of California, with the LWDA receiving \$82,524.75, as 75 percent of the Net Settlement Amount, to assist with future enforcement of state labor laws. The Settlement also provides a substantial benefit to the PAGA Members, who will share approximately \$27,508.25 as 25 percent of the Net Settlement Amount.

15. In assessing whether the Settlement is fair, reasonable, and adequate, the Court

1 may balance the amount in penalties with the risks of further litigation. Here, Plaintiffs obtained
2 a meaningful amount in civil penalties despite facing significant challenges and risks had the
3 litigation continued. Plaintiffs considered several factors in reaching the decision to settle at this
4 point in the litigation, including (a) the risk that the Court would strike all or parts of Plaintiffs'
5 claims on manageability grounds given the current split of authority as to whether the court has
6 inherent power to strike PAGA claims on manageability grounds; (b) the risk and uncertainty in
7 proving liability and PAGA penalties at trial; (c) the prospect that the Court could substantially
8 reduce any award of civil penalties on the grounds that "to do otherwise would result in an
9 award that is unjust, arbitrary and oppressive, or confiscatory," pursuant to Labor Code §
10 2699(e)(2); and (d) the risk that Defendants would appeal any unfavorable judgment.

11 16. Continued litigation would be an expensive, time-consuming and extremely
12 uncertain proposition, and could lead to an unfavorable judgment and/or a lengthy and
13 unsuccessful appeal.

14 17. Plaintiffs contend that Defendants willfully misclassified OSs as independent
15 contractors until approximately January 2021, resulting in violations of the Labor Code,
16 including failure to: (1) pay overtime wages; (2) pay minimum wages; (3) pay meal period
17 compensation; (4) pay rest period compensation; (5) furnish accurate wage and hour statements;
18 (6) pay wages due upon discharge; and (7) indemnify for business expenses. In January 2021,
19 Defendants stopped classifying OSs as independent contractors and reclassified the role of OS
20 to a W-2 employee, classified as an exempt outside salesperson. Plaintiffs also contend that
21 subsequent to the reclassification, OSs were improperly classified as outside salespersons
22 because their compensation was not based on the price of a product or service since
23 Defendants' customers do not pay anything for the services and products they obtain from
24 Defendants. Additionally, OSs do not spend more than 50% of their time engaged in selling.
25 Therefore, Plaintiffs contend that violations continued after reclassification.

26 18. Defendants contended that OSs were properly classified as independent
27 contractors because OSs had a legally required business license, maintained a business location
28 separate from the Defendants' location, had authority to hire and fire other persons to assist in

1 providing services to Defendants, and regularly spent more than half the working time away
2 from the Defendants' place of business obtaining contracts for services. Defendants also
3 contended that OSs regularly spent more than 50% of their time engaged in selling products and
4 obtaining contracts for services and therefore meet the outside salesperson exemption.
5 Plaintiffs' claims for violations of the Labor Code hinged on proving that OSs were
6 misclassified. Misclassification claims such as the claims alleged here can be challenging to
7 prove on a group-wide basis because how each individual spends their time can vary drastically
8 from day-to-day. While Plaintiffs believe in the strength of their claims, it was possible that a
9 judge would decide aggrieved employees were not willfully misclassified and did not suffer any
10 of the alleged violations.

11 19. Defendants supported its contentions with written policies distributed to
12 Plaintiffs and aggrieved employees, a random sample of time and pay records, and citations to
13 relevant authority. If its evidence and arguments were accepted, the possibility of penalties
14 would not merely be reduced, but eliminated. Plaintiffs' counsel considered the risks of
15 summary adjudication/ judgment, trial, and, if successful, the risk penalties would be severely
16 reduced, or the decision reversed.

17 20. Considering the risks of continued litigation, the uncertainties involved in the
18 split of authority on the issue of manageability of PAGA claims, the burdens of proof necessary
19 to establish liability, and the probability of appeal of a favorable judgment, it is clear that the
20 non-reversionary settlement amount of \$200,000 is fair, adequate, and reasonable in light of
21 PAGA's purpose to remediate present labor law violations, to deter future violations, and to
22 maximize enforcement of the Labor Code.

23 21. Plaintiffs calculated the maximum potential penalties in an "everything goes
24 right" scenario to be approximately \$7,465,500, using only initial violation rate of \$100 for
25 each aggrieved employee per pay period. Defendants employed 423 PAGA Members during the
26 PAGA Period, who worked an aggregate 14,325 pay periods.

27 22. PAGA penalties were estimated by Plaintiffs for eight alleged underlying
28 violations at the initial violation rate of \$100, assuming one violation per aggrieved employee

(423 EEs) per pay period (14,325 PPs) as follows:

- Failure to Pay Wages (§ 1194) (14,325 PPs x \$100): \$1,432,500
- Failure to Pay Overtime Wages (§ 510) (14,325 PPs x \$100): \$1,432,500
- Meal Periods (§ 512) (14,325 PPs x \$100): \$1,432,500
- Rest Periods (§ 226.7) (14,325 PPs x \$100): \$1,432,500
- Wage Statements (§ 226) (423 EEs x \$250): \$105,750
- Expense Reimbursement (§ 2802) (14,325 PPs x \$100): \$1,432,500
- Final Wages (§ 203) (423 EEs x \$100): \$42,300
- Misclassification (§ 226.8) (31 ICs x \$5,000): \$155,000

Maximum PAGA Penalties: \$7,465,550

23. Maximum exposure was highly discounted for several reasons. First, Defendants claimed that nearly all non-exempt employees, including Plaintiffs, signed arbitration agreements limiting their claims to individual disputes. Second, at the time of the settlement, Plaintiffs' counsel estimated a 50 percent likelihood that Plaintiffs' claims could be dismissed based on manageability grounds, given that Defendants argued that there are 26 unique non-exempt positions, reducing the value of the PAGA claims to \$3,732,750.

24. Plaintiffs' counsel estimated a 50 percent likelihood that Plaintiffs would prevail at trial on their claims, further reducing the value to the PAGA claims to approximately \$1,866,375.

25. Additionally, the Court could exercise its discretion to reduce the amount of PAGA penalties under Labor Code § 2699(e)(2).

26. After considering the risk the scope of the action could be limited, liability may not be proven, and penalties, if awarded, could be substantially reduced, Plaintiffs assessed the realistic exposure as \$1,866,375 (25% of 7,465,550).

27. The proposed \$200,000 settlement represents nearly 11% of Plaintiffs' Counsel's assessment of the realistic exposure of what may have been obtained through lengthy, expensive, risky litigation. (2.68% of \$7,465,550 maximum exposure). The settlement amount is reasonable, fulfills the purpose of PAGA and provides a substantial amount to the LWDA for

1 education and enforcement.

2 28. The settlement was reached after extensive informal discovery and review and
3 analysis of all relevant policies, expert analysis, and protracted negotiation. Taking all factors
4 into consideration, Plaintiffs' Counsel concluded the settlement is more than "fair, reasonable,
5 and adequate," and avoids the risk, after extended litigation, there could be little or no recovery.

6 29. Plaintiffs' Counsel requests \$66,600.00 for their attorneys' fees, (33.33% of the
7 Gross Settlement Amount), and \$19,372.00 in litigation costs. As of the date of the filing of this
8 Motion and to bring this settlement to a final closure, my office alone will have incurred
9 \$70,525.00 [108.5 hrs x \$650 = \$70,525] in attorneys' fees and \$12,242.67 in litigation costs.
10 Attached as **Exhibit 1 to this Declaration** is a true and correct copy of the itemization of my
11 office's litigation costs.

12 30. Plaintiffs' request for attorneys' fees in the amount of 33.33% of the gross
13 Settlement is reasonable given the significant result achieved on behalf of the State of
14 California and PAGA Members. The settlement amount of \$200,000 represents approximately
15 11% of the realistic value of the PAGA claims, after discounting for risks.

16 31. Plaintiffs' counsel litigated this case on a purely contingent basis, incurring over
17 \$19,000 in costs with no guarantee of recovery.

18 32. I invested 106.5 hours of attorney and support staff time into this action, with
19 payment deferred to the end and entirely contingent on the outcome. I anticipate that my office
20 will spend an additional 2 hours to bring this case to a full conclusion.

21 33. Furthermore, the efforts of Plaintiffs' counsel have resulted in benefits beyond
22 the settlement fund as, after Plaintiffs mailed notice of the alleged violations to the LWDA,
23 Defendants reclassified OSs to W-2 employees.

24 34. The hours expended are reasonable in light of the complexity and duration of the
25 litigation, and Plaintiffs' Counsel's fees, if the lodestar method were used, actually represent a
26 negative multiplier

27 35. My skill and experience support my hourly rate of \$650, which has been
28 routinely approved by the Los Angeles Superior Court, Orange County Superior Court, and

1 Riverside Superior Court.

2 36. The Settlement provides for reimbursement of costs not to exceed \$22,000.
3 Plaintiffs' Counsel seeks reimbursement of actual costs of \$19,372.00. These costs are
4 reasonable and were necessary to prosecute this case.

5 37. The Settlement provides for settlement administration costs not to exceed \$4,500
6 to be paid from the Gross Settlement Amount to ILYM Group, Inc. ILYM Group, Inc. has
7 submitted a bid for the capped amount of \$3,995.

8 38. Free Energy's arbitration agreements prevented Plaintiffs from bringing
9 individual damages claims in court.

10 39. Plaintiffs released all claims, and waived Civil Code section 1542, in exchange
11 for \$12,500 each. Ms. Hernandez was employed as an Outreach Specialist for three years. As
12 with the representative PAGA claims, Free Energy strongly denies the merits of the individual
13 claims, asserted credible defenses, and resolved the claims only to buy peace and avoid the
14 inconvenience and expense of arbitration.

15 40. Subject to the usual litigation risks, the settlement amount is less than what may
16 have reasonably been obtained in arbitration if successful. If considered only as a payment for a
17 general release of claims, no part of the payment is consideration for agreeing to settlement of
18 PAGA claims.

19 41. My firm is actively involved in class action and complex litigation and has been
20 for many years. I have been personally involved in all of the cases listed below. In connection
21 with all of these cases, I have acted as lead attorney. The following list sets forth many of the
22 class action cases which Srourian Law Firm, P.C. has handled:

23 a) *Guerrero v. Ruth's Hospitality Group*, Riverside Superior Court. Class
24 action seeking overtime compensation, break premiums, wage statement
25 penalties, among other penalties, for hotel staff employed by defendant in the
State of California. Case settled in 2022 for \$6,000,000.00 with Preliminary
Approval pending.

26 b) *McLemore v. Nautilus Hyosung America, Inc.*, United States District
27 Court, Central District of California, Class action seeking minimum wage and
overtime compensation for on-call time, break premiums, wage statement
28 penalties, among other penalties, for engineers employed by defendant throughout
the country. Plaintiffs' counsel. Case settled in 2018 for \$3,000,000, with Final
Approval granted and no objections filed.

1 c) *Guerrero v. Chefs' Toys*, Orange County Superior Court. Class action
2 seeking overtime compensation, break premiums, wage statement penalties,
3 among other penalties, for hotel staff employed by defendant in the State of
4 California. Plaintiffs' counsel. Case settled in 2021 for \$1,100,000.00 with
5 Preliminary Approval pending.

6 d) *Zamudio v. Letter Ride*, Plaintiffs' counsel in class action in San Diego
7 Superior Court seeking overtime compensation, break premiums, wage statement
8 penalties, among other penalties, for delivery drivers employed by defendant in
9 the State of California. Case settled in 2019 for \$1,000,000.00 with Final
10 Approval granted and no objections filed.

11 e) *Manoukian v. John Bean Technologies*, United States District Court,
12 Central District of California, Class action seeking minimum wage and overtime
13 compensation, break premiums, wage statement penalties, among other penalties,
14 for non-exempt employees employed by defendant throughout the State of
15 California. Plaintiffs' counsel. Case settled in 2018 for \$987,500, with Final
16 Approval granted and no objections filed.

17 f) *Medlock v. MedMen Dispensary*, Orange County Superior Court. Class
18 action seeking overtime compensation, break premiums, wage statement
19 penalties, among other penalties, for hotel staff employed by defendant in the
20 State of California. Plaintiffs' counsel. Case settled in 2020 for \$975,000.00 with
21 Final Approval granted and no objections filed.

22 g) *Mayca v. DHL*, Los Angeles County Superior Court. Class action seeking
23 overtime compensation, break premiums, wage statement penalties, among other
24 penalties, for hotel staff employed by defendant in the State of California.
25 Plaintiffs' counsel. Case settled in 2019 for \$945,000.00 with Final Approval
26 granted and no objections filed.

27 h) *Sylvester v. Starwood*, Los Angeles Superior Court. Class action seeking
28 overtime compensation, break premiums, wage statement penalties, among other
penalties, for hotel staff employed by defendant in the State of California.
Plaintiffs' counsel. Case settled in 2015 for \$875,000, with Final Approval
granted and no objections filed.

i) *Clay v. Innovative Dining Group*, Los Angeles Superior Court. Class
action seeking overtime compensation, break premiums, wage statement
penalties, among other penalties, for front of house/back of house staff employed
by defendant in the State of California. Plaintiffs' counsel. Case settled in 2016 for
\$325,000, with Final Approval granted and no objections filed.

j) *Patterson v. LA Leasing*, San Diego Superior Court, Class action seeking
minimum wage and overtime compensation, break premiums, wage statement
penalties, among other penalties, for employees employed by defendant in the
State of California. Plaintiffs' counsel. Case settled in 2018 for \$425,000, with
Preliminary Approval granted and Final Approval pending.

k) *Sears v. AlliedBarton*, San Bernardino Superior Court, Class action
seeking reimbursement of necessary business expenditures, among other
penalties, for employees employed by defendant in the State of California.
Plaintiffs' counsel. Case settled in 2018 for \$425,000, with Preliminary Approval
granted and Final Approval pending.

1 1) *Prado v. Sand and Sea Inc.*, Plaintiffs' counsel in pending class action in
2 Los Angeles Superior Court seeking overtime compensation, break premiums,
3 wage statement penalties, among other penalties, for front of house/back of house
4 staff employed by defendant in the State of California. Case settled in 2019 for
\$500,000.00 with Final Approval granted and no objections filed.

5 I declare under the penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct and that this declaration is executed on October 6, 2023 in, San
7 Diego, California.

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10 _____
11 Daniel Srourian
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EXHIBIT 1

\$39.02	11/19/20	PAGA LETTER POSTAGE
\$39.95	12/8/21	DDS Invoice 5863
\$1,129.95	2/10/21	DDS Inv. 8978 - Advance complex fees
\$435.00	11/11/21	DDS Inv 22955
\$94.00	4/5/21	Courtcall Patrick ISC
\$114.95	3/30/21	DDS Inv 12175
\$154.95	4/7/21	DDS Inv 12175
\$39.95	4/21/21	DDS Invoice 12984 - File FAC
\$94.00	6/14/21	Courtcall Appearance for Ex Parte
\$94.00	6/14/21	Courtcall Appearance for Ex Parte - Patrick
\$187.05	6/10/21	Ex Parte Filing 6/10
\$100.60	6/11/21	Ex Parte Filing Day After - paying fee and delivering to dept
\$99.85	6/24/21	Sano File Opp
\$94.00	6/28/21	Courtall video motion to compel arb
\$94.00	6/28/21	Courtall video motion to compel arb
\$173.80	8/16/21	File Surreply
\$94.00	9/1/21	Courtcall for Appearance
\$75.00	10/29/21	Cathy PAGA fee
\$1,111.95	11/11/21	DDS filing 22955
\$300.00	12/8/21	Filing fee Daniel
\$300.00	12/8/21	Filing fee Cathy
\$94.00	6/1/22	Courtcall 6/1/22 CMC
\$4,530.00	5/19/23	Mediation Fees
\$1,799.50	10/13/21	Complaint Filing Fee
\$110.00	2/24/22	File Motion Compel Opp
\$94.00	2/21/22	Courtcall Charge
\$184.95	3/25/22	DDS Inv 29908
\$409.25	5/25/22	DDS Service Fee
\$154.95	9/5/23	File RFD
\$12,242.67		TOTAL