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Attorneys for Plaintiff and Aggrieved Employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN**

MICHAEL GIBSON, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

SOUTHWEST TRADERS
INCORPORATED, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: STK-CV-UOE-2020-10620

(Assigned to the Honorable Erin Guy Castillo,
Dept. 10B)

**DECLARATION OF MAX W. GAVRON IN
SUPPORT OF PLAINTIFF'S MOTION TO
APPROVE THE PARTIES' SETTLEMENT
AGREEMENT PURSUANT TO THE LABOR
CODE PRIVATE ATTORNEYS GENERAL
ACT OF 2004**

Date: September 27, 2022;
September 28, 2022;
September 29, 2022;
September 30, 2022; or
October 3, 2022

Time: 9:00 a.m.
Dept.: 10B

1 I, Max W. Gavron, hereby declare and state as follows:

2 1. I am an attorney at law duly admitted to practice before all courts in the State of
3 California and am a member of the law firm of the Diversity Law Group, P.C., one of the
4 attorneys of record for Plaintiff Michael Gibson (“Plaintiff”) in the above-entitled action. I have
5 personal knowledge of the matters set forth herein, and if called upon as a witness to testify
6 thereto, I could and would competently do so.

7 2. I am one of the primary attorneys on this matter. From the inception of the case,
8 Plaintiff’s Counsel have zealously represented the interests of Plaintiff and the aggrieved
9 employees. The Settlement was obtained for the benefit of the aggrieved employees.

10 3. On December 14, 2020, Plaintiff sent notice to the Labor and Workforce
11 Development Agency (“LWDA”) giving notice of his intent to pursue a representative PAGA
12 action, on behalf of herself and the State of California as well as on behalf of other aggrieved
13 employees (the “PAGA Notice”).

14 4. On December 17, 2020, Plaintiff filed the Action against Defendant asserting class
15 action claims under Labor Code §§ 201-203, 204, 226, 226.7, 246, 510, 512, 558, 1174, 1194,
16 1198, 1199, 2802, as well as a representative action claim under PAGA, and a claim under
17 Business and Professions Code § 17200, *et seq.*

18 5. On February 25, 2021, Plaintiff filed a First Amended Complaint, alleging a single
19 claim for violation of the PAGA, after having dismissed without prejudice his putative class
20 claims. On or about April 1, 2021, Defendant filed an Answer to the First Amended Complaint.

21 6. Thereafter, the Parties agreed to engage in mediation before neutral Hon. Brian C.
22 Walsh (Ret.). In connection with the mediation, Defendant provided information regarding the
23 number of potentially aggrieved employees, the number of pay periods at issue, written policies
24 and procedures, a sampling of time and pay data for analysis, and its position regarding potential
25 liability. Defendant also produced confidential information regarding its financial condition,
26 which it contended impacted its ability to pay any judgment resulting from this action. Based on
27 this information, the Parties conducted settlement negotiations. Following a full day of mediation
28 with Judge Walsh on March 30, 2022, and subsequent negotiations occurring thereafter, the

1 Parties agreed to terms for complete settlement of the Action, which was negotiated at arm's-
2 length with each Party having had the opportunity to consider all known facts and circumstances.

3 7. The Parties have agreed to settle the Action pursuant to the terms and conditions
4 of the Private Attorneys General Act (Labor Code § 2698, *et seq.*) Settlement and Release
5 Agreement (“Agreement” or “Settlement Agreement”), a true and correct copy of which is
6 attached to this declaration as **Exhibit A**.

7 8. Prior to mediation, Defendant produced a sampling of time and pay records for the
8 aggrieved employees, which permitted Plaintiff to analyze Defendant’s potential exposure and
9 liability. As detailed in the Settlement Agreement, § II.12, there were approximately 31,855 pay
10 periods at issue during the time encompassed by this settlement. PAGA’s penalty structure is
11 based on the number of violations of the Labor Code committed during a given pay period. *See*
12 Cal. Lab. Code § 2699(f). Defendant’s potential exposure could be as high as \$3.1 million if the
13 Court were to award a \$100 penalty for each pay period encompassed by the proposed settlement.
14 However, Defendant argued that its exposure was significantly less because it maintained legally
15 compliant policies, complied with the law at all times, the sampling of time and pay records
16 produced for evaluation demonstrated an extremely low facial violation rate regarding Plaintiff’s
17 claims, and that it maintained arbitration agreements applicable to its employees, which it
18 contended precluded Plaintiff’s PAGA claims. On June 15, 2022, the United States Supreme
19 Court issued its decision in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, 2022 WL
20 2135491, at *10 (U.S. June 15, 2022), which Defendant would have argued precludes Plaintiff’s
21 PAGA claim. *Id.* (holding that Federal Arbitration Act (“FAA”) preempted portion of California
22 Supreme Court’s holding in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014)
23 and that PAGA claims may be arbitrable under the FAA).

24 9. While the PAGA does provide for a potentially heightened penalty of \$200 for
25 “subsequent” violations, many courts do not award that penalty unless there has been a prior
26 citation by the LWDA or court ruling demonstrating that the employer previously violated the
27 Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209; *accord*
28 *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* (S.D. Cal. Aug. 10,

2009) 2009 WL 2448430, at *9 (“[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *see also Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (holding no subsequent penalty unless prior citation or court ruling). Thus, Defendant would have argued that even if Plaintiff was able to establish any violation of the Labor Code, the PAGA penalties assessed for these violations will be computed at the \$100 rate, as opposed to the \$200 per pay period rate at maximum, and there is a likelihood that a further reduction of the penalty would be appropriate given its good faith efforts to comply with the Labor Code and its contentions that it complied with the Labor Code at all times.

10. Defendant also argued that even if Plaintiff prevailed, the recoverable penalties under PAGA are minimal. Indeed, courts to consider the issue have refused to “stack” PAGA penalties and often significantly reduce the penalties awarded. *See Carrington v. Starbucks Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving PAGA penalty reduction to \$5 per pay period); *accord Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809. If the Court in this case were to reduce penalties to \$5 a pay period, as was approved in *Carrington*, the potential exposure amounts to approximately \$159,275.00 (31,855 pay periods x \$5.00).

11. Given Defendant’s financial condition, the Parties have agreed that Defendant will fund equal monthly payments of \$26,666.67 over an 18-month period with the first payment funded within seven (7) days after the Court grants Plaintiff’s Motion for Approval, and every month thereafter until the Gross Settlement Amount is fully funded. (Settlement Agreement at § V.2). The Settlement Agreement allocates 35% of the Gross Settlement Amount for attorneys’ fees, or \$168,000.00, up to \$20,000.00 in litigation costs incurred by Plaintiffs’ counsel, \$10,000.00 to Plaintiff for a service award, and up to \$7,500.00 for settlement administration costs. (*Id.* at §§ III.2(a)-(d)). The remainder, or the “PAGA Penalty Fund,” is allocated to the payment of civil penalties under PAGA, 75 percent of the civil penalties for distribution to the Labor and Workforce Development Agency (the “LWDA”) and 25 percent of the civil penalties

1 for distribution to the “aggrieved employees” on whose behalf Plaintiffs filed this action as
2 required by PAGA. (*Id.* at § III.2(e)).

3 12. The Settlement Agreement provides the following release:

- 4 a. Upon the approval by the Court of this Agreement and funding of
5 the GSA by Defendant, each of the PAGA Members, including
6 Plaintiff, shall, for the Covered Period, fully release and forever
7 discharge the Released Parties, subject to the terms and conditions
8 hereof and the approval of the Court, from the Covered Claims and
any other form of relief or remedy in law, equity, or whatever kind
or nature that were asserted or could have been asserted based on
the facts alleged in the Action. (*Id.* at § IV.1).

9 13. The Settlement Agreement defines “Covered Claims” as: [A]ny and all claims for
10 civil penalties under the PAGA that were asserted or could have been asserted based on the facts
11 alleged and with respect to the claims asserted in Plaintiff’s LWDA Notice and the Action for the
12 entire Covered Period, which are premised on the alleged violation of sections 7 & 11 of the
13 applicable IWC Wage Order and/or Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 512,
14 558, 1174, 1194, 1198, 1199, and 2802. (*Id.* at § II.9).

15 14. Plaintiff also executed a general release as part of the Settlement Agreement. (*Id.*
16 at § IV.2). Each PAGA Member will receive an individual payment proportionate to the number
17 of Eligible Pay Periods worked. (*See id.* § III.3). Each Individual Settlement Payments will be
18 considered the payment of a civil penalty and treated as IRS Form 1099 income. (*See id.*) Any
19 checks not cashed by Settlement Group Members will be voided so that the unclaimed amount
20 can be forwarded to the *cy pres* recipient, the Legal Aid at Work. (*See Settlement Agreement* §
21 V.6.) I do not have any relationship with or connection to said organization.

22 15. My qualifications are as follows: I received a full-tuition scholarship, and
23 graduated from Southwestern Law School in 2013, magna cum laude. I was in the top 5% of my
24 class. During my time at Southwestern, I was a Notes and Comments Editor on the Southwestern
25 Law Review. I also received awards for achieving the highest grade in my class in several
26 courses. In 2012, I was a full-time extern, at the United States District Court for the Central
27 District. Immediately after law school, I taught several courses at Southwestern, including
28 Principles of Legal Analysis and Legal Methods. I taught those courses for approximately four

1 years.

2 16. I practiced civil litigation at Haight Brown & Bonesteel LLP from approximately
3 September 2013, through January 2016. I was third-chair in a federal court jury trial that resulted
4 in a defense verdict in our client's favor on a \$21 million commercial breach of contract dispute. I
5 also regularly litigated cases across the civil litigation spectrum, including employment matters.

6 17. From February 2016, through Fall 2017, I practiced at the international law firm of
7 Arnold & Porter, which had recently merged with Kaye Scholer, LLP. I defended Fortune 50
8 companies in Multi-District Litigation primarily in the product liability sphere. I also successfully
9 drafted an appellate brief in the Ninth Circuit resulting in the reversal of a summary judgment
10 decision regarding trade secret issues, in addition to working in several other practice groups. *See*
11 *Experian Info. Solutions v. Nationwide Marketing Servs. Inc.*, 893 F.3d 1176 (9th Cir. 2018).

12 18. From September 2017, through September 2018, I served as a law clerk to a Judge
13 sitting on the United States District Court, Central District of California. I regularly prepared
14 bench memoranda, on cases involving all types of civil litigation, including regularly working on
15 wage and hour class actions.

16 19. I am currently an attorney at the law firm Diversity Law Group, P.C., an
17 employment law firm that has handled numerous wage and hour class and individual actions, on
18 both plaintiff and defense sides. My current practice focuses on employment matters involving
19 both class actions, and single plaintiffs. The firm currently has cases in the Los Angeles Superior
20 Courts, the Orange County Superior Courts, the San Diego County Superior Courts, and the
21 United States District Courts for the Central, Northern, and Eastern Districts of California. I am
22 currently handling, or have handled, numerous wage and hour class action lawsuits with the firm,
23 including, but not limited to: *Agar v. Sensient Natural Ingredients, LLC* (Case No. CV-19-
24 001906, Stanislaus County Superior Court); *Heredia v. Eddie Bauer LLC* (Case No.
25 16CV300475, United States District Court, Northern District of California); *Parsons v. Estenson*
26 *Logistics, LLC* (Case No. 34-2019-00252929, Sacramento County Superior Court); *Wood v.*
27 *Reeve Trucking Co., Inc.* (Case No. STK-CV-UOE-2018-0004414, San Joaquin County Superior
28 Court); *Coronel v. Pinnacle Agriculture* (Case No. 18CV004287, Monterey County Superior

1 Court), and *Tice v. Trader Joe's Company* (Case No. 20CV00892, Santa Barbara County
2 Superior Court), among others.

3 20. I have been certified as class counsel in a number of cases, including *Smith v. Gold*
4 *Country Health Center, Inc.* (Case No. PC20180491, El Dorado County Superior Court) and
5 *Pantoja v. RAMCO Enterprises, L.P.* (Case No. M126835, Monterey County Superior Court). I
6 have also assisted in numerous wage and hour class action mediations.

7 21. On June 14, 2019, I argued two related cases in front of the Ninth Circuit Court of
8 Appeals. One of them was *Rodriguez v Nike Retail Service Inc.*, Case No. 17-16866. On June 28,
9 2019, the Ninth Circuit issued a published decision, reversing and remanding in favor of our
10 clients. *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810 (9th Cir. 2019). The related case
11 decision was *Chavez v. Converse, Inc.*, 772 Fed. Appx. 571 (June 28, 2019).

12 22. From the inception of the case, Plaintiff's counsel has zealously represented the
13 interests of Plaintiff and the aggrieved employees. The settlement was obtained for the benefit of
14 the aggrieved employees and the LWDA. Based on my review of all the information and based
15 on my experience in wage and hour litigation, I believe this settlement to be fair, adequate, and
16 reasonable.

17 23. Concurrent with the filing of this motion, my office uploaded the instant motion,
18 Settlement Agreement, and proposed order to the LWDA's website. Attached hereto as **Exhibit**
19 **B** is a true and correct copy of the LWDA confirmation.

20 24. Attached hereto as **Exhibit C** is a true and correct copy of proposed notice to
21 accompany the settlement checks to aggrieved employees.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct.

24 Executed on August 29, 2022, at Los Angeles, California.

25
26 

27 Max W. Gavron
28

EXHIBIT A

PRIVATE ATTORNEYS GENERAL ACT (LABOR CODE § 2698, ET SEQ.)
SETTLEMENT AND RELEASE AGREEMENT

Michael Gibson v. Southwest Traders Incorporated
San Joaquin County Superior Court Case No. STK-CV-UOE-2020-10620
(the “Action”)

This Settlement and Release Agreement (“Agreement”) is made and entered into by and between plaintiff MICHAEL GIBSON (“Plaintiff”), individually and on behalf of the State of California pursuant to Labor Code § 2699, *et seq.* (the Private Attorneys General Act [“PAGA”]) on the one hand, and defendant SOUTHWEST TRADERS INCORPORATED (“Defendant”), on the other hand. Plaintiff and Defendant are collectively referred to herein as “the Parties.”

This Agreement shall be binding on Plaintiff and all PAGA Members (as defined below) he seeks to represent and on Defendant, its former or present parents, subsidiaries, affiliates, and other officers, directors, employees, partners, and agents, and any other successors, assigns, or legal representatives, subject to the terms and conditions hereof and the approval of the Court.

I. NATURE OF ACTION

1. On December 14, 2020, Plaintiff sent notice to the Labor and Workforce Development Agency (“LWDA”) giving notice of his intent to pursue a representative PAGA action, on behalf of himself and the State of California as well as on behalf of other aggrieved employees (the “PAGA Notice”).

2. On December 17, 2020, Plaintiff filed the Action against Defendant asserting class action claims under Labor Code §§ 201-203, 204, 226, 226.7, 246, 510, 512, 558, 1174, 1194, 1198, 1199, 2802, as well as a representative action claim under PAGA, and a claim under Business and Professions Code § 17200, *et seq.*

3. On February 25, 2021, Plaintiff filed a First Amended Complaint, alleging a single claim for violation of the PAGA, after having dismissed without prejudice his putative class claims.

4. On or about April 1, 2021, Defendant filed an Answer to the First Amended Complaint.

5. Thereafter, the Parties engaged in formal and informal discovery. Plaintiff propounded written discovery requests, including requests for production of documents and interrogatories, upon Defendant.

6. Thereafter, the Parties agreed to engage in mediation before neutral Hon. Brian C. Walsh (Ret.). In connection with the mediation, Defendant provided Plaintiff and PAGA Counsel (as defined below) with information about the number of potentially aggrieved employees, the number of pay periods at issue, written policies and procedures, a sampling of time and pay data for analysis, and its position regarding potential liability. Based on this information, the Parties conducted settlement negotiations.

7. Following a full day of mediation with Judge Walsh on March 30, 2022, and subsequent negotiations occurring thereafter, the Parties agreed to terms for complete settlement of the Action, which was negotiated at arm's-length with each Party having had the opportunity to consider all known facts and circumstances.

II. REPRESENTATIONS AND ADDITIONAL DEFINITIONS

1. "Released Parties" shall mean and refer to Defendant SOUTHWEST TRADERS INCORPORATED, and its former or present parents, subsidiaries, affiliates, and other officers, directors, employees, partners, and agents, and any other successors, assigns, or legal representatives.

2. "PAGA Counsel" shall refer to Larry W. Lee and Max W. Gavron of Diversity Law Group and Kelsey A. Webber of Webber Law Group ("WLG").

3. "Counsel for Defendant" and "Defense Counsel" shall refer to Christopher Olmsted, Jennifer Suberlak, and Tim Johnson of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

4. "Covered Period" shall mean the period from July 14, 2020, to the date of approval, or until the date on which the number of pay periods worked by such employees since July 14, 2020, exceeds 35,040, whichever is sooner.

5. "PAGA Members" shall mean and refer to all non-exempt employees of Defendant, including Plaintiff, who are or have been employed by Defendant in the State of

California during the Covered Period.

6. “Court” refers to the San Joaquin County Superior Court.

7. “PAGA Member Share” shall mean and refer to each of the PAGA Members’ 25% of PAGA penalties allocated to the PAGA Members in accordance with Labor Code § 2699(i). Cumulatively, it shall be referred to as “PAGA Member Shares.”

8. “Settlement Administrator” shall refer to Phoenix Settlement Administrators.

9. “Covered Claims” means any and all claims for civil penalties under the PAGA that were asserted or could have been asserted based on the facts alleged and with respect to the claims asserted in Plaintiff’s LWDA Notice and the Action for the entire Covered Period, which are premised on the alleged violation of sections 7 & 11 of the applicable IWC Wage Order and/or Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 512, 558, 1174, 1194, 1198, 1199, and 2802.

10. “Eligible Pay Periods” means any pay period during the Covered Period that one or more of the PAGA Members received wages.

11. “Effective Date” and “Final” shall mean the date that the Court grants approval to the settlement embodied herein.

12. “Gross Settlement Amount” or “GSA” shall mean and refer to the \$480,000.00 that Defendant is obligated to pay under the terms of this Agreement. The GSA is non-reversionary, such that the entire amount will be disbursed under the stipulated terms and none of it will revert to Defendant. Defendant represents that PAGA Members worked no more than 31,855 Eligible Pay Periods between July 14, 2020, and March 4, 2022. The number of pay periods included during the Covered Period shall not exceed 35,040, which represents a 10% increase over 31,855.

13. Plaintiff alleges that Defendant failed to properly calculate the regular rate of pay for purposes of paying overtime, meal and rest period premiums, and sick pay, provide off-duty meal and rest breaks, pay all wages owed upon separation of employment, reimburse business expenses, and provide accurate itemized wage statements to Plaintiff and all aggrieved

employees, in violation of Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 512, 558, 1174, 1194, 1198, 1199, and 2802, and that this underlying conduct gives rise to a claim pursuant to the PAGA.

14. Defendant vehemently denies Plaintiff's claims and all allegations asserted in the Action and PAGA Notice. Defendant contends, among other things, that it has at all times complied with the Labor Code, the related Wage Orders, and all other state and federal wage laws, and further contends that the Action is without merit. Defendant has denied and continues to deny each and every factual allegation and alleged claim asserted as part of the Action and the PAGA Notice. Defendant further contends that the imposition of the asserted penalties would be unjust, arbitrary, oppressive, and confiscatory.

15. The Parties recognize that the issues presented in the Action are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that further litigation will cause inconvenience, distraction, disruption, delay, and expense disproportionate to the potential benefits of litigation. The Parties have considered the risk and uncertainty of the outcome inherent in any litigation. This risk also includes Defendant's financial condition and the collectability of any judgment that may be issued against it.

16. Plaintiff and PAGA Counsel have diligently pursued an investigation of the PAGA Members' allegations against Defendant.

17. Based on their own independent investigations and evaluations, Plaintiff and PAGA Counsel are of the opinion that the stipulated settlement terms as set forth in this Agreement are fair, reasonable, adequate, and in the best interests of the Plaintiff, the State of California, and the PAGA Members in light of all known facts and circumstances and the risks inherent in litigation, including potential appeals. Further, PAGA Counsel believes that the agreed-upon settlement terms are in the best interests of the PAGA Members and that settlement is fair, reasonable, and adequate for the State of California and each of the PAGA Members, particularly given the inherent risk of litigation and Defendant's present financial condition. Defendant maintained that it suffered from financial difficulties and disclosed information

substantiating this claim through the mediation process. Plaintiff and PAGA Counsel considered this information in evaluating the reasonableness of the proposed Settlement.

18. The purpose of this Agreement is to settle and compromise the Action and all Covered Claims that Plaintiff and the PAGA Members may have against the Released Parties. Neither the existence of this Agreement nor anything contained in this Agreement shall be construed or deemed as an admission of liability, culpability, negligence, or wrongdoing on the part of Defendant. Nothing herein shall constitute an admission by Defendant that the Action was properly brought as a representative action other than for settlement purposes. Settlement of the Action, the negotiation and execution of this Agreement, and all acts performed or documents executed pursuant to or in furtherance of this Agreement or the settlement of the Action: (a) are not, shall not be deemed to be, and may not be used as, an admission or evidence of any wrongdoing or liability on the part of either Defendant or of the truth of any of the factual allegations in the operative complaint in the Action; (b) are not, shall not be deemed to be, and may not be used as, an admission or evidence of any fault or omissions on the part of Defendant in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal; and (c) are not, shall not be deemed to be, and may not be used as, an admission or evidence of the appropriateness of these or similar claims for representative treatment, class certification, or administration other than for purposes of administering this Agreement.

19. The Parties agree that upon full execution of this Agreement, discovery and any other proceeding unrelated to the Agreement, is informally stayed while the parties undertake the work necessary to obtain court approval of the Agreement. To facilitate such approval from the Court, PAGA Counsel shall prepare and file a Motion for Approval of PAGA Settlement ("Motion for Approval"), which shall be submitted for review and approval to Counsel for Defendant prior to filing. In the event the Court does not grant this Motion for Approval, the Parties will reconvene in good faith and attempt to rectify the shortcomings to the extent possible before PAGA Counsel is to resubmit the Motion for Approval or other supplemental briefing with all appropriate possible changes and/or additions. In the event the Court does not approve the

Settlement, the Parties will be restored to their positions prior to the Agreement and the Agreement shall be deemed null and void. The informal stay on discovery and any other proceedings unrelated to the Agreement will be lifted five (5) court days after the Court's rejection of the revised Motion for Approval. The Parties understand and agree that all of the time that this matter has been informally stayed shall be excluded from calculation of the 5-year rule to bring this matter to trial as required pursuant to Code of Civil Procedure § 583.010.

III. TERMS OF SETTLEMENT

1. In consideration of the mutual covenants, promises, and representations set forth in this Agreement, Plaintiff, on behalf of the PAGA Members and the State of California as a Private Attorney General, on the one hand, and Defendant, on the other, agree to settle and compromise the Action and the Covered Claims, subject to the settlement and release terms and conditions set forth in this Agreement.

2. The Amount of Settlement. As consideration for the settlement and release and other terms described in this Agreement, Defendant agrees to pay the GSA, in a total amount of **\$480,000.00**. This GSA payment is inclusive of the following:

- a. PAGA Counsel's fees request of thirty-five percent (35%) of the GSA, or \$168,000.00, to which Defendant will not object;
- b. PAGA Counsel's request for actual costs up to the amount of \$20,000.00, to which Defendant will not object;
- c. Service Award to Plaintiff in the amount of \$10,000.00, to which Defendant will not object, in exchange for a general release of all claims;
- d. Administration costs of \$7,500.00 to be paid to the Settlement Administrator; and
- e. the remainder of the GSA after deducting the items (a), (b), (c), and (d) above, which shall be designated as the "PAGA Penalty Fund."

3. Allocation and Calculation of the PAGA Penalty Fund. Each of the PAGA Members shall receive a portion of the PAGA Penalty Fund on a pro-rata basis determined by the

number of Eligible Pay Periods each of the respective PAGA Members worked during the Covered Period. The anticipated total PAGA Penalty Fund will be approximately \$274,500.00. Seventy-five percent (75%) of the PAGA Penalty Fund, or \$205,875.00, will be paid to the LWDA as required by Labor Code § 2699(i) (the “LWDA Payment”). The remaining twenty-five percent (25%) of the PAGA Penalty Fund, or \$68,625.00, will be distributed to PAGA Members on a pro-rata basis based on the formula set forth below. Each PAGA Member’s pro-rata share of the PAGA Penalty Fund represents his or her PAGA Member Share.

- a. PAGA Member Shares. Plaintiff and each of the PAGA Members shall receive a pro rata share of the twenty-five percent (25%) of the PAGA Penalty Fund allocated to PAGA Members. Plaintiff and each of the PAGA Members shall receive a pro-rata value equal to PAGA Members’ 25% of the Penalty Fund multiplied by the ratio of (a) the number of Eligible Pay Periods worked by him or her to (b) the total number of Eligible Pay Periods worked by all PAGA Members during the Covered Period. All payments made to PAGA Members (“Individual Settlement Payments”) will be reported on an IRS Form 1099.

4. PAGA Counsel’s Fees and Costs. As part of the Motion for Approval of this Agreement, PAGA Counsel will request court approval of 35% of the GSA, which is \$168,000.00, in attorneys’ fees. PAGA Counsel will request actual cost reimbursement up to the amount of \$20,000.00 for costs incurred by PAGA Counsel. Should PAGA Counsel request a lesser amount for attorneys’ fees and costs and/or the Court approve a lesser amount, the difference shall be allocated to the PAGA Penalty Fund and distributed accordingly. Any attorneys’ fees and costs awarded to PAGA Counsel, hereinafter referred to as “PAGA Counsel Fees & Costs,” shall fully compensate and reimburse PAGA Counsel for any and all of the work already performed in connection with the Action and all work remaining to be performed in fully and finally resolving the Action, including but not limited to securing Final Court approval of the Agreement, and all costs that PAGA Counsel has incurred or will incur.

5. Plaintiff Service Award. As part of the Motion for Approval of this Agreement, Plaintiff will request a Service Award for serving as the PAGA representative in the amount of \$10,000.00. This Service Award is in exchange for his service in bringing this action and achieving the result on behalf of the State of California and PAGA Members. Should the Court approve a lesser amount, the difference shall be allocated to the PAGA Penalty Fund and distributed accordingly. Plaintiff's Service Award shall be referred herein as the "Service Award."

6. Tax Treatment of Settlement Amounts. With regard to settlement payments to PAGA Members and Plaintiff, IRS Forms 1099 will be issued. Nothing in this Agreement is intended to constitute legal advice regarding federal, state, and/or local tax obligations. Plaintiff acknowledges that he has obtained no tax advice from Defendant and that neither Defendant nor its attorneys have made any representation concerning the tax consequences, if any, of the GSA in this Agreement or any payment to be made pursuant to this Agreement. To the extent that this Agreement or any of its attachments is interpreted to contain or constitute advice regarding any state or federal tax issue, such advice is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding penalties under the Internal Revenue Code. Defendant, Defendant's counsel, and Plaintiff's counsel are not responsible for any of the PAGA Members' and Plaintiff's tax obligations regarding the allocation of the settlement payments. Payment of PAGA Counsel Fees & Costs will be reflected in a Form 1099 to PAGA Counsel who shall assume full responsibility and liability for the payment of taxes due on such payments. Plaintiff's Service Award shall also be reported on a Form 1099 and Plaintiff shall assume full responsibility and liability for the payment of taxes due on such payments.

IV. RELEASE

1. Release by All PAGA Members and Plaintiff. Upon the approval by the Court of this Agreement and funding of the GSA by Defendant, each of the PAGA Members, including Plaintiff, shall, for the Covered Period, fully release and forever discharge the Released Parties, subject to the terms and conditions hereof and the approval of the Court, from the Covered Claims

and any other form of relief or remedy in law, equity, or whatever kind or nature that were asserted or could have been asserted based on the facts alleged in the Action.

V. ADMINISTERING THE SETTLEMENT AND PAYMENT PLAN

1. Within thirty (30) calendar days after the Effective Date, Defendant will compile a list of the PAGA Members (“PAGA Member List”) containing: (1) name; (2) last known home address and telephone number; (3) number of Eligible Pay Periods employed during the Covered Period; and (4) Social Security Number, to the extent available.

2. Defendant shall deposit equal monthly payments of \$26,666.67 over an 18-month period with the Settlement Administrator to fund the amount of the Gross Settlement Amount (\$480,000.00). Defendant shall make the first payment seven (7) days after the Court grants Plaintiffs’ Motion for Approval, and every month thereafter until the Gross Settlement Amount is fully funded.

3. Within thirty (30) calendar days of the Court approving the Settlement and the date Defendant fully funds the Gross Settlement Amount, the Settlement Administrator shall distribute:

- a. PAGA Member Shares in the total estimated amount of \$68,625.00;
- b. Service Award to Plaintiff in the amount of \$10,000.00;
- c. Attorneys’ Fees of \$168,000.00 and actual Costs up to \$20,000.00 to PAGA Counsel;
- d. Settlement Administration Costs of \$7,500.00 to Phoenix Settlement Administrators; and
- e. The LWDA Payment in the amount of \$205,875.00 to the LWDA.

4. Within fifteen (15) calendar days of receiving the last payment of the Gross Settlement Amount from Defendant, the Settlement Administrator shall search for the address of each of the PAGA Members through the United States Postal Service NCOA database (which provides updated addresses for any individual who has moved in the previous four years who has notified the U.S. Postal Service of a forwarding address) to obtain current address information,

and shall mail the payment checks representing each PAGA Member Share to the respective addresses. The payment checks for each PAGA Member Share shall be sent to each of the PAGA Members by U.S. First Class mail to the subject individual's address with directions to the Postmaster to forward the payment checks and return all undeliverable payment checks to the Settlement Administrator. A written letter approved by the Parties, in advance of Plaintiff filing the Motion for Approval, explaining this Agreement and the PAGA Members' release of Covered Claims will be included in the mailing of each of the PAGA Members' checks and submitted to the Court for its review and approval. It will be conclusively presumed that each of the checks reflecting the PAGA Members' Individual Settlement Payments was received if the payment check has not been returned within thirty (30) days of the original mailing of the payment check. The date of the initial mailing of the payment check shall be conclusively determined according to the records of the Settlement Administrator.

5. The Settlement Administrator shall ensure that seventy-five percent (75%) of the PAGA Penalty Fund is paid to the LWDA.

6. Settlement checks shall remain valid and negotiable for one hundred eighty (180) calendar days from the date of their issuance. If there are uncashed checks following this period, the Settlement Administer will ensure that uncashed funds shall be forwarded to Legal Aid at Work, as a cy pres recipient. Any unclaimed funds shall not affect the binding nature of this Agreement as to any of the PAGA Members.

VI. DUTIES OF THE PARTIES PRIOR TO APPROVAL

1. Upon execution of this Agreement by the Parties, PAGA Counsel shall prepare the Motion for Approval for review and approval by Counsel for Defendant, before ultimately filing with the Court for approval of the Agreement and corresponding proposed settlement and release terms. PAGA Counsel shall apply to the Court for the entry of an order and final judgment approving this Agreement as required by Labor Code § 2699(I). The Motion for Approval will request the Court's approval of the following:

- a. All terms contained in this Agreement;

- b. Amount of Plaintiff's Service Award;
- c. Amounts of PAGA Counsel's Fees & Costs; and
- d. Approval of the settlement in this Agreement.

2. As part of the Motion for Approval, PAGA Counsel will include a proposed Order requesting approval of this Agreement and its terms, which shall be binding upon all PAGA Members.

VII. PARTIES' AUTHORITY

1. The signatories hereto hereby represent that they are fully authorized to enter into this Agreement and bind the Parties hereto to the terms and conditions hereof.

VIII. MUTUAL FULL COOPERATION

1. The Parties agree to fully cooperate with each other to accomplish the terms of this Agreement, including, but not limited to, execution of such documents and to take such other action as may reasonably be necessary to implement the terms of this Agreement. The Parties to this Agreement shall use their best efforts, including all efforts contemplated by this Agreement and any other efforts that may become necessary by order of the Court, or otherwise, to effectuate this Agreement and the settlement and release terms set forth herein. As soon as practicable after execution of this Agreement, PAGA Counsel shall, with the assistance and cooperation of Defendant and its counsel, take all necessary steps to secure the approval of this Agreement from the Court.

IX. CONFIDENTIALITY

1. Other than information necessary to secure Court approval of this Agreement and the settlement contained herein, the Parties agree to keep confidential all matters relative to this Agreement, including the claims asserted by Plaintiff in the Action and PAGA Notice, and the settlement terms, including the facts and circumstances leading up to it. None of the Parties will issue any press release or other disclosure regarding the Agreement and/or settlement other than as necessary to obtain Court approval or effectuate the settlement and release terms. The Parties further agree that neither party, nor their respective counsel, will discuss the existence of this

Agreement except as necessary to effectuate its terms or as otherwise required by law, including any and all obligations towards the LWDA and warranted responses to inquiries and/or concerns from PAGA Members. The Parties may, however, discuss the terms of this Agreement with their spouses, attorneys, financial advisors, tax advisors, and accountants as necessary for tax related purposes, or upon a valid court order, at which time the individual receiving information about the terms of this Agreement shall be informed that the terms of this Agreement are confidential, and the individual may not reveal or disclose to any third party the terms of the Agreement.

X. NO PRIOR ASSIGNMENTS

1. The Parties represent, covenant, and warrant that they have not directly or indirectly, assigned, transferred, or purported to assign, or transfer to any person or entity any portion of any liability, claim, demand, action, cause of action or rights herein settled, released, and discharged except as set forth in this Agreement. The representations, warranties, covenants, and agreements contained in this Agreement are for the sole benefit of the Parties under this Agreement and shall not be construed to confer any right or to avail any remedy to any other person.

XI. NO ADMISSION

1. Nothing contained herein nor is the consummation of this Agreement to be construed or deemed an admission of liability, culpability, negligence, or wrongdoing on the part of Defendant or any of the Released Parties. Each of the Parties has entered into this Agreement with the intention to avoid further disputes and litigation with the attendant inconvenience and expense. Defendant denies that it has engaged in any unlawful activity, that it has failed to comply with the law in any material respect, or that it has any liability to anyone under the claims asserted in the Action. This Agreement is entered into solely for the purpose of compromising highly disputed claims.

XII. ATTORNEYS' FEES, COSTS, AND EXPENSES

1. Except as specifically set forth herein, each party shall bear its/her own attorneys' fees, costs, and expenses, taxable or otherwise, incurred from litigation relating to this Action and

this Agreement, and shall not seek reimbursement thereof from any other party to this Agreement. However, if an action is brought to enforce this Agreement and any of its terms contained therein, the prevailing party shall be entitled to its/her reasonable attorneys' fees and costs.

XIII. CONSTRUCTION

1. The Parties hereto agree that the terms and conditions of this Agreement are the result of lengthy, intensive, arm's-length negotiations between the Parties and that this Agreement constitutes the entire contract between Plaintiff (on behalf of himself and all other PAGA Members) and Defendant regarding actual or potential claims asserted by Plaintiff against the Released Parties. This Agreement supersedes all prior agreements, written or oral, between or among the Parties regarding those claims or potential claims and the resolution of those claims. Consequently, no other agreement, statement, or promise made by any of the Parties to another as to any matter addressed in this Agreement shall be binding or valid.

XIV. CAPTIONS AND INTERPRETATIONS

1. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or any provision hereof. Each term of this Agreement is contractual and not merely a recital.

XV. MODIFICATION

1. This Agreement may not be amended, changed, altered, or modified, except in writing and signed by the Parties or their successors-in-interest. This Agreement may not be discharged except by performance in accordance with its terms or by a subsequent written contract signed by the Parties.

XVI. MISCELLANEOUS

1. This Agreement contains the entire agreement between the Parties relating to the settlement, release, and discharge of the Covered Claims, and all prior or contemporaneous agreements (except any arbitration agreements), understandings, representations, and statements, whether oral or written and whether by a party or such party's legal counsel, are merged herein.

No rights hereunder may be waived except in writing. The Parties have made such investigation of the facts and the law pertaining to the matters described herein and to this Agreement as they deem necessary, and have not relied, and do not rely, on any statement, promise, or representation of fact or law, made by any of the other parties, or any of their agents, employees, attorneys, or representatives, with regard to any of their rights or asserted rights, or with regard to the advisability of making and executing this Agreement, or with respect to any such matters that would alter or change the terms of this Agreement. No representations, warranties, or inducements have been made to any party concerning this Agreement other than those expressly set forth or referred to herein.

2. This Agreement shall be binding upon and inure to the benefit of the Parties, the PAGA Members, and their respective heirs, trustees, executors, administrators, successors, and assigns.

3. Concurrently with sending the appropriate PAGA Member Shares, the Settlement Administrator will notify all PAGA Members of the binding nature of the release through an accompanying written letter that will be approved by the Parties in advance of Plaintiff filing the Motion for Approval, and the Parties agree that such shall have the same force and effect as if this Agreement were executed by each of the PAGA Members.

4. Neither Plaintiff nor PAGA Counsel shall seek, encourage, or otherwise solicit any other current and/or former employees of Defendant for the purpose of instituting or pursuing any claims against Defendant that are related to, arising from, or otherwise associated with this Agreement.

5. This Agreement may be executed in counterparts, electronically, *e.g.*, DocuSign, and when each of the Parties has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one Agreement, which shall be binding upon and effective as to all Parties. The counterparts may be transmitted electronically (.PDF) or by facsimile.

6. This Agreement shall be governed, construed, and interpreted, and the rights of

the Parties shall be determined, in accordance with the laws of the State of California, irrespective of the State of California's choice-of-law principles.

7. The Parties have cooperated in the negotiation and preparation of this Agreement. This Agreement shall not be construed against any of the Parties on the basis that it, or its counsel, was the drafter or participated in the drafting of this Agreement.

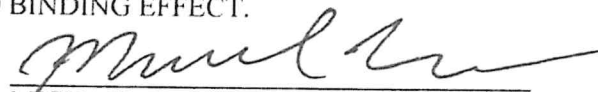
8. The San Joaquin County Superior Court shall retain jurisdiction to enforce this Agreement pursuant to Code of Civil Procedure § 664.6. The Court shall retain continuing jurisdiction over this Action and over all Parties and PAGA Members, to the fullest extent to enforce and effectuate the terms and intent of this Agreement. The Parties intend this Settlement to be enforceable to the fullest extent of the law regardless of future occurrences or changes in the law.

THE PARTIES HAVE READ THE FOREGOING AGREEMENT. THEY HAVE CONSULTED WITH LEGAL COUNSEL REGARDING THE FOREGOING AGREEMENT AND KNOW THE CONTENTS THEREOF AND SIGN THE SAME AS THEIR FREE, KNOWING, AND VOLUNTARY ACT AND DEED, BEING FULLY AWARE OF ITS CONSEQUENCES AND ITS FINAL AND BINDING EFFECT.

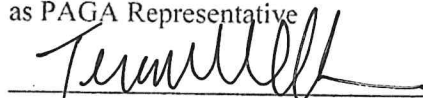
DATED: July 8/2/2022, 2022

8/2/2022

DATED: July 8/10/2022, 2022



MICHAEL GIBSON,
as PAGA Representative



SOUTHWEST TRADERS INCORPORATED

By: Terrence Walsh

Its: Southwest Traders
President

APPROVED AS TO FORM AND CONTENT:

August, 19, 2022

DATED: July 19, 2022

OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.

By: 

Christopher Olmsted
Tim Johnson
Jennifer Suberlak

Attorneys for Defendant SOUTHWEST
TRADERS INCORPORATED

DATED: August 2, 2022

DIVERSITY LAW GROUP

By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff MICHAEL GIBSON and
PAGA Members

EXHIBIT B

EXHIBIT C

[SETTLEMENT ADMINISTRATOR LETTERHEAD]

Notice of PAGA Settlement and Release Agreement

[Mailing Date]

[Address]

RE: Settlement Payment

Enclosed is your settlement payment from the settlement of the lawsuit entitled *Gibson v. Southwest Traders Incorporated*, Case No. STK-CV-UOE-2020-10620, Superior Court of the State of California for the County of San Joaquin (“Action”). This Action was filed by Plaintiff Michael Gibson (“Plaintiff”) against Defendant Southwest Traders Incorporated (“Defendant” or “Company”) pursuant to the California Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698, *et seq.* (the “PAGA”).

The Action was brought on behalf of the State of California and all similarly situated “aggrieved employees” of the Defendant for civil penalties for the Company’s alleged failure violation of Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 512, 558, 1174, 1194, 1198, 1199, and 2802. Defendant denies any wrongdoing or that it owes any penalties. The parties agreed to resolve the case, and as part of that settlement, Defendant agreed to pay a gross settlement amount of \$480,000.00, which shall be distributed as follows: (1) \$168,000.00 in attorneys’ fees and \$ [redacted] in costs; (2) \$10,000.00 for Plaintiff’s service award; (3) \$7,500.00 to the settlement administrator for its costs; and (4) 75% of the remaining PAGA penalty fund, or \$ [redacted], to the California Labor and Workforce Development Agency for its share of penalties. Under the PAGA, certain penalties get divided between the State and the employees. As a result of this settlement, the State’s and your ability to seek penalties recoverable under the PAGA for the claims described above have been settled.

The settlement group includes all current and former non-exempt employees of Defendant, including Plaintiff, who are or have been employed by Defendant in the State of California who worked during the period between July 14, 2020, through [Approval Date/date on which the number of pay periods worked by such employees since July 14, 2020, exceeds 35,040] (“Covered Period”). You are releasing Defendant, its former or present parents, subsidiaries, affiliates, and other officers, directors, employees, partners, and agents, and any other successors, assigns, or legal representatives from any and all claims for civil penalties under the PAGA that were asserted or could have been asserted based on the facts alleged and with respect to the claims asserted in Plaintiff’s LWDA Notice and the Lawsuit for the entire Covered Period, which are premised on the alleged violation of sections 7 & 11 of the applicable IWC Wage Order and/or Labor Code §§ 201, 202, 203, 204, 226, 246, 226.7, 510, 512, 558, 1174, 1194, 1198, 1199, and 2802.

You have been identified as having worked [X] eligible pay periods in California as a non-exempt employee of Defendant between July 14, 2020, through [Approval Date/date on which the number of pay periods worked by such employees since July 14, 2020, exceeds 35,040]. Enclosed is a check made out to you in the amount of \$(amount). The check represents your share of the settlement for PAGA civil penalties. The check will expire 180 calendar days from the date it was issued. After the 180-day period, the administrator will send any unclaimed funds to the Legal Aid at Work. Even if you fail to cash the enclosed check, you will still be deemed to have waived all claims based on or arising from the Action, including all claims set forth in the release of claims described above.

If you have any questions, you can contact the settlement administrator at [add contact information], or the Plaintiff’s attorneys at: Larry W. Lee/Max W. Gavron, Diversity Law Group, P.C., 515 S. Figueroa, Suite 1250, Los Angeles, CA 90071, Telephone: 213-488-6555.

Sincerely,

[Administrator]