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Additional Counsel Listed on Next Page

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

LUIS CRUZ, individually, and on behalf of all others similarly situated; JAMES CARAMAZZA, individually, and on behalf of all others similarly situated; MICHAEL LEON, individually, and on behalf of all others similarly situated Plaintiffs, v. GREYSTAR MANAGEMENT SERVICES, LP, a Delaware limited partnership; GREYSTAR REAL ESTATE PARTNERS, LLC, a Delaware limited liability company; SUNRISE RIVERSIDE, LLC, a Delaware limited liability company, BRADLEY JOHNSON, an individual; and DOES 1 through 100, inclusive, Defendants.	CASE NO.: 37-2020-00009672-CU-OE-CTL [Assigned to the Hon. Carolyn Caietti in Dept. C-70] **PAGA REPRESENTATIVE ACTION** **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** **[Filed concurrently with Declarations of David D. Bibiyan, Justin F. Marquez, Melissa A. Huether, Plaintiffs, and Sean Hartranft; [Proposed] Order; and [Proposed] Judgment]** **HEARING INFORMATION** DATE: July 15, 2022 TIME: 10:30 a.m. DEPT: C-70 Action Filed: May 26, 2020 Trial Date: None Set

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 15, 2022 at 10:30 a.m., or as soon thereafter as plaintiffs Luis Cruz, James Caramazza, and Michael Leon (collectively, "Plaintiffs") may be heard in Department C-70 of the San Diego County Superior Court of California, Plaintiffs will, and hereby do, move for this Court for entry of an order approving the Joint Stipulation and Settlement Agreement ("Settlement Agreement"), under the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.* ("PAGA"), entered into by and between Plaintiffs, on the one hand; and defendants Greystar Management Services, LP, Greystar Real Estate Partners, LLC, Sunrise Riverside, LLC, and Bradley Johnson (collectively, "Defendants"), on the other hand; in the above-referenced action.

This motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declarations of David D. Bibiyan, Justin F. Marquez, Melissa A. Huether, Plaintiffs, and Sean Hartranft, exhibits attached thereto, the [Proposed] Order Granting Approval of the PAGA Settlement, and any other evidence or argument that may be presented at the hearing.

Dated: June 22, 2022

BIBIYAN LAW GROUP, P.C.

BY: *David D. Bibiyan*

DAVID D. BIBIYAN
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Labor Code section 2699(l)(2) requires that the Superior Court review and approve any settlement of a civil action filed pursuant to the Private Attorneys General Act of 2004, codified at Labor Code section 2698, *et seq.*, ("PAGA"). Plaintiffs Luis Cruz ("Plaintiff Cruz"), James Caramazza ("Plaintiff Caramazza"), and Michael Leon ("Plaintiff Michael Leon", and collectively, "Plaintiffs") on the one hand; and defendants Greystar Management Services, LP, ("Greystar Management"), Greystar Real Estate Partners, LLC ("Greystar Real Estate"), Sunrise Riverside, LLC ("Sunrise"), and Bradley Johnson ("Johnson", and collectively, "Defendants"), on the other hand; have agreed to settle Plaintiffs' PAGA claims, fully resolving this case pursuant to the Joint Stipulation and Settlement Agreement[1] ("Settlement" or "Settlement Agreement" or "Agreement").

The approximately 3,500 "Aggrieved Employees" who are covered by the Settlement Agreement are all current and former non-exempt, hourly-paid employees employed by Greystar Management during the period between February 21, 2019 through December 31, 2021 (the "Settlement Period") in the State of California ("Aggrieved Employees"). The Settlement Agreement provides that Defendants pay $1,900,000.00[2] as the Gross Settlement Amount. From this amount, Plaintiffs request an award of $16,950.00[3] in administration costs, attorneys' fees in the amount of $665,000.00 (as the same may be escalated pursuant to the Settlement Agreement), reimbursement of $52,122.50 in litigation costs, and an Enhancement Payment of $7,500.00 each

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[1] A true and correct copy of the Settlement Agreement is attached as Exhibit "1" to the Declaration of David D. Bibiyan ("Bibiyan Decl.") for the Court's convenience.

[2] The Settlement is based on Defendants' representation that there are no more than 105,100 Pay Periods worked by Aggrieved Employees during the PAGA Period. In the event the number of Pay Periods worked by Aggrieved Employees during the PAGA Period increases by more than 10%, or 10,510 Pay Periods, then the Gross Settlement Amount shall be increased proportionally by the Pay Periods during the PAGA Period worked in excess of 115,610 (105,100 + 10,510) multiplied by the Pay Period Value. The Pay Period Value shall be calculated by dividing the Gross Settlement Amount by 105,100 Pay Periods. The Parties agree that the Pay Period Value is $18.08. ($1,900,000.00 / 105,100 Pay Periods.) Thus, for example, should there be 120,000 Pay Periods worked by Aggrieved Employees during the PAGA Period, then the Gross Settlement Amount shall be increased by $79,371.20 ((120,000 Pay Periods – 115,610 Pay Periods) x ($18.08/Pay Period)).

[3] The Settlement Agreement states administration costs shall not exceed $17,000. The bid from ILYM Group, Inc., the Settlement Administrator, was $16,950.00.

to Plaintiff Leon and Plaintiff Cruz, for a total of $15,000.00. Of the remaining sum (hereinafter, the "Net Settlement Amount), seventy-five percent (75%) of which shall be paid to the California Labor and Workforce Development Agency ("LWDA") and twenty-five percent (25%) of which will be paid to Aggrieved Employees. These penalties are genuine and meaningful and fulfill PAGA's underlying purpose to benefit the public. Accordingly, Plaintiffs request that the Court approve the Settlement. Such awards are reasonable and also warrant approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Plaintiff Cruz was employed by Defendants as a maintenance worker from approximately December 2014 through approximately November of 2020. Plaintiff Leon was employed by Defendants from approximately March 24, 2020 through December 31, 2021. Plaintiff Caramazza was employed by Defendants from approximately March of 2015 through November of 2019, with duties that included picking up and taking out garbage, cleaning swimming pools, and making repairs in apartment properties.

Based on information provided by Defendants' Counsel, there are approximately 3,500 Aggrieved Employees in the Settlement Period.

B. Procedural History

On December 31, 2019, Ana Herrera ("Herrera") filed with the LWDA a notice under Labor Code section 2699.3 stating she intended to serve as a proxy of the LWDA to recover civil penalties for various Labor Code violations ("Herrera PAGA Notice"). On February 21, 2020, Herrera filed a PAGA representative action in the Superior Court of California for the County of San Diego, Case Number 37-2020-00009672-CU-OE-CTL, seeking civil penalties on behalf of herself and Aggrieved Employees against among others, Defendants, or some of them, for civil penalties under PAGA alleged in the Herrera PAGA Notice (the "Herrera Action"). During the pendency of the litigation, Herrera passed away. On March 24, 2021 and March 16, 2022, Plaintiff Cruz filed with the LWDA a notice under Labor Code section 2699.3 stating he intended to serve as a proxy of the

LWDA to recover civil penalties for various Labor Code violations ("Cruz PAGA Notice")[4]. Plaintiff Cruz was later substituted into the Herrera Action in the place of Herrera (hereinafter, the "Cruz Action").

On February 24, 2020, Plaintiff Caramazza filed with the LWDA a notice under Labor Code section 2699.3 stating he intended to serve as a proxy of the LWDA to recover civil penalties for various Labor Code violations ("Caramazza PAGA Notice")[5]. After sixty-five (65) days had passed from the filing of the PAGA Notice without any action by the LWDA, on May 6, 2020, Plaintiff Caramazza filed a PAGA representative action in the Superior Court of California for the County of San Francisco, Case Number CGC-20-594345 (the "Caramazza Action") seeking civil penalties on behalf of himself and Aggrieved Employees against among others, Defendants, or some of them, for civil penalties under PAGA alleged in the Caramazza PAGA Notice.

On March 25, 2020, Plaintiff Leon filed with the LWDA a notice under Labor Code section 2699.3 stating he intended to serve as a proxy of the LWDA to recover civil penalties for various Labor Code violations ("Leon PAGA Notice")[6]. After sixty-five (65) days had passed from the filing of the PAGA Notice without any action by the LWDA, on June 1, 2020, Plaintiff Leon filed a PAGA representative action in the Superior Court of California for the County of Los Angeles, Case Number 20STCV20588 (the "Leon Action"), seeking civil penalties on behalf of himself and Aggrieved Employees against among others, Defendants, or some of them, for civil penalties under PAGA alleged in the Leon PAGA Notice.

Thereafter, Plaintiffs and Defendants (collectively, the "Parties") engaged in informal discovery and agreed to attend an early mediation. Prior to mediation, Plaintiffs were provided with, among other things: (1) a 10% sampling of time and payroll records for all Aggrieved Employees;

[4] A true and correct copy of the Herrera PAGA Notice is attached to the Declaration of Justin F. Marquez as Exhibit "A," and a true and correct copy of the Cruz PAGA Notice and Amended PAGA Notice is attached to the same Declaration as Exhibit "B" thereto.

[5] A true and correct copy of the Caramazza PAGA Notice is attached to the Declaration of David D. Bibiyan as Exhibit "2" thereto.

[6] A true and correct copy of the Leon PAGA Notice is attached to the Declaration of Melissa A. Huether as Exhibit "10" thereto.

(2) hire dates, termination dates, and final rates of pay for all Aggrieved Employees; (3) a 10% sampling of contact information for all Aggrieved Employees; (4) Greystar Management's employee handbook dated January 2015; (5) a California addendum to Greystar Management's 2015 employee handbook; (6) Greystar Management's reimbursement policy dated May 2019; (7) Greystar Management's maintenance emergency policy dated September 2020; (8) Greystar Management's California addendum to their employee handbook dated May 2020; (9) Greystar Management's employee handbook dated 2020; Greystar Management's "California Meal Break Law- Frequently Asked Questions;" (10) Greystar Management's "California On Call Time Law" policy; (11) Greystar Management's standalone policy on Maintenance Emergencies; and Greystar Management's standalone policy on Travel and Expense Reimbursement; and (12) Greystar Management's standalone policy on the use of cell phones.

The Parties first planned to attend mediation with the Honorable Carl West (ret.) but very shortly before the mediation the Parties had to cancel due to Defendants requiring additional time to provide to Plaintiff the requisite sampling. On July 7, 2021, the Parties attended a full day mediation with Paul Grossman, Esquire to determine if the matter could be resolved. The Parties were unable to reach a resolution on the day of mediation. Defendants thereafter obtained new counsel and the Parties, by and through their respective counsel in place after mediation, with the aid of the mediator, continued to negotiate terms that would be mutually acceptable to the Parties for settlement of the Cruz Action, the Caramazza Action, and the Leon Action (collectively, the "Action"). After months of negotiations through the mediator, the aid of the mediator's evaluation, and months of further negotiations surrounding the terms of the settlement, the Parties reached the Settlement Agreement to resolve the Action. As part and parcel to the Settlement, the Parties agreed that Plaintiff Caramazza and Plaintiff Leon would dismiss the Caramazza Action and the Leon Action, without prejudice, and the Plaintiffs would file an amended complaint in the Cruz Action, including all Plaintiffs and their respective allegations, thereby consolidating the three actions into one. On April 7, 2022, Plaintiffs filed a Second Amended Complaint in the Cruz Action. Thereafter, Plaintiff Caramazza and Plaintiff Leon filed their respective dismissals, without prejudice, of the Caramazza Action and Leon Action, thereby completing consolidation.

Plaintiffs' Counsel[7] have conducted significant investigation of the law and facts relating to the claims asserted in the Action, and have concluded that that the Settlement is fair, reasonable, adequate, and in the best interests of the LWDA and Aggrieved Employees, taking into account the sharply contested issues involved, the expense and time necessary to litigate the Action through trial and any appeals, the risks and costs of further litigation, the risk of an adverse outcome, the uncertainties of complex litigation, the information learned through informal discovery regarding Plaintiffs' allegations, and the substantial benefits to be received by Aggrieved Employees.

Defendants have concluded that, because of the substantial expense of defending against the Action, the length of time necessary to resolve the issues, the inconvenience involved, and the concomitant disruption to their business operations, it is in their best interests to accept the terms of this Agreement. Defendants deny each of the allegations and claims asserted against them in the Action. However, Defendants nevertheless desire to settle the Action for the purpose of avoiding the burden, expense and uncertainty of continuing litigation and for the purpose of putting to rest the controversies engendered by the Action.

C. <u>Discovery and Investigation</u>

In the leadup to mediation, Plaintiff's Counsel investigated Plaintiffs' claims, performed legal research regarding Defendants' defenses, and engaged in informal discovery. During that time, Defendants produced: (1) a 10% sampling of time and payroll records for all Aggrieved Employees; (2) hire dates, termination dates, and final rates of pay for all Aggrieved Employees; (3) a 10% sampling of contact information for all Aggrieved Employees; (4) Greystar Management's employee handbook dated January 2015; (5) a California addendum to Greystar Management's 2015 employee handbook; (6) Greystar Management's reimbursement policy dated May 2019; (7) Greystar Management's maintenance emergency policy dated September 2020; (8) Greystar Management's California addendum to their employee handbook dated May 2020; (9) Greystar Management's employee handbook dated 2020; Greystar Management's "California Meal

[7] Plaintiff's Counsel is comprised of David D. Bibiyan of Bibiyan Law Group, P.C., Bobby Saadian and Justin F. Marquez of Wilshire Law Firm, and Josepeh Lavi and Vincent C. Granberry of Lavi & Ebrahimian, LLP.

Break Law- Frequently Asked Questions;" (10) Greystar Management's "California On Call Time Law" policy; (11) Greystar Management's standalone policy on Maintenance Emergencies; and Greystar Management's standalone policy on Travel and Expense Reimbursement; and (12) Greystar Management's standalone policy on the use of cell phones.

This yielded sufficient information to determine, for the Settlement Period, the total number of Aggrieved Employees, the total number of shifts and PAGA pay periods, the length of shifts for all Aggrieved Employees, average rates of pay, detailed analysis of meal period violations, and the policies and practices in play during the Settlement Period. The documents and information produced by Greystar Management enabled Plaintiffs' Counsel to analyze the law and facts relating to Plaintiffs' claims. Plaintiffs' Counsel also retained an expert to review and analyze the time and payroll records and prepare a model setting forth Defendants' potential exposure for civil penalties for use in the mediation. The documents and information shared also enabled Plaintiffs to evaluate the potential hurdles to recovery, including in connection with the merits of the claims and manageability. Based on this investigation and discovery, Plaintiffs were able to act intelligently and effectively in negotiating the proposed Settlement.

D. <u>Mediation</u>

On July 7, 2021, the Parties attended a full day mediation session before Paul Grossman, Esquire, a well-regarded mediator experienced in mediating complex labor and employment matters. At the conclusion of the mediation session the Parties were unable to reach a resolution on the day of mediation. However, the Parties continued to negotiate in the months following, which eventually culminated in a long form settlement agreement.

The Settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into mediation willing to explore the potential for a settlement of the Action, but each side was also prepared to litigate its position through trial and appeal if a settlement had not been reached. After several exchanges of draft settlement agreements and various telephone calls to discuss the same, over the course of the following months, the Parties fully executed the Settlement Agreement, a copy of which is attached to the Declaration of David D. Bibiyan as Exhibit "1" thereto.

Based on Plaintiffs' investigation, informal discovery, and evaluation of Plaintiffs' claims, Defendants' defenses regarding the merits of the claims and the manageability of a trial thereon, Defendants' potential exposure, the expense and time necessary to pursue this action through trial, the risks and costs of further prosecution of this action, the uncertainties of complex litigation and developing law, and the benefits that will accrue to the LWDA and the Aggrieved Employees, the Parties and their counsel believe that a settlement on the terms set forth herein is fair, reasonable, adequate, and in the best interests of Plaintiffs, Aggrieved Employees, the LWDA, and Defendants.

III. <u>SUMMARY OF SETTLEMENT</u>

A. The Aggrieved Employees

The "Aggrieved Employees" who are covered by the Settlement Agreement are all current and former non-exempt, hourly-paid employees employed by Greystar Management in the State of California during the Settlement Period. Based on information provided by Defendants prior to mediation, Plaintiffs believe there are approximately 3,500 Aggrieved Employees in the Settlement Period.

B. Settlement Terms

The Settlement provides for a Gross Settlement Amount ("GSA") of $1,900,000.00, as the same may be escalated pursuant to the Parties' Settlement Agreement, to be paid by Defendants. The GSA shall be allocated as follows:

1. Net Settlement Amount

The amount of the GSA that remains after deducting the Enhancement Payment, Settlement Administration Costs and Plaintiffs' Counsel's Attorneys' Fees and Costs will be designated as the Net Settlement Amount ("NSA"). If the Court approves those allocations, the total estimated amount of the Net Settlement Amount is **$1,150,927.50 (**as the same may be escalated pursuant to the Settlement Agreement). Pursuant to the Settlement Agreement and Labor Code section 2699(i), 75% of the Net Settlement Amount, or **$863,195.63** (as the same may be escalated pursuant to the Settlement Agreement) will be paid to the LWDA, and the remaining 25%, or **$287,731.87** (as the same may be escalated pursuant to the Settlement Agreement) of the Net Settlement Amount will be paid to the Aggrieved Employees on a *pro rata* basis using their respective number of Pay Periods worked during the Settlement Period. The estimate average payment to Aggrieved Employees is $57.16.

2. Enhancement Payment.

Enhancement Payments in the amount of up to $7,500.00 each, will be paid to Plaintiff Cruz and Plaintiff Leon, for a total of $15,000.00, for their services on behalf of the State of California ("the State") and Aggrieved Employees, which included assisting Plaintiffs' Counsel with the investigation, litigation, and settlement, as well as their participation in mediation. In addition, Plaintiff Cruz and Plaintiff Leon are providing a broader release to Defendants. Plaintiff Caramazza is not seeking an enhancement payment.

C. Settlement Administrator and Costs

The Parties have agreed that the Settlement Administrator will be ILYM Group, Inc. The cost of administering the Settlement, including but not limited to, mailing the Individual Settlement Payments[8] to the Aggrieved Employees, shall not exceed $16,950.00 and will be paid to the Settlement Administrator from the Gross Settlement Amount.

D. Plaintiffs Counsel's Attorneys' Fees and Costs

An award of attorneys' fees to Plaintiffs' Counsel in an amount not to exceed 35% of the Gross Settlement Amount, which unless escalated pursuant to the Settlement Agreement, will be $665,000.00, as well as reimbursement of litigation costs reasonably incurred in an amount of $52,122.50. Plaintiffs' Counsel have entered into a fee-sharing agreement between themselves, such that attorneys' fees shall be divided as follows: 70% to Bibiyan Law Group, P.C., 25% to Wilshire Law Firm, and 5% to Lavi & Ebrahimin, LLP. The fee sharing agreement was disclosed and agreed to by all Plaintiffs.

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[8] "Individual Settlement Payments" refers to the *pro rata* amount payable to each Aggrieved Employee from the 25% portion of the Net Settlement Amount allocated to payments to the Aggrieved Employees.

E. Settlement Administration

Within twenty-one (21) calendar days after the Effective Date[9], Defendants will provide the Settlement Administrator with the full name, last known addresses, last known telephone numbers, the last four (4) digits of Social Security Numbers, and dates of employment for all Aggrieved Employees (collectively, the "Aggrieved Employee List"). Moreover, within fourteen (14) calendar days after the Effective Date, Defendants will deposit the Gross Settlement Amount into a settlement fund to be established by the Settlement Administrator. Within seven (7) calendar days of funding, the Settlement Administrator will issue payments to: (1) Aggrieved Employees; (2) the LWDA; (3) Plaintiff Cruz and Plaintiff Leon; and (4) Plaintiffs' Counsel. The Settlement Administrator will mail Individual Settlement Payments to the Aggrieved Employees, along with the PAGA Payment Letter, the substance of which is attached to the Settlement Agreement as Exhibit "1" thereto.

The Settlement Administrator will mail Individual Settlement Payments to the Aggrieved Employees, along with the PAGA Payment Letter (attached as Exhibit 1 to the Settlement), via regular First-Class U.S. Mail, using the most current, known mailing addresses identified in the Aggrieved Employee List. The Settlement Administrator will also issue a payment to itself for Court-approved services performed in connection with the Settlement on the twenty-eighth (28th) day after the Effective Date.

Checks for Individual Settlement Payments shall be negotiable for one hundred eighty (180) calendar days from the date of their issuance. If a check is returned to the Settlement Administrator as undeliverable during the 180-day period, the Settlement Administrator shall take all reasonable efforts to identify the Aggrieved Employee's correct address, including the performance of a "skip-trace." If an updated address can be identified, the Settlement Administrator shall issue another check to the Aggrieved Employee and mail it to the Aggrieved Employee at his or her updated

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[9] Per the Settlement Agreement, the term "Effective Date" means the later of: (a) the date the Court signs an Order granting approval of this Settlement and Judgment; (b) if any objections or motions to intervene are filed prior to the date the Court signs an Order granting approval of this Settlement, sixty (60) days from the later of the date the Court signs an order granting approval of the Settlement or the date the Court enters final judgment so long as no appeal is filed within that time frame; and (c) to the extent any appeals have been filed, the date on which they have been resolved or exhausted.

address. An Aggrieved Employee who failed to receive their Individual Settlement Payment check despite the procedures described herein shall nevertheless remain bound by the Settlement.

F. Taxes

The Parties do not expect there to be any employer side payroll taxes arising from this Settlement as it is a settlement of a representative action for civil penalties. If it is determined that employer side taxes exist on the Total Settlement Amount, such taxes will be funded by the Gross Settlement Amount. The Settlement Administrator will be responsible for issuing to the Aggrieved Employees and Plaintiffs' Counsel any Form 1099-MISC and/or other tax forms as may be required by law for all taxable amounts paid pursuant to this Settlement.

G. Release

In exchange for the payment of the Gross Settlement Amount (as the same may be escalated), all Aggrieved Employees will release any and all claims that are asserted in, arise from, or are reasonably related to the factual allegations and legal assertions made in the Action under PAGA (Labor Code section 2698, et seq.) including all claims and causes of action that could have been asserted in the Action based on the factual allegations and legal assertions alleged up through and specifically including the entire Settlement Period, whether or not specifically delineated as a claim or cause of action in the Action. ("PAGA Released Claims"). The PAGA Released Claims include but are not limited to those: (a) alleged in any of Plaintiffs' notices provided to the LWDA, the operative complaint in the Action, and any amended complaint in the Action, including claims that arise out the claims and facts alleged in the Action under PAGA, (b) any claims under PAGA which could have reasonably been asserted in the Action arising from the alleged facts and/or primary rights alleged to have been invaded, and (c) any other claims to the extent that they that are premised upon or arise out of PAGA Released Claims for failure to pay all wages due, failure to provide minimum wages or pay for all hours worked, failure to pay overtime compensation, failure to provide meal and/or rest periods, failure to pay proper meal or rest period penalties, failure to pay reporting time wages, failure to keep accurate time records, failure to provide and maintain accurate itemized wage statements, failure to keep accurate employee payroll records, failure to timely pay wages due during or at separation of employment, failure to reimburse all business-related expenses, failure to provide paid sick leave at the proper rate, failure to provide lawful, written commission agreements, and claims reasonably relating to the alleged violations of California Labor Code sections 200-205, 205.5, 210, 225.5, 226, 226.3, 226.7, 246, 510, 512, 1174, 1174.5, 1182.12, 1194, 1197, 1197.1, 1197.5, 1198, 2751, and 2802, and applicable portions of California Industrial Welfare Commission ("IWC") Wage Orders, including but not limited to applicable portions of IWC Wage Order No. 5 (Cal. Code Regs., tit. 8, § 11050), against the Released Parties[10]; (d) to the extent that they are premised upon or arise out of the PAGA Released Claims, Labor Code sections 216, 218.6 and 558. The release extends to all remedies under the PAGA for any of the PAGA Released Claims.

H. Escalator Provision

Plaintiffs' acceptance of this Agreement is based on Defendants' representation that the total number of Pay Periods during the Settlement Period is 105,100 Pay Periods worked by Aggrieved Employees during the PAGA Period. In the event the number of Pay Periods worked by Aggrieved Employees during the PAGA Period increases by more than 10%, or 10,510 Pay Periods, then the Gross Settlement Amount shall be increased proportionally by the Pay Periods during the PAGA Period worked in excess of 115,610 (105,100 + 10,510) multiplied by the Pay Period Value. The Pay Period Value shall be calculated by dividing the Gross Settlement Amount by 105,100 Pay Periods. The Parties agree that the Pay Period Value is $18.08 ($1,900,000.00 / 105,100 Pay Periods). Thus, for example, should there be 120,000 Pay Periods worked by Aggrieved Employees during the PAGA Period, then the Gross Settlement Amount shall be increased by $79,371.20 ((120,000 Pay Periods – 115,610 Pay Periods) x ($18.08/Pay Period)).

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[10] Per the Settlement Agreement, the term "Released Parties" shall refer to Defendants and each of their respective past, present and future agents, employees, servants, officers, directors, partners, trustees, representatives, shareholders, stockholders, attorneys, parents, subsidiaries, fictitious business names, equity sponsors, related companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, insurers, consultants, joint venturers, any actual or alleged joint employers, any owner or operators of a housing property where an Aggrieved Employee worked for Defendants, affiliates, alter-egos, representatives, and affiliated organizations, and all of its respective past, present and future employees, directors, officers, agents, attorneys, stockholders, fiduciaries, parents, subsidiaries, successors, and assigns.

I. Uncashed Checks

The funds represented by Individual Settlement Payment checks remaining uncashed for more than 180 days after issuance (collectively, the "Uncashed Settlement Checks") shall be canceled and funds associated with such checks shall be considered unpaid, unclaimed or abandoned cash residue pursuant to Code of Civil Procedure section 384 ("Unpaid Residue"). The Unpaid Residue plus accrued interest, shall be remitted to the State Controller's Office, Unclaimed Property Division in the name of each Aggrieved Employee.

IV. ARGUMENT

A. The PAGA Penalties Secured By The Settlement Are Genuine And Meaningful And Fulfill PAGA's Underlying Purpose To Benefit The Public

The PAGA statute specifically provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part." (Lab. Code, § 2699, subd. (l)(2).) The statute, however, does not require a two-step process or otherwise mimic the class action approval requirements when the parties reach a settlement only as to PAGA civil penalties. (*Salazar v. Sysco Central Cal., Inc.* (E.D. Cal. Feb. 2, 2017) 2017 WL 1135801, *2 [rejecting the application of class action settlement rules and procedures for PAGA settlement approval].). In the absence of an explicit statutory requirement, the LWDA has provided guidance, explaining that courts should evaluate settlements of PAGA claims based on whether "the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public." (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1133.). Courts defer to the agency's interpretation of a statute where authority has been delegated to that agency. (*New Cingular Wireless PCS, LLC v. Pub. Utilities Comm'n* (2016) 246 Cal.App.4th 784, 807.) When evaluating a PAGA settlement, the Court should analyze whether the amount of civil penalties obtained is "genuine and meaningful" in light of the PAGA's statutory purpose.

The California Legislature enacted PAGA to "augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383.). This statute authorizes an employee to bring an action for "civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees." (*Id.* at 360.). An action under PAGA to recover civil penalties "is essentially a law enforcement action designed to protect the public and not benefit private parties." (*Id.* at 381.). Fundamentally, "a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." (*Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 435.) "As the state's proxy, an employee-plaintiff may obtain civil penalties for violations committed against absent employees [citation], just as the state could if it brought an enforcement action directly." (*Id.*)

Under the general provisions of the PAGA scheme, 75% of the civil penalties recovered go to the State, while the remaining amount is given to the aggrieved employees. (Lab. Code, § 2699, subd. (i).) The PAGA action is one of the "primary mechanisms for enforcing the Labor Code." (*Iskanian,* 59 Cal.4th at 383.) As the State's proxy or agent, "the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies- namely, recovery of civil penalties that otherwise would have been assessed by and collected by the [LWDA]." (*Id.*) "[A]n aggrieved employee's action under [PAGA] functions as a substitute for an action brought by the government itself." (*Id.*) The goal of PAGA is to impose civil penalties for Labor Code violations "significant enough to deter violations." (*Id.* at 379.)

Thus, a PAGA action is "fundamentally different from a class action." (*Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123 ["These differences stem from the central nature of PAGA. PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA, bring claims on behalf of the state agency."]. The PAGA statute expressly distinguishes and preserves the right of employees to separately (or concurrently) pursue their own causes of action against their employers and to recover other available federal and state remedies. (Lab. Code, § 2699, subd. (g)(l); *see Baumann,* 747 F.3d at 1123 [explaining the differences between the finality in class action judgments and the limited res judicata effect of PAGA judgments].) "Unlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies." (*McKenzie v. Federal*

Exp. Corp. (C.D. Cal. 2011) 765 F. Supp. 2d 1222, 1233.) PAGA penalties do not seek damages that are compensatory in nature. (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 188.)

Here, the Settlement penalizes Defendants for their alleged violation of California's labor laws, provides a significant benefit of $1,150,927.50 (as the same may be escalated pursuant to the Settlement) to the State and also provides relief to the Aggrieved Employees that is genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public. Lastly, the Gross Settlement Amount of $1,900,000.00 (as the same may be escalated pursuant to the Settlement), is significant enough to deter Defendants from future alleged violations. Accordingly, the Settlement fulfills the underlying purpose of the statute and confers a substantial benefit on the public.

/ / /

B. The Settlement Is Reasonable Given The Risks Of Further Litigation

In assessing whether the amount in civil penalties is genuine and meaningful, the Court may balance the amount in penalties with the risks of further litigation. Here, Plaintiffs obtained a meaningful amount in civil penalties despite facing significant challenges had the litigation continued.

The potential claims for penalties include failure to pay all wages due, failure to provide minimum wages or pay for all hours worked, failure to pay overtime compensation, failure to provide meal and/or rest periods, failure to pay proper meal or rest period penalties, failure to pay reporting time wages, failure to keep accurate time records, failure to provide and maintain accurate itemized wage statements, failure to keep accurate employee payroll records, failure to timely pay wages due during or at separation of employment, failure to reimburse all business-related expenses, failure to provide paid sick leave at the proper rate, and failure to provide lawful, written commission agreements, among others.

Moreover, only initial violation rates were used in calculating potential penalties as, until "notified that it is violating a Labor Code provision … the employer cannot be presumed to be aware that its continuing underpayment of employees is a "violation" subject to penalties." (*Amaral v. Cintas Corp. No. 2 [Amaral] (2008)* 163 Cal. App. 4th 1157, 1209.) Thus, subsequent violations in the PAGA context means not just later in time but following notice to the employer that it is in violation of the Labor Code. (*Patel v. Nike Retail Servs., Inc.* (N.D. Cal. 2014) 58 F.Supp.3d 1032, 1042; *accord Amaral*, 163 Cal. App. 4th at 1209 [only "after the employer has learned its conduct violates the Labor Code, the employer is on notice that any future violations will be punished … at twice the rate of penalties … that were imposed for the initial violation"].) Because in this instance there was no evidence that Defendants were provided notice that they were in violation of the Labor Code, initial violation rates were used to calculate penalties.

While Plaintiffs' Counsel are informed and believe that reasonable minds differ with regard to calculation of PAGA penalties, Plaintiffs' Counsel believe one reasonable calculation of Defendants' maximum exposure in PAGA penalties is as follows:

1. <u>Overtime Violations</u>: Labor Code section 558 prescribes penalties of $50 for an initial violation and $100 for each subsequent violation. Using the initial pay period rate for all violations, and a violation every single pay period for every single non-exempt employee in the Settlement Period, this amounts to a maximum exposure of $5,255,000. (105,100 pay periods x $50.)
2. <u>Minimum Wage Violations</u>: Labor Code section 1197.1 prescribes penalties of $100 for an initial violation and $200 for each subsequent violation. Using the initial pay period rate for all violations, and a violation every single pay period for every single non-exempt employee in the Settlement Period, this amounts to a maximum exposure of $10,510,000. (105,100 pay periods x $100.)
3. <u>Meal Period Violations</u>: Labor Code section 558 prescribes penalties of $50 for an initial violation and $100 for each subsequent violation. Using the initial pay period rate for all violations, and a violation every single pay period for every single non-exempt employee in the Settlement Period, this amounts to a maximum exposure of $5,255,000. (105,100 pay periods x $50.)
4. <u>Rest Period Violations</u>: Labor Code section 558 prescribes penalties of $50 for an initial violation and $100 for each subsequent violation. Using the initial pay period rate for all violations, and a violation every single pay period for every single non-exempt

employee in the Settlement Period, this amounts to a maximum exposure of $5,255,000. (105,100 pay periods x $50.)

5. Waiting Time Penalties: Labor Code section 558 prescribes penalties of $50 for an initial violation and $100 for each subsequent violation. Because this violation is merited only at separation of employment, a 100% violation rate would likely include be just one violation per employee. Plaintiffs' Counsel understood at mediation that there were approximately 2,686 separated Aggrieved Employees. This amounts to a maximum exposure of $268,600. (2,686 Aggrieved Employees x $100.)

6. Wage Statement Violations: According to *Gunther v. Alaska Airlines, Inc.* (2021) 287 Cal.Rptr.3d 229, in this instance, Labor Code section 2699 would be the appropriate penalty for wage statement violations that are inaccurate, which prescribes penalties of $100 for an initial violation and $200 for each subsequent violation. (*Id.* at 247-248.) Using the initial pay period rate for all violations, and a violation every single pay period for every single Aggrieved Employee in the PAGA Period, this amounts to a maximum exposure of $10,510,000. (105,100 pay periods x $100.)

7. Failure to Reimburse. Labor Code section 558 prescribes penalties of $50 for an initial violation and $100 for each subsequent violation. Using the initial violation rate, and a violation every single pay period for every single non-exempt employee in the Settlement Period, that amounts to an exposure of $10,510,000. (105,100 pay periods x $100.)

8. Violation of Labor Code § 246: Labor Code section 246 states that Defendants must provide paid sick leave for employees who have worked more than 30 days within one year of employment. Labor Code section 2699 prescribes penalties of $100 for an initial violation and $200 for each subsequent violation. This amounts to a maximum exposure, using the initial violation rate, of $10,510,000 (105,100 pay periods x $100).

In sum, Plaintiffs' Counsel calculated Defendants' total maximum exposure for PAGA violations if the Court were to find a 100% violation rate for every Aggrieved Employee every pay period and not exercise its discretion to reduce any of those penalties to be $58,073,600.

On the other hand, Plaintiffs' Counsel understand from the mediator and the mediation process that Defendants argued the following in connection with this claim:

Defendants contend that no PAGA penalties are likely to be awarded and, even if they were, the maximum exposure calculated by Plaintiffs is vastly overstated. First, Defendants defend that PAGA penalties cannot and should not be stacked and that, even if they could, very few Courts have ever exercised discretion to stack them. Second, Defendants deny that a violation for each pay period can be established. Third, Defendants contend that a Court is unlikely to exercise its discretion to award civil penalties under PAGA where, as here, Defendants contend there is no conduct shown by that would show any Labor Code violations by Defendants, if any, is knowing and intentional that would justify PAGA penalties. Finally, Defendants asserts that individualized issues predominate the PAGA claims, making the claims unmanageable for trial pursuant to *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746 [*Wesson*]. Thus, Defendant contends that the Court cannot, should not, and will not exercise its discretion to award any penalties under PAGA.

While Plaintiffs are confident in the merits of the case, a legitimate controversy exists as to each predicate Labor Code violation. For example, Plaintiffs contend that the Aggrieved Employees were subjected to, *inter alia*, not being paid for all time under Defendants' control, unlawful meal and rest break policies, and were denied meal and rest break premiums. Defendants refute these contentions, claiming, for example, that everyone was paid for all time worked, they authorized and permitted rest breaks, and provided meal periods.

Plaintiffs also considered the fact that continued litigation would be expensive, time-consuming and an uncertain proposition, involving a trial and possible appeals, and would delay any recovery to the State and the Aggrieved Employees. There is also a substantial risk that the Court would reduce the award even if Plaintiffs are successful or otherwise exercise its discretion not to award penalties at all even if Labor Code violations are found. In contrast, if the Court approves the Settlement, the Aggrieved Employees will receive timely relief and avoid the risk of an unfavorable judgment. And, in light of the Court's ruling in *Wesson*, Plaintiffs had to account for the real possibility that a Court determines that some or all of the theories advanced by Plaintiffs in this Action would not lend themselves to a manageable trial, despite the fact Plaintiffs deny that there is a manageability requirement under PAGA. (*See, e.g., Estrada v. Royalty Carpet Mills*, (2022) 76 Cal.App.5th 685, 709-710). Plaintiffs objectively and knowledgably balanced the strengths and weaknesses of their claims, the likelihood of reaching a trial, and the likelihood of success at trial against the risk of continued litigation and was able to determine a realistic range of settlement recovery for PAGA penalties.

It is also important to mention that shortly after mediation and before a settlement was reached in this Action, the Supreme Court of the United States granted *certiorari* in *Viking River Cruises, Inc. v. Moriana* [*Viking River*]. Plaintiffs' Counsel was faced with the real possibility that the Supreme Court would hold that the Federal Arbitration Act preempts the bringing of PAGA Actions entirely by employees who have entered into arbitration agreements with employers, and, by virtue thereof, with the possibility that no recovery would have been available at all under PAGA in this Action by any of the Plaintiffs and/or Aggrieved Employees.

As such, Plaintiffs' Counsel believes a 75% discount of this maximum exposure, resulting in **$14,518,400, to be a reasonable estimate of the likelihood of what Plaintiffs may potentially recover at trial for PAGA penalties**. ($58,073,600 x .25.)

Thus, when the risks of litigation, including, without limitation, the burdens of proof necessary to establish liability, the mixed case law on manageability, and the risk created by the Supreme Court's granting *certiorari* in *Viking River* that no recovery may have been possible whatsoever, as well as the probability of appeal of a favorable judgment are considered, it is clear that the Settlement is reasonable and in the best interest of the State and the public. The Settlement therefore accomplishes PAGA's objectives by imposing sufficient civil penalties "to punish and deter" Defendants from future alleged Labor Code violations, while also ensuring that the penalties are not "unjust, arbitrary and oppressive, or confiscatory." (Lab. Code, § 2699, subd. (e)(2); *Iskanian*, 59 Cal.4th at 384.)

C. Plaintiffs Counsel's Requested Fees and Costs Are Reasonable

Plaintiffs' Counsel are entitled to reasonable attorneys' fees pursuant to Labor Code section 2699(g)(1) which provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." (Lab. Code, § 2699, subd. (g)(1); see also *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 765 [holding that attorneys' fees to prevailing party are mandatory when the statute uses the word "shall"].) Additionally, Plaintiffs' Counsel are entitled to fees based on the contingent agreement with its clients. It is undisputed that Plaintiffs are the prevailing party. (*See Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153, internal citations omitted ["[P]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in the litigation that achieves some of the benefit the parties sought in bringing suit.")

Accordingly, Plaintiffs are entitled to recover attorneys' fees and costs. Plaintiffs request a fee of 35% of the Gross Settlement Amount, which, unless and until escalated pursuant to the Parties' Settlement Agreement, amounts to $665,000.00, is reasonable, is well within the range of fees generally sought and approved in other class and representative cases and is also reasonable based on Plaintiffs' Counsel's lodestar.

1. An Award of Fees Based on a Percentage of the Common Fund is Appropriate and Reasonable

The percentage of attorneys' fees set forth in the Settlement (*i.e.*, 35% of the GSA) is reasonable. Historically, courts have awarded percentage fees in the range of 20% to 50% in collective actions, depending on the circumstances of the case. (Newberg on Class Actions, 4th Ed. 2002, § 14: 6.) Furthermore, California and federal courts have long recognized that a percentage of recovery for attorneys' fees is properly awarded on the basis of the total recovery. (*Boeing v. Van Gemert* (1980) 444 U.S. 472, 480-481; *see also In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558, fn.13, emphasis added ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around *one-third* of the recovery"].)

Here, the requested fee is consistent with the fees awarded in other PAGA settlements approved by California courts. (*See, e.g., Ortiz v. Morgan Stanley Smith Barney, LLC* San Francisco County Superior Court, Case No. CGC-17-560139 [awarding attorneys' fees of one-third under percentage method]; *Chavez v. Saticoy Lemon Ass'n Case No.* 56-2015-00468600-CU-OE-VTA, 2015 WL 5561118, Ventura County Superior Court Aug. 29, 2015) [approving attorneys' fees of one-third of PAGA settlement fund]; *Tocci v. Yard House Northridge LLC,* Los Angeles County Superior Court Case No. BC625604 [same]; *Jozami v. Twilio Inc.*, San Francisco County Superior Court Case No. CGC-18-566356 [same].)

Plaintiffs' Counsel invested time and resources into litigating this Action, with over $50,000 of costs to date and counting deferred to the end of the case – nearly two years– and entirely contingent on the outcome which, as set forth above, the recovery of which was far from certain with much of the litigation still potentially pending. It has been a long-recognized principle that an attorney merits a significantly larger fee when the compensation is contingent, rather than being fixed on a time or contractual basis. (*Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-51.) During the period that this Action has been pending, Plaintiffs' Counsel have advanced all expenses, and have not received any compensation for prosecuting the Action on behalf of the State and other Aggrieved Employees.

The significant outlay of monetary and personnel resources has been completely at risk and wholly dependent upon obtaining a substantial settlement or the imposition of civil penalties at trial. Plaintiffs' Counsel should not be penalized with a lower fee for settling the case prior to trial, because the percentage of the fund method "encourages early settlement, which avoids protracted litigation." (*Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480, 489.) Thus, the requested award of attorneys' fees is reasonable under the percentage of the fund method.

2. The Requested Fees are Also Reasonable Under a Lodestar Crosscheck.

To measure reasonableness, the Court may cross-check the percentage of recovery against Plaintiff Counsels' lodestar. (*Laffitte*, 1 Cal.5th at 506; *see Privacy Cases*, 175 Cal.App.4th at 556-58.) Plaintiffs' Counsel's lodestar is based upon a total of 1,310.2 hours at customary hourly rates.

Specifically, for Bibiyan Law Group, P.C., David D. Bibiyan billed 313.2 hours at his hourly rate of $725 per hour. Diego Aviles billed 63.3 hours at his hourly rate of $550. Sara Ehsani-Nia billed 563.8 hours at her hourly rate of $475. And Vedang J. Patel billed 46.2 hours at his hourly rate of $375 per hour. Paralegals billed 88.5 hours at $150 per hour. Finally, legal assistants billed 7.7 hours at $75 per hour. For Wilshire Law Firm, Justin F. Marquez billed 128.4 hours at his hourly rate of $850 per hour. (Marquez Decl., ¶ 23.). And, for Lavi & Ebrahimin, LLP, Joseph Lavi billed 15 hours at his hourly rate of $750 per hour. Vincent C. Graberry billed 32.7 hours at his hourly rate of $650 per hour. Anwar D. Burton billed 36.7 hours at his hourly rate of $600 per hour. Pooja V. Patel billed 8.7 hours at her rate of $500 per hour. Melissa A. Huether billed 6 hours at her rate of $500 per hour. Cumulatively, this amounts to a total lodestar of **$731,882.50**.

3. No Multiplier is Necessary to Meet the Lodestar But Even If One Were Necessary to Award Attorneys' Fees Based on a Lodestar Crosscheck It Would Be More Than Justified

Multipliers are commonly awarded in cases accepted on a contingent basis. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 [contingent risk multipliers applied to attract attorneys to cases of significant societal importance and "to compensate them for the risk of loss generally in contingency cases *as a class*."]; *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 947 [contingency fee factor *alone* supported a multiplier].) Indeed, it is virtually impossible to bring a plaintiff's counsel's compensation "into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis" unless a premium *(i.e.,* a multiplier) is provided. (*Ketchum*, 24 Cal.4th at 1132.) "Multipliers can range from two to four or even higher". (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254, disapproved on another ground in *Hernandez Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 273-74, fn. 4.)

Plaintiffs' Counsel has been representing Plaintiffs for more than two years, while never receiving any compensation, and expending significant time and resources which could have been directed towards other cases. In agreeing to litigate this case on a contingent fee basis, Plaintiffs' Counsel assumed considerable risk given the uncertain outcome of PAGA actions, which was amplified in light of *Wesson* and particularly *Viking River*.

But here, it is unnecessary for this Court to apply a multiplier as Plaintiffs are requesting less than the fees Plaintiffs' Counsel actually incurred so that the Aggrieved Employees may realize the fruits of the Settlement to ensure maximum recovery by the Aggrieved Employees. Thus, there is little question that Plaintiffs' request for attorneys' fees is fair, reasonable, appropriate, and should be granted. Nevertheless, even if a multiplier were necessary, it would be more than justified.

a. *<u>Plaintiffs Are Entitled to a Multiplier Based on a Percentage of the Fund to Ensure that the Fee Awarded is Within the Range of Fees Freely Negotiate in the Legal Marketplace in Comparable Litigation</u>*

If a multiplier were necessary to reach the fees requested by Plaintiffs' Counsel, it would be more than justified to compensate Plaintiffs' Counsel at a rate reflecting the risk of nonpayment in this matter, as Class Counsel's representation of Plaintiff was purely on a contingent basis. As set forth herein, the risk of nonpayment in this Action was particularly acute, too, in light of the Supreme Court's granting of *certiorari* in *Viking River* and the potential that it would hold that plaintiff-employees who sign arbitration agreements were pre-empted from bringing PAGA representative actions, thus potentially negating the recovery of any amounts despite investment of over one thousand hours and over $50,000 of costs even before any depositions were taken, expert discovery performed and/or the holding of a trial. This is because litigating a wage-and-hour class action through trial takes years and requires the investment of tens (if not hundreds) of thousands of dollars and thousands of hours of time. Attorneys willing to undertake this risk deserve a high rate of recovery.

Moreover, wage-and-hour laws are still developing, and changes in the law always threaten to wipe out the plaintiff's attorney. In fact, numerous appellate decisions and decisions of both the California and United States Supreme Courts have attacked the validity of PAGA actions directly relevant to this case, including *Wesson* and *Viking* River, which, as set forth herein, could have significantly affected its value. It is this contingent nature of these cases that justify an award when and if Plaintiffs' Counsel is able to obtain a settlement or verdict, because oftentimes no money is recovered in a case, including plaintiff's counsel's costs, let alone their time.

b. <u>The Quality of Representation, the Novelty, and Complexity of the Issues and Results Obtained</u>

Plaintiffs' Counsel used a high level of skill in addressing the difficult questions presented in this case, which involved the contested issues regarding: the compliance of various of Defendants' policies with the Labor Code, including whether all time worked was paid for; a diverse array of case law pertaining to the compensability of on-call time; whether meal and/or rest breaks were given in compliance with the Labor Code; issues regarding the timeliness of pay, including whether all pay was received by termination or resignation; the sufficiency and accuracy of wage statements (including whether issues therewith, if any, were intentional or injurious); and various other issues. Proof of Plaintiffs' Counsel's skill in this area of law lies in the size of this Settlement and the recoveries of the State and Aggrieved Employees despite Defendants' contentions that Plaintiff's unpaid wages claims are speculative; Defendant's contention that its meal and rest period policies were compliant; and other hurdles encountered by Class Counsel that were traversed in reaching this Settlement pertaining to evolving case law regarding PAGA actions.

c. This Litigation Precluded Other Employment by Plaintiffs' Counsel

A practitioner can only properly litigate so many cases at one time. The requirements of this case were significant, requiring over one thousand (1,000) hours to be expended to date by Plaintiffs' Counsel, and another twenty-five (25) to fifty (50) hours conservatively expected to be expended in the future in connection with approval, settlement administration, answering questions of Aggrieved Employees, and updates to this Court regarding uncashed checks. Plaintiffs' Counsel was also most definitely precluded from other employment. This factor should be considered if a multiplier were considered.

3. Plaintiffs' Counsel's Hours Are Reasonable

In determining whether the number of hours expended on the litigation was reasonable, the court must determine that "the time spent was reasonably necessary and that [] counsel made 'a good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary." (*Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263 fn. 8.) The court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112 [noting that "[l]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."]. "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records" (*Martino* *v. Denevi* (1986) 182 Cal.App.3d 553, 559, citations omitted; *see also Wershba,* 91 Cal.App.4th at 255 [“California permits fee awards in the absence of detailed time sheets”]; *Laffitte,* 1 Cal.5th at 505 [trial court properly exercised its discretion to perform the lodestar cross-check “using counsel declarations summarizing overall time spent rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task”].)

Plaintiffs’ Counsel has spent over 1,150 hours litigating this Action to bring it to resolution, not including time which will be expended monitoring the administration of the settlement and distribution of funds to Aggrieved Employees. The efforts expended by Plaintiffs’ Counsel to achieve this result include, but are not limited to, the following:

- the investigation of the matter, including meeting with Plaintiffs, reviewing Defendants’ policies, and requesting and reviewing Plaintiffs’ time and pay records, personnel files, and exploring the corporate structure of the entity defendants;
- compliance with prerequisites in connection with PAGA for each Plaintiff;
- filing the Cruz Action, Leon Action, and Caramazza Action;
- meeting and conferring with opposing counsel as required by the Court prior to Initial Case Management Conferences;
- performing discovery into whether there was an enforceable agreement to arbitrate between Plaintiffs and Defendants when considering the full nature of their employment agreements;
- meeting and conferring with opposing counsel regarding Defendants’ contentions that there existed an agreement to arbitrate between the Parties and that, thus, Plaintiffs could not proceed on a class basis;
- fully briefing a motion to compel arbitration, including various rounds of supplemental briefing, relaying information regarding the Court’s ruling to appellate specialists, analyzing the prospects of appeal, and meeting and conferring with Defendants’ counsel regarding the potential of a writ;
- briefing various demurrers and/or motions to stay brought in the Actions, including meeting and conferring prior to their bringing;

- meeting and conferring regarding a potential motion to consolidate by Defendants;
- propounding formal discovery, responding to formal discovery, drafting meet-and-confer correspondence, responding to meet-and-confer correspondence, and meeting and conferring by telephone;
- meeting and conferring with Defendants regarding mediation, performance of informal discovery beforehand, and negotiating with opposing counsel regarding the parameters thereof;
- selecting a mediator and mediation date;
- working with opposing counsel and consultants for the receipt of a representative sampling and analyzing the same with the aid of expert consultants and Plaintiffs to perform analyses of liability and exposure prior to attendance of the mediation in this matter;
- reviewing hundreds of pages of policy documents from Defendants;
- negotiating a draft opt-out notice for administration by a third party administrator and a confidentiality agreement to facilitate the exchange of confidential information prior to mediation;
- obtaining contact information for Aggrieved Employees, preparing questionnaires for responses by Aggrieved Employees, reaching out to have the questionnaires filled out, reviewing and revising questionnaires based on responses received from Aggrieved Employees, and working with Aggrieved Employees to prepare and sign declarations in support of Plaintiffs' Actions and mediation;
- working with co-counsel for an agreement to jointly prosecute and, particularly, mediate the three Actions together;
- preparation of a mediation brief and damages model for use at mediation;
- attendance at mediation by all Parties and Counsel;
- communicating with Plaintiffs who requested updates or other information regarding this matter;
- continued negotiations after mediation through the mediator, spanning months;

- negotiating, finalizing and fully executing the Settlement Agreement, in which numerous drafts were distributed;
- obtaining bids from third party administrators for administration of a PAGA Notice to Aggrieved Employees regarding the settlement of this Action;
- negotiating, finalizing and fully executing the Settlement Agreement;
- preparing and filing an amended complaint in the Cruz Action to consolidate the three actions; and
- preparing the instant Motion for Settlement Approval.

Plaintiffs' Counsel also bears the risk of taking whatever actions are necessary if Defendants fail to pay. Thus, the Court should find that Plaintiffs' Counsel's hours were necessary and reasonable to achieve the excellent result. Plaintiffs' Counsels' hourly rates are in line with, and, in fact, modest, compared with the hourly rates of other Counsel in similar actions, particularly in light of the fact that no multiplier is even sought in this case.

4. Plaintiffs Counsel's Hourly Rates Are Reasonable

Plaintiffs' Counsel's hourly rates for attorneys are: (1) for Bibiyan Law Group, P.C., $725, $550, $475, and $375, with paralegal and legal assistant's hourly rates are $150 and $75, respectively; (2) for Wilshire Law Firm, $850; (3) for Lavi & Ebrahimin, LLP $750, $650, $600, and $500.

At this requested rate, this results in a total lodestar amount of **$731,882.50**. A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) The Court may consider other factors when determining a reasonable hourly rate, *e.g.*, the attorney's skill and experience, the nature of the work performed, the relevant area of expertise, and the attorney's customary billing rates. (*Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.)

One difficulty in determining the hourly rate of attorneys of similar skill and experience in the relevant community is the scarcity of hourly fee-paying clients in class action litigation. As a practical matter, few if any consumers, pay attorneys' fees on an hourly basis for such extensive litigation, and thus retainer agreements in such cases are based on a contingency fee relationship.

Although there is no customary billing rate, the nature of class action work should be strongly considered by the court. Courts have upheld rates as high as $450[11] per hour (in 1993) in employment matters. (*Bihun v. AT&T Information Systems. Inc.* (1993) 13 Cal. App. 4th 976, overruled on other grounds.)

A survey conducted by the National Law Journal for the year 2002 provides a sample of a billing rate for California Lawyers. In that survey, six California firms provided their hourly billing rates. Of those six firms, five regularly charge in excess of $500.00 per hour for their partners. In fact, four of the firms charge as high as $600.00, $620.00, $650.00, and up to $850.00 per hour. These firms are located in Orange County, Los Angeles County, San Francisco County and San Diego County and are the types of firms that Plaintiff's Counsel regularly opposes in these class action cases. (*See* National Law Journal Survey, attached as Exhibit "3" to the Declaration of David D. Bibiyan.). The only difference is that these defense attorneys are paid on a monthly basis and do not have to advance any costs on a case.

Finally, Plaintiff's Counsel attach the Declaration of Richard Pearl in support of the Motion for Final Approval in the case of *Rosa Cantu, et al v. Pacific Bell Telephone Company*, Los Angeles Superior Court Case No. BC441237, dated January 4, 2011. (*See* Declaration of Richard Pearl attached as Exhibit "4" to Bibiyan Decl.). Mr. Pearl specializes in issues related to cost-award attorney's fees, including the representation of parties in fee litigation and appeals, serving as an expert witness, mediator and arbitrator in disputes concerning attorney's fees and related issues. Mr. Pearl is also the author of California Attorney's Fee Awards (3d ed. Cal. CEB 2010), as well as the author of the Second Edition, years 1994 through 2008. He has also authored numerous other publications on attorney's fees, as set forth in his Declaration.

Mr. Pearl has reviewed the comparable hourly rates of attorney fees in California. He confirms that courts have approved hourly rates of attorneys as follows:

- Rates of up to $875.00 in *Savaglio, et al. v. Wal-Mart*, Alameda County Superior Court, Case No. C-835687-7 (before applying a 2.36 multiplier);

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[11] Adjusted for inflation, $450 in 1993 equals over $860 in 2022.

- Rates of up to $750.00 in *Kashmiri et al. v. Regents of UC*, San Francisco County Superior Court (before applying a 3.7 multiplier); and
- Rates of up to $750.00 in *Environmental Law Foundation v. Laidlaw Transit, Inc.*, San Francisco Superior Court, Case No. CGC-06-451832 (before applying a 1.25 multiplier). *Id* at pages 4 and 5.

Additionally, Mr. Pearl has reviewed numerous declarations, depositions and surveys of legal rates on a non-contingent basis for the year 2009 and found hourly rates of up to $775.00, $795.00, $800.00, $855.00, $950.00, etc. (*Id.* at pp. 6-12). These are non-contingent rates where payment in full is expected promptly upon billing. (*Id.* at p. 13).

Plaintiffs' Counsel are experienced litigators who specialize in employment law, with a substantial PAGA and wage hour class action practice. Moreover, similar rates for the attorneys and staff of Plaintiffs' Counsel have been approved by various California Superior Courts, including just this month. Given the skill and experience of Plaintiffs' Counsel in this case, and the excellent result achieved for the State and other Aggrieved Employees, the requested rates are reasonable.

5. Plaintiffs' Counsel's Litigation Expenses Are Reasonable

The Settlement provides for reimbursement of Plaintiffs' Counsel's reasonable litigation costs in an amount up to $60,000.00. Plaintiffs' Counsel requests only **$**52,122.50 in total for costs incurred. Specifically, $45,368.23 in costs for Bibiyan Law Group, $2,764.39 in costs for Wilshire Law Firm, and $3,989.88 in costs for Lavi & Ebrahimin, LLP. A breakdown for each is set forth in the Declaration of David D. Bibiyan of Bibiyan Law Group, P.C., Declaration of Justin F. Marquez of Wilshire Law Firm, and Melissa A. Huether of Lavi & Ebrahimin, LLP. Because these costs are reasonable, Plaintiffs' Counsel requests that the Court approve those costs.

6. The Settlement Administrator Costs Are Reasonable

The Settlement Administrator's request for costs of up to $16,950.00 is reasonable, given the tasks to be performed by the Settlement Administrator, including but not limited to (a) processing the data provided by Defendants to be used in calculating the Individual Settlement Payments; (b) preparing, printing, and mailing to the over 5,000 Aggrieved Employees the PAGA Payment Letter, as well as following up with reasonable skip tracing; (c) calculating and mailing

Individual Settlement Payments to Aggrieved Employees; (d) filing any required federal and state tax forms and related agency reporting; (e) filing any required reports with the Court; (f) establishing a settlement fund; (g) distributing the Total Settlement Amount; (h) voiding uncashed or undeliverable checks to issue those funds to the State Controller's Office; (i) providing necessary reports and declaration; and (j) all other tasks described in the Settlement Agreement, as to which the Parties mutually agree. The Settlement Administrator's costs should be approved.

D. The Requested Service Award Payment Is Reasonable.

Plaintiffs in class and representative actions are eligible for reasonable enhancement payments as compensation "for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Company of Los Angeles* (2010) 186 Cal.App.4th 399, 412.) Courts routinely grant approval of class action settlement agreements containing service awards for the class representatives, which are "intended to compensate class representatives for work performed on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to act as a private attorney general." (*Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94, citations omitted.)

The same reasoning enhancement awards are given in class actions should be applied in PAGA actions to provide for relief that is consistent with the underlying purpose of the statute. "Unlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies." (*McKenzie,* 765 F. Supp. 2d at 1233.) The California legislature enacted PAGA to "augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Iskanian,* 59 Cal.4th at 383.)

Failing to provide an enhancement award in a representative action for civil penalties would completely undermine the purpose of PAGA by eliminating any incentive to pursue such cases. As an action for civil penalties, a PAGA action is not compensatory in nature, and a PAGA plaintiff cannot expect to obtain restitution for the violations forming the basis for a PAGA settlement.

It is for this reason that courts routinely award enhancement payments in other PAGA settlements. (*Blanchard v. BJ's Restaurants, Inc*., Orange County Superior Court Case No. 30-2014-00761961-CU-OE-CX (Sept. 26, 2016) [approving $10,000 service award]; *Bui v. Vitamin Shoppe Industries Inc.*, Los Angeles County Superior Court Case No. BC518486 (Aug. 31, 2016) [approving $10,000 service award]; *Jesus Miranda v. HomeDeliveryLink, Inc*., San Bernardino County Superior Court Case No. CIV DS1505393 (Aug. 9, 2016) [approving $10,000 service award]*; Mohamad Najjar v. Calop Business Systems, Inc. d/b/a Ca/op Aeroground Service*, Los Angeles County Superior Court Case No. BC582290 (April 5, 2016) [approving $10,000 service award]; and *Sheldon v. AHMC Monterey Park Hospital LP*, Los Angeles County Superior Court Case No. BC440282 (March 2, 2016) [approving $10,000 service award].)

The proposed settlement would not have been made possible without Plaintiffs' effort and commitment. The requested payment is intended to recognize Plaintiffs' effort in bringing the Action, serving as private attorney general under PAGA, assisting Plaintiffs' Counsel with the investigation, litigation, and settlement, regularly conferring with Counsel on the status of the case, reviewing the Settlement Agreement, providing a declaration in support of this Motion, and providing a broader release to Defendants. For these reasons, the Court should approve the requested service award of $7,500.00 each to Plaintiff Cruz and Plaintiff Leon, for a total of $15,000.00.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the PAGA Settlement Agreement in its entirety.

Dated: June 22, 2022

BIBIYAN LAW GROUP, P.C.

BY: David D. Bibiyan

DAVID D. BIBIYAN
VEDANG J. PATEL
Attorneys for Plaintiffs, on behalf of themselves and all others aggrieved

PROOF OF SERVICE

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 eighteen years and not a party to the within action; my business address is 8484 Wilshire Blvd, Suite 500, Beverly Hills, California 90211.

On June 22, 2022, and pursuant to the California Code of Civil Procedure section 1010.6, I caused a true and correct copy of the foregoing document(s) described as **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DAVID D. BIBIYAN, JUSTIN F. MARQUEZ, MELISSA A. HUETHER, PLAINTIFFS, AND SEAN HARTRANFT;** [PROPOSED] **ORDER AND** [PROPOSED] **JUDGMENT** to be served by electronic transmission to the below referenced electronic e-mail addresses as follows:

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

Executed on June 22, 2022 at Beverly Hills, California.

/s/ Emanuel Mungia
Emanuel Munguia

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