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behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN - BAKERSFIELD

SCOTT HARP, on behalf of himself and all others similarly situated, Plaintiffs, v. CALIFORNIA CEMETERY AND FUNERAL SERVICES, LLC, a Delaware corporation; and DOES 1 to 100, inclusive, Defendants.	**CLASS ACTION** Case No.: BCV-21-101299 JEB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SETTLEMENT UNDER THE CALIFORNIA LABOR CODE PRIVATE ATTORNEYS GENERAL ACT** Hearing Date: May 9, 2024 Hearing Time: 8:30 a.m. Honorable Gregory A. Pulskamp Division J Action filed: June 8, 2021 Trial Date: None Set

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

FEDERAL CASES

OTHER AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF MOTION

Plaintiff Scott Harp ("Plaintiff") submits this Memorandum of Points and Authorities in support of this Motion for Settlement Under the California Labor Code Private Attorneys General Act reached in this action. The Parties have documented the proposed settlement in the concurrently-submitted PAGA Settlement Agreement and Release ("Settlement" or "Settlement Agreement") (**Exhibit 1** to the Declaration of Kevin T. Barnes) ("Barnes Declaration").

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code § 2699, et seq. ("PAGA"). **The PAGA Settlement is $60,000 and Defendant will separately pay $150,000 for the Attorney's Fees and Cost Settlement.**

After deductions of the awarded Service Payment to Plaintiff and settlement administration costs as discussed in the Settlement Agreement, the Net PAGA amount of $50,000 will be designated 75% ($37,500) of the PAGA Penalties will go to the State of California and 25% ($12,500) distributed to the aggrieved employees.[1] As such, the net distribution to the aggrieved employees is $12,500. As required by Labor Code § 2699(l)(2), Plaintiff has submitted the proposed settlement documents to the LWDA.[2] This results in an average payment amount of approximately $27.11 and the highest settlement payment will be approximately $41.09 to aggrieved employees. (see Barnes Decl. ¶22).

Plaintiff requests that the Court "review and approve any settlement of any civil action filed pursuant to this part." Labor Code § 2699(l)(2). If the Court deems the settlement fair and acceptable, the Parties' request that the Court approve the settlement and enter the Proposed Order and Judgment permitting the Settlement to be carried out according to the terms of the Settlement Agreement.

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

[2] The settlement agreement will be concurrently uploaded on the date of this filing. Proof of submission of the settlement agreement via a copy of the email from the LWDA confirming receipt is attached as **Exhibit 2** to the Barnes Declaration. (Barnes Decl. ¶29.)

II.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On March 19, 2021, Plaintiff Scott Harp submitted the PAGA Notice to the LWDA for the purposed of complying with Labor Code §2699.3's notice requirement, giving notice of Plaintiff's intentions to file the Action.

On April 21, 2021, Defendant responded to Plaintiff's Notice. Defendant generally denied Plaintiff's Labor Code §226(a) violations and acted to cure the violations for the Labor Code §2751 claim under Labor Code §2699.3(c)(2)(A).

On May 21, 2021, Plaintiff responded to Defendant's LWDA Dispute and Cure Notice.

On June 8, 2021, Plaintiff filed the action as a Class Action case in Kern County Superior Court alleging based on the following claims: (1) Failure to Timely Furnish Accurate Itemized Wage Statements; (2) Penalties Pursuant to Labor Code § 2699; and (3) Unfair Business Practices.

On July 23, 2021, Defendant filed a Motion to Remove this Action to Federal Court. On September 20, 2021, Plaintiff filed a Motion to Remand the matter to State Court. On May 24, 2022, the Court (Honorable Jennifer L. Thurston) granted Plaintiff's request to remand these PAGA-only claims back to state court.

On August 25, 2022, Defendant filed a Motion to Compel Arbitration and the Court's granted Defendant's Motion to Compel Arbitration on September 20, 2022, and ordered Plaintiff to arbitrate his individual claims with Defendant pursuant to the parties' Mutual Resolution Process Agreement. The PAGA case was stayed until completion of the arbitration of his individual claims.

As such, on or about October 20, 2022, Plaintiff submitted his Arbitration Demand to the arbitrator JAMS. The Honorable Franz Miller, Retired was selected as the arbitrator and a two day arbitration hearing was set for January 11-12, 2024. The parties engaged in extensive written discovery and took the depositions of the Plaintiff and a Defendant PMQ witness. Defendant filed a Motion for Summary Disposition, which was fully briefed and set for hearing on February 9, 2024. The parties settled the matter on February 1, 2024, subject to court approval. (Barnes

Decl. ¶17).

Once the Motion for Summary Disposition was fully briefed, the parties engaged in direct negotiations and due to the limited individual and representative PAGA penalties compared to the extensive litigation, the parties agreed to negotiate an individual[3] and representative PAGA settlement, and if/when a settlement was reached, the parties would then separately and thereafter try to agree on a fair value for the attorney fees and costs. As a result of settlement discussion and arm's-length negotiations, the parties agreed on a settlement of the PAGA case for the aggrieved employees for $60,000. Thereafter, the parties separately negotiated and reached an agreement on the Plaintiff's attorney's fees and costs for $150,000. (Barnes Decl. ¶18).

For the purposes of this PAGA-only Settlement, Harp's PAGA Notice and Initial Complaint shall be collectively referred to herein as the "Complaints" or "Actions."

The Settling Parties have now agreed to avoid further litigation and to settle and resolve all existing and potential disputes, actions, lawsuits, charges and claims that the aggrieved employees have or may have against Defendant that are asserted in the Complaints and any claims under PAGA that are asserted in the Complaints based on the facts alleged therein, to the fullest extent permitted by law and without any admission of liability or wrongdoing by either party. The Named Plaintiff 's Counsel has concluded that the Settlement reflected herein is fair, reasonable, and in the best interests of the aggrieved employees and respectfully request that the Settlement be approved by the Court.

III.

SUMMARY OF SETTLEMENT

A. Aggrieved Employees

The Settlement covers the following aggrieved employees:

All persons employed by Defendant in the State of California as salaried exempt inside/outside Sales Managers and Sales Directors from March 19, 2020 through the date of approval or March 31, 2024, whichever is earlier.

[3] The parties agreed to an settlement of Plaintiff Harp's individual labor code claims which were subject of the arbitration for $10,000.

Based on documents and other informal discovery produced by Defendant, Plaintiff understood there to be approximately 461 aggrieved employees who worked 27,759 pay periods. (Barnes Decl. ¶19).

B. <u>PAGA Settlement Fund</u>

Defendant will pay the total amount of $60,000 for the PAGA Settlement. Each settlement payment by the Settlement Administrator shall be accompanied by a letter explaining why the check is being sent, substantially in the form attached as "**Exhibit A** ("Notice") to the Settlement Agreement. Defendant will also pay a separate $150,000 for the **Attorney's Fees and Cost Settlement** in full and final satisfaction of Plaintiff's attorney's fees and costs as a result of this litigation, subject to approval by the Court.

The Net PAGA value shall be calculated by deducting the Service Award to the Plaintiff and the Settlement Administration Costs Payment from the Settlement Fund. The Net PAGA Settlement Fund value is estimated to be approximately $50,000.

The remaining seventy five (75%) of the PAGA Penalties Amount shall be distributed to the LWDA ("LWDA Payment") and twenty five percent (25%) of the PAGA Penalties Amount shall be distributed to the aggrieved employees on a *pro rata* basis, based on the aggrieved employees' respective Settlement Pay Periods during the Settlement Period.

Pursuant to the Settlement Agreement, the $60,000 PAGA settlement is allocated as follows (Barnes Decl. ¶21):

Claims Administration:	$5,000
Service Award to Plaintiff:	$5,000
Net PAGA Settlement Fund:	*$50,000* *($37,500 to the LWDA;* *$12,500 to remain in the* *Net Settlement)*
Net Settlement Fund to Aggrieved Employees:	$12,500

This results in an average payment amount of approximately $27.11 and the highest settlement payment will be approximately $41.09 to aggrieved employees. (Barnes Decl. ¶22).

Plaintiff's Counsel currently has a lodestar to date of $250,828.50 to date (not including any work after March 18, 2024) and costs $3,490, respectively, but is only seeking the amount of $150,000. The Attorney's fees and costs shall be separately paid by Defendant from the PAGA Settlement. (Barnes Decl. ¶30).

C. Release

The release is as follows and only release those claims set forth in the LWDA letter and the operative complaint:

Upon the Effective Date, Plaintiff, the State of California, and all Employees, fully release and discharge Defendant, and each of their officers, directors, employees, agents, shareholders, parents, affiliates, subsidiaries, insurers, representatives, successors, assigns, and attorneys ("Releasees") from any and all claims, rights, or causes of action for civil penalties, attorneys' fees, and costs under California Labor Code Sections 2698, *et seq*. predicated on the alleged California Labor Code violations (including California Labor Code §§ 226, 1194, and 2751) asserted in the Complaint ("Released Claims"). The Released Claims include all claims for penalties, attorneys' fees, litigation costs, interest, and any relief available under PAGA that Plaintiff alleged in the Complaint based on the claims and factual allegations alleged in the Complaint. The period of this Release shall be for the PAGA Recovery Period. The *res judicata* effect of the Judgment will be the same as that of the Release. This waiver and release will be final and binding on the Effective Date and will have every preclusive effect permitted by law.

IV.

LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT

The PAGA statute allows an "aggrieved employee" to bring a civil action on behalf of himself or himself and on behalf of other aggrieved employees and the State to recover civil penalties which are specifically established by the PAGA with respect to provisions of the California Labor Code which does not otherwise provide for civil penalties (Labor Code § 2699(g)), and also, civil penalties which, outside of PAGA, only the LWDA can assess upon and collect from an employer (Labor Code § 2699(a)). Before bringing a civil action under

PAGA, an employee must comply with California Labor Code § 2699.3. *See* Labor Code § 2699(a).

The settlement of a PAGA claim requires court approval. *See* Labor Code § 2699(1)(2) ("The superior court shall review and approve any settlement of any civil action pursuant to this part"). However, "[a] PAGA claim asserted on a non-class representative basis . . . is not considered a class action but a law enforcement action" and therefore one does not have to meet the requirements of a class action. Casida v. Sears Holding Corp., 2012 WL 253217, at *3 (E.D. Cal. Jan. 26, 2012); Thomas v. Aetna Health of Cal., Inc., 2011 WL 2173715, at * 11 (E.D. Cal. June 2, 2011); Arias v. Superior Court, 46 Cal.4th 969, 980-88 (affirming lower court's holding that "plaintiff need not satisfy class action requirements" to assert a PAGA claim); Pedroza v. PetSmart, Inc., 2013 WL 1490667, at *15 (C.D. Cal. Jan. 28, 2013). As such, a court's review of a PAGA settlement involves analysis of several unique features that render the approval process distinct from approval of a class action settlement. A court reviewing a PAGA settlement need only "ensur[e] that a negotiated resolution is fair to those affected." Williams v. Superior Court, 3 Cal.5th 531, 549 (2017).

In a PAGA case, the Court's focus is not the monetary amount which aggrieved employees or the State are to receive, but instead, whether the total settlement amount achieves the PAGA's objectives. The purpose of the 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." *See* Ochoa-Hernandez v. Cjaders Foods, Inc., 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010) (citing Arias, *supra,* 46 Cal.4th at 986). Penalties recovered under the PAGA are, in part, to "be distributed to the [LWDA] for enforcement of labor laws . . . and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the finding to the agency for those purposes." *See* Labor Code §2699(j). The recovery of penalties on behalf of the state, by way of a PAGA claim, is essentially a law enforcement action. *See* Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct., 46 Cal.4th 993, 1003 (2009) (stating that the PAGA is mechanism for "an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies"). **Here, as a result of this Action, Defendant has cured the labor code issues at hand which is the real objective of this PAGA statute.** (Barnes Decl. ¶28).

V.

THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE

This Settlement resulted from a hard-fought but efficient litigation. The Settlement fulfills the purposes of the PAGA, and by any measure, is fair, adequate and reasonable.

A. The Settlement Is Presumed Fair

A representative settlement is presumed fair where: (1) the settlement is reached through arm's length bargaining, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) [and] counsel is experienced in similar litigation. (*See* Dunk v. Ford Motor Company (1996) 48 Cal. App. 4th 1794, 1802.)[4] A court may also consider relevant factors such as the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [and] the presence of a governmental participant….(*See* Officers of Justice v. Civil Service Com'n of City and County of San Francisco (9th Cir. 1995) 688 F.2d 615, 624.) "This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties." (Dunk, *supra*, 48 Cal. App. 4th at 1801.) Moreover, the trial court has broad powers to determine whether a proposed [representative action] settlement is fair. (*See* Mallick v. Superior Court (1979) 89 Cal. App. 3d 434.)

B. The Settlement Is The Product of Arm's Length Negotiations

The stage of the proceedings and the amount of discovery completed is an important factor for courts to consider in determining whether a settlement is fair, adequate and reasonable.

[4] Although Dunk concerned a class action settlement, and class action settlements have stricter requirements for approval than PAGA settlements, including giving notice to the class and the right to opt out, Plaintiffs reference class action cases here because of the dearth of PAGA

(*See* In re Warner Communications Sec. Lit. (S.D.N.Y. 1985) 618 F.Supp. 735, 741, *aff'd*., 198 F.2d 35 (2d Cir. 1986); Ellis v. Naval Air Rework Facility (N.D. Cal. 1980) 87 F.R.D. 15, 18, *aff'd.,* 661 F.2d 939 (9th Cir. 1981).)

In this action, the Parties have engaged in extensive informal and formal discovery. Plaintiff submitted his Arbitration Demand to JAMS and the Honorable Franz Miller, Retired, was selected as the arbitrator. A two day arbitration hearing was set for March 5-8, 2024. Extensive written discovery was completed and depositions were also taken for both Defendant's Person Most Qualified and the named Plaintiff. Defendant filed a Motion for Summary Disposition, which was fully briefed and set for hearing on February 9, 2024. (Barnes Decl. ¶17).

Once the Motion for Summary Disposition was fully briefed, the parties engaged in direct negotiations and due to the limited individual and representative PAGA penalties compared to the extensive litigation. The parties agreed to negotiate an individual and representative PAGA settlement, and if/when a settlement was reached, the parties would then separately and thereafter try to agree on a fair value for the attorney fees and costs. As a result of settlement discussion and arm's-length negotiations, the parties agreed on a settlement of the PAGA case, for the aggrieved employees for $60,000. Thereafter, the parties separately negotiated and reached an agreement on the Plaintiff's attorney's fees and costs for $150,000. (Barnes Decl. ¶18).

Given the exposure of the claims, potential defenses and the discretionary nature of PAGA penalties, Plaintiff believe that this is a very good settlement of the PAGA claims, which will not affect any aggrieved employee's right to pursue underlying Labor Code violations against Defendant if he or she chooses to do so.

C. Plaintiff's Counsel Are Experienced In Similar Litigation And Endorse The Settlement

The view of attorneys in representative litigation is "entitled to significant weight." (Fisher Bros. v. Cambridge-Lee Industries, Inc. (E.D. Pa. 1985) 630 F.Supp. 482, 488; *see also*

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appellate decisions addressing settlement standards, and because if Plaintiff meet the class action requirements, then they certainly meet the less stringent PAGA standards.

Ellis, *supra*, 87 F.R.D. at 18.) Plaintiff's counsel have significant experience in complex representative and class action wage and hour litigation. (Barnes Decl. ¶s 4-8). As such, they are experienced and qualified to evaluate the claims and defenses in this case, and unequivocally support the settlement reached herein.

D. The Strength of Plaintiff's Case, The Amount Offered In Settlement, and The Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement

Where both sides face significant uncertainty, the attendant risks favor settlement. (Hanlon v. Chrysler Comm. (9th Cir. 1998) 150 F.3d 1011, 1026. Moreover, "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." (In re Mega Financial Corp. Securities Litigation (9th Cir. 2000) 213 F.3d 454, 458.)

In this case, Plaintiff seeks PAGA penalties and wages. The PAGA claims that are at issue in this settlement concerns Defendant's failure to (1) timely furnish accurate wage statements; and (2) provide commission agreements in violation of Labor Code section 2751.

Based upon the alleged Labor Code violations, Plaintiff believes the total realistic exposure for the PAGA penalties is $219,150 which is a penalty of $15 for each pay period in the PAGA Recovery Period. Based on a settlement value of $60,000, this amounts to approximately 27% of the realistic penalty exposure. Plaintiff believes this to be a good result considering the discretionary nature of such PAGA awards, the fact that these are technical violations and since Defendant has cured the labor code violations at issue. (Barnes Decl. ¶ 27). *See* Amaral v. Cintas Corp. No. 2, 163 Cal.App.4th 1157, 1208-1209 (2008) ("Until the employer has been 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") (Barnes Decl. ¶ 27).

Plaintiff believes this to be a good result considering the discretionary nature of such awards. Labor Code § 2699(e)(2) also gives a trial court broad discretion to reduce PAGA penalties: "[A] court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Case law supports a trial court's discretion in downgrading penalties based on these factors. *See* Thurman v. Bayshore Transit Management, Inc., 203 Cal.App.4th 1112, 1135-1136 (2012) This discretion warrants a heavy discount, in that even if Plaintiff is successful on his claims, and prove the violations, there is a high likelihood that the Court would not grant the full value of the PAGA penalties.

Likewise, the purpose of the PAGA is to "achieve maximum compliance with [California's] labor laws." *See* Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal.4th 348, 379 (2014). Defendants' payment of penalties, and implementation of programmatic relief, achieve that purpose. **Here, as a result of this Action, Defendant has cured the labor code issues at hand which is the real objective of this PAGA statute.** (Barnes Decl. ¶ 28).

VI.

NOTICE OF THE SETTLEMENT IS NOT REQUIRED

"[A] PAGA action is a statutory action for penalties brought as a proxy for the State," as such, "there is no need to protect absent employees' due process rights[.]" Williams v. Superior Court, 3 Cal.5th 531, 546 (2017). "Unnamed employees need not be given notice of the PAGA claim, no do they have the ability to opt-out of the representative PAGA claim." Ochoa-Hernandez v. Cjaders Foods, Inc., 2010 WL 1340777, at *5 (N.D. Cal. Apr. 2, 2010). A representative PAGA action need not satisfy class action requirements, and no due process concern arises from the fact that there are "nonparty aggrieved employees who are not given notice if, and an opportunity to be heard in, a representative action that is not brought a class action." *Arias v. Sup. Ct.,* 46 Cal.4th 969, 984 (2009). "PAGA does not make other potentially aggrieved employees parties" to the action and no "due process concerns arise under PAGA because absent employees do not own a personal claim for PAGA civil penalties and whatever personal claims the absent employees might have for a relief are not at stake." Williams*, supra,* 3 Cal. 5th at 546-547 (internal references omitted, citing Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct., 46th Cal.4th 993, 1003 (2009) and Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348, 381 (2014).)

Even though Notice is not required, the Settlement Administrator will send a cover letter to the aggrieved employees with their penalty payments explaining the nature of the checks. ("Notice" is attached as **Exhibit A** to the Settlement Agreement). As such, Plaintiff is going above and beyond the requirements of PAGA. Moreover, Plaintiff has served the LWDA with the Settlement Agreement. (Barnes Decl. ¶29; **Exhibit 2** to the Declaration of Kevin T. Barnes).

VII.

PLAINTIFF'S COUNSEL'S FEES ARE SUPPORTED UNDER A LODESTAR ANALYSIS

Pursuant to the PAGA Settlement Agreement, Plaintiff's counsel requests that this Court approve an award of attorneys' fees and costs of $150,000 for the Attorney's Fees and Cost Settlement. The Attorney's fees and costs shall be separately paid by Defendant from the PAGA Settlement. Based on the extensive litigation and attorney's fees over many years and the total number of non-exempt employees encompassed by Plaintiff's allegations, the Parties agreed to only negotiate the PAGA case for the aggrieved employees and, if/when a settlement was reached, the Parties would, then, separately try to agree on a fair value for the attorney's fees and costs. As a result of the parties arms' length negotiations on only the PAGA case for the alleged aggrieved employees, the Parties reached an agreement to resolve Plaintiff's PAGA claims. Thereafter, the Parties separately negotiated and reached an arms' length agreement on the Plaintiff's attorney's fees and costs. (Barnes Decl. ¶ 18).

Pursuant to Labor Code § 2699 subd. (g)(1): "Any employee who prevails in any [PAGA] action shall be entitled to an award of reasonable attorney's fees and costs." Further, under California Code of Civil Procedure § 1021.5, attorneys' fees are recoverable because this PAGA action is "for the benefit" of aggrieved employees and benefits the State of California. *See* Estrada v. FedEx Ground Package System, Inc., 154 Cal.App.4th 1, 16-17 (2007) (acknowledging that monetary recovery obtained on behalf of 209 individual drivers satisfied the "significant benefit," "public interest," and "large class of persons" required under Code of Civil Procedure § 1021.5, regardless of plaintiff's personal motivation). The payment to the LWDA will also benefit the State of California "for [the] education of employers and employees about their rights and responsibilities under [the Labor Code]." Cal. Labor Code § 2699(i).

Plaintiff's Counsel has a total lodestar of $250,828.50, NOT including the hours that counsel expect to spend in the future to close this case. **(**see Barnes Decl., ¶ 30 and **Exhibit 3** – Timesheet; Katri Decl., **Exhibit 1** - Timesheet). **Plaintiff's Counsel has total costs of $3,490** (see Barnes Decl., ¶ 35 and Itemization of Costs of the Law Office of Kevin T. Barnes attached as **Exhibit 6**). These costs were a result of investigation, research, litigation and other related matters to the prosecution of this case. **However**, **Plaintiff's counsel is only seeking a separate fees and costs award in the amount of $150,000, even though my firm's lodestar and costs are $254,318.50.** All counsel and the parties of this litigation believe that the award of attorneys' fees is fair and reasonable based on Plaintiff's counsels work and experience.

VIII.

CONCLUSION

Plaintiff and Plaintiff's Counsel submit that the proposed Settlement as documented in the Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff respectfully requests that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Settlement Agreement.

Dated: March 21, 2024 LAW OFFICES OF KEVIN T. BARNES

By: ______________________
Kevin T. Barnes, Esq.
Attorneys for Plaintiffs