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Attorneys for Plaintiffs, Plaintiffs Laura Brewer and Travis Pons
on behalf of themselves and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

LAURA BREWER AND TRAVIS PONS on behalf of themselves and all others similarly situated, Plaintiffs, vs. EL ENCANTO, INC., a Delaware corporation and DOES 1 through 50, inclusive, Defendants.	**Case No. 22CV00660** [Assigned for all purposes to the Colleen K. Stern, Dept. 5] **PLAINTIFFS' NOTICE OF UNOPPOSED MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT** (Declaration of Anthony Draper and [Proposed] Order filed concurrently herewith) Date: March 24, 2025 Time: 10:00 a.m. Dept.: 5

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TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT at 10:00 a.m. on March 25, 2025 or as soon thereafter as the matter can be heard, in Department 5 of the above entitled Court located at 1100 Anacapia Street, Santa Barbara, CA 93101, before the Honorable Colleen K. Stern, Plaintiffs Laura Brewer and Travis Pons move, unopposed, for entry of an order and judgment approving: (1) the Parties' PAGA Settlement Agreement and all terms therein; (2) the Gross Settlement Amount ("GSA") of Two Hundred Eighty Thousand Dollars ($280,000); (3) appointment of Xpand Legal Consulting, LLC as the Settlement Administrator and approving payment of its fees in the amount of Five Thousand Dollars ($5,000) from the GSA; (4) directing disbursement of the Gross Settlement Amount pursuant to the terms of the Settlement Agreement; (5) directing payment to Plaintiffs' counsel in the amount of Ninety-Eight Thousand Dollars ($98,000), (35% of the GSA) for attorneys' fees and litigation costs in the amount of Fifteen Thousand Three Hundred Twenty Dollars and Thirty Two Cents ($15,320.32), all paid from the GSA; and (6) dismissing this action with prejudice.

This motion will be based on this Notice, the supporting memorandum of points and authorities, the Declaration of Anthony Draper, which includes the PAGA Settlement Agreement as Exhibit 1, the documents and records on file in this matter, and such additional arguments, authorities, and evidence and other matters as may be presented by the Parties hereafter. The Labor Workforce Development Agency has been served with this motion and the Settlement Agreement as set forth in the accompanying proof of service.

Dated: December 27, 2024

JAMES HAWKINS APLC

By Isandra Fernandez
Isandra Fernandez
Anthony Draper
Attorneys for Plaintiffs
Laura Brewer and Travis Pons

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through this unopposed Motion for Approval of PAGA Settlement ("Motion"), Laura Brewer ("Brewer") and Travis Pons ("Pons" and collectively "Plaintiffs"), seek approval of a settlement of the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq*. ("PAGA") claims asserted in this action against Defendant El Encanto, Inc. ("Defendant"). In accordance with California Labor Code § 2699(l), Plaintiffs now ask this Court to review and approve the settlement of Plaintiffs' PAGA claims. This is a settlement ***only*** of the PAGA claims asserted for civil penalties. This settlement is not a class settlement, nor does it release any Aggrieved Employee's claims for direct Labor Code violations (if any).[1]

The PAGA settlement terms are set forth in the accompanying PAGA Settlement Agreement ("Settlement Agreement" or "Settlement"). (See Declaration of Anthony Draper "Draper Decl."; **Exhibit 1** filed concurrently herewith). The Labor Workforce and Development Agency ("LWDA") received notice of this Settlement Agreement, and this Motion as set forth in the accompanying proof of service. A Proposed Order approving the PAGA settlement is submitted herewith.

Plaintiffs respectfully request this Court to approve the PAGA Settlement.

II. STATEMENT OF THE CASE AND THE SETTLEMENT

A. The Parties

Defendant is a resort hotel located in Santa Barbara, California. Brewer was employed by Defendant from on or about October 2018 through February 16, 2021. During her employment, she occupied a non-exempt, hourly position of accounts payable representative. Pons was employed by Defendant from on or about November 2017 through December 2019. During his employment, he occupied a non-exempt, hourly position of bartender. The Aggrieved Employees covered by the Settlement are all non-exempt employees who worked for Defendant in the State of California from

[1] Plaintiffs each have agreed to settle and release all claims known and unknown (including but not limited to their claims for direct Labor Code violations) against Defendant via individual settlement agreements. Plaintiffs shall each receive consideration for their individual releases separate and in addition to the amounts they will receive as Aggrieved Employees pursuant to the Settlement Agreement.

February 15, 2021 through the date the Court grants approval of this Settlement. ("Aggrieved Employees") (Settlement Agreement, ¶¶ 1.6, 1.24.)

B. <u>The Procedural History</u>

On February 17, 2022, Plaintiffs commenced this Action against Defendant by filing a class action Complaint alleging causes of action based on purported Labor Code violations. Plaintiffs' Complaint claims that Defendant: failed to pay all minimum and overtime wages; failed to provide compliant meal and rest periods; failed to reimburse business expenses; failed to issue accurate itemized wage statements; failed to timely pay wages; and engaged in unfair competition. (Draper Decl. ¶ 2.)

On February 14, 2022, Plaintiffs provided timely written notice to the LWDA and to Defendant of Plaintiffs' intent to pursue a Labor Code section 2698 Private Attorney General Act ("PAGA") claim. (Draper Decl. ¶ 3.) On April 21, 2022, Plaintiffs filed a First Amended Complaint ("FAC"), which added to the Complaint a claim for civil penalties pursuant to PAGA based on the same allegations asserted in the Complaint (*Id*.)

Plaintiffs (like the other Aggrieved Employees) signed arbitration agreements with a class action waiver and a representative action waiver and are in the process of filing a request for dismissal of the class action claims. (Draper Decl. ¶ 4.) (Settlement Agreement ¶ 2.4)

C. <u>Plaintiffs' Counsel's Investigation</u>

Counsel for Plaintiffs engaged in informal discovery of Defendant's alleged Labor Code violations, which specifically targeted evaluating the strength and value of the PAGA and class claims in preparation for a resolution of this Action (Draper Decl., ¶ 5.)

Plaintiffs' counsel obtained and reviewed multiple documents, including (i) Plaintiffs' employee files, time and pay records, and wage statements, (ii) relevant policy documents relating to the employment of Plaintiffs and other aggrieved employees, (iii) time-keeping and payroll data for a randomly-selected sample of the Aggrieved Employees; and (iv) relevant statistics sufficient to allow Plaintiffs to assess exposure (i.e., estimated number of total employees, terminated employees, and pay periods from February 15, 2021 through the mediation date). (Draper Decl., ¶ 6.)

Based on the information and documents produced by Defendant, Plaintiffs' counsel was able to (i) determine the total number of distinct individuals falling within the definition of "Aggrieved Employees" for the relevant statutory period, and (ii) construct a damage model that calculated the maximum realistic amount of PAGA penalties that could be levied against Defendant within the PAGA Period. Defendants, however, disputed (and continue to dispute) Plaintiffs' claims and disputed both the existence of and extent of liability as alleged by Plaintiffs. (Draper Decl., ¶ 7.)

Based on Plaintiffs' counsel's experience in litigating many similar "representative" wage and hour claims, the degree of investigation that was conducted and the amount of data that was obtained was sufficient to determine the potential value of the PAGA claims and to evaluate their strength for purposes of settlement (Draper Decl., ¶¶ 8,21-25.)

D. <u>Settlement Negotiations</u>

On January 10, 2024, the Parties participated in an all-day mediation before experienced wage and hour mediator Michael Loeb. At the conclusion of the mediation, the Parties reached an Agreement to settle the PAGA representative claims asserted in the Action. (Draper Decl., ¶ 9.) After further negotiations and multiple exchanges of the proposed settlement agreement, the Parties agreed to the final terms of the agreement as set forth in the PAGA Settlement Agreement that is now before the Court for approval. (Draper Decl., ¶ 10.; Exh. 1.) On December 27, 2024, Plaintiffs submitted the Settlement Agreement, concurrently with the filing of this motion, to the LWDA (Draper Decl., ¶ 11.)

E. <u>The Proposed Settlement</u>

The Settlement Agreement sets forth the terms of the Settlement reached by the Parties, including the following key points:

1. Defendants agree to settle this matter for the payment amount of Two Hundred Eighty Thousand Dollars ($280,000) ("Gross Settlement Amount" "GSA"). (Settlement Agreement, ¶ 3.1.)

2. The total sum available for payment of PAGA penalties shall be calculated by deducting from the GSA: (a) $98,000 (or not more than 35% of the GSA) for the payment of Plaintiffs' counsel's attorney's fees; (b) $15,320.32 for Plaintiffs' counsel's litigation costs; and (c) up to $5,000 for settlement administration costs. The result is a Net Settlement Amount ("NSA") of,

$161,679.68. (Settlement Agreement, ¶¶ 3.3.1.-3.3.2.)

3. Seventy-five percent (75%) of the NSA, or $121,259.76 shall be distributed to the LWDA ("LWDA Payment"), and the remaining twenty-five percent (25%) or $40,419.92 shall be distributed to the Aggrieved Employees ("Employees Payment") on a pro-rata basis, determined by the number of PAGA Pay Periods worked by each individual during the PAGA Period (Settlement Agreement, ¶ 3.3.3.)

4. Effective on the date when Defendant fully funds the entire Gross Settlement Amount, Plaintiffs and Aggrieved Employees will release claims against all Released Parties as follows:

> Any and all claims, known or unknown, for civil penalties under California Labor Code section 2698 *et seq.* (PAGA) that: were asserted in any complaint filed in the Action and/or Plaintiffs' letter(s) to the LWDA (including any subsequently amended complaints or letters); and/or that could have been asserted in any complaint filed in the Action and/or any of Plaintiffs' letter(s) to the LWDA (including any subsequently amended complaints or letters) based on or related to the facts and/or allegations in any complaint filed in the Action and/or Plaintiffs' letter(s) to the LWDA (including any subsequently amended complaints or letters). This release includes, but is not limited to, claims for PAGA civil penalties premised on: California Labor Code sections 201, 201.3, 202, 203, 204, 204.1, 204.11, 205, 205.5, 210, 212, 218.5, 223, 225, 226, 226.7, 246, 510, 512, 551, 552, 558, 1174, 1194, 1194.2, 1197, 1197.1,1197.5, 1198, 1199, 2800 and 2802, and all applicable IWC Wage Orders; minimum wages; overtime, including all claims related to the calculation thereof; pay for all hours worked/compensation due for services; off-the-clock work; calculation of the regular rate of pay; meal periods; rest periods; meal and/or rest period premiums, including all claims related to the calculation thereof; wage statements; timeliness of wages; payment of wages at termination; maintaining accurate and complete records; and business expenses. The release shall run through the date the Superior Court of the State of California, County of Santa Barbara, grants approval of the Settlement.

(Settlement Agreement, ¶ 5.1.)

5. Settlement Administration Costs which are to be paid from the Gross Settlement Amount will not exceed $5,000. Xpand Legal Consulting, LLC, a neutral, third-party, settlement administration company was selected to administer the Settlement (Settlement Agreement, ¶ 1.2.)

6. As detailed herein, Plaintiffs' counsel seeks an award of attorneys' fees not to exceed 35% of the GSA ($98,000) and reasonable litigation costs in the amount of $15,320.32 which is less than that allowed for by the Settlement (which provides that litigation costs shall not exceed $20,000) (Settlement Agreement, ¶ 3.3.1.)

7. For any PAGA Member whose PAGA payment check remains uncashed after 180 days, the Administrator shall transmit the unclaimed funds the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee. (Settlement Agreement, ¶ 4.3.3.)

III. THE PARTIES REQUEST APPROVAL OF THE SETTLEMENT OF THE PAGA CLAIM

The claim before this Court is a representative claim on behalf of the State of California for civil penalties pursuant to the PAGA. The Parties have agreed to settle this PAGA claim in its entirety after informal discovery, the exchange of pre-mediation information, and an arm's length mediations (Draper Decl., ¶¶ 5 -10.) Labor Code § 2699(l) requires that the Court "shall review and approve any settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." Consequently, the Parties respectfully ask the Court to review and approve the settlement of the PAGA claim and the payments to be paid as part of the proposed settlement.

A. The PAGA Settlement Amount is Fair and Reasonable

The proposed settlement plan complies with California Labor Code sections 2699(i) and provides benefits to the State of California and the PAGA Members and is within the range of acceptable settlements. Under the Settlement Agreement, Defendants have agreed to pay a Gross Settlement Amount of $280,000, which includes the Individual PAGA Payments, Plaintiffs' Counsel's Attorneys' Fees and Costs, and Settlement Administration Costs (Settlement Agreement ¶¶ 1.12.) The Settlement Agreement is intended to fully and finally resolve the PAGA claims set forth in the release. (Settlement Agreement ¶ 5.1.) Importantly, this is only a settlement of PAGA claim for civil penalties. It is not a class settlement and does not release the claims for direct Labor Code violations, if any, of the Aggrieved Employees. This settlement does not release any claim that is not a PAGA claim (Settlement Agreement ¶ 5.)

After deducting the Plaintiffs' Counsel's Attorneys' fees and Costs and the Settlement Administration Costs, the remaining Net Settlement Amount is estimated to be $161,679.68. Seventy-five percent (75%) of this amount, or $ 121,259.76 shall be distributed to the LWDA, and the remaining twenty-five percent (25%) or $40,419.92, shall be distributed to the Aggrieved Employees (Settlement Agreement, ¶¶ 3.3.1-3.3.3.)

1. The Settlement is Presumptively Fair

A settlement agreement that is "the product of extensive and hard-fought adversarial negotiations between the Parties" is entitled to a presumption of fairness. (*Wershba v. Apple Computer, Inc.*, (2001) 91 Cal.App.4th 224, 245. Here, the settlement is presumptively fair because: (1) it is the product of non-collusive, arm's-length negotiations that were overseen by an independent mediator knowledgeable in complex labor and employment matters; (2) it was negotiated by counsel with significant experience in similar complex labor and employment matters; and (3) it occurred after counsel for the parties engaged in significant investigation to evaluate the strength and potential value of the PAGA claim, and the risks of litigating these claims through trial. (*Dunk v. Ford Motor Co.*, (1996) 48 Cal. App. 4th 1794, 1802; (Draper Decl., ¶¶ 5,-10-;21-24.)

As discussed herein, after engaging in informal discovery, extensive discussions, and an exchange of information and documents, the Parties participated in a full day mediation to attempt resolution of the lawsuit (Draper Decl., ¶¶ 5-10.) With the assistance of the mediator, the Parties were able to settle this matter given the strengths and weaknesses of the PAGA claims (*Id*.)

Plaintiffs' counsel has extensive experience in representative and class action wage-and-hour litigation and used that experience to achieve favorable results for Plaintiffs, the State of California, and the Aggrieved Employees (Draper Decl. ¶¶ 21-25.) Plaintiffs respectfully submit that the Court should give considerable weight to the competency, experience, and opinion of counsel and the involvement of a neutral mediator in assuring that the settlement was a product of hard-fought, arms-length, negotiations that was entered into without collusion. *Dunk*, 48 Cal. App. 4th at 1802-03; *see Mardirossian & Assocs., Inc. v. Ersoff*, (2007) 153 Cal. App. 4th 257, 272 (relevant factors in determining reasonableness of fees include counsel's skill and experience); *Kirkorian v. Borelli*, (N.D. Cal. 1988) 695 F.Supp. 446, 451. (opinion of experienced counsel is entitled to considerable weight); *Boyd v. Bechtel Corp*., (N.D. Cal. 1979) 485 F. Supp. 610, 616-17, 622 (recommendations of plaintiffs' counsel should be given a presumption of reasonableness); *see also Clark v. Am. Residential Servs. LLC*, (2009) 175 Cal. App. 4th 785, 798 (use of a mediator indicates that the settlement is not the product of collusion); *Satchell v. Fed. Express Corp.*, (N.D. Cal. Apr. 13, 2007) No.: C03-2659 SI, 2007 U.S. Dist. LEXIS 99066, *17 (stating that the "assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive").

2. The Relative Strength of the PAGA Claims and the Range of Possible Outcomes in the Litigation Strongly Favor Approval of the Settlement

The settlement is reasonable in light of the risks and uncertainties associated with the PAGA claims in this case. The relative strength of the PAGA claim brought by Plaintiffs weighs in favor of the Court finding that the Settlement is fair and reasonable, as Defendant maintained numerous defenses to the theories of penalty-liability put forward by Plaintiffs that, if successful, had the potential to eliminate any recovery or significantly reduce any penalties ultimately awarded.

This case addresses alleged violations of employee protections embodied in the California Labor Code– namely, that non-exempt employees: (1) were not paid proper wages earned for all hours they worked including proper minimum and/or overtime compensation; (2) were not permitted to take their full statutorily authorized rest and meal periods or paid one (1) hour of pay at the employees regular rate of compensation for each workday that the meal period and/or rest period that was not properly provided, in violation of Labor Code §§ 226.7 and 512; (3) were not properly/timely paid wages; (4) were not provided accurate itemized wage statements, in violation of Labor Code § 226(a); and (5) were not reimbursed for necessary business expenses, including cell phones.

The PAGA claims are premised on allegations that due to the demands of the work shift, Plaintiffs and Aggrieved Employees were frequently required to perform work "off the clock" during their meal periods and prior to the start of their shift and after clocking out at the end of their shifts. (Draper Decl., ¶ 12.) Plaintiffs also claimed during mediation that Plaintiffs and Aggrieved Employees worked "off-the-clock" because they spent traveling to work in a shuttle from an off-site parking lot. (*Id.*) The PAGA claims for failure to provide compliant rest and meal breaks are likewise also based on allegations that, due to the demands of the shift, Plaintiffs and Aggrieved Employees were unable to take lawful meal and/or rest breaks (*Id.*). The PAGA claims based on Defendant's alleged failure to pay timely wages and provide accurate itemized wage statement are derivative of the failure to pay wage and premium wages claims (*Id*.). The PAGA claims based on failure to reimburse business expenses are based on Defendant's alleged failure to reimburse Plaintiffs and Aggrieved Employees for necessary business expenses, including cell phones. (*Id.*)

Defendant disputes Plaintiffs' claims and contends that it complied with California law, including by prohibiting "off the clock" work, paying for all time worked, providing compliant meal periods, authorizing and permitting compliant rest breaks, providing accurate itemized wage statements, timely paying all wages, and reimbursing all necessary business expenses. (Draper Decl. ¶ 13.) Defendant maintains that non-exempt employees were not entitled to compensation for the time spent traveling in a shuttle to work from an off-site parking lot, and that they had no reason to use their personal cell phones for work. Defendant further denies that any Aggrieved Employee, including Plaintiffs, was "aggrieved" under PAGA. (*Id.*) Defendant additionally maintained that Plaintiffs and the Aggrieved Employees entered into arbitration agreements that required, pursuant to *Viking River Cruises, Inc. v. Moriana*, (2022), 142 S. Ct. 1906 that (1) Plaintiffs and the aggrieved Employees individually arbitrate their individual PAGA claims, and (2) the Court dismiss Plaintiffs' non-individual PAGA claims. Defendant specifically disclaims any liability to Plaintiffs or any of the allegedly Aggrieved Employees or the LWDA for any alleged violation of rights, or for any alleged violation of the California Labor Code or Industrial Welfare Commission Wage Orders. (Draper Decl. ¶ 14.)

Moreover, Defendant maintains that even if the Court did award penalties, the Court could *significantly* reduce the penalties awarded based on the discretionary factors contained in Labor Code §2699(e)(2) ("In action by an aggrieved employee . . . , 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.") (Draper Decl. ¶ 15.) These factors weighed heavily in the analysis of the claims.

Based on these factors and defenses, which had the potential to completely eliminate or significantly reduce Plaintiffs' recovery, the range of realistic "litigation outcomes" on Plaintiffs' PAGA claims was defined by a "maximum possible liability" of approximately $1,300,000 (assuming Plaintiffs could prove the alleged violations occurred, which Defendant denies). This figure attributes the maximum $100 penalty to each of the estimated 13,000 pay periods in scope during the PAGA period. (Draper Decl. ¶ 16.) The figure also assumes that there is a 100% violation rate during the PAGA period, such that every single pay period in question involved at least one Labor Code violation, despite disputes regarding Defendant's liability (*Id.*). From there, Plaintiffs apply the full amount of the default initial penalty provided under PAGA, despite the Court's discretion to reduce the penalty structure and award lower than the default amounts (*Id.*). Defendant does not concede that the default penalty, in whole or in part, is applicable to all of Plaintiffs' alleged claims. (*Id.*)

While Plaintiffs assert multiple theories of recovery, Plaintiffs reasonably believe that "stacking" the potential penalties attendant to each underlying Labor Code violation would not be proper because such penalties are predicated on the same purported underlying conduct. Nor are each of the statutes cited that Plaintiffs allege were violated, independently actionable. Thus, the maximum potential exposure for the singular PAGA claim does not and should not reflect the sum of the potential exposure for each underlying alleged Labor Code violation.

Where a party asserts "one primary right, and but one violation of that right, the complaint states but one cause of action, even though two or more theories of recovery are alleged." *Plotnik v. Meihaus,* (2012) 208 Cal. App. 4th 1590, 1612 "Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." *Id.*; *Renda v. Nevarez*, (2014) 223 Cal. App. 4th 1231, 1236-37 (recognizing "the rule prohibiting double recovery for the same harm."). California federal courts have also recognized this prohibition and noted that plaintiffs cannot "pile one penalty on another for a single substantive wrong." *Smith v. Lux Retail N. Am., Inc.,* (N.D. Cal. June 13, 2013); 2013 WL 2932243, at *3; *Castillo v. ADT, LLC,* (E.D. Cal. Jan. 25, 2017) 2017 WL 363108, at *4 ("penalties cannot be 'stack[ed]' on top of each other").

The estimated valuations attributed to the claims for purposes of settlement, including the range of violation and resulting potential PAGA penalties are as follows, which, again, were not added together in calculating the maximum potential liability due to the unavailability of stacking: (Draper Decl. ¶ 17.):

a. Failure to Pay Wages Due

This claim is premised on allegations: (a) that due to the demands of the work shift and understaffing, Plaintiffs and Aggrieved Employees were frequently required to perform work "off the clock" principally either post work shift and/or during their scheduled meal breaks and (b) that Plaintiffs and Aggrieved Employees were entitled to compensation for time spent traveling to work in a shuttle from an off-site parking lot. Plaintiffs allege that they were frequently required to clock out during meal breaks and continue working and and/or respond to work related calls after they clocked out at the end of their shifts. Plaintiffs allege that Defendant did not compensate Plaintiffs and Aggrieved Employees for the aforementioned "off-the-clock" work. Taking into consideration the nature of the allegations and Defendants' defenses thereto including the inability to establish the violation with respect to all of the Aggrieved Employees and that time spent traveling to work in the shuttles is non-compensable, this claim was valued in the 20% to 10% violation rate and thus between $260,000 and $130,000 in estimated maximum PAGA penalties. (Draper Decl. ¶ 17(a).)

b. Meal Period Claim

The meal period claim is based on allegations that Plaintiffs and Aggrieved Employees were not always provided compliant meal breaks during their work shifts. Plaintiffs allege that due to frequent understaffing, the workload requirements and time constraints imposed by Defendant, they and Aggrieved Employees worked through their meal breaks and/ or had their meal breaks interrupted. Additionally, Plaintiffs and Aggrieved Employees were not provided a second meal period when working in excess of ten hours. Defendant disputes Plaintiffs' allegations and contends that Defendant's meal break policy and practice is compliant. Defendant asserts that neither Plaintiffs nor Aggrieved Employees were prohibited from taking compliant meal periods, and a review of the sample employee data produced revealed a remarkably low meal period violation rate. Defendant further contends that meal break premiums were paid during the PAGA Period for non-compliant meal breaks. Taking into consideration the nature of the claim, Defendant's defenses and issues faced due to *Brinker Rest. Corp. v. Super. Ct.*, (2012) 53 Cal. 4th 1004 ("*Brinker*"), this claim was valued in the 15% to 5% violation rate and thus between $195,000 and $65,000 in estimated maximum PAGA penalties. (Draper Decl. ¶ 17(b).)

c. Rest Period Claim

As with the meal period claim, the rest period violation claim is primarily based on allegations that due to the work pressures and time constraints, Plaintiffs and Aggrieved Employees worked without being able to take a compliant ten (10) minute rest break, or any rest break at all, during their work shifts. Defendant disputes Plaintiffs' allegations and contend that Plaintiff and Aggrieved Employees were allowed to take compliant rest breaks during their work shifts. Defendant also asserts that Plaintiffs lacked any evidence that any individual was not authorized or permitted to take compliant rest periods and noted the unmanageability of such a claim, due to the fact that rest periods are not recorded. Taking into consideration the nature of the claim, Defendant's defenses and issues faced due to *Brinker,* this claim was valued in the range of 10% to 5% violation rate and thus between $130,000 and $65,000 in estimated maximum PAGA penalties. (Draper Decl. ¶ 17(c).)

d. Failure to Timely Pay Wages

This claim is derivative of the underlying claims. Defendant once again asserts that no unpaid wages are owed as Defendant did not fail to pay the correct wages owed, including overtime or minimum wages, nor did they fail to pay premium wages for meal and rest breaks. For purposes of settlement negotiations, said claim was valued at a 10% to 0% violation rate and thus between an estimated maximum $130,000 and $0 in PAGA penalties. (Draper Decl. ¶ 17(d).)

e. Failure to Provide Accurate Itemized Wage Statements

This claim is derivative of the underlying claims based on allegations that Defendants failed to state the correct hours worked, the correct applicable hourly rate and correct total wages earned. Defendant denies that it provided inaccurate wage statements. For purposes of settlement negotiations, said claim was valued at a 5% to 0% violation rate and thus between an estimated maximum $65,000 and $0 in PAGA penalties. (Draper Decl. ¶ 17(e).)

f. Failure to Reimburse Expenses

The claim for business expense reimbursement under Lab. Code §2802 is premised on Plaintiffs' allegation that Defendant failed to reimburse them and similarly situated Aggrieved Employees for the use of their personal mobile phones in the performance of their job duties.

Defendant disputes this claim and contends that Plaintiffs and Aggrieved Employees were not required to use their personal mobile phones in the performance of their job duties. Upon further review and evaluation of the facts and circumstances surrounding this claim and taking into consideration that it would require individualized inquiries into whether and to what extent Aggrieved Employees used their personal phones, this claim was valued between a nominal amount and $0. (Draper Decl. ¶ 17(f).)

The above factors and analysis, including the potential for the PAGA claims to be completely eliminated or significantly reduced, weigh heavily in favor of resolution by way of the compromise set forth in the Settlement. In the view of Plaintiffs' counsel, the benefit conferred by the proposed Settlement is fair, reasonable, and adequate under the circumstances, as it reflects a reasoned compromise which takes into consideration the risks inherent in this case which had the potential to completely eliminate recovery (Draper Decl. ¶ 18.)

3. <u>The Benefits Conferred by the Settlement Favor Approval</u>

The Settlement Agreement provides a monetary benefit that falls well within "the range of an acceptable settlement" under the circumstances. Here, after all deductions are made for administration, attorneys' fees and costs, approximately $161,679.68 will be paid out, of which $121,259.76 (*i.e.,* 75%) will go to the LWDA, and $40,419.92 (*i.e.,* 25%) will go to PAGA Members, as required by Labor Code § 2699(i) (Settlement Agreement, ¶ 3.3.3). Although these calculations will not be made until after approval, a rough estimation of the average pay per Aggrieved Employee is $67.00 .

This result is favorable, as settlements of PAGA claims impacting thousands of individuals have been approved as reasonable for amounts far less than the payment in this case. *Franco v. Ruiz Food Prods*., (E.D. Cal. Nov. 27, 2012) 2012 U.S. Dist. LEXIS 169057, 41-42 ("Defendant has agreed to pay $10,000 as civil penalties pursuant to the PAGA ... Of the $10,000, 75 percent ($7,500) will be paid to the State of California, and the remainder ($2,500) will benefit the class . . . the Court finds that the PAGA payment is set at a reasonable amount, and it shall be approved."); *Garcia v. Gordon Trucking, Inc.*, (E.D. Cal. Oct. 29, 2012) 2012 U.S. Dist. LEXIS 160052, 21-22 ("GTI agrees to allocate $10,000 to Plaintiffs' PAGA claims, and will pay $7,500 to the LWDA, and

$2,500 to participating Class Members on a pro-rata basis. This comports with settlement approval of PAGA awards in other cases. . . therefore, the Court will approve the allocation of the Settlement to Plaintiffs' PAGA claim."); *Schiller v. David's Bridal, Inc.,* (E.D. Cal. June 11, 2012) 2012 U.S. Dist. LEXIS 80776, 40 ("Pursuant to the Settlement Agreement, the Parties have agreed to pay $7,500 to the California Labor and Workforce Development Agency . . . the Court finds that the PAGA Payment is set at a reasonable amount, and recommends that it be approved."); *Gong-Chun v. Aetna Inc.,* (E.D. Cal. July 11, 2012) 2012 U.S. Dist. LEXIS 96828, 45-46 ("Pursuant to the Settlement Agreement, Defendant has agreed to pay $15,000 to the California Labor and Workforce Development Agency . . . the Court finds that the PAGA payment is set at a reasonable amount, and it shall be approved.").[2]

Thus, notwithstanding the existence of issues having the potential to completely eliminate recovery on the PAGA claim, the Settlement Agreement not only achieves a recovery that exceeds PAGA awards routinely approved by the courts, but it also recovers monies for aggrieved employees which they otherwise would not receive.

B. <u>The Settlement Avoids the Risks and Costs of Continued Litigation</u>

Plaintiffs recognize the expense and length of continued proceedings necessary to litigate the matter through trial and any possible appeals and have also considered the uncertainty and risk of the outcome of further litigation, and the difficulties and delays inherent in such litigation based upon the burdens of proof. (Draper Decl., ¶ 19.) Plaintiffs are also aware of the burdens of proof necessary to establish liability, both generally and in response to Defendant's defenses thereto, and the difficulties in establishing Defendant's liability for, and the right to recover, penalties on behalf of Plaintiffs, the State of California, and the other purported Aggrieved Employees (*Id.*).

Additionally, there is a real possibility that Plaintiffs would recover nothing, either for themselves or on behalf of the State of California or other Aggrieved Employees, after years of

[2] The number of aggrieved employees in the instant action falls within the range of the above-cited actions. *Franco,* 2012 U.S. Dist. LEXIS 169057, 14 ("2,055 Class Members were ultimately identified"); *Garcia*, 2012 U.S. Dist. LEXIS 160052, at 12 (class comprised of "approximately 1,869 individuals"); *Schiller*, 2012 U.S. Dist. LEXIS 80776, 16 ("3,327 California Class members were ultimately identified"); *Gong-Chun*, 2012 U.S. Dist. LEXIS 96828, 18 ("2,051 California Class Members were ultimately identified").

costly and labor-intensive litigation. Avoiding these risks and the likelihood of future contentious litigation, which would involve significant costs, favors settlement. (Draper Decl., ¶ 20.)

A crucial factor in evaluating the value of a PAGA-only case is that all PAGA awards are discretionary and can be reduced by the Court.[3] California Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the maximum civil penalty if, based on the facts and circumstances, to do otherwise would result in an award that is "unjust, arbitrary and oppressive or confiscatory." For example, in *Carrington v. Starbucks Corp*., (2018) 30 Cal. App. 5th 504, the Court of Appeal affirmed a judgment after trial that only provided for a PAGA penalty of $5 per pay period. Given this precedent, there is a risk at trial that any PAGA penalties awarded could be significantly less than Plaintiffs' calculation even where Plaintiff prevailed on the PAGA claim.

In other words, were this matter to go to trial, any award granted would be at the discretion of the Court. While Plaintiffs maintain that their PAGA claim has merit, in reaching the settlement, Plaintiffs and their counsel took into account the strengths and weaknesses of each side's position and the uncertainty associated with continued litigation, trial, and/or appeals.

5. **<u>Notice of the Settlement was Provided to the LWDA</u>**

As set forth in the accompanying proof of service, the LWDA was provided notice of this Motion and the Settlement Agreement. The decision of the LWDA to accept the PAGA settlement and not oppose the Motion should be given considerable weight. This is not a situation where the Court needs to be concerned about the rights of absent employees as in a class settlement, as this PAGA-only settlement does not release the individual claims of absent employees, and the LWDA is a government entity that is more than capable of looking out for its own rights.

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[3] Under PAGA, courts have considerable discretion to reduce the penalty award. In *Thurman v. Bayshore Transit Management, Inc*., (2012) 203 Cal.App.4th 1112, 1135-1136, the court found no abuse of discretion when the trial court reduced the penalty by 30 percent based on the facts of the case, ruling that "[t]o do otherwise under the particular facts and circumstances of this case would be unjust, arbitrary, oppressive, and confiscatory." Some trial courts have actually awarded no civil penalties, even when Labor Code violations are established. *See Makabi v. Gedalia*, (2nd Dist. Ct. of App. Mar. 6, 2016) Cal. App. Unpub. 1489, *5-7 (no PAGA penalties were awarded by the Los Angeles County Superior Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, No. 1:07-cv-01314-SAB, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

IV. PLAINTIFFS' COUNSEL IS ENTITLED TO RECOVER REASONABLE FEES AND COSTS

Pursuant to the terms of the Settlement, Plaintiffs' counsel seeks attorneys' fees of $98,000 and reimbursement of litigation costs of not more than $15,320.32, all falling within the bounds authorized by the Settlement Agreement (Settlement Agreement, ¶ 3.3.1.) Plaintiffs' counsel's entitlement to an award of attorneys' fees and costs is warranted on multiple independent grounds. Further, the amount of fees requested falls well within the range of reasonableness under applicable standards. The amount requested constitutes a "percentage of the fund" deemed reasonable in similar wage and hour settlements of this size and approved by California courts This is not only warranted based on the contingency risk Plaintiffs' counsel agreed to incur for the benefit of the State of California and Aggrieved Employees, but also based on the hard fought and beneficial results achieved. Based thereon, Plaintiffs' counsel respectfully requests that the Court enter an order approving the fee and cost amounts requested.

A. Plaintiffs' Counsel is Entitled to Recover Reasonable Fees as a Matter of Right

Plaintiffs' counsel is entitled to recover attorneys' fees under the "common fund" doctrine as a matter of right. As held by the U.S. Supreme Court, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* (1980) 444 U.S. 472, 478.

Courts have long recognized the "common fund" or "common benefit'" doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. *Serrano v. Priest* ("*Serrano III*"), (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Board of Medical Examiners*, (1974) 11 Cal.3d 1*; Glendale City Employees' Ass'n v. City of Glendale,* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California,* (1995) 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert,* (1980) 444 U.S. 472, 478; *Mills v. Electric Auto-Lite Co.,* (1970) 396 U.S. 375, 391-392.

The California Supreme Court has held that, "when a number of persons are entitled in common to a specific fund, and an action brought by a Plaintiff or Plaintiffs for the benefit of all results in the creation or preservation of that fund, such Plaintiff or Plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d 1; *Mills*, 396 U.S. at 391-392 (endorsing the common fund approach in class actions). The percentage-of-the-fund approach appears to be the preferred method of awarding fees in traditional common fund cases, such as this case. Where the settlement amount is a "certain or easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. *Serrano III*, 20 Cal. 3d at 35. In *Glendale City Employees' Association v. City of Glendale,* (1975) 15 Cal.3d 328, 341 fn.19, the California Supreme Court upheld an attorneys' fee award based on a percentage of the common benefit obtained in a lawsuit by a city employees' association for retroactive wages:

> It is not necessary to find this suit a proper class action in order to uphold the portion of the judgment awarding counsel for Plaintiffs' 25 percent of all retroactive salaries and wages received. That award may be sustained under the rule that a litigant who creates a fund in which others enjoy beneficial rights may require those beneficiaries to pay their fair share of the expense of litigation [citations omitted].

Numerous appellate courts have similarly found. *E.g., Knoff v. City & Cty. of San Francisco,* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of attorneys' fees in a representative action as the proper exercise of the court's broad equitable powers); *Rider v. County of San Diego,* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and expenses properly awarded from common benefit composed of illegally imposed sales and use tax); *Parker v. Los Angeles,* (1974) 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners of residential property in an inverse condemnation action).

Thus, as Plaintiffs' counsel has expended a significant amount of time and money to secure a $280,000 settlement fund for the LWDA and Aggrieved Employees, and in doing so, has exclusively borne the risk of loss for such expenditures of time and expenses (as the LWDA elected not to take the case after receiving the PAGA Notice), Plaintiffs' Counsel is entitled to reasonable fees from that fund under applicable precedent.[4]

[4] Plaintiffs' counsel is also entitled to recover attorney's fees and costs as a matter of right under the PAGA statute [Labor Code § 2699(g)(1) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.")], and under C.C.P. § 1021.5, as the instant PAGA action was by definition "for the public benefit" and secured monetary awards for

B. <u>The Fee Amount Requested is Reasonable and Routinely Awarded</u>

In addition to the foregoing, Plaintiffs' counsel's requests attorneys' fees in the amount of $98,000 (or not more than 35% of the $280,000 Gross Settlement Amount). Attorney's fees may be calculated in one of two ways: the percentage method (a percentage of the common fund or settlement value); or the lodestar-multiplier method (reasonable hours multiplied by reasonable hourly rates multiplied by an amount more or less than 1.0 to account for factors such as the risks taken and results achieved.) *Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 489.

The starting point for determining the appropriateness of attorney's fees is to assess the amount of time spent by the attorneys working for the class. *Lealao v. Beneficial California, Inc.*, (2000) 82 Cal.App.4th 19, 24-25. Under this approach, this Court can assess the reasonableness of the requested fees by comparing it to the amount of work performed. It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace. *Chavez v. Netflix, Inc.*, (2008)162 Cal.App.4th 43, 65.

Taking into account the contingency risk Plaintiffs' Counsel agreed to incur for the benefit of the State of California (which elected not to take the case after receiving the Notice) and the valuable results achieved – facts which justify the requested fee – Plaintiffs' Counsel's requested fee is reasonable under all applicable standards.

C. <u>The Fee Amount Is Reasonable Under the "Percentage of the Fund" Method</u>

The amount of fees requested by Plaintiffs' counsel – not more than 35% of the Gross Settlement Amount – is reasonable based on standards applicable to the "percentage of the fund" method. "When assessing whether the percentage requested is reasonable, courts look to factors such

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approximately 333 aggrieved employees. *See e.g. Estrada v. FedEx Ground Package System, Inc.*, (2007) 154 Cal. App. 4th 1, 16-17 (2007) ("Estrada's personal motivation does not diminish the fact that he pursued this public interest class action not only for himself but on behalf of a class comprised of FedEx's past and present drivers and ultimately obtained awards for 209 drivers. [] No more is required to satisfy the 'significant benefit,' 'public interest,' and 'large class of persons' requirements of Code of Civil Procedure section 1021.5.").

as: (a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases." *Vasquez v. Coast Valley Roofing, Inc.*, (E.D. Cal. 2010) 266 F.R.D. 482, 492.

First, the results achieved are significant, as Defendant has agreed to pay $280,000 under the Settlement Agreement. Second, this is a very favorable recovery given the risk of success in obtaining any recoverable penalties. (Draper Decl., ¶¶ 19-20.) As explained above, Defendant maintained defenses to Plaintiffs' PAGA claims that very well could have resulted in a net-zero recovery at trial. Third, Plaintiffs' counsel' experience in complex wage and hour and PAGA action, skill and quality of work performed resulted in the settlement of this Action. (Draper Decl., ¶¶ 21-24.)

Fourth, notwithstanding this risk of loss, Plaintiffs' counsel undertook representation of the instant PAGA claim for the benefit of the State of California on a contingency basis (Draper Decl., ¶ 28.) This not only required Plaintiffs' Counsel to personally assume the risk of nonpayment in securing the substantial financial benefit the State of California stands to receive, but constitutes a "loan" on Plaintiffs' counsel's services – both of which are factors warranting fee enhancement under applicable California Supreme Court authority, which Plaintiffs' counsel is <u>not</u> seeking:

> One of the most common fee enhancers . . . is for contingency risk. We reaffirmed the propriety of a contingency risk enhancement in Ketchum: "The economic rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' (Posner, Economic Analysis of Law (4th ed. 1992) pp. 534, 567.) 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."

Graham v. DaimlerChrysler Corp., (2004) 34 Cal. 4th 553, 579-580.

Finally, the percentage requested by Plaintiffs' counsel falls within a typical range, particularly in light of the modest settlement size. *See e.g. Martin v. AmeriPride Servs.*, (S.D. Cal. June 9, 2011).("[2011 U.S. Dist. LEXIS 61796, 23 C]ourts may award attorney's fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million.")

Attorneys' fee awards in the amount sought here are well-established by California law and practice. Accordingly, Plaintiffs' counsel's attorneys' fee request is fair and reasonable and is consistent with the awards in California.

D. <u>While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees</u>

Although California supports the common fund doctrine, the lodestar method is also used independently or as a cross check for fee awards. *In re Consumer Privacy Cases* 175 Cal. App. 4th 545, 557 (2009). The "reasonableness" of the fee award requested is supported by the lodestar methodology, whether the Courts treat such methodology as operative or as a cross check.

The lodestar calculation typically proceeds in three steps. First, a trial court must determine a baseline guide or "lodestar" figure based on the time spent and reasonable hourly compensation for each attorney involved in the case. *Serrano v. Priest,* (1977) 20 Cal.3d 25, 48. The court then sets a reasonable hourly fee to apply to the time expended, with reference to the prevailing rates in the geographical area in which the action is pending. *Bihun v. AT&T Information Systems, Inc.,* (1993) 13 Cal. App. 4th 976, 997. Finally, a "multiplier" is selected with reference to the following factors: (1) the novelty and difficulty of issues involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of litigation precluded other employment by the attorneys, and (4) the contingent nature of the fee award owing to the uncertainty of prevailing on the merits and of establishing eligibility for the award. *Serrano, supra,* 20 Cal. App.3d at 49.

Plaintiffs' counsel's lodestar calculation supports the requested attorney's fees. (Draper Decl., ¶ 27.) The amount requested here will fairly compensate Plaintiffs' counsel for their successful vindication of Aggrieved Employees' rights, taking into account the quality, nature and extent of counsel's efforts, the results achieved and the fact that the amount of fees is sought is consonant with legal precedent. Plaintiffs' counsel's diligent and efficient pursuit of this matter positioned Plaintiffs to settle this action successfully, affording redress to all Aggrieved Employees and avoiding the inevitable expense and risk attendant to protracted litigation. (Draper Decl. ¶¶ 19,20.)

Courts have defined reasonable multipliers on a lodestar cross-check to "range from 2 to 4 or even higher." *Wershba v. Apple Computer, Inc*., (2001) 91 Cal. App. 4th 224, 255. Courts have also approved a multiplier over 9. *See Weiss v. Mercedes-Benz of N. Am., Inc*., (D.N.J. 1995) 899 F. Supp. 1297, 1304 (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995). In this case, Plaintiffs' counsel's base lodestar equates to attorney fees of $95,275 (Draper Decl. ¶ 27.) Thus, a lodestar multiplier of 1 is all that is required to reach the agreed upon Plaintiffs' counsel's fee of $98,000.

Additionally, by settling this case prior to trial rather than continuing to litigate issues that remain somewhat unsettled, counsel obtained exceptional results for the Aggrieved Employees at far less expense to the parties, the counsel and to this Court. Accordingly, a positive multiplier of Class Counsels' lodestar is further warranted. "Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not punished, for helping to achieve that goal." *Lealao*, *supra*, 82 Cal. App. 4th at 52.

E. <u>Plaintiffs' Counsel's Request for Costs is Reasonable</u>

The settlement provides for cost reimbursement to Plaintiffs' counsel of reasonable costs t in an amount not to exceed $20,000. (Settlement Agreement, ¶ 3.3.1.) In the course of this litigation, Plaintiffs' counsel incurred costs of $15,320.32 through the conclusion of this matter. (Draper Decl., ¶ Ex. 3). Such costs are appropriate for cost reimbursement in these types of cases. *In re United Energy Corp. Sec. Litig*. (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting Newberg, Attorney Fee Awards, § 2.19 (1987)); *In re GNC Shareholder Litigation* (W.D. Pa. 1987) 668 F. Supp. 450, 452. Further, the costs incurred are less than the $20,000 cost amount set forth in the Settlement Agreement.

The costs incurred by Plaintiffs' counsel in this litigation benefited Plaintiffs, Aggrieved Employees, and the State. In light of the litigation costs that Plaintiffs' counsel was required to incur to prosecute this action, Plaintiffs' counsel's cost request is reasonable and should be granted.

V. <u>CONCLUSION</u>

As shown herein, the Settlement is fair, adequate, and reasonable, as it represents a reasoned and valuable compromise obtained through arms-length negotiations. For all the reasons set forth above, Plaintiffs respectfully request that this Court, as set forth in the Proposed Order approving settlement, do the following:

1. Grant approval of the Settlement Agreement, pursuant to California Labor Code §2699, subpart l and enter judgement on the same;

2. Appoint Xpand Legal. as the Settlement Administrator and approve its administration fees in the amount of $5,000, payable out of the Gross Settlement Amount;

3. Approve the award of attorneys' fees in the amount of $98,000 and costs in the amount of $15,320.32, payable from the Gross Settlement Amount;

4. Direct disbursement of the remaining Net Settlement Amount to the LWDA and all PAGA Members as provided for in the Settlement Agreement; and

5. Dismiss the Action with prejudice.

Respectfully Submitted,

DATED: December 27, 2024

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