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6 Attorneys for Plaintiff
ALEXANDER FLAMER IV

7 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
8 **COUNTY OF LOS ANGELES**

9 ALEXANDER FLAMER IV, an
10 individual,

11 Plaintiff,
12 vs.

13 ADVERTISE PURPLE, a California
corporation; and DOES 1 through 10,
14 inclusive,
15 Defendants.

Case No. 23STCV14693

**DECLARATION OF KEITH CUSTIS IN
SUPPORT OF MOTION FOR APPROVAL OF
PAGA ACTION SETTLEMENT**

Date: March 14, 2024
Time: 9:00 a.m.
Dept. 54
Judge: Hon. Maurice A. Leiter
[Assigned for all purposes]

Reservation ID: 412407530268

Complaint Filed: June 23, 2023
Trial Date: T.B.D

DECLARATION OF KEITH CUSTIS

I, Keith Custis, declare as follows:

1. I am a shareholder at the law firm of Custis Law, P.C. (“Custis Law”), and counsel for plaintiff Alexander Flamer IV. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would competently testify under oath to the facts set forth in this declaration. I submit this declaration in support of Plaintiff’s Motion for Approval of PAGA Action Settlement.

2. Attached hereto as **Exhibit A** is a true and correct copy of the fully-executed PAGA Action Settlement (“Settlement Agreement” or “SA”).

3. Attached hereto as **Exhibit B** is a true and correct copy of the fully-executed Amendment to PAGA Action Settlement (“Amendment”). The parties entered into the Amendment for two reasons. First, the amounts of the penalties set forth in the Settlement Agreement to be paid to the Labor and Workforce Development Agency (“LWDA”) and the Aggrieved Employees were based on the negotiated amounts of Settlement Administration Costs and Litigation Costs, and not the actual amounts sought by this Motion. Because Plaintiff’s Motion seeks Settlement Administration Costs and Litigation Costs that are less than the negotiated amounts, the parties entered into the Amendment to include the amounts that are sought by the Motion, as well as to take into consideration that the Court may award different amounts, which would impact the precise amounts allocated to the LWDA and Aggrieved Employees. Second, the parties included a PAGA Payment Letter in the Amendment for inclusion with the payments to the Aggrieved Employees.

4. In compliance with Labor Code Section 2699(1)(2), I submitted the proposed Settlement, along with the Motion for Approval Of PAGA Action Settlement to the LWDA on February 16, 2024. Attached hereto as **Exhibit C** is a true and correct copy of an email from the LWDA confirming receipt of the proposed Settlement.

A. Brief Overview of the Litigation

5. Advertise Purple is in the business of managing online “affiliate advertising” for businesses.

6. Advertise Purple employed Plaintiff from May 2021 until July 2022.

1 7. On April 3, 2023, Plaintiff's Counsel provided pre-filing written notice to the LWDA
2 and by certified mail to Defendants of the alleged Labor Code violations on behalf of the LWDA,
3 Plaintiff, and similarly situated employees as required by Labor Code § 2699.3(a).

4 8. On June 23, 2023, Plaintiff commenced the Action against Defendants by filing his
5 initial complaint. Plaintiff subsequently filed the operative Second Amended Complaint ("SAC"),
6 which asserts a single cause of action under PAGA seeking civil penalties for alleged violations of
7 the Labor Code sections 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12,
8 1194, 1197, 1197.1, 1198, 2751 and 2802.

9 9. In the Action, Plaintiff seeks civil penalties on behalf of all employees of Defendant
10 Advertise Purple who worked in the positions of account executive or business development
11 representative in the State of California, during the PAGA Period (April 3, 2022 to February 15,
12 2024).

13 **B. Discovery and Investigation**

14 10. I thoroughly investigated and researched the PAGA claim and theories of liability
15 before entering into the proposed Settlement. I initially obtained the following information and
16 documents relevant to PAGA liability: (1) the employee handbook that contained Advertise Purple's
17 written wage and hour policies including its timekeeping policies, meal and rest break policies; and
18 (2) Plaintiff's wage statements including a record of all commission payments.

19 11. During this litigation and in this case, Plaintiff propounded eleven (11) special
20 interrogatories, fifty-two (52) requests for production, nine (9) requests for admissions and general
21 form interrogatories, all of which were responded to by Defendant Advertise Purple.

22 12. During the litigation of the related action and this action, Defendants also produced
23 all written wage and hour policies, the time and pay records for Plaintiff, exemplars of wage
24 statements for all other Aggrieved Employees, and the offer letters/commission agreements sent to
25 Plaintiff and other Aggrieved Employees. Plaintiff's counsel also interviewed four Aggrieved
26 Employees in addition to Plaintiff.

27 13. In preparation for the mediation, Advertise Purple also provided Plaintiff with (1) the
28 total number of former and current employees during the PAGA period; (2) the total number of

separated employees during the PAGA period; and (3) the total number of pay periods during the PAGA period for both the Aggrieved Employees (the “PAGA Data”). Using the PAGA Data, Plaintiff’s Counsel prepared a comprehensive damage analysis for use at mediation, which is described in detail below.

C. The Parties Settled After Mediation

14. On August 7, 2023, the parties and their counsel participated in a full-day mediation with the Hon. Judge Michael Latin (Ret.), a well-regarded mediator with considerable experience mediating employment actions including PAGA representative actions. The mediation was not successful.

15. On November 3, 2023, the Parties and their counsel participated in a second full-day mediation with the Hon. Judge Louis Meisinger (Ret.), a well-respected mediator with considerable experience mediating wage and hour class actions and PAGA representative actions. After a full day of intense negotiations, Judge Meisinger issued a mediator’s proposal to settle the PAGA claim for \$82,500, which the parties accepted on November 9, 2023.

16. Following the parties’ acceptance of the mediator’s proposal, the parties continued to negotiate the specific terms and conditions of the PAGA settlement for approximately six weeks.

17. The parties’ negotiations were at all times adversarial and at arm’s length.

D. Summary of Key Settlement Terms

18. Aggrieved Employees Definition. The term “Aggrieved Employees” means “a person employed by Advertise Purple in California as a Business Development Representative or Account Executive during the PAGA Period.” SA, ¶ 1.4.

19. PAGA Period. The PAGA Period is defined as “period from April 3, 2022 to February 15, 2024.” SA, ¶ 1.20.

20. According to Advertise Purple, there are approximately 50 Aggrieved Employees. SA, ¶ 4.1.

21. Monetary Terms. Defendants have agreed to pay a Gross Settlement Amount of \$82,500 (“GSA”) to settle the action. SA, ¶¶ 1.11, 3.1. After deducting amounts for Plaintiff’s Service Payment, Attorneys’ Fees and Costs, and Settlement Administration Costs, the Settlement

provides that the remaining Net Settlement Amount (“NSA”) will be distributed pursuant to Labor Code § 2699(i) to the LWDA and the Aggrieved Employees as follows: 75% to the LWDA and 25% to Aggrieved Employees. SA, ¶ 3.2; *see also* ¶ 3.2.4. The Settlement is non-reversionary. SA, ¶ 3.1.

22. The principal monetary terms of the Settlement, and the amounts sought by this Motion, respectively, are as follows:

	Negotiated Settlement Amounts	Amounts Sought By Motion
Maximum Settlement Amount:	\$82,500.00	\$82,500.00
Less PAGA Counsel’s Attorneys’ Fees	-\$27,497.25	-\$27,497.25
Less PAGA Counsel’s Litigation Costs	-\$8,000.00	-\$7,886.88
Less Plaintiff’s Service Award	-\$1,000.00	-\$1,000.00
<u>Less Settlement Administration Costs</u>	-\$4,000.00	-\$3,995.00

23. Assuming the Court grants the relief requested by the Motion, the NSA will be \$42,120.87. Seventy-five percent (75%) of the NSA—or \$31,590.65—will be distributed to the LWDA as required by the PAGA. SA, ¶ 3.2.4. The remaining twenty-five percent (25%)—or \$10,530.22—of will be distributed on a pro-rata basis to the Aggrieved Employees. *Id.* The average net payment of civil penalties to Aggrieved Employees will be \$210.60 (\$10,530.22/50 employees).

24. Individual PAGA Payments. Individual PAGA Payments will be calculated and paid from the NSA based on the number of pay periods an Aggrieved Employee worked during the PAGA Period. SA, ¶ 3.2.4.1. To calculate Individual PAGA Payments, the Administrator will calculate the total number of Pay Periods worked by each Aggrieved Employee during the PAGA Period and the aggregate number of Pay Periods worked by all Aggrieved Employees during the PAGA Period. To determine each Aggrieved Employee’s Individual PAGA Payment, the Administrator will use the following formula: The Aggrieved Employee Portion of the NSA will be divided by the aggregate number of Pay Periods, resulting in the “pay period value.” Each Aggrieved Employee’s Individual PAGA Payment will be calculated by multiplying each individual Aggrieved Employee’s total number of Pay Periods by the pay period value. *Id.*

25. Tax Treatment. For tax reporting purposes, each settlement payment will be deemed to be 100% penalties that will not be subject to deductions and withholdings. Because no claim forms are required, settlement checks will be mailed to all Aggrieved Employees.

1 26. Settlement Administration. The Settlement provides that Ilym Group, Inc. (“Ilym”)
2 will serve as the Settlement Administrator. SA, ¶ 7.1. Ilym is a reputable administrator that has
3 successfully administered thousands of class and PAGA action settlements. Declaration of Lisa
4 Mullins ¶¶ 2-3; *see also id.* Ex. A (Ilym resume). Ilym will administer the Settlement for the capped
5 costs of \$3,995.00. *Id.*, Ex. C.

6 27. If the Settlement is approved, Advertise Purple will pay the GSA and provide the
7 Aggrieved Employees List to Ilym, respectively, within 14 and 15 days after the Effective Date. SA,
8 ¶¶ 4.2, 4.3. Ilym, in turn, will make all payments required by the Settlement including the payments
9 to the LWDA and all Aggrieved Employees within 28 days after the Effective Date. SA, ¶¶ 4.3, 4.3.

10 28. Treatment of Uncashed Settlement Checks. Settlement checks will be negotiable for
11 180 days. If a check is returned to the Administrator as undeliverable during the 180-day period, the
12 Settlement Administrator shall take all reasonable efforts to identify the Aggrieved Employee’s
13 correct address, including the performance of a “skip-trace,” and to send another check to the
14 Aggrieved Employee at his or her updated address. SA, ¶ 4.4.2. For any Aggrieved Employee whose
15 Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator
16 shall transmit the funds represented by such checks to the California Controller’s Unclaimed Property
17 Fund in the name of the Aggrieved Employee. SA, ¶ 4.4.3; *see also* Civ. Proc. Code § 1500, *et seq.*

18 **E. Plaintiff’s Counsel Experience**

19 29. Custis Law, P.C. has ample experience litigating wage and hour class actions and
20 PAGA representative actions.

21 30. I have more than 26 years of litigation experience representing clients in complex
22 litigation in state and federal courts. I have litigated complex class actions since 2002. Since 2014, I
23 have focused on employment litigation and consumer and wage and hour class actions.

24 31. I am a 1997 graduate of Boston College Law School, where I graduated magna cum
25 laude, served as executive editor of the Boston College Law Review, and was admitted into the Order
26 of the Coif. During law school, I worked for the Consumer Protection Division of the Office of the
27 Massachusetts Attorney General.

28 32. Following law school, I clerked for the Honorable Mark L. Wolf of the United States

1 District Court for the District of Massachusetts.

2 33. I was admitted to the Massachusetts Bar in December 1997 and the California Bar in
3 February 2002.

4 34. In 1998, I began working as an associate attorney at the Boston-based law firm of
5 Choate, Hall & Stewart LLP. As a member of Choate's Complex Financial Litigation Practice Group,
6 my practice focused on insurance coverage claims and other complex business litigation.

7 35. In 2002, after a move to California, I began working at Stroock, Stroock & Lavan
8 LLP at its Los Angeles office. While at Stroock, I was primarily staffed on consumer class actions
9 venued in California state and federal courts. During my employment at Stroock, I played a
10 significant role in the class actions that I was staffed on, as I was often the only associate staffed on
11 such cases. In particular, I received a wide-array of class action experience performing the following
12 types of tasks: (a) drafting demurrers, motions to strike and/or dismiss; (b) drafting and responding
13 to written discovery; (c) drafting and opposing discovery-related motions; (d) arguing discovery-
14 related motions; (e) drafting oppositions to motions for class certification; (f) conducting exposure
15 analyses to assess the strengths and weaknesses of asserted claims, the likelihood of prevailing at
16 class certification and potential damages resulting from such claims; (g) drafting mediation briefs;
17 (h) attending mediations, (i) deposing named plaintiffs and putative class members; (j) defending the
18 depositions of corporate witnesses; and (k) drafting appellate briefs. In short, I played an integral role
19 in all aspects of litigation from the inception of a matter through and beyond class certification.

20 36. In December 2012, after I had resigned from Stroock, I accepted a position with an
21 employment law firm based in Long Beach, California, where I worked on plaintiffs-side
22 employment litigation and wage and hour class actions.

23 37. In March 2014, I opened Custis Law Office, the predecessor to Custis Law, P.C.
24 During that time, Custis Law Office focused on business and employment litigation.

25 38. In April 2014, I also began working as an Of Counsel with the plaintiff's side class
26 action law firm of Ahdoot & Wolfson, P.C. Ahdoot & Wolfson is a nationally recognized law firm
27 that specializes in complex and class action litigation, with a focus on privacy rights, consumer fraud,
28 anti-competitive business practices, employee rights, defective products, civil rights, and taxpayer

1 rights and unfair practices by municipalities.

2 39. While working with Ahdoot & Wolfson, my practice focused on representing the
3 interests of plaintiffs in consumer class actions in the areas of consumer fraud, false and misleading
4 labeling of food products, and privacy. As Of Counsel to Ahdoot & Wolfson, I had principal day-to-
5 day responsibility for numerous consumer class actions and contributed significantly to other
6 consumer class actions. The following examples of such class actions are either ongoing or have
7 been successfully resolved, and have or will confer millions of dollars worth of benefits to
8 consumers, as well as injunctive relief:

- 9 ○ *McKnight v. Uber Technologies, Inc.*, No. 14-CV-05615-JST (N.D. Cal.) (final
10 approval of a \$32.5 million settlement granted).
- 11 ○ *DiFrancesco, et al. v. Utz Quality Foods, Inc.*, Case No. 1:14-CV-14744-DPW
12 (D. Mass.) (\$1.25 million settlement finally approved).
- 13 ○ *In re Hain Celestial Seasonings Prods. Consumer Litig.*, 13-CV-01757-AG-AN
14 (C.D. Cal.) (appointed Class Counsel).
- 15 ○ *Remijas, et al. v. Neiman Marcus Group, LLC*, Case No. 14-cv-1735 (N.D. Ill.)
16 (final approval of a \$1.6 million settlement granted).

17 40. In 2017, I transitioned from my consumer class action practice at Ahdoot & Wolfson,
18 P.C. to litigating single plaintiff employment cases and wage and hour class actions from the
19 plaintiff's side as the principal of Custis Law Office.

20 41. In 2018, I opened Custis Law, P.C. to exclusively represent plaintiffs in single
21 plaintiff employment cases, and class and PAGA representative actions.

22 42. In the past three years, I have represented over eighty clients in single-plaintiff
23 employment cases, many of which included a wage-and-hour component. In the past few years, I
24 have also successfully resolved or am currently litigating the following wage and hour class and/or
25 PAGA representative actions:

- 26 ○ *Mitchell, et al. v. The Madera Group, LLC, et al.*, LASC Case No. 20STCV24075
27 (approval of \$2,000,000 settlement in a wage-and-hour class and PAGA action
28 granted on October 27, 2022).

- *Harris v. LDI Trucking, Inc., et al.*, LASC Case No. 19STCV04890 (approval of an \$1,500,000 settlement in a wage-and-hour class and PAGA action granted on August 17, 2022).
- *Bautista v. FM Restaurants HQ, LLC, et al.*, Orange County Superior Court Case No. 30-2022-01253704-CU-OE-CJC (approval of an \$850,000 settlement in a PAGA action granted on July 11, 2022).
- *Maldonado v. Wingman Partners, Inc., et al.*, LASC Case No. 19STCV09210 (final approval of \$500,000 wage-and-hour class action settlement granted on July 10, 2020).
- *Morales v. Wag Labs, Inc., et al.*, LASC Case No. 19STCV04890 (approval of an \$850,000 settlement in a PAGA action granted on March 10, 2020).
- *Coutcher v. Harman Fitness, et al.*, LASC Case No. 22STCV18360 (pending wage-and-hour class action).
- *Coutcher v. Canoga Park Fitness, et al.*, LASC Case No. 22STCV18386 (pending wage-and-hour class action).
- *Cheever v. Tuesday Morning, Inc.*, LASC Case No. 21STCV39238 (pending wage-and-hour class action; representing plaintiffs and putative class of over 1,000 employees).
- *Jackson v. Quantum Behavioral Solutions, Inc.*, LASC Case No. 21STCV12389 (pending wage-and-hour class action; representing plaintiff and putative class of over 580 employees).

43. I am an active member of the California Employment Lawyers Association (CELA), the Labor and Employment Section of the Los Angeles County Bar Association, the Labor and Employment Section of the California Lawyers Association, and the Consumer Attorneys Association of Los Angeles (CAALA).

F. The Settlement Is Fair, Adequate And Reasonable

44. The Agreement Was Reached After Extensive Arms-Length Negotiations. As noted above, on November 3, 2023, the Parties participated in a full-day mediation with the Hon. Judge

1 Louis Meisinger (Ret.), a well-respected mediator with considerable experience mediating wage and
2 hour class actions and PAGA representative actions. After a full day of intense negotiations, Judge
3 Meisinger issued a mediator's proposal to settle the case for \$82,500, which the parties later accepted.
4 The negotiations were at all times adversarial and at arm's length.

5 45. Strength of Plaintiff's Case. Although Plaintiff maintains that his claims are
6 meritorious, Plaintiff acknowledges there are substantial risks and uncertainties in trying the Action
7 on the merits. As detailed below in Paragraphs 52-72, Advertise Purple could present multiple
8 defenses to Plaintiff's claims. Thus, while Plaintiff was prepared to litigate his claims through trial,
9 success was far from certain.

10 46. The Risk, Expense, Complexity, and Likely Duration of Further Litigation. If the case
11 had not settled, and continued to be litigated, Plaintiff anticipates that the parties would spend
12 hundreds of hours preparing for a trial. Both parties would engage in extensive, additional discovery
13 including depositions of Plaintiff, other Aggrieved Employees, several defense witnesses, and each
14 party's experts. Defendants also would engage in motion practice. The parties would thus incur
15 considerably more attorneys' fees and costs through trial, and possible appeals. This Settlement
16 avoids those risks and the accompanying expense.

17 47. Amount Offered In Settlement Given the Realistic Value of The Claims. The
18 Settlement provides a fair and reasonable monetary recovery for the LWDA and the Aggrieved
19 Employees in the face of disputed claims. A comparison of the amount that Advertise Purple offered
20 in settlement to Advertise Purple's total exposure demonstrates that \$82,500 is reasonable.

21 48. According to the PAGA Data produced by Advertise Purple, Advertise Purple
22 employed 50 Aggrieved Employees during the PAGA Period. The Aggrieved Employees worked a
23 total of approximately 1,000 pay periods during the PAGA Period, which was defined at mediation
24 to conclude on February 15, 2024. During the PAGA Period, 33 Aggrieved Employees separated
25 from Advertise Purple.

26 49. Using that data, and assuming a 100% violation rate, Plaintiff predicted Advertise
27 Purple's total exposure for civil penalties using the initial civil penalties available was \$828,300, with
28 stacking of penalties (i.e., the tabulating and aggregating of all potential penalties); and \$100,000

1 without stacking of penalties, as detailed in Paragraph 71.

2 50. Plaintiff did not calculate the total exposure for civil penalties using both the available
3 initial civil penalties and subsequent heightened penalties because it is unlikely that a court would
4 find that either the Labor Commissioner or a court had placed Advertise Purple on notice that its
5 conduct violated the Labor Code. Several courts have found that the “subsequent” penalty under
6 PAGA applies only after a court or the Labor Commissioner determines that the employer has
7 violated the Labor Code. *See Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 356 (2021) (“the
8 increased \$200 civil penalty for ‘subsequent violation[s]’ does not apply unless [Plaintiff] presents
9 evidence that the Labor Commission or a court notified [Defendant] that it was in violation of the
10 Labor Code.”); *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1173 (9th Cir. 2021) (reversing
11 judgment as to “heightened civil penalties” because the defendant was not given notice by the Labor
12 Commissioner when the “subsequent” violations occurred).

13 51. The \$828,300 amount, however, is subject to challenge in several respects.

14 52. Advertise Purple would argue that an award of \$828,300 is “unjust, arbitrary and
15 oppressive, or confiscatory.” PAGA authorizes the court to reduce the maximum amount of civil
16 penalties “based on the facts and circumstances of a particular case” when “to do otherwise would
17 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Labor Code § 2699(e)(2).
18 In reducing PAGA penalties, courts have considered issues including whether the employees suffered
19 actual injury from the violations, whether the defendant was aware of the violations, and the
20 employer’s willingness to fix the violation. *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th
21 504, 528 (awarding PAGA penalties of only 0.2% of the maximum, reducing approximately
22 \$70,000,000 in penalties to \$150,000); *see also Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203
23 Cal. App. 4th 1112, 1136 (reducing original penalty of \$512,268.88 by 30% to \$358,588.22);
24 *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011), No. ED CV 10-01487 RGK (OPx), 2011 WL
25 7563047, at *4 (reducing original penalty of \$2.8 million by 82% to \$500,000 where Defendant was
26 “not aware” that its actions violated the law).

27 53. Advertise Purple would also likely argue that it was not aware that its action violated
28 the law prior to receiving Plaintiff’s PAGA notice and that it took steps to fix the violations thereafter.

1 Although Advertise Purple's discovery responses indicate that it did classify the Plaintiff as an
2 exempt employee, Advertise Purple's discovery responses also indicate that it re-classified
3 Aggrieved Employees as non-exempt in or around July 2023. Accepting Advertise Purple's
4 representation, the period of time for which civil penalties could be sought at trial based on
5 misclassification would end in July 2023. That, in turn, would have limited the PAGA Period for
6 most violations to a period from April 3, 2022 to July 2023, and concomitantly limited the amount
7 of civil penalties available under the PAGA.

8 54. As detailed in the following paragraphs, Advertise Purple would also have raised
9 many defenses to each claim on the merits.

10 55. Civil Penalties for Minimum and Overtime Wage Claims: Plaintiff alleges that
11 Advertise Purple failed to pay the applicable minimum and overtime wages for all hours worked
12 because Advertise Purple misclassified the Aggrieved Employees as exempt, the Aggrieved
13 Employees routinely worked in excess of eight (8) hours in a single workday and forty (40) hours in
14 a single workweek, and Advertise Purple failed to compensate the Aggrieved Employees for all hours
15 worked in excess of eight (8) hours in a workday and forty (40) hours in a workweek. SAC, ¶¶ 55-
16 78. Using only the initial violation rate, I calculated the potential maximum exposure on the
17 minimum wage violation as \$100,000 (1,000 pay periods x \$100 civil penalty per pay period), and
18 the potential maximum exposure on the overtime wage violation as \$100,000 (1,000 pay periods x
19 \$100 civil penalty per pay period).

20 56. Advertise Purple would raise numerous defenses to these claims including that
21 Advertise Purple classified all Aggrieved Employees as exempt in or around July 2023. Advertise
22 Purple would also argue that employees could request changes to their total hours worked if they felt
23 that amount was inaccurate. Advertise Purple also would likely argue that the Court should exercise
24 its discretion to reduce the maximum penalty exposure because it was unaware of the violations and
25 because of its willingness to fix the violations. In light of these defenses, I discounted the maximum
26 recovery on this claim by 50% to account for the risks that Advertise Purple may prevail in its
27 arguments and arrived at a projected total recovery of \$50,000 in civil penalties for the minimum
28 wage claim and \$50,000 in civil penalties for the overtime wage claim.

1 57. Civil Penalties for Failure to Pay All Earned Wages & Unlawful Deductions. Plaintiff
2 alleges that Advertise Purple failed to pay all earned wages and/or unlawfully deducted earned wages
3 from the Aggrieved Employees' compensation by deducting a percentage of earned commissions for
4 an undisclosed "credit card processing fee," and by deducting "chargebacks" that were not disclosed
5 or agreed to in writing by the Aggrieved Employees. SAC, ¶¶ 79-94. Using only the initial violation
6 rate, I calculated the potential maximum exposure as \$100,000 (1,000 pay periods x \$100 civil
7 penalty per pay period).

8 58. Advertise Purple would raise numerous defenses to this claim including that, contrary
9 to Plaintiff's allegations, Advertise Purple expressly notified the Aggrieved Employees about these
10 deductions in writing during the PAGA Period, and obtained consent in writing regarding both the
11 credit card processing fee and the chargebacks. In light of these defenses, I discounted the maximum
12 recovery on this claim by 50% to account for the risks that Advertise Purple may prevail in its
13 arguments and arrived at a projected total recovery of \$50,000 in civil penalties for this claim.

14 59. Civil Penalties for Meal and Rest Period Violations: Plaintiff alleges that Advertise
15 Purple failed to provide compliant rest and meal periods to the Aggrieved Employees because they
16 were misclassified as exempt employees. SAC, ¶¶ 95-116. Using only the initial violation rate, I
17 calculated the potential maximum exposure on the rest period violation as \$100,000 (1,000 pay
18 periods x \$100 civil penalty per pay period), and the potential maximum exposure on the meal period
19 violation as \$100,000 (1,000 pay periods x \$100 civil penalty per pay period).

20 60. Advertise Purple would raise the same defenses to these claims that it raised in
21 response to the minimum and overtime wage claims because all four claims are based on Plaintiff's
22 allegation that Advertise Purple misclassified the Aggrieved Employees as exempt. In addition,
23 Advertise Purple would argue that it informed all Aggrieved Employees throughout the PAGA
24 Period that they could take rest and meal breaks while working, and that all Aggrieved Employees
25 worked remotely and were largely managing their own work schedules; and, thus, able to take breaks
26 when desired. In light of these defenses, I discounted the maximum recovery on this claim by 75%
27 to account for the risks that Advertise Purple may prevail in its arguments and arrived at a projected
28 total recovery of \$25,000 in civil penalties for the meal period violations and \$25,000 in civil

1 penalties for rest period violations.

2 61. Civil Penalties for Unpaid Reimbursements: Plaintiff alleges that Advertise Purple
3 required employees to use their personal cell phones and Internet data plans for work purposes, but
4 failed to reimburse any portion of the cost of their cell phones or Internet data plans as required by
5 Labor Code Section 2802 and *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App. 4th
6 1137. SAC, ¶¶ 117-130. Using only the initial violation rate, I calculated the potential maximum
7 exposure on the unpaid reimbursement claim to be \$100,000 (1,000 pay periods x \$100 civil penalty
8 per pay period).

9 62. Advertise Purple would likely argue that it provided laptop computers to the
10 Aggrieved Employees and did not require them to use their personal cell phone for work purposes.
11 Advertise Purple also would argue that this claim could not be tried on a representative basis as trial
12 on this claim would require the resolution of numerous individual issues regarding whether a
13 particular Aggrieved Employee incurred business expenses that were not reimbursed. Based on
14 Advertise Purple's likely defenses, I discounted the maximum recovery by 25% to arrive at a
15 projected total of \$75,000.

16 63. Civil Penalties for Inaccurate Wage Statements: Plaintiff's allegations that Advertise
17 Purple violated Labor Code section 226 is derivative of Plaintiff's minimum wage, overtime, and
18 rest and meal period claims. Preliminarily, Plaintiff used the default \$100 penalty instead of the \$250
19 penalty available under Labor Code section 226.3 to calculate maximum exposure. In 2021, the
20 California Court of Appeal held that additional penalties can be imposed under section 226.3 only if
21 "the employer either fails to provide a wage statement or fails to keep required records," not "for any
22 violation of section 226(a)," such as an incomplete or inaccurate statement. *Gunther v. Alaska*
23 *Airlines, Inc.*, 72 Cal. App. 5th 334, 354 (2021). The Court of Appeal expressly disagreed with a
24 contrary interpretation by a different district of the Court of Appeal, which had held a few years
25 before that section 226.3 applies to "all violations of section 226." *Raines v. Coastal Pac. Food*
26 *Distributors, Inc.*, 23 Cal. App. 5th 667, 675 (2018) (emphasis in original). As the Court of Appeal
27 pointed out in *Gunther*, the decision in *Raines* rests on a false dilemma. In the case of an incomplete
28 or inaccurate statement, the choice is not between penalties under 226.3 and no penalties at all, but

1 rather between the standard penalty and a heightened penalty. *See Gunther*, 72 Cal. App. 5th at 354.
2 Although the California Supreme Court has not resolved this disagreement, Plaintiff assumes for
3 settlement purposes that it is more likely to adopt the reasoning in *Gunther*. Using the initial violation
4 rate of \$100, I calculated the potential maximum exposure on the inaccurate wage statement claim
5 to be \$100,000 (1,000 pay periods x \$100 civil penalty per pay period).

6 64. Advertise Purple would raise the same defenses to these claims that it raised in
7 response to the minimum and overtime wage claims, and meal and rest period claims, because all of
8 these claims are based on Plaintiff's allegation that Advertise Purple misclassified the Aggrieved
9 Employees as exempt. In light of those defenses, I discounted the maximum recovery on this claim
10 by 50% to account for the risks that Advertise Purple may prevail in its arguments and arrived at a
11 projected total recovery of \$50,000 in civil penalties.

12 65. Civil Penalties for Violations of Labor Code Sections 201-203: Plaintiff contends that
13 all Aggrieved Employees whose employment with Advertise Purple ended during the PAGA Period
14 are entitled to a derivative "waiting time" penalty under Labor Code Section 203 as a result of
15 Advertise Purple's failure to pay all wages due and owing at the end of employment. This claim is
16 largely derivative of the unpaid minimum wage and overtime claims. Based on the PAGA Data, there
17 are approximately 33 Aggrieved Employees whose employment with Advertise Purple ended during
18 the PAGA Period. Plaintiff's counsel calculated the total potential exposure for waiting time penalties
19 as \$3,300 (33 separate non-exempt Aggrieved Employees * \$100 civil penalty per violation).

20 66. However, Advertise Purple would argue that Plaintiff could only recover waiting time
21 penalties if he were able to establish an entitlement to the underlying wages. Advertise Purple also
22 would have argued that it attempted to pay employees all final wages owed in good faith upon their
23 separation, therefore precluding the finding of willfulness necessary to obtain waiting time penalties.
24 *See* Cal. Code Regs. tit. 8, § 13520 (a "good faith dispute that any wages are due will preclude
25 imposition of waiting time penalties"); *Kao v. Joy Holiday* (2017) 12 Cal. App. 5th 947, 963 (holding
26 that "good faith dispute" over whether employee was exempt precluded imposition of waiting time
27 penalties over contested wages owed). Based on Advertise Purple's likely defenses, I discounted the
28 maximum recovery by 50% to arrive at a projected total of \$1,150.

1 67. Civil Penalties for Violations of Labor Code Section 204: Plaintiff's allegations that
2 Advertise Purple violated Labor Code Section 204 is also derivative of Plaintiff's minimum wage,
3 overtime, and rest and meal period claims. Labor Code § 204 requires employers to provide
4 employees with all wages due and payable twice a month. According to the California Labor
5 Commissioner, "If an employee does not receive full payment of the wages due on the payday
6 designated by the employer in accordance with Labor Code section 204, the payment is late." See
7 <https://www.dir.ca.gov/dlse/Late-Payment-of-Wages.htm>. Using the initial violation rate of \$100, I
8 calculated the potential maximum exposure on the inaccurate wage statement claim to be \$100,000
9 (1,000 pay periods x \$100 civil penalty per pay period).

10 68. Advertise Purple would raise the same defenses to these claims that it raised in
11 response to the minimum and overtime wage claims, and unlawful deduction claims. In light of these
12 defenses, I discounted the maximum recovery on this claim by 50% to account for the risks that
13 Advertise Purple may prevail in its arguments and arrived at a projected total recovery of \$50,000 in
14 civil penalties for this claim.

15 69. Civil Penalties for the Written Commission Claim: During discovery and while this
16 action was pending, Plaintiff discovered that Defendant Advertise Purple had entered into written
17 commission agreements with the Aggrieved Employees. Thus, Plaintiff does not attribute any
18 settlement value to the written commission claim.

19 70. After calculating Advertise Purple's maximum exposure under PAGA, Plaintiff also
20 discounted that exposure for settlement purposes to account for the risks of continued litigation,
21 including: (1) the strength of Advertise Purple's defenses on the merits, which are detailed in the
22 Custis Declaration; (2) the risk of losing on any number of dispositive motions that could have been
23 brought between now and trial (e.g., motions for summary judgment and/or motions in limine), which
24 may have eliminated Plaintiff's claim, or barred evidence necessary to prove his claim; (3) the risk
25 that the Court would exercise its discretion under PAGA to reduce the maximum civil penalties
26 available by statute; (4) the risk that the court would not stack all available civil penalties; (5) the
27 chances of a favorable verdict being reversed on appeal; and (6) the difficulties attendant to collecting
28 on a judgment; e.g., solvency issues. Based on these additional risk factors, I discounted the

maximum recovery by 50%.

71. Taking into account the above contingencies, Plaintiff determined that a realistic total recovery for the Aggrieved Employees would be approximately \$438,650 with the stacking of civil penalties, as follows:

Violation	Total Sanctions (with only Initial Violation Penalty)	Estimated Realistic Recovery
Failure to Minimum Wages	\$100,000	\$50,000
Failure to Overtime Wages	\$100,000	\$50,000
Failure to Provide Rest Breaks	\$100,000	\$50,000
Failure to Provide Meal Breaks	\$100,000	\$50,000
Failure to Reimburse Necessary Business Expenses	\$100,000	\$75,000
Unlawful deductions	\$100,000	\$50,000
Failure to Provide Accurate Itemized Wage Statements	\$100,000	\$50,000
Failure to Pay Wages Timely Upon Separation	\$3,300	\$1,150
Failure to Pay Wages Timely	\$100,000	\$50,000
Failure to Maintain Accurate Payroll Records	\$25,000	\$12,500
TOTAL (With Stacking)	\$828,300	\$438,650

72. The proposed settlement of \$82,500 thus represents approximately 19% of the predicted realistic total recovery of \$438,650 with the stacking of penalties, and 82.5% of the total maximum amount of civil penalties that are available without stacking, and is thus reasonable.

73. Discovery Completed and Status of Proceedings. As detailed above in Paragraphs 10-13, the Parties engaged in sufficient investigation and discovery to support the Settlement.

74. The Experience And Views Of Counsel. Based on my experience litigating complex consumer class actions and wage and hour class and representative actions, as well as my knowledge of the average recovery in PAGA representative actions and wage and hour class actions in California, I believe the Settlement is fair, adequate, and reasonable, is in the best interests of the State of California and the Aggrieved Employees, and should be approved. That is particularly true in light of the uncertainties, risks and costs inherent in continued litigation, and the excellent benefit to be provided to the State of California and the Aggrieved Employees, if the Settlement is approved.

1 **G. Plaintiff's Service Payment**

2 75. The Settlement provides that Plaintiff may seek a Plaintiff's Service Payment in the
3 amount of \$1,000 to be paid from the GSA for his service to the State of California and the other
4 Aggrieved Employees and the risks incurred in serving as Plaintiff in a PAGA action. SA, ¶ 3.2.2,
5 The requested Service Payment is fair and reasonable compensation for Plaintiff's efforts in
6 representing the interests of the LWDA and other Aggrieved Employees, assisting counsel with the
7 litigation and settlement, attending dozens of telephonic meetings with Plaintiff's counsel to discuss
8 the claims and theories at issue in the litigation, attending the mediations to assist with the Settlement
9 and reviewing drafts of the initial complaint, the mediation brief, and the Settlement Agreement.

10 76. It should be noted, too, that Plaintiff's decision to serve as a PAGA plaintiff is largely
11 responsible for this settlement. Most current employees and the vast majority of former employees
12 are reluctant to serve as PAGA plaintiffs for fear of retaliation.

13 77. In light of Plaintiff's substantial contributions to the other Aggrieved Employees and
14 the State of California, Plaintiff submits that the requested service award is reasonable and should be
15 approved.

16 **H. Plaintiff's Attorneys' Fees and Costs**

17 78. The Settlement provides that Plaintiff's Counsel may apply for an award of attorneys'
18 fees in an amount not to exceed 33.33% of the MSA, or \$27,497.25, and reasonably incurred costs
19 not to exceed \$8,000. SA, ¶ SA, ¶ 3.2.1. Plaintiff's Counsel is entitled to attorneys' fees and costs as
20 a matter of right under PAGA. Labor Code § 2699(g)(1). By Plaintiff's Motion for Approval of
21 PAGA Action Settlement, Plaintiff seeks an award of \$27,497.25 in attorneys' fees.

22 79. Plaintiff's Counsel undertook this representation of Plaintiff and the Aggrieved
23 Employees to the exclusion of other paying work, devoting significant time and out-of-pocket costs
24 to this litigation. As a result of this representation, I was unable to accept numerous other cases.
25 During the time that this action has been pending, I have been unable to take on new clients and cases
26 that I otherwise would have been able to accept.

27 80. Plaintiff's Counsel also took this case on contingency, working over 82 hours without
28 being paid, and advancing over \$7,800 in costs without any guarantee of reimbursement. A true and

1 correct copy of Plaintiff's counsel's contemporaneous billing records for this matter is attached
2 hereto as **Exhibit D**.

3 81. I have spent approximately 82.8 hours litigating this case thus far, which is equivalent
4 to a lodestar of \$70,380.00, using my current hourly rate of \$850.

5 82. My work on this case included the pre-filing investigation, researching multiple
6 theories of liability against Advertise Purple, drafting the PAGA Notice letter, drafting the initial and
7 amended complaints, preparing and reviewing written discovery responses, document review and
8 analysis, preparing for mediation, and otherwise litigating the case. Since mediation, I have spent
9 additional time negotiating and preparing the long-form settlement agreement, and this Motion.

10 83. Plaintiff's Counsel will continue to incur time preparing for and attending the hearing
11 on this Motion, and submitting a report regarding dissemination of funds to the Court, among other
12 potential tasks.

13 84. The requested amount of fees of \$27,497.25 is less than 50% of Plaintiff's Counsel's
14 lodestar of \$70,380.00, representing a negative multiplier of 2.56%, with additional work to be
15 performed.

16 85. To calculate the lodestar for all of the time spent on this case, I reviewed and audited
17 my billing records. In determining that I have billed 82.8 hours, I exercised significant billing
18 judgment, reducing a number of hours billed to exclude redundancies, inefficiencies, or other time
19 not appropriately charged to a paying client.

20 86. I also have not included any hours billed to the related case entitled *Flamer v.*
21 *Advertise Purple*, Los Angeles County Superior Court Case No. 22STCV33672, with which the
22 Court is familiar. The billing and accounting on this action was maintained separately and apart from
23 Case No. 22STCV33672.

24 87. My current hourly rate on this matter is \$850 per hour, and is reasonable.

25 88. On June 13, 2023, the Hon. Stephanie M. Bowick approved my \$850.00 rate when
26 ruling on a request for sanctions in denying a motion to compel arbitration in *Castro, et al. v. Fred*
27 *Leeds Property Management, Inc.*, Los Angeles County Superior Court, Case No. 22STCV29694.

28 89. On August 17, 2022, the Court approved my then-effective hourly rate of \$825 per

1 hour in *Wesley Harris v. LDI Trucking, Inc., et al.*, Los Angeles County Superior Court, Case No.
2 19STCV12827, which was consolidated for settlement purposes with *Danny Outland v. Lexmar*
3 *Distribution, Inc., et al.*, Los Angeles County Superior Court, Case No. 19STCV10261 (approving
4 class action settlement with my rate calculated at \$825/hour for lodestar cross-check).

5 90. My current hourly rate of \$850 is also consistent with or lower than the hourly rates
6 prevailing in the community for similar work by attorneys with similar levels of experience. For
7 example, on April 25, 2023, the management-side firm of Sheppard Mullin filed the Declaration of
8 Gal Gressel in connection with a request for attorneys' fees in the matter of *Torres v. Southern*
9 *California Permanente Medical Group, et al.*, LASC Case No. 19STCV42476. A true and correct
10 copy of the Gressel Declaration is attached hereto as **Exhibit E**.

11 91. According to the Gressel Declaration, the regular hourly rate charged by Sheppard
12 Mullin for Babak Yousefzadeh, a partner who has been practicing for only 18 years, was "\$860/hr
13 in 2020; \$925/hr in 2021; \$985/hr in 2022; and \$1,065/hr in 2023." **Exhibit E at ¶ 27**. According to
14 the Gressel Declaration, the regular hourly rate charged by Sheppard Mullin for Mr. Gressel, an
15 employment practitioner who has been practicing for only 10 years, was "\$685/hr in 2020; \$780/hr
16 in 2021; \$880/hr in 2022; and \$975/hr in 2023." **Exhibit E at ¶ 28**. Mr. Yousefzadeh is a 2004
17 graduate of San Francisco Law School. Mr. Gressel is a 2012 graduate of UCLA School of Law. By
18 comparison, I am a 1997 graduate of Boston College Law School.

19 92. My hourly rate of \$850 is also reasonable because courts have consistently approved
20 the hourly rates that I have sought during my 25 years of practice, including *Bautista v. FM*
21 *Restaurants HQ, LLC*, Orange County Superior Court Case No. 30-2022-01253704-CU-OE-CJC
22 (July 2022 Order approving PAGA only settlement with my rate calculated at \$800/hour for lodestar
23 cross-check); *Maldonado v. Wingman Partners, Inc., et al.*, Case No. 19STCV09210 (Los Angeles
24 Sup. Ct.) (July 2020 order approving hourly rate of \$725 for work principally performed in 2018 to
25 2019); *Morales v. Wag Labs, Inc., et al.*, Case No. 19STCV04890 (Los Angeles Sup. Ct.) (March
26 2020 order approving hourly rate of \$725 for work principally performed in 2018 to 2019; and
27 applying a 1.60 multiplier); *Williamson v. McAfee, Inc.* (N.D. Cal., Feb. 3, 2017) No. 5:14-CV-
28 00158-EJD, 2017 WL 6033070, at *2 (2017 order approving 2016 rate of \$670; and applying a 1.499

multiplier); *Lenore Levenhagen v. PacWest Bancorp*, Los Angeles County Superior Court Case No. BC581367 (Los Angeles Sup. Ct.) (2015 order approving 2015 rate of \$655).

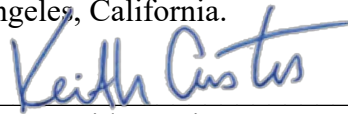
93. The Parties agreed that Plaintiff could seek litigation costs in an amount up to \$8,000. SA, ¶ 3.2.1. Plaintiff seeks an award of \$7,886.88 for reasonably incurred costs, including filing fees, postage, photocopying, mediation fees and deposition costs. A true and correct copy of a record of all costs incurred in this case is attached hereto as **Exhibit F**. Because both Plaintiff's related case asserting individual claims and this case were addressed at the mediations, Plaintiff is seeking reimbursement here of only 40% of the total mediation costs. Because these reasonable costs were necessarily incurred during the case's pendency, they should be reimbursed to Plaintiff's Counsel. All of these costs were necessary to the prosecution of the claims in this matter.

I. The Administrator and Settlement Administration Costs

94. The parties agreed to use ILYM Group, Inc. ("ILYM Group") to administer the settlement and respectfully request that the Court appoint ILYM Group to handle the notice and settlement administration procedures. ILYM agreed to conduct the administration for the capped costs of \$3,995.00.

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

Executed on February 16, 2024 in Los Angeles, California.



Keith Custis

Exhibit A

PAGA SETTLEMENT AGREEMENT

This PAGA Settlement Agreement (“Agreement”) is made by and between plaintiff Alexander Flamer IV (“Plaintiff”) and defendants Advertise Purple, Inc. and Jonathan Moisan (“collectively, Defendants”). The Agreement refers to Plaintiff and Defendants collectively as “Parties,” or individually as “Party.”

1. DEFINITIONS.

- 1.1 “Action” means the Plaintiff’s PAGA lawsuit alleging wage and hour violations against Defendants captioned *Alexander Flamer IV v. Advertise Purple, et al.*, Case No. 23STCV14693, filed on June 23, 2023, and pending in the Superior Court of the State of California, County of Los Angeles.
- 1.2 “Administrator” means Ilym Group, Inc., the neutral entity the Parties have agreed to appoint to administer the Settlement.
- 1.3 “Administration Expenses Payment” means the amount the Administrator will be paid from the Gross Settlement Amount to reimburse its reasonable fees and expenses in accordance with the Administrator’s “not to exceed” bid submitted to the Court in connection with approval of this Settlement.
- 1.4 “Aggrieved Employee” means a person employed by Advertise Purple, Inc. in California as a Business Development Representative or Account Executive during the PAGA Period.
- 1.5 “Aggrieved Employee Data” means Aggrieved Employee identifying information in Defendants’ possession including the Aggrieved Employee’s name, last-known mailing address, Social Security number, and number of PAGA Pay Periods.
- 1.6 “Aggrieved Employee Address Search” means the Administrator’s investigation and search for current Aggrieved Employee mailing addresses using all reasonably available sources, methods and means including, but not limited to, the National Change of Address database, skip traces, and direct contact by the Administrator with Aggrieved Employees.
- 1.7 “Court” means the Superior Court of California, County of Los Angeles.
- 1.8 “Defendants” means Advertise Purple and Jonathan Moisan.
- 1.9 “Defense Counsel” means Debra Ellwood Meppen and Peter Choi of Gordon Rees Scully Mansukhani, LLP.
- 1.10 “Effective Date” means the date by when both of the following have occurred: (a) the Court enters a Judgment on its Order Approving the PAGA Settlement and (b) the Judgment is final. The Judgment is final one business day after: (a) the Court enters a Judgment on its Order Approving the PAGA Settlement; and (b) the period for filing

appeals and/or motions to set aside the Judgment have expired with no appeal and/or motion to set aside the Judgment having been filed.

- 1.11 “Gross Settlement Amount” means \$82,500.00 which is the total amount Defendants agree to pay under the Settlement except as provided in Paragraph 9 below. The Gross Settlement Amount will be used to pay Individual PAGA Payments, the LWDA PAGA Payment, PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, the Plaintiff’s Service Payment; and the Administrator’s Expenses Payment.
- 1.12 “Individual PAGA Payment” means the Aggrieved Employee’s pro rata share of 25% of the PAGA Penalties calculated according to the number of Pay Periods the Aggrieved Employee worked during the PAGA Period.
- 1.13 “Judgment” means the judgment entered by the Court based upon the Final Approval.
- 1.14 “LWDA” means the California Labor and Workforce Development Agency, the agency entitled, under Labor Code section 2699, subd. (i).
- 1.15 “LWDA PAGA Payment” means the 75% of the PAGA Penalties paid to the LWDA under Labor Code section 2699, subd. (i).
- 1.16 “Net Settlement Amount” means the Gross Settlement Amount, less the following payments in the amounts approved by the Court: the LWDA PAGA Payment, PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, the Plaintiff’s Service Payment, and the Administration Expenses Payment. The remainder is to be paid to Aggrieved Employees as Individual PAGA Payments.
- 1.17 “PAGA Counsel” means Keith Custis of Custis Law, P.C., the attorneys representing the Plaintiff in the Action.
- 1.18 “PAGA Counsel Fees Payment” and “PAGA Counsel Litigation Expenses Payment” mean the amounts allocated to PAGA Counsel for reimbursement of reasonable attorneys’ fees and expenses, respectively, incurred to prosecute the Action.
- 1.19 “PAGA Pay Period” means any Pay Period during which an Aggrieved Employee worked for Advertise Purple, Inc. for at least one day during the PAGA Period.
- 1.20 “PAGA Period” means the period from April 3, 2022 to February 15, 2024.
- 1.21 “PAGA” means the Private Attorneys General Act (Labor Code §§ 2698. et seq.).
- 1.22 “PAGA Notice” means Plaintiff’s April 3, 2023 letter to Defendants and the LWDA providing notice pursuant to Labor Code section 2699.3, subd.(a), which is attached hereto as Exhibit 1 and incorporated herein as if expressly set forth.
- 1.23 “PAGA Penalties” means the total amount of PAGA civil penalties to be paid from the Gross Settlement Amount, allocated 25% to the Aggrieved Employees (\$10,500.69) and the 75% to LWDA (\$31,502.06) in settlement of PAGA claims.

- 1.24 “Plaintiff” means Alexander Flamer IV, the named plaintiff in the Action.
- 1.25 “Plaintiff’s Service Payment” means the amount that the Court authorizes to be paid to Plaintiff, in addition to his Individual PAGA Payment, in recognition of his efforts and risks in assisting with the prosecution of the Action.
- 1.26 “Approval Order” means the proposed Court Order Granting Approval of PAGA Settlement.
- 1.27 “Released PAGA Claims” means the claims being released by the Plaintiff and PAGA Counsel and as described in Paragraph 5 below.
- 1.28 “Released Parties” means: Defendants and each of its former and present directors, officers, shareholders, owners, employees, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates.
- 1.29 “Settlement” means the disposition of the Action effected by this Agreement and the Judgment.

2. RECITALS.

- 2.1 On June 23, 2023, Plaintiff commenced this Action by filing a Complaint alleging a single cause of action against Defendants for violation of the PAGA, based on alleged violations of Labor Code sections 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751, and 2802. Thereafter, Plaintiff filed a First Amended Complaint on July 14, 2023, and a Second Amended Complaint on October 2, 2023.
- 2.2 The Second Amended Complaint is the operative complaint in the Action (the “Operative Complaint.”). Defendants deny the allegations in the Action, deny any failure to comply with the laws identified in in the Action and deny any and all liability for the causes of action alleged in the Action.
- 2.3 Pursuant to Labor Code section 2699.3, subd.(a), Plaintiff gave timely written notice to Defendants and the LWDA by sending the PAGA Notice on or about April 3, 2023.
- 2.4 On November 3, 2023, the Parties participated in an all-day mediation presided over by Hon. Louis Meisinger (Ret.) Although the mediation did not result in an immediate settlement, the mediator issued a mediator’s proposal to settle this case, which was accepted by the Parties on November 9, 2023.
- 2.5 Prior to mediation, Plaintiff obtained through formal and informal discovery the number of Aggrieved Employees and PAGA Pay Periods worked as well as relevant policy and procedure documents regarding Plaintiff’s claims. Plaintiff propounded eleven (11) special interrogatories, fifty-two (52) requests for production, nine (9) requests for admissions and general form interrogatories, all of which were responded to by Defendants.

- 2.6 The Parties, PAGA Counsel and Defense Counsel represent that they are not aware of any other pending matter or action asserting claims that will be extinguished or affected by the Settlement.

3. MONETARY TERMS.

- 3.1 Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below, Defendants promises to pay \$82,500.00 and no more as the Gross Settlement Amount. Defendants have no obligation to pay the Gross Settlement Amount prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator will disburse the entire Gross Settlement Amount without asking or requiring Aggrieved Employees to submit any claim as a condition of payment. None of the Gross Settlement Amount will revert to Defendants.
- 3.2 Payments from the Gross Settlement Amount. The Administrator will make and deduct the following payments from the Gross Settlement Amount, in the amounts specified by the Court in the Final Approval:
- 3.2.1 To PAGA Counsel: A PAGA Counsel Fees Payment of not more than 33.33% which is currently estimated to be \$27,497.25 and PAGA Counsel Litigation Expenses Payment of not more than \$8,000.00. Defendants will not oppose requests for Court approval of these payments provided that they do not exceed these amounts. Plaintiff and/or PAGA Counsel will file an application or motion for PAGA Counsel Fees Payment and PAGA Litigation Expenses Payment. If the Court approves a PAGA Counsel Fees Payment and/or a PAGA Counsel Litigation Expenses Payment less than the amounts requested, the Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability to PAGA Counsel or any other Plaintiff's Counsel arising from any claim to any portion any PAGA Counsel Fee Payment and/or PAGA Counsel Litigation Expenses Payment. The Administrator will pay the PAGA Counsel Fees Payment and PAGA Counsel Expenses Payment using one or more IRS 1099 Forms. PAGA Counsel assumes full responsibility and liability for taxes owed on the PAGA Counsel Fees Payment and the PAGA Counsel Litigation Expenses Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any division or sharing of any of these Payments.
- 3.2.2 To the Plaintiff: A Plaintiff's Service Payment not to exceed \$1,000.00 as approved by the Court. If the Court approves a Plaintiff's Service Payment less than the amount requested, the Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will pay the Plaintiff's Service Payment using an IRS 1099 Form. Plaintiff assumes full responsibility and liability for taxes owed on the Plaintiff's Service Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding the Plaintiff's Service Payment.
- 3.2.3 To the Administrator: An Administrator Expenses Payment not to exceed \$4,000.00 except for a showing of good cause and as approved by the Court. To

the extent the Administration Expenses are less or the Court approves payment less than \$4,000.00, the Administrator will retain the remainder in the Net Settlement Amount.

3.2.4 To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$42,002.75 to be paid from the Gross Settlement Amount, with 75% (\$31,502.06) allocated to the LWDA PAGA Payment and 25% (\$10,500.69) allocated to the Individual PAGA Payments.

3.2.4.1. The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$10,500.69) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment.

3.2.4.2. If the Court approves PAGA Penalties of less than the amount requested, the Administrator will allocate the remainder to the Net Settlement Amount. The Administrator will report the Individual PAGA Payments on IRS 1099 Forms.

4. SETTLEMENT FUNDING AND PAYMENTS.

4.1 Aggrieved Employee Pay Periods. Based on a review of its records to date, Defendants estimate there are 50 Aggrieved Employees who will have worked approximately 1,000 of PAGA Pay Periods during the PAGA Period.

4.2 Aggrieved Employee Data. Within 15 calendar days after the Effective Date, Defendants will simultaneously deliver the Aggrieved Employee Data to the Administrator in the form of a Microsoft Excel spreadsheet. To protect Aggrieved Employee' privacy rights, the Administrator must maintain the Aggrieved Employee Data in confidence, use the Aggrieved Employee Data only for purposes of this Settlement and for no other purpose, and restrict access to the Aggrieved Employee Data to Administrator employees who need access to the Aggrieved Employee Data to effect and perform under this Agreement. Defendants have a continuing duty to immediately notify PAGA Counsel if they discover that the Aggrieved Employee Data omitted employee identifying information and to provide corrected or updated Aggrieved Employee Data as soon as reasonably feasible. Without any extension of the deadline by which Defendants must send the Aggrieved Employee Data to the Administrator, the Parties and their counsel will expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any issues related to missing or omitted Aggrieved Employee Data.

4.3 Funding of Gross Settlement Amount. Defendants shall fully fund the Gross Settlement Amount by transmitting the funds to the Administrator no later than 14 calendar days after the Effective Date.

- 4.4 Payments from the Gross Settlement Amount. Within 14 calendar days after Defendants fund the Gross Settlement Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Expenses Payment, and the Plaintiff's Service Payment in the amounts approved by the Court. Disbursement of the PAGA Counsel Litigation Expenses Payment shall not precede disbursement of Individual PAGA Payments.
- 4.4.1 The Administrator will issue checks for the Individual PAGA Payments and send them to the Aggrieved Employees via First Class U.S. Mail, postage prepaid. The face of each check shall prominently state the date (not less than 180 days after the date of mailing) when the check will be voided. The Administrator will cancel all checks not cashed by the void date. Before mailing any checks, the Settlement Administrator must update the recipients' mailing addresses using the National Change of Address Database.
- 4.4.2 The Administrator must conduct an Aggrieved Employee Address Search for all Aggrieved Employees whose checks are returned undelivered without USPS forwarding address. Within 7 days of receiving a returned check the Administrator must re-mail checks to the USPS forwarding address provided or to an address ascertained through the Aggrieved Employee Address Search. The Administrator need not take further steps to deliver checks to Aggrieved Employees whose re-mailed checks are returned as undelivered. The Administrator shall promptly send a replacement check to any Aggrieved Employee whose original check was lost or misplaced, requested by the Aggrieved Employee prior to the void date.
- 4.4.3 For any Aggrieved Employee whose Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the Aggrieved Employee.
- 4.4.4 The payment of Individual PAGA Payments shall not obligate Defendants to confer any additional benefits or make any additional payments to the Aggrieved Employees (such as 401(k) contributions or bonuses) beyond those specified in this Agreement.

5. RELEASES OF CLAIMS. Effective on the date when Defendants fully fund the entire Gross Settlement Amount Plaintiff, Aggrieved Employees and PAGA Counsel will release claims against all Released Parties as follows:

- 5.1 Plaintiff's Release. Plaintiff and his or her respective former and present spouses, representatives, agents, attorneys (including PAGA Counsel), heirs, administrators, successors, and assigns generally, release and discharge Released Parties from all claims, transactions, or occurrences under the PAGA that occurred during the PAGA Period, including, but not limited to: (a) all claims under the PAGA that were, or reasonably could have been, alleged, based on the facts contained in the Operative Complaint and the PAGA Notice ("Plaintiff's Release"), including but not limited to alleged violations of Labor Code §§ 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12,

1194, 1197, 1197.1, 1198, 2751 and 2802, as set forth in the PAGA Notice. Plaintiff's Release does not extend to any claims or actions to enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability benefits, social security benefits, workers' compensation benefits that arose at any time, or based on occurrences outside the PAGA Period. Plaintiff acknowledges that Plaintiff may discover facts or law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective in all respects, notwithstanding such different or additional facts or Plaintiff's discovery of them.

5.2 Aggrieved Employees' Release. All Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice, including alleged violations of Labor Code §§ 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751 and 2802, as set forth in the PAGA Notice.

5.3 Release by PAGA Counsel: PAGA Counsel releases on behalf of its present and former attorneys, employees, agents, successors and assigns the Released Parties from all claims for PAGA Fees incurred in connection with the Operative Complaint and the PAGA Period facts stated in the Operative Complaint and the PAGA Notice.

6. MOTION OR APPLICATION FOR APPROVAL OF SETTLEMENT. PAGA Counsel shall prepare and file a motion for approval of this Settlement.

6.1 Plaintiff's Responsibilities. Plaintiff will prepare and deliver to Defense Counsel, for Defense Counsel's review and comments, all documents necessary for obtaining approval of this Settlement under Labor Code Section 2699, subd. (f)(2)) including (i) a draft proposed Order Granting Approval of PAGA Settlement; (ii) a signed declaration from the Administrator attaching its "not to exceed" bid for administering the Settlement and attesting to its willingness to serve; competency; operative procedures for protecting the security of Aggrieved Employee Data; all facts relevant to any actual or potential conflicts of interest with Aggrieved Employees or the LWDA; and the nature and extent of any financial relationship with Plaintiff, PAGA Counsel or Defense Counsel; (iii) a signed declaration from PAGA Counsel firm attesting to its timely transmission to the LWDA of all necessary PAGA documents (initial notice of violations (Labor Code section 2699.3, subd. (a)), Operative Complaint (Labor Code section 2699, subd. (l)(1)), this Agreement (Labor Code section 2699, subd. (l)(2)); and (iv) all facts relevant to any actual or potential conflict of interest with Aggrieved Employees and/or the Administrator. In their Declarations, Plaintiff and PAGA Counsel shall aver that they are not aware of any other pending matter or action asserting claims that will be extinguished or adversely affected by the Settlement.

6.2 Responsibilities of PAGA Counsel. PAGA Counsel is responsible for expeditiously finalizing and filing the motion for approval of this Settlement no later than 60 days after

the full execution of this Agreement. PAGA Counsel has already reserved the first available hearing date for the motion on March 14, 2024 (Reservation ID: 412407530268), and shall appear in Court to advocate in favor of the motion. PAGA Counsel is also responsible for delivering the Court's Approval Order to the Administrator.

- 6.3 Duty to Cooperate. PAGA Counsel shall provide a draft motion for approval to Defense counsel for Defense Counsel's review and comments no later than February 2, 2024, two weeks before the filing deadline of February 16, 2024. Defense Counsel agrees to provide Defendants' comments and proposed revisions to the draft motion for approval in redline format to PAGA Counsel no later than 5:00 p.m. on February 16, 2024. If the Parties disagree on any aspect of the proposed motion for approval of this Settlement and/or the supporting declarations and documents, PAGA Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to resolve the disagreement. If the Court does not grant the motion for approval of this Settlement or conditions its approval on any material change to this Agreement, PAGA Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to modify the Agreement and otherwise satisfy the Court's concerns. However, in no event, should this paragraph be construed to require the Parties to agree to any term that materially alters this Agreement.

7. SETTLEMENT ADMINISTRATION.

- 7.1 Selection of Administrator. The Parties have jointly selected Ilym Group, Inc. to serve as the Administrator and verified that, as a condition of appointment, Ilym Group, Inc. agrees to be bound by this Agreement and to perform, as a fiduciary, all duties specified in this Agreement in exchange for payment of Administration Expenses. The Parties and their Counsel represent that they have no interest or relationship, financial or otherwise, with the Administrator other than a professional relationship arising out of prior experiences administering settlements.
- 7.2 Employer Identification Number. The Administrator shall have and use its own Employer Identification Number for purposes of calculating payroll tax withholdings and providing reports state and federal tax authorities.
- 7.3 Qualified Settlement Fund. The Administrator shall establish a settlement fund that meets the requirements of a Qualified Settlement Fund ("QSF") under US Treasury Regulation section 468B-1.
- 7.4 Administrator Duties. The Administrator has a duty to perform or observe all tasks to be performed or observed by the Administrator contained in this Agreement or otherwise.

- 8. CONTINUING JURISDICTION OF THE COURT.** The Parties agree that, after entry of Judgment, the Court will retain jurisdiction over the Parties, Action, and the Settlement solely for purposes of (i) enforcing this Agreement and/or Judgment, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as are permitted by law.

- 8.1 **Waiver of Right to Appeal.** Provided the Judgment is consistent with the terms and conditions of this Agreement, specifically including the PAGA Counsel Fees Payment and PAGA Counsel Litigation Expenses Payment, the Parties, their respective counsel waive all rights to appeal from the Judgment, including all rights to post-judgment and appellate proceedings, the right to file motions to vacate judgment, motions for new trial, extraordinary writs, and appeals. The waiver of appeal does not include any waiver of the right to oppose such motions, writs or appeals.

9. ADDITIONAL PROVISIONS.

- 10.1 **No Admission of Liability or Representative Manageability for Other Purposes.** This Agreement represents a compromise and settlement of highly disputed claims. Nothing in this Agreement is intended or should be construed as an admission by Defendants that any of the allegations in the Operative Complaint have merit or that Defendants have any liability for any claims asserted; nor should it be intended or construed as an admission by Plaintiff that Defendants' defenses in the Action have merit. The Parties agree that representative treatment is for purposes of this Settlement only. If, for any reason the Court does not approve this Settlement, Defendants reserve all available defenses to the claims in the Action, and Plaintiff reserves the right to contest Defendants' defenses. The Settlement, this Agreement and Parties' willingness to settle the Action will have no bearing on, and will not be admissible in connection with, any litigation (except for proceedings to enforce or effectuate the Settlement and this Agreement).
- 10.2 **Integrated Agreement.** Upon execution by all Parties and their counsel, this Agreement together with its attached exhibits shall constitute the entire agreement between the Parties relating to the Settlement, superseding any and all oral representations, warranties, covenants, or inducements made to or by any Party.
- 10.3 **Attorney Authorization.** PAGA Counsel and Defense Counsel separately warrant and represent that they are authorized by Plaintiff and Defendants, respectively, to take all appropriate action required or permitted to be taken by such Parties pursuant to this Agreement to effectuate its terms, and to execute any other documents reasonably required to effectuate the terms of this Agreement including any amendments to this Agreement.
- 10.4 **Cooperation.** The Parties and their counsel will cooperate with each other and use their best efforts, in good faith, to implement the Settlement by, among other things, modifying the Settlement Agreement, submitting supplemental evidence and supplementing points and authorities as requested by the Court. In the event the Parties are unable to agree upon the form or content of any document necessary to implement the Settlement, or on any modification of the Agreement that may become necessary to implement the Settlement, the Parties will seek the assistance of a mediator and/or the Court for resolution.
- 10.5 **No Prior Assignments.** The Parties separately represent and warrant that they have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer,

or encumber to any person or entity and portion of any liability, claim, demand, action, cause of action, or right released and discharged by the Party in this Settlement.

- 10.6 No Tax Advice. Neither Plaintiff, PAGA Counsel, Defendants nor Defense Counsel are providing any advice regarding taxes or taxability, nor shall anything in this Settlement be relied upon as such within the meaning of United States Treasury Department Circular 230 (31 CFR Part 10, as amended) or otherwise.
- 10.7 Modification of Agreement. This Agreement, and all parts of it, may be amended, modified, changed, or waived only by an express written instrument signed by all Parties or their representatives, and approved by the Court.
- 10.8 Agreement Binding on Successors. This Agreement will be binding upon, and inure to the benefit of, the successors of each of the Parties.
- 10.9 Applicable Law. All terms and conditions of this Agreement and its exhibits will be governed by and interpreted according to the internal laws of the state of California, without regard to conflict of law principles.
- 10.10 Cooperation in Drafting. The Parties have cooperated in the drafting and preparation of this Agreement. This Agreement will not be construed against any Party on the basis that the Party was the drafter or participated in the drafting.
- 10.11 Confidentiality. To the extent permitted by law, all agreements made, and orders entered during Action and in this Agreement relating to the confidentiality of information shall survive the execution of this Agreement.
- 10.12 Use and Return of Aggrieved Employee Data. Information provided to PAGA Counsel pursuant to Cal. Evid. Code §1152, and all copies and summaries of the PAGA Data provided to PAGA Counsel by Defendants in connection with the mediation, other settlement negotiations, or in connection with the Settlement, may be used only with respect to this Settlement, and no other purpose, and may not be used in any way that violates any existing contractual agreement, statute, or rule of court. Not later than 90 days after the Administrator discharges its obligation to pay out of all Settlement funds, Plaintiff shall destroy all paper and electronic versions of Aggrieved Employee Data received from Defendants unless, prior to the Administrator's payment of all Settlement Funds, Defendants make a written request to PAGA Counsel for the return, rather than the destructions, of Aggrieved Employee Data.
- 10.13 Headings. The descriptive heading of any section or paragraph of this Agreement is inserted for convenience of reference only and does not constitute a part of this Agreement.
- 10.14 Calendar Days. Unless otherwise noted, all reference to "days" in this Agreement shall be to calendar days. In the event any date or deadline set forth in this Agreement falls on a weekend or federal legal holiday, such date or deadline shall be on the first business day thereafter.

- 10.15 Notice. All notices, demands or other communications between the Parties in connection with this Agreement will be in writing and deemed to have been duly given as of the third business day after mailing by United States mail, or the day sent by email or messenger, addressed as follows:

To Plaintiff: Keith Custis
kcustis@custislawpc.com
Custis Law, P.C.
2121 Avenue of the Stars, Suite 800
Los Angeles, California 90067

To Defendants: Peter Choi
pchoi@grsm.com
GORDON REES SCULLY MANSUKHANI, LLP
633 West Fifth Street, 52nd floor
Los Angeles, CA 90071

- 10.16 Execution in Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronically (i.e. DocuSign), or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and each of them will be deemed to be one and the same instrument if counsel for the Parties will exchange between themselves signed counterparts. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.
- 10.17 Stay of Litigation. The Parties agree that upon the execution of this Agreement the litigation shall be stayed, except to effectuate the terms of this Agreement. The Parties further agree that upon the signing of this Agreement that pursuant to CCP section 583.330 to extend the date to bring a case to trial under CCP section 583.310 for the entire period of this settlement process.

Dated: December __, 2023 12/19/2023

Dated: December __, 2023

DocuSigned by:
Alexander Flamer IV

Alexander Flamer IV -17FB3837BB264F2...
Plaintiff

Jonathan Moisan, individually and on behalf of
Defendant Advertise Purple, Inc.

- 10.15 Notice. All notices, demands or other communications between the Parties in connection with this Agreement will be in writing and deemed to have been duly given as of the third business day after mailing by United States mail, or the day sent by email or messenger, addressed as follows:

To Plaintiff: Keith Custis
kcustis@custislawpc.com
Custis Law, P.C.
2121 Avenue of the Stars, Suite 800
Los Angeles, California 90067

To Defendants: Peter Choi
pchoi@grsm.com
GORDON REES SCULLY MANSUKHANI, LLP
633 West Fifth Street, 52nd floor
Los Angeles, CA 90071

- 10.16 Execution in Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronically (i.e. DocuSign), or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and each of them will be deemed to be one and the same instrument if counsel for the Parties will exchange between themselves signed counterparts. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.
- 10.17 Stay of Litigation. The Parties agree that upon the execution of this Agreement the litigation shall be stayed, except to effectuate the terms of this Agreement. The Parties further agree that upon the signing of this Agreement that pursuant to CCP section 583.330 to extend the date to bring a case to trial under CCP section 583.310 for the entire period of this settlement process.

19

Dated: December __, 2023

Alexander Flamer IV
Plaintiff

Dated: December __, 2023

DocuSigned by:

4428B6560FBA4A6...
Jonathan Moisan, individually and on behalf of
Defendant Advertise Purple, Inc.

Exhibit 1



April 3, 2023

Keith A. Custis
kcustis@custislawpc.com

SUBMITTED VIA ONLINE CLAIM NOTICE

California Labor and Workforce Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste 801
Oakland, CA 94612
(<https://dir.tfaforms.net/198>)

SENT VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Jonathan Moisan
Chief Financial and Operating Officer
Advertise Purple
2200 Michigan Ave.
Santa Monica, CA 90404

Re: *Alexander Flamer IV v. Advertise Purple, Kyle Mitnick and Michael Barron*: Written
Notice of Intent to File Civil Action Pursuant to California Labor Code § 2699.3

Dear PAGA Administrator and Employer,

This office represents Alexander Flamer IV (“Mr. Flamer”) with respect to claims arising under California’s Labor Code during his employment at and termination from Advertise Purple (“Advertise Purple”). Advertise Purple is a California corporation that operates an affiliate-based advertising company, and that employs approximately 155 employees. Advertise Purple employed Mr. Flamer from approximately May 2021 until July 19, 2022, initially as a business development representative and subsequently as an account executive, misclassifying Mr. Flamer as an exempt employee. Mr. Flamer is referred to in this correspondence as the “Lead Aggrieved Employee.”

The Lead Aggrieved Employee intends to file a civil action against Advertise Purple and its owners and officers Kyle Mitnick, Michael Barron, and Jonathan Moisan, each in his individual capacity, (collectively, “Advertise Purple” or “Employer”), seeking, *inter alia*, civil penalties, attorneys’ fees, costs and other available relief that is recoverable under the Private Attorneys General Act of 2004 (“PAGA”), Labor Code Section 2698, *et al.*, for violations of the California Labor Code. The Lead Aggrieved Employee shall seek relief on behalf of the State of California, and all aggrieved employees, who are defined as “all current and former employees of Advertise

Purple who worked in the positions of business development representative and/or account executive at any time between April 3, 2022 and the present” (hereafter, “Aggrieved Employees”).

Mr. Mitnick, Mr. Barron, and Mr. Moisan are officers and, on information and belief, owners of Advertise Purple and are, thus, liable in their individual capacities for the civil penalties, attorneys’ fees and litigation costs available to the Lead Aggrieved Employee and other Aggrieved Employees pursuant to California Labor Code Sections 558, 1197.1 and 2699(g)(1). *See, e.g., Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809 (holding that “the language in both section 558(a) and section 1197.1(a) is broad enough to *unambiguously* include [the owner and CEO of the defendant employer] as a person *other than the corporate employer* subject to the civil penalties awarded by the trial court under those two statutes.”) (emphasis in original). Importantly, the *Atempa* court held that the alter ego doctrine did not apply in PAGA actions to immunize owners and officers from liability because the Labor Code imposed liability directly on owners and officers for the corporate employer’s violations of the Labor Code.

Additionally, as owners and officers of Advertise Purple, Mr. Mitnick, Mr. Barron, and Mr. Moisan are also each liable in his individual capacity as an employer pursuant to California Labor Code Section 558.1 for Advertise Purple’s (a) failure to pay minimum wages; (b) failure to pay overtime wages; (c) failure to provide meal and rest periods; (d) failure to provide accurate wage statements; (e) failure to reimburse for necessary business expenses incurred; and (f) failure to pay wages timely during employment and at the time of termination or resignation. Labor Code § 558.1.

Pursuant to California Labor Code Section 2699.3, this letter serves as the Lead Aggrieved Employee’s written notice to the Labor and Workforce Development Agency (“LWDA”) and Advertise Purple regarding the following alleged violations of the California Labor Code, and the facts and legal theories that support those violations.¹ This letter is being submitted to the LWDA online pursuant to the process described on the California Department of Industrial Relations’ website.² The \$75.00 filing fee required by Labor Code Section 2699.3 was paid during the online submission of this letter.

¹ The Labor Code violations, facts and legal theories detailed herein are based on the Lead Aggrieved Employee’s experience and his counsel’s review of the records currently available relating to the Lead Aggrieved Employee’s employment. Discovery conducted in litigation of wage and hour claims such as these often reveals additional Labor Code violations as well as additional facts and legal theories supporting the alleged Labor Code violations. Thus, the Lead Aggrieved Employee reserves the right to supplement this letter with additional Labor Code violations, facts, and legal theories if they becomes aware of them subsequent to the submission of this letter.

² *See* <http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>.

As detailed below, Advertise Purple has violated the California Labor Code within the last year and beyond as to the Lead Aggrieved Employee and other Aggrieved Employees in the following respects:

A. Failure to Pay Minimum Wages in Violation of Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198

California Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198 require an employer to pay employees no less than the established minimum wage. These Labor Code Sections provide that payment of a wage less than the established minimum wage is unlawful. The applicable Industrial Welfare Commission (“IWC”) Wage Order defines compensable work time, or “hours worked,” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” Cal. Code. Regs. tit. 8, § 11100(2)(K) (defining “Hours Worked”). An employee is entitled to be paid no less than the established minimum wage for all hours worked.

Within the previous twelve months and beyond, Advertise Purple maintained a policy and practice of failing to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable minimum wage for all hours worked in the following respects:

First, within the last twelve months and beyond, Advertise Purple failed to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable minimum wages for all hours worked because Employer misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt employees. The Lead Aggrieved Employee and other Aggrieved Employees did not qualify for any exemption. The Lead Aggrieved Employee and other Aggrieved Employees did not qualify for the inside sales exemption from overtime under either California or federal law because the Lead Aggrieved Employee and other Aggrieved Employees did not earn more than 50% of their respective compensation in the form of commissions. Cal. Code Regs., tit. 8, § 11040(3)(D) (exempting employees from obligation to pay overtime wages where the employee’s “earnings exceed one and one-half (1½) times the minimum wage *if more than half of that employee’s compensation represents commissions.*”); *see also* 29 U.S.C.A. § 207 (“No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, *and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.*”).

The percentage of commissions paid to the Lead Aggrieved Employee and other Aggrieved Employees was far less than 50% each pay period and/or representative period. For example, for each of the pay periods between March 26, 2022 and July 11, 2022, the total compensation paid by Advertise Purple to the Lead Aggrieved Employee always consisted of far less than 50% in the form of commissions on goods and services. As reflected by the following chart, the percentage of commissions relative to total compensation paid to the Lead Aggrieved Employee ranged from

0% to 29.2%, and averaged only 12.9% for the March 26, 2022 through June 26, 2022 time period:

Pay Period Start	Pay Period End	Regular	Commission	Total	Commission Percentage
3/26/22	4/11/22	\$2,916.67	\$563.30	\$3,479.97	16.2%
4/12/22	4/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
4/26/22	5/11/22	\$2,916.67	\$819.49	\$3,736.16	21.9%
5/12/22	5/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
5/26/22	6/11/22	\$2,916.67	\$434.76	\$3,351.43	13.0%
6/12/22	6/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
6/26/22	7/11/22	\$2,916.67	\$1,202.80	\$4,119.47	29.2%
	TOTALS	\$20,416.69	\$3,020.35	\$23,437.04	12.9%

Second, because Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt, Advertise Purple did not record the total hours worked by the Lead Aggrieved Employee and other Aggrieved Employees. The Lead Aggrieved Employee and other Aggrieved Employees routinely worked more than eight (8) hours in a single work day and more than (40) hours in a single work week, and were thus entitled to be paid the applicable minimum wage and overtime wage for all hours worked beyond eight (8) hours in a single work day and more than (40) hours in a single work week.

Advertise Purple, however, failed to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable minimum wage for all hours worked beyond eight (8) hours in a single work day and more than (40) hours in a single work week.

Advertise Purple has thus violated Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 1197.1 and/or 2699(a), (f) and (g).

B. Failure to Pay Overtime in Violation of Labor Code Sections 510 & 1198

California Labor Code Sections 510 and 1198 and the applicable IWC Wage Order require employers to pay employees working more than eight (8) hours in a day or more than forty (40) hours in a workweek at the rate of time-and-one-half (1.5) times the regular rate of pay for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek. The applicable IWC Wage Order further provides that employers are required to pay employees working more than twelve (12) hours in a day overtime compensation at a rate of two (2) times their regular rate of pay.

Within the previous twelve months and beyond, Advertise Purple maintained a policy and

practice of failing to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable overtime wage for all hours worked in the following respects:

First, within the last twelve months and beyond, Advertise Purple failed to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable minimum wages for all hours worked because Employer misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt employees. The Lead Aggrieved Employee and other Aggrieved Employees did not qualify for any exemption. The Lead Aggrieved Employee and other Aggrieved Employees did not qualify for the inside sales exemption from overtime under either California or federal law because the Lead Aggrieved Employee and other Aggrieved Employees did not earn more than 50% of their respective compensation in the form of commissions. Cal. Code Regs., tit. 8, § 11040(3)(D)(exempting employees from obligation to pay overtime wages where the employee's "earnings exceed one and one-half (1½) times the minimum wage if more than half of that employee's compensation represents commissions."); see also 29 U.S.C.A. § 207 ("No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.").

The percentage of commissions paid to the Lead Aggrieved Employee and other Aggrieved Employees was far less than 50% each pay period and/or representative period. For example, for each of the pay periods between March 26, 2022 and July 11, 2022, the total compensation paid by Advertise Purple to the Lead Aggrieved Employee always consisted of far less than 50% in the form of commissions on goods and services. As reflected by the following chart, the percentage of commissions relative to total compensation paid to the Lead Aggrieved Employee ranged from 0% to 29.2%, and averaged only 12.9% for the March 26, 2022 through June 26, 2022 time period:

Pay Period Start	Pay Period End	Regular	Commission	Total	Commission Percentage
3/26/22	4/11/22	\$2,916.67	\$563.30	\$3,479.97	16.2%
4/12/22	4/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
4/26/22	5/11/22	\$2,916.67	\$819.49	\$3,736.16	21.9%
5/12/22	5/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
5/26/22	6/11/22	\$2,916.67	\$434.76	\$3,351.43	13.0%
6/12/22	6/25/22	\$2,916.67	\$0.00	\$2,916.67	0.0%
6/26/22	7/11/22	\$2,916.67	\$1,202.80	\$4,119.47	29.2%
	TOTALS	\$20,416.69	\$3,020.35	\$23,437.04	12.9%

Second, because Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt, Advertise Purple did not record the total hours worked by the Lead Aggrieved Employee and other Aggrieved Employees. The Lead Aggrieved Employee and other Aggrieved Employees routinely worked more than eight (8) hours in a single work day and more than (40) hours in a single work week, and were thus entitled to be paid the applicable minimum wage and overtime wage for all hours worked beyond eight (8) hours in a single work day and more than (40) hours in a single work week.

Advertise Purple, however, failed to pay the Lead Aggrieved Employee and other Aggrieved Employees the applicable overtime wages for all hours worked beyond eight (8) hours in a single work day and more than (40) hours in a single work week.

Advertise Purple has thus violated Labor Code Sections 510 and 1198. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 558, 1194, and/or 2699(a), (f)-(g).

C. Failure to Pay All Earned Wages in Violation of Labor Code §§ 221 and 223

California Labor Code Section 221 provides that "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Labor Code § 221. California Labor Code Sections 223 provides that, "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." Labor Code § 223.

Within the previous twelve months and beyond, Advertise Purple maintained a policy and practice of violating Labor Code Sections 221 and 223 as follows. Advertise Purple paid the Lead Aggrieved Employee and other Aggrieved Employees on a salary plus commission basis.

When the Lead Aggrieved Employee worked as a business development representative, Advertise Purple paid the Lead Aggrieved Employee a base salary of \$42,000 plus a commission. The offer letter that Advertise Purple provided to the Lead Aggrieved Employee provides that the commission would be "\$300 per account that closes in which "Step 1" call was set up by you." The offer letter is a written commission agreement. That agreement does not provide that the \$300 commission is earned only after a customer has remained a customer for six months from the date the customer executed a contract with Advertise Purple. Commissions are deemed earned when an account in which the business representative set up the "Step 1" call closes.

When the Lead Aggrieved Employee worked as an account executive, Advertise Purple paid the Lead Aggrieved Employee a base salary of \$70,000 plus a commission. Advertise Purple's Chief Financial Officer described the structure of the commissions as follows: "It is 10% of month 1 billing for your first 10 deals, 20% of month 1 billing for every deal after that and 30% of month

1 billing once you are promoted to Senior AE.” Advertise Purple’s CFO further explained that the commission is based on the performance or billing of the customer in the first month that the customer performed. On information and belief, Advertise Purple did not provide formal written commission agreements to the Lead Aggrieved Employee or other Aggrieved Employees. However, on information and belief, the Lead Aggrieved Employee or other Aggrieved Employees did not agree in writing, or otherwise, that commissions as an account executive would only be deemed earned after a customer has remained a customer for six months from the date the customer executed a contract with Advertise Purple. To the contrary, the Lead Aggrieved Employee or other Aggrieved Employees agreed and understood that commissions are deemed “earned” when after an account executive successfully closed a deal, i.e., when the account executives’ work results in a new customer for Advertise Purple. The amount of the commission would then be based on the customer’s first month of performance.

An employer is generally prohibited from recovering earned wages under California Law (Lab. Code, § 221). If a commission is paid before it is “earned” under the terms of the agreement, the employer may be able to recoup the advance commission payment (subject to minimum wage obligations for non-exempt employees). Such “chargeback provisions” in commission agreements may be lawful if agreed to in writing by the employee. See *Marr v. Bank of Am., NA* (9th Cir. 2013) 506 Fed. Appx. 661, 661. A chargeback on earned commission may also be lawful if it has been (1) agreed to in writing by the employee; and (2) does not deduct from the employee’s base pay. Lab. Code, § 224; see also *Steinhebel v. Los Angeles Times Communications, LLC* (2005) 126 Cal.App.4th 696, 707; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1337-38.

Within the previous twelve months and beyond, Advertise Purple maintained a policy and practice of violating Labor Code Sections 221 and 223 by failing to inform business development representatives and account executives at the commencement of their employment that Advertise Purple would “chargeback” any commissions paid to such Aggrieved Employees if a customer failed to remain a customer for six months. Advertise Purple also maintained a policy and practice of violating Labor Code Sections 221 and 223 by failing to enter into a written agreement with such employees that clearly notifies the employees that no commissions are deemed “earned” until a customer has remained a customer for six months, that provides that all commissions should be deemed an “advance” on a commission until after the six-month period, and that authorizes Advertise Purple to deduct commissions it already paid as a chargeback. Advertise Purple did not obtain the Lead Aggrieved Employee’s or other Aggrieved Employees’ agreement in writing that chargebacks could and would be made against commissions.

For example, assume a business development representative earned a \$300 commission in July 2022 because an account in which “Step 1” call was set up by that employee closed. If that customer terminated its contract with Advertise Purple only two months after the deal closed, Advertise Purple would inform the employee that it was charging back the commission paid, and would deduct the \$300 commission from the employee’s subsequent wages and commissions. Advertise Purple engages in the same unlawful chargeback practice with respect to the commissions paid to account executives.

Because Advertise Purple failed to obtain the Lead Aggrieved Employee's and other Aggrieved Employee's written agreement regarding the commission structure, and further failed to obtain the Lead Aggrieved Employee's and other Aggrieved Employee's written agreement that commissions were not deemed earned until a customer had remained a customer for six months, and further failed to obtain the Lead Aggrieved Employee's and other Aggrieved Employee's written agreement that Advertise Purple could "chargeback" any commissions paid to those employees, Advertise Purple's "chargeback" practice violates Labor Code Sections 221 and 223. Put simply, Advertise Purple is merely stealing earned and paid wages from its employees.

Advertise Purple has thus violated Labor Code Sections 221 and 223. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 558, 1194, and/or 2699(a), (f)-(g).

D. Failure to Provide Meal Periods In Violation of Labor Code §§ 226.7, 512(a) & 1198

California Labor Code Sections 226.7, 512(a), 1198 and the applicable IWC Wage Order require employers to provide meal breaks and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal break is not provided. Pursuant to Labor Code Sections 226.7 and 512(a) and the applicable IWC Wage Order, an employer may not require, cause or permit an employee to work for a period of more than five (5) hours per day without providing the employee with an uninterrupted meal period of not less than thirty (30) minutes, except that if the total work period per day of the employee is not more than six (6) hours, the meal period may be waived by mutual consent of both the employer and the employee. Under California law, first meal periods must start after no more than five hours. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041-1042 (2012). Labor Code Sections 226.7 and 512(a) and the applicable IWC Wage Order also require employers to provide a second meal break of not less than thirty (30) minutes if an employee works over ten (10) hours per day or to pay an employee one (1) additional hour of pay at the employee's regular rate, except that if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Within the last twelve months and beyond, Advertise Purple failed to provide the Lead Aggrieved Employee and other Aggrieved Employees with legally compliant meal periods because Advertise Purple misclassified those employees as exempt and never advised the Lead Aggrieved Employee and other Aggrieved Employees they were entitled to take legally compliant meal periods.

In addition, within the last twelve months and beyond, Advertise Purple's scheduling and staffing policies and practices, or lack thereof, prevented the Lead Aggrieved Employee and other Aggrieved Employees from being relieved of all duty in order to take compliant meal periods. Due to the workload demands at Advertise Purple and Advertise Purple's failure to staff the work sites adequately, the Lead Aggrieved Employee and other Aggrieved Employees regularly were forced

to forego meal periods and/or had their meal periods interrupted or delayed by work, and were not relieved of all duties for unpaid, 30-minute meal periods. The Lead Aggrieved Employee and other Aggrieved Employees often worked their entire shifts without receiving a compliant meal period when California law required a compliant meal period.

Advertise Purple also has a company-wide practice and/or policy of not paying meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, the Lead Aggrieved Employee and other Aggrieved Employees have not received premium pay for all missed, short, or untimely meal periods. Labor Code § 226.7(c) (“If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law . . . , the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.”).

Advertise Purple thus failed to provide all meal periods in violation of Labor Code Sections 226.7, 512(a), and 1198. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to meal period premium wages, civil penalties, attorneys’ fees, costs, and interest thereon, pursuant to Labor Code Sections 558 and/or 2699(a), (f)-(g).

E. Failure to Provide Rest Periods in Violation of California Labor Code Sections 226.7, 512(a) and 1198

California Labor Code Section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC. The applicable IWC Wage Order provides that “[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period” and that the “rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof” unless the total daily work time is less than three and one-half (3.5) hours. Labor Code Section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC. To comply with its obligation to provide rest periods under Labor Code Section 226.7 and the applicable IWC Wage Order, an employer must “relinquish any control over how employees spend their break time, and relieve their employees of all duties — including the obligation that an employee remain on call. A rest period, in short, must be a period of rest.” *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269-270.

Within the last twelve months and beyond, Advertise Purple failed to provide the Lead Aggrieved Employee and other Aggrieved Employees with legally compliant rest periods because Advertise Purple misclassified those employees as exempt and never advised the Lead Aggrieved Employee and other Aggrieved Employees they were entitled to take legally compliant rest periods.

Within the last twelve months and beyond, Advertise Purple’s scheduling and staffing policies and practices, or lack thereof, prevented the Aggrieved Employees from being relieved of

all duty in order to take compliant rest periods. Additionally, Advertise Purple did not authorize and permit the Aggrieved Employees to take 10-minute, duty-free rest periods. Advertise Purple also failed to schedule rest periods and had no policy for permitting the Aggrieved Employees to take rest periods. As a result, the Aggrieved Employees would work shifts in excess of 3.5 hours and/or 6 hours without receiving all ten (10) minute rest periods to which they were entitled. Within the last twelve months and beyond, the Aggrieved Employees worked straight through their shifts without taking any ten (10) minute rest periods.

Advertise Purple also engaged in a systematic, firm-wide practice and/or policy of not paying rest period premiums owed when rest periods were not provided. Thus, Advertise Purple denied the Aggrieved Employees rest periods and failed to pay them rest period premium wages due in violation of Labor Code Section 226.7 and the applicable IWC Wage Order.

Advertise Purple failed to provide all rest periods in violation of California Labor Code Sections 226.7, 512(a) and 1198. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 558 and/or 2699(a), (f)-(g).

F. Failure to Reimburse Necessary Business Expenses in Violation of Labor Code Section 2802

Labor Code Section 2802 requires employers to pay for all necessary expenditures and losses incurred by the employee in the performance of his or her job. The purpose of Labor Code Section 2802 is to prevent employers from passing off their cost of doing business and operating expenses on to their employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014).

Within the previous twelve months and beyond, Advertise Purple, on a company-wide basis, systematically failed to reimburse the Lead Aggrieved Employee and other Aggrieved Employees for necessary business expenses incurred at the direction of Advertise Purple.

Within the previous twelve months and beyond, and Advertise Purple had a uniform policy and/or practice that required the Lead Aggrieved Employee and other Aggrieved Employees to use their personal Internet data plans, personal cell phones, and personal cell phone data plans to carry out their job duties. Advertise Purple also required the Lead Aggrieved Employee and other Aggrieved Employees to incur other home office expenses to carry out their work duties as the Lead Aggrieved Employee and other Aggrieved Employees were required to work remotely from their home offices. The Lead Aggrieved Employee and other Aggrieved Employees were also required to respond to Advertise Purple's work-related messages using either their personal Internet data plans and/or personal cell phones and personal cell phone data plans.

Although Advertise Purple required the Lead Aggrieved Employee and other Aggrieved Employees to regularly use their personal Internet data plans, their personal cell phones and cell

phone data to carry out work-related responsibilities, and to incur other home office expenses, Advertise Purple failed to reimburse the Lead Aggrieved Employee and other Aggrieved Employees for the reasonable costs of their personal Internet data plans, their personal cell phones and cell phone data plans and their other home office expenses. Between March 26, 2022 and his termination from Advertise Purple on July 19, 2022, Advertise Purple did not reimburse Plaintiff at all for any of these expenses. Upon information and belief, Advertise Purple has continued to fail to reimburse other Aggrieved Employees for these expenses throughout the relevant time period.

Advertise Purple could have provided the Lead Aggrieved Employee and other Aggrieved Employees with the actual tools required for use on the job, including company phones, or reimbursed employees for their cell phones and cell phone usage, but instead, Advertise Purple passed these operating costs off onto the Lead Aggrieved Employee and other Aggrieved Employees. Thus, Advertise Purple violated Labor Code Section 2802 by uniformly failing to reimburse any portion of the Lead Aggrieved Employee's and other Aggrieved Employees' cell phone and data plan expenses, the costs of purchasing mobile applications and the cost of the use of personal computers and personal Internet data plans. *See, e.g., Cochran*, 228 Cal. App. 4th at 1144 ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D. Cal. Dec. 9, 2014) (certifying class of cell phone reimbursement claim and adopting the logic of *Cochran*).

Advertise Purple's policy and/or practice of passing its operating costs on to the Lead Aggrieved Employee and other Aggrieved Employees violates Labor Code Section 2802. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Section 2699(f)-(g).

G. Failure to Provide Accurate Wage Statements in Violation of Labor Code Sections 226(a), 1174(d) and 1198

Labor Code Section 226(a) requires an employer to provide its employees with "an accurate itemized statement in writing showing: (1) gross wages earned, (2) total hours worked by the employee . . . , (4) all deductions . . . , (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number . . . , (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." The itemized wage statement must be provided semimonthly or otherwise when wages are paid.

Advertise Purple has not provided the Lead Aggrieved Employee and other Aggrieved Employees with properly itemized wage statements. Labor Code Section 226(e) provides that if

an employer fails to comply with providing an employee with properly itemized wages statements as set forth in Section 226(a), then the employee is entitled to recover the greater of all actual damages or \$50.00 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not to exceed \$4,000. Further, Labor Code Section 226.3 provides that any employer who violates Section 226(a) shall be subject to a civil penalty in the amount of \$250 per employee per violation in an initial citation and \$1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to Section 226(a).

Within the last twelve months and beyond, Advertise Purple knowingly and intentionally failed to provide accurate and complete itemized wage statements to the Lead Aggrieved Employee and other Aggrieved Employees in violation of Labor Code Section 226(a) in several ways:

- Advertise Purple violated Labor Code Section 226(a)(2) by failing to include the accurate number of “total hours worked” because Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt and did not record their “total hours worked” or include the accurate amount of “total hours worked” on their wage statements;
- Advertise Purple violated Labor Code Sections 226(a)(1) and 226(a)(5) by failing to include the accurate amount of “gross wages,” and “net wages” because Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt, failed to record all hours worked by those Aggrieved Employees, as detailed above, and failed to compensate them for all hours worked beyond eight (8) hours in a single workday and beyond forty (40) hours in a single work week.
- Advertise Purple also violated Labor Code Sections 226(a)(1) and 226(a)(5) by failing to include the accurate amount of “gross wages,” and “net wages” because Advertise Purple engaged in an unlawful practice of deducting earned commissions from the compensation of the Lead Aggrieved Employee and other Aggrieved Employees by employing a practice of “chargebacks,” or demanding the effective repayment of earned commissions for customers that cancelled their contracts with Advertise Purple within six months after executing a contract with Advertise Purple, as detailed above.
- Advertise Purple violated Labor Code Sections 226(a)(9) by failing to include the “all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee” for each pay period because Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt, paid them on a salary plus a modest commission basis, and failed to include any hourly rate for either regular hours or overtime hours.
- Advertise Purple also violated Labor Code Sections 226(a)(1), 226(a)(5) and 226(a)(9)

by failing to include the accurate amount of “gross wages” and “net wages” for each pay period when the Aggrieved Employees and other Aggrieved Employees should have received meal and rest period premium wages pursuant to Labor Code Section 226.7.

Because Advertise Purple violated Labor Code Section 226 in numerous ways, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover penalties, attorneys’ fees, costs, and interest thereon pursuant to Labor Code Sections 226(e), 226.3, 1174.5, and/or 2699(a), (f)-(g).

H. Failure to Provide Written Commission Agreements in Violation of Labor Code Sections 2751

California Labor Code Section 2751(a) provides that, “Whenever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid.” California Labor Code Section 2751(b) further provides that “[t]he employer shall give a signed copy of the contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee.” California Labor Code Section 204.1 provides that “Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof.”

Within the last twelve months and beyond, Advertise Purple knowingly and intentionally failed to provide written commission agreements to the Lead Aggrieved Employee and other Aggrieved Employees in violation of Labor Code Section 2751. Advertise Purple paid those employees a commission as defined by the California Labor Code but on information and belief did not provide the Lead Aggrieved Employee and other Aggrieved Employees with a written contract of employment for services to be rendered in California and the contemplated method of payment of the employee involves commissions.

Advertise Purple thus violated Labor Code Section 2751. As a result, the Lead Aggrieved Employee and other Aggrieved Employees are thus entitled to recover civil penalties, attorneys’ fees, costs, and interest thereon, pursuant to Labor Code Sections 203 and/or 2699(f)-(g).

I. Failure to Pay Wages Timely Upon Termination in Violation of Labor Code Sections 201, 202 & 203

California Labor Code Section 201 provides that if an employer discharges an employee, the employee’s earned and unpaid wages at the time of discharge are due and payable immediately. California Labor Code Section 202 provides that, if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

Failure to pay all wages in compliance with Labor Code Sections 201 and 202 subjects the employer to the penalties outlined in Labor Code Section 203. Section 203, in turn, requires the employer to pay the employee a full day of wages (8 hours) at the employee's last hourly rate for each day that all earned but unpaid wages remain unpaid up to a total of 30 days.

Within the previous twelve months and beyond, and in violation of California Labor Code Sections 201 and 202, Advertise Purple willfully failed to pay the Lead Aggrieved Employee and other Aggrieved Employees all their earned and unpaid wages either at the time of discharge, or within seventy-two (72) hours of their separation from employment with Advertise Purple for several reasons:

- Advertise Purple failed to pay the Lead Aggrieved Employee and other Aggrieved Employees for all hours worked beyond eight (8) hours in a day and forty (40) hours in a week because, including minimum and overtime wages because, as detailed above, Advertise Purple misclassified the Lead Aggrieved Employee and other Aggrieved Employees as exempt employees.
- Advertise Purple's failed to pay the Lead Aggrieved Employee and other Aggrieved Employees all earned wages due to Advertise Purple's unlawful practice of "chargebacks," as detailed above.
- Advertise Purple failed pay all earned wages because Advertise Purple failed to provide the Lead Aggrieved Employee and other Aggrieved Employees with statutory meal and rest breaks and to pay meal and rest period premium wages for missed meal and rest breaks, as detailed above.
- Advertise Purple also failed to compensate the Lead Aggrieved Employee and other Aggrieved Employees for the time they spent working during on-duty rest and meal periods.

The Lead Aggrieved Employee and other Aggrieved Employees are thus entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 203 and/or 2699(f)-(g).

J. Failure to Timely Pay Wages During Employment in Violation of Labor Code Section 204

Labor Code Section 204 provides that all wages earned by any person in any employment between the 1st and the 15th days of any calendar month (other than those wages due upon termination of an employee) are due and payable between the 16th and the 26th day of the month during which the labor was performed. Labor Code Section 204 further provides that all wages earned by any person in any employment between the 16th and the last day of any calendar month (other than those wages due upon termination of an employee) are due and payable between the

1st and the 10th day of the following month. Labor Code Section 204 also requires that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. Alternatively, Labor Code Section 204 provides that the requirements of this section are deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven (7) calendar days following the close of the payroll period.

Within the previous twelve months and beyond, for all the reasons detailed above, Advertise Purple failed to pay the Lead Aggrieved Employee and other Aggrieved Employees all wages due to them, including, but not limited to, overtime wages and minimum wages within the time period specified by Labor Code Section 204.

As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 210 and/or 2699(a), (f)-(g).

K. Failure To Maintain Accurate Records In Violation Of Labor Code § 1174(d)

Labor Code Section 1174(d) requires employers to keep payroll records showing the hours worked daily by and the wages paid to employees. Likewise, the relevant Wage Orders require employers to keep accurate records for each employee with respect to total wages paid each payroll period, total hours worked in the payroll period and applicable rates of pay, as well as time records showing when employees begin and end each work period, including meal periods, split shift intervals, and total daily hours.

Within the previous twelve months and beyond, for all the reasons detailed above, Advertise Purple violated Labor Code Section 1174(d) by knowingly, intentionally, and willfully failing to keep required accurate payroll records for the Lead Aggrieved Employee and other Aggrieved Employees. Advertise Purple did not accurately record all hours worked by the Lead Aggrieved Employee and other Aggrieved Employees including the off-the-clock work detailed above, which caused the payroll records of Aggrieved Employees to be inaccurate. Advertise Purple also did not accurately record all hours worked by certain Aggrieved Employees who were paid a daily rate and did not maintain any records showing when they began and ended each work period, including meal periods, split shift intervals, and total daily hours.

As a result, the Lead Aggrieved Employee and other Aggrieved Employees are entitled to recover penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 2699(a), (f)-(g).

L. Penalties Pursuant to California Labor Code Section 558(a)

Labor Code Section 558(a) provides that "[a]ny employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be

subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.” Labor Code Section 558(c) provides that “[t]he civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.”

Within the previous twelve months and beyond, Advertise Purple was an employer who violated the Lead Aggrieved Employee’s and other Aggrieved Employees’ rights by violating the various sections of the Labor Code detailed herein. Accordingly, the Lead Aggrieved Employee shall seek all applicable remedies available under Labor Code Section 558 for herself, the State of California, and all other Aggrieved Employees.

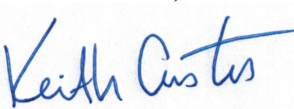
* * *

If the LWDA does not provide notice that it will investigate these violations within 65 days of the date of this notice, The Lead Aggrieved Employee, acting in the public interest as a private attorney general, shall file a civil action—and seek assessment and collection of civil penalties and all other available relief for himself, all other Aggrieved Employees, and the State of California—against Advertise Purple and its owners and officers for violations of California Labor Code Sections 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751 and 2802, as detailed herein. The Lead Aggrieved Employee shall seek all applicable and available penalties and remedies related to these violations of the California Labor Code pursuant to PAGA, including an award of reasonable attorneys’ fees and costs pursuant to Labor Code § 2699(g).

If the LWDA has any questions for the Lead Aggrieved Employee or any aspect of this Notice, please feel free to contact Keith Custis as kcustis@custislawpc.com or 213-863-4276.

Sincerely,

CUSTIS LAW, P.C.



Keith A. Custis

cc: Allyson Thompson, Esq. (via email only)

Exhibit B

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12 Attorneys for Defendants
ADVERTISE PURPLE and JONATHAN MOISAN

13
14 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
15 **COUNTY OF LOS ANGELES**

16 ALEXANDER FLAMER IV, an
17 individual,

18 Plaintiff,
19 vs.

20 ADVERTISE PURPLE, a California
corporation; and DOES 1 through 10,
21 inclusive,

22 Defendants.
23
24
25
26
27
28

Case No. 23STCV14693

**AMENDMENT TO PAGA ACTION
SETTLEMENT**

Date: March 14, 2024
Time: 9:00 a.m.
Dept. 54
Judge: Hon. Maurice A. Leiter
[Assigned for all purposes]

Complaint Filed: June 23, 2023
Trial Date: T.B.D

Pursuant to the PAGA Action Settlement (“Settlement”) entered into on or about November , 2022, Plaintiffs Alexander Flamer IV (“Plaintiff”) and Defendants Advertise Purple and Jonathan Moisan (collectively, Defendants”), through their respective counsel of record, hereby enter into this Amendment to the Settlement (“Amendment”).

1. Paragraph 1.23 is amended as follows:

1.23 “PAGA Penalties” means the total amount of PAGA civil penalties to be paid from the Gross Settlement Amount, allocated 25% to the Aggrieved Employees (\$10,530.22) and the 75% to LWDA (\$31,590.65) in settlement of PAGA claims, which amounts may be amended by the Court’s Order Approving the PAGA Action Settlement.

2. Paragraph 3.2.4 is amended as follows:

3.2.4 To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$42,120.87 to be paid from the Gross Settlement Amount, with 75% (\$31,590.65) allocated to the LWDA PAGA Payment and 25% (\$10,530.22) allocated to the Individual PAGA Payments, which amounts may be amended by the Court’s Order Approving the PAGA Action Settlement.

3. Paragraph 3.2.4.1 is amended as follows:

3.2.4.1. The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$10,530.22) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. The amount of the 25% share of PAGA Penalties set forth in his Paragraph may be amended by the Court’s Order Approving the PAGA Action Settlement.

4. New Paragraph 5.5 is added to the Settlement as follows:

The Administrator shall send a “PAGA Payment Letter” to each Aggrieved Employee with that Aggrieved Employee’s Individual PAGA Payment substantially in the form attached hereto as Exhibit 2, including any revisions required by the Court.

5. Any ambiguities, inconsistencies, or differences between this Amendment and the Stipulation and exhibits thereto shall be interpreted in favor of this Amendment.

6. Except as otherwise expressly set forth herein, all of the terms of the Settlement are hereby incorporated into this Amendment by reference. This Amendment is not intended and shall not be construed to alter any other provision of the Settlement in any way, shape, or form.

7. This Amendment may be signed in one or more counterparts and electronic signatures are acceptable. All executed copies of this Settlement Agreement, and photocopies thereof (including facsimile copies of the signature pages), shall have the same force and effect and shall be as legally binding and enforceable as the original.

CUSTIS LAW, P.C.

Dated: February 15, 2024

By:

Keith Custer

Keith Custis

Attorneys for Plaintiff
ALEXANDER FLAMER IV

GORDON REES SCULLY MANSUKHANI, LLP

Dated: February 15, 2024

By:



Peter Choi

Attorneys for Defendants
ADVERTISE PURPLE and JONATHAN MOISAN

Exhibit 2

NOTICE OF SETTLEMENT OF PAGA REPRESENTATIVE ACTION

Flamer v. Advertise Purple, et al.

Superior Court for the State of California, County of Los Angeles, Case No. 23STCV14693

You are receiving this notice in connection with a Court-approved settlement in a lawsuit (“the Action”) brought on a representative basis under the Private Attorneys General Act, Labor Code § 2698 *et seq.* (“PAGA”). The plaintiff in the lawsuit is Alexander Flamer IV (“Plaintiff”) and the defendants are Advertise Purple and Jonathan Moisan (“Defendants”). The Action seeks civil penalties for purported violations of the California Labor Code on behalf of all persons who worked in California for Advertise Purple as business development representatives or account executives during the PAGA Period (April 3, 2022 to February 15, 2024) (“Aggrieved Employees”). The PAGA statute provides that 75% of any recovery be paid to the State of California and 25% of any recovery be paid to the “aggrieved employee” group, which in this case is the group of Aggrieved Employees of Advertise Purple.

Advertise Purple denies all claims and allegations in the Action, denies that it owes any penalties, and asserts that it has fully complied with all applicable Labor Code provisions. Nevertheless, to avoid further costs and time in defending the Action, Defendants have settled the Action. By settling the Action, Defendants are not admitting that they have done anything wrong.

The Settlement resolves all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice, including alleged violations of Labor Code §§ 201, 202, 203, 204, 221, 223, 226, 226.7, 510, 512, 558, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2751, and 2802, as set forth in the PAGA Notice (the “Released PAGA Claims”). This Settlement excludes all other legal claims.

By Order dated [Approval Date], the Superior Court approved the Settlement of the PAGA claims. By approving the Settlement, the Court did not decide in favor of either Plaintiff or Defendants.

According to Advertise Purple’s records, you are an Aggrieved Employee and therefore entitled to a share of the settlement based upon the Court approved allocation. Enclosed with this Notice is your check for your share. The settlement check shall remain valid for 180 days. Thereafter, all uncashed checks shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law in the name of, and for the benefit of, the Eligible Employee that did not cash his or her settlement check.

Please Note: One hundred percent (100%) of your Individual PAGA Payment under this Settlement will be considered penalties and may be subject to local, state, or federal tax withholdings and will be reported to the IRS and state tax authorities. You should rely on your own tax advisors as to the tax consequences of your Individual PAGA Payment. Neither Plaintiff nor Advertise Purple has made any representations or warranties regarding the taxation of your Individual PAGA Payment. Nothing in this notice or any other communication shall constitute or be construed or relied upon as tax advice.

PLEASE DO NOT CALL OR WRITE THE COURT OR OFFICE OF THE CLERK TO ASK QUESTIONS ABOUT THE SETTLEMENT. IF YOU HAVE ANY QUESTIONS, YOU MAY CALL OR WRITE TO THE SETTLEMENT ADMINISTRATOR AT:

ILYM GROUP, INC.

[TELEPHONE NUMBER]

[ADDRESS]

[ADDRESS]

Exhibit C

From: DIR PAGA Unit lwdadonotreply@dir.ca.gov
Subject: Thank you for your Proposed Settlement Submission
Date: February 16, 2024 at 3:47 PM
To: kcustis@custislawpc.com

DU

02/16/2024 03:47:04 PM

Thank you for your submission to the Labor and Workforce Development Agency.

Item submitted: Proposed Settlement

If you have questions or concerns regarding this submission or your case, please send an email to pagainfo@dir.ca.gov.

DIR PAGA Unit on behalf of
Labor and Workforce Development Agency

Website: http://labor.ca.gov/Private_Attorneys_General_Act.htm

Exhibit D



2121 Avenue of the Stars, Suite 800
Los Angeles, California 90067
Phone: 213-863-4276
Email: kcustis@custislawpc.com

Alexander Flamer IV

00199-Flamer IV

PAGA_Advertise Purple

Type	Date	Attorney	Description	Quantity	Rate	Total
Service	03/31/2023	KC	Communication with client relevant to case (telephone)	0.50	\$850.00	\$425.00
Service	04/03/2023	KC	Draft, revise, finalize PAGA notice; and legal research to support same	3.40	\$850.00	\$2,890.00
Service	04/03/2023	KC	Attn to filing of PAGA Notice with LWDA	0.20	\$850.00	\$170.00
Service	04/03/2023	KC	Attn to service of PAGA Notice by US Certified Mail to Advertise Purple and courtesy copy by email to Advertise Purple's attorney	0.10	\$850.00	\$85.00
Service	06/22/2023	KC	Draft PAGA complaint	2.80	\$850.00	\$2,380.00
Service	06/23/2023	KC	Draft, revise, finalize PAGA Complaint,;revise, finalize Civil Case Cover Sheet and Summons	3.90	\$850.00	\$3,315.00
Service	06/27/2023	KC	Emails with process server re serving PAGA complaint, summons and other case initiation documents on Advertise Purple	0.10	\$850.00	\$85.00
Service	06/30/2023	KC	Attn to filing Proof of Personal Service	0.10	\$850.00	\$85.00
Service	07/07/2023	KC	Email from defense counsel A. Thompson advising she is representing Advertise Purple in PAGA case and demanding arbitration	0.10	\$850.00	\$85.00
Service	07/07/2023	KC	Draft, revise email responding to defense counsel A. Thompson's email re why Advertise Purple's attempt to arbitrate the case will fail (no arbitrable "individual PAGA claim")	0.10	\$850.00	\$85.00
Service	07/14/2023	KC	Draft, revise, finalize First Amended PAGA Representative Complaint	1.20	\$850.00	\$1,020.00
Service	07/14/2023	KC	Attn to filing/service of First Amended PAGA	0.10	\$850.00	\$85.00

Representative Complaint						
Service	07/16/2023	KC	Draft SROGs (Set 1) and RFPs (Set 1)	1.00	\$850.00	\$850.00
Service	07/19/2023	KC	Draft, revise, finalize Plaintiff's SROGs (Set 1), RFPs (Set 1), GFROGs (Set 1) and RFAs (Set 1)	1.50	\$850.00	\$1,275.00
Service	07/23/2023	KC	Draft, revise Notices and Acknowledgments of Receipt for three individual defendants	0.20	\$850.00	\$170.00
Service	07/27/2023	KC	Email from defense counsel transmitting Answer; review of same	0.10	\$850.00	\$85.00
Service	07/28/2023	KC	Draft, finalize Notice of Reassignment of the PAGA case to Dept. 54 and scheduling of a CMC in the PAGA	0.10	\$850.00	\$85.00
Service	08/07/2023	KC	Appear and participate at Mediation at Signature Resolution; travel to/from same (50% of total time)	4.40	\$850.00	\$3,740.00
Service	08/09/2023	KC	Email from Defendant transmitting Notice of Acknowledgment and Receipt re Service	0.10	\$850.00	\$85.00
Service	08/25/2023	KC	Email to defense counsel A. Thompson re Defendant's failure to respond timely to Plaintiff's SROGs (Set 1), RFPs (Set 1), GFROGs (Set 1) and EEFGROGs (Set 1)	0.10	\$850.00	\$85.00
Service	09/01/2023	KC	Email to defense counsel A. Thompson granting 15-day extension for Michael Barron to respond to complaint	0.10	\$850.00	\$85.00
Service	09/08/2023	KC	Draft, finalize Plaintiff's RFPs (Set 2) and GFROGs (Set 2) addressing Defendant's defenses	0.60	\$850.00	\$510.00
Service	09/12/2023	KC	Draft/revise proposed Second Amended Complaint to address Defendant's contention that allegations regarding individual defendant Jonathan Moisan are insufficient	0.50	\$850.00	\$425.00
Service	09/12/2023	KC	Email to defense counsel A. Thompson and C. Banks re the individual defendant's request to be dismissed from action without prejudice	0.20	\$850.00	\$170.00
Service	09/13/2023	KC	Draft, finalize Request for Dismissal Without Prejudice of Defendants Kyle Mitnick and Michael Barron	0.20	\$850.00	\$170.00
Service	09/15/2023	KC	Email from defense firm transmitting Defendant's substantive responses to Plaintiff's first set of discovery; review/analysis of responses	0.40	\$850.00	\$340.00
Service	09/15/2023	KC	Draft Bel-Aire West Notice for PAGA case	0.40	\$850.00	\$340.00
Service	09/17/2023	KC	Draft, revise Belaire West Notice and Stipulation and Proposed Order re Belaire West Notice	0.30	\$850.00	\$255.00

Service	09/18/2023	KC	Email to defense counsel A. Thompson transmitting proposed Belaire West notice and Stipulation and Proposed Order for facilitating same	0.10	\$850.00	\$85.00
Service	09/20/2023	KC	Email transmitting Crowell & Morning's Notice of Appearance; review of same	0.10	\$850.00	\$85.00
Service	09/20/2023	KC	Email from defense counsel C. Banks agreeing to stipulate to filing of Second Amended Complaint	0.10	\$850.00	\$85.00
Service	09/21/2023	KC	Meet and confer telephone call re CMC for PAGA case	0.20	\$850.00	\$170.00
Service	09/21/2023	KC	Draft, revise, finalize Plaintiff's Case Management Conference Statement; attn to filing/service of same	0.30	\$850.00	\$255.00
Service	09/25/2023	KC	Draft, revise Stipulation Granting Plaintiff Leave to File SAC; finalize SAC;	0.40	\$850.00	\$340.00
Service	09/25/2023	KC	Email to defense counsel C. Banks transmitting Stipulation Granting Plaintiff Leave to File SAC and SAC; along with Belaire West notice and stipulation re same	0.10	\$850.00	\$85.00
Service	09/26/2023	KC	Emails with defense counsel C. Banks re Stipulation for Leave to file SAC	0.10	\$850.00	\$85.00
Service	09/26/2023	KC	Finalize, file/serve Stipulation for Leave to file SAC	0.10	\$850.00	\$85.00
Service	09/27/2023	KC	Meet and confer with defense counsel C. Banks re Belaire West notice and stipulation	0.10	\$850.00	\$85.00
Service	09/28/2023	KC	Revise, finalize Stipulation and Order Granting Plaintiff Leave to File Second Amended Complaint	0.10	\$850.00	\$85.00
Service	10/02/2023	KC	Revise/finalize Second Amended Complaint; attn to filing/service of same	0.20	\$850.00	\$170.00
Service	10/02/2023	KC	Review/analyze Defendant's proposed changes to Belaire West Notice; make further revisions to same; send further revised redline Belaire West Notice to defense counsel C. Banks	0.20	\$850.00	\$170.00
Service	10/12/2023	KC	Emails with defense counsel K. Westmoreland and P. Choi re PAGA Data needed for mediation and other case management issues	0.20	\$850.00	\$170.00
Service	10/13/2023	KC	Emails exchanged with GRSM defense counsel Peter Choi re mediation and PAGA data required for mediation	0.10	\$850.00	\$85.00
Service	10/14/2023	KC	Draft, revise PAGA mediation brief	5.90	\$850.00	\$5,015.00
Service	10/15/2023	KC	Draft PAGA Mediation Brief	4.10	\$850.00	\$3,485.00

Service	10/18/2023	KC	Draft, revise PAGA Memo of Understanding (for potential settlement)	0.40	\$850.00	\$340.00
Service	10/18/2023	KC	Email to defense counsel re need for PAGA data and trasmitting PAGA MOU	0.10	\$850.00	\$85.00
Service	10/19/2023	KC	Emails with defense counsel P. Choi and K. Westmoreland re PAGA data and need for updated, accurate data	0.40	\$850.00	\$340.00
Service	10/20/2023	KC	Emails from defendant's firm transmitting substitution of attorney forms	0.10	\$850.00	\$85.00
Service	10/20/2023	KC	Prepare civil penalty analysis; review/analysis of Defendant's data	0.50	\$850.00	\$425.00
Service	10/20/2023	KC	Draft / revise Amended Proof of Service of Second Amended Complaint	0.20	\$850.00	\$170.00
Service	10/20/2023	KC	Draft / revise / finalize Requests for Dismissal as to Kyle Mitnick and Michael Barron	0.20	\$850.00	\$170.00
Service	10/22/2023	KC	Prepare PAGA civil penalty analysis for mediation purposes	0.30	\$850.00	\$255.00
Service	10/24/2023	KC	Legal research re stacking of civil penalties	0.30	\$850.00	\$255.00
Service	10/27/2023	KC	Email from Defendant transmitting Answer to SAC; review/analysis of same	0.20	\$850.00	\$170.00
Service	10/29/2023	KC	Draft, revise mediation brief; review documents produced by Defendant and Defendant's discovery responses	8.50	\$850.00	\$7,225.00
Service	10/30/2023	KC	Draft, revise finalize Plaintiff's Mediation Brief and prepare all exhibits for same; email to arbitrator	9.00	\$850.00	\$7,650.00
Service	11/03/2023	KC	Travel to/from 11/3/23 mediation at Signature Resolution (50% of total time)	0.60	\$850.00	\$510.00
Service	11/03/2023	KC	Attend 11/3/23 mediation at Signature Resolution (50% of total time)	4.00	\$850.00	\$3,400.00
Service	11/03/2023	KC	Email from/to defense counsel P. Choi re defendant's request for extension re Plaintiff's discovery requests	0.10	\$850.00	\$85.00
Service	11/06/2023	KC	File complaint with the LWDA (PAGA Online)	0.10	\$850.00	\$85.00
Service	11/06/2023	KC	Communication with mediator relevant to case (email)	0.10	\$850.00	\$85.00
Service	11/08/2023	KC	Communication with client relevant to case (Zoom)	0.30	\$850.00	\$255.00
Service	11/09/2023	KC	Emails with defense counsel re drafting Stipulation of Settlement	0.10	\$850.00	\$85.00

Service	11/16/2023	KC	Draft, revise proposed PAGA Representation Stipulation of Settlement	1.70	\$850.00	\$1,445.00
Service	11/16/2023	KC	Emails with Settlement Administrator Ilym Group., Inc.	0.20	\$850.00	\$170.00
Service	11/28/2023	KC	Email to/from defense counsel P. Choi requesting defendant to provide further revised or final stipulation of settlement	0.10	\$850.00	\$85.00
Service	11/29/2023	KC	Email and telephone to Defendant's counsel P. Choi re Defendant's further redline/revisions to Joint Stipulation of Settlement	0.10	\$850.00	\$85.00
Service	11/29/2023	KC	Email and telephone to Defendant's counsel P. Choi re Defendant's further redline/revisions to Joint Stipulation of Settlement	0.10	\$850.00	\$85.00
Service	12/04/2023	KC	Emails to defense counsel P. Choi and D. Meppen re Defendant's failure to provide further revise PAGA Stipulation of Settlement after 2.5 weeks	0.20	\$850.00	\$170.00
Service	12/05/2023	KC	Multiple emails with defense counsel P. Choi and D. Meppen re PAGA Stipulation of Settlement, and defendant's attempt to add paid sick leave Labor Code sections to release that are not referenced in PAGA Notice and operative complaint	0.20	\$850.00	\$170.00
Service	01/15/2024	KC	Draft Motion for PAGA Approval	1.00	\$850.00	\$850.00
Service	01/16/2024	KC	Draft Custis Declaration ISO Motion for PAGA Approval	0.90	\$850.00	\$765.00
Service	01/28/2024	KC	Draft PAGA Approval Letter	0.50	\$850.00	\$425.00
Service	02/01/2024	KC	Draft Motion for Approval of PAGA Settlement	4.10	\$850.00	\$3,485.00
Service	02/02/2024	KC	Draft, revise Motion for Approval of PAGA Action Settlement	1.20	\$850.00	\$1,020.00
Service	02/03/2024	KC	Draft, revise [Proposed] Judgment	0.30	\$850.00	\$255.00
Service	02/03/2024	KC	Draft, revise [Proposed] Order Granting Motion for Approval of PAGA Action Settlement	0.40	\$850.00	\$340.00
Service	02/03/2024	KC	Draft, revise Declaration of Alexander Flamer IV ISO Motion for PAGA Settlement Approval	0.40	\$850.00	\$340.00
Service	02/03/2024	KC	Draft, revise Motion for PAGA Settlement Approval	2.60	\$850.00	\$2,210.00
Service	02/03/2024	KC	Draft, revise Declaration of Keith Custis ISO Motion for PAGA Settlement Approval	2.60	\$850.00	\$2,210.00
Service	02/08/2024	KC	Draft, finalize Declaration of Alexander Flamer IV ISO Motion for PAGA Settlement Approval	0.40	\$850.00	\$340.00

Service	02/08/2024	KC	Draft Declaration of Settlement Administrator ISO Motion for PAGA Settlement Approval; email to/from administrator re same	0.40	\$850.00	\$340.00
Service	02/12/2024	KC	Email to defense counsel P. Choi re draft Motion for Approval of PAGA Action Settlement	0.10	\$850.00	\$85.00
Service	02/13/2024	KC	Communication with client relevant to case (emails)	0.10	\$850.00	\$85.00
Service	02/13/2024	KC	Emails with defense counsel re draft Motion for Approval of PAGA Action Settlement	0.10	\$850.00	\$85.00
Service	02/13/2024	KC	Draft, revise Amendment to PAGA Action Settlement to address amounts requested by motion for approval, and to include PAGA Payment Letter	0.70	\$850.00	\$595.00
Service	02/13/2024	KC	Draft, revise proposed PAGA Payment Letter	0.30	\$850.00	\$255.00
Service	02/14/2024	KC	Emails with defense counsel P. Choi re Amendment to PAGA Action Settlement and draft Motion for PAGA Action Settlement	0.10	\$850.00	\$85.00
Service	02/15/2024	KC	Emails with defense counsel P. Choi re Amendment to PAGA Action Settlement	0.10	\$850.00	\$85.00
Service	02/16/2024	KC	Draft, revise, finalize Motion for Approval of PAGA Action Settlement, and all supporting/ related documents	3.20	\$850.00	\$2,720.00
				Quantity Subtotal		82.8
				Quantity Total		82.8
				Subtotal		\$70,380.00
				Total		\$70,380.00

Exhibit E

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
Babak G. Yousefzadeh, Cal. Bar. No. 235974
3 Gal Gressel, Cal. Bar. No. 286312
Hyunki ("John") Jung, Cal. Bar. No. 318887
4 Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4158
5 Telephone: (415) 434-9100
Facsimile: (415) 434-3947
6 Email: byousefzadeh@sheppardmullin.com
ggressel@sheppardmullin.com
7 hjungsheppardmullin.com

8 Attorneys for Defendants, KAISER FOUNDATION
HEALTH PLAN INC., KAISER FOUNDATION
9 HOSPITALS, and SOUTHERN CALIFORNIA
PERMANENTE MEDICAL GROUP

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES – STANLEY MOSK COURTHOUSE**

12 MARIA F. TORRES,

13 Plaintiff,

14 v.

15 SOUTHERN CALIFORNIA PERMANENTE
16 MEDICAL GROUP, a corporation; KAISER
FOUNDATION HEALTH PLAN INC.; a
17 corporation; KAISER FOUNDATION
HOSPITALS, a corporation; and Does 1 through
18 10, Inclusive,

19 Defendants.

Case No. 19STCV42476

Assigned for all purposes to Dept. 58

**DECLARATION OF GAL GRESSEL IN
SUPPORT OF DEFENDANTS' MOTION FOR
TERMINATING SANCTIONS OR ISSUE
AND EVIDENCE SANCTIONS; AND
MONETARY SANCTIONS AGAINST
PLAINTIFF AND HER COUNSEL IN THE
AMOUNT OF \$154,557**

RESERVATION ID#: 019718469581

Judge: Hon. Judge Bruce G. Iwasaki
Date: May 17, 2023
Time: 9:00 a.m.
Courtroom: Dept. 58

Complaint: November 25, 2019
FAC: December 7, 2022
Trial Date: TBD

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I, Gal Gressel, declare and state as follows:

1. I am an attorney with the law firm Sheppard Mullin Richter & Hampton, LLP, attorneys of record for defendants Kaiser Foundation Health Plan Inc., Kaiser Foundation Hospitals, and Southern California Permanente Medical Group (“Defendants”). Unless expressly stated otherwise below, I have personal knowledge of the facts set forth herein, and I could and would testify competently thereto if called and sworn as a witness.

Factual Background

2. A true and correct copy of excerpts of Volume I of Plaintiff's deposition testimony, taken on November 11, 2020 is attached as **Exhibit A**. A true and correct copy of excerpts of Volume II of Plaintiff's deposition testimony, taken on November 12, 2020 is attached as **Exhibit B**. A true and correct copy of excerpts of Volume III of Plaintiff's deposition testimony, taken on March 26, 2021, is attached as **Exhibit C**. A true and correct copy of excerpts of Volume IV of Plaintiff's deposition testimony, taken on October 6, 2022, is attached as **Exhibit D**.

3. **Exhibit E** is a true and correct copy of the License, Certificate, and Registration Verification (“LCR”) policy in effect at the time of Plaintiff’s termination of employment.

4. As part of litigation of this case, a search was conducted for any instance where an employee performed worked on an expired license, certification, or verification (“LCR”) (such as a Basic Life Support certification), or when an employee failed to timely renew their LCR. SCPMG produced documents to Plaintiff showing such information for each employee. **Exhibit F** is a true and correct copy of a chart produced in this case that shows (a) the employees’ ages at the time of discipline, and (b) whether the employee had taken a medical leave of absence within the year preceding the discipline (like Plaintiff). An analysis of the information in the chart shows the following:

- The age of the employee at termination ranged from 22 to 63 years old, with an average age of 40 (adding together all ages and dividing by 25);
- In 18 instances the employee had not taken medical leave in one year preceding the termination ($18/25 = 72\%$);
- In 6 instances the employee had taken medical leave in the preceding year ($7/25 = 28\%$).

11. Plaintiff's counsel had instructed Plaintiff not to answer questions about her disability on the basis that the questions were improper legal-contention questions not permitted by *Rifkind v. Superior Court*, 22 Cal. App. 4th 1255, 1258 (1994). This Court overruled those objections and ordered Plaintiff to answer these questions. **See Exhibit G.** However, at Plaintiff's continued deposition, on March 26, 2021, Plaintiff's counsel instructed Plaintiff not to answer questions considered "outside the scope" of the questions the Court ordered Plaintiff to answer. Plaintiff's counsel had made the same "Rifkind" instructions in another case, *Vargas v. Kaiser Foundation Health Plan, Inc.*, Riverside County Superior Court Case No. RIC1906237. The Court in *Vargas* also found the instructions improper and imposed \$3,600 in sanctions against the plaintiff in that case. A true and correct copy of the Notice of Ruling, which includes the court's order, is attached as **Exhibit P.**

12. SCPMG repeatedly requested that Plaintiff comply with the Court's order to produce her text messages in native format, but she refused, taking the position that she had "complied" with the Court's order by producing them in *PDF* format, and that there was "nothing left to do." True and correct copies of meet and confer communications between the parties' counsel on this subject are attached as **Exhibit Q** (March 2, 2021: defendants, requesting native copies of text messages, as ordered by the Court), **Exhibit R** (March 17 and 19, same), **Exhibit S** (March 23, 2021, Plaintiff stating that with her latest PDF format production, she had "complied" and there was "nothing left to do"); **Exhibit T** (March 24, 2021: defendants again requesting natives to comply with the Court's order); **Exhibit U** (March 25, Plaintiff refusing compliance).

13. On November 2, 2021, the parties stipulated, and the Court approved, the appointment of the Honorable Elizabeth Feffer (ret.) as an all-purpose discovery referee under Code of Civil Procedure section 638 (the "Referee"). A true and correct copy of the parties' stipulation and the Court's order appointing the Referee is attached as **Exhibit V.**

14. On February 3, 2022, Defendants filed an Omnibus Motion re Discovery Disputes, and to Impose Sanctions in the Amount of \$6,000 Against Plaintiff and Her Counsel (the "Omnibus Motion"), to be heard by the Referee. This included Plaintiff's refusal to comply with this Court's February 25, 2021 order (Exhibit G) to produce native copies of her text messages and to answer questions at deposition about her alleged disability. On March 4, 2022, the Referee granted most parts of

1 Defendants' Omnibus Motion, including enforcing this Court's order that Plaintiff must produce her text
2 messages in native format and answer questions at deposition about her disability. A true and correct
3 copy of the Referee's order is attached as **Exhibit W**. The Referee also imposed the full amount of
4 sanctions requested, \$6,000, against Plaintiff, because of "Plaintiff's failure to comply with the court's
5 February 25, 2021 orders" regarding production of her text messages in native format and refusal to
6 answer questions about her disability. Exhibit W, p. 19. I attended the hearing on the Omnibus Motion,
7 which took place on March 3, 2022. A true and correct copy of excerpts of the hearing are attached as
8 **Exhibit X**.

9 **Plaintiff's Refusal to Comply with the Referee's Order**

10 15. On March 23, 2022, Defendants removed this action to federal court. On March 29,
11 2022, I sent a letter to Plaintiff's counsel requesting that Plaintiff confirm she would comply with the
12 Referee's Order and make all disclosures and production by March 31, 2022. My letter explained that
13 "after removal, the federal court takes the case up where the State court left it off," *Jenkins v.*
14 *Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996); *see also* 28 U.S.C. § 1450, that
15 any order entered by a state court "should be treated as though it had been validly rendered in the federal
16 proceeding," *Butner v. Neustadter*, 324 F.2d 783, 786 (9th Cir. 1963), and that as a result, the Referee's
17 Order remained valid and in effect. A true and correct copy of my letter is attached as **Exhibit Y**.

18 16. On March 31, 2022, Plaintiff's counsel responded that Plaintiff would not comply with
19 the Referee's Order, based on her contention that Defendants' removal was improper and that the action
20 was "stayed" at the superior court. Plaintiff's counsel did not offer any authority for their position. A
21 true and correct copy of Plaintiff's March 31, 2022 letter is attached as **Exhibit Z**.

22 17. On April 7, 2022, I sent another letter to Plaintiff's counsel, again requesting that
23 Plaintiff comply with the Referee's Order, a true and correct copy of which is attached as **Exhibit AA**.
24 My letter explained that the state court action was not "stayed," but that rather, the removal terminated
25 the state court's jurisdiction altogether. My letter explained that if Plaintiff continued to refuse to
26 comply with the Referee's Order, Defendants would file a motion for sanctions, including for issue
27 sanctions, evidence sanctions, monetary sanctions, and an adverse inference instruction. I requested that
28

1 Plaintiff's counsel reconsider their position and inform me when they were available to discuss the
2 issues raised in my letter. I did not receive a response.

3 18. On April 25, 2022, Defendants filed a motion for sanctions against Plaintiff due to her
4 refusal to comply with the Referee's order. Plaintiff also filed a motion to remand the action. On June
5 13, 2022, the federal court denied Plaintiff's motion to remand, finding that her claims were preempted
6 by the LMRA, and gave "Plaintiff one last chance to comply with the outstanding discovery orders
7 before issuing additional sanctions, up to and including those requested by Defendants, if not
8 additional." A true and correct copy of the federal court's order is attached as **Exhibit BB**. On May 23,
9 2022, the federal court had issued a tentative ruling to this same effect.

10 **Plaintiff's Failure to Comply With The Federal Court's Order**

11 19. On May 25, 2022, Plaintiff supplemented her answer to Special Interrogatory No. 17, a
12 true and correct copy of which is attached as **Exhibit CC**. Plaintiff also produced medical records.
13 However, despite disclosing four new healthcare providers, Plaintiff produced records for just one of
14 those providers. Plaintiff also produced unemployment and disability benefits records, but did not
15 include in her production the records held by the Employment Development Department (EDD).
16 However, Plaintiff had not provided Defendants with a release for those records from the EDD.
17 Plaintiff's total production was 195 pages.

18 20. On June 22, 2022, Defendants sent a demand to Plaintiff to supplement her discovery and
19 provide releases for her medical records and EDD records. A true and correct copy of my letter with
20 this demand is attached as **Exhibit DD**. Plaintiff provided the releases and supplemented her discovery
21 responses. A true and correct copy of Plaintiff's second supplemental answer to Special Interrogatory
22 No. 17 is attached as **Exhibit EE**.

23 21. Upon receiving Plaintiff's releases, Defendants issued subpoenas and included the
24 releases, and received document productions from Plaintiff's providers and the EDD. The table below
25 summarizes the information and documents that Plaintiff produced in comparison to the production of
26 records received from Plaintiff's providers and the EDD. The additional documents that Defendants
27 received total 1,281 new pages that Plaintiff did not produce.

Custodian or Person Identified by Plaintiff as a Healthcare Provider	Documents Produced by Plaintiff	Later Production from Third Parties
Kaweah Delta Health Care District	Torres 2257-2315 (58 pages total)	SCPMG obtained via release, and produced under SCPMG 00004289-4596 (307 pages total). The true document production was over 5 times what Plaintiff produced – an additional 290 pages of medical records at issue in this case.
Dr. Aditya Verma	None	SCPMG obtained via release, and produced under SCPMG 00004272-4288 (16 pages)
Terrio Physical Therapy	None	SCPMG obtained via release, and produced under SCPMG 00004670-4774 (104 pages)
Dr. Lily Honoris	None	SCPMG obtained via release, and produced under SCPMG 00004775-4803 (billing records) (28 pages); and SCPMG00004804-5753 (949 pages). Defendants served a subpoena for these records on or about July 6, 2022. However, because the custodian of records did not respond to the subpoena and informed Defendants' deposition officer that the subpoena could not be located. Defendants re-issued the subpoena on September 15, 2022. The custodian of records then delivered the documents to the deposition in response to the July 6, 2022 subpoena.
Unemployment and EDD Benefits Records	Torres 2119-2256 (137 pages total)	SCPMG obtained via release, and produced under SCPMG 00004597-4669 (72 pages) These were entirely different records than the records Plaintiff produced.

22. On September 27, 2022, Defendants received Plaintiff's medical records from her cardiologist. A true and correct copy of excerpts of these records are attached in **Exhibit FF**. Plaintiff's cardiologist's records disclosed at least three new providers, but Plaintiff has not produced any records relating to those providers.

23. On October 11, 2022, Plaintiff produced Plaintiff produced 24 pages of medical records from Dr. Jennifer Soares, a true and correct copy of which is attached as **Exhibit GG**. On October 12,

2022, Plaintiff produced Torres 002375, a true and correct copy of which is attached as **Exhibit HH**.

On October 13, 2022, Plaintiff produced an expert report, which refers to Dr. Soares' notes.

24. On September 14, 2022, before receiving the medical records productions described above, I sent a letter to Plaintiff's counsel inquiring whether Plaintiff sought more than garden variety emotional distress damages, with a request that Plaintiff agree to an independent medical examination if she so alleged. On September 15, 2022, Plaintiff's counsel responded that Plaintiff alleged more than garden variety emotional distress damages and represented that Plaintiff would agree to an independent medical examination. Following the disclosure of some of Plaintiff's missing mental health history on September 27, 2022, Plaintiff's counsel indicated that Plaintiff would no longer agree to an independent medical examination by Defendant's expert. After Defendants filed a renewed motion for sanctions in federal court, which raised Plaintiff's refusal, and provided Plaintiff with additional explaining that that the examination was proper, Plaintiff agreed to sit for an examination.

Renewed Sanctions Motion in Federal Court

25. On October 24, 2022, Defendants filed a renewed motion for sanctions. A true and correct copy of Plaintiff's opposition is attached as **Exhibit II**. However, on December 7, 2022, the federal court permitted Plaintiff to amend her Complaint to withdraw any allegations that gave rise to federal court jurisdiction under the Labor Management Relations Act, remanded the case to state court, and referred Defendants' motion for monetary sanctions (only) to the magistrate judge. A true and correct copy of the court's order is attached as **Exhibit JJ**. The federal court heard the motions on December 5, 2022, and a true and correct copy of the transcript from the hearing is attached as **Exhibit KK**. On January 26, 2023, the magistrate judge declined to consider the substance of the motion for sanctions, explaining that due to the remand, "the superior court would be better suited to determine whether Plaintiff has complied with the orders of the superior court and the superior court's discovery referee." A true and correct copy of the magistrate's order is attached as **Exhibit LL**.

Sanctions

26. On February 27, 2023, this Court entered terminating sanctions in the case *Robert Wendt v. Oi, Inc.*, Case No. 22STCV10507. A true and correct copy of the Court's order is attached as **Exhibit MM**.

1 27. Babak Yousefzadeh, a partner at my firm, has been practicing law in California for over
2 eighteen years, and is a labor and employment specialist (having focused on employment law for
3 almost his entire career), at one of the most preeminent law firms in the country, with one of the largest
4 and best known labor and employment practices in California. Mr. Yousefzadeh's regular hourly rate
5 during the pendency of this litigation are as follows: \$860/hr in 2020; \$925/hr in 2021; \$985/hr in
6 2022; and \$1,065/hr in 2023. Although Mr. Yousefzadeh's regular hourly rate has increased during
7 this litigation, and the bulk of Defendants' efforts to obtain Plaintiff's medical records and related
8 information took place in 2021 to present, when Mr. Yousefzadeh's rates were higher, for purposes of
9 this motion, and to calculate fees more conservatively, Defendants request that the Court approve a
10 lower rate of \$750 per hour for Mr. Yousefzadeh.

11 28. I have been practicing law in California for over ten years, and am also an employment
12 specialist in the labor and employment group of Sheppard Mullin. My regular hourly rates during the
13 pendency of this litigation are as follows: \$685/hr in 2020; \$780/hr in 2021; \$880/hr in 2022; and
14 \$975/hr in 2023. Although my regular hourly rate has increased during this litigation, and the bulk of
15 Defendants' efforts to obtain Plaintiff's medical records and related information took place in 2021 to
16 present, when my rates were higher, for purposes of this motion, and to calculate fees more
17 conservatively, Defendants request that the Court approve a lower rate of \$585 per hour for me.

18 29. John Jung has been practicing law in California for over five years, and is also an
19 employment specialist in the labor and employment group of Sheppard Mullin. Mr. Jung's regular
20 hourly rate in 2022, at the time he performed the relevant work on this matter, was \$715 per hour. For
21 purposes of this motion, and to calculate fees more conservatively, Defendants request that the Court
22 approve lower rate of \$500 per hour for Mr. Jung.

23 30. For efficiency, our firm has utilized paralegals to assist on this matter, with rates varying
24 from \$205 per hour to \$385 per hour from 2020 to 2023. For purposes of this motion, and to calculate
25 fees more conservatively, Defendants request that the Court approve an hourly rate of \$250 per hour for
26 paralegals.

27 31. I have reviewed our billing records to determine the costs and time incurred in: (1)
28 seeking emotional-distress discovery from Plaintiff, such as propounding discovery, meet-and-confer

correspondence, reviewing documents and records, and seeking Plaintiff's medical records; (2) motion practice to obtain Plaintiff's emotional-distress discovery, which includes the motion to compel before the Referee, two sanctions motions in federal court, and this motion for sanctions (including an estimated eight hours of time for myself on the reply brief and two hours for Mr. Yousefzadeh); and (3) Defendants' expert psychiatrist, who was required to proceed without all of Plaintiff's relevant medical records, as summarized in the tables below.

Reasonable Attorneys Fees'

Timekeeper	Hours	Rate	Total Reasonable Fees
Babak G. Yousefzadeh	23.40	\$750	\$17,550
Gal Gressel	161.70	\$585	\$94,595
John Jung	24.8	\$500	\$12,400
Paralegals	36.8	\$250	\$9,200
Total			\$133,745

Costs Incurred

Item	Cost
Service of Subpoenas, records fees, deposition officer fees	\$3,138
Psychiatric expert	\$17,674
Total	\$20,812

Thus, the total reasonable attorneys fees' and costs incurred are \$154,557.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on the 25th day of April, 2023, in San Francisco, California.



Gal Gressel

Exhibit F

Exhibit F
Flamer v. Advertise Purple, et al., Case No. 23STCV14693
Litigation Costs

Date	Description	Amount
4/3/23	Postage for serving PAGA Notice by US Certified Mail	\$9.48
4/3/23	Filing fee paid to the Labor Workforce and Development Agency (LWDA)	\$75.00
6/26/23	Initial filing fee and related e-filing/court fees	\$463.07
6/26/23	Ace Legal fee for e-filing Plaintiff's Notice of Related Case	\$15.02
6/30/23	Ace Legal fee for e-filing Proof of Personal Service in PAGA Case	\$15.02
6/30/23	USA Express fee for Service of Process on Advertise Purple's Registered Agent for Service of Process Invoice PS316948	\$122.40
7/14/23	Ace Legal fee for e-filing FAC in PAGA Case	\$15.02
7/14/23	Mediation fee paid to Signature Resolution (Judge Michael Latin) (Plaintiff's total mediation fee for this mediation for both Case No. 23STCV14693 and Case No. 22STCV33672 was \$9,450)	\$3,500.00
9/13/23	Ace Legal fee for e-filing Request for Dismissal Without Prejudice of Defendants Kyle Mitnick and Michael Barron	\$15.02
9/21/23	Ace Legal fee for e-filing Plaintiff's Case Management Conference Statement	\$15.02
9/29/23	Ace Legal fee for e-filing Stipulation and Proposed Order Granting Plaintiff Leave to File SAC	\$35.62
10/2/23	Ace Legal Fee for e-filing Plaintiff's Second Amended Complaint	\$15.02
10/19/23	Mediation fee paid to Signature Resolution (Judge Louis Meisinger) ((Plaintiff's total mediation fee for this mediation for both Case No. 23STCV14693 and Case No. 22STCV33672 was \$8,000)	\$3,500.00
10/20/23	Ace Legal fee for e-filing Amended Proof of Service of Second Amended Complaint and Requests for Dismissal of Kyle Mitnick and Michael Barron	\$15.02
11/15/23	Motion reservation fee for hearing on Motion for Court Approval of PAGA Settlement	\$61.65
2/16/24	Journal Technologies & Court fees for e-filing Motion for Court Approval of PAGA Settlement and supporting documents	\$7.26
12/1/24	Estimated fee for e-filing Administrator's declaration regarding the distribution of settlement funds.	\$7.26
	TOTAL	\$7,886.88

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 18 years and not a party to the within action; my business address is 2121 Avenue of the Stars, Suite 800, Los Angeles, California 90067.

On February 16, 2024, I served the foregoing document(s) described as:

**DECLARATION OF KEITH CUSTIS IN SUPPORT OF MOTION FOR APPROVAL OF
PAGA ACTION SETTLEMENT**

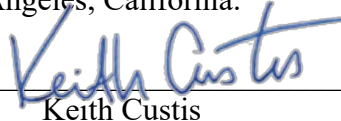
on the interested parties in this action,

Debra Ellwood Meppen
Kimberly Westmoreland
Peter Choi
Gordon Rees
Scully Mansukhani, LLP
633 West Fifth Street, 52nd Floor
Los Angeles, CA 90071
kwestmoreland@grsm.com
dmeppen@grsm.com
pchoi@grsm.com

by sending a true copy thereof to the interested parties as follows:

- ☐ **(BY PERSONAL SERVICE)** By causing the document(s) listed above to be personally delivered on the date set forth above to the person(s) at the address(es) set forth above.
- ☒ **(BY EMAIL)** By electronically mailing a true and correct copy through Custis Law, P.C.'s electronic mail system from kcustis@custislawpc.com to the email addresses set forth above pursuant Code of Civil Procedure Section 1010.6(e) and Rule 2.251 of the California Rules of Court.
- ☐ **(BY U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California, that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 16, 2024 in Los Angeles, California.


Keith Custis