

KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq., Cal. Bar No. 185123
eric@kingsleykingsley.com
KELSEY M. SZAMET, Esq., Cal. Bar No. 260264
kelsey@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Telephone: (818) 990-8300
Fax: (818) 990-2903

Attorneys for Plaintiff and the Proposed Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

RIVELINO TAVIRA, an individual, on
behalf of himself and others similarly situated

PLAINTIFF,

v.

GENERAL FOUNDRY SERVICE
CORPORATION; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. RG20072299

[Case Assigned for All Purposes to Hon. Brad
Seligman in Dept. 23]

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Kelsey M. Szamet, Rivelino Tavira, and Lluvia
Islas, Proposed Order, and Judgment]*

Date: August 31, 2021

Time: 3:00 p.m.

Dept.: 23

Reservation No.: R-2257420

Complaint Filed: August 24, 2020

FAC Filed: October 29, 2020

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 31, 2021 at 3:00 p.m. in Department 23 of the above-entitled court, Plaintiff RIVELINO TAVIRA (“Plaintiff”) will, and hereby does, move the Court for an order:

1. Granting final approval of the settlement in the case pursuant to the Joint Stipulation of Class Action Settlement and Release of Claims (“Settlement Agreement”), a copy of which is attached to the concurrently-filed Declaration of Kelsey M. Szamet as Exhibit “1”;

2. Affirming Kingsley & Kingsley, APC as Class Counsel;

3. Affirming RIVELINO TAVIRA as Class Representative and awarding an enhancement award of \$2,500.00;

4. Awarding ILYM Group, Inc. claims administration fees of \$6,500.00 for its services as Settlement Administrator; and,

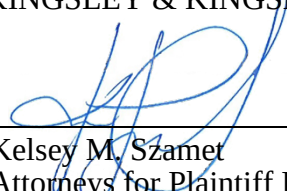
5. Entering judgment.

This Motion will be made pursuant to Code of Civil Procedure section 382 and California Rule of Court, rule 3.769 on the grounds that the proposed Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members and the parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Rivelino Tavira, Lluvia Islas, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: August 6, 2021

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Attorneys for Plaintiff Rivelino Tavira and the
Proposed Class

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	1
A.	Litigation Overview and Procedural History	1
B.	Settlement Efforts	2
C.	Preliminary Approval.....	2
III.	THE PRELIMINARILY APPROVED SETTLEMENT.....	3
A.	The Settlement Class.....	3
B.	Settlement Payments.....	3
C.	Individual Settlement Payments	4
D.	Class Notice	4
E.	Check Mailed Settlement – No Reversion.....	4
IV.	THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT	5
A.	The Settlement is Entitled to a Presumption of Fairness	5
B.	The Court Should Approve This Class Action Settlement Because it Satisfies Each of the <i>Kullar</i> Factors	6
1.	The Strength of Plaintiff’s Case.....	6
2.	The Risk, Expense, Complexity, and Likely Duration of Further Litigation	10
3.	The Risk of Maintaining Class Action Status through Trial.....	10
4.	The Amount Offered in Settlement.....	10
5.	The Extent of Discovery Completed and Stage of the proceedings	11
6.	The Experience and Views of Counsel	11
7.	The Presence of a Governmental Participant.....	12
8.	The Proposed Plan of Allocation Is Fair and Reasonable.....	12
9.	The Reaction of the Class Members to the Proposed Settlement	12
V.	ENHANCEMENT TO PLAINTIFF	12
VI.	SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY. 13	

VII.	CONCLUSION.....	14
------	-----------------	----

TABLE OF AUTHORITIES

Federal Cases

Ingram v. The Coca-Cola Company,

200 F.R.D. 685 (N.D. Ga 2001)..... 12

McKenzie v. Federal Exp. Corp.,

(C.D. Cal. 2011) 765 F. Supp. 2d 1222 8

Officers for Justice v. Civil Service Comm’n,

(9th Cir. 1982) 688 F.2d 615 12

Van Vranken v. Atlantic Richfield Co.,

901 F. Supp. 294 (N.D. Cal. 1995) 12

State Cases

Carrington v. Starbucks Corporation,

(2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647..... 9

Dunk v. Ford Motor Co.,

(1996) 48 Cal.App.4th 1794 5

Kullar v. Foot Locker Retail, Inc.,

(2008) 168 Cal.App.4th 116 6

Nordstrom Commissions Cases,

186 Cal.App.4th 576 (2010) 9

State Statutes

Business & Professions Code § 17200 1

Code of Civil Procedure § 1542..... 13

Code of Civil Procedure § 1781(f)..... 4

Code of Civil Procedure § 382..... 5

Labor Code § 1194..... 1

Labor Code § 1199..... 1

Labor Code § 226(2)(C)..... 7

Labor Code § 226(a) passim

1	Labor Code § 226(a)(6)	8
2	Labor Code § 226(e)	8, 9
3	Labor Code § 226(e)(1)	7, 10
4	Labor Code § 226(e)(2)(B)	7
5	Labor Code § 226.3.....	8
6	Labor Code § 2698.....	9
7	Labor Code § 2699.....	1, 2
8	Labor Code § 510.....	1

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff RIVELINO TAVIRA (“Plaintiff”) submits this Motion for Final Approval of
4 Class Settlement and requests that the Court enter an order:
5 Court for an order:

6 1. Granting final approval of the settlement in the case pursuant to the Joint
7 Stipulation of Class Action Settlement and Release of Claims (“Settlement Agreement”), a copy
8 of which is attached to the concurrently-filed Declaration of Kelsey M. Szamet as Exhibit “1”;

9 2. Affirming Kingsley & Kingsley, APC as Class Counsel;

10 3. Affirming RIVELINO TAVIRA as Class Representative and awarding an
11 enhancement award of \$2,500.00;

12 4. Awarding ILYM Group, Inc. claims administration fees of \$6,500.00 for its
13 services as Settlement Administrator; and,

14 5. Entering judgment.

15 **II. FACTUAL BACKGROUND**

16 A. Litigation Overview and Procedural History

17 On August 24, 2020, Plaintiff filed a Class Action Complaint and a notice with California’s
18 Labor and Workforce Development Agency (“LWDA”) regarding his intent to file an action
19 seeking civil penalties under PAGA. (Declaration of Kelsey M. Szamet (“Szamet Decl.”)
20 ¶5.) (Settlement Agreement, Ex. 1 at (“Ex. 1 at”) § II, ¶2.) On October 29, 2020, Plaintiff filed a
21 First Amended Complaint (“FAC”), adding the PAGA claim based on the facts previously alleged
22 in the Complaint. (*Id.*) On December 8, 2020, Defendant filed an Answer to Plaintiff’s FAC.

23 The FAC alleged claims for: (1) Failure to pay wages and/or overtime pursuant to Labor
24 Code §§ 510, 1194, and 1199; (2) Violation of Labor Code § 226(a); (3) Violation of Business &
25 Professions Code § 17200; and (4) Penalties pursuant to Labor Code § 2699, et seq. (Szamet Decl.
26 ¶6; Ex. 1 at § II, ¶2.)

27 The Parties stipulated to the amendment of the FAC to permit Plaintiff to file a Second
28 Amended Complaint (“SAC”). (Szamet Decl. ¶7; Ex. 1 at § II, ¶2.) On February 5, 2021, Plaintiff

1 filed his SAC which alleges only two claims: (1) Penalties pursuant to Labor Code §226(a); and
2 (2) PAGA penalties pursuant to Labor Code § 2699, et seq. based upon the alleged Labor Code
3 §226(a) violation. (*Id.*) On February 8, 2021, Defendant filed an Answer to Plaintiff's SAC.

4 B. Settlement Efforts

5 After the matter was at issue, the Parties began to engage in informal discovery to
6 understand the nature of the allegations and the scope of potential liability. (Szamet Decl. ¶8; Ex.
7 1 at § II, ¶2.) Defendant provided Plaintiff's counsel with pertinent data for the Class Members
8 so that the Parties could fully investigate the claims at issue and understand their strengths and
9 weaknesses. (Szamet Decl. ¶9; *Id.*) During this process, Plaintiff learned there are 2,914 itemized
10 wage statements at issue and 55 Proposed Settlement Class Members. (Szamet Decl. ¶10; Ex. 1
11 at § III, ¶29.)

12 After the Parties exchanges all relevant information, they engaged in informed arms-length
13 negotiations to try to resolve the claims at issue. (Szamet Decl. ¶11; Ex. 1 at § II, ¶2.) The Parties
14 were able to come to an agreement as reflected in the Settlement Agreement now presented to the
15 Court for preliminary-approval. (Szamet Decl. ¶12.)

16 Based on their own independent investigation and evaluation, Class Counsel is of the
17 opinion that the Settlement Agreement with Defendant is fair, reasonable and adequate, and in the
18 best interest of the settlement classes in light of all known facts and circumstances, including the
19 risk of significant delay, defenses asserted by Defendant, uncertainties regarding a class and
20 representative action trial on the merits, and numerous potential appellate issues. (Szamet Decl.
21 ¶13; Ex. 1 at § II, ¶2.) Although Defendant denies any liability, Defendant is agreeing to this
22 Settlement Agreement solely to avoid the cost of litigation. (*Id.*) Accordingly, the Parties and
23 their counsel desire to fully, finally, and forever settle, compromise and discharge all disputes and
24 claims arising from or relating to the Actions on the terms set forth here. (*Id.*)

25 C. Preliminary Approval

26 On April 28, 2021, the Court issued an Order preliminarily approving the settlement in this
27 case, approving the proposed Class Notice, ordering that the Settlement Administrator send notice
28 to the Settlement Class, and setting a date for the Final Approval and Fairness Hearing. (Szamet

Decl. ¶14.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

For purposes of Settlement Agreement, the settlement class is defined as: “all persons who are employed or have been employed as an hourly employee by GENERAL FOUNDRY SERVICE CORPORATION, in the State of California who worked one or more pay periods during the Class Period.” (“Settlement Class Members” or “Class Members”) (Szamet Decl. ¶15; Ex. 1 at § I, ¶5.)

The final Settlement Class contained 63 individuals. (Islas Decl. ¶5.)

B. Settlement Payments

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$165,317.73¹, which includes the sum of the Individual Settlement Payments, the Class Representative Enhancement Award, the Class Counsel Award, PAGA Payment, and the Settlement Administrator Costs. (Szamet Decl. ¶16; Ex. 1 at § I, ¶17.) Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to determine the Net Settlement Amount for distribution to the Settlement Class as follows:

Gross Settlement Amount:	\$	165,317.73
Less Class Representative Enhancement:	\$	2,500.00
Less Class Counsel’s Fees:	\$	55,100.40
Less Class Counsel’s Costs:	\$	4,137.20
Less PAGA Payment:	\$	8,000.00
		<i>(\$6,000 to the LWDA and \$2,000 to remain in the Net Settlement Amount)</i>
<u>Less Settlement Administrator Costs:</u>	<u>\$</u>	<u>6,500.00</u>
Anticipated Net Settlement Amount	\$	90,217.33

(Ex. 1 at § III, ¶15.)

///

///

¹ The Settlement Agreement provided for a Gross Settlement Amount of \$144,325.00. However, during the Notice process, Defendant identified 8 additional Class Members and a resulting increase to the number of workweeks at issue. (See Ex. 1 at § I.17; III.29.) This caused the Class Settlement Amount to be increased to \$165,317.73 per the terms of the Settlement Agreement. (*Id.*)

1 C. Individual Settlement Payments

2 The amount of each Participating Class Member's Individual Settlement Payment is an
3 individualized amount that is based on the number of Compensable Workweeks worked by the
4 Participating Class Member during the Class Period. (Ex. 1 at § III, ¶17; *see also* Ex. A to the
5 Settlement Agreement at pp. 3 [Class Notice].) This individual amount shall be determined
6 according to the settlement payment formula set forth in the Settlement Agreement. (*Id.*) The
7 Settlement Agreement provides for a specific and detailed dispute process regarding Individual
8 Settlement Payments. (*See* Ex. 1 at § III, ¶9.)

9 Based on these calculations, the average potential recovery is \$1,432.02 per Settlement
10 Class Member. (Islas Decl. ¶12.)

11 D. Class Notice

12 The Court approved the proposed Class Notice and directed the mailing of the Notice by
13 first-class mail to Settlement Class Members in accordance with the proposed implementation
14 schedule. (Szamet Decl. ¶17.) The procedures for giving notice to the Settlement Class Members,
15 as set forth in the Settlement Agreement and Plaintiff's Motion for Preliminary Approval and
16 approved by the Court, have been fully and properly carried out. (Islas Decl. ¶3.)

17 To date, ILYM Group, Inc. received zero (0) request to be excluded ("opt-outs") from the
18 proposed Settlement Agreement and zero (0) objections. (Islas Decl. ¶¶9-10.)

19 E. Check Mailed Settlement – No Reversion

20 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
21 without the possibility of reversion of settlement funds to Defendant. Under the Settlement
22 Agreement, every Settlement Class Members will receive a settlement check and Settlement Class
23 Members do not need to submit a claim in order to receive a settlement check. Any funds that
24 remain uncashed after 160 days shall be turned over by the Settlement Administrator, with
25 information for each Settlement Class Members who failed to timely cash his/her settlement check,
26 to the State of California Controller's Office Unclaimed Property Fund. (Ex. 1 at § III, ¶20.)

27 ///

28 ///

1 **IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT**

2 Pursuant to California Code of Civil Procedure § 1781(f), “a class action shall not be
3 dismissed or compromised without the approval of the court, and notice of the proposed dismissal
4 or compromise shall be given to all members of the Class in such manner as the court directs”
5 In deciding whether to grant final approval to a proposed class action settlement under Code of
6 Civil Procedure § 382, the court’s overriding concern is whether the proposed settlement is “fair,
7 adequate, and reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

8 A. The Settlement is Entitled to a Presumption of Fairness

9 “A presumption of fairness exists where: (1) the settlement is reached through arm’s length
10 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
11 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
12 small.” (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The proposed Settlement in the present case
13 meets all of the *Dunk* factors and is therefore entitled to a presumption of fairness.

14 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
15 arm’s-length negotiations. All settlement discussions were made by experienced and informed
16 counsel, who believe that this settlement represents a favorable resolution for the Settlement Class
17 Members. (Szamet Decl. ¶18.) The settlement negotiations have been, at all times, adversarial
18 and non-collusive, and no self-dealing or other type of misconduct by either side has taken place.
19 (Szamet Decl. ¶19.)

20 Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly
21 evaluate the strength of the case and the risks associated with ongoing litigation. Defendant
22 provided Plaintiff’s counsel with pertinent data for the Class Members so that the Parties could
23 fully investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl.
24 ¶20; Ex. 1 at § II, ¶2.) During this process, Plaintiff learned there are 2,914 itemized wage
25 statements at issue and 55 Proposed Settlement Class Members. (Szamet Decl. ¶21; Ex. 1 at § III,
26 ¶29.) Receipt of appropriate discovery allowed Class Counsel to fairly evaluate the exposure and
27 risks associated with each claim alleged in the lawsuit. (Szamet Decl. ¶22.)

28 Third, Class Counsel have significant experience in cases of this type, including several

1 years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶23.) Class
2 Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel
3 believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and
4 that the average recovery for each Settlement Class Member of \$1,432.02 is substantial, given the
5 risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶24.)

6 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were zero
7 (0) request to be excluded and no objectors. (Islas Decl. ¶¶9-10.) As all of the *Dunk* factors are
8 satisfied, this settlement is entitled to a presumption of fairness.

9 B. The Court Should Approve This Class Action Settlement Because it Satisfies Each
10 of the Kullar Factors

11 In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth
12 several factors that the Court should analyze in determining whether to approve a class action
13 settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense,
14 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
15 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
16 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
17 participant; and (8) the reaction of the class members to the proposed settlement.

18 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
19 informal discovery before entering into meaningful settlement negotiations in this matter. (*Id* at
20 Szamet Decl. ¶¶8-10.) This discovery permitted Class Counsel to fairly evaluate the strength of
21 the case and the risks associated with ongoing litigation. (Szamet Decl. ¶25.) Class Counsel is
22 experienced in handling wage and hour class actions and, after weighing all of the following
23 factors, supports this Settlement Agreement. (Szamet Decl. ¶26.)

24 1. The Strength of Plaintiff's Case

25 a) The Risks Associated with the Inaccurate Wage Statement Claim

26 Labor Code § 226(a) provides:

27 An employer ... shall furnish to his or her employee ... an accurate itemized
28 statement in writing showing ... (6) the inclusive dates for each pay period, (8) the
name and address of the legal entity that is the employer

1 Plaintiff alleges that Defendant provided employees with itemized wage statements, that
2 fail to show the start and end date for each pay period and the address of the legal entity that is the
3 employer and. (Szamet Decl. ¶27.) Wage statement penalties are “fifty dollars (\$50) for the initial
4 pay period in which a violation occurs and one hundred dollars (\$100) per employee for each
5 violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars
6 (\$4,000).” Labor Code § 226(e)(1).

7 Plaintiff takes the position that a review of the paystubs at issue reveals that Defendant’s
8 itemized wage statements simply do not show the required information. (Szamet Decl. ¶28.)
9 Given that, Plaintiff was confident that he could establish that Defendant violated Labor Code
10 § 226(a) on a class wide basis. (Szamet Decl. ¶29.) Though Plaintiff perceived little risk that he
11 could prove at trial that Defendant violated section 226(a), Plaintiff anticipated that Defendant
12 would seek to minimize the alleged violation as merely “technical”. (Szamet Decl. ¶30.)
13 Ultimately, though, Plaintiff does not think this argument is persuasive because the trier of fact
14 can determine from the face of the instrument that the required information is not shown. (Szamet
15 Decl. ¶31.) While Plaintiff perceived little risk in proving, at trial, that the wage statements
16 violated §226(a), Plaintiff perceived cognizable risk in proving Defendant’s alleged violations of
17 § 226(a) caused injury and were knowing and intentional.

18 Defendant maintained that Plaintiff was required to show injury per the Labor Code §226
19 (e)(1) and that Plaintiff would not be able to articulate a cognizable injury here. [“An employee
20 suffering injury as a result of a knowing and intentional failure by an employer to comply with
21 subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the
22 initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for
23 each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand
24 dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.”] (Szamet
25 Decl. ¶32.)

26 In response, Plaintiff maintains that pursuant to Labor Code § 226(e)(2)(B) injury is
27 presumed by virtue of an employer failing to provide a properly itemized wage statement. [“An
28 employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide

1 accurate and complete information as required by any one or more of items (1) to (9), inclusive,
2 of subdivision (a) and the employee cannot promptly and easily determine² from the wage
3 statement alone... information required to be provided”.] (Szamet Decl. ¶33.)

4 Plaintiff certainly anticipated that Defendant would argue Plaintiff could “promptly and
5 easily” determine the start date of the pay period from the face of the wage statement alone by
6 simply counting back from the listed end date of the pay period and likewise. (Szamet Decl. ¶34.)
7 Contrary to this argument, Plaintiff maintains that Plaintiff would have to look at documents
8 outside the four corners of the wage statement to determine the exact dates of Defendant’s pay
9 periods such as a calendar or pay date schedule. (Szamet Decl. ¶35.) (*See McKenzie v. Federal*
10 *Exp. Corp.*, (C.D. Cal. 2011) 765 F. Supp. 2d 1222 at 1229-1230 [the “Court concludes that
11 McKenzie's wage statements violated Section 226(a)(6) by failing to state the beginning date for
12 each pay period...”]) Nonetheless, on balance, Plaintiff had to acknowledge that there was at least
13 some risk that the trier of fact could determine that the start date of the pay period could easily be
14 determined from the face of the wage statement alone. (Szamet Decl. ¶36.)

15 Likewise, Defendant would argue that Plaintiff and all Proposed Class Members reported
16 to work each day at the location that is “the name and address of the employer” so all employees
17 knew this information. (Szamet Decl. ¶37.) Plaintiff ultimately does not think this is a strong
18 argument since Section 226(a) specifically states that this information must be shown on the face
19 of the paystub. (Szamet Decl. ¶38.)

20 More importantly from a risk analysis perspective, however, is Plaintiff’s ability to show
21 that any alleged Section 226(a) violation was “knowing and intentional”. (Szamet Decl. ¶39.)
22 Defendant maintained that if a Court determined that there was any violation, it would be only a
23 technical violation of Labor Code § 226(a) that did not merit the imposition of penalties. (Szamet
24 Decl. ¶40.) Pursuant to Labor Code § 226(e), employees are only entitled to the statutory penalty
25 for a “knowing and intentional failure by an employer to comply with subdivision (a).” (Szamet
26 Decl. ¶41.) Pursuant to Labor Code § 226.3, the Labor Commissioner has the discretion to “decide

27 ² Lab. Code § 226(2)(C) provides: For purposes of this paragraph, “promptly and easily determine” means a
28 reasonable person would be able to readily ascertain the information without reference to other documents or
information.

1 not to penalize an employer for a first violation when that violation was due to a clerical error or
2 inadvertent mistake.” (*Id.*) Plaintiff anticipated that at trial, Defendant would argue that any alleged
3 violation was the result of a clerical oversight and, accordingly, Plaintiff could not prove the
4 violation was “knowing and intentional.” (Szamet Decl. ¶42.) Consequently, if Defendant could
5 make a potentially persuasive argument that if Defendant did not act knowingly or intentionally
6 there would be no penalties available under Labor Code § 226(e) to the Class Members. (Szamet
7 Decl. ¶43.) While Class Counsel maintains that it could establish that the alleged violation was
8 “knowing and intentional”, nonetheless Class Counsel had to recognize that there was risk that a
9 trier of fact might ultimately be swayed by Defendant’s arguments. (Szamet Decl. ¶44.)

10 b) The Risks Associated with the PAGA Claim

11 California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, permits
12 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
13 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
14 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
15 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

16 Plaintiff discounted the PAGA claim for multiple reasons during the negotiation process.
17 (Szamet Decl. ¶45.) First, the aggrieved employees’ PAGA claims are derivative of the foregoing
18 class claims. (Szamet Decl. ¶46.) Second, a court has discretion to award less than the maximum
19 penalty. Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil
20 penalty amount specified by this part if, based on the facts and circumstances of the particular case,
21 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”).
22 *See e.g., Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647,
23 669 (affirming award of 10% of maximum PAGA penalty). (Szamet Decl. ¶47.) Finally, the
24 settlement class is arguably compensated for these violations in the proposed Settlement
25 Agreement, and thus any sizeable PAGA recovery for these same violations could be deemed as
26 duplicative by the Court. (Szamet Decl. ¶48.) As such, the Settlement Agreement’s contemplated
27 PAGA payment of \$8,000.00 is appropriate. (Szamet Decl. ¶49.) *See Nordstrom Commissions*
28 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million

1 settlement to PAGA penalties).

2 2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

3 There is significant expense associated with the class certification process, which the
4 Parties can avoid by entering into the contemplated Settlement Agreement now. (Szamet Decl.
5 ¶50.) If the Court did eventually certify a class, trial of a case involving approximately 55
6 Settlement Class Members would require the retention of expensive expert witnesses, the accrual
7 of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶51.)
8 Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any
9 outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶52.) An
10 appeal would result in further delay for the Settlement Class Members who are waiting for a
11 resolution in this matter. (*Id.*)

12 3. The Risk of Maintaining Class Action Status through Trial

13 This case has not been certified to be tried as a class action. (Szamet Decl. ¶53.) While
14 Plaintiff believes there is strong evidence to support certification of the Section 226(a) claim,
15 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
16 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
17 to conduct multiple depositions, including of the Class Representative and of several person(s)
18 most knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what
19 these depositions will reveal and whether they will support class certification to the extent
20 expected. (*Id.*)

21 4. The Amount Offered in Settlement

22 This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
23 (Szamet Decl. ¶54.) The Parties arrived at it after extensive investigation and discovery, careful
24 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
25 likely to be awarded to the class were the trier of fact to find Defendant liable. (*Id.*)

26 Plaintiff valued the Wage Statement Claim, without discount, at \$288,650. (Szamet Decl.
27 ¶55.) Plaintiff used \$50 for each initial violation and \$100 thereafter (2,914 x \$100 – 55 x \$50 =
28 \$288,650. (Szamet Decl. ¶56.) This figure is likely overstated because Labor Code §226(e)(1)

puts a \$4,000 cap on wage statement penalties per employee. (Szamet Decl. ¶57.)

Plaintiff calculated the maximum potential value of the PAGA claim at \$291,400 using \$100 per pay period). (Szamet Decl. ¶58.) The main risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl. ¶59.) A judge can award the statutory maximum of \$100 for the initial violation and \$200 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶60.) While there is a dearth of available authority, in Plaintiff’s view, were he to succeed on the underlying Labor Code Section 226(a) violation, it is not likely that a Judge would also award a large amount of PAGA penalties of top of any damages recovered. (Szamet Decl. ¶61.)

Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the Settlement Class Members’ claims was \$580,050. (Szamet Decl. ¶62.) As a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount of \$165,317.73 is fair and reasonable. (Szamet Decl. ¶63.)

5. The Extent of Discovery Completed and Stage of the proceedings

As outlined above, Class Counsel conducted a thorough investigation into the facts of the claims alleged. (Szamet Decl. ¶64.) The agreement to settle did not occur until Counsel exchanged and possessed sufficient information to make an informed judgement regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (*Id.*)

6. The Experience and Views of Counsel

Kingsley & Kingsley is very experienced in prosecuting and defending employment litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition violations. (Szamet Decl. ¶¶65-66.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Kelsey M. Szamet. (Szamet Decl. ¶¶65-66.) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶67.)

1 7. The Presence of a Governmental Participant

2 There is no governmental participant in this action. (Szamet Decl. ¶68.)

3 8. The Proposed Plan of Allocation Is Fair and Reasonable

4 Plans of allocation are subject to the same standard of review as class action settlements;
5 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
6 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
7 compensates Settlement Class Members pro rata based on the number of Compensable Work
8 Weeks worked by the Settlement Class Member during the Class Period. The lump sum payment
9 to each Settlement Class Member not excluding him/ herself will be determined on an
10 individualized basis based upon the compensable pay periods worked by the Settlement Class
11 Member. (Ex. 1 at § III, ¶17.) This allocation distributes Settlement Agreement funds
12 proportionally to each class member’s potential damages and should therefore be approved as fair,
13 adequate, and reasonable. (Szamet Decl. ¶69.)

14 9. The Reaction of the Class Members to the Proposed Settlement

15 To date, there are zero (0) request to be excluded from the proposed Settlement Agreement
16 and zero (0) objections. (Islas Decl. ¶¶9-10.) Such indicates that the reaction of Settlement Class
17 Members on the whole is positive and weighs in favor of approval.

18 **V. ENHANCEMENT TO PLAINTIFF**

19 Plaintiff’s Counsel request an enhancement of \$2,500.00 to the Class Representative
20 RIVELINO TAVIRA for his work on behalf of the Settlement Class. (Szamet Decl. ¶113.)
21 “Courts routinely approve incentive awards to compensate named plaintiffs for the services they
22 provide and the risks they incurred during the course of the class action litigation.” *Ingram v. The*
23 *Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations
24 omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).
25 In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in
26 recognition of the services they provided to the class by responding to discovery, participating in
27 the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*,
28 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000

1 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068
2 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each
3 named plaintiff).

4 Mr. Tavira is an adequate class representative because he has diligently, adequately and
5 fairly represented the Settlement Class and has not placed his interests above any member of the
6 Settlement Class. (see Declaration of Rivelino Tavira (“Tavira Decl.”) ¶¶6-12.)

7 Here, Class Counsel requests an enhancement for Mr. Tavira’s valiant effort and time
8 expended in this matter. The time spent by Rivelino Tavira is significant and includes researching
9 and retaining competent counsel; providing information to Class Counsel regarding the nature of
10 the work at Defendant; compiling relevant documents; working closely with Class Counsel to
11 develop the theories of liability and martial relevant evidence; regularly discussing the status of
12 the case with Class Counsel; discussing the case via telephone with many Settlement Class
13 Members; and responding promptly to Class Counsel’s communications regarding settlement.
14 (Szamet Decl. ¶114; Tavira Decl. ¶¶5-11.) As set forth in the Settlement Agreement, Plaintiff will
15 also be entering into a general release of liability pursuant to Civil Code Section 1542. (Szamet
16 Decl. ¶115; Ex. 1 at § III, ¶2.)

17 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶116.)
18 The enhancement takes into consideration the time, effort, and expense incurred by Mr. Tavira in
19 coming forward to litigate this matter on behalf of all Settlement Class Members. (Szamet Decl.
20 ¶117.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees
21 and costs in the event that Defendant prevailed at trial. (Szamet Decl. ¶118.)

22 **VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY**

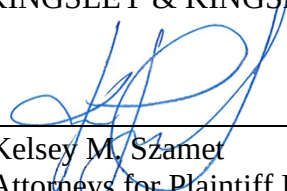
23 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
24 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
25 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
26 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
27 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “6.” (Szamet
28 Decl. ¶124.)

1 **VII. CONCLUSION**

2 Plaintiff respectfully submits that the proposed Settlement Agreement is fair, adequate,
3 reasonable, and in the best interest of the Settlement Class Members. Therefore, Plaintiff
4 respectfully requests that the Court (1) grant Final Approval of the Settlement Agreement and all
5 of its terms; (2) award attorneys' fees and costs in the amount detailed in the concurrently filed
6 Motion for Attorneys' Fees and Costs; (3) award ILYM Group, Inc. claims administration fees of
7 \$6,500.00; and (4) award the Class Representative an enhancement of \$2,500.00; and (5) enter
8 judgment.

9
10 DATED: August 6, 2021

KINGSLEY & KINGSLEY, APC

11
12 By: 

13 Kelsey M. Szamet
14 Attorneys for Plaintiff Rivelino Tavira and the
15 Proposed Class
16
17
18
19
20
21
22
23
24
25
26
27
28

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
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 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On August 6, 2021, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Charles H. Goldstein
Joseph A. Goldstein
cgoldsteinesq@gmail.com
josephgoldsteinesq@gmail.com
The Goldstein Law Firm, PC
8912 Burton Way
Beverly Hills, CA 90211

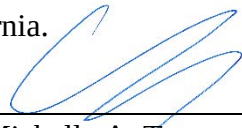
☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

☒ **BY ELECTRONIC MAIL TRANSMISSION:** I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the below email address(es).

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 6, 2021, at Woodland Hills, California.



Michelle A. Tanzer