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

HELEN SANTOS, an individual, on behalf of
herself and others similarly situated,

PLAINTIFF,

v.

AIR CULINAIRE WORLDWIDE, LLC; and
DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. 20STCV40648

[Case Assigned for All Purposes to Hon.
William F. Highberger in Dept. 10]

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND PAGA
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, Plaintiff Helen Santos, and
Nicole Bench of ILYM Group, Inc. and
Proposed Order and Judgment Thereon]*

Date: May 3, 2023

Time: 11:00 AM

Dept.: 10

Complaint Filed: October 23, 2020

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on May 3, 2023 at 11:00 a.m. in Department 10 of the
3 above-entitled court, Plaintiff HELEN SANTOS (“Plaintiff”) will, and hereby does, move the
4 Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the
5 Court for an order:

6 1. Granting final approval of the settlement in the case pursuant to the Amended Joint
7 Stipulation of Class Action Settlement and Release of Claims (“Settlement”), a copy of which is
8 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 Helen Santos as Class Representative and awarding a litigation
11 enhancement of \$5,000.00;

12 4. Awarding ILYM Group, Inc. claims administration fees of 15,000.00 for its
13 services as Settlement Administrator; and,

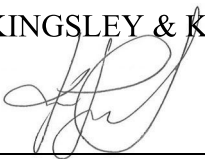
14 5. Entering judgment.

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

18 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
19 and Authorities, the Declarations of Kelsey M. Szamet, Helen Santos, Nicole Bench of ILYM
20 Group, Inc., all other papers and records on file in this action, and on such oral and documentary
21 evidence as may be presented at the hearing on this Motion.

22
23 DATED: April 11, 2023

KINGSLEY & KINGSLEY, APC

24
25 By: 

26 Kelsey M. Szamet
27 Attorneys for Plaintiff HELEN SANTOS and the
28 Proposed Class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff HELEN SANTOS (“Plaintiff”) submits this Motion for Final Approval of Class
4 Settlement and requests that the Court:

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

8 2. Award attorneys’ fees and costs as detailed in the concurrently-filed Motion for
9 Attorneys’ Fees and Costs;

10 3. Award ILYM Group, Inc. claims administration fees of \$15,000.00 for its services
11 as Settlement Administrator;

12 4. Affirm named Plaintiff HELEN SANTOS as Class Representative and award a
13 cumulative Class Representative payment of \$5,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

16 **A. Litigation Overview and Procedural History**

17 On October 23, 2020, Plaintiff filed a Class Action Complaint and provided written notice
18 to the California's Labor and Workforce Development Agency ("LWDA") regarding her intent to
19 file an action seeking civil penalties under PAGA. (Declaration of Kelsey M. Szamet (“Szamet
20 Decl.”) ¶5.)

21 The operative Complaint alleges claims for: (1) Failure to Pay Wages and/or Overtime
22 Under Labor Code §§ 510, 1194, 1194.2, and 1199; (2) Failure to Provide Meal Breaks Pursuant
23 to Labor Code §§ 226.7 and 512, (3) Failure to Provide Rest Breaks Pursuant to Labor Code §
24 226.7; (4) Violation of Labor Code § 226(a); (5) Penalties Pursuant to Labor Code § 203; and, (6)
25 Violation of Business & Professions Code § 17200. (Szamet Decl. ¶6.)

26 On April 4, 2022, the Parties filed a stipulation to permit Plaintiff to file a First Amended
27 Complaint ("FAC"), adding a PAGA claim based on the facts asserted in the October 23,2020
28 notice letter and previously alleged in the Complaint. (Szamet Decl. ¶7.)

1 B. The Discovery Process

2 After the matter was at issue, the Parties began to engage in informal discovery to
3 understand the nature of the allegations and the scope of potential liability. Defendant provided
4 Plaintiff's counsel with pertinent data for the Class Members so that the Parties could fully-
5 investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶8.)

6 On October 22, 2021, the Parties attended a full-day mediation with experienced mediator
7 Todd A. Smith and reached a settlement, as set forth herein, to settle Plaintiff's claims on a class-
8 wide basis. (Szamet Decl. ¶9.)

9 Defendant denies any liability or wrongdoing of any kind associated with the claims
10 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
11 that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or
12 representative action treatment. (Szamet Decl. ¶10.) Defendant contends, among other things, that,
13 at all times, it has complied with the California Labor Code, and the Industrial Wage Commission
14 Orders, and with all other applicable state, federal and local laws related to the alleged Class
15 Members' employment. (*Id.*)

16 Based on their own independent investigation and evaluation, Class Counsel is of the
17 opinion that the Settlement with Defendant is fair, reasonable and adequate, and in the best interest
18 of the settlement classes in light of all known facts and circumstances, including the risk of
19 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 ¶11.) Although Defendant denies any liability, Defendant is agreeing to this Settlement, which is
22 a compromise of disputed claims, solely to avoid the cost of litigation, and this Settlement shall
23 not be construed or used as an admission by or against Defendant as to the merits of any claims
24 against it. (*Id.*) Accordingly, the Parties and their counsel desire to fully, finally, and forever settle,
25 compromise and discharge all disputes and claims arising from or relating to the Action on the
26 terms set forth here. (*Id.*)

27 C. Preliminary Approval

28 On June 13, 2022, the Court issued an Order preliminarily approving the settlement in this

case, approving the proposed Class Notice, ordering that the Settlement Administrator send notice to the Settlement Class, and setting a date for the Final Approval and Fairness Hearing. (Szamet Decl. ¶12.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

For purposes of this Settlement only, the settlement class is defined as: “all persons who are employed or have been employed as an hourly employee by Defendant in the State of California during the Covered Period.” (“Class Members” or “Settlement Class Members”) (Szamet Decl. ¶13.) The Covered Period is the period from October 23, 2016 through November 24, 2021. (Szamet Decl. ¶14; Ex. 1 at § I, ¶6.)

Based on documents and other information produced by Defendant, it is estimated that there are approximately 185 Settlement Class Members. (Szamet Decl. ¶15; Ex. 1 at § III, ¶30.) Of these, 152 are former employees. (Szamet Decl. ¶16.) There are 15,220 workweeks at issue (7,610 pay periods.) (Szamet Decl. ¶17.) There are no objections and 1 opt-out, this the final Settlement Class contains 184 individuals. (Bench Decl. ¶16.)

B. Settlement Payments

As detailed fully in the Settlement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$425,000.00, which includes without limitation the Class Counsel Award, Class Representative Enhancement Payment, Individual Settlement Payments, PAGA Payment, and Settlement Administrator Costs. (Szamet Decl. ¶18; Ex. 1 at § I, ¶17.)

The Net Settlement Amount is the Gross Settlement Amount, less Court-approved Class Counsel Award, Class Representative Enhancement Payment, payment to the LWDA, and Settlement Administration Costs. (Szamet Decl. ¶19; Ex. 1 at § I, ¶20.)

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:	\$	425,000.00
Class Representative Enhancement:	\$	5,000.00
Class Counsel’s Fees:	\$	141,666.67
Class Counsel’s Costs:	\$	12,000.00
PAGA Payment:	\$	30,000.00

1 (\$22,500.00 to the LWDA;
2 \$7,500.00 to remain in the Net
3 Settlement Amount)
4 Settlement Administrator Costs: \$ 15,000.00
5 **Net Settlement Amount:** \$ 228,833.33
6 (Ex. 1 at § III, ¶15.)

7 C. Individual Settlement Payments

8 The amount of each Participating Class Member's Individual Settlement Payment is an
9 individualized amount that is based on the number of Compensable Work Weeks worked by the
10 Participating Class Member during the Covered Period. (Ex. 1 at § I, ¶18; see also Ex. A to the
11 Settlement at pp. 3 [Class Notice].) This individual amount shall be determined according to the
12 settlement payment formula set forth in the Settlement. (See Ex. 1 at § III, ¶17; Id. at Ex. A to the
13 Settlement [Class Notice].) The Settlement provides for a specific and detailed Work Week
14 dispute process. (See Ex. 1 at § III, ¶9.)

15 Based on these calculations, the average potential recovery is \$1,094.90 per Settlement
16 Class Member and the highest amount is \$3,762.84. (Bench Decl. ¶17.)

17 D. Class Notice

18 The Court approved the proposed Class Notice and directed the mailing of the Notice by
19 first-class mail to Settlement Class Members in accordance with the proposed implementation
20 schedule. (Szamet Decl. ¶20). The procedures for giving notice to the Settlement Class Members,
21 as set forth in the Settlement and Plaintiffs' Motion for Preliminary Approval and approved by the
22 Court, have been fully and properly carried out. (Bench Decl. ¶10.)

23 To date, ILYM Group, Inc. has received one (1) request to be excluded ("opt-outs") from
24 the proposed Settlement and zero (0) objections. (Bench Decl. ¶¶14- 15.)

25 E. Check Mailed Settlement – No Reversion

26 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
27 without the possibility of reversion of settlement funds to Defendant. Under the Settlement, every
28 Settlement Class Member will receive a settlement check and Settlement Class Members do not
need to submit a claim in order to receive a settlement check. Any funds that remain uncashed
after 160 days shall be turned over by the Settlement Administrator, with information for each

1 Settlement Class Member who failed to timely cash his/her settlement check, to the State of
2 California Controller's Office Unclaimed Property Fund. ((Ex. 1 at § III, ¶20.)

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

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

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

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

16 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
17 arm's-length negotiations overseen by an experienced mediator. All settlement discussions were
18 made by experienced and informed counsel, who believe that this settlement represents a favorable
19 resolution for the Settlement Class Members. (Szamet Decl. ¶21.) The settlement negotiations
20 have been, at all times, adversarial and non-collusive, with the aid of a mediator, and no self-
21 dealing or other type of misconduct by either side has taken place. (Szamet Decl. ¶22.)

22 Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly
23 evaluate the strength of the case and the risks associated with ongoing litigation. This included
24 sample time and pay data, the class size, and a sampling of itemized wage statements issued to
25 Settlement Class Members. (Szamet Decl. ¶23.) Receipt of appropriate discovery allowed Class
26 Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit.
27 (Szamet Decl. ¶24.)

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. ¶25.) 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 over \$1,094.90 is substantial, given
5 the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶26.)

6 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there was only
7 one (1) request to be excluded and no objectors. (Bench Decl. ¶¶14-15.) As all of the *Dunk* factors
8 are 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. ¶¶8-11.) This informal discovery and settlement negotiations permitted Class
21 Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation.
22 (Szamet Decl. ¶27.) Class Counsel is experienced in handling wage and hour class actions and,
23 after weighing all of the following factors, supports this Settlement. (Szamet Decl. ¶28.)

24 1. The Strength of Plaintiff's Case

25 a) The Risks Associated with the Wages and/or Overtime Claim

26 i) Defendant's Alleged Failure to Blend

27 Plaintiff contends that Defendant has had a continuous policy of not paying Plaintiff and
28 Class Members for all hours worked in violation of established law guaranteeing a minimum wage

1 and wages owed under contract or statute and prohibitions on making deductions reducing the
2 agreed upon wage. (See Lab. Code §§ 218, 218.5, 222, 223, 224, 1194, 1194.2, & 1197.)
3 California workers are statutorily entitled to overtime compensation, unless they are properly
4 classified as falling within one of the narrow exemption categories. Under California law, “[a]ny
5 work in excess of eight hours in one workday and any work in excess of 40 hours in any one
6 workweek...shall be compensated at the rate of no less than one and one-half times the regular
7 rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny work in excess
8 of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay
9 for an employee.” (Lab. Code, § 510, subd. (a).) California law also requires that any compensation
10 must be included in the regular rate of pay for the purpose of determining the correct overtime
11 rate.

12 Here, Plaintiff contends that she and all Class Members were forced to work on a regular
13 and consistent basis without receiving compensation for all hours worked at the proper rate.
14 (Szamet Decl. ¶29.) Specifically, Plaintiff contends that Defendant failed to blend Plaintiff’s and
15 the Class Members’ “LTD” pay into the regular rate of pay for the purposes of calculating the
16 overtime rate during pay periods that Class Members worked overtime and also earned LTD pay.
17 (Szamet Decl. ¶30.) However, Defendant put forth strong arguments that the LTD pay is not any
18 type of bonus or non-discretionary pay that must be blended. (Szamet Decl. ¶31.) Instead,
19 Defendant provided evidence that LTD pay is short for “long term disability pay”. (Szamet Decl.
20 ¶32.) Contrary to Plaintiff’s assertions, Defendant argues that this type of pay actually cannot be
21 blended because it is not a wage payment at all. (Szamet Decl. ¶33.) Were Defendant to succeed
22 on this argument, this claim would have little to no value so Plaintiff perceived great risk associated
23 with this claim. (Szamet Decl. ¶34.)

24 ii) Defendant’s Alleged “Auto-Deduct” Meal Policy

25 In addition, Plaintiff alleged that Defendant has an unlawful policy of automatically
26 deducting 30 minutes of time for a meal period regardless of whether the employee actually was
27 able to take a fully thirty (30) minute meal period within the first five (5) hours of work. (Szamet
28 Decl. ¶35.) Plaintiff contends that this unlawful “auto-deduct” policy and practice resulted in

1 Defendant allegedly failing to pay Plaintiff and all Class Members for all wages at the appropriate
2 rate for all hours worked. (*Ibid.*)

3 b) The Risks Associated with the Meal Break Claim

4 Under California Labor Code section 512 and IWC Wage Order No. 16, no employer shall
5 employ any person for a work period of more than five hours without providing a meal period of
6 not less than thirty minutes. The first meal period must be permitted to commence no later than
7 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
8 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
9 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
10 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section
11 512’s mandate: “Employers must afford employees uninterrupted half-hour periods in which they
12 are relieved of any duty or employer control and are free to come and go as they please.” (*Brinker*
13 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

14 It is well settled that if an employer fails to maintain a uniform policy that authorizes and
15 permits the meal periods or rest breaks called for under the law (as specified in the applicable
16 Wage Order), “it has violated the wage order and is liable.” (See *Brinker*, 53 Cal.4th at p. 1033.)
17 Following *Brinker*, California courts have confirmed that liability for meal and rest period
18 violations arises when an employer adopts a uniform policy that fails to comply with the Labor
19 Code. (See *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, [“In
20 *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break policy was unlawful,
21 [defendant] would be liable only when it actually failed to provide a required off-duty meal break.
22 *Brinker* leads us now to conclude [defendant] would be liable upon a determination that
23 [defendant]’s uniform on-duty meal break policy was unlawful.” (emphasis added)]; accord
24 *Bradley v. Networkers International LLC* (2012) 211 Cal.App.4th 1129; *Benton v. Telecom*
25 *Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 725–726 [finding that the employer would
26 become liable upon a showing that it failed to maintain a policy authorizing required breaks, which
27 does not require an individual technician to provide he or she actually missed breaks as a result of
28 the employer’s policies. Rather, “the Wage Order . . . imposes an affirmative obligation on every

1 employer to authorize and provide legally-required meal and rest breaks; if it fails to do so, it has
2 violated the law and is liable.”].) Plaintiff contends that Defendant must pay an additional hour at
3 the employee’s regular rate of compensation for each workday the employer failed to provide a
4 lawful meal period to each employee. (See Lab. Code, § 226.7, subd. (c).) Defendant, therefore,
5 allegedly owes Plaintiff and all Class Members a meal period penalty for every shift of five or
6 more hours in length.

7 Here, as described above, Plaintiff contends that Defendant maintained an unlawful “auto-
8 deduct” policy wherein it automatically deducts 30 minutes of time from the employee’s total
9 hours worked for the day regardless of whether a lawful meal period was actually provided under
10 California law. Plaintiff contends that she routinely was unable to take a first meal period and,
11 despite often working over 10 hours, was not able to take a second meal period. (Szamet Decl.
12 ¶36.) Plaintiff contends there is at least one meal period violation per person, per day during the
13 covered period. (Szamet Decl. ¶37.) Plaintiff argues that the time records show ubiquitous meal
14 period violations. (Szamet Decl. ¶38.)

15 Plaintiff argues that because the records show meal period violations the burden would
16 shift to Defendant. In *Donahue v. AMN Services*, the Court adopted the rebuttable presumption
17 discussed by Justice Werdegarr in her concurring opinion in *Brinker Restaurant Corp. v. Superior*
18 *Court*, 53 Cal. 4th 1004 (2012). Under this presumption, “[i]f an employer’s records show no meal
19 period for a given shift over five hours, a rebuttable presumption arises that the employee was not
20 relieved of duty and no meal period was provided.” (*Donohue v. AMN Services, LLC* (2021) 11
21 Cal.5th 58, 74.) The Court further explained that this presumption applies not only to records
22 showing “missed meal periods” but also when records show “short and delayed meal periods” (*Id.*
23 at 76.) and “the presumption goes to the question of liability and applies at the summary judgment
24 stage, not just at the class certification stage.” (*Id.*)

25 Plaintiff anticipated that Defendant would argue, that while *Donahue* does create a
26 presumption it is significant that “[a]pplying the presumption does not mean that time records
27 showing missed, short, or delayed meal periods result in ‘automatic liability’ for employers.” (*Id.*
28 at 77; Szamet Decl. ¶39.) To the contrary, Air Culinaire would argue that it “can rebut the

1 presumption by presenting evidence that employees were compensated for noncompliant meal
2 periods or that they had in fact been provided compliant meal periods during which they chose to
3 work.” (*Id.*) Defendant would argue that since its written policy was to “provide” a meal period
4 per *Brinker*, that to determine liability on this claim would necessitate asking each and every Class
5 Member “whether they were provided a compliant meal period but chose to work”. (*Id.* at 78;
6 Szamet Decl. ¶40.) Defendant also argued that the records do show many meal period premiums
7 were paid. (Szamet Decl. ¶41.)

8 Plaintiff believes this is not enough for Air Culinaire to overcome the strong presumption
9 set forth in *Donohue*. Indeed, *Donohue* provided specific guidance: It explains that employers
10 must “give employees a mechanism for recording their meal periods” and “ensure that employees
11 use the mechanism properly.” (*Id.* at 78.) One such way is to incorporate a “dropdown menu” in
12 the timekeeping system that comes up if an employee misses a meal break, or takes a late or a short
13 break, and requires the employee to explain the reason for the noncompliant break (i.e., whether a
14 proper break was not provided or whether it was the employee’s choice). Because this solution
15 was explicitly endorsed by the Court and not the type of system Defendant used, Plaintiff believes
16 Air Culinaire will not be able to overcome that presumption set forth in *Donohue* and that Plaintiff
17 will be able to use Defendant’s records to prove liability for each and every non-compliant meal
18 period. (Szamet Decl. ¶42.) Nonetheless, Plaintiff acknowledges that shifts showing a meal period
19 premium was paid should be excluded for damages purposes. (Szamet Decl. ¶43.)

20 c) The Risks Associated with the Rest Break Claim

21 Under IWC Wage Order No. 16, every employer shall authorize and permit all employees
22 to take rest periods. Employees are entitled to a paid ten-minute rest break for every four hours
23 worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11160, subd. 11(A).)

24 The *Brinker* court clarified what steps an employer must take to make rest breaks available
25 to its employees:

26 An employer is required to authorize and permit the amount of rest break time
27 called for under the wage order for its industry. If it does not—if, for example, it
28 adopts a uniform policy authorizing and permitting only one rest break for
employees working a seven-hour shift when two are required—it has violated the
wage order and is liable. No issue of waiver ever arises for a rest break that was
required by law but never authorized; if a break is not authorized, an employee has

1 no opportunity to decline to take it.

2 (*Ibid.*)

3 The California Supreme Court further refined requirements for rest periods, holding that
4 employees must be relieved of all duty and employer control and free to leave the premises during
5 rest breaks. (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 270 (2016) [“[A] rest period means
6 an interval of time free from labor, work, or any other employment-related duties. And employees
7 must not only be relieved of work duties, but also be freed from employer control over how they
8 spend their time.”].)

9 The 10-minute rest break must be a net 10-minutes in a suitable rest area. None of the time
10 allotted for rest breaks can be consumed by the time it takes to get to a suitable rest area. See
11 *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 267-268 (2016) (relying on 1/3/86 and
12 2/22/02 DLSE Letters wherein the DLSE ruled that the net ten-minute language for rest breaks
13 means 10-minutes of time in a rest area and cannot include time it takes to get to and from the rest
14 area). The employer must show that it clearly articulates the right to rest periods and rest periods
15 of net ten minutes, which means it must clearly communicate “net” ten minutes means and that,
16 regardless of what happens along the way to or from the rest area, employees are entitled to a full
17 ten-minutes in the rest area. See *Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1199
18 (the “onus is on the employer to clearly communicate the authorization and permission [to take
19 meal and rest breaks] to its employees.”)

20 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
21 of compensation for each workday the employer fails to provide a rest period according to law.
22 Plaintiff contends that Defendant, therefore, owes Plaintiff and all Class Members a rest period
23 penalty for every shift of three- and one-half hours in length or more.

24 Here, Plaintiff contends that Defendant routinely failed to provide Plaintiff and the Class
25 with rest breaks of not less than ten (10) minutes as required by the Labor Code during the relevant
26 time period. (Szamet Decl. ¶44.) She contends that Defendant also required Plaintiff and the Class
27 Members to stay on the premises. (Szamet Decl. ¶45.) She contends that was required to ask for
28 permission to leave the premises, was routinely unable to take a compliant first rest period and was

1 not able to take a second (or third) rest period. (Szamet Decl. ¶46.) As such, Plaintiff contends
2 there is at least one rest period violation per person, per day during the covered period. (Szamet
3 Decl. ¶47.)

4 As with meal periods, Defendant argued that it maintained a facially compliant policy that
5 “provided” all required rest periods, it did not require employees to stay on the premises, and it
6 never interfered with Plaintiff or any Class Members’ ability to take all complaint rest periods.
7 (Szamet Decl. ¶48.) Plaintiff acknowledges that rest period claims can be difficult to prove on a
8 classwide basis due to the lack of records. (Szamet Decl. ¶49.) This is especially true when an
9 employer maintains a facially compliant rest period policy. (Szamet Decl. ¶50.) Defendant argued
10 that this would devolve into a series of mini-trials where the trier of fact would be entitled to hear
11 from each class member as to whether they were in fact provided the opportunity to take all require
12 rest periods per day. (Szamet Decl. ¶51.) Of course, Defendant argued this would defeat class
13 certification and make it nearly impossible to prove this claim on a classwide basis. (Szamet Decl.
14 ¶52.) Based on this risk, Plaintiff believed it was appropriate to discount this claim. (Szamet Decl.
15 ¶53.)

16 d) The Risks Associated with the Wage Statement Claim

17 In relevant part, Labor Code § 226(a) requires that employers furnish to his or her
18 employee, an accurate itemized statement in writing showing... all applicable hourly rates in effect
19 during the pay period and the corresponding number of hours worked at each hourly rate by the
20 employee. (Labor Code §§ 226(a)(9)). This is a derivative section 226(a) claim.

21 Here, Plaintiff alleged that Defendant failed to issue Plaintiff and the Class Members
22 accurate itemized wage statements showing all applicable hourly rates in effect during the pay
23 period and the corresponding number of hours worked at each hourly rate by the employee as the
24 itemized wage statements show LTD pay that was not properly blended. (Szamet Decl. ¶54.)

25 Defendant contends that this is a derivative argument and Plaintiff did not plead a direct
26 violation of section 226(a). (Szamet Decl. ¶55.) Thus, if Defendant were to succeed on the wage
27 claim based on the arguments set forth above, that Plaintiff’s section 226(a) claim would also fail.
28 (Szamet Decl. ¶56.) Defendant also argued that under *Maldonado v. Epsilon Plastics, Inc.*, 22

Cal.App.5th 1308 (2018),¹ there was no liability (*Id.*) [The Court set out a simple rule for determining what falls under those certain circumstances: hours worked versus wages earned. The court held that “only the absence of the hours worked will give rise to an inference of injury,” and “the absence of accurate wages earned will be remedied by the violated wage and hour law itself.”] Defendant would apply *Maldonado* to argue that a potential mistake on a wage statement (i.e. a potential failure to blend cannot give rise to section 226(a) liability, only completely missing information that is required to be shown such as total hours worked.) (Szamet Decl. ¶57.)

e) The Risks Associated with the Waiting Time Penalty Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee’s termination or within seventy-two (72) hours of resignation, then the employee’s wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Here, Plaintiff and numerous Class Members are no longer employed by Defendant. (Szamet Decl. ¶58.) Due to Defendant’s alleged failure to properly blend all compensation into the regular rate of pay, Plaintiff argues that Defendant failed to pay all wages owed and due upon their termination and/or resignation. (Szamet Decl. ¶59.)

The viability of this claim is tied to the wage claim. (Szamet Decl. ¶60.) If Plaintiff prevailed on the wage claim discussed above, Plaintiff would argue that Defendant’s actions were willful, as they have intentionally failed or refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) “The failure to pay is willful if the employer ‘knows what [it] is doing [and] intends to do what [it] is doing’, and does

¹ *Maldonado* has since been abrogated by *Naranjo v. Spectrum Security Services Inc.*, (2022) 13 cal.5th 93, resolving a long-standing debate over whether waiting-time and wage statement penalties are recoverable when an employer fails to pay employees premium pay owed for meal and rest break violations. Siding with employees, the *Naranjo* held that that they are. Moreover, the Court additionally interpreted California's wage statement statute to require that wage statements reflect "all amounts earned and now owing, not just those amounts actually paid." However, at the time of mediation and settlement of this case, *Naranjo* was the law of the land and presented an acute risk to this claim.

not also require proof that the employer acted with “a deliberate evil purpose to defraud work[ers] of wages which the employer knows to be due.” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.) If, however, Plaintiff’s wage claim failed, this claim would also likely fail.

f) The Risks Associated with the PAGA Claim

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

Plaintiff discounted the PAGA claim for multiple reasons. First, the aggrieved employees’ PAGA claims are arguably derivative of all the foregoing class claims. (Szamet Decl. ¶61.) Second, and most importantly, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶62; Labor Code § 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). See e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty). See *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).² Third and finally, the Settlement Class is compensated for these violations in the proposed Joint Stipulation of Settlement, and thus any PAGA recovery for these same violations could arguably be construed as duplicative. (Szamet Decl. ¶63.) As such, Plaintiff contends that the Settlement’s contemplated PAGA payment of \$4,000 is appropriate. (Szamet Decl. ¶64.)

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

There is significant expense associated with the class certification process, which the

² After a trial, Los Angeles Superior Court Complex Judge Ann Jones awarded only \$55,000 in back wages after trial plus \$770,000 in civil penalties which was just 2% of the \$41 million amount workers were seeking in back pay and PAGA penalties. *Sanchez et al. v. McDonald's Restaurants of California Inc. et al.*, Case No. BC499888.

1 Parties can avoid by entering into the contemplated Settlement now. (Szamet Decl. ¶75.) If the
2 Court did eventually certify a class, trial of a case involving approximately 194 Settlement Class
3 Members would require the retention of expensive expert witnesses, the accrual of extensive
4 litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶66.) Moreover, given
5 the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial
6 would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶67.) An appeal would result
7 in further delay for the Settlement Class Members who are waiting for a resolution in this matter.
8 (*Id.*)

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

10 This case has not been certified to be tried as a class action. (Szamet Decl. ¶68.) While
11 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
12 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
13 decertification is always a possibility. (*Ibid.*) In attempting to certify a class, the Parties would
14 need to conduct multiple depositions, including of the Class Representative and of several
15 person(s) most knowledgeable regarding Defendant's policies. (*Ibid.*) There is a risk for both sides
16 as to what these depositions will reveal and whether they will support class certification to the
17 extent expected. (*Ibid.*)

18 4. The Amount Offered in Settlement

19 It was very difficult for the Parties to reach this Settlement of \$425,000.00. (Szamet Decl.
20 ¶69.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
21 (Szamet Decl. ¶70.) The Parties arrived at it after extensive informal discovery and settlement
22 negotiations, careful evaluation of the law, risks, and all information substantiating the amount of
23 penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable.
24 (*Ibid.*)

25 a) Plaintiff's Assessment of Defendant's Maximum Exposure

26 Plaintiff worked with an expert to review Defendant's sample of time and pay records and
27 put together a damage model. (Szamet Decl. ¶71.)

28 Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount,

1 at approximately \$4,182. (Szamet Decl. ¶72.) This calculation assumed that LTD pay was not
2 properly blended into regular rate of pay for purposes of determining the correct overtime rate in
3 pay periods where both overtime was worked and LTD was paid. (Szamet Decl. ¶73.) Expert
4 analysis revealed that this was infrequent, and the core potential wage liability was therefore
5 limited. (Szamet Decl. ¶74.)

6 The full value of the Meal Period claim, without any discount, was approximately
7 \$308,726.81. (Szamet Decl. ¶75.) The full value of the Rest Period claim, without any discount,
8 was approximately \$308,726.81. (Szamet Decl. ¶76.)

9 Plaintiff valued the Wage Statement Claim, without discount, at \$84,850.00. (Szamet Decl.
10 ¶77.) Plaintiff used \$50 for the initial pay period (not \$100) and puts a \$4,000 cap on wage
11 statement penalties per employee. (Szamet Decl. ¶78.) Due to the risk discussed above that 226(a)
12 liability wouldn't attach under *Maldonado*, Plaintiff determined that a steep discount of this claim
13 was fair for settlement purposes. (Szamet Decl. ¶79.)

14 Plaintiff valued the Waiting Time Claim, tied to the Wage/Overtime claim for the 144
15 former employees, at \$509,191.56. (Szamet Decl. ¶80.) Considering the dispute over whether
16 class members were owed any wages for allegedly unblended LTD pay (which if proven was a
17 small dollar amount), Plaintiff determined that accepting a discount on this claim was appropriate.
18 (Szamet Decl. ¶81.)

19 Finally, Plaintiff calculated the value of the PAGA claim at \$761,000 for Settlement Class
20 Members (using 7,610 pay periods x \$100/per pay period). (Szamet Decl. ¶82.) The main risk
21 taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl.
22 ¶83.) A judge can award the statutory maximum or – in theory – one cent per wage statement.
23 (Szamet Decl. ¶84.) While there is a dearth of available authority, in Plaintiff's view, were she to
24 succeed on any of the underlying Labor Code violations, it is not likely that a Judge would also
25 award a large amount of penalties of top of any damages recovered. (Szamet Decl. ¶85.)

26 Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the
27 Settlement Class Members' claims was approximately \$1,976,677. (Szamet Decl. ¶86.) However,
28 as a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Amount

of \$425,000.00 is fair and reasonable. (Szamet Decl. ¶87.)

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. ¶88.) The agreement to settle did not occur until Class 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. (*Ibid.*)

6. The Experience and Views of Counsel

Finally, counsel's experience and success in similar class actions also weigh in favor of preliminary approval. See *Wershba*, supra, 91 Cal.App.4th at 245. Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on complex wage, hour, and working condition violations. (Szamet Decl. ¶¶89-90.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id.*) Kingsley & Kingsley, APC currently serves as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id.*) A list of representative cases that Kingsley & Kingsley, APC has handled is included in the accompanying declaration of Kelsey M. Szamet. (*Id.*) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl. ¶91.)

7. The Presence of a Governmental Participant

There is no governmental participant in this action except, arguably, the LWDA as there is a PAGA claim at issue. (Szamet Decl. ¶92.)

8. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (See, e.g., *Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of Compensable Work Weeks during which s/he worked in proportion to the aggregate number of workweeks worked by all Settlement Class Members. (Ex. 1 at § I ¶ 18.) This allocation distributes Settlement funds

proportionally to each Class Member’s potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶93.)

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

There is one (1) request to be excluded from the proposed Settlement and zero (1) objections. (Bench Decl. ¶¶14-15.) Such indicates that the reaction of Settlement Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFF

Plaintiff’s Counsel request an enhancement of \$5,000.00 to the Class Representative HELEN SANTOS for her work on behalf of the Settlement Class. (Szamet Decl. ¶135.) “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation.” *Ingram v. The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

Ms. Santos is an adequate class representative because she has diligently, adequately and fairly represented the Settlement Class and has not placed her interests above any member of the Settlement Class. (*see Declaration of Helen Santos* (“Santos Decl.”) ¶¶3-15.)

Here, Class Counsel requests an enhancement for Ms. Santos’s valiant effort and time expended in this matter. The time spent by HELEN SANTOS is significant and includes providing information to Class Counsel regarding the nature of the work at AIR CULINAIRE WORLDWIDE, LLC; compiling documents; meeting with her attorneys to discuss the status of the case, the theories of liability, and responding promptly to Class Counsel’s communications regarding settlement. (Szamet Decl. ¶136; Santos Decl. ¶¶5-11.) As set forth in the Settlement,

Plaintiff will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Szamet Decl. ¶137; Ex. 1 at § III, ¶2.)

Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶138.) The enhancement takes into consideration the time, effort, and expense incurred by Ms. Santos in coming forward to litigate this matter on behalf of all Settlement Class Members. (Szamet Decl. ¶139.) Additionally, the Class Representative was at risk for paying for Defendant's legal fees and costs in the event that Defendant prevailed at trial. (Szamet Decl. ¶140.)

VI. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY

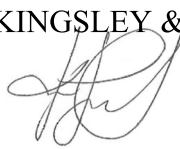
As indicated on the Proof of Service, Plaintiff's Motion for Final Approval of Class Action Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit "6." (Szamet Decl. ¶145.)

VII. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests that the Court (1) grant Final Approval of the Settlement and all of its terms; (2) award attorneys' fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs; (3) award ILYM Group, Inc. claims administration fees of \$15,000.00; and (4) award the Class Representative an enhancement of \$5,000.00; and (5) enter judgment.

DATED: April 10, 2023

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Attorneys for Plaintiff HELEN SANTOS and the
proposed class

(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 April 11, 2023, 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:

Clint D. Robison
Angeli C. Aragon
O'HAGAN MEYER
21550 Oxnard Street, Suite 1050
Woodland Hills, CA, 91367
Email(s): crobison@ohaganmeyer.com
aragon@ohaganmeyer.com

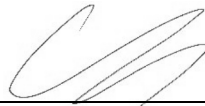
☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware 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 THROUGH CASE ANYWHERE:** On interested parties set forth on the attached service list.

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

Executed on April 11, 2023, at Encino, California.



Michelle Tanzer