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

DANIEL STEPHENSON, an individual, on
behalf of himself and others similarly
situated,

PLAINTIFF,

v.

BAKERSFIELD DODGE, INC.; and DOES 1
thru 50, inclusive,

DEFENDANTS.

CASE NO. BCV-20-102693

[Case Assigned for All Purposes to Hon.
Thomas S. Clark in Dept. 17]

**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, Emil Davtyan, DANIEL
STEPHENSON and Lluvia Islas of ILYM
Group, Inc., Proposed Order and Judgment]*

Date: May 26, 2023

Time: 8:30 AM

Dept.: 17

Complaint Filed: November 18, 2020

FAC Filed: February 18, 2021

Trial Date: None Set

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

2 PLEASE TAKE NOTICE that on May 26, 2023 at 8:30 AM in Department 17 of the
3 above-entitled court, Plaintiff DANIEL STEPHENSON (“Plaintiff”) will, and hereby does, move
4 the 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 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 and Davtyan Law Firm, Inc. as Class
10 Counsel;

11 3. Affirming DANIEL STEPHENSON as Class Representative and awarding an
12 enhancement award of \$5,000.00;

13 4. Awarding ILYM Group, Inc. claims administration fees of 5,000.00 for its services
14 as Settlement Administrator; and,

15 5. Entering judgment.

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

19 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
20 and Authorities, the Declarations of Kelsey M. Szamet, Emil Davtyan, DANIEL STEPHENSON,
21 Lluvia Islas of ILYM Group, Inc., all other papers and records on file in this action, and on such
22 oral and documentary evidence as may be presented at the hearing on this Motion.

23
24 DATED: May 4, 2023

KINGSLEY & KINGSLEY, APC

25
26 By: _____

Kelsey M. Szamet
Attorneys for Plaintiff DANIEL STEPHENSON and
the proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff DANIEL STEPHENSON (“Plaintiff”) submits this Motion for Final Approval
4 of Class Settlement and moves the Court for an order:

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

8 2. Affirming Kingsley & Kingsley, APC and Davtyan Law Firm, Inc. as Class
9 Counsel;

10 3. Affirming DANIEL STEPHENSON as Class Representative and awarding an
11 enhancement award of \$5,000.00;

12 4. Awarding ILYM Group, Inc. claims administration fees of 5,000.00 for its services
13 as Settlement Administrator; and,

14 5. Entering judgment.

15 **II. FACTUAL BACKGROUND**

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

17 On November 18, 2020, Plaintiff filed a notice with California’s Labor and Workforce
18 Development Agency (“LWDA”) regarding his intent to file an action seeking civil penalties under
19 the Labor Code Private Attorney General Act of 2004, § 2699, et seq. (“PAGA”). (Declaration of
20 Kelsey M. Szamet (“Szamet Decl.”) ¶5.) On November 18, 2020, Plaintiff DANIEL
21 STEPHENSON filed a Class Action Complaint entitled *DANIEL STEPHENSON, an individual,*
22 *on behalf of himself and others similarly situated v. BAKERSFIELD DODGE, INC.; and Does 1*
23 *thru 50, inclusive*, Case No. BCV-20-102693 in the Kern County Superior Court (“Action” or
24 “Lawsuit”). (*Id.* at ¶ 6.) The Action alleges two claims: (1) failure to issue accurate itemized wage
25 statements in compliance with Labor Code §226(a); and (2) violations of Labor Code section 2699,
26 et seq. (“PAGA”). (*Id.* at ¶ 7)

27 On February 18, 2021, Plaintiff filed the First Amended Complaint (“FAC”), adding his
28 PAGA claim, after the pre-filing notice period had lapsed. (*Id.* at ¶ 8.)

1 B. The Discovery Process

2 Once the matter was at issue, the Parties began to engage in informal discovery and direct
3 settlement negotiations to understand the nature of the allegations and the scope of potential
4 liability. (Szamet Decl. ¶ 9.) Defendant provided Plaintiff’s counsel with pertinent class data and
5 the number of pay periods during the liability period. (Szamet Decl. ¶ 10.) Plaintiff learned that
6 the number of class members was approximately 98 (including Plaintiff) and there was a maximum
7 of 2,018 pay periods during the Covered Period¹ that are at issue. (*Id.* at ¶11.)

8 Defendant denies any liability or wrongdoing of any kind associated with the claims
9 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
10 that, for any purpose other than settlement, Plaintiff’s claims are not appropriate for class or
11 representative action treatment. (Szamet Decl. ¶ 12.) Defendant contends, among other things,
12 that, at all times, it has complied with the California Labor Code, and the Industrial Wage
13 Commission Orders. (*Ibid.*)

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

23 C. Preliminary Approval

24 On March 23, 2022, the Court issued an Order granting preliminary approving of the
25 Settlement Agreement including the Class Notice, ordering the Settlement Administrator to send
26 notice to the Settlement Class members, and setting a date for the Final Approval and Fairness
27

28 ¹ The “Covered Period” means the period from November 18, 2019 through March 25, 2021.
(Settlement Agreement, Ex. 1 § I, ¶ 6.)

Hearing. (Szamet Decl. ¶14.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Class Members

For purposes of Settlement, the Class Members are defined as: “all persons who are employed or have been employed as an hourly employee by BAKERSFIELD DODGE, INC., in the State of California who worked one or more pay periods during the Class Period and who received a paystub with an attached description of monies paid.” (“Class Members”) (Szamet Decl. ¶ 15; Settlement, Ex. 1 at § I, ¶ 5.)

The Covered Period is November 18, 2019 through March 25, 2021. (Szamet Decl. ¶ 16; Ex. 1 at § I, ¶ 6.)

Based on documents and other information produced by Defendant, there are approximately 98 Class Members and there is a maximum of 2,018 pay periods during the Covered Period that are at issue. (Szamet Decl. ¶ 17; Ex. 1 at § III, ¶ 30.)

The final Settlement Class contains 95 individuals. (Islas Decl. ¶11, 13.)

B. Gross Settlement Amount

As detailed fully in the Settlement Agreement the Settlement provides for Defendant to pay a Gross Settlement Amount of \$54,330.19,² which includes the sum of the Individual Settlement Payments, the Class Representative Enhancement, the Class Counsel Award, the PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶ 18; Ex. 1 at § I, ¶ 35.)

This is a non-reversionary Settlement, meaning Defendant will pay the Gross Settlement Amount and no portion will revert to Defendant. (Ex. 1 at § II, ¶ 15.)

The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award, Class Representative Enhancement, Class Counsel’s Fees, Class Counsel’s Costs, the PAGA Payment, and Settlement Administration Costs. (Szamet Decl. ¶ 19; *Id* at Ex. 1 at § II, ¶ 15.)

² The Court granted Preliminary Approval of a Settlement of \$50,000, but the Gross Settlement Amount was increased pursuant to the formula set forth in § III, ¶ 30 of the Settlement Agreement (Ex.1). The Attorneys’ Fees and the Net Settlement Amount were upwardly adjusted accordingly.

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 members as follows:

Gross Settlement Amount:	\$	54,330.19
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel's Fees:	\$	18,108.25
Less Class Counsel's Costs:	\$	3,000.00
Claims Administration:	\$	5,000.00
PAGA Payment:	\$	4,000.00
		<i>(\$3,000.00 to the LWDA; \$1,000.00 to remain in the Net Settlement Amount)</i>
Less Settlement Administrator Cost:	\$	<u>5,000.00</u>
Net Settlement Amount:	\$	20,221.94

C. Individual Settlement Payments

The amount of each Class Member's individual settlement payment will be an individualized amount that is based on the number of Compensable Workweeks during which s/he worked in proportion to the aggregate number of workweeks worked by all Settlement Class Members. (Ex. 1 at § I, ¶ 16; see also Ex. A to the Settlement Agreement at pp. 3 [Class Notice].) This individual amount shall be determined according to the formula set forth in the Settlement Agreement (See Ex. 1 at § III, ¶ 17; *Id.* at Ex. A to the Settlement Agreement [Class Notice].) The Settlement Agreement provides for a specific and detailed dispute process regarding the dates of employment stated on their Notice of Class Action Settlement. (See Ex. 1 at § III, ¶ 9.)

Based on these calculations, the Participating Claimants will receive an estimated average gross payment of \$200.22, with the estimated highest gross payment being \$387.97. (Islas Decl. ¶14.)

D. Class Notice

The Court approved the proposed Class Notice and directed the mailing of the Notice by first-class mail to Settlement Class Members in accordance with the proposed implementation schedule. (Szamet Decl. ¶20). The procedures for giving notice to the Settlement Class Members, as set forth in the Settlement Agreement and Plaintiffs' Motion for Preliminary Approval and approved by the Court, have been fully and properly carried out. (Islas Decl. ¶4-13.)

1 To date, ILYM Group, Inc. received three (3) requests to be excluded (“opt-outs”) from
2 the proposed Settlement Agreement and zero (0) objections. (Islas Decl. ¶¶11-13.)

3 E. Check Mailed Settlement – No Reversion

4 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
5 without the possibility of reversion of settlement funds to Defendant. Under the Settlement
6 Agreement, every Settlement Class member will receive a settlement check and Settlement class
7 members do not need to submit a claim in order to receive a settlement check. Any funds that
8 remain uncashed after 160 days shall be turned over by the Settlement Administrator, with
9 information for each Settlement Class member who failed to timely cash his/her settlement check,
10 to the non-profit Bet Tzedek. (Ex. 1 at Exhibit C ¶20.)

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

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

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

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

24 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
25 arm’s-length negotiations. All settlement discussions were made by experienced and informed
26 counsel, who believe that this settlement represents a favorable resolution for the Settlement Class
27 Members. (Szamet Decl. ¶21.) The settlement negotiations have been, at all times, adversarial
28 and non-collusive, and no self-dealing or other type of misconduct by either side has taken place.

1 (Szamet Decl. ¶22.)

2 Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly
3 evaluate the strength of the case and the risks associated with ongoing litigation including data and
4 documents informally for purposes of settlement. (Szamet Decl. ¶23.) This included the number
5 of pay periods at issue during the liability period. (*Id.*) Receipt of appropriate discovery allowed
6 Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the
7 lawsuit. (Szamet Decl. ¶24.)

8 Third, Class Counsel have significant experience in cases of this type, including several
9 years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶25.) Class
10 Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel
11 believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and
12 that the average recovery for each Participating Settlement Class Member of over \$200 is
13 substantial, given the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶26; Islas
14 ¶14.)

15 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were
16 only three (3) requests to be excluded and no objectors. (Islas Decl. ¶¶11-13.) As all of the *Dunk*
17 factors are satisfied, this settlement is entitled to a presumption of fairness.

18 B. The Court Should Approve This Class Action Settlement Because it Satisfies Each
19 of the *Kullar* Factors

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

27 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶27.) Class Counsel
28 conducted informal discovery before entering into meaningful settlement negotiations in this

1 matter. (Szamet Decl. ¶ 28.) This informal discovery and settlement negotiations permitted Class
2 Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation.
3 (Szamet Decl. ¶ 29.) Class Counsel is experienced in handling wage and hour class actions and,
4 after weighing all of the following factors, supports this Settlement. (Szamet Decl. ¶ 30.)

5 1. The Strength of Plaintiffs' Case

6 a) The Risks Associated with the Wages Statement Claim

7 Labor Code §226(a) requires, in relevant part:

8 An employer, semimonthly or at the time of each payment of wages, shall
9 furnish to his or her employee ... an accurate itemized statement in writing
10 showing ... (2) total hours worked by the employee...(9) all applicable
11 hourly rates in effect during the pay period and the corresponding number
12 of hours worked at each hourly rate by the employee. (Labor Code §§
226(a)(2) and (9), respectively.

12 Here, the gravamen of Plaintiff's complaint is that Defendant violated this provision by
13 issuing itemized wage statements that fail to show the total hours worked by the employee, the
14 applicable hourly rates in effect during the pay period and the corresponding number of hours
15 worked at each hourly rate by the employee in violation of Labor Code §226(a)(2), (9). (Szamet
16 Decl. ¶ 31.)

17 Plaintiff takes the position that a review of the paystubs at issue reveals that Defendant's
18 itemized wage statements simply do not show the required information. (Szamet Decl. ¶ 32.)
19 Through the informal exchange of information, Defendant has indicated that there are 98 members
20 in the Settlement Class and 2,018 pay periods at issue. (Szamet Decl. ¶ 33.) Given that, Plaintiff
21 was confident that he could establish that Defendant violated Labor Code § 226(a) on a class wide
22 basis. (Szamet Decl. ¶ 34.) However, there were certainly risks to be weighed. (Szamet Decl. ¶
23 35.)

24 (1) The Parties' Staunchly Conflicting Positions

25 Defendant maintained that Plaintiff was required to show injury per the Labor Code § 226
26 (e)(1) and that Plaintiff could not articulate a cognizable injury here. ["An employee suffering
27 injury as a result of a knowing and intentional failure by an employer to comply with subdivision
28 (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay

1 period in which a violation occurs and one hundred dollars (\$100) per employee for each violation
2 in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000),
3 and is entitled to an award of costs and reasonable attorney’s fees.”] (Szamet Decl. ¶ 36.) In
4 response, Plaintiff maintains that pursuant to Labor Code § 226(e)(2)(B) injury is presumed by
5 virtue of an employer failing to provide a properly itemized wage statement. [“An employee is
6 deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate
7 and complete information as required by any one or more of items (1) to (9), inclusive, of
8 subdivision (a) and the employee cannot promptly and easily determine³ from the wage statement
9 alone... information required to be provided”.] (Szamet Decl. ¶ 37.)

10 Plaintiff certainly anticipated that Defendant would argue Plaintiff could “promptly and
11 easily” determine the total hours Plaintiff worked, applicable hourly rates in effect during the pay
12 period and the total corresponding number of hours worked at each hourly rate by Plaintiff by
13 reviewing Plaintiff’s paystubs and completing simple calculations based on the gross wages paid
14 from the face of the wage statement alone. (Szamet Decl. ¶ 38.) Contrary to Defendant’s
15 anticipated argument, Plaintiff maintains that Plaintiff would have to look at documents outside
16 the four corners of the wage statement, and have to engage in discovery and perform complex
17 mathematical calculations to reconstruct time records in order to determine if he was correctly paid
18 for all hours worked at the appropriate rate of pay, thus having suffered injury under Section 226.
19 (Szamet Decl. ¶ 39; *Reinhardt v. Gemini Motor Transport* (E.D. Cal. 2012 879 F.Supp.2d 1138;
20 *Ibid.*.) Additionally, Plaintiff maintains that courts have long held that confusion is sufficient to
21 establish injury under this simple standard. (*McKenzie v. Federal Exp. Corp.*, (C.D. Cal. 2011)
22 765 F. Supp. 2d 1222, 1231. Accordingly, Plaintiff perceived little risk that he would not be able
23 to establish injury. (Szamet Decl., ¶ 40.)

24 Most importantly from a risk analysis perspective, however, is Plaintiff’s ability to show
25 that any alleged Section 226(a) violation was “knowing and intentional.” (Szamet Decl. ¶ 41.)
26 Defendant maintained that if a Court determined that there was any violation, it would be only a

27 ³ Lab. Code § 226(2)(C) provides: For purposes of this paragraph, “promptly and easily
28 determine” means a reasonable person would be able to readily ascertain the information without
reference to other documents or information.

1 technical violation of Labor Code § 226(a)(2) and (9) that did not merit the imposition of penalties.
2 (Szamet Decl. ¶ 42.) Pursuant to Labor Code § 226(e), employees are only entitled to the statutory
3 penalty for a “knowing and intentional failure by an employer to comply with subdivision (a).”
4 Pursuant to Labor Code § 226.3, the Labor Commissioner has the discretion to “decide not to
5 penalize an employer for a first violation when that violation was due to a clerical error or
6 inadvertent mistake.” Plaintiff anticipated that at trial, Defendant would argue that any alleged
7 violation was the result of a clerical oversight and, accordingly, Plaintiff could not prove the
8 violation was “knowing and intentional.” (Szamet Decl. ¶ 43.) Consequently, if Defendant could
9 make a potentially persuasive argument that if Defendant did not act knowingly or intentionally
10 there would be no penalties available under Labor Code § 226(e) to the Class Members. (Szamet
11 Decl. ¶ 44.) While Class Counsel maintains that it could establish that the alleged violation was
12 “knowing and intentional,” nonetheless Class Counsel had to recognize that there was risk that a
13 trier of fact might ultimately be swayed by Defendant’s arguments. (Szamet Decl. ¶ 45.)

14 b) The Risks Associated with the PAGA Claim

15 California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, et seq., permits
16 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
17 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
18 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
19 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

20 For the purposes of a PAGA claim under Labor Code section 2699, Plaintiff contends that
21 it is immaterial whether Plaintiff and the aggrieved employees suffered an injury as defined by
22 Labor Code § 226(e). (Szamet Decl. ¶ 46.) Recent case law makes it quite clear that there is no
23 question that, for a PAGA claim, an employer’s failure to include the required information alone
24 triggers liability and entitles Plaintiff and other aggrieved employees to recover civil penalties.
25 (Szamet Decl. ¶ 47.)

26 In *Lopez v. Friant*, the California Court of Appeal reversed a summary judgment ruling
27 that applied the “knowing and intentional” standard of Labor Code section 226(e) to a Private
28 Attorneys General Act (“PAGA”) claim for violation of section 226(a). The court held that PAGA

claims based on wage statement violations are not subject to the statutory penalty requirements of section 226(e)(1). (*Lopez v. Friant & Assocs., LLC* (2017) 15 Cal. App. 5th 773.)

As explained in *Lopez*, PAGA was designed to incentivize the enforcement of Labor Code provisions for which there was no private right of action, and to supplement the limited resources of state enforcement agencies. The plaintiff in *Lopez*'s PAGA claim was based on a violation of Labor Code section 226(a)(7), which requires the issuance of wage statements that include either the last four digits of the employee's social security number, or some other employee identification number. The defendant moved for summary judgment against that predicate violation, arguing that the employer's failure to include an identification number was not "knowing and intentional" as required for statutory damages or penalties under section 226(e)(1). The trial court granted summary judgment in favor of the defendant. The plaintiff appealed.

Plaintiff's primary argument on appeal was that the "knowing and intentional" requirement under section 226(e) does not apply to a PAGA action based on a wage statement violation under section 226(a). The appellate court agreed and held: "Because section 226(e)(1) sets forth the elements of a private cause of action for damages and statutory penalties, its requirement that a plaintiff demonstrate "injury" resulting from a "knowing and intentional" violation of section 226(a) is not applicable to a PAGA claim for recovery of civil penalties." *Id.* at 784.⁴

Plaintiff discounted the PAGA claim for multiple reasons. (Szamet Decl. ¶48.) First, the aggrieved employees' PAGA claims are arguably derivative of all the foregoing class claims. (Szamet Decl. ¶49.) Second, and most importantly, a court has discretion to award less than the maximum penalty. (Szamet Decl. ¶50; 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)

⁴ See also *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1231 [The Court flatly rejected the defendant's argument and granted summary judgment in favor of Plaintiff on the PAGA claim, concluding that there is no injury requirement whatsoever to prevail on a PAGA violation premised on underlying violations of Labor Code § 226(a)]; see also *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116, 1136 [holding that a plaintiff "is not required to establish injury in order to obtain judgment on this [PAGA] claim. All she needs to establish is a violation of section 226(a), which she has done"]).

30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA penalty).⁵ 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. ¶ 51.) As such, Plaintiff contends that the Settlement's contemplated PAGA payment of \$4,000 is appropriate. (Szamet Decl. ¶ 52.) See *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

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

There is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated settlement now. (Szamet Decl. ¶ 53.) If the Court did eventually certify a class, trial of a case involving approximately 98 Class Members would require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶ 54.) Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶ 55.) An appeal would result in further delay for the Class Members who are waiting for a resolution in this matter. (*Ibid.*)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Szamet Decl. ¶ 56.) While Plaintiff believes there is strong evidence to support certification of several classes and subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Ibid.*) In attempting to certify a class, the Parties would need to conduct multiple depositions, including of the Class Representative and of several person(s) most knowledgeable regarding Defendant's policies. (*Ibid.*) There is a risk for both sides as to what these depositions will reveal and whether they will support class certification to the extent expected. (*Ibid.*)

4. The Amount Offered in Settlement

⁵ 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 It was very difficult for the Parties to reach this Settlement of \$54,330.19. (Szamet Decl.
2 ¶ 57.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
3 (Szamet Decl. ¶ 58.) The Parties arrived at it after extensive informal discovery and settlement
4 negotiations, careful evaluation of the law, risks, and all information substantiating the amount of
5 penalties reasonably likely to be awarded to the class were the trier of fact to find Defendant liable.
6 (*Ibid.*)

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

8 As for valuation of the Labor Code § 226(a) claim, Labor Code § 226(e) sets forth the
9 penalty scheme of \$50 for the initial violation and \$100 for each pay period thereafter with a
10 maximum of \$4,000 per employee.⁶ Here, there are approximately 98 Settlement Class Members
11 and 2,108 pay periods at issue. Therefore, Plaintiff contends that the maximum possible penalty
12 would be \$201,750. This amount is comprised of \$100 x 2,018 for each violation at the
13 "subsequent" amount minus the "initial" violation of \$50 so \$201,800 - \$50 = \$201,750.

14 There is much debate about whether and when the "initial" versus "subsequent" penalty
15 would attach. The statute's plain language indicates that an employer will be assessed a lower,
16 "initial" penalty for each initial pay period in which a violation occurs, and a higher, "subsequent"
17 penalty for each subsequent pay period in which a violation occurs. (Lab. Code § 226(e).) In
18 *Amaral*, however, the court held, "Until the employer has been notified that it is violating a Labor
19 Code provision (whether or not the commissioner or court chooses to impose penalties), the
20 employer cannot be presumed to be aware that its continuing underpayment of employees is a
21 'violation' subject to penalties [and will be assessed only the 'initial' violation rate]." (*Amaral v.*
22 *Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.)⁷ This language could be read as
23 indicating that until a court (or possibly the Labor Commissioner) informs an employer that it has

24 ⁶ Labor Code § 226(e)(1): "An employee suffering injury as a result of a knowing and intentional failure by an
25 employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial
26 pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay
period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable
attorney's fees."

27 ⁷ *Amaral* certainly is not directly on point as it is not discussing the penalty provisions of Labor Code §226(e), but
28 another Labor Code statute altogether. However, there is a dearth of legal authority and Plaintiff's Counsel is not aware of any
other case that sheds more light on the issue than *Amaral*. (Szamet Decl. ¶ 59.)

1 violated the Labor Code, the employer can only be assessed the “initial” violation rate. (Szamet
2 Decl. ¶ 60.) On the other hand, it could be argued that the plain language speaks for itself and
3 “initial” means first and “subsequent” means any itemized wage statements issued thereafter.
4 (Szamet Decl. ¶ 61.) If the maximum penalty amount was limited to the “initial” \$50 per pay
5 period, that would reduce the maximum potential penalty award to \$100,900 (2,018 x \$50 =
6 100,900).

7 As for the maximum potential exposure on the PAGA claim, if the Court were to award
8 \$100 per pay period, the maximum potential penalty award would be \$201,800 (2,018 x. \$100 =
9 \$201,800).

10 The main risk taken into account with PAGA is the discretionary nature of the penalty
11 award. (Szamet Decl. ¶ 62.) As discussed above, a judge can award the statutory maximum of \$50
12 for the initial violation and \$100 thereafter or – in theory – one cent per wage statement. (Szamet
13 Decl. ¶ 63.) While there is a dearth of available authority, in Plaintiff’s view it is not likely that a
14 Judge would award the maximum amount of penalties. (Szamet Decl. ¶ 64.)

15 In addition, the “subsequent” amounts under Labor Code §226(e) and PAGA have recently
16 been called into question. (Szamet Decl. ¶ 65.) Indeed, the most recent authority suggests that the
17 “subsequent” penalty is not available until the employer has received formal “notice” of its
18 violation of the law either through an administrative decision or a court ruling.⁸

19 Under this new ruling, Defendant would certainly argue that it had not received formal
20 “notice” and the \$50 penalty was the maximum potential amount per pay period. (Szamet Decl. ¶
21 66.) Of course, Defendant would certainly argue the same legal analysis applies to the “initial”

22 ⁸ Most practitioners have been calculating the heightened penalties of PAGA by assuming that the initial violation
23 was \$100 and that any later violation was a “subsequent” violation automatically resulting in a \$200 penalty per aggrieved
24 employee per pay period. A recent Ninth Circuit ruling, however, has potentially reduced this exposure for heightened penalties
25 by holding that the \$200 subsequent penalty cannot be assessed until the employer has “notice” it is violating the Labor Code
26 section at issue.

25 In *Bernstein v. Virgin America Inc.* (9th Cir. 2021) 990 F.3d 1157, the Ninth Circuit, applying California law, held that
26 simply violating a Labor Code section again after an initial violation does not automatically establish a subsequent violation as
27 contemplated by PAGA. Rather, the “subsequent” violation requires the employer to be notified it is in violation of the section,
28 either through an administrative decision or a court ruling. (*Bernstein, supra*, at 1172.)

27 The *Bernstein* Court cited the decision in *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 614, applying the
28 “good faith” defense to the imposition of penalties. The court explained that “when an employer presents a defense based in law
or fact which, if successful, would preclude any recovery on the part of the employee,” the employer cannot be presumed to be
aware that its continuing conduct is a violation subject to penalties. (*Bernstein, supra*, at 1172-1173 [quoting and citing *Amaral, supra*, at 614].)

1 and “subsequent” amounts available under Labor Code §226(e). (Szamet Decl. ¶ 67.) If Defendant
2 were successful with these arguments, the maximum potential exposure decreases dramatically to
3 \$100,900 for the Labor Code §226(a). Using this figure, the recovery provided for under the
4 settlement represents 49.6% of the maximum potential recovery. Assuming PAGA penalties were
5 not awarded, then the proposed settlement remains 49.6% of the maximum potential recovery.

6 As a result of this risk and the risks on the merits discussed above, Class Counsel believes
7 the Gross Settlement Amount of \$54,330.19 is fair and reasonable. (Szamet Decl. ¶ 68.)

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

9 As outlined above, Class Counsel conducted a thorough investigation into the facts of the
10 claims alleged. ((Szamet Decl. ¶ 69.) The agreement to settle did not occur until Class Counsel
11 exchanged and possessed sufficient information to make an informed judgement regarding the
12 likelihood of success on the merits and the results that could be obtained through further litigation.
13 (*Ibid.*)

14 6. The Experience and Views of Counsel

15 Kingsley & Kingsley is very experienced in prosecuting and defending employment
16 litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition
17 violations. (Szamet Decl. ¶¶70-71.) The firm is well versed in class action litigation and has
18 diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves
19 as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern
20 California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is
21 included in the accompanying declaration of Kelsey M. Szamet. (Szamet Decl. ¶¶70-71.) After
22 factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair
23 and reasonable. (Szamet Decl. ¶72.)

24 7. The Presence of a Governmental Participant

25 There is no governmental participant in this action. (Szamet Decl. ¶73.)

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

27 Plans of allocation are subject to the same standard of review as class action settlements;
28 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*

1 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) As detailed in the Settlement
2 Agreement, the proposed plan of allocation compensates Class Members pro rata based on the
3 number of Compensable Workweeks during which s/he worked in proportion to the aggregate
4 number of workweeks worked by all Settlement Class Members. (Ex. 1 at § I ¶ 16.) This allocation
5 distributes Settlement funds proportionally to each Class Member’s potential damages and should
6 therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶ 74.)

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

8 To date, there are three (3) requests to be excluded from the proposed Settlement
9 Agreement and zero objections. (Islas Decl. ¶¶11-13.) Such indicates that the reaction of
10 Settlement Class Members on the whole is positive and weighs in favor of approval.

11 **V. ENHANCEMENT TO PLAINTIFF**

12 Plaintiff’s Counsel request an enhancement of \$5,000.00 to the Class Representative
13 DANIEL STEPHENSON for his work on behalf of the Settlement Class members (Szamet Decl.
14 ¶115.) “Courts routinely approve incentive awards to compensate named plaintiffs for the services
15 they provide and the risks they incurred during the course of the class action litigation.” *Ingram v.*
16 *The Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga 2001) (internal quotations and citations
17 omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).
18 In *Coca-Cola*, the Court approved service awards of \$300,000 to each named plaintiff in
19 recognition of the services they provided to the class by responding to discovery, participating in
20 the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*,
21 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000
22 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068
23 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,00 enhancement to each
24 named plaintiff).

25 Mr. Stephenson is an adequate class representative because he has diligently, adequately
26 and fairly represented the Settlement Class members and has not placed his interests above any
27 member of the Settlement Class. (*see* Declaration of DANIEL STEPHENSON (“Stephenson
28 Decl.”) ¶¶3-14.)

1 Here, Class Counsel requests an enhancement for Mr. Stephenson’s valiant effort and time
2 expended in this matter. The time spent by DANIEL STEPHENSON includes providing
3 information to Class Counsel regarding the nature of the work at BAKERSFIELD DODGE, INC.,
4 compiling documents, meeting with his attorneys to discuss the status of the case, the theories of
5 liability, and responding promptly to Class Counsel’s communications regarding settlement.
6 (Szamet Decl. ¶116; Stephenson Decl. ¶¶4-11.) As set forth in the Settlement Agreement, Plaintiff
7 will also be entering into a general release of liability pursuant to Civil Code Section 1542. (Szamet
8 Decl. ¶117; Ex. 1 at § III, ¶2.)

9 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶118.)
10 The enhancement takes into consideration the time, effort, and expense incurred by Mr.
11 Stephenson in coming forward to litigate this matter on behalf of all Settlement Class Members.
12 (Szamet Decl. ¶119.) Additionally, the Class Representative was at risk for paying for Defendant’s
13 legal fees and costs in the event that Defendant prevailed at trial. (Szamet Decl. ¶120.)

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

15 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
16 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
17 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
18 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
19 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “6.” (Szamet
20 Decl. ¶125.)

21 **VII. CONCLUSION**

22 Plaintiff respectfully submits that the proposed Settlement Agreement is fair, adequate, reasonable,
23 and in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests
24 that the Court (1) grant Final Approval of the Settlement Agreement and all of its terms; (2) award
25 attorneys’ fees and costs in the amount detailed in the concurrently filed Motion for Attorneys’
26 Fees and Costs; (3) award ILYM Group, Inc. claims administration fees of \$5,000.00; and (4)
27 award the Class Representative an enhancement of \$5,000.00; and (5) enter judgment.
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3 DATED: May 4, 2023

KINGSLEY & KINGSLEY, APC

4
5 By: 

6 Kelsey M. Szamet

7 Attorneys for Plaintiff DANIEL STEPHENSON and
8 the proposed class
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(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 May 4, 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:

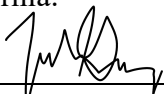
Daniel K. Klingenberger dklingenberger@lebeauthelen.com LeBeau Thelen LLP 5001 E. Commercenter Drive, Suite 300 P.O. Box 12092 Bakersfield, CA 93389-2092	Emil Davtyan emil@davtyanlaw.com Davtyan Law Firm, Inc. 400 N. Brand Blvd, Suite 700 Glendale, CA 91203
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[XX] 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.

[XX] 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).

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

Executed on May 4, 2023, at Los Angeles, California.



Taylor Gregg