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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

VICKI FLORES, an individual, on behalf of
herself and others similarly situated,

PLAINTIFF,

v.

HERITAGE BAG COMPANY; and DOES 1
thru 50, inclusive,

DEFENDANTS.

CASE NO. CIVDS2023373

[Case Assigned for All Purposes to Hon. David
Cohn in Dept. S-26]

**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
Ari J. Stiller, Vicki Flores and Nicole Bench,
Proposed Order, and Judgment]*

Date: August 2, 2022

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: October 20, 2020

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 2, 2022 at 10:00 a.m. in Department S-26 of the above-entitled court, Plaintiff VICKI FLORES ("Plaintiff") will, and hereby does, move the Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the Court for an order:

1. Granting final approval of the settlement in the case pursuant to the Joint Stipulation of Class Action Settlement and Release of Claims ("Settlement" or "Settlement Agreement"), a copy of which is attached to the concurrently-filed Declaration of Ari J. Stiller as Exhibit "1";

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

3. Affirming Vicki Flores as Named Plaintiff and awarding an enhancement award of \$5,000.00;

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

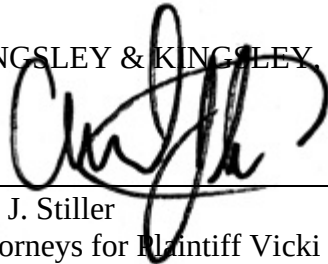
5. Entering judgment.

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

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Ari J. Stiller, Vicki Flores, Nicole Bench of ILYM Group, Inc., all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: July 7, 2022

KINGSLEY & KINGSLEY, APC

By: 

Ari J. Stiller
Attorneys for Plaintiff Vicki Flores and the proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Vicki Flores (“Named 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 Joint Stipulation
6 of Class Action Settlement and Release of Claims (“Settlement” or “Settlement Agreement”), a
7 copy of which is attached to the concurrently-filed Declaration of Ari J. Stiller 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 Vicki Flores as class representative and award an incentive
13 payment of \$5,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

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

17 Plaintiff worked as an inspector/packer for Defendant Heritage Bag Company
18 (“Defendant”) at its facility in Rancho Cucamonga, California. Her job duties included packing
19 and inspecting trash bags, lawn bags and waste basket bags sold by Defendant. (Declaration of Ari
20 J. Stiller [“Stiller Decl.”] ¶ 4.) In this action, she alleges that Defendant failed to blend her shift
21 differential pay into her regular rate of pay for purposes of calculating overtime, that it failed to
22 pay premium wages for missed meal and rest periods at the appropriate rate of pay, and that it
23 failed to reimburse for work-related expenses, among other claims. (Stiller Decl. ¶ 5.)

24 On October 20, 2020, Plaintiff filed a Class Action Complaint against Defendant alleging
25 claims for: (1) Failure to Pay all Wages and/or Overtime Under Labor Code §§ 510, 1194, and
26 1199; (2) Failure to Provide Meal Breaks Pursuant to Labor Code §§ 226.7 and 512; (3) Penalties
27 Pursuant to Labor Code § 203; and (4) Violation of Business & Professions Code § 17200. (Stiller
28 Decl. ¶ 6.) On August 12, 2021, Plaintiff filed a notice with the California’s Labor and Workforce

1 Development Agency (“LWDA”) regarding her intent to file an action seeking civil penalties
2 under PAGA. (Stiller Decl. ¶ 7.) She submitted an amended PAGA notice on January 3, 2021.
3 (Stiller Decl. ¶ 8.) On March 16, 2022, Plaintiff filed a First Amended Complaint with claims for
4 failure to provide accurate itemized wage statements in violation of Labor Code § 226(a), failure
5 to reimburse business expenses, and penalties pursuant to Labor Code § 2699, et seq. (Stiller Decl.
6 ¶ 9.)

7 B. The Discovery Process

8 After the matter was at issue, the Parties engaged in discovery to understand the nature of
9 the allegations and the scope of potential liability. (Stiller Decl. ¶ 10.) In advance of mediation,
10 Defendant provided Plaintiff’s counsel with pertinent data for the Class Members so that the
11 Parties could fully investigate the claims at issue and understand their strengths and weaknesses.
12 (Stiller Decl. ¶ 11.) Defendant provided its handbook and other relevant policy documents;
13 thousands of pages of timekeeping and payroll data for the entire class over six randomly selected
14 payroll periods during the class period; the number of pay periods in the PAGA and class periods;
15 the number of class members, including those who signed arbitration agreements; and an analysis
16 of the number of pay periods worked by class members with arbitration agreements. (Stiller Decl.
17 ¶ 12.) Plaintiff’s counsel also served formal discovery but agreed to stay it pending settlement
18 negotiations. (Stiller Decl. ¶ 13.) Plaintiff’s counsel had mediation data analyzed by an expert to
19 prepare a damage model for mediation. (Stiller Decl. ¶ 14.)

20 On July 30, 2021, the Parties attended a full-day mediation with experienced mediator
21 Kelly A. Knight. (Stiller Decl. ¶ 15.) Although the parties did not resolve the matter that day,
22 they continued their settlement efforts in the following months with the assistance of the mediator
23 and, in September 2021, reached a settlement, as provided herein, to settle Plaintiff’s claims on a
24 class-wide and representative basis. (*Id.*) The Parties also engaged in meaningful confirmatory
25 discovery after the mediation in which Defendant provided Plaintiff’s counsel with an exemplar
26 wage statement confirming that Defendant cured the alleged paystub and wage blending claims.
27 (Stiller Decl. ¶ 16.) This information was provided on October 20, 2021. (Stiller Decl. ¶ 17.)

28 Defendant denies any liability or wrongdoing of any kind associated with the claims

1 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
2 that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or
3 representative action treatment. (Stiller Decl. ¶ 18.) Defendant contends, among other things, that,
4 at all times, it has complied with the California Labor Code and the Industrial Wage Commission
5 Orders. (*Id.*)

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

15 C. Preliminary Approval

16 On March 23, 2022, the Court issued an Order preliminarily approving the settlement in
17 this case, approving the proposed Notice of Class Action Settlement ("Class Notice" or "Notice"),
18 ordering that the Settlement Administrator send Notice to the Settlement Class Members (as
19 defined below), and setting a date for the Final Approval and Fairness Hearing. (Stiller Decl. ¶
20 20.) The administrator has disseminated the notice and there have been no objections or opt-outs.
21 (Bench Decl. ¶¶ 11–12.)

22 **III. THE PRELIMINARILY APPROVED SETTLEMENT**

23 A. The Settlement Class

24 The settlement class is defined as: "all hourly paid, non-exempt persons employed by
25 Defendant in the State of California during the Settlement Period" of October 20, 2016 through
26 December 31, 2021 ("Settlement Class Members" or "Class Members"). (Stiller Decl. ¶ 21;
27 Settlement Agreement, Ex. 1 at § I, ¶¶ 5, 37.) The final settlement class contained 565 Settlement
28 Class Members who worked 28,186 pay periods within the Class Period. (Bench Decl. ¶ 5.) While

higher than the 459 members anticipated at the time of preliminary approval, the increase falls within the allowance agreed to by the parties without triggering the Settlement Agreement’s escalator clause. (See Settlement Agreement § I, ¶ 32.)

The PAGA settlement group is defined as: “all hourly paid, non-exempt persons employed by Defendant in the State of California during the PAGA Settlement Period” from August 12, 2020 through December 31, 2021 (“PAGA Settlement Group”) (Stiller Decl. ¶ 22; Settlement Agreement, Ex. 1 at § I, ¶¶ 23–24.)

B. Settlement Payments

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Gross Settlement Fund of \$475,000.00, which includes the sum of the Class Counsel Award, Incentive Award, Individual Settlement Payments, PAGA Payment, and Settlement Administrator Costs. (Stiller Decl. ¶ 23; Ex. 1 at § I, ¶ 14.) The Net Settlement Fund is the Gross Settlement Fund less Court-approved Class Counsel Award, Incentive Award, payment to the LWDA, and Settlement Administrator Costs. (Stiller Decl. ¶ 24; Ex. 1 at § I, ¶ 19.)

Plaintiff now requests final approval of the allocation of the Gross Settlement Fund to determine the Net Settlement Fund for distribution to the settlement class as follows:

Gross Settlement Fund:	\$	475,000.00
Incentive Award:	\$	5,000.00
Class Counsel Fees:	\$	158,333.33
Class Counsel Costs:	\$	10,760.34
PAGA Payment:	\$	30,000.00
		<i>(\$22,500.00 to the LWDA and \$7,500.00 to PAGA Settlement Group)</i>
<u>Settlement Administrator Costs:</u>	\$	<u>15,000.00</u>
Net Settlement Fund	\$	263,406.33
PAGA Payment to Employees	\$	7,500.00
Class Settlement Fund	\$	255,906.33

C. Individual Settlement Payments

The Individual Settlement Payment amount of each Participating Class Member is an individualized amount that is based on the number of Eligible Pay Periods worked by the

Participating Class Member during the Settlement Period. (Ex. 1 at § III, ¶ 19; *see also* Ex. A to the Settlement Agreement [Class Notice].) Specifically, Individual Settlement Payments will be paid from the Net Settlement Fund on a pro rata basis based on the number of Eligible Pay Periods worked during the Settlement Period in proportion to the aggregate number of Eligible Pay Periods worked by all Settlement Class Members during the Settlement Period.

The PAGA Settlement Group payment will also be paid on a pro-rata basis. A PAGA Settlement Group Member's distribution from the employees' share of the PAGA Payment will be based on the number of Eligible Pay Periods worked during the PAGA Settlement Period in proportion to the aggregate number of Eligible Pay Periods worked by all PAGA Settlement Group Members during the PAGA Settlement Period. (*See* Ex. 1 at § III, ¶ 20.)

Twenty percent (20%) of the Gross Settlement Fund to each Participating Class Member shall be deemed payment for settlement of claims for wages and will be subject to appropriate deductions and withholdings calculated and made by the Settlement Administrator. (Ex. 1 at § III, ¶18.) Eighty percent (80%) of the Gross Settlement Fund to each Participating Class Member shall be deemed payment for settlement of claims for penalties and interest not subject to withholdings. (*Id.*) All Individual Settlement Payments to PAGA Settlement Group Members shall be allocated as 100% non-wage payment for civil penalties. (*Id.*) The Settlement Agreement provides for a specific and detailed dispute process regarding Individual Settlement Payments. (*See* Ex. 1 at § III, ¶11.)

Based on these calculations, the average potential recovery is \$466.21 per Settlement Class Member, with the estimate highest gross payment being \$2,545.11. (Bench 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. (Stiller Decl. ¶ 25.) The procedures for giving notice to the Settlement Class Members, as set forth in the Settlement Agreement and Plaintiff's Motion for Preliminary Approval and approved by the Court, have been fully and properly carried out. (Bench Decl. ¶¶ 5–8.) ILYM Group did not receive any opt-outs or objections. (Bench Decl. ¶¶ 11–12)

1 E. Check Mailed Settlement – No Reversion

2 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
3 without the possibility of reversion of settlement funds to Defendant. Under the Settlement
4 Agreement, every Settlement Class Member will receive a settlement check and Settlement Class
5 Members do not need to submit a claim to receive a check. Any funds that remain uncashed after
6 160 days shall be turned over by the Settlement Administrator, with information for each
7 Settlement Class Members who failed to timely cash his/her settlement check, to Bet Tzedek Legal
8 Services, which the parties agree is non-profit organization that satisfies the requirements of Code
9 of Civil Procedure section 384(b)(3)(C). (Ex. 1 at § III, ¶22.)

10 F. The Release

11 The Released Class Settlement Claims, for the Settlement Period, are defined as: “all wage
12 and hour claims against the Released Parties brought or that could have been brought in the Action
13 based on the facts and theories alleged therein, including but not limited to claims under California
14 Labor Code sections 201-204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174.5, 1182.12, 1194, 1197,
15 1197.1, 1198, and 2802 as well as California Business and Professions Code Section 17200.” (Ex.
16 1 at § I, ¶ 29.)

17 The Released PAGA Claims, for the PAGA Settlement Period, are defined as: “all wage
18 and hour claims for civil penalties brought or that could have been brought against Defendant in
19 the Action based on the facts and theories alleged therein, including but not limited to claims under
20 California Labor Code sections 201-204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174.5, 1182.12,
21 1194, 1197, 1197.1, 1198, and 2802. The PAGA Settlement Group may not opt out of this
22 release.” (Ex. 1 at § I, ¶ 30.)

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

24 Pursuant to California Code of Civil Procedure § 1781(f), “a class action shall not be
25 dismissed or compromised without the approval of the court, and notice of the proposed dismissal
26 or compromise shall be given to all members of the Class in such manner as the court directs”
27 In deciding whether to grant final approval to a proposed class action settlement under Code of
28 Civil Procedure § 382, the court’s overriding concern is whether the proposed settlement is “fair,

adequate, and reasonable.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

A. The Settlement is Entitled to a Presumption of Fairness

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

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

Second, the Parties engaged in formal and informal discovery that permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. This included policy documents time and pay data, payroll records, the class size, wage statements issued to Settlement Class Members, and an analysis of the number of pay periods worked by class members with arbitration agreements. (Stiller Decl. ¶28.) Receipt of appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Stiller Decl. ¶29.)

Third, Class Counsel have significant experience in cases of this type, including decades prosecuting wage, hour, and working condition violations. (Stiller Decl. ¶30.) Class Counsel is thus qualified to evaluate the class claims and viability of the defenses. Class Counsel believes that the settlement is fair, reasonable, adequate, and in the best interests of the class and that the average recovery for each Settlement Class Member of over \$466 is substantial, given the risks inherent in litigation and the defenses asserted. (Stiller Decl. ¶31.)

Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were no requests to be excluded or objectors. (Bench Decl. ¶¶ 11–12.) As all of the *Dunk* factors are

1 satisfied, this settlement is entitled to a presumption of fairness.

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

4 In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth
5 several factors that the Court should analyze in determining whether to approve a class action
6 settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense,
7 complexity and likely duration of further litigation; (3) the risk of maintaining class action status
8 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage
9 of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
10 participant; and (8) the reaction of the class members to the proposed settlement. In *Munoz v. BCI*
11 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 409, the court clarified that
12 a *Kullar* showing does not require the parties to submit the outer reaches of maximum possible
13 recovery without taking into account the actual risks of certification, decertification, dispositive
14 motions, and trial, so long as there is a record which allows "an understanding of the amount that
15 is in controversy and the realistic range of outcomes of the litigation."

16 The proposed settlement satisfies each of these factors. Class Counsel conducted extensive
17 discovery before entering into meaningful settlement negotiations in this matter. (*Id* at Stiller Decl.
18 ¶¶ 10- 19.) This discovery permitted Class Counsel to fairly evaluate the strength of the case and
19 the risks associated with ongoing litigation. (Stiller Decl. ¶ 32.) The Parties also engaged in
20 meaningful confirmatory discovery after the mediation in which Defendant provided Plaintiff's
21 counsel with an exemplar wage statement confirming that Defendant cured the alleged paystub
22 and wage blending claims. (Stiller Decl. ¶ 33.) Class Counsel is experienced in handling wage
23 and hour class actions and, after weighing all of the following factors, supports this Settlement
24 Agreement. (Stiller Decl. ¶ 34.)

25 1. The Strength of Plaintiff's Case

26 a) The Risks Associated with Minimum Wage/Overtime Claim

27 Under state and federal law, overtime compensation is based on an employee's "regular
28 rate of pay." (*Huntington Mem'l Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902.) For

hourly employees, the regular rate is generally the employee’s straight-time hourly rate. (*Huntington, supra*, 131 Cal.App.4th at p. 905.) However, in any pay period where an hourly employee earns other compensation in addition to hourly wages – such as a non-discretionary bonus, commission, or shift differential – the “regular rate” is computed by dividing the employee’s total compensation by the total hours worked in that period. (*See Marin v. Costco Wholesale Corp.* (2008) 169 Cal.App.4th 804, 807.) “Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any non-hourly compensation the employee has earned.” (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 554.)

“Where two rates of pay are paid during a workweek, the California method for determining the regular rate of pay for calculating overtime in that workweek [is] based upon the weighted average of all hourly rates paid.” (DLSE Policies and Interpretations Manual § 49.2.5.) This “blended” rate is “established by adding all hours worked in the week and dividing that number into the total compensation for the week.” *Ibid*.

Plaintiff alleges that Defendant failed to pay overtime at the proper rate by not blending shift differentials into the employees’ regular rate of pay. (Stiller Decl. ¶ 35.) Plaintiff’s wage statements show her overtime rate as 1.5 times her standard hourly rate of \$13.50 even in pay periods where most of Plaintiff’s regular hours were paid at a higher rate due to earning a shift differential. (Stiller Decl. ¶ 36.) While this type of claim normally does not involve much risk, Defendant here argued that it paid overtime on shift differentials, just with a different pay code on its wage statements compared to the pay code used for overtime on non-shift-differential hours. (Stiller Decl. ¶ 37.) Plaintiff argued that the separate calculations did not follow California’s rules for calculating the “regular rate of pay” but Defendant contended that its practice was unlikely to result in under-compensation of wages regardless. (Stiller Decl. ¶ 38.) Plaintiff disputes this but had to acknowledge the risk posed by Defendant’s argument. (Stiller Decl. ¶ 39.)

b) The Risks Associated with the Meal Break Claim

Employers must pay one hour at the employee’s “regular rate of compensation” as a penalty when they fail to provide a thirty-minute uninterrupted meal period as required by Labor

Code section 512. See Labor Code § 226.7(b). Here, for the same reasons that Defendant’s failure to blend shift differentials into the regular rate caused an overtime violation, it also resulted in underpaid meal period premiums when such premiums were owed. The California Supreme Court recently decided that there is no distinction between the “regular rate of pay” for calculating overtime and “regular rate of compensation” for calculating meal period premiums: “We hold that the terms are synonymous: ‘regular rate of compensation’ under section 226.7(c), like ‘regular rate of pay’ under section 510(a), encompasses all nondiscretionary payments, not just hourly wages.” (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 863.)

Plaintiff perceived some risk on this claim based on Defendant’s argument that it used the blended rate for meal period premiums. (Stiller Decl. ¶ 40.) Plaintiff contests this argument based on paystub evidence that she believes demonstrates the violation under *Ferra*. (Stiller Decl. ¶ 41.) Still, the alleged underpaid meal premiums constituted a relatively small portion of the potential damages.

c) The Risks Associated with the Reimbursement Claim

Under California Labor Code § 2802(a) an employer “shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.” Plaintiff alleges that Defendant required employees to incur business expenditures for which they were never reimbursed, including the costs of steel-toed boots and protective eyewear. (Stiller Decl. ¶ 42.) Plaintiff perceived this as a high-risk claim for several reasons. First, steel-toed boots may not be a clothing item that’s so specialized as to require reimbursement. Second, it appears Defendant issued vouchers to employees for the cost of these items. (Stiller Decl. ¶ 43.) Plaintiff argues that the vouchers could prove insufficient, but she had to acknowledge that it’s unlikely that the difference between the voucher and the actual cost would be significant. Also, there is a risk that the Court would find no liability if the voucher was sufficient to cover the realistic cost of these items, even if certain employees paid more. (Stiller Decl. ¶ 44.)

d) The Risks Associated with the Inaccurate Wage Statement Claim

Labor Code § 226(a)(2) requires that every employer shall, semimonthly or at the time of

1 each payment of wages, furnish each of his or her employees an accurate itemized statement in
2 writing showing total hours worked by the employee. Labor Code § 226(a)(9) requires the wage
3 statement to display all applicable hourly rates in effect during the pay period and the
4 corresponding number of hours worked at each hourly rate by the employee.

5 Plaintiff alleges that Defendant failed to provide employees with accurate itemized wage
6 statements, as required by the Labor Code, because Defendant issued Plaintiff and the aggrieved
7 employees wage statements that fail to accurately show the total hours worked and the applicable
8 hourly rates in effect. (Stiller Decl. ¶ 45.) Specifically, whenever Plaintiff and the aggrieved
9 employees earned meal period premiums, the extra hour of pay was added to total hours worked.
10 (*Id.*) Moreover, Defendant failed to accurately list total overtime hours worked and the
11 corresponding number of hours worked at each hourly rate when an employee earns shift
12 differential pay or other bonuses and works overtime. (Stiller Decl. ¶ 46.)

13 On the overtime rates issue, Plaintiff acknowledged risk posed by Defendant's argument
14 that this claim is derivative of a wage violation, and therefore not actionable pursuant to
15 *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336–1337.) Defendant also
16 argued that a reasonable employee could still determine their hours and wages from Defendant's
17 paystubs. (See *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136.) While Plaintiff
18 believes there is lower risk in her claim for including meal period premiums as total hours worked,
19 the meal premiums and regular hours were separately listed elsewhere on the stub, so there was
20 still risk that a Court would find no liability as to this issue. (Stiller Decl. ¶ 47.)

21 e) The Risks Associated with the Untimely Payment and Waiting
22 Time Penalty Claims

23 Under Labor Code § 203, if an employer fails to provide wages at the time of an employee's
24 termination or within 72 hours of resignation, then the employee's wages shall continue as a
25 penalty for up to 30 days. Section 203 reflects a public policy that favors the full and prompt
26 payment of earned wages. (See *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7;
27 *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) Similarly, Labor Code § 204 and 210, an
28 employee may seek a penalty for not being paid timely after the close of a payroll period.

1 Here, Plaintiff and some members of the Proposed Class are no longer employed by
2 Defendant. (Stiller Decl. ¶ 48.) Plaintiff argues that she is owed waiting time penalties due to
3 Defendant's failure to pay appropriate overtime wages and meal period premiums. (*See Diaz v.*
4 *Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859.) (Stiller Decl. ¶ 49.)

5 In evaluating settlement, Plaintiff considered Defendant's argument that a good-faith belief
6 exception applies because its actions were not willful and its payment calculations did not result
7 in underpayment. While Plaintiff disputes that not knowing the law is a sufficient defense, she still
8 had to acknowledge that this argument posed some risk. (Stiller Decl. ¶ 50.) Moreover, the parties
9 dispute how the Court would interpret Defendant's use of a formula that paid overtime on shift
10 differentials separate from the overtime on non-shift-differential hours. (Stiller Decl. ¶ 51.)
11 Defendant argues that this shows inadvertence as to the pay periods where Plaintiff alleges a
12 violation. (Stiller Decl. ¶ 52.) Finally, Plaintiffs expected Defendant to argue that the Court has
13 discretion to lower the waiting time penalty amount where it is significantly higher than the wages
14 owed, which is the case here. Plaintiffs disagree that the Court has this discretion, but nonetheless
15 had to consider this argument when determining an appropriate settlement. (Stiller Decl. ¶ 53.)

16 f) The Risks Associated with the PAGA Claim

17 Plaintiff is cognizant of risks associated with their PAGA claim and has therefore agreed
18 to discount this claim for multiple reasons. First, the aggrieved employees' PAGA claims arise
19 from the same violations as the foregoing class claims and bear the same risks on the merits.
20 Second, the Court has discretion to award less than the maximum penalty, which Defendant argued
21 would be appropriate considering the low amount of direct wage damages, even if Plaintiff
22 prevails. (*See* Labor Code § 2699(e)(2) ["a court may award a lesser amount than the maximum
23 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
24 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
25 confiscatory"]; *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 529 [affirming
26 award of 10% of maximum PAGA penalty].) Finally, the Settlement Class is compensated for
27 these violations in the proposed Settlement Agreement, and thus any PAGA recovery would be
28 duplicative. Thus, PAGA did not make up a significant percentage of the overall potential liability

1 compared to other claims. (Stiller Decl. ¶ 54.) As such, the Settlement Agreement's contemplated
2 PAGA payment of \$30,000.00 is appropriate. (Stiller Decl. ¶ 55.)

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

4 There is significant expense associated with the class certification process, which the
5 Parties can avoid by entering into the contemplated Settlement Agreement now. (Stiller Decl. ¶
6 56.) If the Court did eventually certify a class, trial of a case involving approximately 565
7 Settlement Class Members would require the retention of expensive expert witnesses, the accrual
8 of extensive litigation costs, and a significant time overlay by the parties. (Stiller Decl. ¶ 57.)
9 Moreover, given the complexity and unsettled nature of the issues in this case it is likely that any
10 outcome at trial would have resulted in a lengthy and costly appeal. (Stiller Decl. ¶ 58.) An appeal
11 would result in further delay for the Settlement Class Members who are waiting for a resolution in
12 this matter. (*Id.*)

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

14 This case has not been certified as a class action. (Stiller Decl. ¶ 59.) While Plaintiff
15 believes there is strong evidence to support certification of several possible subclasses,
16 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
17 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
18 to conduct multiple depositions, including of the Named Plaintiff and of several person(s) most
19 knowledgeable regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what these
20 depositions will reveal and whether they will support certification to the extent expected. (*Id.*)

21 4. The Amount Offered in Settlement

22 It was very difficult for the Parties to reach this Settlement of \$475,000.00. (Stiller Decl.
23 ¶ 60.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
24 (Stiller Decl. ¶ 61.) The Parties arrived at it after extensive investigation and discovery, careful
25 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
26 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
27 of an experienced mediator, Kelly A. Knight. (*Id.*)

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

1 Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount,
2 at approximately \$12,396. (Stiller Decl. ¶ 62.) Plaintiff used an hourly average rate of \$18.07 and
3 25,647 workweeks for Settlement Class Members. (Stiller Decl. ¶ 63.)

4 The full value of the Meal Period claim, without any discount, was approximately \$2,152.
5 (Stiller Decl. ¶ 64.) Meal period premiums were paid infrequently, and the claim requires both a
6 meal premium and shift differential in the same pay period. (Stiller Decl. ¶ 65.)

7 With regard to the Reimbursement Claim analysis, Plaintiff believed that it was reasonable
8 to value the potential reimbursement at \$20 per year, per employee, for reimbursement of the
9 difference between the voucher and actual cost of protective boots and eyewear. This brought the
10 damages for this claim to \$10,889.74 (\$20 x average of 1.18 years worked/class member x 459
11 class members). (Stiller Decl. ¶ 66.)

12 Plaintiff valued the Wage Statement Claim, without discount, at approximately \$669,277.
13 (Stiller Decl. ¶ 67.) This is based on wage statements that list meal period premiums as part of the
14 total hours worked. Due to the risk discussed above that 226(a) liability wouldn't attach under
15 *Morgan* and *Maldonado*, Plaintiff determined that a steep discount of this claim was fair for
16 settlement purposes. (Stiller Decl. ¶ 68.)

17 Plaintiff valued the Waiting Time Claim, tied to the Wage/Overtime claim, at \$506,571.
18 (Stiller Decl. ¶ 69.) This was based on the employees whose meal period premium wages failed to
19 incorporate the appropriate regular rate of pay under *Ferra*. This accounts for Defendant's
20 argument that it did, in fact, pay overtime for hours worked at the shift differential rate, even if
21 they were not listed under the overtime pay code on its wage statements. (Stiller Decl. ¶ 70.)
22 Considering the derivative nature of Labor Code section 203 and the dispute over willfulness,
23 Plaintiffs determined that accepting a discount on this claim was appropriate. (Stiller Decl. ¶ 71.)

24 Finally, Plaintiff calculated the value of the PAGA claim at \$162,317 for pay periods with
25 a regular rate violation and another \$529,826 for pay periods with an independent wage statement
26 violation. (Stiller Decl. ¶ 72.) The main risk taken into account with PAGA is the discretionary
27 nature of the penalty award. (Stiller Decl. ¶ 73.) The court could award the statutory maximum of
28 one hundred (\$100) dollars for the initial violation and two hundred (\$200) dollars thereafter or –

1 in theory – one cent per wage statement. (Stiller Decl. ¶ 74.) While there is a dearth of available
2 authority, in Plaintiffs’ view, were they to succeed on any of the underlying Labor Code violations
3 (especially waiting time penalties), it is not likely that the Court would also award a large amount
4 of PAGA penalties on top of damages. (Stiller Decl. ¶ 75.)

5 Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the
6 Settlement Class Members’ claims was approximately \$1,893,429. (Stiller Decl. ¶ 76.) However,
7 as a result of the forgoing risks on the merits, Class Counsel believes the Gross Settlement Fund
8 of \$475,000.00 is fair and reasonable. (Stiller Decl. ¶ 77.)

9 5. The Extent of Discovery Completed and Stage of the Proceedings

10 As outlined above, Class Counsel conducted a thorough investigation into the facts. (Stiller
11 Decl. ¶78.) The agreement to settle did not occur until Class Counsel exchanged and possessed
12 sufficient information to make an informed judgement regarding the likelihood of success on the
13 merits and the results that could be obtained through further litigation. (*Id.*)

14 6. The Experience and Views of Counsel

15 Kingsley & Kingsley is very experienced in prosecuting employment litigation, and the
16 firm has focused its practice since 2000 on wage, hour, and working condition violations. (Stiller
17 Decl. ¶¶ 79-81.) The firm is well versed in class action litigation and has diligently and
18 aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley currently serves as Class Counsel
19 for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Ibid.*)
20 A list of representative cases that Kingsley & Kingsley, APC has handled is included in the
21 accompanying declaration of Ari J. Stiller. (Stiller Decl. ¶¶ 80-81.) After factoring in the risks
22 explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Stiller
23 Decl. ¶ 82.)

24 7. The Presence of a Governmental Participant

25 There is no governmental participant in this action aside from the LWDA, which has been
26 notified of the settlement and has not objected. (Stiller Decl. ¶ 83.)

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

28 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 work weeks worked by the Settlement Class Member during the Settlement Period. The payment to each member of the Settlement Class not excluding him/ herself will be determined by dividing the Net Settlement Fund by the total number of Eligible Pay Periods worked by all members of the Settlement Class during the Settlement Period and then multiplying the weekly amount by the number of Eligible Pay Periods by the individual class member as determined by the Settlement Administrator. This allocation distributes Settlement funds proportionally to each class member’s damages, and should therefore be approved as fair, adequate, and reasonable. (Ex. 1 at § III, ¶19.)

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

To date, there have been no requests to be excluded from the proposed Settlement Agreement or objections. (Bench Decl. ¶¶ 11–12.) This 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 Named Plaintiff Vicki Flores for her work on behalf of the settlement class. (Stiller Decl. ¶128.) Ms. Flores 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 Vicki Flores (“Flores Decl.”) ¶¶ 3-14.)

“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

1 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068
2 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,000 enhancement to
3 each named plaintiff).

4 Here, Class Counsel requests an enhancement for Ms. Flores' valiant effort and time
5 expended in this matter. The time spent by Ms. Flores is significant and includes researching and
6 retaining competent counsel; providing information to Class Counsel regarding the nature of her
7 work for Defendant; compiling relevant documents; working closely with Class Counsel to
8 develop the theories of liability and martial relevant evidence; regularly discussing the status of
9 the case with Class Counsel; participating by telephone during mediation; and responding
10 promptly to Class Counsel's communications regarding settlement. (Stiller Decl. ¶129; Flores
11 Decl. ¶¶4-6, 10.) As set forth in the Settlement, Plaintiff will also be entering into a general release
12 of liability pursuant to Civil Code Section 1542. (Stiller Decl. ¶130; Ex. 1 at § III, ¶3.)

13 Class Counsel considers this to be a fair and reasonable enhancement. (Stiller Decl. ¶131.)
14 The enhancement takes into consideration the time, effort, and expense incurred by Ms. Flores in
15 coming forward to litigate this matter on behalf of all Settlement Class Members. (Stiller Decl.
16 ¶132.) Additionally, the Named Plaintiff was at risk for paying for Defendant's legal fees and
17 costs in the event that Defendant prevailed at trial. (Stiller Decl. ¶133.)

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

19 As indicated on the Proof of Service, Plaintiff's Motion for Final Approval of Class Action
20 Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development
21 Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of
22 submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA
23 confirming receipt is attached to the Declaration of Ari J. Stiller as Exhibit "6." (Stiller Decl. ¶138.)

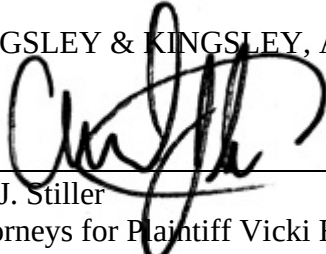
24 **VII. CONCLUSION**

25 Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and
26 in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests that
27 the Court (1) grant Final Approval of the Settlement Agreement and all of its terms; (2) award
28 attorneys' fees and costs in the amount detailed in the concurrently filed Motion for Attorneys'

1 Fees and Costs; (3) award ILYM Group, Inc. claims administration fees of \$15,000.00; (4) award
2 the Named Plaintiff an enhancement of \$5,000.00; and (5) enter judgment.

3
4 DATED: July 7, 2022

KINGSLEY & KINGSLEY, APC

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6 By: 

Ari J. Stiller

7 Attorneys for Plaintiff Vicki Flores and the proposed
8 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 July 7, 2022, 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:

Lonnie D. Giamela
Anet Drapalski
lgiamela@fisherphillips.com
adrapalski@fisherphillips.com
FISHER & PHILLIPS LLP
444 South Flower Street, Suite 1500
Los Angeles, California 90071

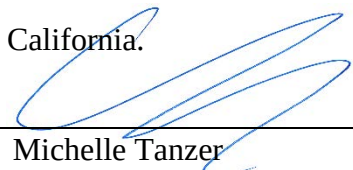
[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that 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.

[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 July 7, 2022, at Woodland Hills, California.



Michelle Tanzer