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

MIE MOULTON, an individual, on behalf of
herself and others similarly situated,

PLAINTIFF,

v.

BET INFORMATION SYSTEMS, INC.; and
DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. 21STCV38602

[Case Assigned for All Purposes to Hon. David
S. Cunningham in Dept. 11]

**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
Liane Katzenstein Ly, Mie Moulton and
Makenna Snow of ILYM Group, Inc.;
Proposed Order and Judgment]*

Date: December 7, 2023

Time: 10:00 AM

Dept.: 11

Complaint Filed: October 20, 2021

FAC Filed: December 27, 2021

Trial Date: None Set

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

2 PLEASE TAKE NOTICE that on December 7, 2023 at 10:00 AM in Department 11 of
3 the above-entitled court, Plaintiff MIE MOULTON (“Plaintiff”) will, and hereby does, move the
4 Court for an Order of Final Approval of the Class Settlement in this case. Plaintiff moves the
5 Court for an order:

6 1. Granting final approval of the settlement in the case pursuant to the Amended
7 Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the
8 concurrently-filed Declaration of Liane Katzenstein Ly as Exhibit “1”;

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

10 3. Affirming MIE MOULTON as Class Representative and awarding an
11 enhancement award of \$10,000.00;

12 4. Awarding ILYM Group, Inc. claims administration fees of \$53,300.00 for its
13 services as Administrator; and,

14 5. Entering judgment.

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

18 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
19 and Authorities, the Declarations of Liane Katzenstein Ly, Mie Moulton, Makenna Snow of ILYM
20 Group, Inc., all other papers and records on file in this action, and on such oral and documentary
21 evidence as may be presented at the hearing on this Motion.

22
23 DATED: November 13, 2023

KINGSLEY & KINGSLEY, APC

24
25 By: 

26 Liane Katzenstein Ly
27 Attorneys for Plaintiff MIE MOULTON and the
28 proposed classes

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

5 1. Grant final approval of the settlement in this case pursuant to the Amended Class
6 Action and PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the
7 concurrently-filed Declaration of Liane Katzenstein Ly 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 \$53,300.00 for its services
11 as Administrator;

12 4. Affirm named Plaintiff MIE MOULTON as Class Representative and award a
13 cumulative Class Representative payment of \$10,000.00; and

14 5. Enter judgment.

15 **II. FACTUAL BACKGROUND**

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

17 On October 20, 2021, Plaintiff filed a Class Action Complaint against Defendant in the
18 Superior Court for the State of California, County of Los Angeles, Case No. 21STCV38602,
19 seeking recovery for: (1) failure to pay wage and/or overtime under Cal. Labor Code §§ 510, 1194,
20 and 1199; (2) failure to provide meal breaks pursuant to Cal. Labor Code §§ 226.7 and 512; (3)
21 failure to provide rest breaks pursuant to Cal. Labor Code § 226.7; (4) failure to reimburse
22 business-related expenses under Cal. Labor Code § 2802; (5) failure to provide accurate itemized
23 wage statements pursuant to Cal. Labor Code § 226(a); (6) waiting time penalties pursuant to Cal.
24 Labor Code § 203; and, (7) violation of Cal. Business & Professions Code § 17200. (Declaration
25 of Liane Katzenstein Ly (“Ly Decl.”) ¶5.)

26 Also on October 20, 2021, Plaintiff sent a notice letter, pursuant to California Labor Code
27 § 2699, et seq., the Private Attorneys General Act (hereafter, “PAGA”), to the California Labor
28 Workforce Development Agency (hereafter, “LWDA”) regarding her intent to seek civil penalties

1 based on Defendant's alleged violations of the California Labor Codes enumerated in the
2 Complaint in addition to claims pursuant to Cal. Labor Code §§ 204, 210, 226.8, 432.5, and Cal.
3 IWC Wage Order 7. (Ly Decl. ¶6.)

4 On December 27, 2021, Plaintiff filed a First Amended Class and Representative Action
5 Complaint adding an additional cause of action for penalties pursuant to PAGA based upon the
6 same alleged Cal. Labor Code violations enumerated in the Complaint and additional violations
7 for: (1) failing to keep accurate meal period records under Cal. IWC Wage Order 7-2001; (2)
8 failing to properly classify Plaintiff and other employees as employees under Cal. Labor Code §
9 226.8; (3) failing to pay timely wages under Cal. Labor Code §§ 204(d) and 210; and, (4) requiring
10 Plaintiff and other employees to agree to, as a condition of employment, an independent contractor
11 agreement that contains illegal indemnity in violation of Cal. Labor Code § 432.5. (Ly Decl. ¶7.)

12 The FAC defines two proposed classes as follows:

13 a) "All persons who are employed or have been employed as an independent
14 contractor by BET INFORMATION SYSTEMS, INC., in the State of
15 California since four (4) years prior to the filing of this action to the
present." ("Independent Contractor Class".)

16 b) "All persons who are employed or have been employed as a detailer by BET
17 INFORMATION SYSTEMS, INC., in the State of California since four (4)
18 years prior to the filing of this action to the present." ("Detailer Class".)
(Collectively referred to herein as the "Classes".)

19 (Ly Decl. ¶8.)

20 On March 23, 2022, Defendant removed this Action to the Central District of California
21 and the case was assigned to Judge Dale S. Fischer. (Ly Decl. ¶9.) After a joint request from both
22 Parties, the district court stayed the entire action, including Plaintiff's right to file a motion for
23 remand, on March 31, 2022. (Ly Decl. ¶10.) The stay was based on the Parties agreement to
24 mediate the case on June 27, 2022. (Ly Decl. ¶11.)

25 The Parties attended mediation with Tripper Ortman on June 13, 2022, and the case settled.
26 (Ly Decl. ¶12.) The Parties stipulated to remand the case back to state court on June 21, 2022, and
27 the district court signed the order remanding on June 22, 2022. (Ly Decl. ¶13.)

28 ///

1 B. The Discovery Process

2 Plaintiff and Defendant have yet to engage in formal discovery, instead focusing their
3 efforts on resolving this case through early mediation. Defendant informally produced a
4 randomized 20% sampling (1,251 Class Members) of time and pay data for members of the Classes
5 for the time period of October 20, 2017 to May 11, 2022 for mediation purposes only. Plaintiff
6 worked with an expert to review and analyze these records for mediation. (Ly Decl. ¶14.)

7 This puts the margin of error at around 3%, and Plaintiff is confident that the 20% random
8 sample is statistically significant, and Plaintiff's expert was satisfied that the sample was
9 statistically significant. (Ly Decl. ¶15.)

10 Defendant also produced policy documents and the pay data indicating applicable
11 reimbursements and mileage information. (Ly Decl. ¶16.)

12 Defendant denies any liability or wrongdoing of any kind associated with the claims
13 alleged in the Action, disputes the damages and penalties claimed by Plaintiff, and further contends
14 that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or
15 representative action treatment. (Ly Decl. ¶17.) Defendant contends, among other things, that, at
16 all times, it has complied with the California Labor Code, and the Industrial Wage Commission
17 Orders. (*Id.*)

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

27 C. Preliminary Approval

28 On May 17, 2023, the Court issued an Order preliminarily approving the settlement in this

case, approving the proposed Class Notice, ordering that the Administrator send notice to the Classes, and setting a date for the Final Approval and Fairness Hearing. (Ly Decl. ¶19.)

III. THE PRELIMINARILY APPROVED SETTLEMENT

A. The Settlement Class

For purposes of the Agreement, there are two proposed settlement classes:

Independent Contractor Class: All persons who are employed or have been employed as an independent contractor by BET Information Systems, Inc., in the State of California since four (4) years prior to the filing of this action to the present. (“Independent Contractor Class”.)

Detailer Class: All persons who are employed or have been employed as a detailer by BET Information Systems, Inc., in the State of California since four (4) years prior to the filing of this action to the present. (“Detailer Class”)

(collectively “Independent Contractor Class” and “Detailer Class” referred to as the “Classes” or “Class Members”.)

(Ly Decl. ¶20; Ex. 1 at ¶1.5.)

The Class Period is October 20, 2017 through July 28, 2022. (Ly Decl. ¶21; Ex. 1 at 1.12.)

The Agreement was based on an estimated total of 6,577 Class Members and 53,273 Total Workweeks, which are numbers Defendant has confirmed based on its records. (Ly Decl. ¶22; Ex. 1 at ¶9.)

The final Classes contained 6,280 individuals. (Snow Decl. ¶5.)

B. Aggrieved Employees

For purposes of the Agreement, the Aggrieved Employees are defined as: “all persons who are a member of either the Independent Contractor Class or the Detailer Class from October 20, 2020 to July 28, 2022. (“Aggrieved Employees” “PAGA Group” or “PAGA Members”.) (Ly Decl. ¶23; Settlement, Ex. 1 at ¶1.4.)

The PAGA Period is October 20, 2020 through July 28, 2022. (Ly Decl. ¶24; Ex. 1 at ¶1.32.) Based on documents and other information produced by Defendant, there are approximately 3,019 Aggrieved Employees. (Ly Decl. ¶25, Ex. 1 at ¶9) The final number of Aggrieved Employees in the PAGA Group is 2,920. (Snow Decl. ¶5.)

1 C. Gross Settlement Amount

2 As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross
3 Settlement Amount of \$2,250,000.00, which includes the sum of the Individual Class Payments,
4 the Class Representative service award, the Class Counsel Award, PAGA Payment, and the
5 Settlement Administration Costs. (Ly Decl. ¶26; Ex. 1 at ¶2.1.)

6 The Net Settlement Amount is the Gross Settlement Amount, less Class Counsel Award,
7 Class Representative Enhancement, PAGA Payment, and Settlement Administration Costs. (Ly
8 Decl. ¶27; Ex. 1 at ¶1.29.)

9 Plaintiff now requests final approval of the allocation of the Gross Settlement Amount to
10 determine the Net Settlement Amount for distribution to the Classes as follows:

11	Gross Settlement Amount:	\$	2,250,000.00
12	Less Class Representative Enhancement:	\$	10,000.00
13	Less Class Counsel's Fees:	\$	750,000.00
14	Less Class Counsel's Costs:	\$	25,000.00
15	Less PAGA Payment:	\$	25,000.00
16			(\$18,750.00 to the LWDA; \$6,250.00 to remain in the Net Settlement Amount)
17	Less Administrator Costs:	\$	<u>53,300.00</u>
18	Net Settlement Amount:	\$	1,392,950.00

19 (Ex. 1 at ¶2.)

20 D. Individual Settlement Payments

21 The Individual Class Payment amount of each Participating Class Member is an
22 individualized amount that is based on the number of Workweeks worked by the Participating
23 Class Member during the Class Period. (Ex. 1 at ¶1.23; see also Ex. A to the Agreement [Class
24 Notice].) Specifically, Individual Class Payments will be paid from the Net Settlement Amount
25 and shall be paid pursuant to the settlement formula as follows: (1) First, dividing the Net
26 Settlement Amount by the total number of Workweeks worked by all Participating Class Members
27 during the Class Period and; (2) Second, multiplying the result by each Participating Class
28 Member's Workweeks. The Administrator will calculate the number of workweeks worked by the
Class Members in an hourly-paid or non-exempt position in California during the Class Period
("Compensable Workweeks") based upon the records in Defendant's possession, custody or

control, the amount to be paid per workweek, and the individual settlement awards to eligible Class Members. The Compensable Workweeks will be calculated by the Administrator for each Class Member. Defendant's workweek data will be presumed to be correct, unless a particular Class Member proves otherwise to the Administrator by credible evidence. The individual settlement awards will be determined by dividing the Net Settlement Fund by the total number of Compensable Workweeks for the entire Settlement Class resulting in the Workweek Value; and then multiplying the Workweek Value by the number of Compensable Workweeks worked by each Class Member. (Ex. 1 at ¶2.2.4; Id. at Ex. A to the Settlement [Class Notice].)

Twenty-five percent (25%) of the Gross Settlement Amount to each Participating Class Member shall be deemed payment for settlement of claims for wages and expenses and will be subject to appropriate deductions and withholdings calculated and made by the Administrator. (Ex. 1 at ¶2.2.5.) Seventy-five percent (75%) of the Gross Settlement Amount to each Participating Class Member shall be deemed payment for settlement of claims for penalties and interest and other non-wage payments not subject to withholdings. (*Id.*)

The Agreement provides for a specific and detailed dispute process regarding Individual Class Payments. (See Ex. 1 at ¶8.6.)

The Individual PAGA Payment will be an equal payment to all Aggrieved Employees calculated as follows: twenty-five percent (25%) of the PAGA Payment (or \$6,250) divided by the number of Aggrieved Employees. (See Ex. 1 at ¶1.25.)

Based on these calculations, the average potential recovery is \$220.92 per Settlement Class Member. (Snow Decl. ¶17.) Most of the class worked less than 20 weeks. This was a group of employees with high turnover. However, 363 class members will be receiving more than \$900.00, because they worked 35 weeks or more. This is a very good settlement for the employees who had longevity.

E. 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. (Ly Decl. ¶28) The procedures for giving notice to the Settlement Class Members, as set

1 forth in the Agreement and Plaintiffs’ Motion for Preliminary Approval and approved by the Court,
2 have been fully and properly carried out. (Snow Decl. ¶7.)

3 The class list contained 6,280 Class Members, but mailing addresses were missing for
4 many of the Class Members. (Ly Decl. ¶29.) After performing more searches for more up to date
5 information, class notice was mailed on June 20, 2023. (*Id.*) After the initial mailing, there were
6 still 1,806 Class Members without available mailing addresses. (Ly Decl. ¶30.) Defendant was
7 able to obtain e-mail addresses for these 1,806 Class Members, and e-mail notice was sent to
8 the 1,806 Class Members on September 15, 2023. (Ly Decl. ¶31.) The email also requested
9 a current mailing address. (*Id.*; Snow Decl. ¶11.)

10 To date, ILYM Group, Inc. received three (3) requests to be excluded (“opt-outs”) from
11 the proposed Agreement and zero (0) objections. (Snow Decl. ¶¶12-13.) The three requests for
12 exclusion were submitted by Dilhanie Herwarathna, John Buente, and Tanya Root. (Snow Decl.
13 ¶12.)

14 F. Check Mailed Settlement – No Reversion

15 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
16 without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every
17 Settlement Class Member will receive a settlement check and Settlement Class Members do not
18 need to submit a claim in order to receive a settlement check. Any funds that remain uncashed
19 after 180 days shall be turned over by the Administrator, with information for each Settlement
20 Class Member who failed to timely cash his/her settlement check, to the State of California
21 Controller’s Office Unclaimed Property Fund. (Ex. 1 at ¶3.4.3.)

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

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

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

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

7 As to the first *Dunk* factor, this settlement is the result of adversarial, non-collusive, and
8 arm’s-length negotiations overseen by an experienced mediator. All settlement discussions were
9 made by experienced and informed counsel, who believe that this settlement represents a favorable
10 resolution for the Settlement Class Members. (Ly Decl. ¶32.) The settlement negotiations have
11 been, at all times, adversarial and non-collusive, with the aid of a mediator, and no self-dealing or
12 other type of misconduct by either side has taken place. (Ly Decl. ¶33.)

13 Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly
14 evaluate the strength of the case and the risks associated with ongoing litigation. Receipt of
15 appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated
16 with each claim alleged in the lawsuit. (Ly Decl. ¶34.)

17 Third, Class Counsel have significant experience in cases of this type, including several
18 years prosecuting wage, hour, and working condition violations. (Ly Decl. ¶35.) Class Counsel is
19 thus qualified to evaluate the class claims and viability of the defenses. Class Counsel believes that
20 the settlement is fair, reasonable, adequate, and in the best interests of the classes and that the
21 average recovery for each Settlement Class Member of over \$220.92 is substantial, given the risks
22 inherent in litigation and the defenses asserted. (Ly Decl. ¶36.)

23 Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were
24 three (3) requests to be excluded and no objectors. (Snow Decl. ¶¶12-13.) As all of the *Dunk*
25 factors are satisfied, this settlement is entitled to a presumption of fairness.

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

28 In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth

several factors that the Court should analyze in determining whether to approve a class action settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 409, the court clarified that a Kullar showing does not require the parties to submit the outer reaches of maximum possible recovery without taking into account the actual risks of certification, decertification, dispositive motions, and trial, so long as there is a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal. App. 4th at 409.

The proposed settlement satisfies each of these factors. (Ly Decl. ¶37.) Class Counsel conducted extensive informal discovery before entering into meaningful settlement negotiations in this matter. (Ly Decl. ¶¶14-18; ¶¶38-41.) The extensive discovery permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. (Ly Decl. ¶42.) Class Counsel is experienced in handling wage and hour class actions and, after weighing all of the following factors, supports this Agreement. (Ly Decl. ¶43.)

1. The Strength of Plaintiffs' Case

a) Defendant Misclassified Plaintiff and Members of the Independent Contractor Class as Independent Contractors

Although any person rendering service for another is generally presumed to be an employee (see California Labor Code section 3357), Plaintiff alleges that Defendant knowingly and willfully misclassified Plaintiff and members of the Independent Contractor Class as "independent contractors" in violation of California Labor Code § 226.8, until approximately 2020 when Plaintiff and members of the Independent Contractor Class were reclassified as employees. (Ly Decl. ¶44.) Specifically, Plaintiff was initially classified as an independent contractor for Defendant earning compensation on a piece-rate basis and provided with a 1099. (Id.) However,

1 in 2020, Plaintiff and the other members of the Independent Contactor Class were reclassified as
2 “employees” and were thereafter provided W2s. (*Id.*) After being reclassified as employees in
3 2020, Plaintiffs were paid at a flat-rate, that operated as a sort of “piece-rate”, per store visited.
4 (*Id.*)

5 However, Plaintiff contends that at all times while working for BET, Plaintiff was actually
6 an employee of Defendant rather than an independent contractor because, inter alia: BET had
7 control or the right to control Plaintiff’s and the Independent Contractor Class’s work by
8 overseeing and instructing Plaintiff and Class Members how to complete assignments and
9 assigning which stores they were sent to. (Ly Decl. ¶45.) For example, BET would assign
10 approximately 15 store assignments at a time, and Plaintiff and Class Members had no discretion
11 over which stores comprised the 15. (*Id.*) Moreover, when a BET company scheduler would assign
12 a job to Plaintiff and she declined that assignment, Plaintiff would have difficulty obtaining other
13 jobs thereafter or not be assigned any jobs at all. (*Id.*)

14 California Labor Code § 226.8 makes it unlawful for any person or employer to willfully
15 misclassify an individual as an independent contractor. California presumes that workers are
16 employees “and places the burden on the hirer to establish that the worker is an independent
17 contractor.” (*Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913, 951, n.
18 23; Cal. Lab. Code, § 2775(b)(1).) To be considered an independent contractor, the hiring entity
19 must demonstrate each prong of the “ABC” test:

20 (A) The person is free from the control and direction of the hiring entity in
21 connection with the performance of the work, both under the contract for the performance of the
22 work and in fact.

23 (B) The person performs work that is outside the usual course of the hiring
24 entity’s business.

25 (C) The person is customarily engaged in an independently established trade,
26 occupation, or business of the same nature as that involved in the work performed. (Cal. Lab. Code,
27 § 2775(b)(1)(A)-(C).) This was the test established in *Dynamex*, which presumes that workers are
28

employees. (*Dynamex*, 4 Cal.5th at p. 955, 957.)¹ Defendant can only defeat this presumption by establishing each of the three “ABC” prongs. (*Ibid.*; see also Cal. Lab. Code, § 2775.) “[E]ach part of the ABC test may be independently determinative of the employee or independent contractor question.” (*Dynamex*, 4 Cal.5th at p. 955.)

The definition of “employee” under the California Wage Orders is “intended to be broader and more inclusive” than the common law test, and than the federal “economic reality” standard. (*Id.* at pp. 953, 956.) In contrast to the common law, which provides the narrowest definition of an employee in order “to limit one’s vicarious liability for the misconduct of a person rendering service to him,” *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (“*Borello*”), California “adopt[s] a distinct standard that provides broader coverage of workers with regard to the very fundamental protections afforded by wage and hour laws and wage orders.” (*Dynamex*, 4 Cal.5th at p. 949.)

(1) Plaintiff and Members of the Independent Contractor Class are Employees as They Were Hired, Trained, and Required to Perform Traveling Arrangement and Reservation Services Which Defendant is in the Business of Providing

If an employer is unable to show “that the worker performs work that is outside the usual course of the hiring entity’s business,” then that worker is an employee pursuant to the ABC test. (*Dynamex*, 4 Cal.5th at p. 964.) The California Supreme Court provided two examples of the application of this element:

[W]hen a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store’s usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee.[Citation.] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [Citation], or

¹ “[T]he Legislature made clear that it was broadly adopting the *Dynamex* holding for purposes of all benefits to which employees are entitled under the . . . Labor Code[] and all applicable wage orders. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 277, as modified on denial of reh’g (Nov. 20, 2020), review denied (Feb. 10, 2021).), at *3.)

1 when a bakery hires cake decorators to work on a regular basis on its custom-designed
2 cakes [Citation], the workers are part of the hiring entity’s usual business operation and the
3 hiring business can reasonably be viewed as having suffered or permitted the workers to
4 provide services as employees.

5 (*Id.* at p. 959-60.)

6 Here, Defendant is in the business of providing traveling arrangement and reservation
7 services, among other services, which it advertises to its customers as such. These services include,
8 but are not limited to, visiting local stores, supporting brands by taking photos, merchandising
9 products, and setting up promotional displays.² Plaintiff and other members of the Independent
10 Contractor Class were hired and trained by Defendant to perform these very tasks.

11 Defendant will be unable to carry its burden under part B of the ABC test, and Plaintiff and
12 the Independent Contractor Class will show that they have suffered wage and hour violations due
13 to misclassification for a period of time. Even though employee status can be established without
14 examining parts A and C of the test, Plaintiff will briefly address each in turn.

15 (2) Plaintiff and Members of the Independent Contractor Class are
16 Employees Since Defendant Controlled the Details of Their Work

17 If an employer is unable to show “that the worker is free from the control and direction of
18 the hiring entity in connection with the performance of the work, both under the contract for the
19 performance of the work and in fact,” then the worker is an employee pursuant to part A of the
20 ABC test. (*Dynamex*, 4 Cal.5th at p. 964.) Thus, if the employer has either the right to control or
21 actual control over how the worker accomplishes the desired result, then the worker is an employee
22 under part A. (*Id.* at p. 958; see *Angelotti v. Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1405
23 [holding “[i]n light of the nature of the work and the evidence of his actual experience on the job,
24 [hiring entity] clearly had the right to control the manner and method of [plaintiff’s] work.”].)

25 Here, Defendant had the right to control the manner of Plaintiff’s and the Independent
26 Contractor Class’s work. Defendant provided Plaintiff and members of the Independent Contractor
27 Class with specific instructions pertaining to the job performance, practices and policies Plaintiff
28 and members of the Independent Contractor Class must follow, and provided training materials to

² <https://merchandiser.survey.com/retailgigs>

1 Plaintiff and the Independent Contractor Class. (See *Caso v. Nimrod Productions, Inc.* (2008) 163
2 Cal.App.4th 881, 890 [applying *Borello*, finding that three stunt choreographers satisfied their
3 burden on summary judgment to demonstrate they were employees of Touchstone when
4 Touchstone “retained control over the entire production, including the ability to create, edit and
5 even transform the production as it saw fit,” and “reported to Touchstone producers.”].)

6 BET is the entity that arranges jobs with their clients that Plaintiff and members of the
7 Independent Contractor Class then completes. BET directs Plaintiff and members of the
8 Independent Contractor Class where to go, when to show up, what to do, and when to leave, and
9 then pays them for their work. BET also required Plaintiff and Class Members to communicate
10 with its company scheduler and project managers to discuss issues pertaining to assignments and
11 direct employees to their next job site. Most notably, there were **no changes in responsibilities or**
12 **job duties** from the time Plaintiff was classified as an Independent Contractor to when she was
13 later classified as an employee in 2020. BET also determined how Plaintiff and Class Members
14 were paid, either hourly or by piece rate. When Plaintiff asked BET for a copy of an employment
15 contract, BET notified her that there was no written employment contract; however, BET did issue
16 approximately 51 wage statements to Plaintiff, as an *employer* would.

17 All meaningful aspects of the business relationship are controlled by Defendant. Thus,
18 Defendant is unable to carry its burden to show a lack of control over Plaintiff and the Independent
19 Contractor Class under part A of the ABC test.

20 (3) Plaintiff and Members of the Independent Contractor Class are
21 Employees Since They Did Not Operate Independent Businesses
22 While They Worked for Defendant

23 If an employer is unable to show “that the worker is customarily engaged in an
24 independently established trade, occupation, or business of the same nature as the work performed
25 for the hiring entity” then that worker is an employee pursuant to part C of the ABC test. (*Dynamex*,
26 4 Cal.5th at p. 964.) The appropriate inquiry under part C is “whether the person ... actually has
27 such an independent business, occupation, or profession, not whether he or she could have one.”
28 (*Id.* at p. 962, n.30.) An independent contractor “generally takes the usual steps to establish and

1 promote his or her independent business—for example, through incorporation, licensure,
2 advertisements, routine offerings to provide the services of the independent business to the public
3 or to a number of potential customers, and the like.” (*Ibid.*)

4 Plaintiff and the Independent Contractor Class did not operate independent traveling
5 arrangement or reservation businesses while they worked for Defendant. Defendant hires its
6 employees in order to provide the full list of services to its clients, as advertised on Defendant’s
7 website. Plaintiff’s and other workers’ services are a critical component of Defendant’s business.
8 Even if Defendant could prove they were engaged in an independently established trade under this
9 prong, Plaintiff and members of the Independent Contractor Class would still be employees
10 because Defendant cannot satisfy prongs A and B. (See *James v. Uber Technologies Inc.* (N.D.
11 Cal. 2021) 338 F.R.D. 123, 139.)

12 In conclusion, if part A, B, or C of the ABC test is not met, then a worker is an employee.
13 (*Dynamex, supra*, 4 Cal.5th 964.) Defendant cannot carry its burden on any part of the test, let
14 alone all three. Therefore, during a portion of the relevant time period that Defendant misclassified
15 Plaintiff and members of the Independent Contractor Class, Plaintiff and the Independent
16 Contractor Class were and continue to be employees under the California Wage Orders and are
17 entitled to wage protections, business expense reimbursement, meal and rest breaks, and waiting
18 time penalties.

19 Plaintiff alleges that Defendant knowingly and willfully misclassified Plaintiff and
20 members of the Independent Contractor Class as “independent contractors” during the relevant
21 time period in order to avoid the costs associated with the rights afforded to employees under
22 federal and California law- all to Defendant’s benefit. (Ly Decl. ¶46.) Plaintiff believes that she
23 has a strong argument for misclassification. (Ly Decl. ¶47.) However, if the Court determined that
24 the Independent Contractor Class was classified correctly, most of the other claims in this action
25 would fail. (Ly Decl. ¶48.) Plaintiff took these risks into account when settling. (Ly Decl. ¶49.)

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1 b) Defendant Failed to Pay All Wages And/or Overtime Owed

2 (1) Defendant Failed to Separately Pay Minimum Wages for Paid
3 Rest Breaks Under Their “Piece-Rate”/Flat-Rate System

4 “Under California’s minimum wage law, employees must be compensated for each hour
5 worked at either the legal minimum for the contractual hourly rate, and compliance cannot be
6 determined by averaging hourly compensation.” *Bluford*, 216 Cal. App. 4th at 872; *Armenta v.*
7 *Osmose, Inc.*, 135 Cal.App.4th 314, 324 (2005 (“While the averaging method utilized by the
8 federal courts to assess whether a minimum wage violation has occurred may be appropriate
9 when considered in light of federal public policy, it does not advance the policies underlying
10 California's minimum wage law and regulations.”) (emphasis added); see also *Cardenas v.*
11 *McLane FoodServices, Inc.*, 796 F. Supp. 2d 1246, 1252 (C.D. Cal. 2011) (finding that the
12 federal averaging method did not apply to the payment of piece-rate wages under California
13 law). This was reiterated again recently in *Gonzalez v. Downtown LA Motors, LP*, 215
14 Cal.App.4th 36 (2013) where the Court concluded that “[a]veraging piece-rate wages over total
15 hours worked results in underpayment of employee wages” *Id.* at 50.

16 Compensation on a “‘Piece rate basis’ is a method of payment based on units of
17 production or a fraction thereof.” 8 CA ADC § 11140, para. 2.(L). Under California law, workers
18 are entitled to receive paid rest breaks. Wage Order 14 provides in pertinent part the following
19 with regards to California’s rest period requirement: “Every employer shall authorize and permit
20 all employees to take rest periods . . . Authorized rest period time shall be counted, as hours
21 worked for which there shall be no deduction from wages.” 8 CA ADC § 11140, para. 12
22 (emphasis added). This same Wage Order defines “Hours Worked” as “the time during which an
23 employee is subject to the control of an employer, and includes all the time the employee is
24 suffered or permitted to work, whether or not required to do so.” *Id.*, para. 2.(G). “Hours
25 Worked,” in turn, must be compensated at the employees’ regular rate and in no case less than
26 the minimum wage. 8 CA ADC § 11000 (Order Regulating the Minimum Wage), para. 2.

27 Plaintiff argues that under a piece-rate system, since employees are paid for units
28 produced, unless they are separately compensated at an hourly rate of no less than the minimum

wage for the time they spend taking rest breaks, any rest break they take is unpaid or underpaid. See *Bluford*, 216 Cal. App. 4th at 872 (Under California law, “rest periods must be separately compensated in a piece-rate system. Rest periods are considered hours worked and must be compensated.”); *Armenta*, 135 Cal.App.4th at 316-18 (holding that where a piece-rate method of compensation is used, the employer is required to pay at least the minimum wage for each hour worked); *Ontiveros v. Zamora*, 2009 WL 425962, 3-5 (E.D.Cal., 2009) (plaintiffs properly alleged that strict piece rate failed to properly compensate for state-mandated rest breaks).

In other words, unless the employer provides hourly compensation of no less than the minimum wage for every 10-minute rest period taken by the employee, the employer is providing no compensation whatsoever during rest periods. *Id.*³

In 2016, the California legislature codified the *Bluford* holding under Labor Code § 226.2, which provides:

This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance . . .

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

Lab. Code § 226.2.

Furthermore, an employer that fails to provide a rest period “in accordance with an applicable order of the Industrial Welfare Commission . . . shall pay the employee one additional

³ *Bluford* suggests that rest periods must be paid at the average hourly rate, not just at minimum wage. See *Bluford*, *supra*, 216 Cal. App. 4th at 872 (“Under the California minimum wage law, employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate . . .”). On November 1, 2013, the California Labor Commissioner, Julie Su, issued to DLSE staff a Memorandum entitled The Minimum Wage and Rest Period Obligations of Employers in the Context of Piece Rate Employment in which she stated the state’s interpretation of Section 12 (Rest Periods) of all IWC wage orders to be that “the hourly rate payable to piece- rate employees during rest periods is the hourly piece-rate wage calculated by dividing the total weekly piece- rate earnings by the total hours of piece-rate work performed in the week.” New state law through AB 513, discussed *infra*, confirms the labor commissioner’s interpretation; Cal. Dept. Industrial Relations, DLSE, Julie A. Su, Memorandum, The Minimum Wage and Rest Period Obligations of Employers in the Context of Piece Rate Employment (Nov. 1, 2013).

1 hour of pay” Cal. Labor Code § 226.7. This Court has held that grape workers may seek
2 recovery of additional wages for missed rest periods in a private suit such as this one. *Valenzuela*
3 *v. Giumarra Vineyards Corp.*, 614 F.Supp.2d 1089, 1101 (E.D.Cal. Feb. 20, 2009).

4 Here, Plaintiff and members of the Classes earned compensation on a piece-rate basis
5 (per each visited store where work was performed). However, Defendant did not provide any
6 separate hourly compensation to Plaintiff and members of the Classes for rest breaks to which
7 they were entitled (100% of wages earned by the Classes were earned for “piece” work
8 performed). As such, Defendant’s policies and practices resulted in members of the Classes
9 taking their breaks “unpaid” and in violation of the law.

10 Again, Plaintiff factored in the possibility that the misclassification claim would fail, and
11 the rest period claim would fail with it. (Ly Decl. ¶50.) Additionally, Defendant argued that
12 Class Members had ample time to take rest breaks. (Ly Decl. ¶51.) This was an additional risk
13 factor for this claim. (Ly Decl. ¶52.)

14 (2) Defendant Failed to Pay Wages and Overtime

15 Plaintiff alleges that Defendant failed to pay Plaintiff for earned wages, overtime, and
16 doubletime. Cal. Labor Code section 510(a) requires “[a]ny work in excess of eight hours in one
17 workday and any work in excess of 40 hours in any one workweek and the first eight hours
18 worked on the seventh day of work in any one workweek shall be compensated at the rate of no
19 less than one and one-half times the regular rate of pay for an employee.” Further, “[a]ny work in
20 excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular
21 rate of pay for an employee” and “any work in excess of eight hours on any seventh day of a
22 workweek shall be compensated at the rate of no less than twice the regular rate of pay of an
23 employee.” (Cal. Lab. Code, § 510(a).)

24 As recounted above, BET failed to pay Plaintiff and members of the Independent
25 Contractor Class for all hours worked at the proper rate. Plaintiff and members of the
26 Independent Contractor Class were required to use their own personal vehicles to travel between
27 stores during their shifts. Defendant failed to compensate Plaintiff and members of the
28 Independent Contractor Class for this travel time. Plaintiff estimates spending approximately 4 to

1 5 hours daily on drive time but was not paid for this travel time. Plaintiff and the Independent
2 Contractor Class were entitled to be paid for this travel time subject to their employer's
3 control.(see *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324; see *Gonzalez v.*
4 *Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36.) Plaintiff and Class Members were also
5 unpaid for the time it took for them to prepare for each assignment, the time spent
6 choosing/mapping routes to the next job site, and time spent communicating with BET's
7 company scheduler or project managers when discussing job assignments or project-specific
8 issues.

9 Further, when BET reclassified Plaintiff and members of the Independent Contractor
10 Class as employees, BET paid Plaintiff and all members of the Classes a flat rate. Defendant
11 failed to adjust the regular rate of pay for calculation of overtime wages. As such, BET is liable
12 for unpaid wages and/or overtime under California law.

13 Defendant disputes that the Class Members were not compensated for travel time. BET
14 argues that it did include travel time in its compensation. (Ly Decl. ¶53.) Furthermore, BET
15 disputes that the majority of the Class Members actually travelled between locations. (*Id.*)

16 c) Plaintiff and the Classes Were Denied Lawful Meal Periods

17 California law requires employers to provide employees a duty-free, uninterrupted thirty
18 (30) minute meal period when an employee works more than five (5) hours in a workday, and it
19 must be provided within the first five (5) hours the employee works. Cal. Lab. Code 512; Cal. IWC
20 Wage Order 7-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Superior Court* (2012) 53
21 Cal.4th 1004. Employers must also provide employees with a second duty-free, uninterrupted
22 thirty (30) minute meal period when an employee works more than (10) hours in a workday, and
23 it must be provided before the end of the 10th hour of work. *Ibid.* Meal periods can be waived, but
24 only under the following circumstances: (1) if an employee's total work period in a day is over
25 five (5) hours but no more than six (6) hours, the required meal period may be waived by mutual
26 consent of the employer and employee, and (2) if an employee's total work period in a day is over
27 ten (10) hours but no more than twelve (12) hours, the required second meal period may be waived
28 by mutual consent of the employer and employee, but only if the first meal period was not waived.

1 *Ibid.*

2 Employers covered by California Industrial Welfare Commission (“IWC”) Wage Order 7-
3 2001 have an obligation to relieve their employees for at least one meal period for shifts over five
4 hours (see above).

5 Employers must pay employees an additional hour of wages at the employees’ regular rate
6 of pay for each missed or improper (e.g., less than 30 minutes, interrupted meal period, first meal
7 period provided after 5 hours, second meal period provided after 10 hours) meal period. Cal. Lab.
8 Code §226.7; Cal. IWC Wage Order 7-2001, §11(B) (“If an employer fails to provide an employee
9 a meal period in accordance with the applicable provisions of this order, the employer shall pay
10 the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday
11 that the meal period is not provided”); *Brinker, supra*, 53 Cal.4th 1004.

12 Plaintiff maintains that Defendant violated California’s meal break laws by not allowing
13 Plaintiff and members of the Classes, to take daily meal breaks. (Ly Decl. ¶54.) Indeed, due to the
14 hectic nature of their job, Plaintiff alleges he and class members were rarely able to ever take a
15 lawful meal break. (*Id.*) Because Plaintiff and members of the Classes were required to complete
16 all of a job assignment’s duties and requirements before the next assignment, complete travel time
17 logs, complete vendor logs, and other work-related duties before ending their shifts, they typically
18 had no time to take lawful uninterrupted meal, and rest periods, if they were to complete their
19 required duties. If Plaintiff or members of the Classes ever failed to complete all of the duties
20 required by the job assignment, or they rejected a store assignment, they would be subject to
21 potential discipline up to and including termination and/or unable to receive new job assignments.
22 Thus, Plaintiff and other members of the Classes were routinely discouraged and prevented from
23 taking uninterrupted meal, and rest, periods in order to complete all of an assignment’s required
24 duties and avoid the imposition of potential disciplinary measures. (Ly Decl. ¶55.)

25 Plaintiff contends that Defendant also violated California’s meal period laws by not paying
26 Plaintiff and members of the Classes an extra hour of wages for each missed or improper meal
27 period. (Ly Decl. ¶56.)

28 Thus, Plaintiff alleges that Defendant failed to maintain a company meal period policy

1 compliant with California law and failed to provide Plaintiff and members of the Classes with
2 proper meal periods. (Ly Decl. ¶57.) Liability for a class of similarly situated employees can be
3 established by evidence that an employer adopted a uniform corporate break policy that failed to
4 give full effect to California law and the applicable California wage orders requirements. The fact
5 that employees may legally waive meal breaks does not affect this result. *Brinker, supra*, 53
6 Cal.4th 1004.

7 The aforementioned conduct results in violations of Cal. Labor Code sections 226.7 and
8 512, including Cal. Lab. Code sections 1198-1199 and Cal. IWC Wage Order 7-2001, §11(A) and
9 (C). These violations subject Employer to civil penalties under Cal. Labor Code sections 558 and
10 2699, and Cal. Wage Order 7-2001, §20. Each violation of each Cal. Labor Code section and Cal.
11 Wage Order provision results in a separate civil penalty, for each aggrieved employee for each pay
12 period during which the referenced statutes and Wage Order provisions were violated. Employer's
13 failure to provide valid meal periods ultimately resulted/results in further violations such as the
14 violations discussed below.

15 Defendant argues that many of the "Shifts" worked by the Class Members were too short
16 to necessitate a meal break. (Ly Decl. ¶58.) Additionally, Defendant argues that the Class Members
17 had ample time to take breaks and they were informed of their right to take them. (Ly Decl. ¶59.)

18 d) Defendant Failed to Allow Rest Periods

19 California law requires employers to provide employees a paid, duty-free ten (10) minute
20 rest period for each four (4) hours worked, or major fraction thereof. IWC Wage Order 7-2001,
21 §12(A). Employers must pay employees an additional hour of wages at the employee's regular
22 rate of pay for each missed or improper (e.g., less than 10 minutes, interrupted rest period, rest
23 period(s) at improper time(s) during shift(s)) rest period. Cal. Lab. Code §226.7; Cal. IWC Wage
24 Order 7-2001, §12(B) ("If an employer fails to provide an employee a rest period in accordance
25 with the applicable provisions of this order, the employer shall pay the employee one (1) hour of
26 pay at the employee's regular rate of compensation for each work day that the rest period is not
27 provided").

28 Plaintiff maintains that Defendant violated California's rest break laws by not allowing

1 Plaintiff and members of the Classes to take regular rest breaks. (Ly Decl. ¶60.) In fact, Plaintiff
2 alleges he and class members were never provided 10-minute rest breaks, and it was never even
3 mentioned that she could or should be allowed to take one. (*Id.*)

4 Thus, Defendant did not maintain a company rest period policy and/or practice compliant
5 with California law, and Employer frequently did not provide Plaintiff and members of the Classes
6 with appropriate rest periods. (Ly Decl. ¶61.) Per Defendant’s policy and/or practice, Plaintiff and
7 the Classes were not adequately informed and instructed about, and thereby were not afforded an
8 adequate opportunity to take, proper rest breaks per California law. Further, Defendant failed to
9 pay Plaintiff and members of the Classes with an additional hour of pay at Plaintiff’s and the
10 Classes’ regular rates of pay for each missed or improper rest period. (*Id.*)

11 The aforementioned conduct results in violations of Cal. Labor Code section 226.7,
12 including Cal. Lab. Code sections 1198-1199 and Cal. IWC Wage Order 7-2001, §12(A). These
13 violations subject Employer to civil penalties under Cal. Labor Code section 2699, and Cal Wage
14 Order 7-2001, §20. Each violation of each Cal. Labor Code section and Cal. Wage Order provision
15 results in a separate civil penalty, for each aggrieved employee for each pay period during which
16 the referenced statutes and Wage Order provisions were violated.

17 Defendant argues that the Class Members had ample time to take rest breaks and they were
18 informed of their right to take them. (Ly Decl. ¶62.) Defendant argues that there was extensive
19 down time that permitted rest breaks. (*Id.*)

20 e) Defendant Failed to Reimburse Employees for Necessary Business
21 Expenditures

22 Under California Labor Code § 2802(a) an employer “shall indemnify his or her
23 employee for all necessary expenditures or losses incurred by the employee in direct
24 consequence of the discharge of his or her duties, or of his or her obedience to the directions of
25 the employer.” An employee acts in “discharge of his duties,” for purposes of this Section when
26 the employee acts within the “course and scope of employment.” (See *O'Hara v. Teamsters*
27 *Union Local No. 856*, C.A.9 (Cal.)1998, 151 F.3d 1152.)
28

1 Plaintiff argues that BET required Plaintiff and members of the Classes to incur
2 necessary expenses to perform their work duties. (Ly Decl. ¶63.) BET required Plaintiff to use
3 their personal cell phones in executing their duties under Defendant’s employ. (*Id.*) Specifically,
4 Plaintiff and members of the Classes were required to be available by cell phone and download
5 and use an application called “Survey Merchandiser” to find available projects and complete
6 assignments such as, but not limited to, entering inventory, facings and pricing data, adding
7 stickers to products, building displays, and stocking shelves. BET also required Plaintiff and
8 Class Members to use their personal cell phones to regularly communicate with the company
9 scheduler and project managers. BET further required Plaintiff and members of the classes to use
10 their personal cell phones to track their drive time using the app “MileIQ,” which required a
11 subscription fee. BET did not reimburse for employees for this fee.

12 Additionally, Plaintiff necessarily incurred costs associated with mileage in order to
13 travel between stores. (Ly Decl. ¶64.) During the course of Plaintiff’s employment, she alone
14 incurred approximately 13,745 miles among job locations. The distance between assignments
15 ranged anywhere from less than a mile to over 90 miles. Because BET failed to reimburse
16 Plaintiff and members of the Classes for these business expenses, BET is liable under Cal. Labor
17 Code section 2802. (Ly Decl. ¶65.)

18 Defendant argues that it did reimburse for business expenses and that it maintained a
19 system for Class Members to submit their reimbursement requests. (Ly Decl. ¶66.) The records
20 produced by BET did indicate some reimbursements. (Ly Decl. ¶67.) This did create a risk for
21 certification and a merits risk that Plaintiff considered as part of the settlement negotiations. (Ly
22 Decl. ¶68.)

23 f) Defendant’s Wage Statement are Facially Defective in Violation of
24 Sections 226.2 and 226(a)

25 Cal. Labor Code § 226(a) requires employers to issue accurate itemized wage statements
26 to employees, including “(2) total hours worked by the employee . . . (3) the number of piece-
27 rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis . . .
28 (9) all applicable hourly rates in effect during the pay period and the corresponding number of

hours worked at each hourly rate by the employee.” Additionally, in codifying Bluford Cal. Labor Code Section 226.2 has extended Section 226(a) to require:

The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable: (A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

Cal. Lab. Code § 226.2

An employee “suffering injury,” like Plaintiff and members of the Classes, can recover penalties for an employer’s “knowing and intentional failure” to comply with Cal. Labor Code §226(a). See Cal. Labor Code § 226(e)(1). Under the statute, an employee is deemed to “suffer injury” if the employer does not provide accurate and complete information required by Labor Code § 226(a) and the employee cannot “promptly and easily determine” from the wage statement alone the amount of gross wages or net wages paid to the employee or other information specified by Cal. Labor Code § 226(a). See Cal. Labor Code § 226(e)(2)(B).

Plaintiff alleges that Defendant’s wage statements violate Cal. Lab. Code sections 226(a) and 226.2 above. As discussed herein, Plaintiff and members of the Classes were paid by the “piece”. (Ly Decl. ¶69.) However, the wage statements issued to members of the Classes, including Plaintiff, failed to include the “the number of piece-rate units earned” and the “applicable piece rate” paid to Plaintiff and the Classes in violation of Cal. Lab. Code section 226(a)(3). (*Id.*)

Moreover, the wage statements are further defective in that they fail to state the total hours worked or applicable rate of pay, including the total hours of separate compensation for paid rest breaks owed to piece rate employees, and the rate of such compensation, in violation of Cal. Lab. Code sections 226(a) and 226.2. This information was not easily ascertainable from the wage statement alone, because it was completely missing or inaccurate.

g) The Risks Associated with the PAGA Claim

California’s Private Attorneys General Act (“PAGA”), Labor Code § 2698, et seq., permits private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were

1 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
2 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

3 As a result of Defendant's conduct alleged above, Plaintiff seeks PAGA penalties available
4 for violations under Cal. Labor Code sections 201, 202, 203, 226(a), 226.7, 226.8, 510, 512, 1194,
5 1199, and 2802. Cal. Labor Code section 2699(f) provides, in relevant part, "[f]or all provisions
6 of this code except those for which a civil penalty is specifically provided, there is established a
7 civil penalty for a violation of these provisions, as follows: one hundred dollars (\$100) for each
8 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
9 each aggrieved employee per pay period for each subsequent violation." In addition, the statute
10 provides that "[a]ny employee who prevails in any action shall be entitled to an award of
11 reasonable attorney's fees and costs." (Cal. Labor Code § 2699(g)(1).)

12 In addition to the meal period, rest period, wage statement, and wage violations, alleged
13 in detail above, Plaintiff also alleges a PAGA violation for failure to keep accurate meal period
14 records; failure to pay timely wages; failure to maintain an independent contractor agreement
15 containing lawful provisions; and, failure to properly classify individuals as employees as the basis
16 for a PAGA claim on behalf of two groups of aggrieved employees.

17 Plaintiff alleges that Defendant failed to properly classify Plaintiff and other aggrieved
18 employees as employees. California Labor Code section 226.8 provides for a significant civil
19 penalty under PAGA. Section 226.8(a)(1) states: "(a) It is unlawful for any person or employer to
20 engage in any of the following activities: [¶] (1) Willful misclassification of an individual as an
21 independent contractor." "Willful misclassification" is defined to mean "avoiding employee status
22 for an individual by voluntarily and knowingly misclassifying that individual as an independent
23 contractor." (Cal. Lab. Code, § 226.8, subd. (i)(4).) Cal. Labor Code § 226.8 provides for a civil
24 penalty of between \$5,000 and \$15,000 for each "violation." (See *id.*, § 226.8, subd. (b).) These
25 penalties increase to between \$10,000 and \$25,000 per violation if the court determines the
26 employer has "engaged in or is engaging in a pattern or practice of" willfully misclassifying its
27 employees. (See *id.*, § 226.8, subd. (c); *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 335.)

28 Plaintiff alleges that in addition to the other penalties, Defendant owes between \$10,000

1 and \$25,000 in civil penalties per violation under PAGA. (See § 226.8, subd. (c).)

2 Plaintiff also alleges that Defendant failed to pay Plaintiff and other aggrieved employees
3 timely wages. “Section 204 imposes an obligation of timely payment of wages upon California
4 employers and provides rules for scheduling wage payments. Specifically, for most employees,
5 section 204 requires payment of wages twice during a calendar month, and an employer is subject
6 to penalties for violating section 204.” *See’s Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th
7 889, 904 (2012) (citing to Cal. Labor Code §§ 204(a); 210).

8 California Labor Code § 204(a) provides:

9 All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2,
10 earned by any person in any employment are due and payable twice during each
11 calendar month, on days designated in advance by the employer as the regular
12 paydays. Labor performed between the 1st and 15th days, inclusive, of any
13 calendar month shall be paid for between the 16th and the 26th day of the month
during which the labor was performed, and labor performed between the 16th and
the last day, inclusive, of any calendar month, shall be paid for between the 1st and
10th day of the following month.

14 California Labor Code § 204(a) further provides:

15 The requirements of this section shall be deemed satisfied by the payment of wages
16 for **weekly**, biweekly, or semimonthly payroll if the wages are paid not more than
seven calendar days following the close of the payroll period (emphasis added).

17 California Labor Code § 204(a) further provides:

18 The requirements of this section shall be deemed satisfied by the payment of wages
19 for **weekly**, biweekly, or semimonthly payroll if the wages are paid not more than
20 **seven** calendar days following the close of the payroll period (emphasis added).

21 Plaintiff and other aggrieved employees were paid on a weekly basis, as stated under Cal.
22 Labor Code section 204(a), making their wages due no later than seven (7) days from the closing
23 of each respective pay period. Plaintiff’s and aggrieved employees’ wage statements indicate that
24 at least for some of the PAGA liability period, Defendant had a policy and practice of paying
25 Plaintiff and the Class Members on an irregular pay schedule, approximately 2 times per month.
26 (*Ibid.*)

27 Defendant also maintains an independent contractor agreement that must be agreed upon
28 as a condition of employment, containing provisions that explicitly violate several provisions of

1 California law and public policy. California Labor Code §432.5 specifically prohibits employers
2 from requiring “any employee or applicant for employment to agree, in writing, to any term or
3 condition which is known by such employer, or agent, manager, superintendent, or officer thereof
4 to be prohibited by law.” Defendant includes illegal indemnity in its independent contractor
5 agreement that Plaintiff and all other aggrieved employees must agree to as a condition of
6 employment.

7 The Parties discounted the PAGA claim for multiple reasons. First, many of the aggrieved
8 employees’ PAGA claims are derivative of all the foregoing class claims. Second, a court has
9 discretion to award less than the maximum penalty. Labor Code § 2699(e)(2) (“a court may award
10 a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts
11 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
12 arbitrary and oppressive, or confiscatory”). See e.g., *Carrington v. Starbucks Corporation* (2018)
13 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award of 10% of maximum PAGA
14 penalty). Additionally, to establish penalties for the California Labor Code section 226.8 Plaintiff
15 would need to establish that the misclassification claim was “willful.” This is a high hurdle to
16 overcome. As such, the Agreement’s contemplated PAGA payment of \$25,000.00 is appropriate.
17 (Ly Decl. ¶70.) See *Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming
18 settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

19 The main driver in the settlement was the Class claims. (Ly Decl. ¶71.) The Parties
20 allocated \$25,000.00 to the PAGA Settlement. Given that the PAGA claims would be derivative
21 of the other claims, and given the Court’s discretion to reduce penalties, Plaintiff believes that the
22 amount allocated to the PAGA claims is fair and reasonable.(Ly Decl. ¶72.)

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

24 There is significant expense associated with the class certification process, which the
25 Parties can avoid by entering into the contemplated Agreement now. (Ly Decl. ¶73.) If the Court
26 did eventually certify a class, trial of a case involving over 6,200 Settlement Class Members would
27 require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a
28 significant time overlay by the parties. (Ly Decl. ¶74.) Moreover, given the complexity and

1 unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted
2 in a lengthy and costly appeal. (Ly Decl. ¶75.) An appeal would result in further delay for the
3 Settlement Class Members who are waiting for a resolution in this matter. (*Id.*)

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

5 This case has not been certified to be tried as a class action. (Ly Decl. ¶76.) While Plaintiff
6 believes there is strong evidence to support certification of several possible certification is always
7 hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always
8 a possibility. (*Id.*) In attempting to certify a class, the parties would need to conduct multiple
9 depositions, including of the Class Representative and of several person(s) most knowledgeable
10 regarding Defendant's policies. (*Id.*) There is a risk for both sides as to what these depositions will
11 reveal and whether they will support class certification to the extent expected. (*Id.*)

12 4. The Risk of Arbitration

13 Plaintiff also factored in the risks associated with existence of arbitration agreements. (Ly
14 Decl. ¶77.) Plaintiff and most of the Class Members signed arbitration agreements. (Ly Decl.
15 ¶78.) These agreements included class action and PAGA waivers. (Ly Decl. ¶79.) Plaintiff
16 believes she has strong defenses to enforcement of the agreement. (Ly Decl. ¶80.) However,
17 Plaintiff acknowledges the risks associated with Defendant's motion to compel arbitration. The
18 Parties agreed to stay this issue pending mediation. (Ly Decl. ¶81.) This was biggest risk to the
19 case and it warranted the largest discount. (Ly Decl. ¶82.)

20 5. The Amount Offered in Settlement

21 It was very difficult for the Parties to reach this Settlement of \$2,250,000.00. (Ly Decl.
22 ¶83.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations. (Ly
23 Decl. ¶84.) The Parties arrived at it after extensive investigation and discovery, careful evaluation
24 of the law, risks, and all information substantiating the amount of penalties reasonably likely to be
25 awarded to the class were the trier of fact to find Defendant liable, and the assistance of an
26 experienced mediator, Tripper Ortman. (*Id.*)

27 The bulk of the damages in this case were related to the PAGA penalties. The underlying
28 claims were substantially less than the claims for the PAGA penalties. Given the arbitration issue,

1 Plaintiff substantially reduced the value of the case for settlement.

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

3 Plaintiff assessed full value of the Minimum Wage/Overtime claim, without any discount,
4 at approximately \$169,159.00, Plaintiff valued the unpaid rest period wage claim at \$98,705.00,
5 and Plaintiff valued the failure to account for the piece rate pay at \$60,052 (Total of \$327,916).
6 (Ly Decl. ¶85.) This was based on the minimum wage rate for each year and the hours tracked by
7 Defendant through its own systems (they utilized an application on the Class Members phones for
8 part of the Class Period). (Ly Decl. ¶86.) Plaintiff's expert also extrapolated the data for the portion
9 of the Class Period that was not tracked this way. (Ly Decl. ¶87.) The average shift length was
10 4.28 hours so the overtime actually worked was relatively low. (Ly Decl. ¶88.)

11 The full value of the Meal Period claim, without any discount, was approximately
12 \$452,613.00 (Ly Decl. ¶89.) Plaintiff utilized the same hourly rates noted above and determined
13 the shifts that were long enough to necessitate a meal period from Defendant's records. (Ly Decl.
14 ¶90.)

15 The full value of the Rest Period claim, without any discount, was approximately
16 \$592,228.00. (Ly Decl. ¶91.) Plaintiff utilized the same hourly rates noted above and determined
17 the shifts that were long enough to necessitate a rest period from Defendant's records. (Ly Decl.
18 ¶92.)

19 With regard to the Reimbursement Claim analysis, Plaintiff was able to determine the
20 mileage from Defendant's system and deduct any reimbursements actually paid by cross
21 referencing the pay data. (Ly Decl. ¶93.) Plaintiff also utilized \$35.00 per month for the
22 reimbursement for cell phone usage. This brought the damages for this claim to \$1,150,366.00.
23 (Ly Decl. ¶94.)

24 Plaintiff valued the Wage Statement Claim, without discount, at \$1,183,950.00. (Ly Decl.
25 ¶95.) Plaintiff used \$100 for each wage statement issued (pay period) and utilized a \$4,000 cap on
26 wage statement penalties per employee. (Ly Decl. ¶96.)

27 Plaintiff valued the Waiting Time Claim at \$8,203,427.00 based on approximately 5,198
28 former employees and an average shift length of approximately 4.18 hours. (Ly Decl. ¶97.)

1 Finally, Plaintiff calculated the value of the PAGA claims (stacked for each violation at
2 \$35,731,600.00. This includes penalties for all of the underlying claims. (Ly Decl. ¶98.) If the only
3 penalty awarded was for the misclassification claim, the value of the PAGA claim is \$26,260.00
4 (at \$10,000 a head). (Ly Decl. ¶99.) If only one penalty is applied for any of the other violations,
5 the value is \$2,367,900.00. (Ly Decl. ¶100.) As such, there is a high fluctuation in the possible
6 penalties awarded at maximum value. (Ly Decl. ¶101.) The court also has discretion to decrease
7 these penalties. (Ly Decl. ¶102.)

8 Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the
9 Settlement Class Members' claims was without including PAGA is \$11,910,500.00. (Ly Decl.
10 ¶103.) The value of the non-penalty claims is \$2,523,123.00. (Ly Decl. ¶104.) Obviously, factoring
11 PAGA, and stacking penalties, the value of the case is close to \$50,000,000.00. (Ly Decl. ¶105.)
12 Given the risks associated with waiting time penalties and PAGA and the risks associated with the
13 arbitration agreement, Class Counsel believes the Gross Settlement Amount of \$2,250,000.00 is
14 fair and reasonable. (Ly Decl. ¶106.)

15 6. The Extent of Discovery Completed and Stage of the proceedings

16 As outlined above, Class Counsel conducted a thorough investigation into the facts of the
17 claims alleged. (Ly Decl. ¶107.) The agreement to settle did not occur until Class Counsel
18 exchanged and possessed sufficient information to make an informed judgement regarding the
19 likelihood of success on the merits and the results that could be obtained through further litigation.
20 (*Id.*)

21 7. The Experience and Views of Counsel

22 Kingsley & Kingsley is very experienced in prosecuting and defending employment
23 litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition
24 violations. (Ly Decl. ¶¶108-110.) The firm is well versed in class action litigation and has
25 diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves
26 as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern
27 California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is
28 included in the accompanying declaration of Liane Katzenstein Ly. (Ly Decl. ¶¶108-109.) After

factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Ly Decl. ¶110.)

8. The Presence of a Governmental Participant

There is no governmental participant in this action. (Ly Decl. ¶111.)

9. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be “fair, adequate and reasonable.” (See, e.g., *Officers for Justice v. Civil Service Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Settlement Class Members pro rata based on the number of Workweeks worked by the Settlement Class Member during the Class Period. (Ly Decl. ¶112.) The lump sum payment to each Settlement Class Member not excluding him/ herself will be determined by dividing the Net Settlement Amount by the total number of Compensable Workweeks worked by all members of the settlement class during the Class Period and then multiplying the Workweek Value by the number of Compensable Workweeks by the individual class member as determined by the Administrator. (*Id.*) This allocation distributes Settlement funds proportionally to each class member’s damages, and should therefore be approved as fair, adequate, and reasonable. (*Id.*) (Ex. 1 at ¶2.2.4.)

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

To date, there are three (3) requests to be excluded from the proposed Agreement and zero (0) objections. (Snow Decl. ¶¶12-13.) Such indicates that the reaction of Settlement Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFF

Plaintiff’s Counsel request an enhancement of \$10,000.00 to the Class Representative MIE MOULTON for her work on behalf of the Classes. (Ly Decl. ¶157.) “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

1 approved service awards of \$300,000 to each named plaintiff in recognition of the services they
2 provided to the class by responding to discovery, participating in the mediation process, and taking
3 the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g.*
4 *Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v.*
5 *UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal.
6 Jan. 26, 2007) (approving \$25,00 enhancement to each named plaintiff).

7 Ms. Moulton is an adequate class representative because she has diligently, adequately and
8 fairly represented the Classes and has not placed her interests above any member of the Classes.
9 Plaintiff is a member of both classes. She worked as an independent contractor and as an employee.
10 (Ly Decl. ¶158) (*see* Declaration of MIE MOULTON (“Moulton Decl.”) ¶¶2-4.)

11 Here, Class Counsel requests an enhancement for Ms. Moulton’s valiant effort and time
12 expended in this matter. The time spent by MIE MOULTON is significant and includes
13 researching and retaining competent counsel; providing information to Class Counsel regarding
14 the nature of the work at Defendant; compiling relevant documents; working closely with Class
15 Counsel to develop the theories of liability and martial relevant evidence; regularly discussing the
16 status of the case with Class Counsel; discussing the case via telephone with Settlement Class
17 Members; attending a full-day of mediation; and responding promptly to Class Counsel’s
18 communications regarding settlement.. (Ly Decl. ¶159; Moulton Decl. ¶¶5-8.) As set forth in the
19 Agreement, Plaintiff will also be entering into a general release of liability pursuant to Civil Code
20 Section 1542. (Ly Decl. ¶160; Ex. 1 at ¶6.)

21 Class Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶161.)
22 The enhancement takes into consideration the time, effort, and expense incurred by Ms. Moulton
23 in coming forward to litigate this matter on behalf of all Settlement Class Members. (Ly Decl.
24 ¶162.) Additionally, the Class Representative was at risk for paying for Defendant’s legal fees
25 and costs in the event that Defendant prevailed at trial. (Ly Decl. ¶163.)

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

27 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
28 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development

Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Liane Katzenstein Ly as Exhibit "6." (Ly Decl. ¶168.)

VII. CONCLUSION

Plaintiff respectfully submits that the proposed Agreement is fair, adequate, reasonable, and in the best interest of the Settlement Class Members. Therefore, Plaintiff respectfully requests that the Court (1) grant Final Approval of the Agreement and all of its terms; (2) award attorneys' fees and costs in the amount detailed in the concurrently filed Motion for Attorneys' Fees and Costs; (3) award ILYM Group, Inc. claims administration fees of \$53,300.00; and (4) award the Class Representative an enhancement of \$10,000.00; and (5) enter judgment.

DATED: November 13, 2023

KINGSLEY & KINGSLEY, APC

By: 

Liane Katzenstein Ly
Attorneys for Plaintiff MIE MOULTON and the
proposed classes

(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 November 13, 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:

KLINEDINST PC
Thomas Daugherty
TDaugherty@Klinedinstlaw.com
Jessica S. Park
jpark@klinedinstlaw.com
501 West Broadway, Suite 600
San Diego, CA 92101

Attorneys for Defendant

[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 November 13, 2023, at Woodland Hills, California.



Michelle Tanzer