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

SHELTON HARPER, an individual, on
behalf of himself and others similarly
situated,

PLAINTIFF,

v.

SAN MAR PROPERTIES; and DOES 1 thru
50, inclusive,

DEFENDANTS.

CASE NO. 21CECG03563

[Case Assigned for All Purposes to Hon.
Jonathan Skiles in Dept. 403]

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

*[Filed concurrently with Motion for Approval
of Attorneys' Fees and Costs; Declarations of
Kelsey M. Szamet, Shelton Harper, and
Makenna Snow of ILYM Group, Inc., Proposed
Order and Judgment]*

Date: January 18, 2024

Time: 3:30 PM

Dept.: 403

Complaint Filed: December 2, 2021

FAC Filed: February 7, 2022

Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 18, 2024 at 3:30 PM in Department 403 of the above-entitled court, Plaintiff Shelton Harper (“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 Amended Class Action and PAGA Settlement Agreement (“Agreement”), a copy of which is attached to the concurrently-filed Declaration of Kelsey M. Szamet as Exhibit “1”;

2. Affirming Kingsley & Kingsley, APC and Abramson Labor Group as Class Counsel;

3. Affirming Shelton Harper as Class Representative 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 Administrator; and,

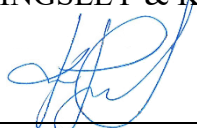
5. Entering judgment.

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 Agreement is fair, adequate, reasonable, and in the best interest of the Class Members and the parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Shelton Harper, Makenna Snow 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: December 19, 2023

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet
Attorneys for Plaintiff SHELTON HARPER and the
proposed class

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Shelton Harper (“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 Kelsey M. Szamet as Exhibit “1”;

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

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

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

14 5. Enter judgment.

15 An objective evaluation of the Settlement confirms that the relief negotiated on the
16 Settlement Class’s behalf is fair, reasonable, and valuable. The Settlement was negotiated by the
17 Parties at arm’s length with helpful guidance from Judge Patrick O’Hara (Ret.), an experienced
18 and well-respected mediator, and the Settlement confers substantial benefits to Class Members.
19 This relief—averaging approximately \$920.44 per Class Member from the Net Settlement
20 Amount—is particularly impressive when viewed against the difficulties encountered by plaintiffs
21 pursuing wage and hour cases. Moreover, by settling now rather than proceeding to trial, Class
22 Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of
23 class certification being denied or of Defendant prevailing at trial, or of Plaintiff prevailing at trial
24 but losing on appeal.

25 As discussed below, the proposed Settlement satisfied all criteria for final settlement
26 approval under California law and falls within the range of reasonableness. Accordingly, Plaintiff
27 respectfully requests that this Court grant final approval of the Settlement Agreement.

28 ///

II. FACTUAL BACKGROUND

A. Litigation Overview and Procedural History

On December 2, 2021, Plaintiff filed a Class Action Complaint seeking recovery for: (1) failure to pay wages and/or overtime under Labor Code sections 510, 1194, 1194.2, and 1199; (2) failure to provide meal breaks pursuant to Labor Code sections 512 and 226.7; (3) failure to provide rest breaks pursuant to Labor Code section 226.7; (4) failure to provide accurate itemized wage statements pursuant to Labor Code section 226(a); (5) waiting time penalties pursuant to Labor Code section 203; and, (6) violation of Business & Professions Code section 17200. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶5.) On December 2, 2021, Plaintiff sent a notice letter, pursuant to Labor Code § 2699, et seq., the Private Attorneys General Act (“PAGA”), to the Labor Workforce Development Agency (“LWDA”) regarding his intent to seek civil penalties for the Labor Code violations above. (Szamet Decl. ¶6.) Then, on February 7, 2022, Plaintiff filed a First Amended Class and Representative Action Complaint adding an additional cause of action for penalties pursuant to Labor Code section 2699, et seq. based upon the same alleged Labor Code violations at issue in the Complaint and an additional violation for failure to keep accurate meal period records. (the “Operative Complaint”). (Szamet Decl. ¶7.) Defendant denies the allegations in the Operative Complaint, denies any failure to comply with the laws identified in in the Operative Complaint and denies any and all liability for the causes of action alleged. (Szamet Decl. ¶8.)

B. The Discovery Process and Mediation

On May 24, 2022, the Parties participated in an all-day mediation presided over by the Hon. Patrick O’Hara (Ret.) which led to this Agreement to settle the Action. (Szamet Decl. ¶9.)

Prior to mediation, Plaintiff obtained, through informal discovery, pertinent documents and data for the Class and PAGA Members for mediation purposes only. Prior to mediation, Plaintiff obtained, through informal discovery, pertinent documents and data for the Class and PAGA Members so that the Parties could fully investigate the claims at issue and understand their strengths and weaknesses. (Szamet Decl. ¶10.) Plaintiff’s investigation was sufficient to satisfy the criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th

1 1794, 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130
2 (“*Dunk/Kullar*”).

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

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

18 C. Preliminary Approval

19 On September 11, 2023, the Court issued an Order preliminarily approving the settlement
20 in this case, approving the proposed Class Notice, ordering that the Administrator send notice to
21 the Class , and setting a date for the Final Approval and Fairness Hearing. (Szamet Decl. ¶13.)

22 **III. THE PRELIMINARILY APPROVED SETTLEMENT**

23 A. The Settlement Class

24 For purposes of Settlement, the Settlement Class is defined as: “all non-exempt employees
25 who are employed or have been employed by SAN MAR PROPERTIES, INC., in the State of
26 California who worked one or more pay periods during the Covered Period.” (“Class”) (Szamet
27 Decl. ¶14; Agreement, Ex. 1 at ¶1.1.5.)

28 The Covered Period is December 2, 2017 through May 31, 2022. (Szamet Decl. ¶15; Ex.

1 at ¶1.1.12.) Based on documents and other information produced by Defendant, there are 199 Class Members and 6,526 total Workweeks during the Covered Period. (Szamet Decl. ¶16; Ex. 1 at ¶9.) The final Settlement Class contains 199 individuals. (Snow Decl. ¶5.)

B. The Aggrieved Employees

For purposes of the Agreement, the Aggrieved Employees are defined as: “all non-exempt employees who are employed or have been employed by SAN MAR PROPERTIES, INC., in the State of California who worked one or more pay periods during the PAGA Period.” (“Aggrieved Employees” or “PAGA Members”) (Szamet Decl. ¶17; Settlement, Ex. 1 at ¶1.1.4.)

The PAGA Period is December 2, 2020 through May 31, 2022. Szamet Decl. ¶18; Ex. 1 at ¶1.1.31.) Based on documents and other information produced by Defendant, there are approximately 116 PAGA Members. (Szamet Decl. ¶19, Ex. 1 at ¶9)

C. Settlement Payments

As detailed fully in the Agreement, the Settlement provides for Defendant to pay a Gross Settlement Amount of \$325,000.00, which includes the sum of the Individual Class Payments, the Class Representative service award, the Class Counsel Award, PAGA Payment, and the Settlement Administration Costs. (Szamet Decl. ¶20; Ex. 1 at ¶1.1.22.)

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

Gross Settlement Amount:	\$	325,000.00
Less Class Representative Enhancement:	\$	5,000.00
Less Class Counsel’s Fees:	\$	108,333.33
Less Class Counsel’s Costs:	\$	10,000.00
Less PAGA Payment:	\$	10,000.00
		<i>(\$7,500.00 to the LWDA and \$2,500.00 to PAGA Members)</i>
<u>Less Administrator Costs:</u>	<u>\$</u>	<u>15,000.00</u>
Anticipated Net Settlement Amount	\$	220,583.33

(Ex. 1 at ¶3.)

D. Individual Settlement Payments

The amount of each Participating Class Member’s Individual Class Payment is an individualized amount that is based on the number of compensable workweeks worked by the

1 Participating Class Member during the Covered Period. (Ex. 1 at ¶1.1.5; *see also* Ex. A to the
2 Agreement at [Class Notice].) This individual amount shall be determined according to the
3 settlement payment formula set forth in the Agreement. (*See* Ex. 1 at ¶3.2.4; *Id.* at Ex. A to the
4 Agreement [Class Notice].) The Agreement provides for a specific and detailed Workweeks
5 dispute process. (*See* Ex. 1 at ¶1.1.23.) The average Individual Class Payment will be \$920.44
6 (Szamet Decl. ¶21.)

7 The individual PAGA settlement amount of each PAGA Member will be paid from the
8 twenty-five percent (25%) of the PAGA Payment to be paid to aggrieved employees (or \$2,500.00)
9 and is an individualized amount that is based on the number of Workweeks worked by the
10 Aggrieved Employee during the PAGA Period. (*See* Ex. 1 at ¶3.2.5.)

11 Based on these calculations, the average potential recovery is \$920.44 per Class Member.
12 (Snow Decl. ¶14.)

13 E. Class Notice

14 The Court approved the proposed Class Notice, and directed the mailing of the Notice by
15 first-class mail to Class Members in accordance with the proposed implementation schedule.
16 (Szamet Decl. ¶22) The procedures for giving notice to the Class Members, as set forth in the
17 Agreement and Plaintiffs' Motion for Preliminary Approval and approved by the Court, have been
18 fully and properly carried out. (Snow Decl. ¶7.)

19 To date, ILYM Group, Inc. received zero (0) requests to be excluded ("opt-outs") from the
20 proposed Agreement and zero (0) objections. (Snow Decl. ¶¶11-12.)

21 F. Check Mailed Settlement – No Reversion

22 The Parties agreed to, and the Court preliminary approved, a checks-mailed settlement
23 without the possibility of reversion of settlement funds to Defendant. Under the Agreement, every
24 Class Member will receive a settlement check and Class Members do not need to submit a claim
25 in order to receive a settlement check. Any funds that remain uncashed after the void date shall
26 be turned over by the Administrator, with information for each Class Members who failed to timely
27 cash his/her settlement check, to the State of California Controller's Office Unclaimed Property
28 Fund. (Ex. 1 at ¶4.4.3.)

IV. THE COURT SHOULD ORDER FINAL APPROVAL OF THE SETTLEMENT

Pursuant to California Code of Civil Procedure § 1781(f), “a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the Class in such manner as the court directs” In deciding whether to grant final approval to a proposed class action settlement under Code of 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 Class Members. (Szamet Decl. ¶23.) 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. (Szamet Decl. ¶24.)

Second, the Parties engaged in informal discovery that permitted Class Counsel to fairly evaluate the strength of the case and the risks associated with ongoing litigation. In addition, Defendant produced data and documents informally to evaluate the strength and weaknesses of the claims at issue for purposes of mediation. (Szamet Decl. ¶25.) Receipt of appropriate discovery allowed Class Counsel to fairly evaluate the exposure and risks associated with each claim alleged in the lawsuit. (Szamet Decl. ¶26.)

Third, Class Counsel have significant experience in cases of this type, including several years prosecuting wage, hour, and working condition violations. (Szamet Decl. ¶27.) 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 Class Member of over \$920.44 is substantial, given the risks inherent in litigation and the defenses asserted. (Szamet Decl. ¶28.)

Finally, the fourth *Dunk* factor considers the percentage of objectors. Here, there were zero (0) requests to be excluded and no objectors. (Snow Decl. ¶¶11-12.) As all of the *Dunk* factors are satisfied, this settlement is entitled to a presumption of fairness.

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

California Rule of Court (“Rule”), Rule 3.769 requires litigants to obtain court approval of class action settlements. Approval occurs in two steps: (1) an early “preliminary” review by the trial court; and (2) a subsequent “final” review after notice of the settlement has been distributed to class members for their comments and objections. Cal. R. Ct. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”). The motion for preliminary approval must be accompanied by (1) the settlement agreement, (2) proposed notice to the class, and (3) the proposed order. *Id.* at 3.769(c). The motion must also identify any agreement concerning the payment of attorneys’ fees. *Id.* at 3.769(b).

If the trial court grants preliminary approval of a settlement, Rule 3.769(f) requires the court to (1) schedule a final approval hearing and (2) approve the method by which the parties are to provide notice to the class of the hearing and “an explanation of the proposed settlement.” The court must also approve a procedure for class members to file objections to the settlement. *Id.* at 3.769(f). At the final approval hearing, the court must conduct an inquiry into the fairness of the proposed settlement. *Id.* at 3.769(g).

Although Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” *See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085, 1089-90 (1994); Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”).

In *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, the court set forth set forth several factors that the Court should analyze in determining whether a class action

1 settlement is “reasonable” and should be approved. These factors include: (1) the strength of
2 plaintiff’s case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the
3 risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the
4 extent of discovery completed and stage of the proceedings; (6) the experience and views of
5 counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members
6 to the proposed settlement.

7 The proposed settlement satisfies each of these factors. (Szamet Decl. ¶29.) Class Counsel
8 conducted extensive informal discovery before entering into meaningful settlement negotiations
9 in this matter. (*Id.* at Szamet Decl. ¶10.) This discovery permitted Class Counsel to fairly evaluate
10 the strength of the case and the risks associated with ongoing litigation. (Szamet Decl. ¶30.) Class
11 Counsel is experienced in handling wage and hour class actions and, after weighing all of the
12 following factors, supports this Agreement. (Szamet Decl. ¶31.)

13 1. The Strength of Plaintiffs’ Case

14 a) The Risks Associated with the Minimum Wage/Overtime Claim

15 California employees are entitled to compensation for all hours worked, which means “the
16 time during which an employee is subject to the control of an employer, and includes all the time
17 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
18 of Regs., § 11050(2)(K); see *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified
19 on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “subject to the control
20 of an employer” even if not working, or if an employee “is suffered or permitted to work” even if
21 not “under the employer’s control, provided the employer has or should have knowledge of the
22 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh’g denied (May 13, 2020)
23 (citations omitted.) An employer controls an employee if the employer directs an employee and
24 the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may
25 consider include whether the activity is required, “the location of the activity, the degree of the
26 employer’s control, whether the activity primarily benefits the employee or employer, and whether
27 the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*
28 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9

1 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the
2 clock pre-shift activity in preparation to start work right when they clocked in).)

3 In *Troester*, employees spent four to ten minutes completing tasks to close up the store,
4 such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held
5 that California law prohibits employers from requiring employees to work off the clock, even for
6 minutes, without compensation. (*Id.* at p. 848.) The Court explained:

7 An employer that requires its employees to work minutes off the clock on a
8 regular basis or as a regular feature of the job may not evade the obligation
9 to compensate the employee for that time by invoking the de minimis
10 doctrine. As the facts here demonstrate, a few extra minutes of work each
11 day can add up. . . . What Starbucks calls “de minimis” is not de minimis
12 at all to many ordinary people who work for hourly wages.

13 (*Id.* at p. 847.)

14 Additionally, California workers are statutorily entitled to overtime compensation, unless
15 they are properly classified as falling within one of the narrow exemption categories. Under
16 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
17 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
18 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny
19 work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the
20 regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

21 Throughout the relevant period, Plaintiff maintains that he and other Class Members were
22 subject to the control of Defendant during their meal breaks, without being compensated for those
23 “hours worked.” (Szamet Decl. ¶32.) As such, Plaintiff contends he was working off the clock
24 during that time and is owed wages. (Szamet Decl. ¶33.) Plaintiff alleges that Defendant had
25 knowledge, as it was company policy for employees to clock out and continue performing their
26 work duties during that uncompensated time. (Szamet Decl. ¶34.)

27 First, Defendant vehemently denied this claim and argued that its labor policies prohibit off-the-
28 clock work, all meal periods were provided and Class Members were not working off the clock during
meal periods. (Szamet Decl. ¶35.) Second, Defendant argued that Plaintiff’s theory of liability would be
extremely difficult to prove on a classwide basis because the time records will show compliant meal
periods. (Szamet Decl. ¶36.) Defendant argued that this case would devolve into a series of mini-trials

1 wherein each Class Member would have to testify as to whether he or she clocked out, but actually worked
2 through their meal periods. (Szamet Decl. ¶37.) Of course, Defendant argued that this would defeat class
3 certification altogether. (Szamet Decl. ¶38.) *See Brinker*, 53 Cal. 4th at 1051-52 (holding that in the
4 absence of a uniform, companywide policy, proof of liability is individual); *Amey v. Cinemark USA Inc.*,
5 No. 13-CV-05669-WHO, 2015 WL 2251504, at *12 (N.D. Cal. May 13, 2015) (denying certification of
6 off-the-clock claim because plaintiffs' work requirements depended on the manager); *Brewer v. Gen.*
7 *Nutrition Corp.*, No. 11-CV-3587 YGR, 2014 WL 5877695, at *12 (N.D. Cal. Nov. 12, 2014) (denying
8 certification based on policy requiring employees to finish closing duties within 30 minutes, because the
9 court would still be left with numerous individual issues); *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516,
10 532-33 (C.D. Cal. 2011) (denying certification of off-the-clock claim).

11 Plaintiff acknowledges that this can be a highly difficult type of claim to prove because there are
12 no time records to substantiate or evaluate the claim. (Szamet Decl. ¶39.) Instead, Defendant would argue
13 that if there was any such issue of working off the clock during meal periods, it would necessitate speaking
14 to each and every Settlement Class Member about their experiences day to day and whether any off the
15 clock time was ever worked and if so, why it was worked. (Szamet Decl. ¶40.) This type of inquiry,
16 Defendants would argue, makes its very difficult to establish liability based on common proof. (Szamet
17 Decl. ¶41.) Based on this acute risk, Plaintiff believed it was appropriate to discount this claim for
18 settlement purposes. (Szamet Decl. ¶42.)

19 b) The Risks Associated with the Meal Break Claim

20 California law requires employers to provide employees a duty-free, uninterrupted thirty
21 (30) minute meal period when an employee works more than five (5) hours in a workday, and it
22 must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage
23 Order 5-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th
24 1004. Employers must also provide employees with a second duty-free, uninterrupted thirty (30)
25 minute meal period when an employee works more than (10) hours in a workday, and it must be
26 provided before the end of the 10th hour of work. *Ibid.* Meal periods can be waived, but only under
27 the following circumstances: (1) if an employee's total work period in a day is over five (5) hours
28 but no more than six (6) hours, the required meal period may be waived by mutual consent of the

1 employer and employee, and (2) if an employee's total work period in a day is over ten (10) hours
2 but no more than twelve (12) hours, the required second meal period may be waived by mutual
3 consent of the employer and employee, but only if the first meal period was not waived. *Ibid.*

4 Employers covered by Industrial Welfare Commission ("IWC") Wage Order 5-2001 have
5 an obligation to both (1) relieve their employees for at least one meal period for shifts over five
6 hours (see above), and (2) to record having done so. If the employer fails to properly record a valid
7 meal period, it is presumed that no meal period was provided. IWC Wage Order 5-2001, §7(A)(3)
8 ("Meal periods . . . shall also be recorded"); Brinker, supra, 53 Cal.4th 1004, 1052-1053, citing
9 §7(A)(3) ("If an employer's records show no meal period for a given shift over five hours, a
10 rebuttable presumption arises that the employee was not relieved of duty and no meal period was
11 provided").

12 Employers must pay employees an additional hour of wages at the employees' regular rate
13 of pay for each missed or improper (e.g., less than 30 minutes, interrupted meal period, first meal
14 period provided after 5 hours, second meal period provided after 10 hours) meal period. Lab. Code
15 §226.7; IWC Wage Order 5-2001, §11(B) ("If an employer fails to provide an employee a meal
16 period in accordance with the applicable provisions of this order, the employer shall pay the
17 employee one (1) hour of pay at the employee's regular rate of compensation for each workday
18 that the meal period is not provided"); Brinker, supra, 53 Cal.4th 1004.

19 Plaintiff contends that Defendant violated California's meal break laws by not allowing
20 Plaintiff and other Class Members to take actual daily meal breaks. (Szamet Decl. ¶43.) Indeed,
21 Plaintiff further contends that due to the hectic nature of the job, Plaintiff was rarely able to ever
22 take a meal break. (*Id.*) Because Plaintiff and Class Members were required to complete calls and
23 other work-related duties throughout their shifts, they contend that they had no time to take lawful
24 uninterrupted meal periods if they were to complete their required assignments. (*Id.*) Plaintiff
25 alleges that if Plaintiff or Class Members ever failed to remain on-call, they would be subject to
26 potential discipline up to and including termination. (*Id.*) Thus, Plaintiff and Class Members argue
27 that they were routinely discouraged and prevented from taking uninterrupted meal periods in
28 order to complete their assignments and avoid the imposition of potential disciplinary measures.

1 (*Id.*) Plaintiff asserts that Defendant further violated California’s meal period laws by not paying
2 Plaintiff and Class Members an extra hour of wages for each missed or improper meal period.
3 (Szamet Decl. ¶44.)

4 In response, first and foremost, Defendant argued that Class Members were provided with legally
5 compliant meal periods. (Szamet Decl. ¶45.) As with the wage claim, Defendant argued that Plaintiff’s
6 theory of liability would be extremely difficult to prove on a classwide basis because the time records will
7 show compliant meal periods so Defendant would be entitled to inquire of each class member, on each day
8 whether or not they were provided with compliant meal periods. (Szamet Decl. ¶46.) Of course, Defendant
9 argued that such an inquiry would defeat class certification altogether. (Szamet Decl. ¶47.) In its defense,
10 Defendant would have argued that it has no obligation to “guarantee” or “ensure” that meal periods are
11 taken by all employees at all times. *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040 (2012)
12 (employers are “not obligated to police meal breaks and ensure no work thereafter is performed”). Rather,
13 an employer satisfies (as Defendant would argue) its obligation to provide meal periods if “it relieves its
14 employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity
15 to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.” *Id.*
16 Defendant argued that there is no “basis in the wage order or statute” for the notion “that an employer must
17 ensure that no work is done – i.e., prohibit work” during a meal period. *Id.* at 1038; *see also Murphy*, 40
18 Cal. 4th at 1104 (finding a violation occurs only if the employee is “forced to forgo his or her meal period”).

19 Defendant would have argued at trial that “to assert a meal break claim, the employee must show
20 that he was **forced to forego** his meal breaks as opposed to merely showing that he did not take them.”
21 *Nguyen v. Baxter Healthcare Corp.*, No. 8:10-CV-01436-CJC, 2011 WL 6018284, at *5 (C.D. Cal. Nov.
22 28, 2011) (emphasis in original); *see also Brinker*, 53 Cal. 4th at 1034; *Dailey v. Sears, Roebuck & Co.*, 214
23 Cal. App. 4th 974, 1000-02 (2013); *Gonzalez v. Officemax N. Am.*, No. CV 07-04839 JVS MLGX, 2012
24 WL 5473764, at *5 (C.D. Cal. Nov. 5, 2012). Thus, Defendant would have argued that courts reject
25 certifying meal break claims where no common policy denies breaks on a class-wide basis. *See, e.g.*,
26 *Purnell v. Sunrise Senior Living Mgmt., Inc.*, No. SA CV10-00897 JAK, 2012 WL 1951487, at *8 (C.D.
27 Cal. Feb. 27, 2012); *Washington v. Joe’s Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) (denying
28 certification because “an individualized inquiry will be required to determine whether any employee failed

1 to take a meal break because he/she was too busy”); *Salazar v. Avis Budget Grp., Inc.*, 251 F.R.D. 529, 533
2 (S.D. Cal. 2008); *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS JCGX, 2013 WL 210223, at *8
3 (C.D. Cal. Jan. 17, 2013); *Gonzalez*, 2012WL 5473764, at *5 (holding that “[why] any particular employee
4 missed any particular break requires, ineluctably, individualized fact finding”).

5 Plaintiff was confident that Defendant would attempt to gather testimonial evidence from
6 class members indicating that the records were accurate and either they took compliant meal breaks
7 as reflected in the records or were paid a meal period premium in lieu thereof. (Szamet Decl. ¶48.)
8 Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses risks for
9 the Class. (Szamet Decl. ¶49.) There is risk as to both sides as to what declarations and depositions
10 of class members might reveal. (Szamet Decl. ¶50.) Indeed, Plaintiff had to consider that
11 Defendant could secure declarations from Class Members that all complaint breaks were
12 “provided”, but that Class Members chose to take late breaks or miss breaks on occasion. (Szamet
13 Decl. ¶51.)

14 Taken together, Plaintiff acknowledged there was significant risk as to establishing liability
15 on the meal period claim. (Szamet Decl. ¶52.) Considering this risk, Plaintiff believes it is fair
16 and reasonable to discount the meal period claim for settlement purposes. (Szamet Decl. ¶53.)

17 c) The Risks Associated with the Rest Break Claim

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

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

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

(*Ibid.*)

The California Supreme Court further refined requirements for rest periods, holding that

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

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

17 Here, similar to the meal break violations, Plaintiff alleged that Defendant maintained a
18 consistent policy of failing to provide Plaintiff and the Class members with rest breaks of not less
19 than ten (10) minutes per four (4) hour work period or major fraction thereof. (Szamet Decl. ¶54.)
20 Plaintiff maintains that he and the Class members were unable to take compliant rest breaks due
21 to work volume and the general inability to take a rest break while performing on-site work, or
22 traveling to or from a site. (Szamet Decl. ¶55.)

23 In its defense, Defendant would have argued that Plaintiffs’ rest period claim was even less
24 appropriate for certification than their meal period claim because California law does not require
25 employees to record rest periods. Absent a shift-by-shift, break-by-break, employee-by-employee
26 inquiry, Defendant would have argued that there was simply no way to know (1) whether a break
27 was taken; and (2) if not, why not. (Szamet Decl. ¶56.) For each instance where an employee did
28 not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still

1 have to determine why that particular employee had less than their full allotment of rest time.
2 Defendant accordingly would have argued that rest break claims are inherently individualized in
3 nature because employers only need to “authorize and permit” breaks; they need not ensure that
4 rest breaks are taken. *Brinker*, 53 Cal. 4th at 1004. To succeed, “[a]n employee must show that the
5 employer prevented the employee from taking breaks; mere proof of knowledge that the employee
6 was forgoing breaks is insufficient.” As such, Plaintiff had to acknowledge that it could potentially
7 be easy for Defendant to defeat certification of this claim if it was able to gather testimonial
8 evidence from class members indicating that they were able to take all required rest breaks each
9 day. (Szamet Decl. ¶57.) Though Plaintiff does not believe this was the case, Plaintiff must
10 acknowledge it poses risks for the Class. (Szamet Decl. ¶58.) Just as with meal periods, there is
11 risk as to both sides as to what declarations and depositions of class members might reveal.
12 (Szamet Decl. ¶59.)

13 d) The Risks Associated with the Inaccurate Wage Statement Claim

14 California Labor Code §226(a) requires Defendant to provide its employees with an accurate,
15 itemized written wage statement that shows, in relevant part, all applicable hourly rates and the
16 corresponding number of hours worked. An employee “suffering injury,” like Plaintiff and Class Members,
17 can recover penalties for an employer’s “knowing and intentional failure” to comply with Labor Code
18 §226(a). See Labor Code § 226(e)(1). Labor Code section 226(a) provides, in pertinent part, that an
19 employer must provide an “accurate itemized” wage statement showing net and gross wages earned. Cal.
20 Lab. Code § 226(a). “[A]n employee has a statutory right to an accurate pay stub.”¹ Based on the preceding
21 allegations, Plaintiffs allege that Defendant issued Class Members incorrectly itemized wage statements.
22 (Szamet Decl. ¶60.) Penalties for wage statement violations are calculated according to the formula
23 provided by Labor Code section 226(e)(1): An employee suffering injury as a result of a knowing and
24 intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all

26 ¹ *Jaimez v. Daihatsu USA, Inc.*, 181 Cal. App. 4th 1286, 1306 (2010) (“*Jaimez*”); *see also*
27 *Kisliuk v. ADT Sec. Servs.*, 263 F.R.D. 544, 548 (C.D. Cal. 2008). “The purpose of the wage
28 statement requirement is to provide transparency as to the calculation of wages. A complying
wage statement accurately reports most of the information necessary for an employee to verify if
he or she is being properly paid in accordance with the law and that deductions from wages are
proper.” DLSE Opinion Letter 2006.07.06 at 2.

1 actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred
2 dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate
3 penalty of \$4,000.

4 However, Defendant would have argued that the “subsequent” penalty applies only after a
5 determination that the employer has violated the Labor Code. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.
6 App. 4th 1157, 1209 (2008) (“Although common sense might suggest a “subsequent” violation is nothing
7 more than a violation that occurs at a later point in time after an “initial” violation, this definition is
8 inadequate because the statutes provide for multiple penalties for “each failure to pay each employee”
9 incurred in an initial violation . . . Until the employer has been notified that it is violating a Labor Code
10 provision (whether or not the Commissioner or court chooses to impose penalties), the employer cannot be
11 presumed to be aware that its continuing underpayment of employees is a “violation” subject to penalties.”).

12 Additionally, although wage statement claims are readily certifiable, they are vulnerable to an
13 unfavorable disposition on summary judgment as defendants commonly argue that, without more, wage
14 statement claims are nothing but technical violations for which Class Members suffer no injury. Before
15 Section 226(e) was amended, the dispositive issue was whether “suffering injury” was satisfied by the
16 deprivation of a legal right (i.e., an employer’s provision of non-compliant wage statements), or by
17 consequential damages caused by the non-compliant wage statements. Employers had frequently prevailed
18 in arguing for the latter interpretation. Even after the enactment of section 226(e), some courts have held
19 that this amendment merely clarifies existing law and have held that plaintiffs must demonstrate actual
20 injury. *See Loud v. Eden Med. Ctr.*, 2013 U.S. Dist. LEXIS 122873, **36-53 (N.D. Cal. Aug. 28, 2013)
21 (granting summary judgment on wage statement claim because plaintiff could not show injury due to
22 defects and that incorrect wage information is not willful).

23 e) The Risks Associated with the Waiting Time Penalties Claim

24 This claim alleges that Defendant failed to pay all wages due and owing upon termination
25 or resignation. Labor Code § 203(a) provides:

26 If an employer willfully fails to pay ... any wages of an employee
27 who is discharged or who quits, the wages of the employee shall
28 continue as a penalty from the due date thereof at the same rate until
 paid or until an action therefor is commenced; but the wages shall
 not continue for more than 30 days.

1 Under Labor Code § 203, a “‘willful’ failure to pay wages ... occurs when an employer
2 intentionally fails to pay wages to an employee when those wages are due.” Cal. Code Regs., tit.
3 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 (“willful”
4 simply means that “the employer intentionally failed or refused to perform an act which was
5 required to be done[.] Willful ... does not necessarily imply anything blameable, or any malice or
6 wrong toward the other party”).

7 Here, Plaintiff contends that Defendant failed to properly pay overtime for any work in
8 excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet
9 Decl. ¶61.) The risk analysis for the section 203 claim flows from the risk analysis for the
10 underlying wage claim discussed above as derivative waiting-time penalties are only as strong as
11 the underlying predicate claims, and are subject to good faith defenses. (Szamet Decl. ¶62.) If
12 Defendant could prove, as it contends, that class members were properly paid for all hours worked,
13 there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet
14 Decl. ¶63.)

15 Plaintiff also alleged that Defendant owes waiting time penalties by not paying former
16 alleged employees all wages owed and all premium payments for non-compliant meal or rest
17 periods, Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2002) 40
18 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute “wages” under
19 Labor Code § 203. (“We hold that section 226.7’s plain language, the administrative and
20 legislative history, and the compensatory purpose of the remedy compel the conclusion that the
21 ‘additional hour of pay’ is a premium wage, not a penalty”). (Szamet Decl. ¶64.)

22 The bigger risk that Plaintiff analyzed, however, is that to establish liability for waiting
23 time penalties, Plaintiff would have to establish not only that the underlying violations occurred,
24 but also that Defendant’s conduct was “willful.” (Labor Code § 203; Szamet Decl. ¶65.) If
25 Defendant could establish that any alleged failure to blend was the result of mistake or oversight
26 and not “willful”, then it is possible that Plaintiff would not be able to recover penalties for this
27 claim. (Szamet Decl. ¶66.) Because of this risk, Plaintiff determined that accepting a discount for
28 settlement purposes was appropriate. (Szamet Decl. ¶67.)

1 f) The Risks Associated with the PAGA Claim

2 California's Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, permits
3 private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that
4 plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were
5 established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of
6 \$100 per employee per pay period for the initial violation and \$200 for subsequent violations.

7 Plaintiff discounted the PAGA claim for multiple reasons. (Szamet Decl. ¶68.) First, the
8 aggrieved employees' PAGA claims are derivative of all the foregoing class claims. (Szamet Decl.
9 ¶69.) If Plaintiff cannot establish liability on the underlying claim (taking into account the risks
10 discussed above), then the derivative PAGA claim will also necessarily fail. (*Id.*) Second, a court
11 has discretion to award less than the maximum penalty. (Szamet Decl. ¶70.) (Labor Code §
12 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified
13 by this part if, based on the facts and circumstances of the particular case, to do otherwise would
14 result in an award that is unjust, arbitrary and oppressive, or confiscatory"). *See e.g., Carrington*
15 *v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669 (affirming award
16 of 10% of maximum PAGA penalty). Third, the likelihood of the Court reducing the PAGA
17 damages awarded to Plaintiffs and the aggrieved employees – assuming liability is proven as to
18 each of Plaintiffs' claims – is also higher in this case where these same individuals will also be
19 receiving money for the same unlawful conduct under the class claims. (Szamet Decl. ¶71.) (*see*
20 *Avila v. Cold Spring Granite Co.* (E.D. Cal. Jan. 12, 2018) Case No. 1:16-cv-001533-AWI-SKO,
21 2018 U.S. Dist. LEXIS 6142 *17 ("Because the PAGA penalties sought are at least partially
22 duplicative of penalties granted by the underlying Labor Code violations, see, e.g., Cal. Lab. Code
23 §§ 203, 226, 558(a), 1194.2, and because a Court has discretion in whether and in what amount to
24 award PAGA penalties, see Cal. Lab. Code § 2699(e)(2), Plaintiff recognizes that the potential
25 PAGA penalties are highly uncertain."); and see *Nordstrom Commissions Cases*, 186 Cal.App.4th
26 576, 589 (2010) (affirming settlement allocating \$0 of \$6.4 million settlement to PAGA penalties).

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28 ///

1 g) Solvency Concerns

2 The final, but very significant, consideration for purposes of resolution is Defendant's
3 financial status. Defendant is a local family who manages (and owns) some apartment complexes.
4 (Szamet Decl. ¶72.) Defendant is not a large and sophisticated statewide landlord that can
5 withstand a significant judgment against it. (Szamet Decl. ¶73.) Plaintiff's main concern was
6 working with the mediator to come to a reasonable resolution that puts real money in the pockets
7 of Class Members, but is an amount that Defendant can actually manage to pay. (Szamet Decl.
8 ¶74.) Relying on the expert guidance of Judge O'Hara, the Parties came to a Settlement that is a
9 true compromise, but also fair and reasonable based on the risks discussed and the exposure
10 analysis to follow. (Szamet Decl. ¶75.)

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

12 There is significant expense associated with the class certification process, which the
13 Parties can avoid by entering into the contemplated Agreement now. (Szamet Decl. ¶76.) If the
14 Court did eventually certify a class, trial of a case involving approximately 199 Class Members
15 would require the retention of expensive expert witnesses, the accrual of extensive litigation costs,
16 and a significant time overlay by the parties. (Szamet Decl. ¶77.) Moreover, given the complexity
17 and unsettled nature of the issues in this case it is likely that any outcome at trial would have
18 resulted in a lengthy and costly appeal. (Szamet Decl. ¶78.) An appeal would result in further
19 delay for the Class who are waiting for a resolution in this matter. (*Id.*)

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

21 This case has not been certified to be tried as a class action. (Szamet Decl. ¶79.) While
22 Plaintiff believes there is strong evidence to support certification of several possible subclasses,
23 certification is always hard fought and subject to judicial discretion. Moreover, in class actions,
24 decertification is always a possibility. (*Id.*) In attempting to certify a class, the parties would need
25 to conduct multiple depositions, including of the Class Representative and of several person(s)
26 most knowledgeable regarding Defendant's meal and rest policies and practices. (*Id.*) There is a
27 risk for both sides as to what these depositions will reveal and whether they will support class
28 certification to the extent expected. (*Id.*)

1 4. The Amount Offered in Settlement

2 It was very difficult for the Parties to reach this Settlement of \$325,000.00. (Szamet Decl.
3 ¶80.) This Settlement is the result of adversarial, non-collusive, and arms-length negotiations.
4 (Szamet Decl. ¶81.) The Parties arrived at it after extensive investigation and discovery, careful
5 evaluation of the law, risks, and all information substantiating the amount of penalties reasonably
6 likely to be awarded to the class were the trier of fact to find Defendant liable, and the assistance
7 of an experienced mediator, Judge Patrick J. O'Hara (Ret.). (*Id.*)

8 Based on their analysis of documents and class data produced by Defendant (including a
9 sample of time and pay records and Defendant's written labor policies and procedures handbooks),
10 Plaintiffs' Counsel were able to realistically assess the value of Plaintiffs' claims and intelligently
11 engage defense counsel in settlement discussions that culminated in the proposed settlement now
12 before the Court.

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

14 Plaintiff assessed the full value of the minimum wage without any discount, at
15 approximately \$104,416. (Szamet Decl. ¶82.) This calculation was based off of expert analysis
16 of the data provided by Defendant and assumed there were 15 minutes of unpaid wages per shift,
17 per Class Member. (Szamet Decl. ¶83.) Plaintiff also analyzed the potential unpaid overtime
18 claim due to the alleged failure to blend bonuses into the overtime rate. (Szamet Decl. ¶84.) This
19 violation could potentially only occur during pay periods where overtime was worked and a bonus
20 was also paid. (Szamet Decl. ¶85.) Plaintiff assessed the full value of this overtime claim, without
21 any discount, at approximately \$3,976. (Szamet Decl. ¶86.)

22 Plaintiff assessed the full value of the meal period claim, without any discount at \$244,725.
23 (Szamet Decl. ¶87.) This amount assumes a 50% meal period violation record for the entire Class.
24 (Szamet Decl. ¶88.) Of course, if the meal period violation rate was found to be significantly
25 lower, this number would decrease dramatically. (Szamet Decl. ¶89.)

26 The same analysis is true for rest periods. (Szamet Decl. ¶90.) Plaintiff assessed the full
27 value of the rest period claim, without any discount, at \$244,725. (Szamet Decl. ¶91.) This amount
28 assumes a 50% rest period violation record for the entire Class. (Szamet Decl. ¶92.) Of course, if

1 the meal period violation rate was found to be significantly lower, this number would decrease
2 dramatically. (Szamet Decl. ¶93.)

3 Plaintiff valued the Wage Statement Claim, without discount, at \$254,400. (Szamet Decl.
4 ¶94.) In the data, there were 100 Class Members who worked during the relevant liability period
5 for Labor Code §226(a). (Szamet Decl. ¶95.)

6 Plaintiff valued the Waiting Time Claim, tied to the alleged unpaid wages claim, at
7 \$324,000. (Szamet Decl. ¶96.) In the data, there were 90 Class Members whose employment
8 ended during the relevant liability period for Labor Code §203. (Szamet Decl. ¶97.) Considering
9 the derivate nature of Labor Code §203 and the dispute over whether class members were owed
10 any wages, Plaintiff determined that accepting a discount on this claim was appropriate. (Szamet
11 Decl. ¶98.)

12 Finally, Plaintiff calculated the value of the PAGA claim at \$259,400 for Class Members
13 (using \$100 per pay period). (Szamet Decl. ¶99.) There were 2,594 pay periods in the data during
14 the relevant liability period for Labor Code §2699, et seq. (Szamet Decl. ¶100.) The main risk
15 taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl.
16 ¶101.) A judge can award the statutory maximum of \$100 for the initial violation and \$200
17 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶102.) While there is a
18 dearth of available authority, in Plaintiff’s view, were he to succeed on any of the underlying Labor
19 Code violations, it is not likely that a Judge would also award a large amount of penalties of top
20 of any damages recovered. (Szamet Decl. ¶103.)

21 Per Plaintiff’s assessment, the maximum potential value of all of Plaintiff’s and the Class’
22 claims was approximately \$1,435,642. (Szamet Decl. ¶104.) A settlement value of \$325,500
23 represents 23% of the potential maximum exposure. (Szamet Decl. ¶105.) Such a settlement is
24 well within the range of reasonableness and as a result of the forgoing risks on the merits, Class
25 Counsel believes the proposed Settlement is fair and reasonable.² (Szamet Decl. ¶106.)

26 ² “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not
27 per se render the settlement inadequate or unfair.” *See Officers for Justice v. Civil Serv. Comm’n of City & Cty. of*
28 *San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). “The proposed settlement is not to be judged against a
hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* at 625. “Estimates of
a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case,
and the expected delay in recovery (often measured in years).” *In re Toys R Us-Delaware, Inc.-- Fair & Accurate*

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

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

7 6. The Experience and Views of Counsel

8 Kingsley & Kingsley is very experienced in prosecuting and defending employment
9 litigation, and the firm has focused its practice since 2000 on wage, hour, and working condition
10 violations. (Szamet Decl. ¶¶108-110.) The firm is well versed in class action litigation and has
11 diligently and aggressively pursued this action. (*Ibid.*) Kingsley & Kingsley, APC currently serves
12 as Class Counsel for dozens of pending class action lawsuits in Northern, Central, and Southern
13 California. (*Ibid.*) A list of representative cases that Kingsley & Kingsley, APC has handled is
14 included in the accompanying declaration of Kelsey M. Szamet. (Szamet Decl. ¶¶108-109.) After
15 factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair
16 and reasonable. (Szamet Decl. ¶110.)

17 7. The Presence of a Governmental Participant

18 There is no governmental participant in this action except arguably the LWDA. (Szamet
19 Decl. ¶111.)

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

21 Plans of allocation are subject to the same standard of review as class action settlements;
22 they must be “fair, adequate and reasonable.” (*See, e.g., Officers for Justice v. Civil Service*
23 *Comm’n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation
24 compensates Class pro rata based on the number of Workweeks worked by the Class during the
25 Covered Period. The lump sum payment to each Class not excluding him/ herself will be

26 _____
27 *Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014). In other words, in valuing the
28 claims within a realistic *range* of outcomes, the settling plaintiff should discount the value of the settled claims for
risks such as changes in the law, the probability of success, and other factors. Overall, “the most important factor”
in determining “whether a settlement is fair and reasonable” is the “strength of the case for plaintiffs on the merits,
balanced against the amount offered in the settlement.” *Id.* at 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at 130).

determined on an individualized basis based upon the Workweeks worked by the Class. (Ex. 1 at ¶3.2.4.) This allocation distributes Agreement funds proportionally to each class member's potential damages and should therefore be approved as fair, adequate, and reasonable. (Szamet Decl. ¶112.)

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

To date, there are zero (0) requests to be excluded from the proposed Agreement and zero (0) objections. (Snow Decl. ¶¶11-12.) Such indicates that the reaction of Class Members on the whole is positive and weighs in favor of approval.

V. ENHANCEMENT TO PLAINTIFF

Plaintiff's Counsel request an enhancement of \$5,000.00 to the Class Representative Shelton Harper for his work on behalf of the Class. (Szamet 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 approved service awards of \$300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also, e.g. Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007 WL 227862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,000 enhancement to each named plaintiff).

Mr. Harper is an adequate class representative because he has diligently, adequately and fairly represented the Class and has not placed his interests above any member of the Class. (*see* Declaration of Shelton Harper ("Harper Decl.") ¶¶5-10.)

Here, Class Counsel requests an enhancement for Mr. Harper's valiant effort and time expended in this matter. The time spent by Shelton Harper is significant and includes researching and retaining competent counsel; providing information to Class Counsel regarding the nature of the work at Defendant; compiling relevant documents; working closely with Class Counsel to

1 develop the theories of liability and martial relevant evidence; regularly discussing the status of
2 the case with Class Counsel; discussing the case via telephone with Class Members; making
3 himself available for a full-day of mediation as necessary; and responding promptly to Class
4 Counsel’s communications regarding settlement. (Szamet Decl. ¶158; Harper Decl. ¶¶6-7.) As set
5 forth in the Agreement, Plaintiff will also be entering into a general release of liability pursuant to
6 Civil Code Section 1542. (Szamet Decl. ¶159; Ex. 1 at ¶6.)

7 Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶160.)
8 The enhancement takes into consideration the time, effort, and expense incurred by Mr. Harper in
9 coming forward to litigate this matter on behalf of all Class Members. (Szamet Decl. ¶161.)
10 Additionally, the Class Representative was at risk for paying for Defendant’s legal fees and costs
11 in the event that Defendant prevailed at trial. (Szamet Decl. ¶162.)

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

13 As indicated on the Proof of Service, Plaintiff’s Motion for Final Approval of Class Action
14 Settlement (“Motion”) will be concurrently uploaded to the Labor and Workforce Development
15 Agency’s (“LWDA”) website on the date this Motion is filed as required by statute. Proof of
16 submission of Plaintiff’s Motion, all related documents, and copy of the email from the LWDA
17 confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit “6.” (Szamet
18 Decl. ¶167.)

19 **VII. CONCLUSION**

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

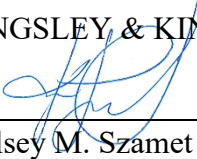
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1 DATED: December 19, 2023

KINGSLEY & KINGSLEY, APC

2 By: 

3 Kelsey M. Szamet

4 Attorneys for Plaintiff SHELTON HARPER and the
5 proposed class
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On December 20, 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:

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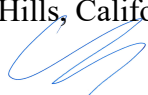
Attorneys for Plaintiff

[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 December 20, 2023, at Woodland Hills, California.



Michelle Tanzer