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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

JUSTINA BALDERRAMA, an individual, on behalf of herself, the State of California, as a private attorney general, and on behalf of all others similarly situated,

Plaintiff,

v.

OMNI ENTERPRISES, INC., a California Corporation; and DOES 1 TO 50,

Defendants.

Case No. 30-2022-01256174-CU-OE-CXC

NOTICE OF MOTION AND PLAINTIFF'S MOTION FOR ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[*Declarations of Jonathan Melmed, Justina Balderrama, and [Proposed] Order filed concurrently herewith*]

Date: March 20, 2025
Time: 2:00 P.M.
Dept: CX104
Judge: Hon. Melissa R. McCormick

Complaint Filed: April 22, 2022
First Amended Complaint Filed: July 19, 2022
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on March 20, 2025, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Department CX104 of the Superior Court of California, County of Orange before the Honorable Melissa R. McCormick, pursuant to California Code of Civil Procedure section 382 and California Rule of Court 3.769(c), Plaintiff Justina Balderrama ("Plaintiff") individually, and on behalf of all others similarly situated, and on behalf of the Aggrieved Employees (as defined herein) will and does hereby move this Court for entry of an Order:

1. Preliminarily certifying the Class for purposes of settlement;

2. Preliminarily appointing Plaintiff as Class Representatives for purposes of settlement;

3. Preliminarily appointing Jonathan Melmed, Esq. and Laura M. Supanich, Esq. of Melmed Law Group P.C. as Class Counsel for purposes of settlement;

4. Preliminarily approving the settlement as fair, adequate, and reasonable, based upon the terms set forth in the Parties' Settlement Agreement and Release of Class Action (the "Settlement Agreement"), including payment by defendant Omni Enterprises, Inc. ("Defendant") of the non-reversionary Gross Settlement Amount ("GSA") of $325,000.00, plus the employer's side payroll taxes;

5. Preliminarily approving Class Counsel's request for up to one third of the GSA as attorneys' fees (*i.e.*, up to $108,333.33), plus reimbursement of actual litigation costs up to $20,000.00;

6. Preliminarily approving an allocation of PAGA penalties of $20,000.00, including payment to the Labor and Workforce Development Agency for its share of 75% of the PAGA penalties pursuant to PAGA in an amount of $15,000.00;

7. Preliminarily approving a Class Representative incentive award to Plaintiff Justina Balderrama in an amount of up to $7,500.00 from the Gross Settlement Amount to compensate her for the burdens, responsibilities, time, effort and risks involved in coming forward on behalf of the Class;

8. Appointing ILYM Group, Inc. as the third-party Settlement Administrator for mailing notices and for settlement administration, and approving that $15,000.00 be deducted from the GSA for the costs of settlement administration; and

9. Approving the proposed Notice of Proposed Class Action and PAGA Settlement ("Class

Notice"), and ordering they be disseminated to the Class as provided in the Settlement Agreement.

This Motion is based upon the supporting Memorandum of Points and Authorities, the Declarations of Jonathan Melmed, Esq. and plaintiff Justina Balderrama, the Settlement Agreement, and the [Proposed] Order filed concurrently herewith, along with such evidence and argument of counsel as may be presented at the hearing, and such additional matters as the Court may consider at the hearing on this Motion.

Lastly, given the multiplicity of issues addressed in this Motion, and because this Motion is unopposed, Plaintiff believes that there is good cause to exceed the page limit set forth in California Rule of Court 3.764(c)(2), and respectfully requests that the Court consider Plaintiff's memorandum of points and authorities, which exceeds the statutory page limit.

Dated: November 6, 2024

Respectfully submitted,

MELMED LAW GROUP P.C.

By:____________________________
Jonathan Melmed, Esq.
Laura Supanich, Esq.
Attorneys for Plaintiff, the Putative Class and Aggrieved Employees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TREATISES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion seeks preliminary approval of a wage-and-hour class action settlement between Plaintiff and Defendant on behalf of *all individuals who are or were employed by Defendants as non-exempt employees in California during the Class Period* (the "Class" or the "Class Members"). The Class Period is defined as the period of time from April 22, 2018, through May 13, 2024. Defendant has identified 287 Class Members and approximately 18,092 workweeks in the Class Period.

After engaging in substantial independent investigation and a full-day mediation session before experienced wage and hour mediator Louis Marlin, and hard-fought negotiations, the Parties agreed to a *non-reversionary* gross settlement amount of $325,000.00 plus the employer-side payroll taxes. Declaration of Jonathan Melmed in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("JM Decl.") ¶ 3.

Subject to court approval, after deductions for attorneys' fees and litigation expenses to Class Counsel, enhancement award payment to the Class Representative, Settlement Administration expenses, and a payment to the Labor Workforce and Development Agency ("LWDA") under PAGA, the remaining amount (the "Net Settlement Amount") will be distributed to Class Members who did not opt out of the Settlement as follows:

Gross Settlement Amount	**$325,000.00**
Attorneys' Fees (1/3 of the GSA)	(up to $108,333.33)
Litigation Costs and Expenses	(up to $20,000.00)
Class Rep. Enhancement Award	(up to $7,500.00)
Settlement Administration Costs	(up to $15,000.00)
PAGA payment to the LWDA	(up to $15,000.00)
Net Settlement Amount	**$159,166.67**

Through this motion, Plaintiff requests entry of an order: (1) conditionally certifying the Class under California Code of Civil Procedure section 382 and California Rule of Court 3.769(c) for settlement purposes and preliminarily approving the Settlement; (2) approving the proposed Class

Notice to be distributed to Class Members pursuant to the Settlement Agreement;[1] (3) appointing ILYM Group, Inc. as the Settlement Administrator; and (4) scheduling a hearing for final approval, for the Court to consider the ultimate fairness of the settlement and the requested fees and costs following distribution of notice to the Class, and examination of the results of the notice process.

II. BACKGROUND

A. Procedural History, Discovery, and Investigation

On April 22, 2022, Plaintiff gave notice to the LWDA and Defendant of her claims for Defendant's violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 256, 510, 512, 1174, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199 and the IWC Wage Order No. 5 under the Private Attorney General Act ("PAGA"). JM Decl. ¶ 8.

On April 22, 2022, Plaintiff filed her class action complaint against Defendant alleging causes of action for: (1) failure to pay all minimum wages; (2) failure to pay all overtime wages; (3) failure to provide rest periods and pay missed rest period premiums; (4) failure to provide meal periods and pay missed meal period premiums; (5) failure to maintain accurate employment records; (6) failure to pay wages timely during employment; (7) failure to pay all wages earned and unpaid at separation; (8) failure to furnish accurate itemized wage statements; and (9) violations of California's Unfair Competition Law. JM Decl. ¶ 9.

On July 19, 2022, Plaintiff filed a First Amended Complaint adding an additional cause of action for PAGA penalties based on the foregoing. JM Decl. ¶ 10.

On July 21, 2022, Plaintiff served formal written discovery requests, including Requests for Production of Documents and Special Interrogatories. JM Decl. ¶ 10.

Defendant failed to respond to timely Plaintiff's formal written discovery. Plaintiff then filed a Motion to Compel Discovery Responses, which was granted on January 24, 2023. JM Decl. ¶ 10.

Plaintiff's counsel, Melmed Law Group, P.C. ("Class Counsel") has conducted sufficient discovery, investigation, and exercised due diligence in the prosecution of the Action. *See*, JM Decl. ¶ 11. This discovery, investigation, and prosecution has included, among other things, (a) numerous

[1] The Class Notice and the Share Form are attached to the Settlement Agreement as internal **Exhibits 1** and **2**, respectively. *See,* Melmed Decl. at **Exhibit A**.)

telephonic conferences with Plaintiff; (b) inspection and analysis of documents and other information produced by Plaintiff and/or Defendant; (c) analysis of the legal positions and defenses taken by Defendant; (d) investigation into the viability of class treatment and representative nature of the claims asserted in the Action; (e) analysis of potential class-wide damages, including information sufficient to understand Defendant's potential defenses to Plaintiff's claims; (f) research of the applicable law with respect to the claims asserted in the Complaint and the potential defenses thereto; and (g) assembling and analyzing of data for calculating damages. *Id*.

The Class Representative has vigorously prosecuted this case, and Defendant has vigorously contested it. JM Decl. ¶ 12. The Parties engaged in sufficient investigation and discovery to assess the relative merits of the claims of the Class and of Defendant's defenses to them. *Id*.

B. Mediation and Settlement

In consideration thereof, and in advance of sinking substantial costs into further contested proceedings, the Parties attended private mediation before experienced employment law neutral Louis Marlin on February 13, 2024. JM Decl. ¶ 13. During mediation, the Parties exchanged further information and discussed all aspects of the case, including the risks and delays posed by additional litigation, the risks to both Parties for proceeding with a motion for class certification, along with the evolving legal landscape and evidentiary challenges to establishing respective claims and defenses. *Id*. These were contentious issues because of the factual and legal complexity of the case. *Id*. However, the Parties did reach a settlement at mediation. *Id*.

The settlement negotiations were hard-fought and conducted in good faith and at arm's length between attorneys with substantial experience litigating class action and wage-and-hour cases. JM Decl. ¶ 14. The settlement was the product of a non-collusive settlement process in which the Parties were forced to make significant compromises in the interest of reaching a full and complete settlement of the action. *Id*. The final settlement amount was reached as a result of reasonable compromises in light of these considerations. *Id*. The Parties entered into a long form Settlement Agreement which is now presented for Court approval. *Id*.

From Class Counsel's review of the facts, strengths, and weaknesses of the case, the risks and delays posed by further litigation, and Class Counsel's own prior litigation experience, Class Counsel believe that the recovery for each Settlement Class Member is fair and reasonable taking into consideration the amounts received in other wage and hour class actions, the risks inherent in litigation of this genre, and the reasonable tailoring of each Settlement Class Member's claims to the settlement award he or she will receive. JM Decl. ¶ 15.

To Plaintiff's knowledge, there are no other actions, whether in the pre-filing LWDA stage, or pending in court, that may be affected by this settlement. JM Decl. ¶ 16.

III. SUMMARY OF THE PARTIES' CLAIMS AND DEFENSES

In the operative complaint, Plaintiff, individually and on behalf of the putative Class alleges causes of actions for: **(1)** failure to pay minimum wage (Labor Code §§ 1194, 1194.2, 1197); **(2)** failure to pay overtime wages (Labor Code §§ 510); **(3)** failure to provide rest periods and pay missed rest period premiums (Labor Code § 226.7; **(4)** failure to provide meal periods and pay missed meal period premiums (Labor Code §§ 226.7 and 512) **(5)** failure to maintain accurate employment records (Labor Code § 1174); **(6)** failure to pay wages timely during employment (Labor Code §§ 204 and 210) **(7)** failure to pay all wages earned and unpaid at separation (Labor Code §§ 201-203); **(8)** failure to provide complete and accurate wage statements (Labor Code § 226); **(9)** unfair business practices based on the foregoing (Business & Professions Code § 17200 *et seq.*); and **(10)** PAGA civil penalties based on the foregoing. JM Decl. ¶ 17.

As used herein for ease of reference to the reader, the term "Plaintiff and the Class" shall refer to Plaintiff, the putative Class Members, and the Aggrieved Employees.

A. Plaintiff's Minimum & Overtime Wage Claims

Labor Code section 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission, and any payment of less than the minimum wage is unlawful. JM Decl. ¶ 18. Similarly, Labor Code section 1194 entitles "any employee receiving less than the legal minimum wage…to recover in a civil action the unpaid balance of the full amount of this minimum wage." Further, the IWC Wage Order obligates employers to pay each employee minimum wages for all hours worked. *Id*.

These minimum wage standards apply to each hour employees worked for which they were not paid. JM Decl. ¶ 19. Therefore, an employer's failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324. *Id*.

Here, Plaintiff alleged that she and the Class Members received daily assignments Defendant expected them to complete within an insufficient amount of time. JM Decl. ¶ 20. Plaintiff alleged that Defendant's unreasonable demands required Plaintiff and the Class Members to work off-the-clock without receiving at least minimum wage for each hour worked. *Id*. Thus, Plaintiff and the Class Members were not paid at least minimum wage for all hours suffered or permitted to work. *Id*.

Plaintiff alleged that, because Defendant failed to provide Plaintiff and the Class Members with compensation for all hours worked, each are entitled to recover liquidated damages under Labor Code section 1194.2. JM Decl. ¶ 21.

Labor Code section 510 states, "[e]ight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee." JM Decl. ¶ 22.

For the reasons stated above, Plaintiff alleged that she and the Class Members worked certain hours for which they were not paid. JM Decl. ¶ 23. Because Plaintiff and the Class Members spent eight hours or more working on "compensated" time, this uncompensated time should have been compensated at the overtime rate. Instead, no compensation was paid at all to Plaintiff and the Class Members. *Id*.

B. Plaintiff's Meal Period Claims

Under California Labor Code section 512 and the IWC Wage Order, no employer shall employ any person for a work period of more than five (5) hours without providing a meal period of not less than thirty (30) minutes. During this meal period of not less than thirty (30) minutes, the employer is to be completely free of the employer's control and must not perform any work for the employer. If the employee does perform work for the employer during the thirty (30) minute meal period, the employee has not been provided a meal period in accordance with the law. Also, the employee is to be compensated for any work performed during the thirty (30) minute meal period. Finally, an employer may not employ an employee for a work period of more than ten (10) hours a day without providing the employee with another meal period of not less than thirty (30) minutes. JM Decl. ¶ 24.

Plaintiff alleged that, due to Plaintiff's and the Class Members' work schedules, they were frequently not able to take compliant meal periods. JM Decl. ¶ 25. Additionally, when Plaintiff and the Class Members were provided meal periods, they were on-duty and therefore noncompliant. *Id*. For example, Defendant expected Plaintiff and the Class Members to continue working and finish their cleaning assignments to meet their daily goals while clocked out for their meal periods. *Id*.

In addition to failing to provide compliant meal periods, Plaintiff and the Class Members were not compensated with one (1) hour's-worth of pay at their regular rate of compensation when they were not provided with a compliant meal period in accordance with Labor Code section 226.7(b). JM Decl. ¶ 26.

C. Plaintiff's Rest Period Claims

Pursuant to Labor Code section 226.7, and the applicable IWC Wage Order, Plaintiff alleged that Defendant failed to provide Plaintiff and the Class members with compensated, duty-free rest periods of not less than ten (10) minutes for every major fraction of four hours worked. JM Decl. ¶ 27.

The IWC Wage Order states in pertinent part: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." JM Decl. ¶ 28.

Here, Plaintiff alleged that Defendant failed to authorize or permit Plaintiff and the Class Members to take duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. JM Decl. ¶ 29. Specifically, due to the demands of the job, Plaintiff and the Class Members were required to skip their rest periods entirely. *Id*.

In addition to failing to authorize and permit compliant ret periods, Plaintiff and the Class Members were not compensated with one (1) hour's-worth of pay at their regular rate of compensation when they were not provided with a compliant rest period in accordance with Labor Code section

226.7(b). JM Decl. ¶ 30.

D. Plaintiff's Wage Statement Claim

Plaintiff alleged that Defendant failed to provide accurate itemized wage statements in accordance with Labor Code section 226(a). Labor Code section 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

(1) gross wages earned;

(2) total hours worked by the employee;

(3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;

(4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;

(5) net wages earned;

(6) the inclusive dates of the period for which the employee is paid;

(7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number;

(8) the name and address of the legal entity that is the employer;

(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…

Plaintiff alleged that due to Defendant's failure to pay employees all minimum and overtime wages for all hours worked, and for all meal and rest period premiums, the wage statements issued by Defendant do not indicate the correct amounts of gross wages earned, the correct number of hours worked, the correct net wages earned, or at the correct rate. JM Decl. ¶ 31.

Labor Code section 226.3 provides that "[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial violation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226." Thus, for the violations of Labor Code section 226 described above, Plaintiff and the other Class Members may also recover Labor Code section 226.3 penalties for Defendant's violations of Labor Code section 226(a). JM Decl. ¶ 32.

E. Plaintiff's Records Claim

Labor Code section 1174 states, "[e]very person employing labor in this state shall…[k]eep, at a central location in the state or at the plants or establishments at which employers are employed, payroll records showing the hours worked daily by and the wages paid to…employees employed at the respective plants or establishments." JM Decl. ¶ 33.

The "Records" section of the applicable IWC Wage Order states that every employer shall keep accurate information with respect to each one of its employees, including time records showing when the employee begins and ends each work period and meal period, total hours worked in the payroll period and applicable rates of pay, and total wages paid each payroll period. JM Decl. ¶ 34.

Labor Code section 1174.5 imposes a civil penalty of $500 for an employer's failure to maintain accurate and complete records. This civil penalty is in addition to the civil penalty of $100 per pay period, per aggrieved employee that would be imposed pursuant to Labor Code section 2699 for a violation of Labor Code section 1174(d). JM Decl. ¶ 35.

As set forth above, Plaintiff alleged that Defendant violated these requirements by failing to accurately record employee hours worked including, but not limited to, Defendant's failure to record each meal period taken, the applicable rates of pay, and the wages paid. JM Decl. ¶ 36.

F. Plaintiff's Waiting Time Penalty Claim

Sections 201-203 of the Labor Code provides that former employees must be paid all wages due on termination of employment. JM Decl. ¶ 37. If departing employees do not receive all wages due, then they can recover penalties up to thirty days' worth of wages against their former employer. *Id.* Here, Plaintiff alleged that, due to Defendant's faulty policies described above, Plaintiff and the Class Members whose employment with Defendant concluded were not compensated for each and every hour worked or at the appropriate rate. *Id.* Additionally, Defendant has failed to pay all Class Members for meal and rest period premiums and all unpaid minimum and overtime wages, whose sums were certain, at the time of termination or within seventy-two (72) hours of their resignation and have failed to pay those sums for thirty (30) days thereafter. *Id*.

G. Plaintiff's Untimely Wages During Employment Claim

Labor Code section 204 expressly requires employers who pay employees on a weekly, biweekly, or semimonthly basis to pay all wages "not more than seven calendar days following the close of the payroll period." Plaintiff alleged that, due to Defendant's failure to pay to Plaintiff and the Class Members minimum wage and overtime compensation and meal and rest period premiums as described above, Defendant failed to timely pay its employees within seven calendar days following the close of payroll, in accordance with Labor Code section 204 on a regular and consistent basis. *See Parson v. Golden State FC, LLC* (N.D. Cal. May 2, 2016) 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (finding after *Ling vs. P.F. Chang's China Bistro, Inc.* that a failure to pay rest period premiums can support claims under Labor Code sections 203 and 204). JM Decl. ¶ 38.

H. Plaintiff's Unfair Competition Claim

Plaintiff contended that by committing the above-described Labor Code violations, Defendant engaged in unlawful, unfair, and/or fraudulent business practices in violation of California Business and Professions Code sections 17200-17204 and is liable for restitution to the Plaintiff and the Class. JM Decl. ¶ 39. Moreover, this cause of action lengthens the statute of limitations of the Class' claims to four years preceding the filing of the Complaint. *Id*.

I. Plaintiff's PAGA Claim

The Private Attorney General Act of 2004 ("PAGA" - Labor Code §§ 2699-2699.5) allows an aggrieved employee to bring suit against an employer for violations of most Labor Code provisions. Suits brought under PAGA do not affect the employee's right to recover other remedies under state or federal law. *See* Labor Code § 2699(g); *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal. App. 4th 365, 375. JM Decl. ¶ 40. Wherever the Labor Code gives the Labor and Workforce Development Agency discretion to assess a civil penalty, a court is authorized to exercise the same discretion. Labor Code § 2699(e)(1). The statute of limitations for PAGA suits is one year. An employee who prevails in an action brought under PAGA is entitled to an award of reasonable attorney's fees and costs. The penalties available under PAGA are those provided in the underlying Labor Code provision that is violated or, if no penalty is listed, those provided by PAGA itself. Where the Labor Code does not provide for a penalty, PAGA establishes a civil penalty of $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. Labor Code § 2699(f). For any civil penalties collected under PAGA, seventy-five percent of the penalties are distributed to the LWDA for enforcement and education, and twenty-five percent is distributed to the aggrieved employees. *Id.*

Plaintiff alleged that by virtue of each of Defendant's foregoing Labor Code violations, Plaintiff and the Class are, in addition to other remedies, entitled to civil penalties under PAGA. JM Decl. ¶ 41. This cause of action opens Defendant to additional penalties for the Labor Code violations, in additions to attorneys' fees and costs. *Id.*

J. Defendant's Total Denial of Liability and Its Legal and Factual Defenses

Defendant denied and continues to deny generally the claims and contentions alleged in the Complaint. JM Decl. ¶ 42.

First, Defendant argued that its main client is the jail system, and the jails require all employees to take their meal and rest periods at the same time. JM Decl. ¶ 43. Furthermore, Defendant argued that they were compliant with all meal and rest period laws, and no employees are required work through meal and/or rest periods to meet work demands. *Id.* Thus, whether Class Members missed their meal or rest periods would turn on individualized issues and therefore present significant difficulty in obtaining class certification. *Id.*

Second, Defendant argued that PAGA penalties would be limited. Defendant argued that even if Plaintiff prevailed, the recoverable penalties under PAGA are minimal. JM Decl.¶ 44. First, courts to consider the issue have refused to "stack" PAGA penalties. *See Carrington v. Starbucks Corporation* (Cal. Ct. App. Nov. 27, 2018) No. D072392 (published Dec. 19, 2018) (approving PAGA penalty reduction to $5 per pay period); accord *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809. Moreover, Defendant argued that Plaintiff is not entitled to recover PAGA penalties at the subsequent violation rate of $200 per pay period. JM Decl. ¶ 44. California's appellate courts have held that "[u]ntil the employer has been notified that it is violating a Labor Code provision (whether or not the commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware [of the violation]" and therefore, until a Court or the Commissioner issues a finding of a violation, the initial $100 violation rate applies for each pay period in which the alleged violation occurred. *Amaral v. Cintas Corp. No. 2* (2008)

163 Cal.App.4th 1157, 1209; accord *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service, Inc.* (S.D. Cal. Aug. 10, 2009) 2009 WL 2448430, at *9 ("[u]nder California law, courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"). Thus, Defendant argued that even if the Plaintiff was able to establish any violation of the Labor Code, the PAGA penalties assessed for these violations will be computed at the $100 rate, as opposed to the $100 per pay period rate at maximum, and there is a likelihood that a further reduction of the penalty to $5 per pay period as approved in *Carrington* would apply given Defendant's compliance with the Labor Code as discussed above. JM Decl. ¶ 44. Defendant further argued that even if Plaintiff was able to recover some PAGA penalties on behalf of other aggrieved employees, courts frequently use their discretion under Section 2699(e)(2) to significantly reduce PAGA penalties where such penalties would be unjust, arbitrary and improper. *See, e.g.*, *Stuart v. RadioShack Corp.* (N.D. Cal. 2009) 641 F. Supp. 2d 901, 902–03; *Hernandez v. BCI Coca-Cola Bottling Co.* (C.D. Cal. Apr. 12, 2012) 2012 WL 12272348, at *2, *judgment entered,* 2012 WL 12092593 (C.D. Cal. May 9, 2012), and *aff'd,* 554 F. App'x 661 (9th Cir. 2014); JM Decl. ¶ 44. Defendant maintains that given their good faith attempts to comply with the Labor Code, and *de minimis* defenses, this Court would exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable for any of Plaintiff's claims. *Id. See also*, Labor Code §§ 203, 2699(e)(2); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135 (affirming reduction of PAGA penalties for wage statement violations from $2,800,000 to $500,000, because "the aggrieved employees suffered no injury" as a result of the violations, the defendants "were not aware" their wage statements violated the law, and the defendants "took prompt steps to correct all violations once notified."); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at *4 (reducing PAGA penalties from $2.8 million to $500,000). *Id.*

***Third**,* Defendant asserted that any violations of the Labor Code were unintentional, and that Plaintiff would have difficulty proving willfulness or intentionality for penalty purposes, including claims for civil penalties under PAGA and claims for waiting time penalties. JM Decl. ¶ 45. Defendant further argued that Plaintiff would be unable to prove "injury" for purposes of recovering penalties under Labor Code 226(e). *Id*.

In considering these significant risks and others, as well as the time, expense and cost of litigation, trial and appeals, the Parties agreed that Settlement was appropriate, and that the Settlement here is fair and reasonable. JM Decl. ¶ 46.

K. Fair Valuation of Plaintiff's Claims

In coming to a determination that this settlement is fair and reasonable and in the best interests of the Class, Plaintiff took into consideration the risk of the court not certifying the class; the risk that the Court may not award wage statement penalties, PAGA penalties, or waiting time penalties based on a lack of willfulness or difficulties in establishing bad faith; and other potential defenses of Defendant on the merits. JM Decl. ¶ 47. If Defendant prevailed on any of these defenses, the claims of the Class would potentially be worth **nothing**. *Id*. The settlement, given the risks, is fair and reasonable. *Id.* A detailed claim-by-claim analysis of the fair valuation of Plaintiff's claims followed by a risk discount analysis of Defendant's defenses is set forth in the JM Declaration at paragraph 48.

The estimated 287 Class Members will enjoy substantial monetary recovery amounting to an average recovery per class member of approximately $554.59 net, and an approximate minimum recovery of $8.80 net. JM Decl. ¶ 54.

III. SUMMARY OF BASIC SETTLEMENT TERMS

The Settlement Agreement entered into by the parties is attached as **Exhibit A** to the JM Decl. and incorporated herein by reference in its entirety. The following is a summary of the principal terms of the Settlement Agreement:

A. The Settlement Sum, Attorneys' Fees, Costs, and Representative Award

The non-reversionary Gross Settlement Amount ("GSA") of $325,000.00 to be paid by Defendant in full settlement includes: (1) Class Counsel's attorneys' fees in a sum of up to one third of the GSA as attorneys' fees (*i.e.*, up to $108,333.33); (2) litigation costs of up to $20,000.00; (3) the California Labor Workforce and Development Agency PAGA Penalties in the sum of $15,000.00; (4) settlement administration costs to ILYM Group, Inc. in the sum of $15,000.00; and (5) the Class Representative service award ($7,500.00). Settlement Agreement, at § 8.1.

B. Net Funds Available to Class Members

After all Court-approved deductions from the non-reversionary GSA, it is estimated that

$159,166.67 (the "Net Settlement Amount" or "NSA") will be distributed to the Class Members. The Net Settlement Amount shall be distributed pro rata on a "checks cashed" basis based on the proportional number of weeks worked by each Class Member during the Class Period. Settlement Agreement, at 8.2.

Class Members will be provided with notice of the settlement, its terms and their right to opt out, object, appear at the fairness hearing. Settlement Agreement, at § 7.2.

C. <u>Release</u>

Upon final approval of the settlement, the Class Members who do not seek to be excluded from the settlement release those claims arising out of or related to the allegations set forth in the operative complaint and/or PAGA notice to the California Labor and Workforce Development Agency that arose during the Class Period and/or PAGA Period, including claims for: **(1)** failure to pay minimum wage for all hours worked in violation of Labor Code sections 1194 and 1194.2, and the applicable IWC Wage Order(s); **(2)** failure to pay proper overtime wages in violation of Labor Code sections 510, 1197, and 1198, and the applicable IWC Wage Order(s); **(3)** failure to provide compliant rest periods and pay missed rest break premiums in violation of Labor Code section 226.7 and the applicable IWC Wage Order(s); **(4)** failure to provide compliant meal periods and pay missed meal period premiums in violation of Labor Code sections 226.7 and 512, and the applicable IWC Wage Order(s); **(5)** failure to maintain accurate employment records in violation of Labor Code section 1174; **(6)** failure to pay timely wages during employment in violation of Labor Code sections 204, 210; **(7)** failure to pay all wages due and owing at separation in violation of Labor Code sections 201, 202, and 203; **(8)** failure to provide complete and accurate wage statements in violation of Labor Code sections 226 and 226.3; **(9)** deceptive, fraudulent, or otherwise unlawful business practices based on the foregoing in violation of California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200–17210); **(10)** statutory penalties based on the foregoing pursuant to PAGA (Lab. Code, §§ 2698-2699.6); and **(11)** all claims for liquidated damages, penalties, interest, fees, costs based on the foregoing. Settlement Agreement, at § 1.37.

No other claims are released other than those claims specifically plead in the Complaint or otherwise specifically identified herein. This Settlement Agreement will not release any person, party, or entity from claims, if any, by Class Members for workers compensation, unemployment, or disability benefits of any nature. Nor does it release any claims, actions, or causes of action which may be possessed by Class Members under state or federal discrimination statutes, including, without limitation, the California Fair Employment and Housing Act (Gov. Code, §§ 12900–12996); the Unruh Civil Rights Act (Civ. Code, § 51); the California Constitution; Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000, et seq.); the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.); the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.); and all of their implementing regulations and interpretive guidelines. *Id*.

D. <u>Class Notice and Administration</u>

Subject to Court approval, the parties agree to engage ILYM Group, Inc., who will be responsible for be mailing the Class Notice and Share Form to Class Members; posting notice of entry of final order and judgment certifying the Class Settlement and approving this Settlement Agreement; handling inquiries from Class Members concerning the Class Notice; determining Individual Settlement Amounts; determining individual payments to members of the PAGA Settlement Class; maintaining the settlement funds in an appropriate interest-bearing account; preparing, administrating, and distributing Individual Settlement Amounts to Class Participants; preparing, administrating, and distributing individual payments to members of the PAGA Settlement Class; distributing the portion of the PAGA Payment payable to the LWDA; issuing a final report and performing such other duties as the Parties may direct. Additionally, the Settlement Administrator will handle all tax document preparation and reporting, including state and federal tax forms, if any. Settlement Agreement § 7.1.

On a weekly basis, the Settlement Administrator will provide reports to Class Counsel and Defense Counsel with summary information updating them as to the number of validated and timely objections and Opt Out requests. The Settlement Administrator will serve on Class Counsel and Defense Counsel via e-mail date-stamped copies of the original Opt Out requests and objections no later than seven (7) days after their receipt. The Settlement Administrator will provide Class Counsel with proof of mailing of the Class Notice, without listing individual Class Member names which the Settlement

Administrator will file with the Court at the time Class Counsel files its motion in support of the Court's Final Approval and Fairness Hearing. *Id*.

No later than thirty (30) days prior to the Final Approval and Fairness Hearing, the Settlement Administrator will compile and deliver to Class Counsel and Defense Counsel a report with summary information regarding: (a) the total amount of final Individual Settlement Amounts of each Class Participant, without any identifying personal information; (b) the number of Class Participants to receive such payments, and **(c)** the final number of Opt-Outs and objections. *Id*.

The Class Notice will inform Class Members of their estimated share of the settlement and the number of workweeks they worked during the Class Period. Class Members may dispute their workweeks if they believe they worked more weeks in the Class Period than Defendant's records show by submitting information to the Settlement Administrator no later than forty-five (45) days after being mailed the Class Notice and Share Form by the Settlement Administrator, which is the defined Response Deadline. The Settlement Administrator will jointly work with Plaintiff and Defendants to resolve the dispute in good faith. If Plaintiff and Defendants cannot agree over the workweeks to be credited, the Settlement Administrator shall make the final decision based on the information presented by the Class Member and Defendants. Settlement Agreement § 7.2.

ILYM Group, Inc. has administered thousands of class action settlements and is qualified to administer the settlement. Information about ILYM Group, Inc. is available at https://ilymgroup.com/about/.

E. <u>Notice Process</u>

Class Members will have forty-five (45) calendar days from the date the Notice Packets (*i.e.,* the Class Notice, and Share Form) are mailed by the Settlement Administrator to postmark their requests for exclusion and/or objections. Settlement Agreement § 7.2. The date of the postmark on the return envelope shall be exclusive means used to determine whether a participating Class Member has "timely" disputed the calculation or application of the formula for determining Settlement Awards. *Id.*

The Settlement Administrator will certify jointly to Class Counsel and Defense Counsel the number of exclusions. Settlement Administrator shall be responsible for calculation of the Settlement

Sums, issuance of checks, as well as withholding and remitting, all required state and federal taxes, and for communicating this information to Defense Counsel. *See* Settlement Agreement § 7.1. Within two hundred and ten (210) days of mailing the Individual Settlement Amounts to Class Participants, the Settlement Administrator shall file with the Court and provide to Class Counsel a declaration of payment. Settlement Agreement § 8.7. Any funds associated with checks that have not been cashed within 180 days from date of issuance, will become void and the Individual Settlement Amount associated with the un-cashed check shall be remitted pursuant to Code of Civil Procedure section 384 to the California State Controller for deposit in the Unclaimed Property Fund in the name of the individual whose check was uncashed, subject to approval by the Court. Settlement Agreement § 8.8.

F. <u>Tax Treatment</u>

Twenty percent (20%) of each Individual Settlement Amount shall constitute wages in the form of back pay (and each Class Participant will be issued an IRS Form W-2 for such payment to him or her), eighty percent (80%) of each Individual Settlement Amount shall constitute interest and penalties (and each Class Participant will be issued an IRS Form 1099 for such payment to him or her). *See* Settlement Agreement, § 5.5.

The tax allocation of 20% wages and 80% penalties is appropriate for the following reasons: (1) Defendant presented strong defenses to Plaintiff's wage claims, including that all employees took their meal and rest breaks at the same time, and they were compliant; and (2) Plaintiff's stronger claims where Defendant did not provide as strong of defenses were those for inaccurate itemized wage statements and waiting time penalties. JM Decl. ¶ 55. The remedies under these statutes provide for penalties rather than wages, and would result in significant recovery of penalties if the case were to proceed. *Id*. Thus, a tax allocation of 20% wages and 80% penalties is appropriate. *Id*.

IV. <u>PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY CERTIFICATION IS APPROPRIATE FOR PURPOSES OF SETTLEMENT</u>

California Rule of Court 3.769(d) provides that the Court may make an order approving certification of a provisional settlement class at the preliminary approval stage. It is well-established that trial courts should use a "lesser standard of scrutiny" for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* 9 ("*Dunk*") (1996) 48 Cal. App. 4th 1794, 1807 n.19. The reasons include that no trial is anticipated in a settlement class, so the case management issues inherent in determining if the class should be certified need not be confronted; and the trial court's fairness review of the settlement protects the interests of the non-representative class members. (*Id.*); *see also Officers for Justice*, 690 F.2d at 633 ("Th[e] relationship between the certification determination and the merits of the case is further attenuated within the context of the settlement evaluation process . . . .[C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light."); *Amchem Prods., Inc. v. Windsor* (1987) 521 U.S. 591, 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . .for the proposal is that there be no trial."). As discussed below, for the purposes of this settlement only, the parties ask this Court to provisionally certify the Class, as defined above, under section 382 of the Code of Civil Procedure.

A. <u>Numerosity and Ascertainability</u>

Numerosity is met if a proposed class is so large that joinder of all members would be impracticable. *See* Cal. Code Civ. Proc. § 382. A proposed settlement class is ascertainable if the class members can be objectively identified and given notice of the litigation without unreasonable time or expense. *See Medrazo v. Honda of N. Hollywood* (2008) 166 Cal. App. 4th 89, 101. Here, the Parties have determined that the size of the Class is approximately 287 Class Members. JM Decl. ¶ 7.

B. <u>Well-Defined Community of Interest</u>

1. <u>Commonality</u>

To justify certification, the class proponent must show that questions of law or fact common to the class predominate over the questions affecting the individual members. *See Arenas v. El Torito Rests., Inc*. (2010) 183 Cal. App. 4th 723, 732 (citing *Washington Mut. Bank v. Superior Court* (2001) 24 Cal. 4th 906, 913. While the Parties dispute whether a class would be appropriate if the litigation were to continue, they agree, for the purposes of this settlement only, that the Class is subject to common compensation policies, the payment of minimum and overtime wages, and the reimbursement of business expenses. JM Decl. ¶¶ 17-41.

2. Typicality

Typicality "focuses on whether there exists a relationship between the plaintiff's claims and the claims alleged on behalf of the class." *Newberg,* § 3:13. Again, the Parties dispute whether Plaintiff's claims are typical of the Class for the purposes of any continued litigation of the Action, but agree for the purposes of this settlement only, that Plaintiff asserts claims regarding Defendant's compensation practices, and reimbursement practices, that are at the core of the lawsuit. JM Decl. ¶¶ 17-41.

3. Adequacy of Representation

The proposed class representative must establish that he or she will adequately represent the proposed class. *See Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal. App. 4th 540, 546. Specifically, Plaintiff is adequate to represent the class because she was employed by Defendant during the Class Period, experienced the same wage and hour practices as the rest of the class, understood her duties as class representative, has been willing to undergo the risk of litigation, and has no conflict of interest with the other Class Members.

Adequacy may be established by the fact that counsel are experienced practitioners. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1162. Here, Plaintiff alleges, and Defendant does not dispute, for purposes of this settlement, that Plaintiff and the Class are represented by counsel with extensive experience in wage-and-hour litigation. JM Decl. ¶¶ 56-60.

4. Superiority

Certification of the Class for settlement purposes is superior here because there will be a global resolution of all claims at once, which fosters judicial economy. Class certification is also vastly superior to litigation of numerous individual claims because most of the claims are too small to litigate outside of the class context.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH IS FAIR, ADEQUATE, AND REASONABLE

A. Class Action Settlements Are Subject to Judicial Review and Approval Under the California Rules of Court

The law favors settlements. *Bush v. Superior Court* (1992) 10 Cal. App. 4th 1374, 1382. This is particularly true in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. However, a class action may not be dismissed, compromised, or settled without the Court's approval. Cal. R. Ct. 3.769(a). The California Rules of Court set forth the procedures for court approval of a class action settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of the proposed settlement. Cal. R. Ct. 3.769(c), (e)-(g).

> The decision to approve or reject a proposed settlement lies within the Court's sound discretion. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 234-35. Nevertheless, in considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or rehearsal for trial on the merits. . . .[or] to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 690 F.2d 615, 625.

The Court's ultimate duty is to determine whether the settlement is fair, adequate, and reasonable. *See Dunk,* 48 Cal. App. 4th at 1801 (setting forth the "fair, adequate, and reasonable" standard) (citing *Officers for Justice*, 690 F.2d at 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43 (a trial court must approve a class action settlement agreement, but only after determining that it is "'fair, adequate and reasonable,'" considering factors such as the "'risk, expense, [and] complexity'" of continued litigation). The Court enjoys broad discretion in making its fairness determination, and should consider factors including but not limited to:

> [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . .and the reaction of the class members to the proposed settlement.

Dunk, 48 Cal. App. 4th at 1801 (setting forth a non-exhaustive list of factors for the court's consideration at final approval).

The above factors are not exclusive, ". . . .and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." *Wershba*, 91 Cal. App. 4th at 245. However, in doing so, the Court must give "[due] regard to what is otherwise a private consensual agreement between the parties." *Id.* The inquiry must be limited "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id*. (citation and internal quotation marks omitted).

At the preliminary approval stage, the Court need only determine that the settlement falls within the "range of possible judicial approval," so that notice to the class and the scheduling of the fairness hearing are worthwhile. *See* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") § 11:25 (4th ed. 2002). Indeed, the Court should grant preliminary approval if there are no "grounds to doubt its fairness or other obvious deficiencies . . . .and [the settlement] appears to fall within the range of possible approval." *Manual For Complex Litigation* (Third) § 30.41 (1995); *see Dunk*, 48 Cal. App. 4th at 1802. 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*, 48 Cal. App. 4th at 1802 (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of approval because there are no grounds to doubt its fairness.

B. The Settlement Is the Result Of Serious, Informed, Non-Collusive Negotiations and Reflects a Fair Compromise of Claims and Risk Factors

The settlement was the product of extensive arm's-length negotiations. JM Decl. ¶ 14, 51. Though cordial and professional, the settlement negotiation was adversarial and non-collusive in nature. *Id.* The settlement reached is the product of substantial effort by the parties and their counsel. *See* generally, JM Decl.

Although Plaintiff and her counsel believed that there was a strong possibility of certifying the claims, they recognized the potential risk, expense, and complexity posed by litigation, such as unfavorable decisions on class certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal that can take several more years to litigate. JM Decl. ¶ 49. Plaintiff and her counsel further recognized the very real risk of recovering nothing if this case proceeded with expensive protracted litigation. *Id.*

The resulting Settlement was based on calculations, risk assessment, and non-collusive negotiation; it takes the risks identified above and others into account in arriving at the non-reversionary settlement amount of $325,000.00. JM Decl. ¶ 53.

C. <u>The Extent of The Pre-Litigation Discovery and Investigation Was More Than Sufficient to Permit Preliminary Approval of The Settlement</u>

The parties thoroughly investigated and evaluated the factual and legal strengths and weaknesses of this case before reaching the settlement. JM Decl. ¶ 53. As described above, the settlement was reached after extensive investigation and research, thorough calculations and risk evaluation, substantial exchanges of documents, a thorough evaluation of data for the Class, and an exchange of information required to evaluate Defendant's defenses. *Id.* The settlement came only after the case was thoroughly investigated by Plaintiff's counsel. *Id.*

D. <u>The Risks Inherent in Continued Litigation Are Great</u>

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should consider "[t]he strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, [and] the risk of maintaining class action status." *See Dunk*, 48 Cal. App. 4th at 1801. As described above, Defendant has strong defenses to Plaintiff's claims, which create a real possibility that the claims might not be certified and/or might fail on the merits. JM Decl. ¶¶ 55-65. Proceeding with litigation would impose a significant risk of no recovery as well as ongoing, substantial additional expenditures of time and resources. *Id*. If settlement were not achieved, continued litigation ofthe claims would take a substantial amount time and possibly confer no benefit on Class Members. *Id*. By contrast, the settlement will yield a prompt, certain, and substantial recovery for the Class, which also benefits the parties and the Court. *Id.*

Another risk inherent in continued litigation is the risk of non-certification and/or maintaining class action status through trial, and appeal. JM Decl. ¶ 66. In considering these risks, the choice was overwhelmingly in favor of settlement. *Id*.

E. <u>The Class Notice Plan Conforms to All Applicable Statutes and Rules</u>

The proposed Class Notice should be approved, as it fully informs the Class Members of the nature of the lawsuit and each Class Member's rights under the terms of the Settlement Agreement and applicable law. *See* Settlement Agreement, **Exhibit 1**. The manner in which the Class Notice shall be disseminated, as outlined above, will ensure that all or nearly all of the Class Members will be properly notified of the proposed settlement.

The Court has wide discretion in approving the means of providing notice, so long as the class representative "provide(s) meaningful notice in a form that should have a reasonable chance of reaching a substantial percentage of class members." *Archibald v. Cinerama Hotels* (1976) 15 Cal. 3d 853, 861. Here, the Parties' notice plan is that notice of the Settlement will be disseminated directly to the class members by first class mail by the settlement administrator within 14 days of preliminary approval. Settlement Agreement § 7.2.

The notice plan and the Class Notice satisfy the requirements of Rule of Court 3.766 and afford Settlement Class Members with all due process protections required by the United States Constitution. Moreover, the contents of the Class Notice are in compliance with California Rule of Court 3.766(d), because the Notice includes, without limitation (1) a detailed explanation of the case, including the basic contentions or denials of the parties; (2) a statement that the court will exclude the member from the class if the member so requests by a specified date; (3) a procedure for the member to follow in requesting exclusion from the class; (4) a statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) a statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel. *See* Settlement Agreement, **Exhibit 1**. The 45-calendar day deadline for Class Members to exclude themselves or challenge their weeks worked is reasonable, as it provides Class Members with sufficient time to do so and, if they so choose, to seek independent legal advice in the interim.

F. <u>Plaintiff's Counsel Are Experienced in Similar Wage-And-Hour Litigation.</u>

Plaintiff's Counsel are experienced in wage-and-hour class actions. Numerous state and federal courts have certified them as adequate and competent class counsel in such class actions. JM Decl. ¶¶ 56-60.

The Parties' counsel agree that this settlement is fair and reasonable in light of the nature of the claims, realistic risk adjusted value of damages, complexities of the case, the state of the law, and uncertainties of class certification and litigation. *See, generally* JM Decl. Given the risks inherent in litigation and the defenses asserted, this settlement is fair, adequate, and reasonable and in the best interests of Class Members and should be preliminarily approved. *Id*.

Experienced counsel, operating at arm's length, have weighed the strengths and risks of the case, and endorse the proposed settlement. *See* JM Decl. ¶ 51. The view of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128 (court must take into account "the experience and view of counsel").

G. <u>The Attorneys' Fees Under the Settlement Agreement Are Fair</u>

Under the terms of the Settlement Agreement, Class Counsel is requesting $108,333.33 in attorneys' fees. JM Decl. ¶ 61. This amount is one-third (1/3) of the $325,000.00 agreed upon by the parties as the non-reversionary Gross Settlement Amount. *See Id.*

As the California Supreme Court has made clear, 1/3 of the common fund is a reasonable percentage for a trial court to award as attorney fees in a class action where a common fund was generated as a result of the case. *See Laffitte v. Robert Half International* (2016), I Cal. 5th 480, 506 (Cal. Aug. 11, 2016) ("We therefore agree with the Court of Appeal below that 'the percentage of fund method survives in California class action cases, and the trial court did not abuse its discretion in using it, in part, to approve the fee request [of 1/3 of the common fund] in this class action"). The California Supreme Court further clarified that trial courts "have discretion to conduct a lode-star cross check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross check and use other means to evaluate the reasonableness of a requested percentage fee.").[2]

In similar class action cases, numerous courts have approved fees of up to 1/3 of the common fund. *See e.g., Martin v. FedEx Ground Package System, Inc.*, 2008 WL 5478576, at *8 (N.D. Cal. Dec. 31, 2008) (federal district court approved attorneys' fees of 1/3 of common fund); *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (approving fee award of 1/3 of the total maximum settlement and noting that the fee award of 1/3 of the total settlement was "well

[2] Once the Court grants preliminary approval of the Settlement Agreement and Class Notice is disseminated, Plaintiff's Counsel will later submit a comprehensive motion for attorneys' fees and costs to be heard at the same time as the final approval hearing or include same in Plaintiff's Motion for Final Approval of Class Action Settlement.

within the range of percentages which courts have upheld as reasonable in other class action lawsuits"); *Wilson v. Kiewit Pacific Co*., No. 09-cv-03630, ECF No. 119 (N.D. Cal. 2012) (approving fee award of 1/3 of the common fund and noting that such award is fair, reasonable and appropriate); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) (awarding fees of 1/3 of common fund in a wage and hour class action, noting: "[f]ee awards in class actions average around one-third of the recovery."). Significantly, the Retainer Agreement in this case provides fees up to one-third of the amount obtained. *See Id.* Accordingly, preliminary approval of attorneys' fees of one-third of the common fund are reasonable and should be conditionally approved here.

H. <u>The Class Representative Incentive Award is Fair and Appropriate</u>

The parties request payment of an Incentive Award from the non-reversionary Gross Settlement Amount to the Class Representative in the amount of $7,500.00, in addition to whatever payments she is otherwise entitled to receive as a Class Member. The proposed Incentive Award is reasonable compensation given the time and effort that the named Plaintiff devoted to this case and the valuable assistance she provided to Class Counsel. JM Decl. ¶¶ 63-65.

Plaintiff provided invaluable assistance to Class Counsel and the Class in this case, including providing factual background for mediation and the Class Complaint; reviewing the relevant documents, and Complaint; participating in phone calls with her lawyers to discuss litigation and settlement strategy; and reviewing the settlement documents. Plaintiff agreed to participate in this case with no guarantee of personal benefit. *Id.*

Further, Plaintiff agreed to undertake the financial risk of serving as Class Representative and exposed herself to the risk of negative publicity by anyone who opposed this case. *Id.* Moreover, the requested $7,500.00 Incentive Award for the Class Representative falls within the range of incentive payments typically awarded to Class Representatives in similar class actions. *See e.g. Bond v. Ferguson Enterprises, Inc*., No. 1:09–cv–1662 OWW MJS, 2011 WL 2648879 (E.D. Cal. June 30, 2011) (approving $11,250 service award to each of the two class representatives in a trucker meal break class action; *Ross v. US Bank National Association*, No. C 07-02951 SI, 2010 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010) (approving $20,000 enhancement award to Class Representative in California wage-and-hour class action settlement); *Vasquez v. Coast Valley Roofing, Inc*., 266 F.R.D. 482, 493 (E.D. Cal. 2010) (approving service awards in the amount of $10,000 each from a $300,000 settlement fund in a wage/hour class action); *West v. Circle K Stores, Inc*., NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28 (E.D. Cal. Oct. 19, 2006) ("the court finds plaintiffs' enhancement payments of $ 15,000 each to be reasonable."); *Glass v. UBS Fin. Servs*., No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, at *52 (N.D. Cal. Jan. 26, 2007) (finding "requested payment of $ 25,000 to each of the named plaintiffs is appropriate" in wage and hour settlement); *Louie v. Kaiser Found. Health Plan, Inc*., CASE NO. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008) (approving "$25,000 incentive award for each Class Representative" in wage an hour settlement); *Garner v. State Farm Mut. Auto. Ins. Co*., No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class"). *Id.*

VI. THE COURT SHOULD APPOINT ILYM GROUP, INC. AS SETTLEMENT ADMINISTRATOR

The parties propose that the Court appoint ILYM Group, Inc. to serve as the Settlement Administrator. JM Decl. ¶ 66. ILYM Group, Inc. is experienced in administering class action settlements. *Id.,* as **Exhibit E**.

VII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the approval process is the formal hearing, whereby proponents of the settlement may explain and describe its terms and conditions and offer argument in support of approval, and Class Members or their counsel may be heard in support of or in opposition to the settlement. The parties propose that the Court schedule a hearing for final approval of the settlement, including Plaintiff's request for attorneys' fees, costs and the service award, in _________ 2025.

VIII. CONCLUSION

For all of the foregoing reasons, the parties respectfully request that the Court grant their motion for preliminary approval of the parties' settlement.

Respectfully submitted,

Dated: November 6, 2024

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